[Cite as *State v. Rodriguez*, 2010-Ohio-1944.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-024
	:	O P I N I O N
- vs -		5/3/2010
	:	
MARIO A. RODRIGUEZ,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 09CR10255

Martin P. Votel, Preble County Prosecuting Attorney, Kathryn M. Worthington, Courthouse, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

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RINGLAND, J.

{¶1} Defendant-appellant, Mario A. Rodriguez, appeals a decision of the Preble County Court of Common Pleas denying his motion for a new trial. We affirm.

{¶2} On March 7, 2009, Trooper Darren Fussner of the Ohio Highway Patrol observed a vehicle driven by appellant traveling 74 m.p.h. in a 65 m.p.h. zone along Interstate 70. The trooper checked the vehicle's speed again once it passed, noting that the

vehicle slightly slowed to 71 m.p.h. Trooper Fussner pursued the vehicle. Once he caught up to the vehicle, Trooper Fussner stated that the vehicle had slowed and was traveling in the left lane behind a semi truck. He ran the registration and determined that the vehicle was a rental car with a Colorado license plate. Appellant's vehicle changed lanes, increased its speed, and passed the semi. The trooper once again activated his radar unit and found the vehicle to be traveling between 71 and 74 m.p.h.

{¶3} Trooper Fussner activated his overhead lights to effectuate a traffic stop. He noted that appellant immediately put on his right hand turn signal but "kind of just kept going in the left-hand lane without really moving over to the right lane. It just kept going and going." The trooper testified that the vehicle finally moved over to the right lane, but "kept going and going and going." The vehicle then moved to the berm, but kept "going down the berm." It took appellant approximately 50 seconds to pull over the vehicle and bring it to a stop. The trooper testified that in his 20 years of experience, the amount of time it took for appellant to pull over was unusual for a traffic stop.

{¶4} After the vehicle stopped, the trooper observed a lot of movement from the driver and passenger in the vehicle, which put him "more at an unease." After exiting his cruiser, the trooper remained back on the left side of his vehicle as a precautionary measure. The trooper waited for appellant to make eye contact with him in the rearview mirror and then waived appellant out of the vehicle to come toward him. Appellant then got out of the vehicle without shoes on, leaving his door open, and keeping his back toward the officer. The trooper noted that appellant reached back into the car on two occasions. The trooper testified that he was "very uncomfortable that there might be an attack imminent" and, as a result, he moved over to the right front of the cruiser. As he was moving to the other side of the cruiser, appellant lifted his shirt over the waistband on his pants to straighten it out and brushed himself down. The trooper claimed he was "uncomfortable, and I thought possible

that he could have had something in his waistband that he was trying to hide."

{¶5} Once appellant approached, appellant reached toward the officer to shake his hand. The trooper shook appellant's hand and noticed that it was completely black. He also noticed that appellant's shirt also had a black substance all over the front as well. Trooper Fussner explained to appellant the basis for the traffic stop and made inquiries regarding his license, the rental of the vehicle as well as appellant's origin and destination. Appellant stated that he was from San Ysidro, California and headed with the passenger in the vehicle to visit friends in Manhattan.

{¶6} The trooper asked appellant to move to the back of the cruiser and asked if he would mind being patted down for weapons. According to the trooper, appellant shook his head "that it was okay, and actually reached out, the door was open, he reached out and grabbed my seat * * * place[d] his hands on my seat and he actually steps back and spreads his legs, waits for me to start patting him down." Appellant disputes that he consented to the pat-down.

{¶7} During the pat-down, the officer testified that he felt a "very large, hard object" in appellant's waistband. The officer believed, in his experience, that it was either "a weapon or some kind of contraband. There's no other reason to have something like that in your waistband." The trooper immediately handcuffed appellant, turned him around, lifted his shirt, and saw two black packages. The packages were shaped like soles of a shoe and covered in black carbon paper. After removing the items, Trooper Fussner asked whether the items were cocaine or heroin. Appellant responded, "I think so, I don't know."

{¶8} After securing appellant in the cruiser, Trooper Fussner drew his weapon and walked toward the passenger, who was still seated in the vehicle. As he approached the vehicle, the officer called for back-up. The trooper called the passenger from the vehicle and required him to lay face down on the ground until back-up arrived. The passenger was

placed in handcuffs and, following a search, found similar packages in his shoes. Trooper Shaun Smart read appellant his *Miranda* rights.

{¶9} The troopers conducted a NIC test on the scene and determined that the packages contained heroin. The troopers proceeded to search the vehicle where they found a pair of shoes which had the insoles removed and three cell phones. About an hour after the stop, Trooper Smart spoke with appellant. Appellant acknowledged that he and the passenger had been paid several thousand dollars to transport the narcotics.

{¶10} Appellant was charged with possession of heroin in violation of R.C. 2925.11(A)(C)(6)(f), a felony of the first degree, and possessing criminal tools in violation of R.C. 2923.24(B)(2), a felony of the fifth degree. On the day of trial, appellant requested that the trial date be continued as he would be hiring a new attorney. The court denied the request since the jury had been impaneled and trial was set to begin within five to ten minutes. Appellant then explained that he wished to file a motion to suppress, but his attorney would not do so. When asked whether there was any basis for a motion to suppress, appellant's attorney replied, "no." About 15 minutes later, the court went back on the record. New counsel for appellant made his appearance, explaining that appellant's family had hired him over the weekend, that he believed there was a basis for a motion to suppress, and requested the trial be continued. The court denied the request. The court relayed that appellant had known his options for "a long time," the jury was selected, appellant had plenty of time to retain substitute counsel, and the morning of trial is too late to file a motion to suppress.

{¶11} Following trial, the jury found appellant guilty as charged. Counsel filed a motion for new trial, which was denied by the trial court. Appellant was sentenced to a total of ten years in prison. Appellant timely appeals, raising four assignments of error. We will address appellant's assignments of error out of order.

{¶12} Assignment of Error No. 1:

{¶13} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN DENYING APPELLANT'S MOTION FOR A NEW TRIAL."

{¶14} Assignment of Error No. 3:

{¶15} "THE TRIAL COURT ERRED IN HOLDING BOTH THE SEARCH AND SEIZURE OF APPELLANT WERE CONSTITUTIONAL."

{¶16} Assignment of Error No. 4:

{¶17} "THE TRIAL COURT ERRED IN FINDING APPELLANT'S 5TH AMENDMENT CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN THE OFFICER HAD HIM IN CUSTODY AND INTERROGATED HIM WITHOUT READING HIM MIRANDA WARNINGS."

{¶18} In his third assignment of error, appellant argues that the search conducted by Trooper Fussner and the resulting seizure of the heroin were unconstitutional. Appellant claims the trooper did not have the reasonable, articulable suspicion necessary to conduct the frisk. Additionally, appellant submits that, even if the frisk was lawful, once the officer felt the objects under appellant's waistband, he did not immediately know they were contraband.

{¶19} Additionally, in his fourth assignment of error, appellant argues that his Fifth Amendment Rights were violated by Trooper Fussner. Specifically, appellant argues that, once Trooper Fussner discovered the contraband in appellant's waistband, his questioning "is this cocaine? Is this heroin?" was improper. Appellant argues that the trooper should have administered *Miranda* warnings prior to the questioning. Appellant urges that his response, "I think so, I don't know," should have been suppressed because it was elicited in violation of his constitutional rights.

{¶20} In his first assignment of error, appellant combines his arguments from the third and fourth assignments of error, claiming that the trial court erred by denying his motion for a new trial. Additionally, appellant argues his original trial counsel was ineffective for failing to

file a motion to suppress, which he also raises under his second assignment of error.

{¶21} A review of the procedural posture of this case is relevant to our analysis of these assignments of error. Specifically, the issues raised in appellant's third and fourth assignments of error, contesting the search, seizure and questioning by Trooper Fussner, are matters which should have been challenged in a motion to suppress. In this case, appellant failed to file a motion to suppress. Before trial, appellant expressed his discontent with his original trial counsel to the court for counsel's failure to file a motion to suppress. Soon thereafter replacement counsel appeared on appellant's behalf. Appellant's replacement counsel requested a continuance so that a motion to suppress could be filed. The trial court denied counsel's request and the matter proceeded to trial.

{¶22} Following trial, counsel filed a Crim.R. 33 motion for new trial. The motion urged that a recent case, *State v. Lawson*, 180 Ohio App.3d 516, 2009-Ohio-62, was directly applicable to the case and that the verdict was improper. *Lawson* is a Second District Court of Appeals case challenging the search of an automobile driver following a traffic violation. In *Lawson*, the Second District reviewed a motion to suppress.

{¶23} Motions for new trial can only be granted under limited circumstances. Crim.R. 33(A) provides, "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: (1) Irregularity of the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial; (2) Misconduct of the jury, prosecuting attorney, or witness of the state; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) That the verdict is not sustained by sufficient evidence or is contrary to law. * * *; (5) Error of law occurring at the trial; (6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered or produced at the trial * * *."

{¶24} Appellant's motion for new trial did not contest a matter authorized under Crim.R. 33(A). Specifically, appellant did not contest the trial court's denial of a continuance for the purposes of filing a motion to suppress or claim that the trial court abused its discretion for failing to allow the motion. Rather, appellant's motion for new trial basically served as a post-trial motion to suppress. Essentially, appellant attempted to circumvent the trial court's denial of a last-minute motion to suppress by filing a post-trial motion.

{¶25} In the instant appeal, appellant similarly does not allege an abuse of discretion nor does he contest the court's denial of a continuance or motion to suppress. Instead, like his trial court motion, appellant solely argues the evidence should have been suppressed.

{¶26} As a result, since no form of relief is available to appellant under Crim.R. 33, appellant's first assignment of error is overruled. Additionally, because appellant failed to properly raise his arguments at the trial level contesting the search, seizure and questioning, he has waived all but plain error review of his third and fourth assignments of error. Crim.R. 52(B). Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111.

{¶27} Appellant does not contest the traffic stop, but argues that Trooper Fussner did not have authority to conduct the frisk. Appellant also argues the questioning about the nature of the substance violated his Fifth Amendment rights.

{¶28} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 9, 88 S.Ct. 1868. "Once a lawful stop has been made, the police may conduct a limited protective search for concealed weapons if the officers reasonably believe that the suspect may be

armed or a danger to the officers or to others." *Lawson* at ¶62. To justify a pat-down under *Terry*, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* at 27. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. See, also, *State v. Smith* (1978), 56 Ohio St.2d 405, 407.

{¶29} Based on the totality of the circumstances, Trooper Fussner articulated a reasonable basis to believe that appellant may be armed and a danger to the officer. After activating his overhead lights, Trooper Fussner testified that appellant took an unusually long amount of time to stop his vehicle. Once the vehicle was stopped, the trooper observed a lot of movement from the driver and passenger in the vehicle. Appellant then got out of the vehicle without shoes, left his door open, and kept his back toward the officer. The trooper stated that appellant reached back into the car on two occasions before approaching. Appellant lifted his shirt over the waistband of his pants and brushed himself down before reaching the officer.

{¶30} Although a *Terry* frisk is confined to a pat-down of the person's outer clothing to discover whether any "guns, knives, clubs, or other hidden instruments for the assault of the police officer" are present, if the officer discovers contraband based upon the plain feel of the object, no constitutional violation has occurred. *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375-376, 113 S.Ct. 2130. Under the plain-feel doctrine, an officer conducting a pat-down for weapons may lawfully seize an object if he has probable cause to believe that the item is contraband. *State v. Phillips*, 155 Ohio App.3d 149, 2003-Ohio-5742, ¶41-42. The "incriminating character" of the object must be "immediately apparent" and the officer may not manipulate the object to determine its incriminating nature. *Dickerson* at 375-376.

{¶31} Upon frisking appellant, Trooper Fussner testified that he felt a large, hard object in the waistband of appellant's pants. Trooper Fussner stated immediately upon feeling the object he knew it was "a weapon or some kind of contraband. There's no other reason to have something like that in your waistband." After feeling the item he immediately handcuffed appellant, pulled up appellant's shirt, and removed the packaged drugs.

{¶32} As at the trial level, appellant submits *Lawson* as primary support that the search and seizure in this case was unconstitutional. Yet, in *Lawson*, the Second Appellate District correctly granted the motion to suppress because the officers could not identify the nature of the contraband based upon plain feel. 2009-Ohio-62 at ¶40. The officer in *Lawson* manipulated the lump in the defendant's pocket, asked other officers to manipulate the substance and had to question the defendant about the object before it could be identified as contraband. Id. The Second District concluded that the manipulation and extended detention of Lawson was unreasonable. Id. In this case, there was no indication that Trooper Fussner manipulated the heroin or detained appellant for an extended period of time to identify the large packages as contraband.

{¶33} We next turn to the trooper's questioning of appellant about the package without first administering *Miranda* warnings. Once Trooper Fussner removed the packages from appellant's waistband, he asked appellant whether it was cocaine or heroin. Appellant responded, "I think so, I don't know."

{¶34} Statements made during the custodial interrogation of a defendant may not be admitted into trial where *Miranda* warnings have not been given. See *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602. Custodial interrogation occurs when there is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444.

{¶35} Even if Trooper Fussner's question asking appellant about the type of

substance may have been improper, any error in admitting the statement was harmless because appellant suffered no prejudice. *State v. Rivera-Carillo*, Butler App. No. CA2001-03-054, 2002-Ohio-1013, *16. Trooper Fussner had already recovered the packaged drugs before asking appellant what type of drug was in the packages. Further, a lab test confirmed that the packages contained heroin. *State v. Perkins* (1985), 18 Ohio St.3d 193, 196; *Nix v. Williams* (1984), 467 U.S. 431, 446, 104 S.Ct. 2501. The outcome of the trial would not have been different even if appellant's response would have been suppressed.

{¶36} Based on the foregoing, appellant's first, third and fourth assignments of error are overruled.

{¶37} Assignment of Error No. 2:

{¶38} "APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO FILE A MOTION TO SUPPRESS."

{¶39} In his second assignment of error, appellant argues that his trial counsel was ineffective for failing to file a motion to suppress on his behalf.

{¶40} In order to establish ineffective assistance of counsel, appellant must show that his trial counsel's performance was both deficient and prejudicial. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. Specifically, appellant must show that his counsel's performance "fell below an objective standard of reasonableness," and that there is a reasonable probability that but for his counsel's deficient performance, the outcome of the trial would have been different." *Strickland* at 688, 693-694. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct;" as a result, a reviewing court's "judicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

{¶41} A reviewing court is not permitted to use the benefit of hindsight to second-

guess the strategies of trial counsel. *State v. Hoop,* Brown App. No. CA2004-02-003, 2005-Ohio-1407, ¶20. A criminal defendant must overcome a presumption that his counsel's actions or inactions "might be considered sound trial strategy." *Strickland* at 689. Even debatable trial strategies and tactics do not constitute ineffective assistance of counsel. *Hoop* at ¶20. Further, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley* at 142.

{¶42} A failure to file a motion to suppress is not per se ineffective assistance of counsel. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574. "To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶65, citing *State v. Adams,* 103 Ohio St.3d 508, 2004-Ohio-5845, ¶35. See, also, *State v. Gibson* (1980), 69 Ohio App.2d 91, 95 (finding where there is no justification for filing a suppression motion, appellant has not met the burden of showing his counsel's performance was deficient).

{¶43} Moreover, where the failure to file a motion to suppress represents a reasonable trial strategy or a "tactical judgment," a claim of ineffective assistance must fail. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶31-33; *State v. Downing*, Summit App. No. 22012, 2004-Ohio-5952, ¶20-21; *State v. Newman*, Ottawa App. No. OT-07-051, 2008-Ohio-5139, ¶29. See, also, *State v. Benge* (Dec. 5, 1994), Butler App. No. CA93-06-116, 1994 WL 673126, *22.

{¶44} The record demonstrates that the decision of appellant's original trial counsel to not file a motion to suppress in this case was a matter of trial strategy. In denying appellant's Crim.R. 33 motion for a new trial, the trial court found that appellant had been offered a plea bargain for a reduced charge that would have resulted in a four-year sentence instead of a

ten-year sentence under the original charges. Yet, if appellant had filed a motion to suppress and the trial court denied it, the plea bargain would no longer be available. The passenger in the vehicle who had also been found with heroin filed a motion to suppress in his case based upon the same set of facts. The trial court denied the "co-defendant's" motion. With knowledge of the plea offer and the denial of the "co-defendant's" motion, appellant's original trial counsel advised appellant that any motion to suppress would be baseless and unsuccessful. We find no evidence that the conduct of appellant's original counsel was deficient. Further, as we have discussed above, appellant suffered no prejudice in this matter.

{¶45} Appellant's second assignment of error is overruled.

{¶46} Judgment affirmed.

YOUNG, P.J., concurs.

BRESSLER, J., concurs separately.

BRESSLER, J., concurring separately.

{¶47} I concur with the result reached by the majority, to the extent that appellant's conviction is affirmed. However, I write separately to express my opinion that appellant's failure to properly challenge the search, seizure, and questioning in a pretrial motion to suppress constitutes a waiver of his right to make these challenges during or after his trial or upon appeal.

{¶48} The proper method for asserting challenges to exclude evidence obtained as a result of police conduct is a motion to suppress. *State v. Freeman*, Cuyahoga App. No. 92286, 2009-Ohio-5226, ¶23, citing *State v. French*, 72 Oho State.3d 446, 650, 1992-Ohio-32. Crim.R. 12(C)(3) requires that a defendant file a motion to suppress evidence with the

trial court prior to trial, and the failure to do so "shall constitute waiver of the defenses or objections" for purposes of trial. Crim.R. 12(H); see, also, *State v. Wade* (1973), 53 Ohio St.2d 182; *State v. Montgomery*, Licking App. No. 2007 CA 95, 2008-Ohio-6077.

{¶49} As the majority points out, appellant failed to properly make these challenges before trial. Instead, appellant raised these challenges in a Crim.R. 33 motion for new trial, which was not the proper method for asserting such a challenge. Nonetheless, the trial court considered appellant's arguments, and in denying appellant's motion for new trial stated that even if appellant filed a motion to suppress the court would have denied the motion. While I agree with the majority's conclusion in overruling appellant's assignments of error related to the exclusion of evidence, I believe a plain error analysis of these issues to be unnecessary, as appellant waived the right to assert these challenges by failing to file a pretrial motion to suppress. Id. Further, while I agree with the majority's finding that appellant's failure to file a motion to suppress can be attributed to trial strategy, I believe it is inappropriate to analyze issues that could only be raised in a motion to suppress.

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