Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102474

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERONE TATE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-585895-A

BEFORE: S. Gallagher, J., E.T. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: October 29, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Jerone Tate appeals his conviction for various drug-related offenses. Upon review, we affirm.

{¶2} According to police testimony, on May 23, 2014, Detectives Jeffrey Yasenchack and Charles Davis observed a silver Audi with dark-tinted windows sitting in a traffic lane, impeding traffic. The detectives pulled behind the vehicle and activated lights and sirens. The driver backed the vehicle into a driveway. The detectives followed into the driveway to conduct the traffic stop.

{¶3} As the detectives approached the vehicle, they observed the driver, later identified as Tate, through the windshield. Appellant was moving around and did not immediately comply with instructions to show his hands. As he rolled down the window, the detectives noticed a strong odor of raw marijuana coming from the vehicle. When appellant was asked for his driver's license, he appeared nervous. Appellant was removed from the vehicle, handcuffed, and placed into the back of the detectives' vehicle along with the male passenger.

{¶4} While the occupants of the vehicle were detained, Det. Yasenchack searched the vehicle and found two bags of marijuana and a handgun in the glove box. He also found an insurance card belonging to appellant. After the two males were advised of their rights, appellant indicated that he had just picked up his cousin down the block and was dropping him off at his grandmother's house, which was where they had backed into the driveway. According to Det. Yasenchack, appellant admitted the marijuana was his, but indicated the gun belonged to another cousin, who was not the passenger and who was in the vehicle earlier in the day and had placed the gun in the glove box. The male passenger denied any knowledge of the drugs or gun.

{¶5} Appellant was placed under arrest, and a search was conducted of the vehicle. Det. Yasenchack smelled a strong odor of marijuana coming from behind the backseat and discovered a shoe box with an odor of marijuana in the trunk. The shoe box contained a large freezer bag full of marijuana and a cloth bag containing $8,005 in U.S. currency. Cell phones were also recovered from the vehicle. Det. Yasenchack testified that appellant admitted the marijuana found in the trunk was his. Appellant told Det. Yasenchack that he owned a restaurant and that the money came from his restaurant. Appellant did not provide the name of the restaurant or any other information. Appellant also refused to provide any information about the cousin who he claimed was the owner of the gun.

{¶6} In connection with the traffic stop, appellant was cited for the tinted windows and for obstructing the flow of traffic.

{¶7} Appellant was indicted on charges of drug trafficking, drug possession, possessing criminal tools, and having weapons while under disability, as well as accompanying specifications. He entered a plea of not guilty to the charges. The trial court denied a motion to suppress following a hearing. The case proceeded to a jury trial.

{¶8} During the trial, the court denied Tate's Crim.R. 29 motion for acquittal. The trial court allowed the state to introduce other-acts evidence pursuant to Evid.R. 404(B). Appellant was found guilty on all counts.

{¶9} Counts 1 and 2 were merged for sentencing. The trial court sentenced appellant to concurrent prison terms on Counts 1, 3, and 4, for a total of nine months, to run consecutive to a one-year prison term on the firearm specification on Count 1. The trial court advised appellant of postrelease control.

{¶10} Appellant timely filed this appeal. He raises eight assignments of error for our review. Under his first assignment of error, appellant claims the trial court erred when it denied his motion to suppress and for the return of illegally seized property.

{¶11} In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8-9, the Ohio Supreme Court set forth the following review standard for a motion to suppress:

> Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583.
>
> Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶12} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). An investigative traffic stop does not violate the Fourth Amendment where an officer has reasonable suspicion that the individual is engaged in criminal activity, including a minor traffic violation. *State v. Jones*, 8th Dist. Cuyahoga No. 100300, 2014-Ohio-2763, ¶ 17. Under such circumstances, the stop is constitutionally valid regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question. *Id*. Where the circumstances attending the traffic stop produce a reasonable suspicion of some other illegal activity, the officer may detain the motorist for as long as that new articulable and reasonable suspicion continues. *Id*. at ¶ 21.

{¶13} In this case, the detectives had authority to stop the vehicle because they had a reasonable suspicion that the driver had committed a traffic violation by obstructing the flow of traffic and for having tinted windows. Therefore, the traffic stop was constitutionally permissible.

After appellant backed the vehicle into the driveway, appellant did not immediately display his hands upon the detective's request, and when the officers approached the vehicle, the odor of raw marijuana was detected. Upon detecting the odor, appellant and the passenger were removed from the vehicle, handcuffed, and placed into the back of the detectives' vehicle. Under these circumstances, the detention was reasonable. Further, the smell of marijuana provided the detectives with probable cause to search the vehicle. As this court has previously stated,

> The Ohio Supreme Court has held that "a police officer may order a motorist to get out of a car, which has been properly stopped for a traffic violation, even without suspicion of criminal activity." *State v. Evans*, 67 Ohio St.3d 405, 407, 1993 Ohio 186, 618 N.E.2d 162 (1993), citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), fn. 6. Further, the smell of marijuana alone by a person qualified to recognize the odor is sufficient to provide probable cause for a warrantless search of the vehicle. *State v. Moore*, 90 Ohio St.3d 47, 48, 2000-Ohio-10, 734 N.E.2d 804.

Jones at ¶ 22.

{¶14} After reviewing the totality of the circumstances, we find the detectives had reasonable suspicion to investigate further and appellant's detention and the search of the vehicle was justified and did not violate the Fourth Amendment. Appellant's motion to suppress and for the return of illegally seized property was properly denied, and his first assignment of error is overruled.

{¶15} Under his second assignment of error, appellant claims the trial court erred by failing to state its "essential findings" when it denied appellant's motion to suppress and for the return of illegally seized property.

{¶16} Crim.R. 12(F) provides that "where factual findings are involved in determining a motion, the court shall state its essential findings on the record." A review of the record reflects that the trial court stated on the record that the traffic stop was legal and that the odor of marijuana was enough to provide the officers with probable cause to search the vehicle. Appellant did not

request that the trial court make more detailed findings. Further, the record provided this court with a sufficient basis to review the ruling on the motion to suppress. Reversible error does not occur if the court's reasoning is set forth in the record and the record as a whole provides a sufficient basis for appellate review. *State v. Atkinson*, 8th Dist. Cuyahoga No. 95602, 2011-Ohio-5918, ¶ 22-24. Appellant's second assignment of error is overruled.

{¶17} Under his third and fourth assignments of error, appellant claims the trial court violated Evid.R. 403(A) and 404(B) when it allowed the admission of other-acts evidence.

{¶18} Pursuant to Evid.R. 404(B), although "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith[,]" other-acts evidence may be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See also* R.C. 2945.59. Pursuant to Evid.R. 403(A), relevant evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." A decision regarding the admissibility of other-acts evidence rests within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 18.

{¶19} In this case, the state sought to introduce evidence of appellant's prior offense from 2011, which involved a similar traffic stop with marijuana and a gun found in a vehicle driven by appellant. In that case, which involved the same detectives, appellant confessed that he was selling marijuana and that it was his gun found in the vehicle. The state claimed herein that the other-acts evidence was relevant to show scheme, lack of mistake, and identity with regard to the gun found in the vehicle and the trafficking offense.

{¶20} After considering the requirements of Evid.R. 404(B) and balancing the probative value of the evidence against any unfair prejudice, the trial court allowed the state to admit evidence, over objection. The trial court provided a limiting instruction to the jury as to the other-acts evidence.

{¶21} The Ohio Supreme Court has set forth the following three-step analysis that should be used by trial courts when considering other-acts evidence:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R. 403.

State v. Williams, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶22} Here, the state sought to introduce the other-acts evidence to show scheme, lack of mistake, and identity with regard to the gun found in the vehicle and the trafficking offense. According to the police testimony in this case, appellant had indicated the gun found in the glove box was his cousin's and admitted the marijuana was his. That appellant had a prior offense two and a half years before the current case in which he had admitted to selling marijuana and claimed ownership of a gun found in the vehicle does not make it any more or less probable that appellant had knowledge or ownership of the gun and marijuana in this case. There was nothing to show that the same gun or vehicle was involved, and the prior drug evidence only infers appellant's criminal propensity to commit the offenses charged in this case. It cannot be said that the other-acts evidence shows a scheme, lack of mistake, identity, or knowledge with regard to the current incident. Rather, the evidence was presented to show appellant acted in conformity with the prior

offense. The prejudicial effect did substantially outweigh the probative value of that evidence. Accordingly, the other-acts evidence was improperly allowed.

{¶23} However, even though the evidence was inadmissible, reversible error did not occur. The Ohio Supreme Court has instructed that in determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), a court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record. *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, at ¶ 33. "[A]n improper evidentiary admission under Evid.R. 404(B) may be deemed harmless error on review when, after the tainted evidence is removed, the remaining evidence is overwhelming." *Id*. at ¶ 32.

{¶24} In this case, if we excise the improper evidence from the record and look to the remaining evidence, we find there was overwhelming evidence of guilt. The gun was found in the vehicle driven by appellant and was in close proximity to appellant. Appellant's insurance card was also in the vehicle. Appellant testified that he had just picked up the passenger and was giving him a ride home. The passenger denied knowledge of the drugs or gun. Appellant was aware of the gun in the glove box and failed to identify the "cousin" to whom he claimed the gun belonged. Further, in addition to the marijuana found in the glove box, a shoe box containing a large freezer bag full of marijuana and a cloth bag containing a large sum of money were found in the trunk. There was testimony that appellant admitted to the detectives that the drugs were his. Additionally, a limiting instruction had been provided by the trial court.

{¶25} Upon our review, we are unable to find appellant was prejudiced as a result of the admission of the other-acts evidence. We conclude there is no reasonable possibility that the

testimony contributed to the accused's conviction and declare the error was harmless beyond a reasonable doubt. Appellant's third and fourth assignments of error are overruled.

{¶26} Under his fifth assignment of error, appellant claims the trial court erred when it ordered the forfeiture of money to the state.

{¶27} This court has previously recognized that drug trafficking may be established by direct evidence, circumstantial evidence, or both, and that "[c]ourts have consistently held that items such as plastic baggies and large sums of money are typically used in drug trafficking and may constitute circumstantial evidence of trafficking in violation of R.C. 2925.03(A)(2)." *State v. Nelson*, 8th Dist. Cuyahoga No. 100439, 2014-Ohio-2189, ¶ 17; *see also State v. Forte*, 8th Dist. Cuyahoga No. 99573, 2013-Ohio-5126, ¶ 10.

{¶28} Here, the police seized two bags of raw marijuana and a handgun from the vehicle's glove box, and a large sum of money along with a large freezer bag full of raw marijuana from a shoe box in the trunk. The detectives testified that the neighborhood was known for drug transactions, that tinted windows are associated with drug dealers, and that the confiscated items were indicative of drug trafficking. Under the circumstances herein, the money could have been reasonably believed to be used to facilitate the offense of drug trafficking. The seized money was properly found to be subject to forfeiture. Appellant's fifth assignment of error is overruled.

{¶29} Under his sixth assignment of error, appellant claims the trial court erred when it denied appellant's motion for acquittal.

{¶30} A motion for judgment of acquittal should be granted only in cases where the evidence is "insufficient to sustain a conviction" for the charged offenses. Crim.R. 29(A). We review a trial court's denial of a defendant's motion for acquittal using the same standard we apply when reviewing a sufficiency-of-the-evidence claim. When reviewing sufficiency of the

evidence, an appellate court must determine "'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶31} Appellant claims the jury could not have concluded he acted knowingly with regard to the offenses. R.C. 2901.22(B), which applies to the trafficking in drugs and possession of drugs counts, states that "[a] person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." Moreover, "[a] person has knowledge of circumstances when the person is aware that such circumstances probably exist." *Id.*

{¶32} Here, the detectives testified that they initiated a traffic stop when they observed a vehicle with dark-tinted windows stopped in the street, blocking traffic. They confiscated drugs and money from the vehicle. Appellant was the driver of the vehicle. Further, there was testimony that appellant admitted the drugs were his and that he was aware of the presence of the gun in the glove box, for which he failed to identify the owner other than as his "cousin." These facts are sufficient to prove appellant knowingly possessed and knowingly trafficked drugs. Further, upon our review, we hold that a rational trier of fact, when viewing this evidence in a light most favorable to the prosecution, could have found the essential elements of the offenses proven beyond a reasonable doubt. Appellant's sixth assignment of error is overruled.

{¶33} Under his seventh assignment of error, appellant claims the trial court erred when it denied his motion for new trial based on newly discovered evidence.

{¶34} A motion for new trial is within the sound discretion of the trial court, and the court's ruling on the motion will not be disturbed on appeal absent an abuse of discretion. *State v. Matthews*, 81 Ohio St.3d 375, 378, 1998-Ohio-433, 691 N.E.2d 1041. In order to prevail on a motion for a new trial based upon newly discovered evidence, the defendant must demonstrate that the new evidence

> "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence."

State v. Barnes, 8th Dist. Cuyahoga No. 95557, 2011-Ohio-2917, ¶ 23, quoting *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶35} Although appellant makes a long-winded argument that again challenges the Evid.R. 404(B) evidence, he has failed to identify any new evidence that satisfies the requirements for succeeding on a motion for new trial. Appellant's seventh assignment of error is overruled.

{¶36} Under his eighth assignment of error, appellant claims the trial court erred when it failed to make findings before it denied bail pending appeal.

{¶37} App.R. 8(A) recognizes the discretionary right of the trial court or the court of appeals to release a defendant on bail and suspend his sentence during the pendency of his appeal. App.R. 8(B) requires "application for release on bail and for suspension of execution of sentence after a judgment of conviction shall be made in the first instance in the trial court" and, where denied, "a motion for bail and suspension of execution of sentence pending review may be made to the court of appeals or two judges thereof." App.R. 8(B) does not require the trial court to make findings when it decides to deny release on bail and suspension of execution of sentence

pending appeal. Further, appellant filed an application for bail with this court on appeal that was denied. Appellant's eighth assignment of error is overruled.

{¶38} Judgment affirmed.

It is ordered that appellee recover from appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
EILEEN T. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION)

EILEEN T. GALLAGHER, P.J., CONCURRING IN JUDGMENT ONLY:

{¶39} I concur in the judgment of the majority, affirming the decision of the trial court. I write separately, however, to express my belief that the trial court did not abuse its discretion by admitting evidence of appellant's 2011 offense under Evid.R. 404(B).

{¶40} "'Evidence that an accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime or that he acted in conformity with bad character.'" *State v. Ceron*, 8th Dist. Cuyahoga No. 99388, 2013-Ohio-5241, ¶ 67, quoting *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 15. There are exceptions, however, to this rule.

{¶41} Under Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Hence, the rule affords the trial court broad discretion regarding the admission of other-acts evidence. *Williams* at ¶ 17.

{¶42} In determining whether other-acts evidence is to be admitted, trial courts should conduct a three-step analysis. The first step is to determine if the other-acts evidence "is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence" under Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith, or whether the other-acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). Finally, the court should consider whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice. *Williams* at ¶ 20, citing Evid.R. 403.

{¶43} With respect to the first and second steps of the *Williams* analysis, I would find that the challenged testimony was relevant and offered for a legitimate purpose, i.e., to show common scheme, knowledge, or identity. Det. Yasenchack testified that in 2011 he conducted a traffic stop of appellant's vehicle and ultimately discovered marijuana and a gun inside the vehicle's center console. With respect to the basis of the other-acts evidence presented in this case, Det. Yasenchack testified that during the 2011 incident, appellant accepted ownership of the gun and marijuana found inside the vehicle and admitted to "unloading marijuana so he could pay his bills." Thus, Det. Yasenchack's testimony, if believed by the jury, was relevant to establish appellant's knowledge and/or ownership of the contraband discovered inside appellant's vehicle in 2014,

which appellant claimed was not his. In my view, this evidence was not introduced to demonstrate appellant's propensity to act as a drug trafficker. Instead, I believe the other-acts evidence was introduced for a legitimate purpose under Evid.R. 404(B) and was relevant to determining whether appellant acted "knowingly." *See State v. Burrell*, 5th Dist. Stark No. 1994 CA 00314, 1995 Ohio App. LEXIS 3590 (May 22, 1995).

{¶44} Regarding the third step of the *Williams* analysis, I would find that the danger of unfair prejudice did not substantially outweigh the probative value of the challenged testimony. In this case, the trial court instructed the jury that evidence of appellant's 2011 offense could not be considered to show that appellant had acted in conformity with a character trait. This instruction lessened the prejudicial effect of Det. Yasenchack's testimony as the jury is presumed to have followed the court's instructions. *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). (Tr. 435.) Thus, Evid.R. 404(B) permitted admission of evidence of appellant's prior offense because it helped to prove common scheme, knowledge, or identity, as it related to ownership and possession of the marijuana and gun. Accordingly, I would conclude that the prejudicial effect did not substantially outweigh the probative value of the evidence.

{¶45} Based on the foregoing, I would conclude that the trial court did not abuse its discretion in admitting Det. Yasenchack's other-acts testimony into evidence. In my view, the majority's harmless-error analysis was unnecessary. Accordingly, I concur in judgment only with the majority's resolution of appellant's third and fourth assignments of error.