[Cite as *State v. Gibson*, 2017-Ohio-102.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104363

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CALVIN D. GIBSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-600132-A

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

RELEASED AND JOURNALIZED: January 12, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Defendant-appellant, Calvin D. Gibson, appeals from the trial court's judgment finding him guilty of drug possession and sentencing him to 12 months incarceration. We affirm Gibson's conviction but vacate the imposition of costs and remand for a hearing regarding costs.

I. Factual and Procedural Background

{¶2} The Cuyahoga County Grand Jury indicted Gibson on one count of drug possession in violation of R.C. 2925.11(A). Counsel was appointed, Gibson pleaded not guilty, and the matter proceeded to a jury trial.

{¶3} Cleveland police detective Colin Ginley testified that on the evening of October 8, 2015, he and several other members of the gang impact unit were on patrol in Cleveland in an unmarked car. Ginley said that as they drove down Parkview Drive, they saw a silver truck with Michigan license plates parked on the side of the road. The officers observed three men in the street standing around the truck and leaning in and out of the truck. Two men were sitting inside the truck. Ginley testified that the unmarked Tahoe driven by the police is generally known in the neighborhood as belonging to the police, and that as the Tahoe approached the truck, the men looked at the police "surprised," and the men standing around the truck started to step back "in a nervous manner." Ginley testified that in light of their experience and training, the police believed the men to be engaged in drug trafficking, so they stopped, turned on the

overhead lights, exited the car, announced they were police, and ordered everyone to put their hands up.

{¶4} Ginley testified that two of the three males complied, but the third male, later identified as Gibson, ignored the orders and kept walking away. Ginley said that he saw Gibson, who he identified in court, move a small item from his left hand to his right hand, and then put the item in his right pants pocket. As Ginley and another officer approached Gibson with their guns drawn, Gibson put his hands in the air. The officers saw a small glass vial containing a brown liquid sticking out of Gibson's front pants pocket. The police handcuffed Gibson and took possession of the vial. The prosecutor and defense counsel stipulated at trial that the vial contained PCP in less than a bulk amount.

{¶5} Cleveland police detective Brian Stockwell, who was on patrol with the gang impact unit that evening, testified that out-of-state license plates are often used by drug dealers to hide their identity. He characterized the area around where the police saw the silver truck as a "high crime area," and said that based on their experience and training, when the police saw the silver truck with Michigan plates and three males around the truck, leaning in and out of the truck, they believed the men were engaged in drug activity.

{¶6} The jury subsequently found Gibson guilty of drug possession in violation of R.C. 2925.11(A), a fifth-degree felony. The trial court sentenced him to 12 months

incarceration, suspended his driver's license, and ordered that he pay court costs. This appeal followed.

II. Law and Analysis

A. Search and Seizure

{¶7} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). One such exception is an investigative stop. *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967). A police officer may make a brief, warrantless, investigatory stop of an individual where the officer reasonably suspects that the individual is or has been involved in criminal activity. *Id.* at 21.

{¶8} Reasonable suspicion entails some minimal level of objective justification for making a stop; that is, "something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause." *State v. Brown*, 2d Dist. Montgomery No. 20336, 2004-Ohio-4058, ¶ 16. We determine the existence of reasonable suspicion 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. Shoulders*, 196 Ohio App.3d 178, 2011-Ohio-2659, 962 N.E.2d 847, ¶ 13 (8th Dist.), quoting *State v. Andrews*, 57 Ohio St.3d 86, 87, 565 N.E.2d 1271 (1991).

{¶9} In his first assignment of error, Gibson contends that the police violated his Fourth Amendment rights when they stopped, got out of their car, and ordered everyone to put their hands up. Gibson contends that the police had nothing more than a hunch that criminal activity was afoot, and such hunches are insufficient under the Fourth Amendment to support a warrantless search and seizure. He contends that the vial of PCP was discovered as a result of an unconstitutional search and seizure and was therefore inadmissible evidence.

{¶10} The record reflects that Gibson never filed a motion to suppress the evidence, however. This court has held that a motion to suppress is the proper method for excluding evidence obtained as a result of police conduct that results in a constitutional violation. *State v. Daniels*, 8th Dist. Cuyahoga No. 93545, 2010-Ohio-3871, ¶ 17; *State v. Freeman*, 8th Dist. Cuyahoga No. 92286, 2009-Ohio-5226, ¶ 23. Crim.R. 12(C)(3) requires that a defendant file a motion to suppress evidence with the trial court prior to trial, and the failure to do so "shall constitute waiver of the defenses or objections" for purposes of trial. Crim.R. 12(H).

{¶11} Gibson therefore waived the right to raise any challenge to the constitutionality of the search and seizure on appeal by failing to file a pretrial motion to suppress. *Daniels* at ¶ 18; *Freeman* at ¶ 24; *State v. Wade*, 53 Ohio St.2d 182, 190, 373 N.E.2d 1244 (1978) (appellate court need not consider appellant's assertions of improper search and seizure and illegal arrest where counsel did not file a motion to suppress;

constitutional rights may be lost as finally as any others by a failure to assert them at a proper time). Accordingly, the first assignment of error is overruled.

B. Ineffective Assistance of Counsel

{¶12} In his second assignment of error, Gibson contends that he was denied his Sixth Amendment right to effective assistance of counsel because counsel failed to move for the waiver of payment of court costs.

{¶13} To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing that there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶14} R.C. 2947.23(A)(1) states that "[i]n all criminal cases, * * * the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs." Court costs may, however, be waived in the discretion of the court if the court first determines that the defendant is indigent. *See* R.C. 2949.092; *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, at paragraph one of the syllabus. The court may only grant a waiver of court costs if the defendant makes a motion at the time of sentencing. *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶ 5. If the defendant fails to make a motion to

waive court costs at the time of sentencing, the issue is waived and the matter of costs is res judicata. *Id*.

{¶15} Here, counsel had a duty to seek a waiver of costs. The record reflects that the trial court declared Gibson indigent and appointed counsel for him. There is nothing in the record demonstrating that Gibson's circumstances changed prior to trial and sentencing. Thus, we find no justification for counsel's failure to request a waiver of costs during sentencing and conclude that counsel violated an essential duty to the client. *See In re Carter*, 4th Dist. Jackson Nos. 04CA15 and 04CA16, 2004-Ohio-7285, ¶ 43 (reasonable defense counsel faced with evidence of client's indigence would have informed the court that his client was indigent and asked the court to either waive the court costs or impose a term of community service instead of court costs).

{¶16} This court has held that a failure to file an affidavit of indigency is ineffective assistance of counsel if the record shows there is a reasonable probability the defendant would have been found indigent. *State v. Huffman*, 8th Dist. Cuyahoga No. 63938, 1995 Ohio App. LEXIS 233 (Jan. 26, 1995). Here, the trial court's prior finding that Gibson was indigent, and its subsequent finding in the journal entry of sentencing that Gibson was indigent and appointment of appellate counsel for him, demonstrate a reasonable probability that the trial court would have waived costs had counsel made a timely motion. Counsel's failure to seek a waiver of costs based on Gibson's indigency was deficient and prejudiced Gibson. Accordingly, we sustain the second assignment of

error, vacate the imposition of costs, and remand for a hearing regarding the imposition of costs on an indigent defendant.

{¶17} Affirmed in part, vacated in part, and remanded.

It is ordered that the costs herein taxed be shared equally.

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 further proceedings.

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

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS WITH SEPARATE OPINION

FRANK D. CELEBREZZE, JR., J., CONCURRING:

{¶18} I concur with the majority's opinion and resolution of this case, but write separately to express my opinion that when imposing costs, if the trial court had stated it considered appellant's present and future ability to pay costs, it could have perhaps avoided this remand. While a court does not have to consider these factors unless an individual files an affidavit, such a statement could head off the argument.