[Cite as *State v. Thomas*, 2020-Ohio-5007.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, : No. 107701

v. :

DANA THOMAS, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 22, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-616120-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Daniel Cleary, Brian Kraft, and Ryan Bokoch, Assistant Prosecuting Attorneys, *for appellee.*

Stephen L. Miles, *for appellant.*

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Dana Thomas ("Thomas") appeals his convictions and sentence and asks this court to reverse and remand to the trial court for further proceedings. After a review of the record and the law, we affirm.

{¶ 2} After a bench trial, the trial court found Thomas guilty of three counts of aggravated murder, one count of murder, six counts of aggravated robbery, seven counts of kidnapping, two counts of aggravated burglary, three counts of felonious assault, and one count of having weapons while under a disability. Thomas was sentenced to life in prison without parole. Thomas was ordered to serve six years prior to his life sentence for two three-year firearm specifications.

I. Facts and Procedural History

{¶ 3} Thomas, along with Anita Hollins ("Hollins"), Dwayne Sims ("Sims"), Nigel Brunson ("Brunson"), and Garry Lake ("Lake") were charged in a multicount indictment in connection with an incident at Cooley Lounge. The incident resulted in the murder of bartender, Melissa Brinker ("Brinker") and the robbery of several patrons. Hollie Smith ("Smith"), a friend of Hollins, testified that Hollins was injured after being assaulted, on December 6, 2015, at Cooley Lounge. Smith stated that Hollins filed charges in Cleveland, and after a trial in Cleveland Municipal Court, the individuals that assaulted her were acquitted. Hollins, along with Sims, Brunson, and Thomas planned to rob the lounge in retaliation.

{¶ 4} On the night of October 24, 2016, Lake testified that he needed a ride home from a party. When Hollins picked him up, Brunson, Thomas, Sims, and Hollins's two children were in the car. Lake testified that he fell asleep during the car ride, and when he awoke, Hollins had parked the car at a playground in the area of West 132nd Street in Cleveland, in the vicinity of the Cooley Lounge. Brunson, Thomas, and Sims were no longer in the car. Then Brunson, Thomas, and Sims

reentered the car, stating that they had just robbed a bar. Thomas stated that "she [Brinker] looked him in the face, so he shot her." (Tr. 2578.) Lake also testified that he was present during a conversation between Thomas and Hollins about the location of cameras in the lounge.

{¶ 5} Melissa Morton ("Morton"), friend of Brinker and regular patron of the Cooley Lounge, testified that two men arrived at the bar and ordered a single shot and an additional cup so they could split the shot. Shortly after, the two men proceeded to order the other patrons to the ground, stating that this was robbery.

{¶ 6} Cell phone records placed Thomas, Brunson, and Sims near the Cooley Lounge at the time of the robbery and murder. The police retrieved video surveillance from the lounge showing the men sitting at the end of the bar sharing a drink, and the police retrieved the cup that the men drank from before the robbery. DNA analysis of the cup established two profiles. Analysis showed that Thomas is 4.44 million times more likely than a coincidental match to an unrelated African-American, and Brunson is 130 million times more likely than a coincidental match to an unrelated African-American person. Thomas was then identified as one of the young men in the bar. Police also linked Sims to the attack.

{¶ 7} Thomas was arrested by police on January 11, 2017, and was read his *Miranda* rights. Thomas explained to police that he would not talk without an attorney present. In response, the police told Thomas that he was going to be charged with aggravated murder. Thomas then admitted to police that he was with

Sims and Brunson at the Cooley Lounge on the night of the robbery, but did not commit the murder. Thomas was recorded by police making this admission.

{¶ 8} Thomas was subsequently charged and processed. Before trial, Thomas's trial attorney filed a general motion to suppress, which stated in part,

> Now comes the Defendant, by and through counsel, and respectfully moves this Court to suppress the following evidence illegally and unconstitutionally obtained by the State:
>
> All statements, whether oral or written, obtained from the Defendant while under restraint of his/her freedom, on the ground that said statements were obtained by coercion and without proper advice as to, or recognition of, his right to remain silent and to the effective assistance of counsel as required by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Motion No. 4586815 (May 2, 2017).

{¶ 9} In the motion, trial counsel also requested an evidentiary hearing on the motion prior to trial. However, a hearing was never conducted on the motion, and Thomas's trial counsel did not file additional motions. As a result, Thomas filed this appeal assigning one error for our review:

I. The appellant received infective assistance of counsel.

II. Standard of Review

{¶ 10} In order to succeed on a claim of ineffective assistance, the appellant must establish that his counsel's performance was deficient and that the appellant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Prejudice is established if the appellant proves the

existence of a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Bradley* at 143. In evaluating a claim of ineffective assistance of counsel, a court must give great deference to counsel's performance. *Strickland* at 689. "A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69.

III. Law and Analysis

{¶ 11} Thomas claims that he was rendered ineffective assistance by his trial counsel because the trial counsel did not file a more specific motion to suppress arguing that Thomas's statements to the police should be suppressed and that Thomas's arrest was without probable cause. "To gain reversal on a claim of ineffective assistance of counsel, a convicted defendant must show that (1) his 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.' *Strickland* at 687." *State v. Patterson*, 2017-Ohio-8318, 99 N.E.3d 970, ¶ 32 (8th Dist.).

A. Motion to Suppress Statements to Police

{¶ 12} Thomas contends that his statements to the police after requesting an attorney to be present should have been suppressed because all questioning by the police should have stopped after his request. However,

> "[f]ailure to file a motion to suppress does not constitute per se ineffective assistance of counsel." *State v. Moon*, 8th Dist. Cuyahoga No. 101972, 2015-Ohio-1550, ¶ 28. Instead, a defendant must show

> that the motion would have "had a reasonable probability of success" and affected the outcome of the case. *State v. Sanchez*, 8th Dist. Cuyahoga No. 103078, 2016-Ohio-3167, ¶ 22; *Moon* at ¶ 28; *see also State v. Kirk*, 8th Dist. Cuyahoga Nos. 95260 and 95261, 2011-Ohio-1687, ¶ 46 ("Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted."). When scrutinizing an appellant's trial counsel's failure to file a motion to suppress, a reviewing court must decide whether that failure was a tactical decision based on the trial counsel's investigation of the matter. *State v. Spring*, 7th Dist. Jefferson No. 15 JE 0019, 2017-Ohio-768, 85 N.E.3d 1080, ¶ 20, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 2000-Ohio-448, 721 N.E.2d 52.

Id. at ¶ 35.

{¶ 13} Prior to questioning Thomas, the police read Thomas his *Miranda* rights, and

> "[p]rior to a custodial interrogation, the accused must be apprised of his or her right against self-incrimination and right to counsel. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *Miranda* defines "custodial interrogation" as any "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." *Id.* at 444.

State v. Scullin, 8th Dist. Cuyahoga No. 107866, 2019-Ohio-3186, ¶ 27, citing *Cleveland v. Oles*, 2016-Ohio-23, 45 N.E.3d 1061, ¶ 13 (8th Dist.). During Thomas's interrogation, Thomas requested to have an attorney present. According to Thomas, after he indicated that he wished to have an attorney, the detectives continued to talk to him. "In *Miranda,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that when a defendant requests an attorney, the police must stop interrogation until an attorney is present." *State v. Knuckles*, 65 Ohio St.3d 494, 496, 605 N.E.2d 54 (1992).

{¶ 14} Thomas does not allege that the detectives continued questioning or interrogating him. Thomas stated that the detective informed him of the charge and penalty of aggravated murder. However, "'[a]n interrogator may inform the suspect of the penalties for the offense of which he is suspected.'" *Scullin* at ¶ 58, citing *State v. Bays*, 87 Ohio St.3d 15, 23, 716 N.E.2d 1126 (1999). (Internal citations omitted.) After the detectives informed Thomas that he was going to be charged, Thomas stated that he wanted to talk about the charges against him, and "[o]nce a defendant invokes his right to counsel, police may talk to him only if the defendant himself initiates further communications." *Knuckles* at 496, citing *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The record indicates that Thomas initiated further communication with the detectives.

{¶ 15} Detectives proceeded with taking a video statement of Thomas admitting that he was at the Cooley Lounge during the robbery, but that he was not involved in the shooting of the murder victim.

> In *State v. Jallah*, 8th Dist. Cuyahoga No. 101773, 2015-Ohio-1950, this court recognized that pursuant to R.C. 2933.81(B), when an interrogation is recorded electronically, as was the case here, a defendant's statements during the recorded interrogation are presumed to be voluntary. *Id.* at ¶ 80. Furthermore, this court explained that the statute places the burden on appellant to demonstrate that the recorded statement or confession was involuntary. *Id.*

Scullin at ¶ 64.

{¶ 16} Thomas has not demonstrated that his recorded statement was involuntary. We find that Thomas's allegation that the detectives continued

questioning him after requesting an attorney is incorrect. The detective did not continue interrogating or questioning Thomas.

> An individual may waive his or her *Miranda* rights after previously invoking them. But, it is well established that, once a defendant in custody invokes his *Miranda* rights, no further interrogation is permitted unless the defendant initiates further conversation with police. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 51, citing *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Oregon v. Bradshaw*, 462 U.S. 1039, 1043-1044, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) (plurality opinion); *see also Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313.

State v. Villegas, 2d Dist. Montgomery No. 27234, 2017-Ohio-2887, ¶ 15.

{¶ 17} Thomas waived his right to counsel when he agreed to speak to the detectives and recorded his statement. Therefore, Thomas has not demonstrated that his *Miranda* rights were violated. As a result, Thomas has not demonstrated that his trial counsel representation was deficient by not filing a more specific motion to suppress Thomas's statements to the police. Additionally, Thomas has not demonstrated that the motion to suppress had a reasonable probability of success and affected the outcome of the case. *See, e.g.*, *State v. Hofacker*, 2d Dist. Darke No. 2015-CA-5, 2016-Ohio-519, ¶ 22, quoting *In re D.D.*, 2d Dist. Montgomery No. 22740, 2009-Ohio-808, ¶ 3 ("'Where the basis of an ineffective assistance of counsel claim is counsel's failure to file a motion to suppress evidence, the defendant making that claim must prove that the basis of the suggested suppression claim is meritorious.'").

B. No Probable Cause to Arrest

{¶ 18} Thomas also argues that his trial counsel's performance was deficient because trial counsel failed to file a specific motion to suppress Thomas's statements to the police due to Thomas's arrest without probable cause. The police obtained an arrest warrant after Thomas's DNA collected from the lounge matched the results from the Combined DNA Index System ("CODIS"). "Probable cause to obtain and execute an arrest warrant exists where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent man in believing that an offense was committed." *State v. Jenkins*, 8th Dist. Cuyahoga No. 105881, 2018-Ohio-5153, ¶ 12, citing *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

{¶ 19} Thomas's DNA was found on a cup in the lounge from the night of the robbery. Surveillance video shows Thomas drinking from the cup and throwing it away before the murder and robbery occurred. In Thomas's brief, he states that the DNA evidence was insufficient to warrant probable cause to arrest him because the DNA specialist who testified at trial testified that she matched the DNA found on the cup to Thomas after he had been arrested, not before. Thomas is incorrect in his assertion. The trial testimony demonstrated that before Thomas's arrest, the DNA for Brunson, Thomas's accomplice, had not been confirmed until June 15, 2017. However, the DNA specialist never testified that Thomas's DNA was in question. During the DNA specialist's testimony, she was asked, "Okay. And you testified that you found the profile — or could not exclude the profile of Nigel Brunson on

item 19.1, and that there was statistical data supported finding Dana Thomas's DNA on there as well, correct?" (Tr. 1882-1883.) To which she replied, "[t]hat's correct." *Id.*

{¶ 20} The police received the report from the DNA specialist on January 10, 2017, stating that Thomas's DNA could not be excluded, based on the match to Thomas's DNA profile in CODIS. (Tr. 2247.) It was at this time they issued an arrest warrant for Thomas. They arrested Thomas the next day. The police then obtained a warrant for Thomas's DNA to compare or match it to the DNA found on the cup. (Tr. 2272-2273.) *See State v. Norman*, 4th Dist. Ross Nos. 08CA3059 and 08CA3066, 2009-Ohio-5458, ¶ 26-29 (Tested DNA that results in a CODIS hit can be used as probable cause to arrest, as "probable cause only requires the existence of circumstances that warrant suspicion."). "[T]he standard for probable cause requires only a showing that a probability of criminal activity exists, not a prima facie showing of criminal activity." *State v. Young*, 146 Ohio App.3d 245, 254, 2001-Ohio-4284, 765 N.E.2d 938 (11th Dist.), citing *State v. George*, 45 Ohio St.3d 325, 329, 544 N.E.2d 640 (1989), and *State v. Taylor*, 82 Ohio App.3d 434, 440, 612 N.E.2d 728 (1992). Because the DNA hit on CODIS demonstrated that a probability of criminal activity existed, there was probable cause for the police to execute an arrest warrant for Thomas.

{¶ 21} In conclusion, we find that Thomas has not demonstrated that his trial counsel erred by not filing a more specific motion to suppress Thomas's statements to the police alleging there was not probable cause to arrest him. The

record reveals that Thomas was alleged to be one of the individuals at the end of the bar drinking out of a cup thrown in the trash right before the robbery began. Thomas's DNA was found on a cup located in the same trash bin at the crime scene. We find that there was probable cause to obtain and execute an arrest warrant for Thomas.

{¶ 22} Thomas's sole assignment of error is overruled.

{¶ 23} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

PATRICIA ANN BLACKMON, P.J., and
RAYMOND C. HEADEN, J., CONCUR