[Cite as *State v. Clark*, 2010-Ohio-2383.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio — Court of Appeals No. WM-09-009

Appellee — Trial Court No. 09 CR 047

v.

Ronnie L. Clark — **DECISION AND JUDGMENT**

Appellant — Decided: May 28, 2010

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney, and Katherine J. Middleton, Assistant Prosecuting Attorney, for appellee.

Clayton M. Gerbitz, for appellant.

* * * * *

SINGER, J.

{¶ 1} This appeal is from a judgment issued by the Williams County Court of Common Pleas following a jury verdict which found appellant guilty of kidnapping and two counts of rape. Because we conclude that appellant cannot establish error based upon ineffective assistance of trial counsel, we affirm.

{¶ 2} Appellant, Ronnie L. Clark, was indicted on the following offenses: two counts of rape, in violation of R.C. 2907.02(A)(2) and one count of kidnapping, in violation of R.C. 2905.01(B)(2). The charges resulted from allegations that, on March 15, 2009, appellant hit, slapped, and tied his wife ("victim") to a bed in the bedroom of their residence and then forcibly penetrated her vaginal and rectal areas with a plastic coat hanger. Appellant pled not guilty and the following evidence, relevant to the issue on appeal, was presented during trial.

{¶ 3} Williams County Sheriff's Deputy Doug Jones testified that at approximately 12:30 a.m. on March 15, 2009, he responded to a domestic violence call to appellant's residence in West Unity. Deputy Jones heard via his radio that Officer Hartsock had gone to meet with the victim at a neighbor's home. The deputy stated that he initially went to appellant's residence to check on his physical safety and condition. After the deputy knocked on the door for about five minutes, appellant answered the door, naked and extremely intoxicated. Deputy Jones announced who he was and asked if he could step into the residence. Appellant permitted the deputy to enter into the living room.

{¶ 4} Appellant freely responded to the deputy's questions, stating that he assumed the deputy was there because he and his wife had an argument after she refused to have sex with him. Appellant said his wife "took off" and he did not know where she was. The deputy advised appellant to sit down on a couch or recliner because appellant, who appeared to be very intoxicated, kept falling down on the floor while they were

talking. According to the deputy, appellant would "come to" within a few seconds after falling. Eventually, the deputy asked appellant to get dressed. Deputy Jones then followed appellant to the bedroom while continuing to ask him questions about what had happened.

{¶ 5} While appellant got dressed, the deputy observed rolled up napkins with blood on them, a plastic hanger on the floor by the end of the bed, two open jars of Vaseline—one empty, other bloodstained napkins on a table, bloodstains on the bedding, and three scarves tied to three of the bedposts. The deputy then asked what had happened in the bedroom. Appellant stated that he tied his wife to the bed on her stomach. He said he kept asking her to have sex, but she refused. Appellant said he became upset and "smacked his wife on the butt several times really, really hard." Appellant denied that anything else had happened and responded that the blood on the bed was from his penis. The deputy did not notice any injuries to appellant while he was naked, but asked if appellant needed medical attention. Appellant said "no" and then the two left the bedroom.

{¶ 6} Deputy Jones said that appellant said he had consumed about a half a bottle of vodka. While talking with appellant, the deputy could not directly access his portable radio, but heard via radio traffic that Officer Hartsock was with the victim. About an hour after he arrived at appellant's residence, Deputy Jones contacted Officer Hartsock, who advised that appellant should be arrested for domestic violence. Deputy Jones then arrested him and Officer Hartsock came to the residence shortly thereafter. The deputy

read appellant his *Miranda* rights and placed him in the back of his cruiser. A few minutes later, Officer Hartsock transferred appellant to the back of the West Unity Police patrol car and transported him to the police office and then to the Corrections Center of Northwest Ohio ("CCNO").

{¶ 7} When Officer Hartsock returned, Deputy Jones walked through the residence at that point, assisting him in taking photos of the items Jones saw while talking with appellant. Deputy Jones did not have any contact with the victim, appellant's wife, that evening.

{¶ 8} The following other witnesses also testified. The victim testified that during the hours before the alleged kidnapping and rape, appellant had been drinking heavily. He did not act like himself, and began to slap her when she indicated she did not want to have sexual intercourse. Appellant then told her to be quiet, that he was going to "take what is mine," and tied her by the wrists and ankles, face down to the bedposts. He continued to threaten her, slap her, and pull her by the hair. At one point, he left the room, returned with Vaseline which he smeared on her buttocks, vagina, and rectum. He then penetrated her vaginally and anally with his fingers, a plastic coat hanger, and possibly another object.

{¶ 9} After about two hours, appellant was eventually able to free herself and ran, naked but wrapped in an afghan, to a neighbor woman's home. She was ultimately taken to the hospital where a nurse with sexual assault training examined her and completed a rape kit. At trial, her testimony was essentially the same as her statement to the nurse and

police. She also identified various objects shown in photos taken in the bedroom which were used in or related to the alleged rape and kidnapping charges.

{¶ 10} The neighbor woman testified that the victim had come to her door in the early morning hours of March 15, hysterical, crying, and trembling, saying her husband was beating her. The neighbor said the victim was naked, wrapped in a blanket, and had a necktie tied around her wrist. The neighbor's testimony at trial corroborated the victim's version of the events. The neighbor called 911 and a West Unity Police officer, Patrolman Hartsock, arrived within minutes. The neighbor noted that the victim's face and ear were red and there was a bite mark on her breast. The neighbor corroborated what the victim told the officer at that time: that appellant had tied the victim to the bed, had stuck a hanger and another object inside her, and had untied her feet which allowed her to free herself and run to the neighbor's house for help. During the neighbor's testimony, the 911 call was played for the jury.

{¶ 11} Kay Martin, the hospital nurse who performed the rape kit and sexual assault examination testified regarding the victim's statements about what happened. Again, the victim's statements to the nurse were consistent with her trial testimony, her verbal statements to the officer, and the police report. Using photographs, the nurse also testified as to the victim's injuries which were found, including bruising on her chest, breast, right wrist, hip, and back. The nurse also found internal and external vaginal and rectal area abrasions with some bleeding in the cervical area. The nurse opined that the internal injuries were caused by "some type of pointed or sharp object."

{¶ 12} West Unity Police Patrolman Dustin Hartsock then testified regarding the victim's statements and responses to questions on the day of the incident. After being dispatched to respond to the 911 call, he heard that Williams County Sheriff's Deputy Doug Jones was also en route to the scene. Officer Hartsock said he responded to the neighbor's address where the victim was located and Deputy Jones responded to the address indicated for appellant. Officer Hartsock's description corroborated the statements provided by the neighbor woman and the victim. After Officer Hartsock took photographs to document her physical injuries, except for her private areas, the victim was checked by an EMT squad called by the officer. The victim refused to be transported to the hospital at that point. The Assistant Chief of police, Dan Fedderke advised the officer that he was also en route.

{¶ 13} Patrolman Hartsock then went to the couple's residence where he found Deputy Jones placing appellant under arrest and into the deputy's patrol car. Eventually, appellant was placed into Patrolman Hartsock's vehicle for transport. Patrolman Hartsock then testified regarding photographs he took in the bedroom at appellant's home, showing the scarves tied on the bed, empty and partially used Vaseline jars and lids, a plastic hanger found on the floor, blood stains on the comforter, pillow case, and sheets, and "chunks" of the victim's hair on the bed. Assistant Chief Fedderke advised him that he was bringing the victim to the residence to get clothing, since she was nude. Appellant was transported away from the residence prior to her arrival there.

{¶ 14} After picking up larger evidence bags from the police office, the patrolman returned to the residence to collect the evidence from the bedroom. Patrolman Hartsock observed that appellant, who was extremely intoxicated, asked and was allowed to use the restroom at the police office before being transported to CCNO.

{¶ 15} Assistant Chief Dan Fedderke also corroborated the victim's demeanor and statements made regarding appellant's actions. Assistant Chief Fedderke testified that he had escorted the victim to her residence to get clothing and had also observed the bedroom area. Although the victim initially did not want to talk about the incident or seek medical attention, Assistant Chief Fedderke suggested that she go to the hospital for treatment, where he then took her. After the examination was completed, he brought her to the police office to make a tape-recorded statement and then took her home.

{¶ 16} Assistant Chief Fedderke then went to CCNO to do an interview with appellant. After reading him his *Miranda* rights, the assistant chief then talked with appellant who said he had been very drunk during the alleged rape and did not remember what had happened. According to the assistant chief, appellant was very upset, emotional, and crying. Appellant said "if she said I did it, I did it." After the state rested, appellant offered no witnesses or evidence in his own defense.

{¶ 17} The jury found appellant guilty on all three counts. The court sentenced appellant to the mandatory minimum of three years incarceration for each of the crimes, to be served concurrently.

{¶ 18} Appellant now appeals that judgment and argues the following sole assignment of error:

{¶ 19} "The appellant received ineffective assistance of counsel due to the failure of counsel to file a motion to suppress the evidence seized from the appellant's home without a warrant."

{¶ 20} In order to prove ineffective assistance of counsel, a defendant must show 1) that defense counsel's representation fell below an objective standard of reasonableness and 2) that counsel's deficient representation was prejudicial to the defendant's case. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See, also, *Strickland v. Washington* (1984), 466 U.S. 668, 694.

{¶ 21} Appellant contends that his trial counsel was ineffective for failing to move to suppress the evidence seized by the police. "The failure to file or pursue a motion to suppress does not automatically constitute ineffective assistance of counsel." *State v. Benjamin*, 4th Dist. No. 08CA3249, 2009-Ohio-4774, at ¶ 23, citing *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, in turn, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384. To demonstrate ineffective assistance for failing to file a motion suppress, a defendant must show: (1) a basis for the motion to suppress; (2) that the motion had a reasonable probability of success; and (3) a reasonable probability that suppression of the challenged evidence would have changed the outcome at trial. See *Madrigal*, supra, at 389; *Benjamin*, supra, at ¶ 23, citing *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, at ¶ 65; *State v. Chamblin*, 4th Dist. No. 02CA753, 2004-Ohio-2252, at ¶ 34.

{¶ 22} Warrantless entries and searches of residences are presumptively unreasonable under the Fourth Amendment, subject only to a few specifically established

and well-delineated exceptions. See *Payton v. New York* (1980), 445 U.S. 573. One such exception is plain view. See *Coolidge v. New Hampshire* (1971), 403 U.S. 443. Under the plain view exception to the Fourth Amendment warrant requirement, evidence of crime or contraband may be seized by police officers without a warrant if (1) the initial intrusion that 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. *State v. Williams* (1978), 55 Ohio St.2d 82, paragraph one of the syllabus.

{¶ 23} The initial requirement for such a plain view seizure is that "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California* (1990), 496 U.S. 128, 136. In addition, the officer must be lawfully located in a place from which the object can be plainly seen, and must also have a lawful right of access to the object itself. Id. at 137. Finally, the incriminating character of the evidence in plain view must be "immediately apparent." Id. at 136. Thus, where a police officer's lawful entry into a house is entirely peaceful and invited, with no search or intent to search in the mind of the officer, he or she is "not required to remain blind to the obvious." *State v. Pamer* (1990), 70 Ohio App.3d 540, 543.

{¶ 24} Where the intent of officers is "not to search, but to question a resident," a "reasonableness standard" applies. *State v. Chapman* (1994), 97 Ohio App.3d 687, 690. The standard for measuring the "scope" of a suspect's consent under the Fourth

Amendment is that of "objective" reasonableness, i.e., what a typical reasonable person would have understood by the exchange between the police officer and the suspect. *State v. Lane*, 2d Dist. No. 21501, 2006-Ohio-6830, at ¶ 43 (citation omitted).

{¶ 25} Another recognized exception to the warrant requirement centers around exigent circumstances in which the safety of the police or others within a home is in peril. See *United States v. Johnson* (6th Cir.1994), 22 F.3d 674, 680, citing to *Minnesota v. Olson* (1990), 495 U.S. 91 (exigent circumstances exist where there is risk of danger to police or others). An officer may seize any evidence that is in plain view during the course of his legitimate emergency activities. *Michigan v. Tyler* (1978), 436 U.S. 499, 509-510. Police officers may reenter a residence and collect evidence in plain view, even when the emergency situation that justified the initial intrusion has terminated. *State v. Sage* (1987), 31 Ohio St.3d 173, 185-186. The condition is that during the reentry, the officers are limited to the scope of their initial entry. Id.

{¶ 26} Finally, under the doctrine of inevitable discovery, evidence that was obtained illegally is admissible, nonetheless, if it inevitably would have been obtained lawfully. See *Nix v. Williams* (1984), 467 U.S. 431; *State v. Perkins* (1985), 18 Ohio St.3d 193, syllabus. Even when a defendant refuses consent to search his house, where police have probable cause to enter an area and could have gotten a warrant, the evidence seized without a warrant will be admissible. See *State v. Kuhn*, 9th Dist. No. 05CA008859, 2006-Ohio-4416, ¶ 14.

{¶ 27} In this case, appellant initially consented to the officer's entry into the residence. Therefore, the officer had a legal right to be in the residence. This does not end our discussion, however, since consent to merely enter the house does not mean consent to search the entire home. After talking with appellant, who was intoxicated and naked when he answered the door, the officer then told appellant to put some clothes on. Appellant had allegedly just committed a violent offense. Under the facts of this case, it was reasonable for the officer to ensure his own as well as appellant's safety by accompanying him to the bedroom. Nothing in the record indicates that the officer's intent was to search the residence or that he conducted any type of invasive "sweep" of the area. The items submitted into evidence from the bedroom were in plain view and clearly indicated they might be related to the reported offense. The officers returning after appellant had left the residence were permitted to gather the items within the plain view area.

{¶ 28} Moreover, even presuming for the sake of argument only, that the officer who initially viewed the bedroom was not there lawfully, the police ultimately had probable cause to get a warrant for the bedroom, since the victim indicated that was the scene of the alleged rape and kidnapping. Under the rule of inevitable discovery, the police would have been able to enter and retrieve the items admitted into evidence. Therefore, any motion to suppress would not have been granted. Consequently, appellant cannot establish that trial counsel's representation fell below the acceptable standard required under *Bradley*, supra, and *Strickland*, supra.

{¶ 29} Furthermore, our review of the record indicates that the nurse, the officers, and appellant's own statements to police the day after the incident provides corroboration for his wife's statements. Although he claimed not to have remembered what happened, he did proclaim several times to police that, if his wife said he had committed various acts, she was to be believed and that he had done them. Consequently, even without the items retrieved from the residence, appellant cannot show that the outcome of the trial would have been different. Therefore, appellant cannot establish either prong of the *Bradley*/*Strickland* test to show that trial counsel was ineffective.

{¶ 30} Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 31} The judgment of the Williams County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE