[Cite as *State v. Garcia*, 2010-Ohio-5780.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94386

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHNNY GARCIA

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526897

BEFORE: Cooney, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 24, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Johnny Garcia ("Garcia"), appeals his drug trafficking conviction. Finding merit to the appeal, we reverse and remand.

{¶ 2} In August 2009, Garcia was charged with drug trafficking. The matter proceeded to a bench trial, at which he was found guilty. The trial court sentenced him to one year of community control sanction. The following evidence was adduced at trial.

{¶ 3} In July 2009, Cleveland police officers Liz Galarza ("Galarza") and Carmin Morales ("Morales") initiated a traffic stop after they observed a vehicle

speeding. The driver, Johnny Payne ("Payne"), pulled his vehicle over after the officers activated their overhead lights. Payne and the passenger, Garcia, immediately exited their vehicle. Galarza approached Payne, who handed her his driver's license and then ran away. Morales stopped Garcia before he fled the scene. She instructed Garcia to place his hand on the top of the vehicle and conducted a pat-down for safety.

{¶ 4} Morales testified that it was suspicious that Garcia and Payne jumped out of the car so she wanted to make sure that he did not have any weapons on him. When she patted down Garcia, she did not find any weapons, but found 12 baggies of marijuana in his pants pocket. She testified that the 12 baggies felt like a bulky bulge in Garcia's pocket. Morales stated that she did not know what the bulge was, but that the bulge did not feel like a knife or gun. Morales further testified that she believed that the bulge "could have been a weapon."

{¶ 5} Garcia now appeals, raising three assignments of error for review.

Ineffective Assistance of Counsel – Motion to Suppress

{¶ 6} In the first assignment of error, Garcia argues that he was denied effective assistance of counsel when defense counsel failed to file a motion to suppress the search of his person. We agree.

{¶ 7} Reversal of convictions for ineffective assistance of counsel requires that the defendant prove "(a) deficient performance ('errors so serious that

counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment') and (b) prejudice ('errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable'). *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶30.

{¶ 8} We note that the failure to file a motion to suppress is not per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52; *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. To establish ineffective assistance of counsel for failure to file a motion to suppress, Garcia must prove that there was a basis to suppress the evidence in question and that the failure to file the motion to suppress caused him prejudice. *Adams* at ¶35; *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077. However, even if some evidence in the record supports a motion to suppress, the Ohio Supreme Court has still "rejected claims of ineffective counsel when counsel failed to file or withdrew a suppression motion when doing so was a tactical decision, there was no reasonable probability of success, or there was no prejudice to the defendant." (Citations omitted.) *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291, 752 N.E.2d 859.

{¶ 9} Garcia contends that the search violated his constitutional rights because the bulge in his pocket could not have been mistaken for a weapon. In

support of his argument, Garcia refers to Morales's initial testimony that she did not know what the bulge was and that the bulge in his pocket did not feel like a weapon.

{¶ 10} The Fourth Amendment to the United States Constitution allows a police officer to stop an individual if the officer possesses a reasonable suspicion, based upon specific and articulable facts, that criminal activity "may be afoot." *Terry v. Ohio* (1968), 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889. During a legitimate investigative stop, if a police officer has a reasonable suspicion that an individual is armed, the officer may conduct a limited protective search for the safety of the officer and the public. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph two of the syllabus. The reasonableness of both an investigatory stop and a protective search must be viewed in light of the totality of the circumstances. *Bobo* at paragraph two of the syllabus; *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740.

{¶ 11} In *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334, the court held that when police are conducting a lawful *Terry*-type search, they may seize nonthreatening contraband when its incriminating nature is "immediately apparent" to the searching officer through his sense of touch. Id. at 376. The *Dickerson* court explained that: "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the

suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." Id. at 375-376. The *Dickerson* court cautioned, however, that the officer may not manipulate the object, which he has previously determined not to be a weapon, in order to ascertain its incriminating nature. Id. at 378.

{¶ 12} In the instant case, Morales testified that the 12 baggies of marijuana "felt bulky in [Garcia's] front pocket. Not like a weapon[.]" She admitted that the bulge did not feel like a knife or a gun, and she testified "I didn't know what it was. I mean, there was a big bulge in the side of [Garcia's] pants." When asked by defense counsel if the bulge justified her going in Garcia's pocket, Morales responded, "[y]eah. Could have been anything." Upon further questioning by defense counsel, Morales testified that she believed that the bulge "could have been a weapon" and that is why she pulled it out of Garcia's pocket.

{¶ 13} It is clear from Morales's testimony that she could not determine the incriminating character of the bulge until she reached into Garcia's pocket and found 12 baggies of marijuana. Although Morales was lawfully in a position to feel the object in Garcia's pocket (under *Terry*, Morales was entitled to stop Garcia and pat him down for safety because of his evasive actions toward the officers), the incriminating character of the bulge in Garcia's pocket was not immediately apparent to her. Thus, Morales exceeded the scope of an allowable

search when she seized the 12 baggies of marijuana from Garcia's pants pocket. See *State v. Jenkins*, Cuyahoga App. No. 91100, 2009-Ohio-235 (where this court found ineffective assistance of counsel for the failure to file a motion to suppress when the officer's act of reaching into defendant's pocket went beyond the scope of what is permitted in a pat-down because the officer did not indicate that the keys he found in defendant's pocket were contraband.) See, also, *State v. Henderson*, Cuyahoga App. No. 91757, 2009-Ohio-1795 (where this court upheld the trial court's suppression of evidence because the nature and identity of a "lumpy lump" in the defendant's pocket was not "immediately apparent" as contraband to the detective.)

{¶ 14} Accordingly, we find that Garcia has established a reasonable probability that, were it not for counsel's error, the result of the trial would have been different (Garcia's motion to suppress would have been successful). Thus, we conclude that Garcia did not receive effective assistance of counsel.

{¶ 15} The first assignment of error is sustained.

{¶ 16} In the second and third assignments of error, Garcia challenges the sufficiency and manifest weight of the evidence. However, based on our disposition of the first assignment of error, we overrule the remaining assignments of error as moot. See App.R.12(A)(1)(c).

{¶ 17} Accordingly, judgment is reversed, and the case is remanded for further proceedings.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR