NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1065

STATE OF LOUISIANA

VERSUS

JOSHUA GEORGE BOGIL

Judgment Rendered: DEC 23 2014

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
No. 533637

Honorable August J. Hand, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McCLENDON, J.

The defendant, Joshua George Bogil, was charged by bill of information with possession of methamphetamine, a violation of LSA-R.S. 40:967(C). He pled not guilty and, following a jury trial, was found guilty as charged. The State filed a habitual offender bill of information and, at a hearing on the matter, the defendant was adjudicated a third-felony habitual offender (two prior convictions for simple burglary of an inhabited dwelling). The defendant was sentenced to ten years imprisonment at hard labor without benefit of probation or suspension of sentence. The defendant now appeals, designating one assignment of error. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On March 30, 2013 at about 12:30 a.m., Officer Corey Herzog, with the Slidell Police Department, was on patrol on Pontchartrain Drive. While driving, Officer Herzog observed the defendant sitting on a curb, stooped over. Unsure if the defendant needed medical assistance, Officer Herzog approached the defendant and asked him if he was having any health issues. Officer Herzog noticed the defendant was disoriented and sweating profusely. The officer asked the defendant if he had taken any narcotics. The defendant replied that he was a "meth user" and that he had methamphetamine and needles on him. Officer Herzog **Mirandized** the defendant, asked if he could search him, and the defendant replied in the affirmative. Officer Herzog searched the defendant and found in his pants pockets a plastic bag containing methamphetamine (powder) and several hypodermic needles. One of the needles had methamphetamine residue in it. The total amount of methamphetamine in the defendant's possession was .04 grams.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues he was denied effective assistance of counsel. Specifically, the defendant contends that his

defense counsel failed to file a motion to suppress evidence, the arrest, and his statement.

The right of a defendant in a criminal proceeding to the effective assistance of counsel is mandated by the Sixth Amendment to the U.S. Constitution. A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. **State v. Serigny**, 610 So.2d 857, 859 (La.App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. **State v. Morgan**, 472 So.2d 934, 937 (La.App. 1 Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-39 (La.App. 1 Cir.), writ denied, 476 So.2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, where, as in this case, the record discloses evidence needed to decide the issue of ineffective assistance of counsel, and that issue is raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337 (La.App. 1 Cir. 11/8/96), 684 So.2d 432, 438.

The defendant argues in brief that defense counsel should have filed a motion to suppress to question the legality of his statement to Officer Herzog, the search, and his arrest. The defendant suggests his statement about being on drugs was not voluntarily and intelligently given because he "did not have the

mental capacity to intelligently and knowingly waive his rights." While conceding he was not in custody when he made the statement, the defendant suggests "he was certainly in such a drugged condition so as to make his statements involuntary." As such, his waiver of rights should not be considered sufficient to constitute a valid waiver.

The defendant's claims are without merit. As set forth previously, at about 1:00 a.m., Officer Herzog approached the defendant, who was sitting on the curb, stooped over, sweating profusely, and disoriented. Recognizing these symptoms as characteristic of narcotic use, Officer Herzog asked the defendant if he had taken narcotics that day. The defendant responded that he had and that he was a "meth user."

In **State v. Fisher**, 97-1133 (La. 9/9/98), 720 So.2d 1179, 1182-83, our supreme court deemed helpful a three-tiered analysis for interactions between citizens and the police under the Fourth Amendment as articulated in **United States v. Watson**, 953 F.2d 895, 897 n.1 (5th Cir.), cert. denied, 504 U.S. 928, 112 S.Ct. 1989, 118 L.Ed.2d 586 (1992). In the first tier, there is no seizure or Fourth Amendment concern during mere communication with police officers and citizens where there is no coercion or detention. The second tier consists of brief seizures of a person, under **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), if the officer has an objectively reasonable suspicion, supported by specific and articulable facts, that the person is, or is about to be, engaged in criminal activity. See **State v. Belton**, 441 So.2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984). The third tier is custodial arrest where an officer needs probable cause to believe that the person has committed a crime. See **State v. Hamilton**, 09-2205 (La. 5/11/10), 36 So.3d 209, 212. Within the first tier, officers have the right to engage anyone in conversation, even without reasonable grounds to believe that they have committed a crime. Further, the police do not need probable cause to arrest or reasonable suspicion to detain an individual each time they approach a citizen.

Hamilton, 36 So.3d at 212. See **State v. Dobard**, 01-2629 (La. 6/21/02), 824 So.2d 1127, 1130.

In **State v. Neyrey**, 383 So.2d 1222, 1224 (La. 1979), our supreme court stated:

> Policemen in the course of their duties initiate or respond to a wide variety of encounters, many of which are not related to the pursuit of criminals providing first aid, mediating disputes or just talking to citizens. Policemen may defuse arguments. They may act as good Samaritans in checking to see if someone is in trouble, sick, too drunk to care for themselves and in need of assistance.
>
> Policemen could not perform such valuable non-prosecutorial services nor could they effectively pursue criminals if they did not initiate or respond to encounters with citizens. While unsolicited assistance, unasked for conversation, and unrequested advice are not always welcome, the Constitution provides no protection from these everyday annoyances whether the source of irritation is a policeman or a citizen. The citizen's remedy in either instance is the same, decline the assistance, refuse to converse, or walk away.

At about 1:00 in the morning, Officer Herzog clearly had the right to approach and converse with a person sitting outside by a public street who appeared to be in physical distress. See **State v. Sims**, 426 So.2d 148, 152 (La. 1983); **State v. Schreiber**, 457 So.2d 218, 221 (La.App. 4 Cir. 1984). Officer Herzog's "first tier" encounter with the defendant, wherein there was no coercion or detention, did not implicate the Fourth Amendment in any way. Concerned for the defendant's safety and having to make the determination of whether or not to call for medical assistance, Officer Herzog asked the defendant if he had taken narcotics. Such a query did not necessarily implicate criminal concerns because there were a host of legal narcotics the defendant could have been taking at the time. On direct examination, Officer Herzog was asked, "It's not against the law to have narcotics in your system, is it?" The officer responded, "No, sir." On cross-examination, the following exchange with Officer Herzog took place:

> Q. And when you got out of your vehicle, and you walked up to him, you said he was sweating and disoriented?
> A. Yes, sir.
> Q. And you recognized those as being symptoms of narcotic use?
> A. Commonly, usually, yes, sir.
> Q. They are also symptoms of all kinds of medical afflictions, aren't they?

A. That's correct.

Moreover, even if the question by Officer Herzog about narcotic use could be considered interrogative in that it was used to elicit an incriminating response from the defendant (as suggested in brief), the defendant was clearly not in custody at the time the question was posed. It is well-settled that the ruling in **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), protects an individual's Fifth Amendment privilege during incommunicado interrogation in a police-controlled atmosphere. In **Miranda**, 384 U.S. at 444, 86 S.Ct. at 1612, the Supreme Court defined "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." Thus, before a confession or inculpatory statement made during a custodial interrogation may be introduced into evidence, the State must prove beyond a reasonable doubt that the defendant was first advised of his **Miranda** rights, that he voluntarily and intelligently waived those rights, and that the statement was made freely and voluntarily and not under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. LSA-C.Cr.P. art. 703(D); LSA-R.S. 15:451. **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 754. See **State v. Patterson**, 572 So.2d 1144, 1150 (La.App. 1 Cir. 1990), writ denied, 577 So.2d 11 (La. 1991).

There was no custodial interrogation at the time the defendant told Officer Herzog he had methamphetamine on his person. The defendant made the incriminating statement only moments after being approached on the street by Officer Herzog. While precustodial incriminating statements do not implicate **Miranda** concerns, the State still has the duty of affirmatively showing that a noncustodial confession or inculpatory statement is free and voluntary. See **State v. Glover**, 343 So.2d 118, 126-28 (La. 1976) (on rehearing). However, motions to suppress filed under LSA-C.Cr.P. art. 703 address only constitutional violations, and an essential prerequisite for suppressing a statement on voluntariness grounds is misconduct or overreaching by the police. **State v.**

Schrader, 518 So.2d 1024, 1027 (La. 1988). There is nothing in the facts that indicate misconduct or overreaching by Officer Herzog, or that the defendant was threatened or coerced at the time he admitted to having used and to being in possession of methamphetamine. See **State v. Thornton**, 12-0095 (La. 3/30/12), 83 So.3d 1024, 1026 (per curiam). Furthermore, the defendant's alleged diminished capacity as a result of his intoxication remains relevant to the voluntariness of his statement only to the extent that it made mental or physical coercion by the police more effective. **Id**. at 1025. Officer Herzog testified the defendant was responsive to his questions. More importantly, there is nothing in the facts to suggest the defendant's inculpatory statement was the product of a will overborne by police coercion due to the defendant's alleged intoxication. **Id**. at 1026.

Nevertheless, the defendant claims that his statements were not voluntary or knowing because he did not have the mental capacity to intelligently and knowingly waive his rights. In **State v. Robinson**, 384 So.2d 332, 335 (La. 1980), the supreme court held that where the free and voluntary nature of a confession is challenged on the ground that the accused was intoxicated at the time of interrogation, the confession will be rendered inadmissible only when the intoxication is of such a degree as to negate defendant's comprehension and to render him unconscious of the consequences of what he is saying. We note that not only did Officer Herzog indicate that the defendant was responsive to his questioning, the defendant testified at trial with particular clarity and detail about the events that transpired the day he was arrested. Specifically, the defendant recalled that he had "done a shot" of methamphetamine "by the railroad tracks ... by Palm Lake" about "an hour, maybe two hours" before he was found sitting outside the curb at the Winn-Dixie. The defendant testified that he took an empty "Coke can" and "turned it upside down" and then emptied the bag of methamphetamine he had into the can. The defendant then "took water [and] squirted it on there [and] twirled it around," and then placed it in a needle. Thereafter, the defendant shot the methamphetamine into his hand because "it's

the only vein [he] could find." The defendant then "crumpled the Coke can up and threw it in to a gutter" and stuck the needle in his pocket. The defendant also testified that he attempted to clean the needle, "but it had jammed up on [him] ... [s]o [he] put the cap back on it, and put it in [his] back pocket." The defendant indicated that while sitting on the curb he "was texting, trying to find a ride back to Picayune. [He] was stranded. [He] and [his] girlfriend had got in a fight. She was by her sister's. And [he] was stranded in Slidell." The defendant indicated that he was attempting to get to Picayune to "get more meth," because he had run out. As such, the defendant has not shown that his impaired state was of such a degree to render him unconscious of the consequences of what he was saying. See **State v. Davis**, 92-1623 (La. 5/23/94), 637 So.2d 1012, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994), wherein the Louisiana Supreme Court upheld a trial court's decision that a defendant's confession was free and voluntary even though the defendant had smoked three or four rocks of crack cocaine twenty-four hours before his confession and he had consumed three or four beers earlier in the day of his confession. The court noted that the defendant appeared coherent, and he was able to explicitly recount the details of the crime. See **Davis**, 637 So.2d at 1024.

After the defendant informed Officer Herzog he was a "meth user," the defendant then told the officer "I have methamphetamines on me, as well as needles." At this point, Officer Herzog **Mirandized** the defendant, and asked him if he had permission to retrieve the drugs and needles. The defendant consented to being searched. Officer Herzog did not need any degree of reasonable suspicion to ask for, and receive, the defendant's consent to search. See **State v. Strange**, 04-0273 (La. 5/14/04), 876 So.2d 39, 42 (per curiam). The validity of such consent is dependent upon it having been given voluntarily, free of duress or coercion either express or implied. **State v. Montgomery**, 432 So.2d 340, 343 (La.App. 1 Cir. 1983). See **State v. Tennant**, 352 So.2d 629, 633 (La. 1977), cert. denied, 435 U.S. 945, 98 S.Ct. 1529, 55 L.Ed.2d 543

(1978). Oral consent is valid. **State v. Ossey**, 446 So.2d 280, 287 n.6 (La.), cert. denied, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984). Officer Herzog testified that while the defendant appeared to be under the influence of drugs, the defendant was responsive to his questions. He also indicated that he did not threaten, coerce, or make any promises to the defendant. The defendant never told the officer he did not want to speak to him, and he never asked for an attorney. Officer Herzog's testimony established that the defendant's consent was neither forced nor coerced, and was clearly given voluntarily. Accordingly, the defendant's voluntary consent rendered the search and seizure of the methamphetamine and needles constitutionally valid. See **Montgomery**, 432 So.2d at 343.

Based on the foregoing, the defendant has not shown deficient performance by counsel; and even had he shown deficient performance, the defendant has failed to demonstrate how such deficiency would have prejudiced him. Within the first moments of Officer Herzog's encounter with the defendant, the officer had been made aware that the defendant had committed a crime, namely that he possessed methamphetamine. The Fourth Amendment had not been implicated at this point, and Officer Herzog was under no legal obligation to **Mirandize** the defendant prior to realizing the defendant had even committed a crime. When the defendant admitted to being in possession of an illegal narcotic, Officer Herzog had the right, the consent to search notwithstanding, to arrest the defendant based on probable cause that a crime had been committed and search his person as a search incident to arrest. See **State v. Surtain**, 09-1835 (La. 3/16/10), 31 So.3d 1037, 1043.

The facts of this case, as defense counsel surely would have known them prior to trial, clearly suggested that the filing of a motion to suppress would have been in vain. See **State v. Pendelton**, 96-367 (La.App. 5 Cir. 5/28/97), 696 So.2d 144, 155-56, writ denied, 97-1714 (La. 12/19/97), 706 So.2d 450. While the defendant maintains that the filing of a motion to suppress would have forced the State to produce evidence proving the voluntariness of his

incriminating statement, the filing and pursuit of pretrial motions are squarely within the ambit of the attorney's trial strategy, and counsel is not required to engage in efforts of futility. See **State v. Shed**, 36,321 (La.App. 2 Cir. 9/18/02), 828 So.2d 124, 132, writ denied, 02-3123 (La. 12/19/03), 861 So.2d 561. Moreover, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rest with an accused and his attorney, and the fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La.App. 1 Cir. 1993).

While we do not find defense counsel's decision to not file a motion to suppress to be error, even if we were to find that such failure to file the motion constituted deficient performance, the outcome would be the same since the defendant was not prejudiced by the alleged error. The **Strickland** inquiry is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. **Strickland**, 466 U.S. at 694-95, 104 S.Ct. at 2068-69. Given the overwhelming evidence of the defendant's guilt, we do not find a reasonable probability exists that, absent the alleged error of failing to file a motion to suppress, the jury would have had a reasonable doubt as to the defendant's guilt. See **Pendelton**, 696 So.2d at 155-56. The defendant's claim of ineffective assistance of counsel, therefore, must fall. See **Robinson**, 471 So.2d at 1038-39.

The assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the conviction, habitual offender adjudication, and sentence.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.