

[Cite as *State v. Cooper*, 2009-Ohio-2583.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91566**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**MARIO COOPER**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-504102

**BEFORE:** Rocco, J., Gallagher, P.J., and Kilbane, J.

**RELEASED:** June 4, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Mario Cooper appeals from his conviction after a jury found him guilty of possession of crack cocaine.

{¶ 2} He presents three assignments of error, claiming the trial court wrongly denied his motion to suppress evidence, the prosecutor engaged in misconduct, and his trial counsel rendered ineffective assistance.

{¶ 3} Upon a review of the record, however, this court finds none of Cooper's claims has merit. Consequently, his conviction is affirmed.

{¶ 4} Cooper's conviction results from an incident that occurred at approximately 1:30 a.m. on November 2, 2007. Case Western Reserve University ("CWRU") Security Officer Michael Lewis testified that, during his patrol of the campus, he emerged from a building to see a white Ford Taurus parked atop a curb in a "grass area." A man, later identified as Cooper, stood outside the vehicle "to look."

{¶ 5} Lewis called out, asking if there was anything wrong. Immediately, Cooper "jumped back" inside the car and "sped off." Lewis entered his patrol car and followed. Ahead of Lewis, Cooper drove in a reckless manner, "jumping" curbs and "riding around erratically." Lewis radioed the campus police for assistance, and watched as the car went over the curb and grass and entered campus lot number 45.

{¶ 6} CWRU police officer Jimiyu Edwards responded to the call. He arrived at the campus parking lot to see the Taurus stopped; both the driver and the passenger had their doors open, and the passenger stood outside by the trunk area.

{¶ 7} Edwards approached the driver's side and asked Cooper to step out of the car. Cooper cooperated, but "seemed to be intoxicated." Edwards then requested Cooper to put his hands on top of the car. Instead, Cooper "put his hands inside of his pocket[s]."

{¶ 8} Edwards repeated the request more than once, and each time, Cooper began to comply, only to place his hands back inside his pockets. After this occurred "four to five times," Edwards decided to perform a pat-down search for his own safety to "check for weapons." Edwards patted down Cooper quickly; when he "came to [Cooper's] right front pocket of his pants," Edwards "felt an object [he] couldn't identify."

{¶ 9} Edwards asked Cooper what the object was. Cooper responded "he didn't know." Edwards then "asked [Cooper] did he mind if I check[ed]." When Cooper acquiesced, Edwards reached into the pocket and "pulled out a large plastic bag that was containing ten smaller plastic bags inside of it, that I believed to be crack cocaine \*\*\*."

{¶ 10} Edwards thereupon placed Cooper under arrest. After Cooper had been transported to the campus police office, Edwards was “filling out the paperwork for processing” the arrest. Cooper “asked me to give him a break, because he just got out of jail in 2006, and he was just trying to make a little money—extra money.”

{¶ 11} Cooper was indicted on three counts, charged with drug trafficking, crack cocaine possession in an amount between twenty-five and one hundred grams, and possession of criminal tools. Each count additionally contained two forfeiture specifications.

{¶ 12} Cooper filed a motion to suppress evidence, but, upon the conclusion of the hearing, the trial court denied the motion. The state dismissed count one of the indictment prior to trial.

{¶ 13} The jury found Cooper guilty of count two, but acquitted him of count three. He ultimately received a six-year sentence for his conviction.

{¶ 14} Cooper appeals his conviction, presenting the following assignments of error for review.

**“I. The trial court erroneously denied Mr. Cooper’s motion to suppress evidence.**

**“II. Prosecutorial misconduct by way of prejudicial comments made by the prosecutor during opening statements prejudiced the jury and denied Mr. Cooper a fair trial.**

**“III. Mr. Cooper was denied the effective assistance of counsel at his hearing on the motion to suppress evidence by the acts and omissions of his attorney, which are evident in the record, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article 1 of the Ohio Constitution.”**

{¶ 15} Cooper initially argues that the trial court improperly denied his motion to suppress evidence. He contends that the campus officers lacked a legitimate basis to make an investigative stop, and that Edwards violated his constitutional rights by asking him a question after conducting the pat-down search, because he was then in police custody for purposes of *Miranda v. Arizona* (1966), 384 U.S. 436. This court disagrees.

{¶ 16} When determining a motion to suppress evidence, the trial court acts as the trier of fact; hence, it is in the best position to resolve factual issues and evaluate the credibility of witnesses. *State v. McEndree*, Ashtabula App. No. 2004-A-0025, 2005-Ohio-6909, ¶22, citing *State v. Mills* (1992), 62 Ohio St.3d

357, 366. The trial court in this case, therefore, must have considered Lewis's and Edwards's testimony truthful in describing the stop.

{¶ 17} Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact; this court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Melvin*, Cuyahoga App. No. 88611, 2007-Ohio-3779, ¶9. Accepting these facts as true, this court then must independently determine, as a matter of law and without deference to the trial court's conclusion, whether those facts meet the applicable legal standard. *State v. Locklear*, Cuyahoga App. No. 90429, 2008-Ohio-4247, ¶24; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8.

{¶ 18} *Terry v. Ohio* (1968), 392 U.S. 1 permits a police officer to detain a person briefly to investigate circumstances that provoke a suspicion that criminal activity may be occurring. *McEndree*, ¶27, citing *Berkemer v. McCarty* (1984), 468 U.S. 420, 442. Thus, the officer may ask a moderate number of questions which are designed to "obtain information confirming or allaying" the officer's suspicions or fears. *Berkemer*, supra. The officer's inquiry must be "reasonable" in scope. *Terry*, at 29.

{¶ 19} *Miranda* warnings are designed to advise a party of his right against "compelled" self-incrimination. *State v. King*, Ashtabula App. No. 2003-A-0018, 2004-Ohio-2598, ¶17. Therefore, a person is entitled to *Miranda* warnings only

when that person is in police “custody,” i.e., when the person is deprived of his freedom in a “significant” way. *State v. Gaston* (1996), 110 Ohio App.3d 835, 842.

{¶ 20} Since an investigatory detention is ordinarily “non-threatening [in] character” to the person detained, *Terry* stops are not subject to the requirements of *Miranda*; the person detained is not “obligated to respond.” *Berkemer*, 439-440. The United States Supreme Court, therefore, has held that “persons temporarily detained pursuant to *Terry* stops are not ‘in custody’ for the purposes of *Miranda*.” *Id.*

{¶ 21} According to Edwards, the pat-down search was made for “officer safety” reasons, so that he could focus his attention on whether Cooper and his companion were intoxicated. *Terry* permits a police officer, for his own protection, to conduct a reasonable search for weapons when a person is detained. *State v. Cammon*, Cuyahoga App. No. 81276, 2002-Ohio-6334, ¶19. In view of the lateness of the hour, the nature of the dispatch, and the manner in which the car entered the private campus parking lot, Edwards’s pat-down search of Cooper for weapons was reasonable. *Id.*, ¶¶20-24; see, also, *State v. King*, *supra* at ¶13.

{¶ 22} Edwards testified that during the pat-down search, he felt something in Cooper’s pocket. Unsure of what the object was, Edwards simply

made a verbal inquiry regarding it. When Cooper claimed not to know, Edwards asked if he could check; he did so in order to ensure the pocket contained no potentially dangerous items.

{¶ 23} This inquiry did not fall afoul of either *Terry* or *Miranda*, because it “was the least intrusive means by which [the officer] could neutralize the potential threat” that remained. *State v. McMillin*, Huron App. No. H-04-018, 2005-Ohio-2096, ¶41; *State v. King*, supra at ¶19. No evidence indicated Cooper’s “will was overborne” by the inquiry; rather, the evidence indicated Cooper voluntarily permitted the additional search in response to a reasonable question. *State v. McEndree*, supra at ¶33; *State v. Cammon*, supra at ¶29.

{¶ 24} Since Edwards’s investigatory stop and search of Cooper “did not rise to the level of a custodial arrest,” his question of whether he could take the item from Cooper’s pocket did not “trigger the requirement of *Miranda* warnings.” *Id.* Moreover, since the incriminating nature of the item removed immediately was apparent, it gave Edwards probable cause to arrest Cooper. *State v. King*, supra at footnote 3.

{¶ 25} Under these circumstances, the trial court correctly denied Cooper’s motion to suppress evidence. *Id.*, ¶20; *State v. Cammon*, supra, ¶29.

{¶ 26} Cooper’s first assignment of error, accordingly, is overruled.

{¶ 27} Cooper next argues that the prosecutor engaged in misconduct during opening statements to the jury by referring to the admission Cooper provided to Edwards during the “booking” procedure, i.e., that he had just gotten out of jail and was trying to make some money.

{¶ 28} Generally, the conduct of a prosecuting attorney during trial cannot be made a ground for error unless the conduct is so egregious in the context of the entire trial that it renders the proceeding fundamentally unfair. *State v. Maurer* (1984), 15 Ohio St.3d 239. The appellate court reviews the record to determine whether, absent the prosecutor’s comments, the jury would have found the defendant guilty. *Id.*

{¶ 29} The record reflects the prosecutor intended to introduce into evidence the fact that Cooper made an oral statement during Edwards’s direct examination. The evidence was admissible pursuant to Evid.R. 801(D)(2).

{¶ 30} However, before Edwards’s testimony had progressed to that point, defense counsel called for a side-bar conference, at which he argued that a portion of Cooper’s admission was more prejudicial than probative as evidence, and requested that the jury not hear the part about Cooper recently getting out of jail.

{¶ 31} The trial court agreed. The court instructed Edwards not to mention that portion. Thus, Cooper asserts on appeal that the prosecutor’s failure to

anticipate the trial court's decision constitutes misconduct. This court cannot subscribe to such an assertion, not only because the record reflects the prosecutors conducted themselves entirely appropriately, but, more particularly, because the evidence otherwise was admissible.

{¶ 32} Consequently, Cooper's second assignment of error also is overruled.

{¶ 33} Finally, Cooper argues that he was denied his constitutional right to effective assistance of counsel. Cooper claims that since the record reflects both he and his counsel made it clear to the court prior to trial that they were in disagreement on basic defense strategy, counsel could not represent him competently. This argument is unpersuasive.

{¶ 34} A claim of ineffective assistance of counsel requires proof that counsel's "performance has fallen below an objective standard of reasonable representation" and, in addition, that prejudice arises therefrom. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus; see, also, *State v. Lytle* (1976), 48 Ohio St.2d 391. The establishment of prejudice requires proof "that there exists a reasonable probability that were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, *supra*, paragraph three of the syllabus.

{¶ 35} The burden is on appellant to prove ineffectiveness of counsel. *State v. Smith* (1985), 17 Ohio St.3d 98. Trial counsel is strongly presumed to have rendered adequate assistance. *Id.*

{¶ 36} The record in this case demonstrates that, despite counsel's misgivings about the wisdom of proceeding to trial on the charges, counsel put the prosecution to its burden of proof, prevented the jury from hearing a portion of Cooper's admission, obtained the dismissal of one of the indicted counts, and secured Cooper's acquittal on one of the remaining two charges. Under these circumstances, Cooper cannot establish either that counsel's performance fell below an acceptable standard of reasonable representation, or that he was prejudiced by counsel's performance.

{¶ 37} Accordingly, Cooper's third assignment of error also is overruled.

{¶ 38} Cooper's conviction is 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.

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KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and  
MARY EILEEN KILBANE, J., CONCUR