[Cite as *State v. Cooper*, 2017-Ohio-970.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104599

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAI'JOHN D. COOPER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-602378-A

BEFORE: Jones, J., Keough, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 9, 2017

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant, Dai'john Cooper ("Cooper"), appeals the trial court's ruling on his motion to suppress, his court costs, and the trial court's failure to notify him of the consequences of the failure to pay his court costs. We affirm.

{¶2} In 2016, Cooper was charged with carrying concealed weapons, receiving stolen property, having weapons while under disability, and resisting arrest. He filed a motion to suppress. The trial court held a hearing and denied the motion to suppress. Cooper pleaded no contest to the indictment and the court sentenced him to 18 months in prison. The following pertinent facts were presented at the hearing on the motion to suppress.

{¶3} Officers from the Cleveland Police gang unit were patrolling the area of E.116th Street and Forest Avenue after midnight on January 2, 2016. They observed a blue station wagon run a red light and turn into a parking lot without using its turn signal. The officers effectuated a traffic stop and announced themselves as "police." The detectives were dressed in plain clothes but wore tactical vests that said "POLICE" on the front and back.

{¶4} Five people were in the station wagon; the driver did not have his driver's license. Cooper was seated behind the driver. Detective Andre Bays approached Cooper and told him to show his hands but Cooper ignored the commands and moved his hands toward his waistband.

{¶5} Detective Bays testified that he commanded Cooper for "about ten seconds"

to show his hands, but Cooper refused and kept moving his hands towards his waistband, so Detective Bays removed Cooper from the car. Cooper tried to push himself away and struggled with Detective Bays, so Bays put him in handcuffs and patted him down. Detective Bays found a loaded and operable 9mm Sig Sauer handgun in Cooper's waistband. Cooper continued to try and push away from Detective Bays; the detective required assistance from two other officers to arrest Cooper. The officers found another gun on one of the other passengers and an open container of liquor in the car.

{¶6} Cooper testified the cops had their guns drawn as soon as they approached the car and he was immediately ordered out of the car. He denied moving around inside the car but admitted to having a gun in his waistband. Cooper also admitted he yelled obscenities at the cops, did not have a permit to be carrying a gun, and was, in fact, prohibited from carrying a gun because he was a convicted felon. Cooper claimed he was handcuffed before he stepped out of the car.

{¶7} Cooper appeals his convictions and raises the following assignments of error for our review:

> I. The trial court erred by failing to suppress the evidence of the handgun.
>
> II. The trial court abused its discretion when it order the appellant to pay court costs.
>
> III. The trial court failed to advise appellant of community service notice;
>
> R.C. 2947.23(A)(1).

{¶8} In the first assignment of error, Cooper argues that the trial court erred in denying his motion to suppress because the detectives did not have reasonable suspicion

to justify searching him for weapons. We disagree.

{¶9} Appellate review of the denial of a motion to suppress 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. 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. Carter*, 72 Ohio St.3d 545, 552, 651 N.E.2d 965 (1995); *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992).

{¶10} Consequently, when reviewing a ruling on a motion to suppress, deference is given to the trial court's findings of fact so long as they are supported by competent, credible evidence. *Burnside* at *id.* However, an appellate court reviews de novo whether the trial court's conclusions of law, based on those findings of fact, are correct. *State v. Anderson*, 100 Ohio App.3d 688, 691, 654 N.E.2d 1034 (4th Dist.1995).

{¶11} 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). Searches conducted outside the judicial process, by officers lacking a prior judicial warrant, are per se unreasonable, subject to a few specifically established exceptions. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). One established exception to the warrant requirement is the rule regarding investigative stops announced in *Terry*. A traffic offense meets the requirements under *Terry*, constituting reasonable grounds for an investigative stop. *State v. Davenport*, 8th Dist. Cuyahoga No. 83487, 2004-Ohio-5020, ¶ 16, citing *State v.*

Carlson, 102 Ohio App.3d 585, 596, 657 N.E.2d 591 (9th Dist.1995). The United States Supreme Court has also recognized that a police officer may order a driver or passenger to exit his or her vehicle if properly stopped for a traffic violation, even if the officer does not have reasonable suspicion of criminal activity. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (driver) and *Maryland v. Wilson*, 519 U.S. 408, 415, 117 S.Ct. 882, 137 L.E.2d 41 (1997) (passenger).

{¶12} Cooper argues that the detectives did not have reasonable suspicion to pat him down for weapons, to search him, to arrest him, or to extend the duration of the traffic stop in order to conduct these acts. We disagree.

> Under *Terry*, a limited protective search of the detainee's person for concealed weapons is justified only when the officer has reasonably concluded that "the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others * * *."

State v. Henderson, 8th Dist. Cuyahoga No. 88250, 2007-Ohio-2461, ¶ 5, citing *Terry* at 24. It is well-settled that "an officer is not permitted to conduct a search merely for convenience, nor may an officer conduct a search as part of his or her normal routine or practice." *State v. Stiles*, 11th Dist. Ashtabula No. 2002-A-0078, 2003-Ohio-5535, ¶ 16, citing *State v. Lozada*, 92 Ohio St.3d 74, 77, 748 N.E.2d 520 (2001). In addition to considering the officer's stated reasons for conducting a protective pat-down, courts will also consider all other facts that the officer was aware of at the time of the occurrence in determining whether his or her search was reasonable. *In re G.H.*, 8th Dist. Cuyahoga No. 100274, 2014-Ohio-2269, ¶ 33, citing *Stiles* at ¶ 18.

{¶13} In the seminal case of *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), the Ohio Supreme Court held that where a police officer, during an investigative stop, has a reasonable suspicion that an individual is armed based on the totality of the circumstances, the officer may initiate a protective search for the safety of him or herself and others. *Id.* at 181. In *Bobo*, the Ohio Supreme Court specified seven factors to justify the investigative stop. Those factors include: (1) the area in which the traffic stop occurred; (2) the time of day; (3) the officer's experience training related to drug transactions and weapon activity; (4) the officer's knowledge of how these transactions occur; (5) the officer's observations of any furtive movements; (6) the officer's experience of recovering weapons or drugs when an individual makes furtive movement; and (7) the officer being out of his or her vehicle and away from protection. *Id.* at 178-180. The test is whether the officer can reasonably conclude, based upon the totality of the circumstances, that the person detained is armed and that a protective search is necessary for the officer's safety and the safety of others. *Id.* at paragraph two of the syllabus.

{¶14} Detective Michael McNeeley testified that he had been a police officer for nine years and received special training in the gang impact unit. The area the unit was patrolling on the night in question was one of the most dangerous areas in Cleveland. Detective McNeeley observed the driver of a blue station wagon make two traffic infractions. After the officers made the traffic stop, Detective McNeeley exited his vehicle and approached the car, with his gun drawn in a "low ready" position. He

testified that there were seven officers on scene and only he and one other officer had their guns drawn, both in a low ready position. He explained that a low ready position is where an officer holds his or her service weapon at a 45-degree angle "basically pointing at the ground."

{¶15} After he approached the car, Detective McNeeley recognized Cooper from previous encounters. Detective McNeely ordered the occupants of the car to show their hands, "Cooper in particular" because "his hands were in front of his waistband and then they went to behind his back and he was actually, he was putting pressure on his feet. The best way to describe it is he was putting pressure on his feet without raising his buttocks off the chair, like blading his shoulders against the seat * * *." Tr. 58-59. Detective McNeely testified:

> our concern was we were telling [Cooper] to show his hands, everyone in the back seat, and nobody was doing it, they continuously refused. I mean, I must have told him two or three times before Bays even got ahold of him, before he started saying to show his hands as well. Initially, it was calm and I was respectful, but then after several times I remember I started screaming it to him * * * .

Tr. 59.

{¶16} Detective Bays testified that he had been a police officer for five years and had received special training in the gang impact unit. The unit was patrolling the area of East 116th and Forest Avenue because there had been several recent shootings in the area.

It was after midnight when Detective Bays pulled up on the scene just after Detective McNeely and approached the car's rear side door on the driver's side, where Cooper was seated. As soon as he approached the car, he observed Cooper "moving around towards his waist and towards his leg area." Tr. 19. Cooper's movement concerned Detective Bays because, based on his "training and experience," "those items that are concealed could possibly be dangerous weapons that could hurt myself or other people around." Tr. 19.

{¶17} Detective Bays told Cooper to show his hands, but Cooper refused and reached towards his waistband. Detective Bays repeatedly ordered Cooper to show his hands, but Cooper refused the detective's orders. Detective Bays ordered Cooper out of the car. As Detective Bays took Cooper out of the car, he put his hands over Cooper's hands and put Cooper's hands together so that, Detective Bays testified, Cooper could not reach for any weapon he may have on him. Cooper kept "pushing off" the detective and Detective Bays required assistance from two other officers to arrest Cooper. During the encounter, Cooper yelled and screamed profanities at the detective.

{¶18} There were four other men in the car and the officers recovered a second handgun and a bottle of liquor. At some point during the stop, a car pulled up with several people in it and they began yelling and screaming at the police.

{¶19} Although Cooper contends that the detectives unlawfully detained him beyond the scope of the initial traffic stop, there is no evidence that the officers detained Cooper for an unreasonable amount of time. As soon as the officers approached the car,

Cooper ignored their commands and began to make furtive movements. He was then removed from the car and the gun was found. *See State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 15 ("[t]he detention of a stopped driver may continue beyond [the normal] time frame when additional facts are encountered that give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop.").

{¶20} In addition, there were four other occupants in the car that the detectives testified were moving around at the same time as Cooper. The presence of passengers in a car during a traffic stop, the detectives testified, makes the situation for them more tenuous because weapons or contraband can be passed from person to person.

{¶21} Finally, we note that the driver of the blue station wagon was driving on a suspended license. Even if Detective Bays had not ordered Cooper out of the car at this time based on Cooper's furtive movements, both detectives testified that the car was going to be towed from the scene. In instances where a driver has a suspended license, Detective McNeely testified:

> I would ask them to turn off the vehicle, and then you'd ask them to exit the vehicle and you'd detain them; initially, you'd try to identify them because they don't have an ID on them, but to find out the driver's status and if they are suspended. [If the driver was suspended] [y]ou would get a citation, possibly an arrest, and your vehicle would be subject to tow.

Tr. 57.

{¶22} Thus, based upon the totality of the circumstances, which include the late time of day, high crime area, the traffic violations, Cooper's furtive movements, the number of occupants in the car, the officers' training and experience, a chaotic situation involving multiple people in the car (two of which were armed) and another car pulling up on the scene with the passengers yelling at the police, we find the officers' actions were reasonable. The detectives were called upon to make quick decisions; we do not find that their actions in this case were unreasonable or infringed upon Cooper's Fourth Amendment Rights.

{¶23} In light of the above, the first assignment of error is overruled.

{¶24} In the second assignment of error, Cooper argues that he should not have been assessed court costs because he filed an affidavit of indigency.

{¶25} R.C. 2947.23(A)(1) governs the imposition of court costs and provides in pertinent part: "In all criminal cases * * * the judge * * * shall include in the sentence the costs of prosecution * * * and render a judgment against the defendant for such costs." "R.C. 2947.23 does not prohibit a court from assessing costs against an indigent defendant; rather it requires a court to assess costs against all convicted defendants." *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. In *White*, the court held that "a trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence." *Id.* at paragraph one of the syllabus. Therefore, a "defendant's financial status is irrelevant to the imposition of court costs." *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶ 3.

{¶26} Prior to sentencing, Cooper filed a motion to suspend or waive payment of his court costs and fines. The trial court decided to impose court costs stating that Cooper's current state of indigence did not mean that he would not have the ability to pay his court costs at some point in the future. The trial court acted within its discretion under R.C. 2947.23(A)(1) in imposing court costs regardless of Cooper's financial status. We find no abuse of discretion.

{¶27} The second assignment of error is overruled.

{¶28} In the third assignment of error, Cooper argues that the trial court erred in imposing court costs without also informing him that his failure to pay the costs may result in the imposition of community service. We disagree.

{¶29} Cooper was relying on a former version of R.C. 2947.23, which required a court to notify a defendant that the court may order a defendant to perform community service if a defendant fails to pay court costs. *See State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423, ¶ 10 (holding that the statutory language is clear; the "notice is mandatory and * * * a court is to provide this notice at sentencing"); *see also State v. Huber*, 8th Dist. Cuyahoga No. 98206, 2012-Ohio-6139.

{¶30} As it applies to this case, S.B. 337, effective September 28, 2012, amended R.C. 2947.23. The current version of R.C. 2947.23(A)(1) requires the court to notify the defendant that the court may order community service if the defendant fails to pay court costs only "[i]f the judge or magistrate imposes a community control sanction or other nonresidential sanction." *Id.* Thus, the current statute no longer requires such

notification when a trial court imposes a prison term. *State v. Brock*, 8th Dist. Cuyahoga No. 104334, 2017-Ohio-97, ¶ 13; *State v. Brown*, 12th Dist. Butler No. CA2013-03-043, 2014-Ohio-1317. Cooper was sentenced in May 2016, therefore, the current statute applies. Cooper was sentenced to a prison term, therefore, the trial court did not err when it ordered him to pay court costs without notifying him of the consequences if he failed to pay such costs.

{¶31} The third assignment of error is overruled.

{¶32} Judgment affirmed.

It is ordered that appellee recover of 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.

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

LARRY A. JONES, SR., JUDGE

KATHLEEN ANN KEOUGH, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR