[Cite as *State v. Annor*, 2010-Ohio-5423.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-248
	:	O P I N I O N
- vs -		11/8/2010
	:	
NATHANIEL S. ANNOR,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY AREA III COURT
Case No. TRC0805745

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Scott Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Nathaniel S. Annor,[1] appeals his conviction in the Butler County Area III Court for operating a vehicle under the influence.

{¶2} At approximately 2:24 a.m. on July 19, 2008, Officer Tony Frey of the West Chester Police Department observed a vehicle being operated by appellant traveling 60 m.p.h along Muhlhauser Road. The speed limit on the road is 45 m.p.h. The officer initiated a traffic stop. Upon his approaching the vehicle, the officer smelled

1. Appellate counsel lists appellant's surname as "Annar." However, the original citation, filings, and

a strong odor of an alcoholic beverage coming from appellant. The officer testified that appellant had difficulty in retrieving his license from his wallet. Appellant stated that he had been at the Back Porch Saloon in West Chester and had consumed one 12-ounce beer. Suspecting that appellant was under the influence of alcohol, the officer asked appellant to step out of the vehicle and conducted four field sobriety tests: the horizontal gaze nystagmus ("HGN"), walk-and-turn, one-legged stand, and a finger count test.

{¶3} Based upon the results of the tests, which indicated that appellant was under the influence, the officer arrested appellant and transported him to the police department. At the police department, appellant agreed to submit to a breathalyzer. The officer testified that appellant attempted to "manipulate" the test by only puffing his cheeks and not blowing into the machine. The officer instructed appellant that he must blow into the machine to secure an accurate reading, but appellant would only blow temporarily until the machine would make a beeping sound and then stop. This conduct occurred for the three minutes permitted by the machine to complete the test. The officer stopped the test and marked it as a refusal. Appellant requested another opportunity to perform the test, but the officer refused.

{¶4} Appellant was charged with operating a motor vehicle under the influence in violation of R.C. 4511.19(A)(1)(a) and speeding in violation of R.C. 4511.21. Appellant's trial counsel filed a motion to suppress and a hearing was scheduled for July 10, 2009. On the date of hearing, appellant's counsel asked to withdraw from representation. Counsel indicated that the state offered to reduce the OVI charge in exchange for appellant's guilty plea. Counsel also stated that appellant had "barely paid any of the initial fee that was quoted" for representation and they "had a disagreement

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orders at the trial level identify appellant by the surname "Annor."

as to how the case should proceed. I think reckless operation that is being offered is a reasonable result." Counsel then asked for a continuance so that appellant could secure new counsel. The trial court permitted counsel to withdraw and the matter was scheduled for a bench trial to be held on August 28, 2009. On that date, appellant was represented by new counsel and the matter proceeded to a bench trial.

{¶5} Following the testimony of Officer Frey on behalf of the state and appellant's testimony on his own behalf, the trial court found appellant guilty as charged. Appellant was sentenced to 180 days in jail with 177 suspended, a $1,000 fine with $500 suspended, court costs, and a driver's license suspension of 180 days. Appellant timely appeals, raising four assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "APPELLANT NATHANIEL ANNAR [sic] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, WHICH DENIAL RESULTED IN PREJUDICE."

{¶8} In his first assignment of error, appellant argues his trial counsel was ineffective. Appellant complains that his first trial counsel was ineffective for withdrawing from representation. Appellant argues that counsel failed to present a reason under the Rules of Professional Conduct to withdraw, there is no indication in the record that appellant was given prior notice of his intent to withdraw, and that appellant was prejudiced because the motion to suppress was never heard by the trial court. In addition, appellant argues his second trial counsel was ineffective for failing to pursue the motion to suppress and make a Crim.R. 29 motion for acquittal at any stage of the proceedings.

{¶9} In an ineffective assistance of counsel claim, a defendant must (1) demonstrate that his counsel's performance fell below an objective standard of reasonable representation, and if so (2) show that he was prejudiced by such deficient performance, i.e., that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington* (1984), 466 U.S. 668, 687-694, 104 S.Ct. 2052; *State v. Raleigh*, Clermont App. Nos. CA2009-08-046, CA2009-08-047, 2010-Ohio-2966, ¶13.

Attorney Withdrawal from Representation

{¶10} Termination of representation by an attorney is governed by Prof.Cond.R. 1.16. Subsection (b) of the rule provides in pertinent part, "[s]ubject to divisions (c), (d), and (e) of this rule, a lawyer may withdraw from the representation of a client if * * *: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; * * * (5) the client fails *substantially* to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given *reasonable* warning that the lawyer will withdraw unless the obligation is fulfilled; * * *." (Emphasis sic.)

{¶11} We find no evidence that the performance of appellant's first counsel fell below an objective standard of reasonable representation. At the hearing, appellant's first trial counsel presented reasons in support of the withdrawal. Counsel indicated appellant had "barely paid any of the initial fee that was quoted" for representation. Additionally, counsel stated the prosecution had offered a plea deal to reduce the OVI charge. Counsel remarked that he and appellant "had a disagreement as to how the case should proceed. I think reckless operation that is being offered is a reasonable result."

{¶12} The record indicates that appellant was aware of counsel's intent to withdraw from representation. Counsel explained, "Mr. Annar [sic] had indicated a

request for a, to me, ask the court for a continuance I guess so he can get new counsel." Appellant was present at the hearing when counsel sought to withdraw and made no objection nor disputed counsel's motion to withdraw.

{¶13} Moreover, appellant was not prejudiced by counsel's withdrawal. Counsel requested and secured a continuance of the matter on appellant's behalf before withdrawing from representation. Further, appellant was given 48 days to secure new counsel and did obtain new counsel.

Motion to Suppress

{¶14} With regard to the motion to suppress, appellant argues that he was prejudiced by his first trial counsel because counsel withdrew from representation before presenting argument in favor of the motion. Likewise, appellant argues his second trial counsel was ineffective for failing to pursue the motion. Appellant argues the motion was meritorious and he was prejudiced by counsels' failure to pursue the motion.

{¶15} In order to prevail on a claim of ineffective assistance of counsel in a case involving a failure to make a motion on behalf of a defendant, the defendant must show "(1) that the motion * * * was meritorious, and (2) that there was a reasonable probability that the verdict would have been different had the motion been made[.]" *Raleigh* at ¶14, quoting *State v. Kring*, Franklin App. No. 07AP-610, 2008-Ohio-3290, ¶55.

{¶16} In his argument, appellant only challenges the evidence relating to the HGN test. Appellant argues that the state failed to demonstrate a proper foundation for the officer's testimony regarding the HGN test and, if the motion would have been pursued, the testimony relating to the HGN test would have been suppressed. Appellant urges that the remaining evidence against him is "slight" and, without testimony of the HGN test, the evidence would be insufficient to support his conviction.

{¶17} Appellant submits the Ohio Supreme Court's decision in *State v. Bresson*

(1990), 51 Ohio St.3d 123. The *Bresson* court held that "results of the [horizontal gaze nystagmus] test are admissible so long as the proper foundation has been shown both as to the officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test." Id. at 128. Appellant suggests that, unlike the officer in *Bresson*, Officer Frey's testimony at trial was insufficient because he did not explain the content of his training or experience to conduct the HGN test, never described the phenomenon of "nystagmus," never used the term "nystagmus" in his testimony, never explained the correlation between alcohol consumption and the "indicators" that he observed, and never explained the "indicators" he observed.

{¶18} After reviewing the officer's testimony regarding the HGN test, appellant's complaints appear valid. The officer's foundational testimony regarding his training and ability to administer the HGN test was virtually nonexistent. Moreover, the officer failed to explain nystagmus and the indicators he observed of appellant's impairment during the test. However, appellant's counsel failed to object to these omissions at trial. If counsel would have objected to the testimony for failure to present a proper foundation, the prosecution would have had an opportunity to further question the officer for foundational purposes. As a result, it is unclear whether the prosecution would have established a proper foundation if given the opportunity to do so. Nevertheless, although the testimony relating to the HGN test appears deficient and would arguably require suppression in its current form, we cannot say that the outcome of trial would have been different if the evidence had been suppressed.

{¶19} The state in this case presented significant evidence, in addition to the HGN results, to support appellant's conviction. After initiating the traffic stop of appellant's vehicle, Officer Frey approached the vehicle and "immediately smelled a strong odor of an alcoholic beverage coming from Mr. Annar [sic]." Appellant admitted

that he had consumed alcohol, i.e., a 12-ounce beer. According to the officer, appellant had a difficult time retrieving his license and registration, stating that appellant "was fumbling around with it." The officer conducted three field sobriety tests in addition to the HGN test: the walk-and-turn, the one-legged stand, and a finger count test. In each test, the officer observed "indicators" of impairment. Appellant does not contest the validity of these tests in his brief. The state may show impaired driving ability by relying on physiological factors such as slurred speech, bloodshot eyes, odor of alcohol, and coordination tests to demonstrate that physical and mental ability to drive is impaired. *State v. Evans*, Warren App. No. CA2009-08-116, 2010-Ohio-4402, ¶22. Based upon foregoing, we find sufficient evidence to convict appellant of OVI and, as a result, appellant suffered no prejudice by admitting the results of the HGN test at trial.

Crim.R. 29 Motion

{¶20} A Crim.R. 29 motion is asserted to test the sufficiency of the evidence. A trial court is required to order an acquittal of "one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A). See, also, *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263. When reviewing a case to determine if the record contains sufficient evidence to support a criminal conviction, the court must "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶21} The failure to assert a Crim.R. 29 motion is not, per se, ineffective

assistance of counsel. See *Defiance v. Cannon* (1990) 70 Ohio App.3d 821, 826-827; *State v. Shaffer*, Portage App. No. 2002-P-0133, 2006-Ohio-336, ¶33; and *State v. Moody*, Licking App. No. 09 CA 90, 2010-Ohio-3272. Moreover, failure to assert a Crim.R. 29 motion during a bench trial does not prevent a defendant from submitting a sufficiency argument on appeal. See *State v. Massie*, Guernsey App. No. 05CA000027, 2006-Ohio-1515, ¶23; *Dayton v. Rogers* (1979), 60 Ohio St.2d 162, 163, overruled on other grounds; *State v. Lazzaro*, 76 Ohio St.3d 261, 266, 1996-Ohio-397. Trial counsel was not ineffective in this case for failing to move for acquittal under Crim.R. 29 because, as noted above, sufficient evidence was presented to support appellant's conviction. Any such motion would have been futile. *State v. Clellan*, Franklin App. No. 09AP-1043, 2010-Ohio-3841, ¶32.

{¶22} Appellant's first assignment of error is overruled.

{¶23} Assignment of Error No. 2:

{¶24} "THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT IN PERMITTING TRIAL COUNSEL TO WITHDRAW FROM REPRESENTATION."

{¶25} In his second assignment of error, appellant argues the trial court erred by allowing appellant's first trial counsel to withdraw because there is no evidence that appellant was given prior notice of counsel's intent to withdraw and the court did not take steps to ensure compliance with the applicable rules of attorney conduct.

{¶26} A trial court has discretion to grant an attorney's motion to withdraw from representation. See *State v. Deal* (1969), 17 Ohio St.2d 17. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *State v. Atkinson*, Warren App. No. CA2009-10-129, 2010-Ohio-2825, ¶7. However, before granting the motion to withdraw, the trial court has a duty to ensure that the mandates of

the Rules of Professional Conduct are followed. See *Wilson v. Wilson*, 154 Ohio App.3d 454, 2003-Ohio-4474, ¶5, citing *Bennett v. Bennett* (1993), 86 Ohio App.3d 343.

{¶27} After review of the record, we find no abuse by the trial court in allowing appellant's first trial counsel to withdraw from representation. In making his oral motion to withdraw, counsel listed multiple reasons in favor of terminating representation consistent with the Rules of Professional Conduct. Counsel indicated that he and appellant disagreed regarding how to proceed in the matter following appellant's rejection of the plea agreement and appellant had failed to meet his financial obligations under their representation agreement. See Prof.Cond.R. 1.16(b)(4) and (5). Implicit from the transcript, appellant was aware of counsel's intent to withdraw, having instructed counsel to request a continuance. Further, appellant made no objection when counsel sought to terminate the representation. Trial court ensured that the withdrawal would not create any material adverse effect by granting a continuance, thereby providing appellant ample opportunity to secure new counsel. See id. at (b)(1).

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

{¶29} Assignment of Error No. 3:

{¶30} "THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, BY FAILING TO RESCHEDULE A SUPPRESSION HEARING, FAILING TO CONDUCT A HEARING ON THE PENDING MOTION TO SUPPRESS EVIDENCE AND FAILING TO RENDER A DECISION UPON THE ISSUES RAISED IN SAID MOTION TO SUPPRESS EVIDENCE."

{¶31} Appellant argues in his third assignment of error that the trial court erred by failing to conduct the requested motion to suppress hearing.

{¶32} In the case at bar, appellant's first counsel filed a motion to suppress on April 8, 2009. A hearing was scheduled for July 10, 2009, where, instead of conducting a hearing on the motion, appellant's counsel sought to withdraw and requested continuance of the matter. A continuance was granted and a bench trial was scheduled for August 28, 2009. Appellant failed to object at the trial level when the court proceeded with trial rather than hold a hearing on the motion to suppress. Therefore, appellant has waived all but plain error.

{¶33} "[P]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52. Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Cox*, Butler App. No. CA2005-12-513, 2006-Ohio-6075, at ¶21, citing *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50. "[N]otice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id.

{¶34} As explained above, appellant was not prejudiced by failure to conduct the motion to suppress hearing. Although the HGN test arguably may have been suppressed, substantial evidence remained to convict appellant of OVI. Therefore, any failure by the court to conduct the requested hearing was harmless.

{¶35} Appellant's third assignment of error is overruled.

{¶36} Assignment of Error No. 4:

{¶37} "THE TRIAL COURT COMMITTED PLAIN ERR [sic] TO THE PREJUDICE OF APPELLANT WHEN IT ALLOWED THE ADMISSION OF TESTIMONY REGARDING APPELLANT'S PERFORMANCE ON AN HGN TEST."

{¶38} In his final assignment of error, appellant argues the trial court erred by allowing testimony of appellant's performance during the HGN test. Having already concluded that the outcome of trial would not have been different with the exclusion of the HGN test, we find no plain error and overrule appellant's fourth assignment of error.

{¶39} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.