[Cite as *State v. Adams*, 2019-Ohio-1323.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 18AP-330
v.	:	(C.P.C. No. 16CR-7292)
Steven Adams,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 12, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Valerie B. Swanson*, for appellee. **Argued:** *Valerie B. Swanson.*

On brief: *Anzelmo Law* and *James A. Anzelmo*, for appellant. **Argued:** *James A. Anzelmo.*

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant, Steven Adams, appeals a January 24, 2018 decision of the Franklin County Court of Common Pleas declining to suppress a firearm and cocaine recovered from Adams during a search of his person and vehicle. This decision merged into a final judgment entered on April 10, 2018. Because we find that the trial court made factual determinations that are entitled to deference and because, based on the facts as determined by the trial court, the arrest and search of Adams were legal, we affirm the denial of suppression. Adams also challenges as ineffective assistance, his counsel's failure to seek a waiver of court costs. Because Adams' counsel presented Adams' financial situation to the trial court for the trial court's consideration in relation to fines, appointing appellate counsel, and costs, we do not find that counsel was ineffective in failing to explicitly request that costs be waived.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On December 30, 2016, a Franklin County Grand Jury indicted Adams for carrying a concealed weapon, improperly handling firearms in a motor vehicle, having a weapon while under a disability, and possession of cocaine. (Dec. 30, 2016 Indictment.) The weapon under disability and cocaine possession counts were also accompanied by firearm specifications. *Id.* at 2. Adams pled not guilty and, in March 2017, moved to suppress the gun and cocaine that comprised the evidentiary basis for the charges. (Mar. 23, 2017 Mot. to Suppress: Nov. 11, 2017 Suppression Tr. at 3, filed June 18, 2018; Jan 4, 2017 Plea Form.) The trial court held a hearing on the motion on November 3, 2017.

{¶ 3} At the hearing, Officers Kevin George and Brandon Harmon of the Columbus Division of Police testified that on December 7, 2016, they were patrolling the parking lot of Eastland Mall when they spotted Adams' car parked far away from other cars in the lot. (Suppression Tr. at 5-8, 33-34, 41.) The officers approached in their cruiser and parked in such a way so as not to block in Adams' vehicle. *Id.* at 8, 34. The cruiser was a standard police car but neither the lights nor siren were activated. *Id.* at 25, 28-29.

{¶ 4} Both officers exited the cruiser and approached Adams' car on foot, George to the driver's side and Harmon to the passenger's side. *Id.* at 8-9, 35. Adams rolled down his window as George approached. *Id.* at 9. The passenger seemed nervous and seemed to be turning his body so as to obscure Harmon's view of the driver's side. *Id.* at 35. However, as George stood at the driver's side window, he saw a digital scale and clear plastic baggy containing white powder on the floorboard in front of the driver's seat. *Id.* at 9-10.

{¶ 5} After spotting the suspected drugs, George asked Adams for identification and Adams promptly produced it. *Id.* at 11. On securing the identification against the possibility that Adams might try to flee, George opened the driver's door, reached in, and turned off the car. *Id.* He then asked Adams if there was a gun in the car and Adams denied having a gun. *Id.* at 11-12. George frisked Adams while Adams was still seated in the car and felt a gun in his right coat pocket. *Id.* at 12. He arrested Adams at that point and secured Adams' and the passenger's removal from the car and Harmon then searched the car. *Id.* at 13-14. Harmon found a scale and baggie of white powder on the driver's side floorboard. *Id.* at 37-38. George searched Adams more thoroughly in connection with the arrest and, in the course of that search, discovered a vial of cocaine in Adams' zippered jacket pocket. *Id.* at 14.

{¶ 6} Both George and Harmon confirmed that at no time before George asked Adams for identification, did the officers use harsh language, commands, or other words or gestures that would indicate Adams was not free to leave. *Id.* at 10-11, 14-15, 36. George expressly testified that until he saw the suspected drugs and scale in plain view and asked for Adams' identification, Adams was free to go. *Id.* at 10-11, 15, 27-28.

{¶ 7} Adams testified but provided a different view of the facts. Adams testified that he was parked at the end of a row but when he pulled up there was a car right next to him. *Id.* at 44-45. He agreed that the officers approached first in their squad car and then on foot. *Id.* at 45-49. He agreed that George was kind and friendly when he spoke but opined it was a "friendly scare" characterized by lots of fishing questions. *Id.* at 48-49, 54-55. Adams testified that, despite the friendly tone, he was "scared to death" that if he drove off the officers might shoot him. *Id.* He agreed that he rolled down his window but said George leaned in on the sill of the door and began asking questions. *Id.* at 49. Adams said that during the interaction George changed tactics, grabbing him by the vest and asking if he had anything on him and that George found the gun during that pat down. *Id.* at 49-50. Adams testified that the scale and baggie were stowed under the seat and that there was no way that George could have seen them, particularly not with Adams' six-foot-four-inch-250-pound bulk in the way. *Id.* at 50.

{¶ 8} On January 24, 2018, the trial court denied Adams' motion to suppress. (Jan. 24, 2018 Entry Denying Suppression.) The trial court recounted the facts as this:

> On December 7, 2016, the defendant was seated in his car in the parking lot at Eastland Mall. The car was running and parked away from other cars in the parking lot. Columbus Police Officers Kevin George and Brandon Harmon were on routine patrol in a Columbus police vehicle. When they entered the parking lot they notice the defendant's car. Officer George testified that generally people will park as close to the entrance as possible to shop, particularly when it is cold outside like it was on this day. Many times, when cars are parked as the defendant's Officer George said it is because a drug transaction is taking place.
>
> The officers decided to drive over to the defendant's car to engage in a conversation with the occupants of the car. He pulled next to the car and got out. Officer George approached the driver side, where the defendant was seated and Officer

> Harmon approached the passenger side. The defendant's vehicle was not blocked by the CPD vehicle.
>
> When Officer George approached the car, the [d]efendant rolled down his window. Officer George engaged in conversation with the defendant. When talking with the defendant he noticed a digital scale and baggie with powder under the wheel well where the defendant was sitting. He suspected the powder was drugs. At this point he asked the defendant for his identification reached into the car turned the ignition off. He asked the defendant if he had a weapon. The defendant said he did not have a weapon. He patted the defendant down while he was still seated in the car and recovered a handgun from defendant's coat pocket. A vial containing suspected cocaine was also retrieved from defendant's pocket. Defendant was detained an[d] ultimately arrested.

Id. at 1-2. Based on the trial court's factual findings it reasoned that the encounter was consensual until Officer George saw the baggie of white powder and scale in plain view. *Id.* at 3-4. As the only searches and seizures occurred after the plain view discovery of suspected drugs, the trial court found them to be lawful. *Id.*

{¶ 9} After this ruling, on February 7, 2018, Adams pled no contest to the charges in the indictment and was found guilty. (Feb. 7, 2018 Plea Form; Plea & Sentencing Tr. at 13-14, filed June 18, 2018.) The trial court sentenced Adams to a prison term consisting of 2 years plus a consecutive 18 months for the weapon under disability offense and associated firearm specification, 1 year plus a consecutive 18 months for possessing cocaine and the associated firearm specification, and 18 months each for the charges of carrying a concealed weapon and improperly handling firearms in a motor vehicle. (Apr. 10, 2018 Jgmt. Entry at 2.) All four counts and specifications were sentenced as concurrent with one another but with each specification was to be served consecutively with its associated count. *Id.* Thus, the total prison term imposed was 42 months.

{¶ 10} Adams now appeals.

II. ASSIGNMENTS OF ERROR

{¶ 11} Adams assigns two errors for our review:

> [1.] The trial court erred by denying Adams' motion to suppress evidence that police obtained in violation of his right against unreasonable searches and seizures guaranteed by the Fourth

> Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.
>
> [2.] Adams received ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

III. DISCUSSION

A. First Assignment of Error – Whether the Trial Court Erred in Refusing to Suppress the Gun and Drugs Recovered During the Search of Adams and his Car

{¶ 12} In reviewing decisions made on motions to suppress, we afford deference to the trial court's factual determinations and review the trial court's recitation of historical facts for "clear error;" however, we review statements of law and their application to facts de novo. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶ 50; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶ 13} " 'The law recognizes three types of police-citizen interactions: 1) a consensual encounter, 2) a brief investigatory stop or detention, and 3) an arrest.' " *State v. Dickman*, 10th Dist. No. 14AP-597, 2015-Ohio-1915, ¶ 9, quoting *State v. Millerton*, 2d Dist. No. 26209, 2015-Ohio-34, ¶ 20; *see also Florida v. Royer*, 460 U.S. 491, 501-07 (1982); *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, ¶ 13 (10th Dist.). If, in the course of a consensual encounter (or any other lawful activity), an officer sees contraband in "plain-view," the officer develops probable cause with respect to that thing and may act accordingly. *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, ¶ 16; *see also Horton v. California*, 496 U.S. 128, 134-37 (1990). In a case in which drugs are seen in plain view in a car, this would include searching the car and all containers therein which might contain drugs. *State v. Mobley*, 10th Dist. No. 18AP-205, 2018-Ohio-4678, ¶ 13, citing *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999).

{¶ 14} Adams does not dispute any of these legal principles nor does he attempt to argue that if George saw the suspected drugs and scale in plain view, that he was entitled to search the car and to arrest Adams. Instead, Adams argues that when George and Harmon approached Adams' car, the interaction was not a consensual encounter but an investigatory stop or detention. (Adams' Brief at 11-13.)

{¶ 15} We have previously explained:

> "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred" within the meaning of the Fourth Amendment.

Jones at ¶ 11, quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968), citing *Brendlin v. California*, 551 U.S. 249, 254 (2007). In this case, that physical force or show of authority to in some way restrain Adams' liberty was missing until after George saw the contraband. Adams testified to behavior by George such as ordering Adams to roll down the window, leaning into the car, and grabbing his vest, but the trial court did not find this evidence to be factually significant and appears to have credited very little of Adams' testimony in its factual recitation of the encounter. (Suppression Tr. at 48-50.) *See supra* at ¶ 8. Given that Adams was on post-release control for robbery (a crime of moral turpitude) and felonious assault at the time of this incident, we have little basis on which to say that the trial court committed clear error in making its factual determination. (Plea & Sentencing Tr. at 21-22.) The officers did not activate the patrol car lights, did not block the path of Adams' car, did not give commands, and never indicated by word, tone, or gesture that Adams was being detained, until after George saw the suspected drugs and scale in plain view. (Suppression Tr. at 8-12, 15, 24-25, 27-29, 34-36.)

{¶ 16} According to the findings of the trial court, this is a case where two officers walked up to a car parked somewhat remotely in a parking lot and one officer saw a scale and a baggie apparently containing drugs on the floor of the car. *See supra* at ¶ 8. Officers are free to approach individuals in public and engage them in conversation without suspicion and without offending the Fourth Amendment as long as they do not, "by means of physical force or show of authority," indicate that the person is not free to leave. *Jones* at ¶ 11, 14; *see also Royer* at 497; *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). Officer George neither made a statement nor took action to restrain Adams' liberty until he saw the drugs and developed probable cause. Adams' first assignment of error is overruled.

B. Second Assignment of Error – Whether Trial Counsel Provided Ineffective Assistance of Counsel in Failing to Request that Court Costs Be Waived

{¶ 17} Ineffective assistance of counsel claims are assessed using the two-pronged approach set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient. * * * Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* Adams argues that his trial counsel rendered ineffective assistance when he failed to request a waiver of costs based on Adams' indigence and that Adams was prejudiced thereby because costs were imposed when they would otherwise have been waived.

{¶ 18} Costs are required to be imposed in all criminal cases pursuant to R.C. 2947.23(A)(1)(a) and are not a financial sanction or fine that requires consideration of a defendant's ability to pay in accordance with R.C. 2929.19(B)(5). However, although costs generally must be imposed, they can also be waived, suspended, or modified "at the time of sentencing or at any time thereafter." *See* R.C. 2947.23(C) ("The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under section 2947.231 of the Revised Code, at the time of sentencing or at any time thereafter."). In recent decisions in Ohio, appellate courts have differed on whether the failure to request a waiver of costs at sentencing may constitute ineffective assistance of counsel, and the Supreme Court of Ohio has accepted a conflict case on the issue. *State v. Davis*, 152 Ohio St.3d 1441, 2018-Ohio-1600.[1]

{¶ 19} Yet, we need not resolve that issue in this case because, even if theoretically possible to be ineffective in failing to request a waiver of costs at sentencing, here, Adams' counsel was not ineffective. During the sentencing, Adams' counsel presented an affidavit of indigency and both Adams and his counsel represented that he was working. (Plea & Sentencing Tr. at 18-20.) Adams also requested and was granted bond during the pendency of this appeal (which would have enabled him to continue to earn income). *Id.* at 22-23. Recognizing Adams' modest but not nonexistent financial means, the trial court waived imposing a fine and appointed appellate counsel, but did require Adams to pay court costs. *Id.* at 21-22, 25. We do not believe that trial counsel was ineffective in presenting Adams' financial situation or that an explicit request for a waiver of costs would have been

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[1] Specific case announcement may be found online at 2018 Ohio LEXIS 943 or 2018 WL 1949992.

reasonably likely to alter the outcome of the trial court's decision on waiver of costs. The trial court was apprised of Adams' ability to make at least some payment. It waived fines and appointed appellate counsel, but it did impose court costs. In this, we find neither deficiency in Adams' representation at sentencing nor prejudice to Adams. *Strickland* at 687.

{¶ 20} Adams' second assignment of error is overruled.

IV. CONCLUSION

{¶ 21} The trial court made factual determinations that the police officers did not by force or show of authority, attempt to restrain Adams as they approached the car. The trial court found that, once at Adams' car, when one officer saw drugs and a scale in plain view, the officers' search and seizure was lawful and the fruits of their search were not subject to suppression from evidence for a trial. Based on the trial court's ruling on Adams suppression motion, he pled no contest to the charges in the indictment. Because we find no clear error in the trial court's factual findings, they are entitled to deference and we do not disturb them.

{¶ 22} Based on the trial court's findings, the arrest and search of Adams were lawful because they happened after Officer George's plain view discovery of illegal drugs on the floorboard of the driver's seat where Adams was seated. We overrule Adams' first assignment of error and affirm the trial court's denial of his motion to suppress.

{¶ 23} We also overrule Adams' second assignment of error. Adams' counsel presented Adams' financial situation (that he was indigent but working) to the trial court, and the trial court after considering that information waived fines, appointed counsel, and only imposed the payment of costs. Under these circumstances, it was not ineffective for counsel to have failed to explicitly request a waiver of court costs. Nor is it reasonably probable that the result would have been different had counsel made this explicit request. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and McGRATH, J., concur.

McGRATH, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).