

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	SUPREME COURT CASE
)	NO. 2008-1742
Appellee,)	
)	
vs,)	ON APPEAL FROM THE
)	COURT OF APPEALS,
DARRICK BARBEE)	NINTH APPELLATE
)	DISTRICT 07CA009183
Appellant)	
)	LORAIN COUNTY
)	COMMON PLEAS
)	COURT CASE NO.
)	04CR065296

MEMORANDUM OF APPELLEE IN
OPPOSITION TO JURISDICTION

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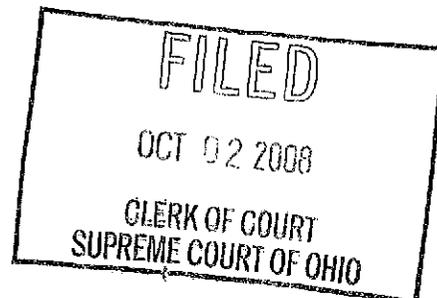


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**EXPLANATION OF WHY THIS CASE DOES NOT
INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This Honorable Court should not accept jurisdiction for the following reasons:

1. The decision of the Ninth Judicial District Court of Appeals to affirm Appellant's conviction and sentence created no injustice as Appellant's arguments were addressed by existing case law.
2. No issue or substantial constitutional question exists in the Appellant's appeal to this Honorable Court. The attempted appeal further presents no viable question of general public interest so as to warrant the exercise of this Court's jurisdiction.

STATEMENT OF THE CASE

On June 17, 2004, the Lorain County Grand Jury indicted Appellant on two (2) counts of Possession of Cocaine, violations of R.C. 2925.11, felonies of the first and second degree respectively degree with a major drug offender specification.

On October 19, 2005, Appellant filed a Motion to Suppress the discovery of illegal narcotics in the Appellant's vehicle because the seizure lacked reasonable suspicion or probable cause. A hearing was held before the trial court on January 9, 2006 and on March 20, 2006. On March 23, 2006, the trial court denied Appellant's Motion to Suppress.

On March 26, 2007, the matter proceeded to jury trial before the Honorable Raymond J. Ewers of the Lorain County Court of Common Pleas. It must be noted that the major drug offender specification was dismissed by the trial court in a discussion that occurred off the record. On March 27, 2007, the jury returned a guilty verdict as to both counts in the indictment.

On May 23, 2007, Appellant was sentenced to an aggregate term of seven (7) years incarceration. On June 22, 2007, Appellant filed notice of appeal with the Ninth District Court of Appeals and on November 13, 2007, filed his merit brief. On July 21, 2008, the Ninth District Court of Appeals affirmed Appellant's conviction and sentence. See State v. Barbee, 9th Dist. No. 07CA009183, 2008 Ohio 3587.

On September 5, 2008, Appellant filed a Notice of Appeal to this Honorable Court. Appellee now responds and urges this Court to decline jurisdiction over the instant matter.

STATEMENT OF FACTS

At the time of trial Trooper Menges was a veteran trooper with twelve (12) years of experience with the Ohio State Highway Patrol, OSP. (Supp. Tr. 7, 8); (Tr. 106). During his career with the OSP, Menges participated in a number of narcotics related arrests. (Supp. Tr. 8); (Tr. 107, 108, 109). On April 26, 2004, Menges was engaging in road patrol duties on the Ohio Turnpike, near the Oberlin Road area in Lorain County, Ohio. (Supp. Tr. 8); (Tr. 108, 110, 111). During his patrol, Menges observed a white Cadillac driving in front of him which had a non-functioning brake light and was following another vehicle too closely (Supp. Tr. 8)(Tr. 110). The Cadillac was approximately twenty (20) feet from the vehicle in front of it, traveling at a speed of sixty three (63) miles per hour. (Supp. Tr. 8, 9); (Tr. 110). Based on these traffic infractions committed in Menges' presence, Menges initiated a traffic stop. (Supp. Tr. 8, 9); (Tr. 110).

Menges approached the Cadillac and spoke with the driver, Appellant. (Supp. Tr. 9). Menges learned Appellant borrowed the vehicle from a friend and was driving from Detroit, Michigan to New Castle, Pennsylvania, where Appellant was to meet with his attorney, and to visit with some family. (Supp. Tr 9-11)(Tr. 111-114). Menges separately questioned the passenger of the vehicle. The passenger stated they were going to Pennsylvania to visit the passenger's brother and friends. (Supp. Tr. 10)(Tr. 112). Due to the inconsistent answers for the stated reason for the trip, Menges became suspicious and noticed the Appellant appeared nervous.

While Menges wrote out warning slips for traffic violations, he summoned Tpr Farabaugh the K-9 officer to the scene. (Supp. Tr. 11, 15); (Tr. 114, 115). When Farabaugh arrived with his drug-sniffing dog, he walked the dog around the Cadillac to see if the dog would alert to the presence of narcotics. (Supp. Tr. 15).

Menges informed the Appellant that the K-9 officer would be walking his dog around the car. (Tr. 146). While Farabaugh and his dog circled the vehicle, Menges testified Appellant seemed nervous and he noticed Appellant lick his lips and beads of sweat formed on the Appellant's forehead. (Tr. 115, 116, 117). Menges further testified that Appellant reacted physically to the news, specifically Appellant's mouth appeared to go dry and sweat began to bead off his forehead. (Tr. 147).

Farabaugh walked his dog, Caesar, around the vehicle. Farabaugh testified that, before he could begin his normal search pattern, Caesar pulled him toward the open passenger side window. (Supp. Tr. 29). The trooper testified that this behavior change indicates the dog has detected an odor of illegal drugs and he is "working through it." The trooper then began walking the search pattern around the car, and Caesar alerted to the trunk of the vehicle and at the open driver's window by scratching and pawing into the window. (Supp. Tr. 30, 31, 32). The entire dog sniff lasted less than one minute. (Supp. Tr. 32); (Tr. 161).

After the dog alerted to the presence of narcotics in the vehicle, Menges testified that he advised Appellant of the results and told him that the officers were preparing to search it. Menges asked Appellant whether there were any drugs in the vehicle, and Appellant responded, "huh-uh. . .[H]e didn't answer [] no and he didn't answer [] yes." (Tr. 118). The troopers searched the vehicle and found two (2) Ziplock bags of cocaine concealed within speakers in the trunk of the Cadillac. The bags of cocaine were encased in plastic wrap, Vaseline, and fabric softener sheets. (Tr. 122, 123, 125, 126, 127, 128). One (1) bag contained two hundred forty eight (248) grams of cocaine powder, and the second bag contained two hundred forty nine (249) grams of crack cocaine. (Tr. 128, 129, 130).

LAW & ARGUMENT

RESPONSE TO FIRST PROPOSITION OF LAW

I. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY OF POLICE OBSERVATIONS AS EVIDENCE OF DRUG POSSESSION, AND DID NOT VIOLATE THE APPELLANT'S RIGHT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant contends that Appellee used Appellant's pre-arrest silence as substantive evidence of guilt in violation of Appellant's Fifth Amendment privilege against self-incrimination. This assertion is without merit because the trial court properly permitted the police officer to testify as to his personal observations and his opinion of Appellant's behavior prior to his arrest.

The decision whether to admit or exclude evidence rests within the sound discretion of the trial court and its decision in such matters will not be reversed on appeal absent an abuse of discretion and material prejudice. State v. Apanovitch (1987), 33 Ohio St.3d 19, 25, 514 N.E.2d 394. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. State v. Adams (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

Ohio Evid. R. 701 allows opinion testimony of lay witnesses and provides:

"If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."

Based on Evid. R. 701, the lay testimony must be, "(1) 'rationally based on the perception of the witness,' i.e. the witness must have firsthand knowledge of the subject of his testimony and the opinion must be one that a rational person would form on the basis of the observed facts; and (2) 'helpful,' i.e., it must aid the trier of fact in understanding the testimony of the witness or in determining a fact in issue." State v. Jordan, 5th Dist. No. CT2003-0029, 2004 Ohio 1211, citing Lee v. Baldwin (1987), 35 Ohio App.3d 47, 49. Furthermore, a police officer may testify to matters

within his experience and to his own observations which may assist the trier of fact in understanding other testimony. State v. Jells (1990), 53 Ohio St.3d 22, 559 N.E.2d 464.

Appellant asserts that the appellate counsel impermissibly upheld the trial court admittance of evidence of Appellant's pre-arrest silence as circumstantial evidence that Appellant had knowledge of the existence of drugs in his car, and relies on State v. Leach (2004), 102 Ohio St.3d 135, 2004 Ohio 2147, to assert this violated his Fifth Amendment privilege against self-incrimination under the Constitution.

In Leach, the Ohio Supreme Court held that the use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. Leach, at 135, 141. In Leach, this Court reasoned that "[a]llowing the use of pre-arrest silence, evidenced here by the pre-arrest invocation of the right to counsel, as substantive evidence of guilt in the state's case in chief undermines the very protections the Fifth Amendment was designed to provide." Id at 141. In Leach the defendant informed the police he wanted to speak to an attorney prior to being interviewed by the police. The state impermissibly used the defendant's statement that he wanted to speak to his attorney in its opening statement and elicited testimony regarding the defendant's statement that he wanted to speak to an attorney, in an improper effort to lead the jury to the conclusion that innocent people speak to the police to clear up misunderstandings, while guilty people consult their attorneys. Id at 142.

In the case at hand, Appellant's reliance on Leach is unfounded because Appellant did not make any statement invoking his right to remain silent or requesting to speak to an attorney that Appellee used to argue that the assertion of his rights was evidence of Appellant's guilt. Rather, Appellee properly elicited evidence pursuant to Evid. R. 701 that showed the police officer properly testified to his observations of Appellant's behavior, the investigative questions posed by the trooper to Appellant during the traffic stop, and Appellant's failure to answer the questions in a

coherent manner. This evidence along coupled with the inconsistent reasons given for travel by Appellant, Appellant's nervousness exhibited by the licking of lips and beads of sweat, was evidence of drug activity and was properly admitted as circumstantial evidence that Appellant had knowledge of the existence of drugs in his car.

In State v. Jordan, supra, the court found that testimony of an officer concerning the types of activities that indicate drug activity were properly admitted pursuant to Evid. R. 701. Jordan at P24. The court reasoned that to a person trained in law enforcement, these indicators learned through training suggest drug activity and that the officer's testimony concerning these indicators was helpful to explain to the jury why the officer detained and continued to investigate the defendant. Id. At P24.

In the case at hand, Appellant was convicted of Possession of Cocaine. R.C. 2925.11 provides in relevant part:

No person shall knowingly obtain, possess, or use a controlled substance.

2901.22(B) provides as follows:

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"Whether a person acts knowingly can only be determined, absent a defendant's admission, from the surrounding facts and circumstances, including the doing of the act itself." State v. Myers, 5th Dist. No. 2006-CA-00141, 2006 Ohio 7018, see also State v. Huff (2001), 145 Ohio App.3d 555. The facts of this case overwhelmingly point to the conclusion that Appellant knowingly possessed a controlled substance, cocaine, on April 26, 2004.

The evidence presented at trial reveals that Appellant was operating a 1994 Cadillac that belonged to his friend on April 26, 2004 on the Ohio Turnpike in Lorain County, Ohio. Appellant had a passenger with him and the pair was allegedly traveling from Michigan to Pennsylvania.

Appellant committed traffic violations en route and was stopped by Trooper Menges of the OSP. A narcotics sniffing canine alerted to Appellant's vehicle. The vehicle was searched and cocaine and crack cocaine were discovered in the trunk of the vehicle wrapped in plastic wrap, smeared with Vaseline, and shrouded in fabric softener sheets. When informed of the canine search of the vehicle, Appellant began to lick his lips and sweat profusely, but did not verbally react. (Tr. 146, 147). Furthermore, Tpr Menges stated that based on his training and experience, a person's mouth goes dry at the point of a canine sniff for only one (1) reason. (Tr. 150, 151).

As this Honorable Court is no doubt aware, possession need not be actual, but may be constructive. State v. Figueroa, 9th Dist. No. 22208, 2005 Ohio 1132, citing, State v. Butler (1989), 42 Ohio St.3d 174. Constructive possession occurs when a person knowingly exercises dominion or control over the item, even without physical possession. State v. Figueroa, 9th Dist. No. 22208, 2005 Ohio 1132, citing, State v. Hankerson (1982), 70 Ohio St.2d 87. Dominion and control may be proven by circumstantial evidence alone. State v. Taylor (1997), 78 Ohio St.3d 15, 676 N.E.2d 82. Furthermore, constructive possession may be inferred from the drugs' presence in a usable form and in close proximity to the defendant. State v. Figueroa, 9th Dist. No. 22208, 2005 Ohio 1132, citing, State v. Thomas, 9th Dist No. 21251, 2003 Ohio 1479. Here, the cocaine and crack cocaine were present in usable form in a vehicle Appellant was entrusted to drive to another state. Since Appellant possessed the keys to operate the Cadillac, Appellant clearly had access to the trunk of the Cadillac.

Since Appellee properly elicited evidence pursuant to Evid. R. 701 and did not violate Appellant's Fifth Amendment rights, this Honorable Court should decline jurisdiction over Appellant's First Proposition of Law.

RESPONSE TO SECOND AND THIRD PROPOSITIONS OF LAW

II. APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Appellant contends that he received ineffective assistance of trial counsel due to the trial attorney's failure to object to the use of Appellant's pre-arrest silence, which Appellant believes the State used to infer Appellant's guilt to the possession of cocaine charges. Appellant's assertion lacks merit.

The two-part test from Strickland v. Washington (1984), 466 U.S. 668, is the appropriate standard to determine whether a defendant has received the ineffective assistance of counsel. State v. Goff (2003), 98 Ohio St. 3d 327; State v. Sheppard (2001), 91 Ohio St.3d 329; State v. Spivey (1998), 84 Ohio St.3d 24.

A claim of ineffective assistance of counsel requires a two- part analysis. The first inquiry is whether counsels' performance fell below an objective standard of reasonable representation involving a substantial violation of any defense counsel's essential duties to appellant. State v. Young (April 19, 1999), 5th Dist. No. 30-CA-85, citing, Lockhart v. Fretwell (1993), 506 U.S. 364; Strickland, 466 U.S. at 687, State v. Bradley (1989), 42 Ohio St.3d 136. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. Id. Because of the inherent difficulties in making the first determination, a court must indulge in a strong presumption that the challenged action might be considered sound trial strategy. State v. Bird (1998), 81 Ohio St.3d 582; Strickland 466 U.S. at 689; State v. Lytle (1976), 48 Ohio St.2d 391; State v. Thompson (1987), 33 Ohio St.3d 1; State v. Hamblin (1988), 37 Ohio St.3d 153; State v. Abuhilwa (March 29, 1995), 9th Dist. No. 16787. [D]ebatable trial tactics *** do not constitute a deprivation of effective counsel. State v.

Phillips (1995), 74 Ohio St.3d 72; State v. Clayton (1980), 62 Ohio St.2d 45; State v. Sherman (June 25, 1999), 11th Dist. No. 98-P-0009.

A defendant is not deprived of effective assistance of counsel when counsel chooses, for reasons of strategy, not to pursue every possible trial tactic. State v. Brown (1988), 38 Ohio St.3d 305; State v. Phillips (1995), 74 Ohio St.3d 72. See also State v. Miller, 9th Dist. No. 02CA0034, 2002 Ohio 7001; State v. Smith, Jr. (November 8, 2000), 9th Dist. No. 99CA007399. The end result of tactical trial decisions need not be positive in order for counsel to be considered effective. State v. Heer, Jr. (September 24, 1998), 10th Dist. No. 97APA12-1670, citing State v. Awkal (1996), 79 Ohio St.3d 324.

The second part of the test requires that Appellant be prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Bradley (1989), 42 Ohio St.3d 136. See also Strickland v. Washington (1984), 466 U.S. 668.

In the case at bar, Appellant received effective assistance of counsel because Appellant's pre-arrest silence was not used to infer guilt, in fact, Appellant's pre-arrest silence was not used as evidence at all. The testimony of Tpr. Menges regarding Appellant's lack of response to his questions was an observation of the witness under Evid. R. 701. In addition, Appellant's silence was used in to show Appellant's visibly observed nervous behavior, which was evidenced by Appellant licking his lips and sweat beading on his head when Appellant was informed a drug dog was to be used. The totality of this evidence, along with the inconsistent reasons for travel, provided circumstantial evidence that Appellant had knowledge of the drugs in his vehicle. Furthermore, Appellant's pre-arrest silence did not result from the assertion of his right to speak to an attorney and the silence was not used to infer Appellant was guilty because he wanted to speak to an attorney.

Counsel's decisions with respect to filing motions and raising objections and defenses are matters of trial strategy and are afforded significant latitude. State v. Robinson, 7th Dist. No. 00 CA 190, 2002 Ohio 6734, citing, State v. Netherland (1999), 132 Ohio App.3d 252. Moreover, counsel is not required to perform a futile act. State v. McCuller, 8th Dist. No. 86592, 2006 Ohio 302, citing, State v. Martin (1983), 20 Ohio App.3d 172. Here, asserting Appellant's pre-arrest silence was used to infer guilt would have been futile and trial counsel cannot be said to have acted ineffectively for failing to do so. Appellant's second proposition of law has no merit. As such, this Honorable Court should decline jurisdiction over the instant matter

III. APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellant contends that he received ineffective assistance of appellate counsel due to the raise a constitutional error on direct appeal by failing to raise the issue that Appellant's pre-arrest silence was used to infer his guilt. Appellant's assertion lacks merit.

The United States Supreme Court held that "**** counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant." Jones v. Barnes (1983), 463 U.S. 745. The Court noted that experienced advocates should weed out the weaker arguments and focus on the strongest claims for appeal. Id.

Appellate counsel may discount the chance of success of weak issues and choose to spend time on stronger issues for appeal without being ineffective. Appellate counsel's refusal to raise weak arguments does not create a genuine issue of ineffective assistance. State v. Allen (1996), 77 Ohio St.3d 172.

In the instant case, appellate counsel's representation did not fall below objective standard of reasonable representation. The mere fact that appellate counsel did not raise every assignment of error Appellant desired is not sufficient to support an allegation of ineffective assistance of counsel nor is it sufficient to support an allegation that representation fell below an objective standard of reasonable representation. Also, judicial scrutiny of counsel's performance must be highly deferential. This deference would support the fact that no ineffective assistance of counsel exists. As such, Appellant has failed to meet the first prong of the Strickland test.

Turning back to the second part of the Strickland test, this requires that Appellant be prejudiced by appellate counsel's ineffectiveness and but for counsel's unprofessional errors, the result of the proceeding would have been different. Bradley, supra at syllabus paragraph three.

Appellant has failed to show he was prejudiced by appellate counsel's ineffectiveness. As stated earlier Appellant's pre-arrest silence was not used to infer guilt because he was remaining silent and wanted to speak to an attorney. Appellant's actions, however, were indicative of nervousness, which along with the evidence of inconsistent reasons for the purpose of the trip, and the licking of his lips and beads of sweat when Appellant was informed of the drug dog, provided the circumstantial evidence that Appellant had knowledge of the drugs in his vehicle.

As such, Appellant's third proposition of law has no merit. As such, this Honorable Court should decline jurisdiction over the instant matter.

CONCLUSION

For the foregoing reasons, this Honorable Court should decline jurisdiction over the instant matter

Respectfully Submitted,

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