[Cite as *State v. Davis*, 2010-Ohio-4636.]

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

STATE OF OHIO Appellee v. WILLIAM DAVIS Appellant	C. A. No. 24925 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 01 0123

DECISION AND JOURNAL ENTRY

Dated: September 29, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant William Davis appeals from decisions of the Summit County Court of Common Pleas. For reasons set forth below, we affirm.

I.

{¶2} On January 22, 2008, Davis was indicted for tampering with evidence, possession of cocaine, failure to comply with an order or signal of a police officer, obstructing official business, illegal use or possession of drug paraphernalia, and turn and stop signals in connection with a January 10, 2008 traffic stop. Police saw Davis leaving a known drug house and stopped him after he allegedly failed to use his turn signal. Davis was asked to step out of the vehicle and as Davis was doing so, the officer observed a speck of what appeared to be cocaine. Additional cocaine was found in the vehicle.

{¶3} Davis filed a motion to suppress which the trial court subsequently denied following a hearing. The case proceeded to a jury trial and the jury found Davis guilty of

tampering with evidence, possession of cocaine, obstructing official business, possession of drug paraphernalia, and turn and stop signals. The jury found Davis not guilty of failure to comply with an order or signal of a police officer. The trial court sentenced Davis to an aggregate term of two years in prison.

{¶4} Davis has appealed, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "Officers violated Mr. Davis' Fourth Amendment rights, as applied to the States by the Fourteenth Amendment, against illegal search and seizure by removing the Appellant from his car during a minor traffic stop."

{¶5} In Davis' first assignment of error he appears to argue that the trial court erred in denying his motion to suppress. He states in his appellate brief that "[w]e acknowledge that the police had sufficient reason to stop the vehicle for the traffic violation * * *. However, the officers completely exceeded their authority by removing Mr. Davis from his vehicle."

{¶6} An appeal from a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. This Court must defer to the trial court's findings of fact as the trial court is in the best position to evaluate the evidence and determine the credibility of the witnesses. *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶10, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699, and quoting *Akron v. Bowen*, 9th Dist. No. 21242, 2003-Ohio-830, at ¶5. A reviewing court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶6. However, this Court will review the trial court's application of the law to the facts de novo. Id. That is to say that this Court will determine whether "the facts [found by the trial court] meet the appropriate legal standard." (Internal

quotations and citations omitted.) *State v. McCoy*, 9th Dist. No. 08CA009329, 2008-Ohio-4947, at ¶4.

{¶7} Davis concedes the validity of the traffic stop and instead contends that the police could not order Davis from his vehicle. We disagree.

{¶8} The Supreme Court of Ohio examined this issue in *State v. Evans* (1993), 67 Ohio St.3d 405, 407, in which it stated that "[t]he United States Supreme Court, in *Pennsylvania v. Mimms* (1977), 434 U.S. 106, held that a police officer may order a motorist to get out of a car, which has been properly stopped for a traffic violation, even without suspicion of criminal activity." The Supreme Court of Ohio went on to note that "*Mimms* merely dispenses with the requirement that the police officer possess reasonable suspicion of criminal activity before the officer may order the driver out of an already lawfully stopped vehicle. Accordingly, the ordering of defendant to get out of his car was proper even if the officers were unable to articulate a reasonable suspicion which prompted this action." *Evans*, 67 Ohio St.3d at 408. Thus, Davis' argument is without merit.

{¶9} To the extent that Davis attempts to make any other arguments with respect to the trial court's denial of his motion to suppress, we are unable to consider them. Davis has failed to provide this Court with a transcript of the hearing on his motion to suppress. We have held that "[w]hen portions of the transcript which are necessary to resolve assignments of error are not included in the record on appeal, the reviewing court has no choice but to presume the validity of the [trial] court's proceedings, and affirm." (Internal quotations and citations omitted.) *State v. Price*, 9th Dist. No. 07CA0003-M, 2008-Ohio-2252, at ¶52. Accordingly, Davis' first assignment of error is overruled.

III.

ASSIGNMENT OF ERROR II

> "Trial Counsel provided ineffective assistance of counsel by failing to put on a defense by failing to call the only witness that could have corroborated Appellant's version of events."

{¶10} Davis argues that his trial counsel was ineffective for failing to call the passenger who was in the car with Davis at the time of the stop as a witness in Davis' defense. We disagree.

{¶11} In order to prove that trial counsel was ineffective, a defendant must demonstrate: (1) deficiency in his attorney's representation and, (2) that the deficiencies prejudiced his defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142. Deficiency of representation "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Prejudice to the defense "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. To succeed on his claim, the defendant must establish both elements, because "'[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" (Internal citation omitted.) *Bradley*, 42 Ohio St.3d at 142, quoting *Strickland*, 466 U.S. at 691.

{¶12} Here Davis alleges that his trial counsel was ineffective by failing to call the passenger as a witness in his defense as she could have corroborated Davis' version of events. The Supreme Court of Ohio has held that "[g]enerally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh* (2001), 90 Ohio St.3d 460, 490.

{¶13} Additionally, Davis has not demonstrated that he was prejudiced by his trial counsel's failure to call this witness. Davis contends that the passenger could have corroborated Davis' version of events that "he was not inebriated and that no cause existed for removal from his vehicle." However, we have already stated that assuming the traffic stop was lawful, as Davis concedes in his appellate brief, police could order Davis from his vehicle without having additional reasonable suspicion of criminal activity. See, also, *Evans*, 67 Ohio St.3d at 407-408.

{¶14} Overall, Davis seems to argue that having the passenger testify would provide some evidence to counter the testimony of the State. However, he does not contend that the result of the trial would have been different if the passenger would have testified. Moreover, as the trial court found the passenger's testimony to be less than credible in the hearing on Davis' motion to suppress, it is difficult to conclude based upon the record before us that the passenger's testimony would have altered the result of the trial. Therefore, we overrule Davis' second assignment of error.

IV.

{¶15} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

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.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

KAREN H. BROUSE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.