[Cite as *State v. Dearth*, 2010-Ohio-1847.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 09CA3122
vs.	:	
ROBERT DEARTH,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Benjamin J. Partee, 137 South Paint Street, Chillicothe, Ohio 45601[1]

COUNSEL FOR APPELLEE: Toni L. Eddy, Chillicothe Law Director, and Michele R. Rout, Chillicothe Assistant Law Director, 20 East Second Street, Chillicothe, Ohio 45601

CRIMINAL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED: 4-23-10

ABELE, J.

{¶ 1} This is an appeal from a Chillicothe Municipal Court judgment of conviction and sentence. A jury found Robert Dearth, defendant below and appellant herein, guilty of operating a motor vehicle while he was under the influence of a drug of abuse in violation of R.C. 4511.19(A)(1)(a).

[1] Different counsel represented appellant during the trial court proceedings.

{¶ 2} Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL COUNSEL'S FAILURE TO FILE A MOTION TO SUPPRESS THE EVIDENCE."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN ITS SELECTION OF A TALESMAN JUROR, DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL."

{¶ 3} On the afternoon of March 21, 2009, Ohio State Highway Patrol Trooper Robert Webb passed appellant on Mt. Tabor Road and observed that he was not wearing a seatbelt. When he looked in his rearview mirror, he saw the vehicle veer off the right side of the road and into the grass before the driver regained control. Trooper Webb followed the vehicle and observed it accelerate and turn onto Liberty Hill Road. Trooper Webb again observed appellant drive in the center of the roadway. At that point, Trooper Webb activated his pursuit lights.

{¶ 4} As Trooper Webb approached the vehicle's window, he detected the odor of burnt marijuana. Appellant had glassy, bloodshot eyes and, after he performed poorly on some physical coordination tests, he was arrested. After Trooper Webb took him to the Patrol Post, he asked appellant to provide a urine sample. Appellant, however, refused. Subsequently, Trooper Webb issued to appellant a uniform traffic ticket that charged appellant with (1) OMVI; (2) failure to wear a seatbelt in violation of

R.C. 4513.263(B)(1); (3) failure to drive within the marked lanes in violation of R.C. 4511.33; (4) failure to yield one-half (½) the roadway in violation of R.C. 4511.26; and (5) driving without a valid operator's license in violation of R.C. 4510.12.

{¶ 5} At the jury trial, Trooper Webb and appellant both testified as to their version of the events. The jury returned a guilty verdict on the OMVI charge, and the trial court found appellant guilty of the failure to wear a seatbelt and the failure to drive in marked lanes. Appellant also pled guilty to driving without a valid operator's license. Finally, the trial court acquitted appellant of the failure to yield one-half (½) of Liberty Hill Road. The trial court sentenced appellant to serve six days in jail, two years of community control and imposed a $375 fine. This appeal followed.

I

{¶ 6} Appellant asserts in his first assignment of error that he received constitutionally ineffective assistance from his trial counsel. In particular, appellant argues that (1) his counsel did not file a motion to suppress evidence, and (2) his acquittal on the charge of failure to yield one-half (½) half of Liberty Hill Road establishes that Trooper Webb did not possess a valid reason to stop his vehicle. Thus, appellant reasons, all subsequent evidence obtained should have been suppressed. We disagree with appellant.

{¶ 7} Our analysis begins with the principle that criminal defendants have a right to counsel and that includes the right to effective assistance from counsel. McCann v. Richardson (1970), 397 U.S. 759, 770, 25 L.Ed.2d 763, 90 S.Ct. 1441; State v. Jones, Gallia App. No. 09CA1, 2010-Ohio-865, at ¶29; State v. Lytle (Mar. 10, 1997), Ross App. No. 96CA2182. To establish constitutionally ineffective assistance of counsel, a

defendant must show that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed .2d 674, 104 S.Ct. 2052; also see State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. Goff (1998), 82 Ohio St.3d 123, 139, 694 N.E.2d 916. Both prongs of the Strickland test need not be analyzed, however, if the claim can be resolved under one prong. See State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52. In other words, if the defense cannot establish prejudice, the question of deficient performance is superfluous. To establish the existence of prejudice, an appellant must show a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus.

{¶ 8} Additionally, when an ineffective assistance claim is based, as it is here, on the failure of counsel to file a suppression motion, other factors must be considered as well. First, the failure to file such motion is not per se ineffective assistance. State v. McGlone (1992), 83 Ohio App.3d 899, 903, 615 N.E.2d 1139; Defiance v. Cannon (1990), 70 Ohio App.3d 821, 826, 592 N.E.2d 884. Second, to establish prejudice, appellant must demonstrate that such motion would have had a reasonable probability of success. State v. Nields (2001), 93 Ohio St.3d 6, 34, 752 N.E.2d 859; also, see State v. Chamblin, Adams App. No. 02CA753, 2004-Ohio-2252, at ¶34. Here, appellant has not persuaded us that a suppression motion would have had a reasonable probability of success.

{¶ 9} Appellant first argues that because the trial court acquitted him of violating R.C. 4511.26 on Liberty Hill Road, Trooper Webb's stop of his vehicle violates the U.S. Constitution. We disagree.

{¶ 10} It is well-settled that the Fourth Amendment to the United States Constitution permits an investigative stop if an officer can articulate specific facts that would warrant a reasonable person to believe that a crime has been committed, or is in the process of being committed. Terry v. Ohio (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889; also see Chillicothe v. Frey, 156 Ohio App.3d 296, 805 N.E.2d 551, 2004-Ohio-927, at ¶14. A reasonable suspicion of criminal activity must be based upon specific, articulable facts and such rebuttal inferences as may be drawn from those facts. State v. Boggs, Ross App. No. 04CA2803, 2804, 2005-Ohio-2758, citing Terry at 21-22.

{¶ 11} To ascertain the constitutionality of a Terry type stop, it is important to note that an officer need only have a reasonable "belief" that a crime was committed. In other words, a stop may be proper even if (1) the defendant is not convicted of the underlying traffic offense for which he was stopped; see, e.g., Bowling Green v. Lynn, 165 Ohio App.3d 825, 848 N.E.2d 899, 2006-Ohio-1401, at ¶22; State v. Nickelson (Jul. 20, 2001), Huron App. No. H-00-036; or (2) if questions remain as to whether the defendant actually committed those offenses. See Cardona v. Connolly (D. CT. 2005) 361 F.Supp.2d 25, 29. Additionally, if a police officer has probable cause to believe that a traffic offense has been committed, a traffic stop is reasonable. Dayton v. Erickson, 76 Ohio St.3d 11-12, 1996-Ohio-431, 665 N.E.2d 1091. Probable cause has been defined as "facts and circumstances within [an officer's] knowledge * * * sufficient

to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." Beck v. Ohio (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 12 L.Ed.2d 142.

{¶ 12} In the case sub judice, Trooper Webb testified that appellant was driving in the center of Liberty Hill road and that this was dangerous to other traffic because "there w[ere] hills and curves, which wouldn't allow you to see other traffic coming toward you." On cross-examination he conceded that although he saw no oncoming traffic, he believed that appellant violated R.C. 4511.26(A)[2] and could have "struck or hurt somebody" had oncoming traffic appeared around one of the curves. We believe that this testimony indicates that Trooper Webb possessed a reasonable belief that a crime was committed (or at a minimum sufficient to defeat appellant's argument that a motion to suppress would have had a reasonable probability of success).

{¶ 13} The second argument under this assignment of error is appellant's assumption that the R.C. 4511.26 violation was the sole reason Trooper Webb stopped appellant's vehicle. To the contrary, Trooper Webb testified that the stop was based on his "observations" (plural) of appellant's driving. When the two vehicles passed one another, Trooper Webb saw that appellant was not wearing a seatbelt (although not sufficient standing alone to warrant an investigative stop). He then observed appellant

[2] R.C. 4511.26(A) requires "[o]perators of vehicles . . . proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one line of traffic in each direction, each operator shall give to the other one-half of the main traveled portion of the roadway or as nearly one-half as is reasonable possible."

drive off the right side of the road, into the grass, and then back on the roadway. Although appellant could not be stopped solely for the seatbelt violation, see R.C. 4513.263(D), Trooper Webb could stop appellant for failing to drive within marked lanes in violation. See R.C. 4511.33; Dayton v. Erickson, supra. We point out that although appellant was acquitted of the R.C. 4511.26 violation, he was convicted for the seatbelt and the marked lanes violation.

{¶ 14} Thus, for all of these reasons, we believe that sufficient evidence was present on which to conclude that Trooper Webb properly stopped appellant's vehicle. Under Terry, Trooper Webb possessed a reasonable suspicion of activity that warranted a investigative stop. Further, Trooper Webb also observed other traffic violations.

{¶ 15} Accordingly, appellant has not persuaded us that a motion to suppress would have had a reasonable probability of success and, thus, he cannot establish ineffective assistance of counsel for the failure to file such motion.

{¶ 16} Accordingly, we hereby overrule appellant's first assignment of error.

II

{¶ 17} Appellant's second assignment of error asserts that his OMVI conviction is "against the manifest weight of the evidence." However, the argument that accompanies that assignment of error asserts that insufficient evidence supports the conviction. We first note that these are separate and distinct legal concepts. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541; also see State v. Umphries, Ross App. No. 09CA3114, 2010-Ohio-866, at ¶7; State v. Lute, Scioto App.

No. 08CA3224, 2009-Ohio-1778, at ¶7. Thus, we will treat them separately.

{¶ 18} When reviewing the sufficiency of the evidence, an appellate court must focus on the adequacy of the evidence; that is, whether the evidence adduced at trial, if believed, could reasonably support a finding of guilt beyond a reasonable doubt. Thompkins, supra at 386; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. The pertinent standard of review is whether, after viewing all of the evidence and the inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt all of the essential elements of the offense. Jenks, supra at 273; Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Further, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." Thompkins, 78 Ohio St.3d at 390, 678 N.E.2d 541 (Cook, J., concurring).

{¶ 19} Here, the prosecution had the burden to prove that appellant operated a motor vehicle while under the influence of a drug of abuse. R.C. 4511.19(A)(1)(a). Trooper Webb testified that he observed appellant drive a vehicle on Mt. Tabor road, that appellant's vehicle left the roadway, that he detected a strong odor of burnt marijuana emanating from both the vehicle as well as appellant's person, and that appellant's eyes were glassy and bloodshot. Additionally, appellant performed poorly on the various physical coordination tests. This evidence, if believed, is sufficient for a jury to conclude that appellant violated R.C. 4511.19(A)(1)(a).

{¶ 20} Insofar as the manifest weight of the evidence is concerned, we will not reverse on that basis unless it is obvious that the trier of fact clearly lost its way and

created a manifest miscarriage of justice that requires reversal and a new trial. See State v. Earle (1997), 120 Ohio App.3d 457, 473, 698 N.E.2d 440; State v. Garrow (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814.

{¶ 21} Appellant explained the smell of marijuana as the fault of friends, and he explained his poor coordination test performance on various medical problems. It is the trier of fact's duty, however, to assess and determine the weight and credibility of evidence. State v. Dye (1998), 82 Ohio St.3d 323, 329, 695 N.E.2d 763; State v. Williams (1995), 73 Ohio St.3d 153, 165, 652 N.E.2d 721. A trier of fact is free to believe all, part or none of the testimony of any witness who appears before it. State v. Nichols (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; State v. Caldwell (1992), 79 Ohio App.3d 667, 679, 607 N.E.2d 1096.

{¶ 22} In the case sub judice, it is apparent that the jury did not believe appellant's testimony, as it was free to do. Rather, the jury opted to believe Trooper Webb's testimony, notwithstanding appellant's contention that the testimony was "unreliable" because Trooper Webb could not remember specific details or, at timed, contradicted himself. This, too, is within the jury's province and we do not generally second-guess the trier of fact on issues of credibility.

{¶ 23} For all these reasons, we hereby overrule appellant's second assignment of error.

III

{¶ 24} Appellant's third assignment of error concerns an issue with jury selection. The transcript reveals that a jury was selected by 9:50 AM the morning of trial. Before

the trial began, however, one juror was excused because she discovered that her husband had been taken to the emergency room. A "voter" was then selected off the street, *voir dired* and sat in her place.[3] Appellant now argues that this procedure violated Ohio law for jury selection and deprived him of a fair trial. We disagree with appellant.

{¶ 25} First, as the prosecution points out, because appellant did not object to this procedure when the alleged error could have been corrected, it has been waived. State v. Williford (1990), 49 Ohio St.3d 247, 251, 551 N.E.2d 1279; State v. Underwood (1983), 3 Ohio St.3d 12, 13, 444 N.E.2d 1332. Second, not only was any alleged error waived, the transcript reveals that defense counsel consented to this procedure.[4] See State v. Bey (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484: State v. Seiber (1990), 56 Ohio St.3d 4, 17, 564 N.E.2d 408. Finally, despite his valiant effort, appellant cannot demonstrate prejudice from this action. See Crim.R. 52(A).

{¶ 26} For all these reasons, we hereby overrule appellant's assignment of error.

{¶ 27} Having reviewed all of the errors assigned by appellant and argued in his brief, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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[3] The trial court noted that this was an "unusual" situation that neither it nor either counsel had ever before experienced. This procedure is, however, an acceptable method to fill unforseen vacancies on jury panels.

[4] The trial court also used the pronoun "we" to explain how this juror was selected off the street, thus suggesting that counsel, including defense counsel, was a part of this process.

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Chillicothe Municipal Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

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