[Cite as *State v. Maughmer* , 2010-Ohio-4425.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA3127
	:	
vs.	:	**September 16, 2010**
	:	
DAVID MAUGHMER,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Benjamin J. Partee, Chillicothe, Ohio, for Defendant-Appellant.

Michael M. Ater, Ross County Prosecuting Attorney, and Jeffrey C. Marks, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Plaintiff-Appellee.

McFarland, P.J.:

{¶1} Defendant-Appellant, David Maughmer, was convicted of possession of cocaine in the Ross County Court of Common Pleas. As his sole assignment of error, Maughmer states he had ineffective assistance of counsel. His trial counsel did not move to suppress the warrantless vehicle search which uncovered the cocaine in question. Maughmer argues that under the authority of United States Supreme Court case of *Arizona v. Gant*, such a motion would have succeeded and the outcome of his trial would have been otherwise. We disagree. Because of the particular facts and

circumstances in this case, *Gant* is inapplicable and a motion to suppress would not have had a reasonable probability of success. Accordingly, Maughmer cannot demonstrate ineffective assistance of counsel on that basis. As such, we overrule his assignment of error and affirm the trial court's decision.

I. Facts

{¶2} In February 2008, Chillicothe police officer Charles Campbell recognized Maughmer sitting in the driver's seat of a car. Knowing there was a warrant out for his arrest, Campbell made contact with him and asked him to step out of the vehicle. When he approached the vehicle, Campbell noted a strong odor of burned marijuana coming from the car. Campbell also saw a hand-rolled cigar, on the passenger-side dashboard, that appeared to contain marijuana. Campbell placed Maughmer in the back of his patrol car, retrieved the cigar, and then searched the rest of the interior of the vehicle. In the glove compartment, Campbell found three small plastic baggies of crack cocaine and a substantial amount of cash. Maughmer told Campbell the cash was his, but the cocaine was not.

{¶3} Maughmer was subsequently charged with one count of possession of cocaine, a fourth degree felony. A jury found him guilty of

the charge and the trial court sentenced him to seventeen months in prison. Maughmer then filed this current direct appeal.

II. Assignment of Error

> APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL COUNSEL'S FAILURE TO FILE A MOTION TO SUPPRESS THE EVIDENCE AND BY TRIAL COUNSEL'S FAILURE TO OBJECT TO THE EVIDENCE OFFERED BASED ON *ARIZONA V. GANT*.

III. Standard of Review

{¶4} Maughmer's sole assignment of error is that because his counsel failed to move to suppress the evidence, which he allegedly should have done under the authority of the *Arizona v. Gant*, he was denied effective assistance of counsel during trial.

{¶5} In order to establish ineffective assistance of counsel, an appellant must show that counsel's representation was both deficient and prejudicial. *In re Sturm*, 4th Dist. No. 05CA35, 2006-Ohio-7101, at ¶77; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. Deficient representation means counsel's performance was below an objective standard of reasonableness. Id. To show prejudice, an appellant must show it is reasonably probable that, except for the errors of his counsel, the proceeding's outcome would have been different. Id.

{¶6} We have stated that "[a] reviewing court when addressing an ineffective assistance of counsel claim, should not consider what, in

hindsight, may have been a more appropriate course of action." *State v. Wright*, 4th Dist. No. 00CA39, 2001-Ohio-2473, at *22. Instead, reviewing courts must be highly deferential. Id. Further, "a reviewing court: 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id., citing *Strickland*.

{¶7} Further, when a claim of ineffective assistance is based on counsel's failure to file a motion to suppress, additional factors must be considered. First, a failure to file such a motion does not automatically amount to ineffective assistance. *State v. Benjamin*, 4th Dist. No. 08CA3249, 2009-Ohio-4774, at ¶23, citing *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52. To establish ineffective assistance for failing to file a motion to suppress, the proponent must show there was a basis for the motion, the motion would have had a reasonable probability of success, and there was a reasonable probability that suppression would have changed the trial's outcome. See *Madrigal* at 389; *Benjamin* at ¶23, citing *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, at ¶65; *State v. Chamblin*, 4th Dist. No. 02CA753, 2004-Ohio-2252, at ¶34.

IV. Legal Analysis

{¶8} As previously stated, Maughmer's claim of ineffective assistance of counsel is based solely on his counsel's failure to move to suppress evidence - namely, the three baggies of crack cocaine found in the vehicle's glove compartment. Maughmer asserts that because of the recent United States Supreme Court decision in *Arizona v. Gant* (2009), 556 U.S. ---, 129 S.Ct. 1710, 173 L.Ed.2d 485, Officer Campbell's search of the vehicle was unconstitutional.[1]

{¶9} Prior to *Gant*, many courts broadly allowed warrantless vehicle searches and deemed them constitutional as long as such searches were conducted incident to a lawful arrest. But in *Gant*, the Supreme Court narrowed the circumstances in which such searches are permissible:

{¶10} "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless

[1] In its brief, the State raises the issue of lack of standing as Maughmer was not the owner of the car in which the drugs were found. But because there is no evidence in the record as to whether or not Maughmer had permission to use the car, we presume, without deciding, that Maughmer has standing for the appeal. See *State v. Carter* (1994), 60 Ohio St. 3d 57, 630 N.E.2d 355.

police obtain a warrant or show that another exception to the warrant requirement applies." Id. at 1723-1724.

{¶11} Maughmer argues that *Gant* is controlling in his case. Officer Campbell initially made contact with Maughmer because he knew there was an active warrant for his arrest. And Campbell placed Maughmer in the back of his cruiser before he conducted the vehicle search. Maughmer argues that, under *Gant*, the search was impermissible because, at the time of the search, he was not within reaching distance of the glove compartment. And further, because he was being arrested for an outstanding warrant, it was not reasonable to believe a search of the vehicle would reveal evidence related to that offense. But this argument completely ignores the fact that Campbell smelled a strong odor of marijuana and saw a hand-rolled cigar, apparently containing marijuana, when he first approached the vehicle.

{¶12} In our view, because of the particular facts in this case, the holding in *Gant* is inapplicable. *Gant* eliminated the use of a lawful arrest as a pretext for a vehicle search when such search has no relation to the arresting offense. In other words, it prevents warrantless vehicle searches that are, essentially, fishing expeditions. But the case sub judice is not such a situation. As opposed to *Gant* and most cases that have cited it, here, the search was conducted only *after* the officer had probable cause to believe

there were illegal drugs in the vehicle. As such, there were independent grounds to conduct a search.

{¶13} Accordingly, the search of Maughmer's vehicle was not merely incident to his arrest for an outstanding warrant. The smell of marijuana in itself gave Officer Campbell probable cause to search the vehicle for additional controlled substances. "[T]he smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement. There need be no other tangible evidence to justify a warrantless search of a vehicle." *State v. Moore*, 90 Ohio St.3d 47, 48, 2000-Ohio-10, 734 N.E.2d 804.

{¶14} We note that our colleagues in the Eighth District have held otherwise in a fact pattern very similar to the case sub judice. In *State v. Burke*, 8th Dist. No. 93258, 2010-Ohio-1433, even though the arresting officer smelled marijuana when he approached the vehicle, which was initially stopped for a traffic violation, the court found *Gant* to be applicable and the vehicle search impermissible. In our view, such a ruling discounts the holding in *Moore* and the fact that there was probable cause for the search - probable cause independent of the traffic violation. Regardless of the reason for the initial stop, the smell of marijuana coming from the

vehicle in itself justified the subsequent vehicle search. As such, we disagree with the ruling in *Burke* and find that the case sub judice falls outside the purview of *Gant*. See, also, *State v. Canter*, 10th Dist. No. 09AP-47, 2009-Ohio-4837.

{¶15} Maughmer's claim of ineffective assistance of counsel is contingent upon his trial counsel's failure to file a motion to suppress. However, to prevail on that claim, such a motion must have a reasonable probability of success. Here, because the ruling in *Gant* is inapplicable, and Officer Campbell had probable cause for the warrantless vehicle search which uncovered the cocaine, a motion to suppress would have been properly denied. As such, we overrule Maughmer's assignment of error and affirm the decision of the court below.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the 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 Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

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

For the Court,

BY: _____
Matthew W. McFarland
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.