[Cite as *State v. McLaughlin*, 2014-Ohio-1150.]

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

State of Ohio	Court of Appeals No. E-12-073
Appellee	Trial Court No. 2011-CR-230
v.	
Andre McLaughlin	**DECISION AND JUDGMENT**
Appellant	Decided: March 21, 2014

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Loretta Riddle, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Erie County Court of Common Pleas, convicting appellant, Andre McLaughlin, of complicity to commit preparation of marijuana for sale and complicity to commit possession of marijuana. Appellant argues

that the matter should be remanded for a new trial because his trial counsel was ineffective and the state committed prosecutorial misconduct during closing arguments. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On the evening of April 8, 2011, the Sandusky Police Department received an anonymous call regarding a suspicious vehicle located in the parking lot behind the Firelands Symphony Orchestra. The caller believed that a white car was involved in a drug transaction. Officer Ken Gautschi responded to the scene, but did not find the car in the parking lot. As Gautschi left the lot, he noticed a white Mercury sedan parked on the side of the street. The car was running and unattended. Gautschi was contacted by another officer who said that a male had gotten out of the car earlier, and was now walking back. The male turned out to be appellant.

{¶ 3} Gautschi approached appellant, and informed him of the complaint. Appellant denied any criminal activity, and explained that he had family that lived nearby and he often parks in that lot. Gautschi then conducted a pat down of appellant, but did not find any contraband. Thereafter, Gautschi informed appellant that he was free to leave. As appellant was heading to the driver's side of the Mercury, Gautschi began shining his flashlight along the ground to see if any drugs or drug paraphernalia had been discarded. Gautschi then shined his flashlight into the Mercury, and observed packages of marijuana on the center console. Appellant was subsequently arrested, and an

inventory search of the car later revealed two cell phones and $6,600 in cash in the back seat.

{¶ 4} The Erie County Grand Jury indicted appellant on three charges stemming from this incident, including preparation of marijuana for sale in violation of R.C. 2925.03(A)(2), a felony of the second degree, possession of marijuana in violation of R.C. 2925.11(A), a felony of the third degree, and possession of drugs in violation of R.C. 2925.11(A), a felony of the fifth degree. The possession of drugs charge was based on a bottle of prescription pills that was also found in the car.

{¶ 5} Appellant entered an initial plea of not guilty. He then filed a motion to suppress the evidence found in the car on the grounds that he did not consent to the warrantless search and the evidence was not in plain view. After a hearing, the trial court denied the motion to suppress. The matter proceeded to a jury trial, following which the jury found appellant guilty of complicity to commit preparation of marijuana for sale, and complicity to commit possession of marijuana. The jury found appellant not guilty of possession of drugs. At sentencing, the trial court ordered appellant to serve 30 months in prison.

B. Assignments of Error

{¶ 6} Appellant has timely appealed, assigning three potential errors for our review:

I. Appellant received constitutionally ineffective assistance of counsel when his trial counsel did not challenge the initial stop and pat down of the appellant in the motion to suppress.

II. Appellant received constitutionally ineffective assistance of counsel when his trial counsel did not object to prosecutorial misconduct and improper statements during closing and such prosecutorial misconduct during closing argument deprived appellant of a fair trial and due process of law as guaranteed by the 14th Amendment to the U.S. Constitution and Section 16, Article I of the Ohio Constitution.

III. Plain error was committed when the state was permitted to engage in prosecutorial misconduct and improper statements during its closing and there was no objection.

II. Analysis

{¶ 7} Appellant's first two assignments of error allege that he received constitutionally ineffective assistance of counsel. To demonstrate ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 696. "Judicial scrutiny of counsel's performance must be highly deferential. * * * [A] court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689. In addition,

> [A] 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. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. *Id.* at 143, quoting *Strickland* at 697.

{¶ 8} We will now turn to appellant's specific claims of ineffective assistance.

A. Suppression Hearing

{¶ 9} In his first assignment of error, appellant argues that counsel was ineffective for failing to seek suppression of the evidence that was in the car because those items were found as a result of an unconstitutional stop and pat down. Specifically, appellant argues that the vague tip from an anonymous caller was insufficient to support a reasonable suspicion that he was involved in illegal activity, and therefore Gautschi had no basis to conduct a *Terry* investigatory stop. Furthermore, appellant argues that Gautschi also had no authority to initiate the pat down because there was no indication that appellant was armed or dangerous. Appellant concludes that because the stop and pat down were unconstitutional, the evidence obtained from the car should have been suppressed.

{¶ 10} The state, in opposition, argues that the tip was sufficient to give Gautschi reasonable suspicion that appellant was involved in a drug transaction, thereby justifying the stop and pat down. Further, the state argues that appellant consented to the pat down. Finally, the state concludes that even if the stop and pat down were unconstitutional, no evidence was obtained as a result. Rather, the evidence was obtained pursuant to the "plain view doctrine" after the initial encounter with appellant had ended.

{¶ 11} The Fourth Amendment to the U.S. Constitution and Article I, Section 14 of the Ohio Constitution protect against unreasonable searches and seizures. To that end, "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). "The Exclusionary Rule has historically applied to illegally obtained evidence as well as any evidence which was an indirect product of unlawful police conduct." *State v. Perkins*, 18 Ohio St.3d 193, 194, 480 N.E.2d 763 (1985), citing *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). "The deterrence rationale behind the principle is the refusal to put the prosecution in a better position than it would have been in the absence of illegality." *Perkins* at 194, citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Thus, one exception to the exclusionary rule is the independent source doctrine, which allows for the admission of evidence that is discovered by means entirely independent of any constitutional violation. *Perkins* at 194; *see also Segura v. United States*, 468 U.S. 796, 797, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (exclusionary rule does not apply where

the connection between the illegal police conduct and the seizure of the evidence is "so attenuated as to dissipate the taint").

{¶ 12} One application of the independent source doctrine, and the one that is relevant in this case, is where "an unlawful entry has given investigators knowledge of facts *x* and *y*, but fact *z* has been learned by other means[.] [F]act *z* can be said to be admissible because [it] derived from an 'independent source.'" *Murray v. United States*, 487 U.S. 533, 538, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). An example of this application is in *Segura*, where the police were found to have unconstitutionally entered an apartment and conducted a limited protective sweep. *Segura* at syllabus. In so doing, the police discovered various drug paraphernalia. The police then secured the location while awaiting a search warrant that was based on information not related to the entry and security sweep. Nearly a day later, the police received the warrant. During the subsequent search, the police located cocaine and records of narcotics transactions. The court of appeals held that the drug paraphernalia found during the initial protective sweep must be excluded, but the remaining evidence found pursuant to the search warrant was admissible. The United States Supreme Court affirmed, and held that

> the evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued wholly on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were unrelated to the entry and

therefore constituted an independent source for the evidence * * *. *Id.* at 799.

{¶ 13} Here, like *Segura*, Gautschi discovered the evidence in the car by means unrelated to the initial stop and pat down of appellant. Indeed, the encounter with appellant did not result in any evidence, nor did it result in information leading to the discovery of the marijuana in the car. Rather, Gautschi seized the marijuana in the car pursuant to the plain view doctrine.

{¶ 14} The plain view doctrine "embodies the understanding that privacy must be protected by the individual, and if a police officer is lawfully on a person's property and observes objects in plain or open view, no warrant is required to look at them." *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006, ¶ 16, citing *Horton v. California*, 496 U.S. 128, 134-137, 140-142, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). It is "grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost * * *." *State v. Halczyszak*, 25 Ohio St.3d 301, 303, 496 N.E.2d 925 (1986). In order for evidence to be seized under the plain view exception, it must be shown 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*, 55 Ohio St.2d 82, 377 N.E.2d 1013 (1978), paragraph one of the syllabus.

{¶ 15} Applying these three requirements in reverse order, we first note that the parties do not dispute that the marijuana was immediately apparent to Gautschi. Next, we find that the discovery was inadvertent because Gautschi did not know in advance that the marijuana was in the car. *See Williams* at 85 (discovery inadvertent where detective did not know that the defendant was in possession of stolen property). Finally, we find that Gautschi was lawfully in a position to observe the marijuana as the car was parked on the side of the street, and Gautschi was standing on the sidewalk when he shined his flashlight into the car. *See Texas v. Brown*, 460 U.S. 730, 739-740, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) ("It is likewise beyond dispute that [the officer's] action in shining his flashlight to illuminate the interior of [the defendant's] car trenched upon no right secured to the latter by the Fourth Amendment. * * * There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." (Citations omitted.)).

{¶ 16} Therefore, because Gautschi seized the evidence in the car pursuant to the plain view doctrine, independent of the stop and pat down of appellant, we hold that the evidence should not be excluded. Consequently, we need not reach appellant's argument that the stop and pat down were unconstitutional.

{¶ 17} Accordingly, since appellant has not demonstrated a reasonable probability that the result of the proceedings would have been different had trial counsel argued different grounds for suppression, his first assignment of error is not well-taken.

B. Closing Arguments

{¶ 18} Appellant's second and third assignments of error both address the permissibility of the prosecutor's closing remarks, and whether those remarks constituted prosecutorial misconduct. Specifically, appellant argues that trial counsel was ineffective for failing to object to the closing remarks, and that the trial court committed plain error in allowing the prosecutor to make them. Because appellant's assignments of error are interrelated, we will address them together.

{¶ 19} "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). A prosecutor is afforded a certain degree of latitude in his or her closing remarks, and may prosecute with earnestness and vigor, striking hard blows. *Id.* at 13-14. In so doing, a prosecutor may comment freely on "what the evidence has shown and what inferences can be drawn therefrom." *State v. Richey*, 64 Ohio St.3d 353, 362, 595 N.E.2d 915 (1992). However, the prosecutor may not strike unfairly. *Smith* at 14. "It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." *Id.*

{¶ 20} Here, appellant cites thirteen instances from the closing argument that he contends goes beyond the evidence presented to the jury. We will address each of these instances in turn.

{¶ 21} In two of the instances, the prosecutor concluded that appellant was selling drugs. Notably, this was the ultimate question to be answered by the jury, and the prosecutor's conclusion was reasonably inferred from the evidence showing that four pounds of marijuana, nearly $7,000 in cash, and two cell phones were found in appellant's car. Thus, these two statements were proper.

{¶ 22} In another two of the instances, the prosecutor made statements that appellant was in an argument with his children's mother, and that the argument possibly concerned money. The record reflects that appellant admitted to Gautschi that while he was in the parking lot he was talking to the mother about some issues and she left. Appellant then parked the car and walked back to her house to have another conversation with her. The content of the conversations was not discussed in evidence, but as the prosecutor noted, it was irrelevant: "Now, who knows what they're arguing about. My guess is it was money. * * * Really doesn't matter, but there was an argument and the girlfriend leaves." Thus, these statements were proper.

{¶ 23} Two more instances concerned appellant's brother, Demario Rogers. Rogers testified that he was the person driving the white Mercury, that the cash and four pounds of marijuana were his,[1] and that appellant had no knowledge of the money or drugs. In her closing argument, the prosecutor stated that appellant was driving the white Mercury and Rogers was the passenger, and that Rogers did not have a record so he

[1] Rogers testified that he was not planning to sell the marijuana, but rather that he was going to put it in a tub and "swim" in it to celebrate his upcoming birthday.

would probably get probation whereas appellant would go to prison if convicted. We find that the prosecutor's statements are reasonable inferences based on the evidence. As to whether he was the passenger, Rogers was cross-examined over his statement at the suppression hearing where he started to say he was the passenger before altering his response to say that he was the driver. As to whether Rogers had a record and would probably only get probation if the drugs were his, Rogers testified that he did not have a felony record. Thus, these two statements were proper.

{¶ 24} In another instance, the prosecutor stated that the cell phones in the car belonged to appellant. Appellant argues that the testimony actually indicated that the police did not know to whom the phones belonged. However, the fact that the phones were found in appellant's car leads to the permissible inference that appellant owned them. Thus, this statement was proper.

{¶ 25} The next instance concerns the prosecutor's statement that the anonymous caller said, "someone's selling drugs." The record indicates that the caller just reported a suspicious vehicle that might be dealing in narcotics. We do not find the prosecutor's statement to be an unfair characterization of the evidence. Nevertheless, even if it were improper, the statement was objected to and sustained by the trial court, thus it did not prejudicially affect appellant's substantial rights.

{¶ 26} The final five instances concern the prosecutor's statements that appellant brought drugs with him when he drove up from Columbus earlier on the day he was arrested. We find these statements to be the most objectionable as there is no evidence

that appellant transported drugs from Columbus, and the prosecutor's theory is entirely speculative. However, we hold that it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury still would have found appellant guilty. *Smith*, 14 Ohio St.3d at 15, 470 N.E.2d 883, citing *United States v. Hasting*, 461 U.S. 499, 510-511, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). Here, the source of the drugs was not pertinent to proving whether appellant possessed and prepared to sell the marijuana. Rather, those facts were decidedly proven by his actions on that evening and the quantity of marijuana, the amount of cash, and the two cell phones in his possession. Moreover, the prosecutor's statements themselves were discounted by the trial court when it instructed the jury both before and after closing arguments that the statements of counsel were not to be considered as evidence. Therefore, because appellant was not prejudiced, we do not find that these five instances constituted prosecutorial misconduct.

{¶ 27} Having determined that the prosecutor did not commit prosecutorial misconduct in her closing argument, we hold that it was not plain error for the trial court to allow those statements. Further, we hold that appellant has failed to demonstrate that a reasonable probability exists that the result of the proceedings would have been different had trial counsel objected to the statements. Therefore, appellant also did not receive ineffective assistance of counsel.

{¶ 28} Accordingly, appellant's second and third assignments of error are not well-taken.

III. Conclusion

{¶ 29} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE