[Cite as *State v. Walker*, 2010-Ohio-4695.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-155**
- vs -	:	
DENNIS WALKER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 07 CR 000525.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

John W. Hawkins, Center Plaza North, #441, 35353 Curtis Boulevard, Eastlake, OH 44095 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Dennis Walker, appeals the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court found Walker guilty of Possession of Cocaine, a felony of the fourth degree, in violation of R.C. 2925.11; Trafficking in Cocaine, a felony of the fourth degree, in violation of R.C. 2925.03(A)(2); and Possession of Cocaine, a felony of the fifth degree, in violation of R.C. 2925.11; and sentenced him to a total of thirty months in prison.

{¶2} For the following reasons, we affirm the decision of the lower court.

{¶3} On July 19, 2007, the Painesville Police Department received a complaint from a citizen stating that two black males wearing white t-shirts appeared to be selling drugs at the corner of Sanders Street and North State Street in Painesville. Officer Jeff Baldrey was dispatched to the location but failed to locate the men. Baldrey drove around the area for approximately fifteen minutes before noticing a van exiting Sanders Street and turning onto State Street. Baldrey ran the van's license plates and determined that the plates belonged to a different vehicle. Baldrey pulled over the vehicle, which was driven by Walker. There was one passenger, Ray Sean Wicks, who was located in the front passenger seat. Both individuals were black males wearing white t-shirts. Baldrey requested to see Walker's driver's license and Walker provided Baldrey with a state identification card. Baldrey ran the identification number through dispatch and determined that Walker had twelve open license suspensions.

{¶4} Baldrey then asked Walker to exit the vehicle and placed him under arrest for Driving Under Suspension. While conducting a search of Walker's person, Baldrey requested that Walker open his mouth. Baldrey then asked Walker to lift up his tongue and Baldrey saw a clear plastic baggie containing small white rocks inside Walker's mouth. Baldrey asked Walker to spit out the baggie and Walker refused. Baldrey grabbed Walker underneath the chin and used pressure to force Walker to spit out the baggie. Walker subsequently spit the baggie out onto the ground.

{¶5} After Walker was handcuffed and placed into the back of a police cruiser, two additional police officers, Officer Brian Avery and Officer Russell Tuttle, conducted a search of the van. During the course of this search, Avery used his flashlight and searched the floor on the driver's side of the van. Avery saw a baggie sticking out of an

open, uncovered vent area on the floor in front of the center console, near the driver's foot pedal area of the van.

{¶6} On October 26, 2007, Walker was indicted by a Lake County Grand Jury on one count of Possession of Cocaine, a fourth-degree felony; one count of Trafficking in Cocaine, a fourth-degree felony; one count of Receiving Stolen Property, a fifth-degree felony; and one count of Possession of Cocaine, a fifth-degree felony. A Receiving Stolen Property charge was dismissed prior to trial.

{¶7} Walker initially pleaded guilty to one count of Possession of Cocaine. Walker failed to appear at sentencing and was later arrested. A second sentencing hearing was set, at which Walker made a motion to withdraw his guilty plea. This motion was granted and the case proceeded to trial.

{¶8} Walker's trial was held on July 1, 2009. Walker was present during voir dire; however, after a lunch break, Walker failed to return to his trial. The trial continued in Walker's absence.

{¶9} The jury found Walker guilty of Trafficking in Cocaine and both counts of Possession of Cocaine. Walker was sentenced to serve a stated prison term of eighteen months for Count One, Possession of Cocaine, eighteen months for Count Two, Trafficking in Cocaine, which were merged together, and twelve months for Count Three, Possession of Cocaine, to run consecutively with the term of Counts One and Two, for a total of thirty months in prison.

{¶10} Walker timely appeals and raises the following assignment of error:

{¶11} "Defendant was materially prejudiced by the ineffective assistance of counsel."

{¶12} Walker argues that his counsel was ineffective due to counsel's failure to file a Motion to Suppress. Walker reasons that Officers Avery and Tuttle had no justification for searching Walker's van after placing him under arrest. Walker alleges that an arrest for traffic offenses of Driving Under Suspension and Driving With Improper License Plates does not justify a search of a defendant's automobile. Walker further contends that if a Motion to Suppress had been filed, there is "a strong probability that the crack cocaine obtained from the search of the van would have been suppressed."

{¶13} The Ohio Supreme Court has adopted a two-part test to decide whether an attorney's performance is below the constitutional standard for effective assistance of counsel. To reverse a conviction due to ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's performance was reasonable considering all the circumstances. *** Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 688-689. "There is a strong presumption that the attorney's performance was reasonable." *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, at ¶10. "[D]ebatable strategic and tactical decisions will not form the basis of a claim for ineffective assistance of counsel, even if there had been a better strategy available. *** In other words, errors of judgment regarding tactical matters do not substantiate a defendant's claim of ineffective assistance of counsel." *State v.*

Swick, 11th Dist. No. 97-L-254, 2001-Ohio-8831, 2001 Ohio App. LEXIS 5857, at *5-6 (citations omitted).

{¶14} If a deficiency in counsel's performance is found, the appellant must then show that prejudice resulted. Id. at *5. "To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Stojetz,* 84 Ohio St.3d 452, 457, 1999-Ohio-464, citing *Strickland,* 466 U.S. at 694.

{¶15} "When claiming ineffective assistance due to failure to file or pursue a motion to suppress, an appellant must point to evidence in the record showing there was a reasonable probability the result of trial would have differed if the motion had been filed or pursued." *State v. Gaines*, 11th Dist. Nos. 2006-L-059 and 2006-L-060, 2007-Ohio- 1375, at ¶17. "If case law indicates the motion would not have been granted, then counsel cannot be considered ineffective for failing to prosecute it." Id., citing *State v. Edwards*, 10th Dist. No. 99AP-958, 2000 Ohio App. LEXIS 3971, at *8.

{¶16} In order to determine whether there was prejudice, we must decide whether there is a reasonable probability that counsel's filing of a Motion to Suppress would have changed the result of Walker's trial. Walker argues that a Motion to Suppress would have succeeded because the police did not conduct a valid search under any exception to the warrant requirement. Walker relies on the United States Supreme Court's holding in *Arizona v. Gant* (2009), 129 S.Ct. 1710, stating that it prohibited the automobile search performed by the police.

{¶17} *Arizona v. Gant* holds that police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Id. at 1719. The

court's holding limited searches of automobiles incident to arrest and noted that "[o]ther established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand." Id. at 1721. Included in these circumstances are searches of a vehicle when there is "probable cause to believe a vehicle contains evidence of criminal activity." Id. Post-*Gant*, courts have continued to apply the automobile exception in cases where there was probable cause to conduct a search of an automobile. See *State v. Canter*, 10th Dist. No. 09AP-47, 2009-Ohio-4837; *State v. White*, 8th Dist. No. 92229, 2009-Ohio-5557.

{¶18} Here, the State does not contend that the search of the vehicle was valid as a search incident to arrest. The State asserts that it conducted a proper inventory search or alternately, a search that was valid under the automobile exception. *Gant* does not overturn such exceptions. Therefore, we must determine whether the vehicle search was valid under the inventory and automobile exceptions to the warrant requirement.

{¶19} It is well-settled under both federal and state law that administrative inventory searches, if performed according to established procedures, are not unreasonable. *South Dakota v. Opperman* (1976), 428 U.S. 364, 372. "[A] routine inventory search of a lawfully impounded automobile is not unreasonable within the meaning of the Fourth Amendment *** when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded automobile." *State v. Robinson* (1979), 58 Ohio St.2d 478, 480.

{¶20} The United States Supreme Court "has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents." *Opperman*, 428

U.S. at 373. "A car may be impounded if *** the occupant of the vehicle is arrested, or when impoundment is otherwise authorized by statute or municipal ordinance." *State v. Duncan*, 11th Dist. No. 2006-L-154, 2007-Ohio-2577, at ¶29. See *State v. Bulls*, 7th Dist. No. 98-CA-173, 2000 Ohio App. LEXIS 3003, at *9 ("[D]eputy was permitted to impound the vehicle due to the improper display of plates," where appellant was displaying plates registered to another vehicle.)

{¶21} Walker claims that this was an investigatory search instead of an inventory search but cannot point to any evidence in the record showing that this search was not performed pursuant to standard police practice. The record also does not show that this was a pretext for an evidentiary search. Officer Avery stated that both he and Officer Tuttle were conducting an inventory search. Officer Tuttle stated that the search was conducted prior to the van being towed from the scene.

{¶22} Here, it was proper to impound the car for several reasons. First, Walker was arrested for driving with a suspended license. Additionally, Walker was found to be displaying license plates registered to a vehicle other than the one he was driving. Finally, the vehicle was not registered to Walker and police were unaware of who owned the car.

{¶23} Contraband, such as drugs or weapons, may be immediately seized during an inventory search because their discovery implicates the plain view doctrine. Under the plain view doctrine, an item may be seized if its incriminating character is immediately apparent and the officers have a lawful right of access or control over the item. *State v. Kinley*, 72 Ohio St.3d 491, 495, 1995-Ohio-279. "The 'immediately apparent' requirement *** is satisfied when police have probable cause to associate an

object with criminal activity." *State v. Waddy* (1992), 63 Ohio St.3d 424, 442, citing *State v. Halczyszak* (1986), 25 Ohio St.3d 301, paragraph three of the syllabus.

{¶24} Officer Avery stated that he plainly saw a plastic baggie while searching the area on the floor surrounding the driver's feet. Although the baggie was located in a vent opening in front of the center console, the vent had no cover and the baggie inside was in plain view of Avery. Avery had probable cause to associate this baggie with criminal activity given that Walker had just been found to be in possession of drugs located inside a similar baggie.

{¶25} The State also asserts that the search was valid under the automobile exception to the warrant requirement.

{¶26} The United States Supreme Court has long recognized an "automobile exception" to the Fourth Amendment's requirement that police officers must generally obtain a warrant before conducting a search. *California v. Carney* (1985), 471 U.S. 386, 390, citing *Carroll v. United States* (1925), 267 U.S. 132, 153. "The well-established automobile exception allows police to conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains contraband or other evidence that is subject to seizure, and exigent circumstances necessitate a search or seizure." *State v. Mills* (1992), 62 Ohio St.3d 357, 367. Accordingly, an officer may search a properly stopped vehicle if he has probable cause to believe that it contains contraband. *State v. Moore*, 90 Ohio St.3d 47, 51, 2000-Ohio-10.

{¶27} Where probable cause exists to search a vehicle, "a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." *United States v. Ross* (1982), 456 U.S. 798, 809. Under the automobile exception, there is no need to demonstrate that a

"separate exigency" exists to justify the search. *Maryland v. Dyson* (1999), 527 U.S. 465, 466. "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Pennsylvania v. Labron* (1996), 518 U.S. 938, 940, citing *Carney,* 471 U.S. at 393.

{¶28} Probable cause in the context of an automobile search has been defined as "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *State v. Kessler* (1978), 53 Ohio St.2d 204, 208 (citation omitted). In a case where police found marijuana in a defendant's pocket during a legal search, a search of the automobile under the automobile exception was proper because police had "probable cause to search the automobile for additional marijuana or evidence of marijuana use." *State v. Gibson*, 9th Dist. No. 16699, 1994 Ohio App. LEXIS 5556, at *10-11.

{¶29} In this case, Walker was validly placed under arrest for Driving Under Suspension. Upon conducting a valid search incident to arrest of Walker, Officer Baldrey discovered that Walker had a baggie of cocaine in his mouth. Due to the complaint made by a citizen to the police department, the description of Walker's clothing, the fact that Walker was pulling out of the area where the complaint had placed the alleged drug dealers, and that officers discovered Walker was in possession of cocaine, they had probable cause to believe that there were other drugs or contraband inside of the van. Because police had probable cause to believe that other drugs could be found in the van, they performed a valid search under the automobile exception.

{¶30} Walker also contends that the initial search incident to arrest of his person was invalid, thus invalidating any probable cause for a search based on the automobile exception.

{¶31} "When an arrest is made, it is *** entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *State v. Winters*, 11th Dist. No. 2009-G-2919, 2010-Ohio-2678, at ¶26, citing *Chimel v. California* (1969), 395 U.S. 752, 762.

{¶32} A valid search can include a search for contraband on the defendant. Here, it was valid for Officer Baldrey to request that Walker open his mouth so Baldrey could determine if Walker was hiding any contraband or other evidence.

{¶33} Based on the foregoing, the appellant has failed to show that there is a reasonable probability that he would have succeeded at trial had his counsel filed a Motion to Suppress.

{¶34} Accordingly, the sole assignment of error is without merit.

{¶35} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, finding Walker guilty of Trafficking in Cocaine and two counts of Possession of Cocaine, and sentencing him to a total prison term of thirty months, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur