[Cite as *State v. Jackson*, 2009-Ohio-4336.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. ELVIN L. JACKSON Appellant	C. A. Nos. 24463 24501 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 07 12 4093(B)

DECISION AND JOURNAL ENTRY

Dated: August 26, 2009

CARR, Judge,

{¶1} Appellant, Elvin Jackson, appeals the judgment of the Summit County Court of Common Pleas. The Court affirms.

I.

{¶2} At approximately 10:45 p.m. on November 30, 2007, Akron police initiated a traffic stop of a vehicle as it traveled on West Long Street with its high beam lights on. Officer Eric Wood obtained photo identification from the vehicle's driver, Jackson, and its only passenger, Noelle Alberts. Officer Wood proceeded to conduct a computer search for possible warrants and discovered that both Jackson and Alberts had active arrest warrants. The existence of the arrest warrants was confirmed via radio communications with a LEADS operator.

{¶3} Officer Wood, along with Officer John Turnure, proceeded to place both Jackson and Alberts under arrest. After making arrangements for the vehicle to be towed, the police proceeded to conduct an inventory search. Drugs were found under the passenger seat along

with "Chor boy," which is used as a crack pipe filter. Trace amounts of drugs were discovered on the driver's seat as well as under the seat. Additionally, police found one crack pipe in the ash tray and another crack pipe in the armrest console.

{¶4} On December 18, 2007, the Summit County Grand Jury indicted Jackson on possession of cocaine in violation of R.C. 2925.11(A)(C)(4), a felony of the fifth degree, and illegal use or possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), a misdemeanor of the fourth degree.

{¶5} On March 26, 2008, Jackson filed a motion to suppress any evidence seized as a result of the November 30, 2007, traffic stop. In support of his motion, Jackson argued that the police could not have reasonably concluded from the circumstances surrounding the traffic stop that crime was afoot. Therefore, Jackson argued, there was no basis for the search. The trial court held a suppression hearing on June 19, 2008. Officer Wood was the only witness who testified at the hearing. Jackson did not call any witnesses.

{¶6} On July 24, 2008, the trial court denied Jackson's motion to suppress. In denying the motion, the trial court found that Jackson was lawfully stopped; that he was lawfully arrested for having an outstanding warrant; and that Officer Wood lawfully searched Jackson's vehicle.

{¶7} On October 10, 2008, Jackson pled no contest to both offenses charged in the indictment. On October 23, 2008, the trial court found Jackson guilty of both charges and sentenced him to six months in prison to be followed by three years of post release control.

{¶8} Jackson has raised eight assignments of error on appeal. Some assignments of error have been rearranged or consolidated to facilitate review.

II.

ASSIGNMENT OF ERROR I

> "MR. JACKSON'S CAUSE OF ACTION; CIVIL RIGHT'S VIOLATION'S UNDER THE 'COLOR OF LAW'. IN VIOLATION OF TITLE 18, U.S.C., SECTION 241, CONSPIRACY AGAINST RIGHTS; TITLE 18 U.S.C., SECTION 242, DEPRIVATION OF RIGHTS UNDER THE COLOR OF LAW; TITLE 42, U.S.C., SECTION 14141, PATTERN OF PRACTICE. (sic)
>
> "U.S. CONSTITUTION VIOLATION'S UNDER THE FIRST, FOURTH, FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENT RIGHTS'." (sic)

{¶9} Jackson asserts several causes of action under provisions of the United States Code for alleged violations of his civil rights. On October 29, 2008, Jackson filed a pro se notice of appeal with this Court. Subsequently, counsel for Jackson filed a notice of appeal on November 20, 2008. Both filings reference criminal case number CR-07-12-4093(B) from the Summit County Court of Common Pleas. However, neither filing makes reference to a civil case where Jackson might have properly asserted the causes of action contained in his assignment of error. In his brief, Jackson references a civil case that was dismissed by the Summit County Court of Common Pleas. However, he has not appealed the judgment in that particular case. Therefore, because Jackson could not have pursued his civil claims in the criminal case currently before the Court, we decline to address the first assignment of error. See App.R. 3(D). It follows that the first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "MR. JACKSON OBJECTS TO THE TRIAL COURTS JUDGMENT AND SENTENCE. IN A GROSS MANIFEST MISCARRIAGE OF JUSTICE, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE; IN VIOLATION OF THE OHIO CONSTITUTON ARTICLE IV, SECTION 3(B)(2)." (sic)

{¶10} In his second assignment of error, Mr. Jackson argues that his conviction was against the manifest weight of the evidence. Mr. Jackson was convicted after pleading "no contest" to the charges contained in the indictment. This case never proceeded to trial. When Jackson pled "no contest," he admitted those facts in the indictment as true. Crim.R. 11(B)(2). A criminal defendant who has pled "no contest" to a charge cannot later challenge his conviction on the grounds that it was against the manifest weight of the evidence. *State v. Tucker* (Sept. 13, 2000), 9th Dist. No. 99CA007464. It follows that Mr. Jackson's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "NO PARTICULAR QUANTITY OF DRUG ALLEGED IN THE INDICTMENT, A DEFECT IN THE INDICTMENT FOR FAILING TO STATE A CHARGE; PURSUANT TO CRIM R 12 PLEADINGS AND MOTIONS BEFORE TRIAL; (1) DEFENSES AND OBJECTIONS BASED ON DEFECTS IN THE INSTITUTION OF THE PROSECUTION. (2) DEFENSES AND OBJECTIONS BASED ON DEFECTS IN THE INDICTMENT, INFORMATION, OR COMPLAINT. IN VIOLATION OF THE U.S. CONSTITUTION FIFTH AND FOURTEENTH AMENDMENTS. A DEFENSE NOT RAISED IN THE TRIAL COURT, IN PLAIN ERROR." (sic)

ASSIGNMENT OF ERROR VI

> "MR. JACKSON INVOKED HIS U.S. CONSTITUTION SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL, IN THE TRIAL COURT, TO GROSS INEFFECTIVE COUNSEL'S, AND IN HIS PRO SE MOTION TO DISMISS AMENDED FILED JAN.28, 2008, THE TRIAL COURT ABUSED ITS DISCRETION; IN A MANIFEST MISCARRIAGE OF JUSTICE; REFUSING TO MOVE, AND TO RULE ON SAID MOTION."

{¶11} In his brief, Jackson argues the indictment in this case was defective because it failed to identify a specific quantity of drugs in charging him with possession of cocaine in violation of R.C. 2925.11(A)(C)(4). Jackson also argues the trial court erred by not reviewing his motion to dismiss the indictment.

{¶12} The trial court record contains a cover sheet which summarizes all docket entries in this case. According to this docket summary, Jackson filed a pro se motion to dismiss on January 25, 2008. Jackson made a similar pro se filing on January 28, 2008. It appears from the docket summary that the purpose of Jackson's January 28 filing was to remove his initial motion to dismiss and file an amended motion to dismiss. However, the January 28 filing is not contained in the record. This Court has repeatedly held, "It is the duty of the appellant to ensure that the record on appeal is complete." *State v. Daniels*, 9th Dist. No. 08CA009488, 2009-Ohio-1712, at ¶22, quoting *Lunato v. Stevens Painton Corp.*, 9th Dist. No. 08CA009318, 2008-Ohio-3206, at ¶11. "Where the record is incomplete because of appellant's failure to meet his burden of providing the necessary record, this Court must presume regularity of the proceedings and affirm the decision of the trial court." *State v. Jones*, 9th Dist. No. 22701, 2006-Ohio-2278, at ¶39, citing *State v. Vonnjordsson* (July 5, 2001), 9th Dist. No. 20368. Because a review of the amended motion to dismiss is necessary for the determination of Jackson's third and sixth assignments of error, this Court must presume regularity in the trial court's proceedings and affirm the judgment of the trial court. See *Jones* at ¶39.

{¶13} This Court further notes that Jackson was represented by counsel at the time he filed the pro se motions to dismiss. The Supreme Court of Ohio has held that while a criminal defendant has, "the right to either appear pro se or to have counsel, he has no corresponding right to act as co-counsel on his own behalf." *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7. The right to counsel and the implied right to appear pro se are independent of each other and may not be asserted simultaneously. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, at ¶32. Because Jackson was represented by counsel when he filed his pro se motions to dismiss the indictment, the filings were not properly before the trial court.

{¶14} Moreover, even if the motions had been properly filed, when a trial court fails to issue a ruling on a pretrial motion, this Court presumes that the motion was denied. *Nelson Jewellery Arts Co., Ltd. v. Fein Designs Co., Ltd., L.L.C.*, 9th Dist. No. 22738, 2006-Ohio-2276, at ¶14., citing *Bank One, N.A. v. Lytle*, 9th Dist. No. 04CA008463, 2004-Ohio-6547, at ¶18.

{¶15} As discussed above, Jackson did not properly raise any objections pertaining to the indictment. Jackson argues the trial court committed plain error in not finding the indictment defective for failure to specify a quantity of drugs. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To constitute plain error, the error must be obvious and have a substantial adverse impact on both the integrity of, and the public's confidence in, the judicial proceedings. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. A reviewing court must take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶12. Jackson was charged with possession of cocaine under R.C. 2925.11, which provides, in part, "[n]o person shall knowingly obtain, possess, or use a controlled substance." Ohio courts have determined that R.C. 2925.11 "contains no element concerning the quantity of illegal drugs possessed[.]" *State v. Lynch* (1991), 75 Ohio App.3d 518, 520-521. Because specifying a quantity of drugs is not necessary to obtain a conviction under R.C. 2925.11, the trial court did not commit plain error in not finding the indictment defective.

{¶16} Jackson's third and sixth assignments of error are overruled.

ASSIGNMENT OF ERROR IV

"IN PLAIN ERROR THE TRIAL COURT ABUSED ITS DISCRETION, RULING AGAINST MR. JACKSON'S SUPPRESSION HEARING; WHERE PROOF OF FALSITY RESTED SOLELY UPON CONTRADICTION OF THE

OFFICER'S TESTIMONY. IN VIOLATION OF HIS U.S. CONSTITUTION, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHT'S." (sic)

ASSIGNMENT OF ERROR V

"IN PLAIN ERROR AND IN A MANIFEST MISCARRIAGE OF JUSTICE, THE TRIAL COURT ABUSED ITS DISCRETION DENYING TO MR. JACKSON HIS DUE PROCESS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE; A VIOLATION OF THE U.S. CONSTITUTION FIFTH, AND FOURTEENTH AMENDMENTS."

{¶17} Jackson argues the trial court committed plain error in refusing to grant his motion to suppress and in refusing to allow him to present evidence in his defense. This Court disagrees.

{¶18} "The review of a motion to suppress presents a mixed question of fact and law for an appellate court." *State v. Farris*, 9th Dist. No. 03CA0022, 2004-Ohio-826, at ¶7; *State v. Long* (1998), 127 Ohio App.3d 328, 332.

> "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." (Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

{¶19} When an officer has probable cause to believe that a traffic violation is occurring, the stop is not unreasonable under the Fourth Amendment even if the officer had some ulterior motive for making the stop. *Whren v. United States* (1996), 517 U.S. 806; *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, syllabus.

{¶20} "[A] routine inventory search of a lawfully impounded automobile is not unreasonable within the meaning of the Fourth Amendment when performed pursuant to standard police practice, and when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded automobile." *State v.*

Robinson (1979), 58 Ohio St.2d 478, 480, citing *South Dakota v. Opperman* (1976), 428 U.S. 364. It is well settled that a lawful inventory search can take place prior to a car being towed to an impound lot. *State v. Peagler* (1996), 76 Ohio St.3d 496, 501-502; *Colorado v. Bertine* (1987), 479 U.S. 367, 375.

{¶21} The trial court held a suppression hearing on June 19, 2008. Officer Wood was the State's sole witness. Officer Wood testified that he originally initiated the traffic stop because of an equipment violation. After reviewing the police report, Officer Wood clarified that the stop was initiated because of a high beam violation. Officer Wood obtained Jackson's driver's license and then checked for active warrants by accessing the computer in the cruiser as well as contacting the LEADS operator. When it was revealed that both Jackson and Alberts had active arrest warrants, Officer Wood, along with Officer Turnure, asked Jackson and Alberts to step out of the vehicle and placed them under arrest. After making arrangements for the car to be towed, the police proceeded to conduct an inventory search of the vehicle. Officer Wood testified that in addition to checking for weapons, the vehicle had to be inventoried prior to towing it from the street. Officer Wood explained this is done for the protection of the parties involved and to ensure that all property is later returned to the arrestee. While searching the vehicle, the police found cocaine, two crack pipes and a filtering device. On cross-examination, counsel for Jackson asked several questions relating to whether Alberts was a confidential informant. Officer Wood testified that he had no knowledge of whether Alberts was working as a confidential informant. He further testified that he did not see Alberts in possession of a communication device, such as a two-way radio, which might have allowed Alberts to communicate with law enforcement. Jackson did not call any witnesses at the suppression hearing.

{¶22} The trial court denied Jackson's motion to suppress by judgment entry filed on July 24, 2008. In denying Jackson's motion to suppress, the trial court found that 1) Jackson was lawfully stopped; 2) Jackson was lawfully arrested for having an outstanding, active warrant; and 3) Officer Wood lawfully searched Jackson's vehicle.

{¶23} Officer Wood was the only witness to testify at the suppression hearing. The trial court, as the trier of fact, was in the best position to resolve questions of fact and evaluate the credibility of Officer Wood's testimony. See *Burnside* at ¶8. Accepting these facts as true, this Court must make an independent determination regarding whether the facts satisfied the applicable legal standard. Id. Based on the testimony of Officer Wood, it was reasonable for the trial court to conclude that the stop was justified because law enforcement had probable cause to believe that a traffic violation was occurring. A routine check for warrants revealed the existence of outstanding arrest warrants. After taking Jackson and Alberts into custody, the officers conducted a lawful inventory search of Jackson's vehicle pursuant to standard procedure. It was during the course of that search that the officers discovered cocaine and drug paraphernalia. In light of this testimony, this Court concludes that the trial court did not err in denying Jackson's motion to suppress.

{¶24} Jackson also claims he was denied the opportunity to present evidence in his defense. As a preliminary matter, by pleading "no contest," Jackson admitted the facts in the indictment as true and waived his opportunity to call witnesses and present evidence in his defense at trial. See Crim.R. 11(B)(2); *Tucker*, supra. In support of his assignment of error, Jackson argues the decision of trial counsel not to subpoena Alberts to testify at the suppression hearing constituted ineffective assistance of counsel. However, these arguments do not fall within the scope of his assignments of error. See App.R. 16(A)(7); *Strickler v. First Ohio Banc*

& Lending, Inc., 9th Dist. Nos. 08CA009416, 08CA009460, 2009-Ohio-1422, at ¶6. Moreover, this Court has repeatedly held that "[d]ecisions regarding the calling of witnesses are within the purview of defense counsel's trial tactics." *State v. Pordash*, 9th Dist. No. 05CA008673, 2005-Ohio-4252, at ¶21, quoting *State v. Ambrosio*, 9th Dist. No. 03CA008387, 2004-Ohio-5552, at ¶10. Debatable trial tactics do not give rise to a claim for ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶25} It follows that Jackson's fourth and fifth assignments of error are overruled.

ASSIGNMENT OF ERROR VII

"THE TRIAL COURT ABUSED ITS DISCRETION, HOLDING MR. JACKSON UNLAWFULLY IN A PRE-TRIAL SUPERVISION PROGRAM. IN VIOLATION OF HIS PERSONAL RECOGNIZANCE BOND; HIS SUBSTANTIAL RIGHTS UNDER THE U.S. CONSTITUTION EIGHT, AND FOURTEENTH AMENDMENTS." (sic)

{¶26} Jackson argues the trial court abused its discretion by holding him unlawfully in a pretrial supervision program, in violation of his personal recognizance bond. This Court disagrees.

{¶27} The record includes a form entitled "Summit County Pretrial Supervision Program Conditions of Release." On December 3, 2008, this form was signed by the magistrate as well as Jackson. According to the terms of the release agreement, Jackson agreed to reside at a halfway house in Akron, Ohio. He also consented to a maximum level of pretrial supervision. At the bottom of the form, Jackson signed a statement which specifically stated, "non-compliance of any condition may result in my bond being revoked and my return to the Summit County Jail pending trial." In light of the agreement, Jackson's argument that he was held unlawfully must be rejected as he clearly consented to the terms of the pretrial supervision program. The seventh assignment of error is overruled.

ASSIGNMENT OF ERROR VIII

> "MR. JACKSON WAS SUBJECTED TO THE CONFISCATION OF HIS VEHICLE AND PERSONAL EFFECTS BY THE ARRESTING OFFICER'S, ABSENT ANY FORFEITURE PROCEEDING, NOR ISSUANCE OF AN INVENTORY SHEET, AND WARRANT. VIOLATION'S OF THE U.S. CONSTITUTION FIFTH, EIGHT, AND FOURTEENTH AMENDMENTS." (sic)

{¶28} In his eighth assignment of error, Jackson argues the police exceeded the scope of their authority when they impounded his vehicle which contained several personal items. This Court disagrees.

{¶29} The United States Supreme Court has held that an inventory search may be reasonable under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause. *Bertine*, 479 U.S. at 372. Inventory searches serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. Id; see, also, *Opperman*, 428 U.S. at 369. In the interest of public safety, automobiles are frequently taken into police custody as part of what has been called community caretaking functions. *Opperman*, 428 U.S. at 369. "The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." Id. In interpreting *Opperman*, the Supreme Court of Ohio has stated that a routine inventory search of a lawfully impounded automobile is constitutional when performed pursuant to a standard of practice and not merely as a pretext for an evidentiary search. *Robinson*, 58 Ohio St.2d at 480.

{¶30} At the suppression hearing, Officer Wood testified that the purpose of the inventory search in this case was to protect all parties involved, including the towing company, and to ensure that all property belonging to Jackson would be returned. While Jackson argues that the impounding of his vehicle was unlawful, he does not point to any place in the record to

support the contention that the police did anything other than properly impound his vehicle pursuant to standard procedures. Jackson does not dispute that his vehicle was parked on a public street. The driver of the vehicle as well as its only passenger had been taken into custody. Impounding the vehicle served the purpose of clearing the street to promote the flow of traffic as well as protecting Jackson's vehicle and the property contained therein. It was reasonable for the police to perform this community caretaking function. It follows that Jackson's eighth assignment of error is overruled.

III.

{¶31} Jackson's eight assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

ELVIN L. JACKSON, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.