STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 99 BA 65
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
FREDERICK HLINOVSKY, JR.,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from County Court West, Case Nos. 99 TRC 4087-01, 99 TRD 4087-03.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:
Attorney Frank Pierce
Prosecuting Attorney
Attorney Thomas Ryncarz
Assistant Prosecuting Attorney
147-A West Main Street
St. Clairsville, Ohio 43950

For Defendant-Appellant:
Attorney David Trouten, Jr.
185 West Main Street
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JUDGES:

Hon. Joseph J. Vukovich

Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: May 1, 2001

VUKOVICH, P.J.

{¶1} Defendant-appellant Frederick Hlinovsky, Jr. presents this timely appeal from an order of the Belmont County Court, Western Division, which accepted his guilty pleas to driving under the influence and driving under a court suspension, sentenced him to jail for a total of 360 days and suspended his operator's license for a total of five years. For the following reasons, the judgment of the trial court is reversed and this cause is remanded for further proceedings.

{¶2} On September 24, 1999, appellant was ticketed for four traffic violations. Count I charged appellant with driving under the influence of alcohol and driving with a prohibited level of alcohol in violation of R.C. 4511.19(A)(1) and (3). Count II entailed driving under an FRA suspension in violation of R.C. 4507.02(B). Count III involved driving under a court suspension. Count IV charged appellant with "hit/skip" under R.C. 4549.03.

{¶3} Appellant was appointed a public defender. On November 16, 1999, the day of pretrial, appellant pled guilty to driving under the influence and driving under a court suspension. In return, the state dismissed Counts II and IV. After accepting appellant's plea, the court sentenced appellant to one hundred eighty days in jail on the driving under the influence conviction, noting that it was appellant's third offense in the past six years. The court then suspended appellant's operator's license for four years and fined him $500. On the driving under suspension conviction, the court sentenced appellant to one hundred eighty days in jail, suspended appellant's license for one year and fined him $250. The jail time and the license suspensions were ordered to run consecutively. Appellant filed

the within timely appeal.

{¶4} Appellant argues that he was denied effective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, defendant has the burden to prove that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* The defendant must produce evidence that counsel acted unreasonably by substantially violating essential duties owed to the client. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674, citing *State v. Keith* (1997), 79 Ohio St.3d 514, 534. Because attorneys are presumed competent, reviewing courts must refrain from second-guessing strategical decisions and presume that counsel's performance falls within the wide range of reasonable legal assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶5} Upon demonstrating counsel's deficient performance, the defendant then has the burden to establish that prejudice to his defense resulted from counsel's deficiency. *Reynolds*, 80 Ohio St.3d at 674. The reviewing court views the totality of the circumstances to decide if there exists a reasonable probability that, were it not for serious errors made, the outcome of the case would have been different. *Strickland*, 466 U.S. at 695-696. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

{¶6} Appellant sets forth four allegations of ineffective assistance of counsel. First, appellant states that the failure to file a suppression motion is *prima facie* evidence of deficient performance. He supports his argument with a statement that there was "nothing to lose" by filing a motion to suppress. However, criminal attorneys do not have an automatic obligation to file suppression motions. *State v. Madrigal* (2000), 87 Ohio St.3d 378,

389. See, also, *State v. Carter* (1996), 115 Ohio App.3d 770, 775 (where we held that failure to file a suppression motion is not necessarily ineffective). "Counsel is not required to file a meritless motion simply for the sake of placing it on the record to avoid a charge of ineffective counsel." *State v. Davenport* (Oct. 25, 2000), Summit App. Nos. 19419, 19420, unreported, 2, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433. Counsel may have reasonably concluded that a suppression motion would be a "futile act." *State v. Jones* (June 13, 2000), Franklin App. No. 99AP-704, unreported, 4, citing *State v. Edwards* (July 11, 1996), Cuyahoga App. No. 69077, unreported, and *State v. Martin* (1983), 20 Ohio App.3d 172.

{¶7} Moreover, appellant fails to even allege the grounds on which a suppression motion could have been filed. As such, this argument is overruled. See, e.g, *State v. Flors* (1987), 38 Ohio App.3d 133, 139; *Jones*, Franklin App. No. 99AP-704 at 4; *State v. Hatton* (Apr. 19, 1999), Pickaway App. No. 97-CA-34, unreported, 9 (stating that the burden is on the defendant to point to evidence supporting a motion to suppress).

{¶8} Appellant's next argument is that his counsel should have asked that the case be heard by a different judge. He supports this argument by stating that he appeared in front of the trial judge numerous times. He states that this judge recently found a person not guilty in an assault case in which appellant was the alleged victim. He also states that this judge dismissed a domestic violence charge where appellant was the alleged victim.

{¶9} First of all, a judge is presumed to be unbiased and unprejudiced in the matters over which he presides. *In re Disqualification of Olivito* (1994), 74 Ohio St.3d 1261, 1263. Moreover, there is no reasonable probability that a recusal motion would have been granted by the judge. See *State v. Keene* (1998), 81 Ohio St.3d 646, 666 (stating that a judge on a three-judge capital panel need not recuse himself where he presided over the

suppression hearing at which the defendant testified and was cross-examined after the judge reminded the defendant that his testimony at the suppression hearing cannot be used against him later). See, also, *State v. Bays* (Jan. 30, 1998), Greene App. No. 95-CA-118, unreported, 26. Judges often preside over multiple cases concerning the same defendant. We do not see how a person in a small town with one county court judge who has multiple legal entanglements both as the defendant and as the victim would be entitled to a visiting judge each time a new case is heard.

{¶10} Regardless, we work under a presumption that counsel's failure to seek recusal is a sound tactical decision which we will not second-guess. *Carter*, 72 Ohio St.3d at 558. It is possible that counsel had reasons for not seeking recusal or that appellant desired to be tried by a judge with whom he is familiar. See Plea/Sentencing Transcript (where appellant addresses the judge and asks for leniency and understanding). This argument is overruled.

{¶11} Appellant also complains that his attorney was ineffective for failing to make mitigating arguments during sentencing. He argues that counsel should have presented evidence that he was insured, that he suffered blackouts from an assault and that he suffered psychological problems. Nevertheless, the Supreme Court recognizes the failure to present evidence in the penalty phase may be the result of a tactical decision. *State v. Keith* (1997), 79 Ohio St.3d 87; *State v. Johnson* (1986), 24 Ohio St.3d 87. Additionally, defense counsel put on evidence that the vehicle which appellant was driving was insured. A letter from appellant's employer was considered by the court in mitigation. Further, appellant spoke in mitigation of sentence. He asked for leniency and promised to reform himself. He talked about his job and argues that the accident was caused by a black out caused by prior injuries. Hence, there was no need for the attorney to repeat this mitigation request. As such, this argument is without

merit.

{¶12} Appellant also argues ineffective assistance of counsel in that his counsel failed to consult with him prior to the day of the pretrial at which appellant pled guilty. He claims that during this one meeting, his counsel misinformed him by stating that as a result of the plea, he would either be sentenced to ten days or thirty days. In fact, appellant's mandatory minimum sentence on the driving under the influence charge was thirty days and the maximum sentence was one year. R.C. 4511.99(A)(3)(a) (pertaining to third offense DUI offenders). On the driving under suspension charge, the maximum sentence was six months.

{¶13} Rather than analyze the issue as one of ineffective assistance, we choose to recognize plain error of the trial court at this juncture pursuant to Crim.R. 52(B). In reading the transcript from the plea/sentencing hearing, we notice that appellant was not informed of the possible sentence that he faced on either charge. Pursuant to Crim.R. 2(C) and (D), a serious offense is defined as an offense for which confinement can be more than six months, and a petty offense is defined as an offense other than a serious offense. Under Crim.R. 11(D) and (E), in serious or petty misdemeanor cases, a court shall not accept a guilty plea or a no contest plea without first informing the defendant of the effect of the various pleas.

{¶14} This court has repeatedly held that in order to inform the defendant of the effect of his guilty plea under Crim.R. 11, the court must inform the defendant of the possible sentences faced. See, *e.g.*, *State v. Moore* (1996), 111 Ohio App.3d 833, 838; *State v. Brum* (June 29, 2000), Columbiana App. No. 99-CO-28, unreported, 1-2; *State v. Jones* (Dec. 20, 1999), Mahoning App. No. 98-CA-165, unreported, 2. We have also stated that failure to comply with the requirements of Crim.R. 11 is plain error. *Brum*, Columbiana App. No. 99-CO-28 at 2.

{¶15} Accordingly, we find plain error in the trial court's failure to advise appellant of the potential sentences he faced. Thus, appellant's guilty pleas are withdrawn, and the four original charges are reinstated. If appellant subsequently enters a plea agreement, the court shall advise appellant of the potential sentences on the crimes to which he is pleading, the potential fines and the potential license suspensions.

{¶16} For the foregoing reasons, the judgment of the trial court is reversed and this cause is remanded for proceedings according to law and consistent with this court's opinion.

Waite, J., concurs.
DeGenaro, J., concurs.