[Cite as *State v. West*, 2016-Ohio-900.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- THEODORE P. WEST, JR. Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 15-CA-30 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 2014CR00806
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 29, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BRYAN R. MOORE Assistant Prosecuting Attorney 20 S. Second Street, Fourth Floor Newark, Ohio 43055	MARY ELAINE HALL 645 Leader Building 526 Superior Avenue, East Cleveland, Ohio 44114

Hoffman, P.J.

{¶1} Defendant-appellant Theodore P. West, Jr. appeals his May 18, 2015 conviction and sentence entered by the Licking County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF PROCEDURAL HISTORY

{¶2} On April 17, 2015, Appellant entered a plea of guilty to one count of Having a Weapon Under Disability, in violation of R.C. 2923.13(A)(2), a felony of the third degree, pursuant to a negotiated plea agreement.

{¶3} At the plea hearing, Appellant stipulated to driving a vehicle that was the subject of a traffic stop on November, 21, 2014. Appellant was found to be operating the vehicle while his license was suspended. While the stop was occurring, the police officer observed Appellant take off his baseball hat and toss it on the passenger side floorboard. A canine officer on the scene performed a free air sniff, and the canine alerted to the vehicle. A search commenced and the officers found a handgun underneath the baseball hat on the passenger floorboard. Ammunition for the firearm was found in the driver side compartment within arm's reach of Appellant. After being advised of his Miranda rights, Appellant denied ownership of the gun and stated it did not work. In a separate interview conducted the same day, Appellant denied ownership of the gun but claimed he knew it worked. The gun was later fired and determined to be operable.

{¶4} Appellant had a previous conviction for a felony offense of violence, to wit: Robbery, Licking County Case Number 04 CR 331. As a result, Appellant was indicted for Having Weapons Under Disability, a violation of R.C. 2923.13(A)(2), a felony of the third degree.

{¶5} The trial court appointed Attorney Phillip Sprouse as counsel for Appellant. Attorney Sprouse did not file a motion to suppress, and later filed a motion to withdraw as counsel. The trial court granted the motion to withdraw following an oral hearing.

{¶6} Attorney Zachary Meranda was then appointed counsel for Appellant. Attorney Meranda filed a supplemental demand for discovery on March 16, 2015. On April 15, 2015, counsel filed a request for leave to file an untimely motion to suppress evidence.

{¶7} The trial court conducted a pretrial hearing on April 17, 2015. Following the pretrial conference, Appellant entered a guilty plea to the charge, pursuant to a negotiated plea agreement. This appeal followed.

{¶8} Appellant assigns as error,

{¶9} "I. DEFENSE TRIAL ATTORNEY, MR. ANTHONY MERANDA, ESQ. PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL TO THE DEFENDANT-APPELLANT, MR. THEODORE P. WEST, JR. WHEN HE FAILED TO FOLLOW THROUGH ON HIS SUPPLEMENTAL DEMAND FOR DISCOVERY AND MOTION TO SUPPRESS AND INSIST UPON A HEARING TO COMPEL THE STATE TO PRODUCE PROOF ON THE RECORD THAT THE LICKING COUNTY LAW ENFORCEMENT AUTHORITIES HAD 'AN ARTICULABLE SUSPICION' TO CONDUCT THE TRAFFIC STOP AND TO PRESENT AVAILABLE CASELAW TO PROVE THAT THE TRAFFIC STOP AND SEARCH AND SEIZURE OF MR. WEST'S PERSON AND EFFECTS VIOLATED THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION.

{¶10} "II. DEFENSE TRIAL COUNSEL, MR. ANTHONY MERANDA, ESQ. PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL TO THE DEFENDANT-

APPELLANT, MR. THEODORE P. WEST, JR. WHEN HE FAILED TO FOLLOW THROUGH ON HIS SUPPLEMENTAL DEMAND FOR DISCOVERY AND MOTION TO SUPPRESS AND INSIST UPON A HEARING TO COMPEL THE STATE TO PRODUCE PROOF ON THE RECORD THAT THE LICKING COUNTY LAW ENFORCEMENT AUTHORITIES DID NOT UNREASONABLY PROLONG THE 'SEIZURE' OF THE DEFENDANT'S 'PERSON' AT THE TRAFFIC STOP UNTIL THE CANINE SNIFF TEAM ARRIVED. NOR DID MR. MERANDA CHALLENGE 'THE RELIABILITY' OF THE DOG SNIFF SURROUNDING THE DEFENDANT'S VEHICLE DURING THE TRAFFIC STOP."

{¶11} "III. DEFENSE TRIAL COUNSEL, MR. ANTHONY MERANDA, ESQ.'S OMISSIONS OF LEGAL REPRESENTATION AS DISCUSSED ABOVE FELL BELOW THE STANDARD OF REASONABLENESS AND PREJUDICED THE DEFENDANT-APPELLANT, MR. THEODORE P. WEST, JR.

{¶12} "IV. DEFENSE TRIAL COUNSEL, MR. ANTHONY MERANDA, ESQ. PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL TO THE DEFENDANT-APPELLANT, MR. THEODORE P. WEST, JR., PURSUANT TO SECTION 10 ARTICLE I OF THE OHIO CONSTITUTION WHEN HE FAILED TO FOLLOW THROUGH AT A MOTION TO SUPPRESS HEARING WITH A PRESENTATION OF AVAILABLE OHIO CASELAW ON SEARCH AND SEIZURE PURSUANT TO SECTION 14 ARTICLE I TO THE OHIO CONSTITUTION.

{¶13} "V. DEFENSE TRIAL COUNSEL, MR. ANTHONY MERANDA, ESQ. PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL TO THE DEFENDANT-APPELLANT, MR. THEODORE P. WEST, JR., PURSUANT TO SECTION 10 ARTICLE I TO THE OHIO CONSTITUTION WHEN HE FAILED TO FOLLOW THROUGH WITH A

MOTION TO SUPPRESS HEARING BASED UPON AVAILABLE OHIO CASELAW ON SEARCH AND SEIZURE."

I., II., III., IV. and V.

{¶14} Appellant's assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶15} Appellant maintains his trial counsel provided ineffective assistance at trial by failing to file a motion to suppress challenging the traffic stop, search and seizure herein.

{¶16} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶17} Challenges to guilty pleas based on allegations of ineffective assistance of counsel during the plea process are evaluated under the two-pronged cause and prejudice test of *Strickland v. Washington,* supra, 466 U.S. at 687-88, 694; *Hill v. Lockhart* (1985), 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203. In order to satisfy the second prong in the context of a guilty plea, appellant must show "there is a reasonable probability, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S. at 59, 106 S.Ct. 366, 88 L.Ed.2d 203.

{¶18} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley,* 42 Ohio St.3d at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶19} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶20} In this case, Appellant entered a plea of guilty as part of a plea agreement. By entering a plea of guilty, the accused is not simply stating he did the act described in the indictment; he is admitting guilt of a substantive crime. *United States v. Broce* (1989), 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927. The guilty plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established. *Menna v. New York* (1975), 423 U.S. 61 at n. 2, 96 S.Ct. 241, 46 L.Ed.2d 195. Thus, when a defendant enters a plea of guilty as a part of a plea bargain he waives all appealable errors, unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea. *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658; *State v. Barnett* (1991), 73 Ohio App.3d 244, 249, 596 N.E.2d 1101; *see, also, State v. Wotring,* 11th Dist. No. L-99-114, 2003-Ohio-326, at ¶ 22, appeal denied (2003), 99 Ohio St.3d 1452, 790 N.E.2d 1217.

{¶21} Here, Appellant has waived all errors assigned on appeal except the argument counsel was ineffective to the extent counsel's representation precluded Appellant from entering a knowing and voluntary plea.

{¶22} Appellant argues his plea herein was not knowing and voluntary as counsel did not file a motion to suppress evidence of the search and seizure. However, upon review, the evidence presented at the April 17, 2015 Plea Hearing does not affirmatively demonstrate trial counsel would have been successful in filing a motion to suppress the evidence. Rather, we find the record is bereft of any actual evidence a motion to suppress would have been merited in this case. Appellant was stopped for a traffic violation and was operating the vehicle with a suspended license. The officer observed Appellant throw his baseball hat onto the passenger side floorboard, and a canine officer performed a free air sniff of the vehicle, alerting to the vehicle. Accordingly, counsel's advice to enter the negotiated plea appears to have been a sound tactical decision, which does not render Appellant's plea involuntary. Appellant cannot demonstrate prejudice on this record as a result of the alleged error by trial counsel.

{¶23} Appellant's assigned errors are overruled.

{¶24} Appellant's conviction and sentence in the Licking County Court of Common Pleas are affirmed.

By: Hoffman, P.J.

Delaney, J. and

Baldwin, J. concur