[Cite as *State v. McDonald*, 2010-Ohio-183.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1181

Appellee — Trial Court No. CR07-3229

v.

Julius C. McDonald — **DECISION AND JUDGMENT**

Appellant — Decided: January 22, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
James Vail, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Julius McDonald, appeals the May 9, 2008 judgment of the Lucas County Court of Common Pleas which, following a jury trial convicting him of possession of crack cocaine, sentenced appellant to 15 months in prison. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On October 29, 2007, appellant was indicted on one count of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(b), a fourth degree felony. The charge stemmed from an incident on March 12, 2006, where appellant was found having sexual relations in a vehicle that contained crack cocaine. Appellant entered a not guilty plea.

{¶ 3} On February 22, 2008, appellant filed a motion to suppress all the evidence obtained as a result of the warrantless search. A hearing on the motion was held on March 20, 2008; thereafter, the parties filed additional memoranda. On May 2, 2008, the trial court denied the motion. On May 7, 2008, the matter proceeded to a jury trial. Following his conviction for possession of crack cocaine, appellant was sentenced to 15 months of imprisonment. This appeal followed.

{¶ 4} Appellant now raises the following four assignments of error for our review:

{¶ 5} "I. The trial court erred in denying defendant's motion to suppress.

{¶ 6} "II. The trial court erred in failing to comply with Criminal Rule 12(E).[1]

{¶ 7} "III. The conviction is contrary to the weight of the evidence.

{¶ 8} "IV. Defendant received ineffective assistance of counsel."

{¶ 9} Appellant, in his first assignment of error, argues that the trial court erred when it denied appellant's motion to suppress the evidence found because the officers lacked reasonable suspicion that criminal activity was taking place. Appellate review of

[1]Crim.R. 12 was amended and subsection (E) was redesignated as subsection (F).

a ruling on a motion to suppress presents mixed questions of law and fact. Appellate courts are to accept a trial court's findings of fact on the motion when they are supported by competent, credible evidence in the record. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. An appellate court applies the appropriate legal standard to the accepted facts de novo, without deference to the trial court. Id.

{¶ 10} Appellant first argues that the anonymous telephone call that two people were having sex in a Ford Bronco in the 1200 block of Joyce Street, was insufficient to "formulate a reasonable suspicion of criminal activity." In support of his argument, appellant cites *Maumee v. Weisner*, 87 Ohio St.3d 295, 1999-Ohio-68, for the distinction between the anonymous informant, who may be unreliable, and the identified citizen, who may be highly reliable. Appellant couples this with the argument that an anonymous tip, absent independent corroboration of the alleged illegal activity, is insufficient to form the basis of a stop. See *Columbus v. Watson* (1989), 64 Ohio App.3d 6.

{¶ 11} Appellant further argues that the plain view exception to the warrant requirement is inapplicable in this case. The Supreme Court of Ohio has held that, in order for the plain view exception to apply, the state must show that: "(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *State v. Williams* (1978), 55 Ohio St.2d 82, paragraph one of the syllabus.

{¶ 12} In support, appellant relies on *State v. Bird* (1988), 49 Ohio App.3d 156. In *Bird*, the police were dispatched to investigate a loud party. Approaching the house, the officers observed a line of cars parked along the edge of the road. Id. Three individuals were in one of the cars with the interior light on. Id. An officer observed one of the individuals lean over toward the dashboard. The officers approached the individuals after they were about 40 feet from the vehicle. One officer questioned the trio while the other looked through the vehicle window. The officer observed a detached rearview mirror, partially hidden by the driver's seat, with a white powdery substance which was later identified as cocaine. Id. at 157.

{¶ 13} The state appealed the trial court's granting of appellee's motion to suppress. The appellate court affirmed finding that the initial intrusion was not justified because the actions of the individuals failed to raise a reasonable suspicion of criminal activity. Id. at 157-158.

{¶ 14} At the March 20, 2008 suppression hearing, Officer Williamson testified that he was dispatched to Joyce Street on a call that a neighbor had observed two individuals having sex in a Ford Bronco. Officer Babcock, in a separate patrol vehicle, also responded. Upon arrival, Williamson observed two individuals in the back seat of a two-door Ford Bronco; the windows were fogged up. The officers opened the driver's side door and observed that the individuals were naked. The officers then requested that they exit the vehicle. Officer Williamson testified that when appellant was climbing from the back row of seats between the front seats, he observed appellant throw something

down. Williamson could not tell exactly where it landed. The female then exited the vehicle. Officer Babcock then retrieved a small baggie from the ashtray; the baggie appeared to contain crack cocaine.

{¶ 15} Looking collectively at the above facts, we conclude that they support a reasonable suspicion that appellant was involved in criminal activity. The call from a neighbor that two individuals were having sex in a Ford Bronco in the 1200 block of Joyce Street was quite specific. The officers arrived at the location and Officer Williamson testified that he observed two individuals in the back seat of a two-door Ford Bronco and that the windows were fogged up.

{¶ 16} Regarding the plain view discovery of the crack cocaine, its discovery was inadvertent since the officers did not know of its existence prior to the search and the incriminating nature of the evidence was immediately apparent. *State v. Williams*, supra. Accordingly, we find that the trial court did not err when it denied appellant's motion to suppress. Appellant's first assignment of error is not well-taken.

{¶ 17} In appellant's second assignment of error, he asserts that the trial court erred when it denied his motion to suppress without stating its findings or reasons on the record. Crim.R. 12(F) provides, in relevant part: "Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."

{¶ 18} Ohio courts have routinely held that in order to invoke the above provision, trial counsel must request that the trial court state its findings of fact on the record. See

State v. Brown, 64 Ohio St.3d 476, 481-482, 1992-Ohio-96; *State v. Fuller*, 6th Dist. No. WM-07-015, 2008-Ohio-1640, ¶ 24.

{¶ 19} In the present case appellant's counsel did, in fact, request that the trial court make Crim.R. 12 findings. At the April 24, 2008 pretrial, the court denied appellant's motion to suppress. On May 2, 2008, the denial was journalized without reasons or findings. The Supreme Court of Ohio has held that where the defendant fails to object to the court's failure to state findings on the record at trial, the error is waived. *State v. Brewer* (1990), 48 Ohio St.3d 50, 60. The court further held that the lack of findings did not prevent it from "fully reviewing the suppression issues." Id.; *State v. Waddy* (1992), 63 Ohio St.3d 424, 443. See, also, *State v. Harris*, 8th Dist. No. 85270, 2005-Ohio-2192; *State v. Hahn*, 5th Dist. 05 CA 17, 2007-Ohio-557.

{¶ 20} Although the trial court erred by not issuing findings and reasons, appellant has failed to demonstrate prejudice. We conclude that the written briefs and the suppression hearing transcript contained in the record have allowed this court to fully review the suppression issues. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 21} In appellant's third assignment of error he contends that his conviction for possession of crack cocaine was against the manifest weight of the evidence. To determine whether a verdict is against the manifest weight of the evidence, the appellate court must decide whether the judgment is supported "by some competent, credible evidence going to the essential elements of the case." *C.E. Morris Co. v. Foley Constr.*

Co. (1978), 54 Ohio St.2d 279, 280. In this way, the appellate court acts as the "thirteenth juror" and "'* * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 22} Appellant's main argument is that the testimony of the two responding officers differed so dramatically that the jury could have easily lost its way. Further, the conflicting testimony did not establish that appellant possessed the crack cocaine.

{¶ 23} Toledo Police Officer Scott Williamson testified that he and Officer Babcock, in separate patrol cars, responded to a call that individuals were having sex in the back of a Ford Bronco in the 1200 block of Joyce Street. Officer Williamson testified that he pulled up behind the vehicle and that it appeared that the individuals were engaged in sexual relations and that they were naked.

{¶ 24} Officer Williamson testified that he and Officer Babcock approached the vehicle, opened the door, and ordered the suspects out. Williamson stated that appellant came out between the seats and that he observed appellant throw something down toward the floor of the front seat. Officer Williamson stated that appellant was placed into custody for indecent exposure. The vehicle was searched and crack cocaine was found in the ashtray. Open containers of beer were also found. Williamson testified that they ran

the information on the vehicle and discovered that it was registered in Michigan; appellant and the female were not the owners.

{¶ 25} During cross-examination, Officer Williamson testified that when he pulled up behind the vehicle the windows were slightly fogged up. Williamson stated that when they shined either the spotlight or flashlight into the vehicle they observed people in the back. Officers Williamson and Babcock then approached the vehicle and opened the driver's side door. Williamson testified that Officer Babcock opened the door and ordered the suspects out of the vehicle. Appellant was first to exit the vehicle and as he climbed between the two front seats Officer Williamson observed him throw something toward the floor. Williamson acknowledged that he could not remember whether appellant was clothed. Appellant and the female were taken into custody and the vehicle was searched by Officer Babcock. Officer Williamson acknowledged that a records check was not done on the owner of the vehicle.

{¶ 26} Toledo Police Officer Todd Babcock testified that on March 12, 2006, he responded to a call to the 1200 block of Joyce Street where it was reported that two individuals were having sex in a blue Ford Bronco. Upon arrival, Officer Babcock testified that he pulled up behind the vehicle and activated his spotlight. He then approached the vehicle with a flashlight. Officer Babcock observed two individuals in the backseat of the Bronco; it appeared that they were having sex. Babcock stated that the individuals had observed him, had separated, and were getting dressed. Officer Babcock then asked them to keep their hands where he could see them and to exit the

vehicle. Babcock stated that appellant first exited the vehicle. Officer Babcock kept a close eye on appellant's hands to make sure that he did not have a weapon or try to conceal contraband. Officer Babcock testified that as appellant was exiting the vehicle, he turned back toward the interior of the vehicle and dropped something into the ashtray. The female then exited the vehicle.

{¶ 27} Officer Babcock testified that once the two suspects were handcuffed, he searched the vehicle. Babcock looked into the ashtray to see what appellant had dropped. Officer Babcock observed a plastic baggie with several large white chunks; the chunks appeared to be crack cocaine.

{¶ 28} During cross-examination, Officer Babcock acknowledged that he could not remember whether the Bronco's windows were fogged up. Babcock agreed that neither appellant nor the female was the registered owner of the vehicle.

{¶ 29} Reviewing the testimony of the officers, we agree that their testimony differs as to certain points. First, both officers testified that they pulled up behind the Ford Bronco. Officer Williamson testified that Babcock pulled up across the street. Officer Williamson stated that he saw appellant throw something toward the floor while Officer Babcock saw appellant drop something in the ashtray.

{¶ 30} Reviewing the officers' testimony, we cannot conclude that the inconsistencies noted by appellant render the testimony so beyond belief that a reasonable juror could not resolve them and render a decision. Importantly, although the versions differed as to exactly where the baggie was dropped, both officers testified that as

appellant came up from the back seat he dropped something. This testimony supported the conclusion that appellant was in actual possession of the crack cocaine. Accordingly, we find that appellant's conviction for possession of crack cocaine was not against the manifest weight of the evidence. Appellant's third assignment of error is not well-taken.

{¶ 31} In appellant's fourth and final assignment of error appellant argues that he was denied the effective assistance of counsel. Appellant specifically disputes trial counsel's statement during closing arguments that appellant threw something down in the vehicle. Appellant argues that he did not throw anything down and that the crack cocaine belonged to the owner of the vehicle. Appellant asserts that to infer that he threw something means that he had control over it; to have control means to have possession.

{¶ 32} "To prove ineffective assistance of counsel defendant must meet the two-prong test established by the Supreme Court in *Strickland v. Washington* (1984) 466 U.S. 668. The Court in *Strickland* held that defendant must show:

{¶ 33} "First * * * that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This 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. at 687.

{¶ 34} Under the first prong, the attorney receives a high presumption of competency. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301, and under the second

prong, the appellant must show that but for the attorney's incompetence the case would have had a different outcome. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142-43, quoting *Strickland* at 689.

{¶ 35} Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. *Strickland* at 689. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171. Even if the wisdom of an approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 48-49. Finally, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. *Strickland* at 689; *State v. Keenan*, 81 Ohio St.3d 133, 152, 1998-Ohio-459.

{¶ 36} During closing arguments, defense counsel stated: "* * * it is possible and plausible that what was thrown – what Officer Williamson saw Mr. McDonald throw something on the floorboard is either still on that floorboard or in the trash somewhere. Now they want you to put him in possession of something else." Trial counsel's statement is consistent with the defense theory during trial. Counsel's theory was that the owner of the vehicle, who was neither contacted nor investigated, was the owner of the crack cocaine found in the vehicle. Upon review, we cannot say that trial counsel's

strategy amounted to ineffective assistance of counsel. Appellant's fourth assignment of error is not well-taken.

{¶ 37} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE