[Cite as *State v. Soto*, 2011-Ohio-785.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94725

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RODOLFO SOTO

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED;
SENTENCE VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517965-B

BEFORE: Rocco, J., Gallagher, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 17, 2011

ATTORNEY FOR APPELLANT

Hector G. Martinez, Jr.
Hector G. Martinez, Jr., Co., LPA
526 Superior Avenue, East
545 The Leader Building
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Louis Brodnik
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶ 1} After entering pleas of no contest to charges of drug trafficking, drug possession, and possession of criminal tools, defendant-appellant Rodolfo Soto appeals from the trial court's decision to deny his motion to suppress evidence.

{¶ 2} Soto presents two assignments of error. He argues the police lacked a reasonable suspicion that criminal activity was occurring at the time they stopped him and his co-defendant, William Rodriguez. He also argues he was denied his right to effective assistance of trial counsel, because counsel represented both him and Williams.

{¶ 3} Upon a review of the record, this court finds no error with respect to the trial court's denial of his motion to suppress evidence. Plain error occurred, however, in Soto's conviction on charges of both drug trafficking and drug possession, since they were allied offenses pursuant to *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314. Finally, the record supports a conclusion that Soto received effective assistance of counsel.

{¶ 4} Thus, although Soto's assignments of error are overruled, his sentence is vacated, and this case is remanded pursuant to *Johnson* in order for the state to elect which of Counts 1 or 2 it wishes to pursue, and for resentencing consistent with that election.

{¶ 5} According to the testimony presented at the hearing on Soto's motion to suppress evidence, Soto's conviction resulted from a coincidence.

{¶ 6} On the afternoon of October 24, 2008, Cleveland police Vice Unit Det. Michael Rinkus was sitting in his unmarked vehicle, waiting for a search warrant to arrive. Rinkus had parked his car in the vicinity of the house to be searched, which was located at 3267 W. 41st Street; members of his unit believed the house was used for drug sales. In addition to Rinkus, several other detectives also had the house under surveillance at that time, and all were in radio contact with each other.

{¶ 7} Rinkus received a call from his colleague Det. Cuadra, who indicated he "had some activity" at a "large blue Ford Expedition" that was parked nearby the house

on Robert Street. Unsure if the vehicle was connected to the activity for which the house would be searched, Rinkus drove around the corner to observe what was occurring.

{¶ 8} Rinkus parked "100 feet or less" behind the Expedition. As he got into position, Rinkus saw a man, later identified as Soto, leaning into the open passenger-side window; Soto's head and both of his arms were inside. Rinkus's position also gave him a view from which he could see into the Expedition. He observed as the driver, later identified as William Rodriguez, "hand[ed] * * * the male outside the passenger window, a baggie rolled up" into a cylinder shape. The object was "six to seven inches in length," and two inches in diameter.

{¶ 9} Rinkus watched Soto "grab" the object, step back long enough to place it into his rear pocket, then return to his original position next to the vehicle. To Rinkus, the item Soto took looked like a plastic bag "of heroin." He advised other officers that he had seen a "sale" that might be connected to the house under surveillance, and asked for assistance.

{¶ 10} The responding marked police cars quickly arrived in the area. As they came toward the Expedition, Soto "back[ed] away from the car, toss[ed] the bag that he retrieved from the driver under the vehicle, and * * * start[s] walking east. He probably [got] about five feet and decide[d] to turn around and start walking west."

{¶ 11} At that point, the police were close enough that Rinkus asked them for help detaining the suspects. Rinkus approached the Expedition and picked up the object Soto

had thrown; it was on the street pavement "just under the vehicle on the passenger's side below the door." The bag proved to contain 74 grams of heroin. At that point, both Soto and Williams were arrested. More of the drug was found in the vehicle's "center console."

{¶ 12} Soto and Rodriguez were indicted together on three counts, charged in Count 1 with drug trafficking in violation of R.C. 2925.03(A)(2), in Count 2 with drug possession in violation of R.C. 2925.11(A), and in Count 3 with possession of criminal tools, R.C. 2923.24(A). Soto retained an attorney to represent him, but, after nearly a year, the case remained unresolved.

{¶ 13} In October 2009, a new attorney entered a notice of appearance; the record does not indicate this attorney was appointed. It does reflect, however, that new counsel filed a motion to suppress evidence on behalf of the "Defendants."

{¶ 14} The matter proceeded to a hearing. Rinkus provided the only testimony. At the conclusion of the hearing, the trial court stated:

{¶ 15} " * * * [W]ith respect to what the officer was able to observe; the fact that in the case at bar the Defendant threw down the drugs when he saw the procession of police cars approaching him. So I do believe that the officers had more than a reasonable suspicion" that justified the stop and search. The trial court denied Soto's motion on that basis.

{¶ 16} Soto and Rodriguez subsequently decided to enter pleas of no contest to the charges. The trial court accepted their pleas, found them guilty, and sentenced Soto to concurrent prison terms of three years on Count 1, six months on Count 2, and three years on Count 3.

{¶ 17} Soto presents the following two assignments of error:

{¶ 18} "I. The trial court erred to the prejudice of Mr. Soto by denying his motion to suppress evidence.

{¶ 19} "II. Trial counsel for Mr. Soto denied him effective assistance of counsel."

{¶ 20} In his first assignment of error, Soto argues that the police lacked a reasonable basis upon which to detain him, therefore, the trial court should have granted his motion to suppress evidence gained from the search. This court disagrees.

{¶ 21} Appellate review of a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. While the trial court assumes the role of the trier of fact in a hearing on a motion to suppress, and is in the best position to resolve issues regarding credibility of witnesses and the weight of the evidence, an appellate court's role is to determine whether those facts meet the appropriate legal standard. *In re: D.W.*, 184 Ohio App.3d 627, 2009-Ohio-5406, 921 N.E.2d 1114. Thus, the trial court's conclusions of law are reviewed de novo. *State v. Williams*, Cuyahoga App. No. 92822, 2010-Ohio-901, ¶7.

{¶ 22} The state bears the burden of proving that a warrantless search or seizure meets Fourth Amendment standards of reasonableness. *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 1999-Ohio-68, 720 N.E.2d 507. In the case of an investigative stop, this typically requires evidence demonstrating that the officer making the stop was aware of sufficient facts to justify it. Id., citing *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶ 23} Under *Terry*, police officers may temporarily detain individuals in order to investigate possible criminal activity as long as the officers have a reasonable, articulable suspicion that criminal activity may be afoot. "Reasonable suspicion" entails some minimal level of objective justification for making a stop; this is something more than an inchoate and unparticularized suspicion or "hunch," but something less than the level of suspicion required for probable cause. Id.

{¶ 24} The appellate court determines if a reasonable suspicion existed by evaluating the totality of the circumstances, considering those circumstances through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271. Rinkus testified that the Expedition was parked very near the house where the search warrant was to be executed. Moreover, in his brief observation of Soto and Williams, a hand-to-hand exchange occurred, and Soto grasped a plastic baggie rolled up in a cylinder that he stepped back to place in his pocket before resuming his position at the

Expedition's window. These actions caused Rinkus to believe he had just watched a drug "sale."

{¶ 25} Rinkus's suspicions became heightened due to Soto's reaction when he saw the police cars' arrival on the street. Soto stepped away from the Expedition and removed the object from his pocket before he attempted to walk away; although he seemed unsure of the direction he should take, he dropped the object before he was detained. *California v. Hodari D.* (1991), 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690; see, also, *State v. Hill* (1998), 127 Ohio App.3d 265, 712 N.E.2d 791; cf., *State v. Thomas* Cuyahoga App. No. 79565, 2002-Ohio-1085.

{¶ 26} With respect to the flight of a suspect, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. * * * It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶47.

{¶ 27} The foregoing demonstrates the police had a reasonable suspicion of criminal activity upon which to conduct a stop of Soto. Once Soto was detained, Rinkus

could retrieve the object Soto had abandoned, and its appearance gave credence to his belief that the plastic baggie contained heroin. Based upon the testimony presented at the hearing on Soto's motion to suppress evidence, the stop and seizure of Soto was entirely appropriate.

{¶ 28} Soto's first assignment of error, accordingly, is overruled.

{¶ 29} In his second assignment of error, Soto argues the trial court had a duty to inquire whether his trial counsel rendered ineffective assistance, because counsel engaged in the dual representation of both Soto and his co-defendant. This argument is rejected.

{¶ 30} In *State v. Morrison*, Cuyahoga App. No. 88129, 2007-Ohio-3985, this court addressed a similar argument, stating:

{¶ 31} "For his second assignment of error, appellant asserts he was provided ineffective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, appellant must demonstrate that he was deprived of a fair trial. A review of a claim of ineffective assistance of counsel requires a two-part analysis. Appellant must show both that the performance of his defense counsel was seriously deficient, and that the deficiency prejudiced his defense such that the result of the trial would have been different had he been provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144.

{¶ 32} " * * * .

{¶ 33} "Appellant * * * claims that he was prejudiced by counsel's joint representation of himself and a co-defendant * * * . This claim is * * * unfounded. Dual representation of criminal defendants is not a per se violation of due process. *Holloway v. Arkansas* (1978), 435 U.S. 475, 482, citing *Glasser v. United States* (1942), 315 U.S. 60, 92. It is possible that choosing dual representation can work to the advantage of the clients in cases when they mount a common defense against charges. Id. at 483.

{¶ 34} "Appellant did not object to the dual representation at trial. *Where no objection is raised* to the trial court regarding the joint representation, appellant must *demonstrate that an actual conflict of interest adversely affected his counsel's performance. Cuyler v. Sullivan* (1980), 446 U.S. 335, 348. To demonstrate an actual conflict of interest, appellant must be able to point to specific instances in the record to suggest an actual conflict or impairment of his interests. *State v. Terry* (May 7, 1987), Cuyahoga App. No. 52072. Appellant neither identifies a single instance in the record that would suggest a conflict of interest nor presents a viable alternative defense that trial counsel could have pursued to appellant's benefit. There is a strong presumption that trial counsel's representation falls within the wide range of reasonable professional assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136; *Strickland*, 466 U.S. at 690. Appellant's second assignment of error is overruled. (Emphasis added.)"

{¶ 35} In this case, the record indicates Soto dismissed his original attorney and retained his co-defendant's trial attorney to represent him. Thus, Soto not only raised no objection, he actively sought out the dual representation.

{¶ 36} The supreme court observed: "Both defense counsel and the trial court are under an affirmative duty to ensure that a defendant's representation is conflict-free. The trial court's duty arises when the court [either] knows or reasonably should know that a *possible conflict of interest exists or when the defendant objects* to the multiple representation. *State v. Manross* (1988), 40 Ohio St.3d 180, 181, 532 N.E.2d 735, 737. (Emphasis added.)" *State v. Dillon*, 74 Ohio St.3d 166, 1995-Ohio-169, 657 N.E.2d 273. Only then is the trial court "constitutionally required to conduct an inquiry into the possible conflict of interest." Id.

{¶ 37} Soto fails to identify in the record any specific instance that demonstrates an actual conflict of interest may have adversely affected his trial counsel's performance. Consequently, the trial court had no duty to inquire about his choice to engage the same attorney as his co-defendant, and his second assignment of error also is overruled.

{¶ 38} Soto's convictions are affirmed. However, the record demonstrates plain error occurred when the trial court convicted him on both Counts 1 and 2, since they are allied offenses pursuant to R.C. 2941.25(A). *Johnson*; see, also, *State v. Prude*, Cuyahoga App. No. 94052, 2010-Ohio-4892, ¶25-28. Therefore, Soto's sentence is vacated, and this case is remanded to the trial court for application of R.C. 2941.25(A).

It is ordered that appellee and appellant share the 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. Case remanded to the trial court for further proceedings consistent with this opinion.

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

_____

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR