[Cite as *State v. Davis*, 2010-Ohio-4383.]

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

State of Ohio — Court of Appeals No. OT-09-032

Appellee — Trial Court No. 08-CR-066

v.

Kenneth Davis — **DECISION AND JUDGMENT**

Appellant — Decided: September 17, 2010

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Matthew S. Schuh, Assistant Prosecuting Attorney, for appellee.

John C. Klaehn, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Kenneth W. Davis, appellant, appeals his conviction for tampering with evidence.[1] The conviction is pursuant to a jury verdict at trial in the Ottawa County Court of Common Pleas. Trial proceeded in September 2009. In an October 15, 2009

[1]R.C. 2921.12 governs the offense. The trial court judgment incorrectly refers to R.C. 2921.11(A) but nevertheless refers to a conviction for tampering with evidence. In view of our disposition of this case on the merits, we have not requested correction of the statute number in the judgment.

judgment, the trial court sentenced appellant to four years imprisonment for the offense and fined him $5,000.

{¶ 2} The Ottawa County Grand Jury indicted Davis on June 5, 2008, on two counts. One was tampering with evidence. The other was possession of drugs, a violation of R.C. 2925.11 and a fifth degree felony. The state dropped the possession charge shortly before trial.

{¶ 3} Davis asserts four assignments of error on appeal:

{¶ 4} "Assignment of Error No. 1. Appellant was not afforded effective assistance of counsel.

{¶ 5} "Assignment of Error No. 2. The trial court erred in denying appellant's Motion to Suppress filed on the day of trial.

{¶ 6} "Assignment of Error No. 3. The trial court denied appellant a fair trial when it denied his Motion to Dismiss.

{¶ 7} "Assignment of Error No. 4. The trial court erred in not granting appellant's motion for a mistrial."

{¶ 8} On June 1, 2008, Davis was a passenger in an automobile driven by Matthew Barnhart. Jon Saxton and Barnhart's girlfriend were also passengers. Police Officer Joel Barton of the Port Clinton Police Department stopped the vehicle for a traffic violation -- failure to use a turn signal in a turn from Buckeye to East Perry Street in Port Clinton. During the course of events, Officer David Scott, also a Port Clinton police

officer, and Deputy Charles Shuff, an Ottawa County Sheriff's Office deputy, stopped to assist Barton.

{¶ 9} Officer Barton testified at trial that he recognized Davis and Saxton in the vehicle as he walked towards the vehicle to speak with the driver. Barton informed the driver of the reason for the stop and requested that he step out of the vehicle. Barton questioned the driver once he exited the vehicle and also requested his permission to search the car. Barnhart consented to the search.

{¶ 10} Barton then asked Davis to step out of the vehicle. At Barton's request, Officer Scott addressed Saxton. Barton testified that he immediately smelled the odor of burnt marijuana about Davis once he got out of the car. Barton asked Davis for consent to search him. Davis responded "Yes," but was uncooperative and moved around when Barton attempted to search him. Davis avoided eye contact. Barton testified that Davis had his mouth shut when he said "Yes" to the search.

{¶ 11} Officer Barton testified that it became "very evident" that Davis either swallowed something or was "trying to conceal something in his mouth." Barton repeatedly told Davis to spit out whatever he had in his mouth. Barton testified that a "violent" struggle followed his attempts to search Davis. Both police officers and the deputy testified that it appeared that Davis was trying to get away. Barton started to place handcuffs on Davis at that time. After Davis was handcuffed, he continued to struggle with Barton.

{¶ 12} Officer Scott assisted Barton in an attempt to gain control over Davis. Scott testified "we ended up taking him to the ground." Once on the ground Davis wrestled and kicked at the police officers and deputy. Davis rolled out into vehicular traffic. During the struggle, Officer Scott sprayed Davis with pepper spray. Deputy Shuff assisted in restraining Davis on the ground.

{¶ 13} Officer Barton testified that he called for an ambulance for Davis because he did not know what Davis swallowed and because Davis had been maced. Davis was transported by ambulance to the hospital.

{¶ 14} Officer Barton testified that he saw white specks or white crumbs all over the side of Davis' mouth and that the substance appeared to him to be crack cocaine. A bridge from Davis' mouth was found on the ground. Officer Barton testified there were white specks on the bridge. The bridge was signed into evidence after the incident but was never tested for drugs.

{¶ 15} Officer Barton testified that he subsequently went to the hospital and Davis waved him over to speak with him. During a conversation that followed, Barton questioned Davis as to what he had swallowed earlier. Barton testified that Davis answered that he had swallowed Percocets and did not have a prescription for the drug.

Ineffective Assistance of Counsel

{¶ 16} Under Assignment of Error No. 1, Davis argues that he was denied effective assistance of counsel. He claims that his counsel was deficient in failing to file, within the time required under the Rules of Criminal Procedure, a motion to suppress

statements he allegedly made to Officer Barton at the hospital. Trial counsel did not file a motion to suppress the statements until September 1, 2009, the day scheduled for trial. The trial court took the bench to proceed on September 1, 2009, but was unable to proceed to trial until the following day.

{¶ 17} The state objected to the motion to suppress as untimely under Crim.R. 12. Under the rule, a motion to suppress is to be filed "within thirty-five days after arraignment or seven days before trial, whichever is earlier." Crim.R. 12(D).

{¶ 18} The trial court considered the motion on September 2, 2009, before trial. In ruling on the motion, the trial court stated that appellant was represented by court appointed counsel since June 2008 and that prior counsel had filed a timely motion to suppress evidence in July 2008. That motion related to evidence from searches and did not seek to suppress statements by Davis.[2]

{¶ 19} Trial counsel for Davis had served as counsel for Davis for four months prior to trial. The trial court denied the motion to suppress on the grounds that the motion was not filed within the time required by rule.

{¶ 20} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

[2]The original motion to suppress, filed in July 2008, was limited to suppression of physical evidence from searches. Appellant argued that he was searched during the traffic stop and at the hospital without consent.

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Proof of prejudice requires a showing "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶ 21} When considering a claim of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland*, 466 U.S. at 689.

{¶ 22} Davis argues that the hospital statements attributed to him were custodial statements taken by police in violation of the requirements of *Miranda v. Arizona* (1966), 384 U.S. 436, 479. Appellant argued in the September 1, 2009 motion to suppress that "[w]hile Defendant [appellant] was handcuffed and undergoing medical treatment in the emergency room of Magruder Hospital, where he had been sent by police, Defendant was interrogated and allegedly made incriminating statements. Defendant was never Mirandized." Appellant argues that his hospital statements were custodial because he was handcuffed by police to his hospital bed at the time of the statements. The state argues that appellant was not in custody when the hospital statements were made and that the statements were not the product of police interrogation.

{¶ 23} *Miranda* rights warnings are required for custodial interrogations. *Berkemer v. McCarty* (1984), 468 U.S. 420, 428-433; *State v. Mason* (1998), 82 Ohio St.3d 144, 153. "[T]he determination as to whether a custodial interrogation has occurred requires an inquiry into 'how a reasonable man in the suspect's position would have understood his situation.' *Berkemer v. McCarty*, 468 U.S. at 442, 104 S.Ct. at 3151, 82 L.Ed.2d at 336. '[T]he ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' *California v. Beheler* (1983), 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 quoting *Oregon v. Matthiason* (1977), 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714, 719." *State v. Mason*, 82 Ohio St.3d at 154.

{¶ 24} Evidence in the record concerning use of handcuffs to restrain appellant at the hospital is very limited. Officer Barton testified as to use of handcuffs at the evidentiary hearing on the original motion to suppress:

{¶ 25} "Q. You had placed handcuffs on Mr. –

{¶ 26} "A. -- I never placed any handcuffs on Mr. Davis.

{¶ 27} "Q. You never placed –

{¶ 28} "A. No, not that I recall.

{¶ 29} "Q. You never placed handcuffs on him on Perry Street?

{¶ 30} "A. Yes, I did, but once he was in the E.R. –

{¶ 31} "Q. Were they taken off of him?

{¶ 32} "A. I believe that I took them off once I knew that he was going to be cordial with me, that I didn't have to fear him getting up and trying to fight me. Like I said, at that point in time I believe someone had handcuffed him to the bed for their safety, and I don't know who that was.

{¶ 33} "Q. When he left Perry Street, he was in handcuffs, wasn't he?

{¶ 34} "A. Once the ambulance got there, I couldn't answer that yes or no. I don't believe. I would imagine for him to be treated that they would at least have put the handcuffs up front."

{¶ 35} The evidence at trial did not address whether appellant was handcuffed to the hospital bed at the time of his statements to Barton at the hospital. The testimony at the hearing on the motion to suppress evidence from searches supports a conclusion that Davis had been handcuffed to a bed during treatment after the incident but does not establish whether Davis remained handcuffed at the time of statements to Barton at the hospital. Appellant has argued no other basis to claim the hospital statements were custodial statements.

{¶ 36} Where an ineffective assistance of counsel claim requires consideration of materials outside the record of proceedings in the trial court, the claim is not of the type that can be considered on direct appeal. *State v. Carter* (2000), 89 Ohio St.3d 593, 606; *State v. Davis*, 6th Dist. No. L-05-1056, 2006-Ohio-2350, ¶ 21; *State v. Oliver*, 9th Dist. No. 24500, 2009-Ohio-2680, ¶ 16.

{¶ 37} The record is insufficient for appellant to meet his burden of establishing a factual basis for the motion to suppress. Accordingly, we find appellant's claim of ineffective assistance of counsel based upon the failure of counsel to file a timely motion to suppress is without merit. Assignment of Error No. I is not well-taken.

{¶ 38} Under Assignment of Error No. II, appellant argues that the trial court erred in overruling the motion to suppress on the basis that it was untimely. Appellant does not dispute, however, that the motion to suppress was not filed "within thirty-five days after arraignment or seven days before trial" as required under Crim.R. 12(D). Failure to file a motion to suppress within the time constraints of Crim.R. 12(D), constitutes a waiver of defenses or objections asserted in an untimely motion to suppress. Crim.R. 12(H).

{¶ 39} Under the rule, a trial court "in the interest of justice may extend the time for making pretrial motions." Crim.R. 12(D). The trial court may for good cause shown grant relief from waiver of defenses or objections arising from a defendant's failure to raise defenses or objections within the time requirements under Crim.R. 12(D). Crim.R. 12(H).

{¶ 40} Appellant argues a change of circumstances occurred when the state dismissed the possession charge approximately one week prior to trial and the state stated that it intended to rely on hospital statements by appellant to prove tampering with evidence at trial. The state argues that appellant was aware of the existence and nature of the hospital statements. A report memorializing the statements was provided to appellant

during discovery. The state also contends that appellant should have anticipated use of his statements against him at trial.

{¶ 41} The decision to grant or deny leave of court to file an untimely motion to suppress evidence pursuant to Crim.R. 12(D) and (H), is a matter committed to the sound discretion of a trial court and is subject to review on appeal on an abuse of discretion standard. *State v. Leahy*, 1st Dist. No. C-090393, 2010-Ohio-2876, ¶ 7-8; *State v. Robson*, 4th Dist. No. 05CA8, 2006-Ohio-628, ¶ 9; *State v. Rush* (July 22, 2003), 5th Dist. No. 03CAC01002, ¶ 7.

{¶ 42} While the importance of the hospital statements increased with the change of trial strategy of the state, appellant had notice during discovery of both the existence and nature of the state's claim as to statements made at the hospital to Officer Barton. We find that the trial court acted within its discretion in denying leave to file the motion to suppress after expiration of the period provided under Crim.R. 12(D) for the filing of the motion. Appellant's Assignment of Error No. 2 is not well-taken.

{¶ 43} Under Assignment of Error No. 3, appellant claims that the trial court erred in denying appellant's motion to dismiss. The motion was filed before trial and considered by the trial court before voir dire. In the motion, appellant claimed that the state failed to disclose that Jon Sexton, previously identified by the state as a trial witness, had informed the state that a written statement he made to police claiming he saw Davis put something in his mouth during the traffic stop was false and made as a result of pressure from Officer Barton.

{¶ 44} Appellant learned of the recantation and filed the motion to dismiss before trial. Appellant also called Sexton as a defense witness at trial. Sexton testified at trial that his written statement to police, that he saw appellant place something in his mouth after realizing the vehicle would be stopped by police, was untrue. He did not see appellant put anything in his mouth. Sexton testified that he made the false statement to police because of police assurances of favorable treatment if he made the false statement.

{¶ 45} Appellant argues that the failure of the state to disclose the witness's recantation of his prior statement to police constituted a violation of his rights to due process under *Brady v. Maryland* (1963), 373 U.S. 83. The state argues that no *Brady v. Maryland* issue is presented because appellant was able to call Saxton to testify at trial and present a full account of his recantation of his statement to police and alleged promises made by police.

{¶ 46} Under *Brady v. Maryland*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. No *Brady* violation, however, occurs, where the defendant was able to present the evidence at trial that the state allegedly sought to suppress. *State v. Ketterer*, Slip Opinion No. 2010-Ohio-3831, ¶ 37; *State v. Wickline* (1990), 50 Ohio St.3d 114, 116; *State v. Edwards*, 6th Dist. No. L-00-1161, 2003-Ohio-571, ¶ 47-48. Such is the case here. Accordingly, we find appellant's Assignment of Error No. 3 is not well-taken.

{¶ 47} Under Assignment of Error No. 4, appellant argues that the trial court erred by denying appellant's motion for a mistrial after Officer Barton testified on direct examination that he had "problems" with appellant and Jon Saxton "in the past as far as narcotics complaints and everything else."

{¶ 48} The issue of admissibility of evidence of other acts evidence arose with the state's first witness, Officer Dave Scott. During the course of Scott's testimony appellant objected to questions concerning the officer's familiarity with appellant. In discussions with the court, the state stated that its questions in the area were limited to present testimony of appellant's behavior on the night of the offense and that appellant acted in a suspicious manner when compared with earlier contacts. The prosecution clearly represented to the court that it did not intend to present testimony of any prior bad acts or allegations against appellant.

{¶ 49} Officer Barton testified as the state's third witness, after Officer Scott and Deputy Shuff. Upon direct examination by the assistant prosecutor, Barton testified:

{¶ 50} "Q. Mr. Bigler: After executing the traffic stop, what did you do next?

{¶ 51} "A. I approached the vehicle from the passenger side. Two reasons why I approach the vehicle from the passenger side, whenever we activate our lights at night, we have take-down lights and also a spotlight which illuminates the back of the car, and I could clearly tell that Mr. Davis was a passenger in that vehicle along with Jon Saxton. I have dealt with those two in the past. I have had some problems with those two in the past as far as narcotics complaints and everything else.

{¶ 52} "Mr. Dunn: Objection.

{¶ 53} "The Court: Approach

{¶ 54} "(The following conference was held at the bench:)

{¶ 55} "Mr. Dunn: It is bad acts we talked about earlier.

{¶ 56} "Mr. Bigler: I didn't know that was going to be his response.

{¶ 57} "The Court: Okay. Move to strike?

{¶ 58} "Mr. Dunn: I move for a mistrial. That is exactly what we talked about before.

{¶ 59} "Mr. Bigler: I told Officer Barton that he couldn't talk about those things until he had been addressed on cross examination. I have no –

{¶ 60} "Mr. Dunn: --That is even more a reason. He told him not to do and he did it. You can't take it back.

{¶ 61} "Mr. Bigler: I told Officer Barton he could not talk about those drug types of things until Terry opened the door on cross examination. That makes it easier.

{¶ 62} "The Court: I am going to make a limiting instruction. I will strike that testimony from the record, and I will tell the jury to disregard the response, the last response of Officer Barton regarding his knowledge of the Defendant.

{¶ 63} "Mr. Dunn: How is that sufficient? He has already talked about that he was specifically told not to do that. He disregarded the instructions and you can't take that back.

{¶ 64} "The Court: Your objection is noted.

{¶ 65} "(The bench conference was concluded.)

{¶ 66} "The Court: There has been an objection. I have sustained the objection of the defense. The jury is instructed to disregard the last answer of the officer regarding his familiarity with the Defendant in this matter."

{¶ 67} The state has stipulated that Officer Barton's testimony about "past narcotic complaints and everything else" was improper evidence under Evid.R. 404(B). Evid.R. 404(B) provides:

{¶ 68} "(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 69} The prejudicial effect of such testimony is clear:

{¶ 70} "The existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule. The undeniable effect of such information is to incite the jury to convict based on past misconduct rather than restrict their attention to the offense at hand." *State v. Allen* (1987), 29 Ohio St.3d 53, 55.

{¶ 71} The grant or denial of a mistrial rests within the discretion of the trial court and is subject to review on appeal under an abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173, 182, *State v. Long* (1978), 53 Ohio St.2d 91, 98; *State v.*

Leaders (Mar. 13, 1992), 6th Dist. No. E-90-61. "Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible. *Illinois v. Somerville* (1973), 410 U.S. 458, 462-463, 93 S.Ct. 1066, 1069-1070, 35 L.Ed.2d 425, 429-430; *Arizona v. Washington* (1978), 434 U.S. 497, 505-506, 98 S.Ct. 824, 830-831, 54 L.Ed.2d 717, 728-729." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127-128.

{¶ 72} Here the trial court immediately sustained the objection to Officer Barton's testimony and instructed the jury to disregard it. A curative instruction to disregard testimony has been recognized as "an appropriate remedy, rather than a mistrial, for inadvertent answers given by a witness to an otherwise innocent question." *State v. Holmes*, 5th Dist. No. 2004CA00118, 2005-Ohio-1481, ¶ 52; see *State v. Mobley* (Apr. 5, 2002), 2d Dist. No. 18878. A jury is presumed to follow such an instruction. *State v. Garner* (1995), 74 Ohio St.3d 49, 59.

{¶ 73} Officer Barton was the chief investigating officer on charges against appellant and a central witness for the prosecution at trial. He testified as to an opinion that the white specks seen on appellant's face were crack cocaine. He testified concerning incriminating statements by appellant at the hospital that he acted to swallow Percocets to prevent their discovery.

{¶ 74} The record demonstrates that Barton is an experienced police officer. His testimony concerning "problems" with appellant and Sexton as to "narcotics in the past" was not responsive to the question asked. According to the assistant prosecuting attorney trying the case, the testimony was also contrary to specific instructions he gave to Barton

before Barton testified. The assistant prosecutor also made assurances to the court earlier, during officer Scott's testimony, that the state would not offer testimony of other acts in its case.

{¶ 75} We cannot consider a more prejudicial circumstance in which to inject past "problems" with police and "complaints" concerning narcotics into a case. Under the tampering charge a key issue at trial was whether appellant was attempting to swallow narcotics or other illegal drugs to prevent their discovery by police and to avoid prosecution for a drug offense. The prejudicial comments directly related to the offense charged.

{¶ 76} There was no physical evidence from the traffic stop or the attempted search of appellant of any drug. Bridgework from appellant's mouth was found on the ground on Perry Street after appellant's struggle with police. Officer Barton testified that he saw white specks on both appellant's face and the bridgework. Officer Barton testified that he took no sample of the substance on appellant's face for testing. Although the bridgework was preserved and available for testing, the state did not test the bridgework for drugs.

{¶ 77} A urine sample was taken and tested at the hospital and tested positive for cocaine and marijuana.[3] The evidence at trial indicated that such test results are not time specific as to when the drugs were used.

[3]The urine test showed no evidence of Percocet.

{¶ 78} Due to these limitations on evidence, Officer Barton's testimony was central to the state's case. He testified to his opinion that the white specks on appellant's face, seen during the struggle with appellant, were crack cocaine. He testified to incriminating statements by appellant at the hospital.

{¶ 79} This is not a case involving overwhelming evidence of guilt. In our view, it is reasonably probable that the testimony of past contacts with police and of past complaints concerning narcotics affected the outcome of this case. We conclude that the injection of the inflammatory testimony of "problems" with appellant "in the past as far as narcotics complaints and everything," prevented appellant from receiving a fair trial on the tampering with evidence charge. We find appellant's Assignment of Error No. 4 is well-taken.

{¶ 80} The judgment of the Ottawa County Court of Common Pleas is reversed and the case is remanded to it for further proceedings consistent with this decision. The state is ordered to pay costs pursuant to App.R. 24.

JUDGMENT REVERSED.

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

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE