[Cite as *State v. Oberding*, 2012-Ohio-3047.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-09-101
	:	O P I N I O N
- vs -		7/2/2012
	:	
THOMAS M. OBERDING,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CR27339

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Thomas G. Eagle, 3386 North State Route 123, Lebanon, Ohio 45036, for defendant-appellant

PIPER, J.

{¶ 1} Defendant-appellant, Thomas Oberding, appeals his conviction and sentence in the Warren County Court of Common Pleas for breaking and entering.

{¶ 2} On May 5, 2007, Detective Ron Robertson investigated a reported break-in at the Bonnie Lynn Bakery in Loveland, Ohio. The perpetrator was apparently injured during the break-in, and police found blood at the scene. Robertson's partner collected a sample of

the blood, which was sent to the crime laboratory for analysis. At the time of the blood-sample collection, police had no known suspects. When a forensic scientist at the crime laboratory tested the sample, she was able to determine that the blood was from a male, but the DNA did not match anyone already in the database. The blood sample was therefore linked to a "John Doe warrant" in the Combined DNA Index System (CODIS) database so that it could be tracked by law enforcement.[1]

{¶ 3} On May 6, 2007, Sergeant Doug Wheatley was investigating a theft, and observed Oberding walking near the scene of the crime. Sergeant Wheatley tried to make contact with Oberding, who was highly intoxicated at the time. However, Oberding fled on foot and ran into a wooded area. When he emerged from the woods, police were forced to tase Oberding because he refused to cooperate. When Oberding fell as a result of being tased, he broke his nose and officers took him to the hospital to treat his wounds. Oberding was also bleeding from abrasions and the prong marks from the taser.

{¶ 4} While Oberding was being cleaned, an officer collected a swab that had Oberding's blood on it before hospital personnel discarded it. The swab was sent to the crime laboratory for analysis. Although the swab of Oberding's blood was eventually matched to that of the sample taken from the bakery, the state did not bring charges for breaking and entering against Oberding.

{¶ 5} In June 2010, Officer Quillan Short began investigating a possible sexual assault. The alleged victim went to the hospital, and a nurse completed a rape kit. The kit, which contained DNA samples from the alleged perpetrator, was sent to the crime laboratory

1. "CODIS is a computerized program designed to house DNA profiles from convicted offenders, forensic samples, suspects, missing persons, unidentified remains and relatives of missing persons in various searchable databases." *State v. Emerson,* 192 Ohio App.3d 446, 2011-Ohio-593, ¶ 10 (8th Dist.), citing Baringer, *CODIS Methods Manual* (5th Rev.2009). CODIS has three levels, local, state, and national, with the county controlling the local database, the Ohio Bureau of Criminal Identification and Investigation controlling the state database, and the Federal Bureau of Investigation maintaining the federal. *Id.*

for testing. The day after the assault, Officer Short received notice that Oberding had come to the police station to discuss his involvement in a sexual encounter with the victim. Officer Short returned to the police station and spoke with Oberding, who stated that he had consensual sex with the victim under a bridge near a bar that he and the victim had patronized. Officer Short asked Oberding if he would be willing to provide a DNA sample. Oberding agreed, signed an authorization form, and permitted Officer Short to take the sample. Officer Short swabbed the inside of Oberding's mouth, and sent the buccal sample to the crime laboratory for testing. Oberding was never placed into custody or handcuffed, nor was he ordered to provide the sample. Oberding was permitted to leave the police station immediately after writing his statement regarding the sexual encounter.

{¶ 6} Officer Short was advised that Oberding's sample matched that of the DNA samples taken from the victim, as well as the John Doe blood sample taken from the bakery. Oberding, who was not charged with any crimes related to the sexual offense, was charged with breaking and entering. Oberding filed a motion to suppress, claiming that police illegally seized the blood sample from the hospital in 2007, and that officers should have only used the DNA sample he provided at the police station in relation to the sex offense investigation. After a hearing on the matter, the trial court denied the motion to suppress. Oberding pled no contest to the breaking and entering charge, and the trial court sentenced Oberding to community control. Oberding now appeals his conviction and sentence, raising the following assignments of error.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS.

{¶ 9} Oberding argues in his first assignment of error that the trial court erred by denying his motion to suppress. Oberding argues first that the blood sample taken from the

hospital was an illegal seizure in violation of his Fourth Amendment rights, and second, that officers again violated his constitutional rights by failing to limit the use of his DNA sample in 2010 to the sexual assault investigation. While Oberding and the state have presented this court with extensive argument as to whether a patient has a reasonable expectation of privacy in materials used at a hospital for treatment, we see no need to analyze this issue because the sample was never used against Oberding.

{¶ 10} The record is clear that charges were not brought against Oberding based on the blood sample taken from the hospital on the day he was treated in 2007. Nor does the record indicate that Oberding's no contest plea in 2011 was predicated on the collection of the blood sample taken from the hospital. Instead, Oberding's no contest plea, while not an admission of his guilt, was an admission of the truth of the facts alleged in the indictment. *See* Crim.R. 11(B)(2). By way of the no contest plea, therefore, Oberding admitted that he "did by force, stealth, or deception, trespass, to wit: without privilege to do so, knowingly enter or remain on the land or premises of another, in an occupied structure with purpose to commit therein any theft offense * * * or any felony * * *."

{¶ 11} The charges were not brought against Oberding for the breaking and entering until he provided his DNA sample in 2010. Therefore, whether the blood sample from 2007 was taken in violation of Oberding's Fourth Amendment rights is immaterial. Instead, we focus our analysis on whether the police could legally use Oberding's DNA sample for purposes other than the investigation into the possible sexual assault, or whether such use violated Oberding's constitutional rights so that the motion to suppress should have been granted.

{¶ 12} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and

evaluate witness credibility. *Id.* Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

{¶ 13} The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." A search is not unreasonable according to the Fourth Amendment, as well as Section 14 Article 1 of the Ohio Constitution, if it is based on a search warrant that is supported by probable cause. However, an exception to the warrant requirement exists when a person waives his Fourth Amendment protection by consenting to a warrantless search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041 (1973).

{¶ 14} "The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances.'" *Ohio v. Robinette*, 519 U.S. 33, 40, 117 S.Ct. 417 (1996), citing *Schneckloth,* 412 U.S. at 248-49. A warrantless search based upon a suspect's consent while not in custody is valid if the "consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth,* 412 U.S. at 248. The state has the burden to prove by clear and convincing evidence that a person's consent was voluntarily given. *State v. Jackson*, 110 Ohio App.3d 137, 142 (6th Dist.1996), citing *Schneckloth,* 412 U.S. at 248-49.

{¶ 15} The trial court determined, and we agree, that Oberding voluntarily gave his DNA sample, thereby consenting to a warrantless search and seizure. Oberding voluntarily

went to the police station, without any provocation by law enforcement. Oberding then asked to speak to an investigator about the sexual assault issue, and chose to speak to Officer Short about his involvement.

{¶ 16} During the motion to suppress hearing, Officer Short testified that Oberding gave the sample in the police station's public reporting room, that the door to the room was not locked, that no other law enforcement officer was present when he took Oberding's sample, and that Oberding was not arrested or placed into custody in any manner. Nor was Oberding handcuffed or ordered to provide the sample. Moreover, Oberding signed a written consent form, authorizing the collection of his DNA. Officer Short also testified that he informed Oberding that his DNA sample "would be used through the crime lab to check with our victim," and for purpose of "what the crime lab uses."

{¶ 17} Based on the totality of the circumstances, Oberding gave his consent voluntarily, as his consent was not the result of duress or coercion. Oberding was told that his DNA sample would be tested and used by the crime laboratory, and the sample was in fact tested and used by the crime laboratory. The fact that Oberding's sample matched that of the John Doe sample from the bakery robbery did not render his consent involuntary.

{¶ 18} The facts of this case are similar to those in *State v. Whitfield*, 3rd Dist. No. 1-04-80, 2005-Ohio-2255, in which the Third District Court of Appeals affirmed the trial court's denial of Whitfield's motion to suppress. Whitfield had been under suspicion for a 2001 rape in Lima, Ohio, and officers asked him to submit a DNA sample as part of their investigation. Whitfield gave a DNA sample to law enforcement on two separate occasions, and such identifying information was maintained in the database. Approximately 20 months later, a woman was raped, and her rape kit was sent to the crime laboratory for testing. The next year, another woman was raped, and her rape kit was also sent for testing. The two rape kits were tested, and DNA recovered from the victims matched that of Whitfield's 2001 sample.

{¶ 19} Whitfield was arrested for multiple counts of burglary and rape, and filed a motion to suppress, claiming that he had not authorized law enforcement to use his DNA for any purpose other than in connection with the 2001 rape investigation. The trial court overruled Whitfield's motion to suppress, and the Third District affirmed that decision. The court analyzed whether Whitfield had given his DNA sample voluntarily in 2001, and found that he had. Therefore, the court held that the state could use evidence that was collected and held in connection with the earlier case because Whitfield gave his sample voluntarily.

{¶ 20} While other Ohio courts have not analyzed this issue at length, courts outside this state have determined that once a suspect's DNA sample is obtained lawfully by police, that sample can be used for other purposes separate from an investigation of the crime for which the sample was first procured.

{¶ 21} The Indiana Supreme Court determined that "once DNA is used to create a profile, the profile becomes the property of the Crime Lab. Thus, [a defendant] had no possessory or ownership interest in it. Nor does society recognize an expectation of privacy in records made for public purposes from legitimately obtained samples." *Smith v. State*, 744 N.E.2d 437, 439 (Ind.2001). A New York appellate court determined that,

> it is also clear that once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person.

People v. King, 232 A.D.2d 111, 117-118 (N.Y.App.1997). We agree with this analysis.

{¶ 22} Law enforcement is not under any constitutional obligation to explain to a suspect every possible way in which DNA that is voluntarily given can be used. Nor does legal collection and storage become unlawful through the passage of time or because subsequent samples may be tested against it. The record is void of any indication that

Oberding attempted to limit the use of his sample in any way, or that he attempted to exert any control over the sample once his DNA left the inside of his cheek and was deposited on the swab. Instead, Oberding voluntarily gave his sample to Officer Short, he knew that the crime laboratory would run a comparison, and he cannot expect to claim any ownership or possessory right over the sample or how it was used.

{¶ 23} The state proved by clear and convincing evidence that Oberding's consent was voluntarily given. The testing and subsequent match to the John Doe sample from 2007 did not constitute a violation of Oberding's Fourth Amendment rights, and his first assignment of error is overruled.

{¶ 24} Assignment of Error No. 2:

{¶ 25} THE TRIAL COURT ERRED IN CONVICTING THE APPELLANT.

{¶ 26} Despite the vague wording of Oberding's second assignment of error, he argues that he was denied effective assistance of counsel because his trial counsel failed to file a motion to dismiss based on the preindictment delay.

{¶ 27} The Sixth Amendment pronounces an accused's right to effective assistance of counsel. Warning against the temptation to view counsel's actions in hindsight, the United States Supreme Court has stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential * * *." *Strickland v. Washington,* 466 U.S. 668, 689, 104 S.Ct. 2052 (1984). The court also stated that a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that a defendant must overcome "the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*., quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶ 28} Also within *Strickland*, the Supreme Court established a two-part test which requires an appellant to establish that first, "his trial counsel's performance was deficient; and

second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, 12th Dist. No. CA2005-12-035, 2007-Ohio-915, ¶ 33, citing *Strickland*.

{¶ 29} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S at 688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reviewing court need not address the deficiency issue if appellant was not sufficiently prejudiced by counsel's performance because the appellant must prove both prongs in order to establish ineffective assistance of counsel. *Id.* at 697.

{¶ 30} Oberding asserts that his trial counsel was ineffective for failing to file a motion to dismiss based on the amount of time that passed between the breaking and entering in 2007 until the indictment in March 2011. In order to establish an ineffective assistance claim pursuant to *Strickland*, therefore, Oberding is required to demonstrate that the trial court would have granted a motion to dismiss had his trial counsel filed one.

{¶ 31} The Ohio Supreme Court has concluded that the delay between the commission of an offense and an indictment, can, under certain circumstances, constitute a violation of due process of law guaranteed by the federal and state constitutions. *State v. Luck*, 15 Ohio St.3d 150 (1984), paragraph two of the syllabus. "To warrant a dismissal on the basis of preindictment delay, a defendant must present evidence establishing substantial prejudice." *State v. Walls,* 96 Ohio St.3d 437, 2002-Ohio-5059, ¶ 51.

> Any claim of prejudice, such as the death of a key witness, lost evidence, or faded memories, must be balanced against the other evidence in order to determine whether actual prejudice will be suffered by the defendant at trial. * * * If the court determines that the defendant will suffer actual prejudice at trial as a result of the delay in commencing prosecution, the court must then determine whether the reason for that delay is unjustifiable.

(Citations omitted.) *State v. Collins*, 118 Ohio App.3d 73, 76-77 (2nd Dist.1997). An unjustifiable delay may occur where it is undertaken intentionally to gain some tactical advantage over the defendant, or when the state is negligent in failing to actively investigate the case. *Id.* at 77.

{¶ 32} The United States Supreme Court has noted that some courts have generally found delays of a year or more "presumptively prejudicial" enough to require an inquiry into whether the defendant was prejudiced by the delay. *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686 (1992) at fn. 1. However, the *Doggett* court also stated that "the government may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down." *Id.* at 656. Therefore, the court concluded, "we attach great weight to such considerations when balancing them against the costs of going forward with a trial whose probative accuracy the passage of time has begun by degrees to throw into question." *Id.*

{¶ 33} The record is undisputed that the breaking and entering into the bakery occurred in 2007 and that Oberding was not indicted until 2011. However, Oberding has not demonstrated that he was prejudiced by the delay in any way. While Oberding relies heavily upon the Supreme Court's recognition that some courts find a one-year delay "presumptively prejudicial," the court did not set forth a bright-line test establishing per se prejudice after a year. Instead, the court recognized that there are considerations, such as law enforcement's need to build a case against the defendant, that warrant the passage of time between a crime and an indictment. If every defendant were intrinsically prejudiced by indictment after a year or more from the time of the crime, police would abandon every cold case investigation. We do not believe that the *Doggett* court meant for an inflexible application.

{¶ 34} The record does not indicate that the delay was undertaken intentionally to gain

some tactical advantage over Oberding, or that the state was negligent in failing to actively investigate the breaking and entering case. For whatever reason, the state did not feel confident that the blood swab taken from the hospital in 2007 was sufficient evidence to charge Oberding with the crime. Law enforcement, therefore, continued to build a case against him, and ultimately encountered evidence of Oberding's criminal culpability when he volunteered a sample of his DNA for testing in 2010.

{¶ 35} Oberding has not offered any reason why he was prejudiced by the delay, save his reliance on presumptive prejudice after a year. However, the mere passage of time does not demonstrate prejudice. See *State v. Triplett*, 78 Ohio St.3d 566, 1997-Ohio-182 (finding that appellant was not prejudiced by a 54-month delay between the time of her indictment and trial).

{¶ 36} Here, the charges were brought within the applicable six-year statute of limitations, and Oberding was not faced with death of witnesses, evidence lost, or faded memories that can otherwise call into question the state's case against a defendant. Instead, the DNA profile created from the blood left at the bakery by the intruder was stored securely in CODIS, and then scientifically matched to Oberding's voluntarily-submitted sample. The fact that the state's case was predicated upon DNA evidence, as well as Oberding's no-contest plea, greatly lessens the Supreme Court's concern regarding a trial "whose probative accuracy the passage of time has begun by degrees to throw into question." *Doggett* at 656.

{¶ 37} Having found that Oberding has failed to demonstrate that he suffered substantial prejudice because of the delay between his crime and the indictment, he has not shown that any motion to dismiss would have been granted. As such, we cannot say that Oberding received ineffective assistance of counsel, and his second assignment of error is overruled.

{¶ 38} Judgment affirmed.

POWELL, P.J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J., concurring separately.

{¶ 39} While I agree with the majority that Oberding has not demonstrated that his trial counsel was ineffective, I write separately to emphasize that Oberding's ineffective counsel claim is one controlled by the *Strickland* standard. According to that standard, Oberding was required to show that his counsel's representation was deficient and that he was prejudiced as a result of his trial counsel's errors. 466 U.S. at 694. Therefore, Oberding's argument is contingent upon a showing that the trial court would have granted a motion to dismiss based on preindictment delay, had one been filed. *Id.*; *Walls*, 2002-Ohio-5059. Oberding's argument fails unless he is able to overcome this "highly deferential" review standard set forth in *Strickland*. 466 U.S. at 689.

{¶ 40} The facts of this case demonstrate that a motion to dismiss for preindictment delay would not have been granted. In reaching this decision, we need not address the Supreme Court's decision in *Doggett*, or any extraneous case law, because Oberding failed to indicate any way in which he was prejudiced by the delay, and the record does not contain any suggestion of prejudice. As such, I would limit our analysis to a discussion of the facts as they apply to the *Strickland* standard, and determine that Oberding was not denied his right to the effective assistance of counsel.