[Cite as *State v. Hurst*, 2009-Ohio-3127.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

State of Ohio,	:	
Plaintiff-Appellee,	:	Case No. 08CA43
v.	:	
Michael Hurst,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	File-stamped date: 6-24-09

APPEARANCES:

Michael Hurst, Marietta, Ohio, appellant pro se.

Roland Riggs, Marietta City Law Director, and Mark C. Sleeper, Marietta City Assistant Law Director, Marietta, Ohio, for appellee.

Kline, P.J.:

{¶1} Michael Hurst appeals his two convictions for OMVI and Failure to Stop After an Accident from the Marietta Municipal Court. On appeal, Hurst contends that he did not have the opportunity to perform an independent test of his urine sample. Because the state did preserve the urine sample, and because Hurst bore the responsibility for having the sample tested, we disagree. Hurst next contends that the state's failure to provide Hurst with a videotape taken the night of his arrest violated Hurst's speedy trial rights. However, we find that Hurst has waived this issue on appeal because he did not file a motion to dismiss based upon a speedy trial violation. Hurst next contends that the trial court erred by not suppressing the urine sample test results. Because the state substantially

complied with Ohio Adm.Code 3701-53-05(F), we disagree. Hurst next contends that he received ineffective assistance of counsel. Because Hurst has not demonstrated prejudice, i.e., he would have gone to trial but for his counsel's supposed errors, we disagree. Finally, Hurst contends that the cumulative errors below produced a trial setting that was fundamentally unfair. Because Hurst has not demonstrated that any errors occurred, let alone multiple errors, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} At about 2:05 a.m. on Friday, February 22, 2008, a Marietta city employee observed Hurst driving into some parked cars. As Hurst left the scene of the accident, the city employee called a Marietta patrolman (hereinafter the "patrolman") on the patrolman's cell phone. The city employee gave the patrolman a description of Hurst's vehicle and then advised the patrolman of the vehicle's location. Based on that information, the patrolman located Hurst's vehicle. After Hurst failed to stop for a flashing red light, the patrolman attempted to pull Hurst over. Hurst finally stopped two blocks later when another police cruiser pulled in front of Hurst's vehicle. The patrolman smelled alcohol on Hurst's breath and, after field sobriety testing, transported Hurst to the police station.

{¶3} While at the police station, Hurst submitted to more field sobriety testing. Apparently, the patrolman videotaped Hurst (hereinafter the "Hurst Video") while Hurst was at the police station. At 3:10 a.m., after twenty minutes of observation and a breath test, the patrolman collected a urine sample from

Hurst. The patrolman placed the urine sample in the evidence refrigerator at 3:45 a.m., and, at 10:30 a.m. that same morning, another police officer mailed the sample to the crime lab in Columbus for testing. The sample remained unrefrigerated until the crime lab received it at 3:31 p.m. on Monday, February 25, 2008.

{¶4} The patrolman charged Hurst with OMVI under R.C. 4511.19(A)(1)(a), Failure to Stop After an Accident under R.C. 4549.02, and other violations. Soon thereafter, Hurst pled not guilty, made a discovery request for the production of documents and recordings, and requested an attorney.

{¶5} The state filed the results of the crime lab's urine test on March 24, 2008. The results showed that Hurst had 0.236 grams by weight of alcohol per one hundred milliliters of urine. As a result, the state also charged Hurst with OMVI in violation of R.C. 4511.19(A)(1)(e). In response, Hurst made a demand for the testimony of the criminalist who performed the urine test.

{¶6} On April 1, 2008, Hurst moved the court for a continuance of the trial date. The court granted the same.

{¶7} On April 14, 2008, Hurst filed two motions regarding the urine sample. The trial court granted both motions. In two separate entries, the trial court ordered the state to preserve the urine sample and to provide the defense with "a portion of the urine sample sufficient to allow for an independent evaluation of said sample."

{¶8} On May 30, 2008, Hurst again moved for a continuance of the trial date. Hurst filed another motion to continue on June 12, 2008. The court granted these motions.

{¶9} On July 23, 2008, Hurst filed a pro se motion seeking both the "appointment of a new public defender" and a "continuance until discovery is made." At a July 24, 2008 hearing, the trial court appointed a new attorney for Hurst and scheduled a discovery hearing for a later date.

{¶10} Hurst filed another pro se motion on July 24, 2008, this one challenging the validity of the urine test results. Hurst attempted to address this motion during the July 24, 2008 hearing. However, the trial court judge said, "I'm not even going to look at your motion now to see whether it has any merit at all. I'm not going to review it until you have counsel appointed." July 24, 2008 Transcript at 10. Later, the trial court treated Hurst's motion challenging the validity of the urine test results as a motion to suppress. And in a subsequent entry, the trial court ordered a suppression hearing for October 2, 2008.

{¶11} Also at the July 24, 2008 hearing, the trial court discussed the Hurst Video for the first time in the following exchange:

{¶12} THE COURT: Was this cruiser equipped with a video?

{¶13} MR. SLEEPER: No, Your Honor. The city police department does not have video.

{¶14} THE COURT: There's a video in the basement some time.

{¶15} MR. SLEEPER: That I'm not sure of. I think there should be, but I don't know why I don't have it in my file right now, so…

{¶16} THE COURT: Do you have a video?

{¶17} MR. BAUMGARTEL: No, ma'am.

{¶18} THE COURT: Okay. Confirm with that.

{¶19} MR. SLEEPER: I will, Your Honor. July 24, 2008 Transcript at 7.

{¶20} At an August 28, 2008 hearing, the prosecutor mentioned that they had obtained the Hurst Video, were making a copy of it, and would soon provide a copy to Hurst. It is not entirely clear when Hurst actually received a copy of the Hurst Video. But at a September 12, 2008 hearing, Hurst's attorney mentioned that they had a copy of the Hurst Video and had reviewed it.

{¶21} At the October 2, 2008 suppression hearing, the trial court heard testimony from the patrolman, the police officer who mailed the urine sample, and the criminalist from the crime lab. These witnesses testified about the collection, refrigeration, transportation, and testing of Hurst's urine sample. Based on that evidence, the trial court found that the state had substantially complied with the relevant Ohio Administrative Code regulations and, therefore, denied Hurst's motion to suppress.

{¶22} Rather than go to trial, Hurst pled no contest to OMVI under R.C. 4511.19(A)(1)(a) and Failure to Stop After an Accident under R.C. 4549.02. The state agreed to dismiss the other charges against Hurst. The trial court found Hurst guilty of the two offenses and sentenced him accordingly.

{¶23} Hurst appeals, asserting the following five assignments of error: I. "TRIAL COURT ABUSED ITS DISCRETION BY IGNORING DEFENDANT'S NEED FOR COURT INTERACTION REGARDING DEFENDANT'S MOTION TO

HAVE A SECOND SAMPLE TEST ADMINISTERED." II. "TRIAL COURT ABUSED ITS DISCRETION BY NOT IMPOSING SANCTIONS OR DISMISSING COMPLAINT FOR PROSECUTION'S WILLFUL FAILURE TO PROVIDE DISCOVERY." III. "TRIAL COURT ERRED IN ITS DECISION TO DENY DEFENDANT'S MOTION TO SUPPRESS URINE SAMPLE, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." IV. "DEFENDANT WAS DENIED A FAIR TRIAL BY NOT BEING APPROPRIATELY REPESENTED BY COUNSEL." And, V. "THE CUMULATIVE EFFECT OF THE ERRORS PRODUCED A TRIAL SETTING THAT WAS FUNDAMENTALLY UNFAIR, THEREBY DENYING DEFENDANT'S DUE PROCESS OF LAW."

II.

{¶24} In his first assignment of error, Hurst contends that he did not have the opportunity to perform an independent test of his urine sample. Specifically, Hurst contends that (1) the state did not provide Hurst with a sample of the urine for independent testing, and (2) the trial court did not allow Hurst to address this issue at the July 24, 2008 hearing.

{¶25} When reviewing the propriety of discovery rulings imposed by a trial court, this court must determine whether the trial court abused its discretion. See *State v. Wiles* (1991), 59 Ohio St.3d 71, 78; *State v. Parson* (1983), 6 Ohio St.3d 442, 445. Accordingly, we will only reverse the trial court's ruling if the court's attitude is unreasonable, arbitrary, or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶26} Crim.R. 16(E)(3) vests a trial court with broad discretion when a party does not comply with discovery. This rule provides that the trial "court may order such [non-complying] party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

{¶27} "A trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery." *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, paragraph two of the syllabus. "The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party. The overall purpose is to produce a fair trial." Id. at 3.

{¶28} In determining whether a trial court abused its discretion regarding a discovery ruling that admitted evidence, we must consider the following three factors: (1) was the prosecution's failure to disclose willful, (2) would foreknowledge of the requested discovery have benefited the defendant in preparing a defense, or (3) would defendant have been prejudiced by admission of the requested discovery. *Parson* at syllabus.

{¶29} Here, contrary to Hurst's assertion, we note that the state did indeed comply with the trial court's orders related to the urine sample. Thus, Hurst's first assignment of error does not implicate Crim.R. 16(E)(3). The record shows that (1) the crime lab in Columbus preserved a sample for Hurst and (2) Hurst

arranged for an independent laboratory to test the sample. But the sample was never transported from the crime lab to the independent laboratory. At the July 24, 2008 hearing, Hurst explained that he could not transport the sample himself because of "chain of custody" issues. Aside from this explanation, it is unclear why Hurst did not independently test the urine sample before the trial date.

{¶30} This case is similar to *State v. Bruce*, Montgomery App. No. 22612, 2008-Ohio-5514. In *Bruce*, the defendant pled no contest to one count of aggravated vehicular homicide and two counts of operating a vehicle while under the influence. On appeal, the defendant claimed that his due process rights were violated because the state did not retain the defendant's blood sample so that the defendant could conduct independent testing. The court ordered the crime lab to preserve a sample for testing, but the defendant did not contact the crime lab to retrieve the sample for several months. Ohio Administrative Code regulations require that a blood specimen be retained for one year. Because of the defendant's delay in contacting the lab, his sample had been destroyed.

{¶31} The court found "that the state did not act in bad faith with regard to the destruction of the blood evidence. Indeed, it appears that [the defendant] and his expert bear the responsibility for not notifying the lab of [the defendant's] desire to test the sample within a reasonable time. Thus, [the defendant's] due process rights were not violated." Id. at ¶19.

{¶32} Here, as in *Bruce*, we find that Hurst bore the responsibility for having the urine sample independently tested. Moreover, Hurst was not denied due process of law by his own failure to have the urine sample independently tested.

First, because the crime lab actually preserved the sample, Hurst cannot demonstrate bad faith (or a willful failure to disclose) on behalf of the state. See *Arizona v. Youngblood* (1988), 488 U.S. 51, 58 ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); *State v. Lupardus*, Washington App. No. 08CA31, 2008-Ohio-5960, at ¶14. And second, Hurst has not demonstrated the exculpatory value of the urine sample. "The burden of proof is on the defendant to show the exculpatory value of the evidence[.]" *State v. Bowen* (Dec. 8, 1999), Columbiana App. No. 96 CO 68, unreported, citing *State v. Groce* (1991), 72 Ohio App.3d 399, 402. See, also, *State v. Brown* (Apr. 30, 1992) Jackson App. No. 660, unreported, citing *Groce*.

{¶33} Finally, based on *Bruce*, we find that the trial court did not abuse its discretion during the July 24, 2008 hearing. Hurst's brief takes two quotes from the trial court out of context, and Hurst makes it appear as though the trial court "would not allow [Hurst] to address the issue of being denied the opportunity to have a second sample testing." Brief of Appellant at 7. The court did indeed say, " – well, the fact it hasn't been accomplished at this point is not my problem. It's your problem." But the full transcript reveals that the trial court was actually addressing Hurst's failure to have the sample tested.

{¶34} MR. BAUMGARTEL: A sample has been preserved. So you know, that did happen.

{¶35} THE COURT: Okay. And so the sample is at the lab?

{¶36} MR BAUMGARTEL: Yes.

{¶37} THE COURT: Have you arranged to have anybody test it?

{¶38} THE DEFENDANT: I did arrange, Your Honor, for an independent laboratory in Columbus.

{¶39} THE COURT: Did they go get it?

{¶40} THE DEFENDANT: But I – to get it transported over there, I could not get them to go over there and do it, and from that point, I asked my counsel to figure out what could happen –

{¶41} THE COURT: Well, I mean –

{¶42} THE DEFENDANT: -- because I can't drive up there and get it and take it over because of the chain of custody, but other than that, if, being the burden of the city or the plaintiff, that they should have provided a way for that to be sent over to the other lab.

{¶43} THE COURT: All right. We're not going to get into all of that this morning. And I'm not sure you correctly –

{¶44} THE DEFENDANT: But it hasn't been accomplished.

{¶45} THE COURT: -- well, the fact it hasn't been accomplished at this point is not my problem. It's your problem."

{¶46} Therefore, because the state complied with the trial court's orders relating to the urine sample, and because Hurst bore the responsibility for having the sample tested, we find that the trial court did not abuse its discretion during the July 24, 2008 hearing.

{¶47} Accordingly, we overrule Hurst's first assignment of error.

III.

{¶48} In his second assignment of error, Hurst contends that the trial court abused its discretion by not imposing sanctions or dismissing the complaint because of the state's "willful failure" to provide Hurst with the Hurst Video. Hurst claims that the state did not provide him with the Hurst Video until 184 days after Hurst's first request for discovery. Because of this, Hurst argues that the state's delay in providing the videotape denied Hurst his right to a speedy trial under both the United States Constitution and R.C. 2945.71(B)(2) and 2945.73(B).

{¶49} By mentioning sanctions, this assignment of error seemingly invokes the trial court's regulation of discovery and the sanctions available under Crim.R. 16(E)(3), which we stated earlier within the first assignment of error. However, Hurst argues only that the state's failure to provide the Hurst Video violated his right to a speedy trial. Hurst makes no argument and cites no authority regarding sanctions available under Crim.R. 16(E)(3). "If an argument exists that can support this assignment of error, it is not this court's duty to root it out." *State v. Carman*, Cuyahoga App. No. 90512, 2008-Ohio-4368, at ¶31; *City of Whitehall v. Ruckman*, Franklin App. No. 07AP-445, 2007-Ohio-6780, at ¶20. Therefore, we limit our analysis to the speedy trial issue raised by Hurst. See App.R. 12(A)(1)(b) and App.R. 16(A)(7).

{¶50} R.C. 2945.71(B)(2) provides: "Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial * * * [w]ithin ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor

for which the maximum penalty is imprisonment for more than sixty days." And R.C. 2945.73(B) provides: "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code."

{¶51} Under Ohio's speedy trial statutes, if the state fails to bring a defendant to trial within the time required by R.C. 2945.71, the trial court must discharge the defendant upon "motion made at or prior to the" start of trial. R.C. 2945.73(B). "Thus, the statute requires the accused to file the motion before trial." *State v. Jones*, Lawrence App. No. 07CA2, 2008-Ohio-304, at ¶19, citing *State v. Thompson* (1994), 97 Ohio App.3d 183, 186-187.

{¶52} Here, Hurst did not file a motion to dismiss based upon a speedy trial violation or raise the issue below. Based on this failure, he waives his right to raise it for the first time on appeal. *State v. Taylor* (2002), 98 Ohio St.3d 27, 2002-Ohio-7017, at ¶37; Jones at ¶19; *State v. Ross,* Ross App. No. 04CA2780, 2005-Ohio-1888, at ¶20; *State v. Talley,* Richland App. No. 06CA93, 2007-Ohio-2902, at ¶43; *State v. Humphrey,* Clark App. No. 02CA25, 2003-Ohio-2825, at ¶17. But, see, *Cleveland v. Ali,* Cuyahoga App. No. 88604, 2007-Ohio-3902, at ¶10.

{¶53} Even if Hurst did not waive his right to raise the issue on appeal, Hurst's own actions tolled his speedy trial time under R.C. 2945.71(B)(2). In four separate continuance motions, Hurst waived his speedy trial rights (three of the waivers contain explicit, written waivers of Hurst's speedy trial rights). See R.C.

2945.72(H). Hurst also tolled his speedy trial time by (1) making discovery requests, see, e.g., *State v. Brummett*, Highland App. No. 03CA5, 2004-Ohio-431, at ¶15, fn.1; (2) asking the court for a new attorney, see, e.g., *State v. Whittaker* (Aug. 24, 1992), Lawrence App. No. 91 CA 08, unreported (stating that defendant's speedy trial calculation failed "to take into account the time tolled on his motion for a new attorney"); and (3) moving to suppress the urine test results, see, e.g., *State v. Deltoro*, Mahoning App. No. 07-MA-90, 2008-Ohio-4815, at ¶24-25. Because Hurst's own actions tolled the time under the speedy trial statute, the state provided the Hurst Video to Hurst well within the timeframe mandated by 2945.71(B)(2) and 2945.73(B).

{¶54} Accordingly, we overrule Hurst's second assignment of error.

IV.

{¶55} In his third assignment of error, Hurst contends that the trial court erred by not suppressing the urine sample test results.

{¶56} The state contends that Hurst's arguments regarding the urine sample are moot because he was not convicted under R.C. 4511.19(A)(1)(c), the section dealing with per se violations based on urine test results. Instead, Hurst pled no contest to the general influence charge under R.C. 4511.19(A)(1)(a). Because of this, the state argues that the urine test results were unnecessary to obtain a conviction. However, we do not agree that Hurst's arguments regarding the urine sample are moot. See, e.g., *State v. Hoder*, No. 08CA0026, 2009-Ohio-1647 (reversing a conviction under R.C. 4511.19(A)(1)(a) after finding that the trial court erred by failing to grant motion to suppress because police did not

substantially comply with urine test regulations); *State v. Dalrymple*, Fairfield App. No. 07 CA 33, 2008-Ohio-2827 (considering the merits of trial court's failure to grant motion to suppress blood alcohol test results in R.C. 4511.19(A)(1)(a) case); *State v. Kincaid*, Lucas App. No. L-06-1312, 2008-Ohio-376, at ¶6. Therefore, we will follow these cases and address Hurst's arguments.

{¶57} Appellate review of a decision on a motion to suppress evidence presents mixed questions of law and fact. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, citing *United States v. Martinez* (C.A.11 1992), 949 F.2d 1117, 1119. At a suppression hearing, the trial court assumes the role of trier of fact, and as such, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Carter* (1995), 72 Ohio St.3d 545, 552. A reviewing court must accept a trial court's factual findings if they are supported by some competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. The reviewing court then applies the factual findings to the law regarding suppression of evidence. An appellate court reviews the trial court's application of the law de novo. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶58} First, Hurst contends that the state did not substantially comply with Ohio Adm.Code 3701-53-05, which governs the collection and handling of urine specimens.

{¶59} The results of an alcohol content test administered pursuant to R.C. 4511.19 may be admitted into evidence upon a showing that the test was administered in accordance with Department of Health (hereinafter "DOH") regulations. *State v. Gibson*, Ross App. No. 04CA2805, 2005-Ohio-5273, at ¶9,

citing *Cincinnati v. Sand* (1975), 43 Ohio St.2d 79, paragraph two of the syllabus. The state need not prove strict or perfect compliance with DOH regulations. *State v. Burnside* (2003), 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶27; *State v. Plummer* (1986), 22 Ohio St.3d 292, syllabus; *State v. Mays* (1992), 83 Ohio App.3d 610, 613. Only "substantial compliance" is necessary for the test results to be admissible. *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3; *Plummer*, syllabus; *Gibson* at ¶9. Once the state shows substantial compliance with the regulations, the burden shifts to the defendant to show prejudice resulting from the failure to strictly comply. *Plummer,* syllabus; *State v. Wasmer* (Mar. 16, 1994), Jackson App. No. 714, unreported.

{¶60} "While not in transit or under examination, all blood and urine specimens shall be refrigerated." Ohio Adm.Code 3701-53-05(F). See, also, *State v. McDonald* (Oct. 30, 1998), Washington App. No. 97CA49, unreported ("DOH regulations require refrigeration of urine samples at all times except when the same is being transported or analyzed.").

{¶61} Hurst claims that the state did not substantially comply with the regulations because the urine sample was mailed on a Friday, thereby causing the sample to go unrefrigerated until the crime lab received it the following Monday. Hurst argues that the police should have waited until Monday to send Hurst's sample for the following reasons: (1) the crime lab was closed on Saturday; (2) there is no mail delivery on Sunday; and (3) the police should have known that sending the urine sample on a Friday would result in Hurst's sample going unrefrigerated for an extended period of time. Because of these expected

delays, Hurst contends that his urine sample was not "in transit" while it remained unrefrigerated.

{¶62} Hurst's argument is without merit. The Twelfth District Court of Appeals addressed a similar argument in *State v. Cook* (1992), 82 Ohio App.3d 619 (hereinafter "*Cook I*"). In *Cook I*, the defendant appealed his conviction for driving under the influence of drugs. On appeal, the defendant claimed that the police did not substantially comply with DOH regulations because the defendant's urine sample was collected on a Friday, mailed on a Friday, but not received by the crime lab until the following Monday. Nevertheless, the court concluded "that the urine specimen was 'in transit' between the time that [the officer] mailed it on January 3, 1992 and the lab received it on January 6, 1992. Ohio Adm.Code 3701-53-05(F) does not require refrigeration while a urine specimen is 'in transit.' Thus, we find that the state substantially complied with Ohio Adm.Code 3701-53-05(F)."

{¶63} *State v. Cook* (Aug. 3, 1992), Stark App. No. CA-8708, unreported, (hereinafter "*Cook II*") also addressed a similar argument. In *Cook II*, "the parties stipulated that Monday, May 27, 1991, was Memorial Day. [The officer] mailed appellee's blood sample on Saturday morning of the Memorial Day holiday weekend and the sample was delivered the following Tuesday morning. [The officer] was aware that there would be no mail delivery on Sunday or Monday." Id. Regardless, the court determined "that the sample was 'in transit' within the meaning of the [DOH] Regulation, and the [DOH] Regulation in this regard was

substantially followed." See, also, *State v. Smith* (1996), 82 Ohio Misc.2d 16 (finding that urine sample was in transit even during "non-mail" days).

{¶64} We choose to follow *Cook I*, *Cook II*, and *Smith*. Therefore, we find that Hurst's urine sample was in transit from the time it was mailed on Friday until the crime lab received it on Monday. As a result, we find that the state substantially complied with Ohio Adm.Code 3701-53-05(F), and Hurst has not demonstrated that he was prejudiced by any alleged failure of the state to strictly comply with the regulations.

{¶65} Hurst further argues that the criminalist falsified the laboratory report of Hurst's urine test. The test on Hurst's sample took place sometime after February 25, 2008, but the lab report itself was notarized on January 7, 2008. Because of this discrepancy, Hurst claims that the criminalist's testimony was impeached and, therefore, inadmissible.

{¶66} First, we disagree that the criminalist somehow falsified her report. Instead, the criminalist testified that she went before a notary on January 7th, 2008; that a copy of her electronic signature appears on the lab report; and that the form had been pre-notarized. The report itself has not been falsified. On the contrary, the report accurately states the date on which the notary acknowledged the criminalist's signature. Hurst presented no evidence at the suppression hearing that the criminalist had "falsified" the lab report or that the results were somehow inaccurate.

{¶67} Moreover, we note that Hurst's counsel questioned the criminalist about the pre-notarized lab report during the suppression hearing. And

therefore, the trial court was able to evaluate the criminalist's credibility in light of the apparent discrepancy in the lab report.

{¶68} Accordingly, we overrule Hurst's third assignment of error.

V.

{¶69} In his fourth assignment of error, Hurst contends that he received ineffective assistance of counsel.

{¶70} "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright,* Washington App. No. 00CA39, 2001-Ohio-2473, unreported; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient * * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense * * *[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20.

{¶71} However, courts have modified the *Strickland* test for cases where the defendant does not actually go to trial. "In the context of a guilty plea, the defendant must demonstrate that there is a reasonable probability that, but for his counsel's error, he would not have pleaded guilty and would have insisted on

going to trial." *State v. Barnett*, Portage App. No. 2006-P-0117, 2007-Ohio-4954, at ¶51, citing *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59; *State v. Martin*, Scioto App. No. 06CA3110, 2007-Ohio-4258, at ¶21. This holding is equally applicable in the context of a no contest plea. *Barnett* at ¶52; *State v. Bishop* (Nov. 25, 1998), Lorain App. No. 97CA006905, unreported; *State v. Brown* (May 16, 1997), Montgomery App. No. 96-CA-092, unreported.

{¶72} Here, Hurst argues that his attorney failed to do the following: (1) subpoena defense witnesses; (2) depose the state's witnesses; (3) file a motion to suppress the Hurst Video; (4) have the urine sample tested; (5) correct the errors of Hurst's first attorney; and (6) provide a counteroffer to the state's plea bargain offer.

{¶73} Regardless of the complaints about his attorney, Hurst has not even attempted to demonstrate that he would have gone to trial but for his counsel's supposed errors. Therefore, Hurst has failed to satisfy the modified *Strickland* test for no contest pleas.

{¶74} Accordingly, we overrule Hurst's fourth assignment of error.

VI.

{¶75} In his fifth assignment of error, Hurst contends that the cumulative effect of the errors below produced a trial setting that was fundamentally unfair, thereby denying Hurst due process of law.

{¶76} Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial

court error does not individually constitute cause for reversal." *State v. Garner* (1995), 74 Ohio St.3d 49, 64; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus. "If, however, a reviewing court finds no prior instances of error, then the doctrine has no application." *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, at ¶108; *State v. Hairston,* Scioto App. No. 06CA3089, 2007-Ohio-3707, at ¶41.

{¶77} Here, Hurst has not demonstrated that any errors occurred, let alone multiple errors. Therefore, Hurst's fifth assignment of error has no merit.

{¶78} Accordingly, we overrule Hurst's fifth assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the 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 Marietta Municipal 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. Exceptions.

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: ______________________________
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.