[Cite as *State v. McDougald*, 2004-Ohio-4512.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 03CA44

vs. : T.C. CASE NO. 02CR385

JEROME L. MCDOUGALD : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 27th day of August, 2004.

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GRADY, J.

{¶1} Defendant, Jerome McDougald, was indicted on one count of attempted tampering with evidence in violation of R.C. 2923.02, 2921.12(A)(1). Defendant filed a motion to suppress the statements he made to police. Following a hearing, the trial court overruled Defendant's motion to suppress. Pursuant to a plea agreement, Defendant entered a

plea of no contest to the charge. In exchange, the parties jointly recommended a six month prison sentence, concurrent with the time Defendant was already serving, plus one hundred fifty days of jail time credit. The trial court accepted Defendant's plea, found him guilty, and imposed the six months sentence jointly recommended by both parties.

{¶2} Defendant timely appealed to this court from his conviction and sentence. Defendant's appellate counsel filed an Anders brief, *Anders v. California* (1967), 386 U.S. 738, stating that she could not find any meritorious issues for appellate review. Appellate counsel further states in her Anders brief that Defendant's present location is unknown to her, and counsel has been unable to contact Defendant. This court is likewise unaware of Defendant's whereabouts. Accordingly, we will address the three potential errors raised in appellate counsel's Ander's brief, as well as conduct our own independent review of the trial record for any errors having arguable merit.

{¶3} Appellate counsel claims that one potential argument that could be raised on appeal is that the trial court erred in concluding that the statements Defendant made at the crime scene to police were not the product of custodial interrogation and therefore *Miranda* warnings were not required.

{¶4} When considering a motion to suppress, the trial court assumes the role of the trier of facts and, as such, is in the best position to resolve conflicts in the evidence

and determine the credibility of the witnesses and the weight to be given to their testimony. *State v. Retherford* (1994), 93 Ohio App.3d 586. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *Id.* Accepting those facts as true, the appellate court must then independently determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. *Id.*

{¶5} The facts found by the trial court are as follows:

{¶6} "The State called Sheriff's Detective Sargent Steven Lord as a witness. The Court finds his testimony credible. On September 11, 2002 at around 4:00 p.m., Detective Lord and other Deputy Sheriffs were in the process of executing a search warrant which authorized a search for evidence of trafficking in crack cocaine at Room 215 at the Howard Johnson Hotel in Piqua, Miami County, Ohio.

{¶7} "This location is known by law enforcement persons as a high crime area for drug trafficking in cocaine. At least two confidential informants had informed Detective Lord of the high incidence of drug trafficking at the motel. Recently, there had been a homicide related to a drug trafficking deal 'gone bad' at that location. When Detective Lord informed Piqua Police Department that he was going to be executing a search warrant at the motel, the Piqua police officer informed him that it was a location where high levels of drug trafficking took place.

{¶8} "Detective Lord and Detective Dave Duchak were interviewing Steven Johnson the occupant of the motel room being searched, in an unmarked car when two vehicles approached.

{¶9} "A Chevrolet parked next to Lord's vehicle. As a Mazda automobile parked on the other side of the Chevrolet, Lord recognized the passenger in the Mazda, Steven Karnhem. Lord knew him as a user of crack cocaine. Lord asked Johnson if he knew the passenger (Karnhem) and Johnson said that he was one of his crack cocaine customers. The Defendant was seated in the front passenger seat of the Chevrolet.

{¶10} "Lord observed Steve Karnhem walk to the driver of the Chevrolet. Lord watched Karnhem receive money from the driver of the Chevrolet. Then Karnhem walked into the motel.

{¶11} "Duchak got out of the car and approached the Mazda, held up his badge, and identified himself as a Deputy Sheriff. Lord wore a vest which identified him as a Deputy Sheriff. Lord approached the Chevrolet. As Lord told the occupants of the Chevrolet to put their hands up where Lord could see them he saw the driver and the Defendant engaging in furtive hand and arm movement. In the meantime, Lord had drawn his pistol and saw the Defendant throw 'some stuff' out of the passenger side window of the vehicle.

{¶12} "As Lord approached the Defendant he saw pieces of

tobacco 'all over' the Defendant's lap. After the Defendant was removed from the vehicle, Lord observed a 'blunt' and some tobacco laying on the concrete about eighteen inches from the car. A 'blunt' is a hollowed out cigar which has been refilled with marijuana.

{¶13} "The Defendant told Lord that his name was Charles Strickland and gave Lord a Social Security number that corresponded to that name. After the Defendant was removed from the car, he was patted down for weapons. Also, with his consent, Lord searched him, but found nothing.

{¶14} "Lord expanded the search of the area around the Chevrolet and found a bag containing suspected crack cocaine on the side walk about five to seven feet from the blunt on the Defendant's side of the Chevrolet. After the Defendant had been detained, but prior to the time Lord placed the Defendant under arrest, he admitted throwing the blunt out of the car, but denied throwing the crack cocaine. This statement was not made under circumstances which are the equivalent to 'custodial interrogation' as envisioned in *Miranda v. Arizona*."

{¶15} In discussing whether police questioning constitutes custodial interrogation and therefore requires *Miranda* warnings, in *State v. Hopfer* (1996), 112 Ohio App.3d 521, 545-546, this court stated:

{¶16} "The United States Supreme Court in *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706, defined a custodial interrogation as

'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' Custodial interrogation is measured by an objective standard, not by the subjective understanding of the suspect.

{¶17} "'A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.' ***Berkemer v. McCarty*** **(1984), 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317, 336.**

{¶18} "Accordingly, we must determine whether a reasonable person in Hopfer's position would have believed that she was not free to leave the presence of the sheriff's deputies and forgo further questioning."

{¶19} After reviewing the record of the suppression hearing and accepting as true the facts as found by the trial court, we believe that a reasonable person in Defendant's position, having been ordered by a police officer holding a gun to get out of his vehicle, would not have believed that he was free to walk away from police and not cooperate with their investigation. In that regard, Detective Lord specifically testified that Defendant was not free to leave. While the atmosphere which surrounds a typical traffic stop or ***Terry*** **investigative stop is comparatively non-threatening in character such that the detainee is not "in custody" for purposes of** ***Miranda,***

Berkemer v. McCarty (1984, 468 US. 420, 439, that is not the case given the particular facts here. Accordingly, we have serious reservations about the correctness of the trial court's legal conclusion that Defendant's statement made in the motel parking lot, admitting that he threw the "blunt" out of the car window when officers approached, which appears to have been made in response to police questioning, nevertheless was not the product of "custodial interrogation," and therefore *Miranda* warnings were not required.

{¶20} Even assuming that the trial court erred in failing to suppress Defendant's incriminating statement he made at the scene because it was not preceded by the necessary *Miranda* warnings, subsequent events cured that error and rendered it completely harmless. After police arrested Defendant and transported him to the Sheriff's Office, he was interrogated. Before being questioned, Defendant was read his *Miranda* rights, acknowledged that he understood his rights, and agreed to waive them and speak with police. During the questioning that followed Defendant made the exact same incriminating admission he had earlier made at the scene, that he threw the "blunt" out of the car window when officers approached. This latter admission was admissible evidence. Thus, any error on the part of the trial court in not suppressing Defendant's earlier incriminating statement he made at the crime scene is harmless. This potential issue lacks any arguable merit.

{¶21} Another possible argument that appellate counsel claims could be raised on appeal is that there was no lawful basis for the arrest of Defendant. Clearly, neither Defendant nor the vehicle he was riding in were the subjects of the search warrant police executed at room 215 of the Howard Johnson's motel, looking for crack cocaine and other evidence of illegal drug activity. However, while police were interviewing the man they discovered inside room 215, Steven Johnson, a Mazda and a Chevrolet pulled into the motel parking lot and parked next to the unmarked police vehicle where the questioning of Johnson was taking place. Johnson identified for police the passenger of the Mazda as Steven Karnehm, one of his crack cocaine customers. Karnehm exited the Mazda and went over to the driver of the Chevrolet who gave Karnehm some money. Karnehm then entered the motel. At that point police had reasonable suspicion to believe that criminal activity might be afoot: that the men in the two vehicles might have come to the motel to engage in illegal drug transactions. That justified an investigative stop. *Terry v. Ohio* (1968), 392 U.S. 1.

{¶22} When officers approached the Mazda and the Chevrolet in which Defendant was a passenger, officers observed Defendant throw something out the passenger window. Officers recovered a "blunt," a hollowed out cigar that had been refilled with marijuana, from the ground next to the passenger side of the Chevrolet. Defendant's lap was covered with what appeared to be tobacco. About five to

seven feet away from that blunt, police also discovered a bag with crack cocaine inside.

{¶23} On these facts and circumstances, police clearly had probable cause to arrest Defendant. This potential issue for appeal lacks any arguable merit.

{¶24} As a final potential issue for appeal, appellate counsel claims that it was error to permit Defendant to waive a preliminary hearing without counsel. However, in cases such as this one where Defendant has been charged with a felony offense, which may only be done by indictment, neither the complete absence of a preliminary hearing nor the failure to appoint counsel before the preliminary hearing denies Defendant any constitutional rights. *Douglas v. Maxwell* (1963), 175 Ohio St. 317. See also: Crim.R. 5(B), 7(A). This potential issue for appeal lacks any arguable merit.

{¶25} In addition to the potential errors raised by appellate counsel, we have conducted an independent review of the trial court's proceedings and have found no error having arguable merit. Accordingly, Defendant's appeal is without merit and the judgment of the trial court will be affirmed.

Judgment affirmed.

BROGAN, J. and YOUNG, J., concur.

Copies mailed to:

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Hon. Jeffrey M. Welbaum