[Cite as *State v. Wilson*, 2010-Ohio-5478.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94097

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

REGINALD WILSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521488

BEFORE: McMonagle, P.J., Blackmon, J., and Jones, J.

RELEASED AND JOURNALIZED: November 10, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Reginald Wilson, appeals his drug trafficking and drug possession convictions, rendered after a jury trial. We affirm.

I

{¶ 2} Wilson was indicted in March 2009 as follows: Count 1, trafficking in PCP; Count 2, possessing PCP; Count 3, trafficking in crack

cocaine; and Count 4, possessing crack cocaine. On the day of trial, the state filed notice of its intent to use evidence of other acts under Evid.R. 404(B). The case proceeded to a jury trial. The defense made a Crim.R. 29 motion relative to the trafficking counts at the conclusion of the state's case, but it was denied. The defense presented a witness, and at the conclusion of its case, renewed its Crim.R. 29 motion, this time relative to all counts. The motion was denied. The jury returned a verdict of not guilty on Count 1, trafficking in PCP, but guilty on the remaining counts. Wilson was sentenced to a 30-month prison term.

II

A. State's Case

{¶ 3} In February 2009, the police observed Wilson weaving while driving a car in heavy traffic. At one point, Wilson stopped the car for a red light, but did so in the middle of the intersection, causing other cars to have to maneuver around his car. When the light turned green, Wilson drove, but then drove through a red light. The police activated their lights and sirens to effect a traffic stop. Wilson stopped, but did so again in the middle of an intersection. The police effort to get him to pull over were unsuccessful.

{¶ 4} Wilson opened the driver's door, as he was instructed to do, and "half fell out of the car." The police testified that he was "pretty much out of it. He was * * * flying high." The police smelled a strong odor of PCP

emanating from the vehicle and Wilson's person. One of the officers saw a glass vial, which he testified is commonly used for PCP, in plain view in a compartment on the car door.

{¶ 5} For officer safety, Wilson was handcuffed and patted down.[1] The police retrieved the glass vial from the car and concluded that it contained PCP. Wilson was arrested for violation of state drug laws and searched incident to arrest. Wilson was wearing a jacket, and three more vials containing PCP and a "chapstick-like" container containing crack cocaine were retrieved from an interior pocket. There were approximately 20 to 25 varying sizes of "rocks" of crack cocaine in the container. The police testified that the varying sizes of the rocks were indicative that they were for sale (the testimony was that the majority of the rocks were "$10 rocks," and there were some "$20 rocks"). No other remarkable items or contraband were recovered from appellant's person or the vehicle. Wilson did not make any statements to the police.

{¶ 6} A state trooper testified about a 2002 traffic stop in Medina involving Wilson. Wilson was the front seat passenger and another passenger was in the rear. PCP in the same type of vials found in this case

[1]The officer did not testify that anything was found during the pat-down search. Rather, he testified that the drugs (other than the vial he saw in plain view) were found once Wilson was searched incident to his arrest.

was recovered from the rear of the vehicle. Wilson was charged with drug possession; he denied having any knowledge of the drugs.

B. Wilson's Case

{¶ 7} After being advised of his Fifth Amendment rights, Wilson's father testified. According to the father, the drugs were his, not Wilson's, and Wilson had no knowledge of them. The father testified that on the day of the incident he was living at a homeless shelter, where drug use and transactions were common. While waiting for his son to pick him up from the shelter, he saw a man put a bag of drugs on a table in the kitchen and leave. The father retrieved the drugs from the bag and put them in the interior pocket of his jacket.

{¶ 8} When Wilson arrived, the two went to a bar. The father testified that he took the jacket off and put it on the backseat of the car before going into the bar. He never told his son about the drugs. The two had drinks in the bar, and when leaving, the father decided to drive because he felt Wilson was too "topsy" from the drinks to drive. Wilson fell asleep while the father was driving back to the shelter. Arriving at the shelter, the father decided to let him sleep for a little longer so that he would be "sober" enough to drive. The father took some, but not all, of the drugs from the coat, but left the coat and remaining drugs in the car. The father then walked around the corner, used some of the drugs he had taken, and "shared" some with a friend while

he talked for a while. About 15 minutes later, he went to go check on his son, but his son and the car were gone.

III

{¶ 9} We consider the first two assignments of error together. In the first assignment, Wilson contends that the police exceeded the permissible scope of their search. For his second assignment, he contends that trial counsel was ineffective because she did not file a motion to suppress.

{¶ 10} "To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-89, 2000-Ohio-448, 721 N.E.2d 52, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 11} "'To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question.' Even if there is a reasonable probability that the motion would have been granted, the failure to pursue it cannot be prejudicial unless there is also a reasonable probability that, without the excluded evidence, the defendant would have been acquitted." (Internal

citation omitted.) *State v. Rucker*, Summit App. No. 25081, 2010-Ohio-3005, ¶46, quoting *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, at ¶65.

{¶ 12} For the reasons set forth below, there was no basis to file a motion to suppress in this case and counsel, therefore, was not ineffective.

{¶ 13} "Where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid * * *." *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11, 665 N.E.2d 1091. Wilson was stopped by the police for traffic violations, namely, weaving and running a red light.

{¶ 14} Wilson contends that "[o]nce the citation was given, [the police] were obligated to leave." But, when he opened the car door upon being stopped, the police smelled a strong odor of PCP emanating from the car and on his person, and saw a vial commonly used to contain PCP. Further, Wilson almost fell out of the car and the police observed that he was "pretty much out of it. He was * * * flying high."

{¶ 15} "An investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.'" *State v. Harrell*, Cuyahoga App. No. 89015, 2007-Ohio-5322, ¶8, quoting *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621. We

hold that the police had reasonable suspicion that Wilson was engaged in criminal activity, and therefore, was properly detained for further investigation.

{¶ 16} During an investigative stop, an officer may perform a pat-down search for weapons. *State v. Evans*, 67 Ohio St.3d 405, 408, 1993-Ohio-186, 618 N.E.2d 162. The purpose of this limited search is to allow an officer to pursue his or her investigation without fear of harm; it is not intended to provide the officer with an opportunity to discover evidence of a crime. Id.

{¶ 17} Before investigating, the police performed a pat-down search of Wilson for officer safety. Wilson contends that the police are "savvy" in that they routinely categorize their illegal searches as pat-down searches for officer safety, and states that "[a] vial inside of a coat * * * does not feel like a gun." But the vials of PCP and container of crack cocaine were *not* discovered during the pat-down search. Thus, Wilson's contention that the pat-down search was "overly intrusive and outside the scope of permissible search and seizure" is without merit.

{¶ 18} After they patted down Wilson, the police investigated the vial they saw in plain view in a compartment on the door of Wilson's car. The warrantless seizure of items in plain view does not violate the Fourth Amendment if it is shown that "(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was

inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *State v. Williams* (1978), 55 Ohio St.2d 82, 377 N.E.2d 1013, paragraph one of the syllabus.

{¶ 19} The police legally stopped Wilson for traffic violations, and thus the intrusion that afforded the police view of the vial was lawful, and the discovery was inadvertent. One of the responding officers testified as follows regarding discovery of the vial and its incriminating nature: "As I was standing on the driver's side of the vehicle, the door was opened and I could see a glass vial, which was indicative of what PCP comes in * * *. It was in plain view in the driver's door handle pocket on top of the door there." On these facts, seizure of the vial was permissible.

{¶ 20} Investigating the vial, the police concluded that it contained PCP, and arrested Wilson for violation of state drug laws. Wilson was searched and three more vials of PCP and a container of crack cocaine were discovered in the jacket he was wearing. Appellant contends that "[i]n this case it is crystal clear that [he] did not give consent to be searched." Consent to search is not implicated here. Rather, Wilson was searched incident to arrest. One of the exceptions to the warrant requirement is a search incident to a lawful arrest, "which allows officers to conduct a search that includes an arrestee's person and the area within the arrestee's immediate control." *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d

949, ¶11, citing *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. Thus, the search that led to the discovery of the remainder of the drugs (i.e., the other three vials of PCP and the crack cocaine) was permissible.

{¶ 21} In light of the above, there was no basis to file a motion to suppress, and the first and second assignments of error are overruled.

{¶ 22} For his third assigned error, Wilson contends that he was deprived of a fair trial because the state introduced "prior bad acts" testimony.

{¶ 23} On the day of trial, the state filed a notice of intent to use "prior bad acts" evidence. The court heard arguments on the issue just prior to opening statements. The state contended that it was its understanding that Wilson was "now claiming he had no idea that he had PCP on him in this particular case[,]" and thus it wanted to introduce testimony about a prior PCP case involving him "to show that the defendant had knowledge." The defense objected and argued, among other things, that Wilson's "intention was not to take the stand[,]" and allowing such evidence would "fl[y] in the face of his constitutional rights to not do that." The trial court overruled the defense's objection and allowed the testimony in the state's case in chief.

The purpose for which the state offered this testimony, however, was to rebut Wilson's claim.[2]

{¶ 24} The Ohio Supreme Court has described rebuttal evidence as follows: "Rebutting evidence is that given to explain, refute, or disprove *new facts introduced into evidence by the adverse party*; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence." *State v. McNeill* (1998), 83 Ohio St.3d 438, 446, 700 N.E.2d 596. (Emphasis added.)

{¶ 25} The state presented the testimony in its case in chief, rather than "to challenge the evidence offered by" Wilson. Although Wilson contended in opening statement that the drugs were not his, opening statements are not evidence. Thus, the evidence should not have been allowed in the state's case in chief. However, in reviewing the trial as a whole, we find the error harmless. Wilson presented his "lack of knowledge defense" through his father's testimony, and the record demonstrates that the father intended to testify regardless of the state's introduction of Wilson's 2002 prior case. (See Tr. 364-365, 430-433, 451, 464.)

{¶ 26} In light of the above, the third assignment of error is overruled.

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[2]The other acts evidence was a state trooper's testimony about a 2002 traffic stop in Medina involving Wilson. Wilson was the front seat passenger and another passenger was in the rear. PCP in the same type of vials found in this case was recovered from the rear of the vehicle. Wilson was charged with drug possession; he denied knowledge of the drugs.

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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
LARRY A. JONES, J., CONCUR