[Cite as *State v. Warren*, 2025-Ohio-256.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRANDON WARREN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 BE 0016

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 23 CR 144

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor and *Atty. Jacob A. Manning*, Assistant Prosecutor, for Plaintiff-Appellee

Atty. Anthony J. Richardson II, and *Atty. Aleia B. Brown*, Law Office of Anthony J. Richardson II, LLC, for Defendant-Appellant

Dated: January 24, 2025

WAITE, J.

{¶1} Appellant Brandon Warren appeals the May 14, 2024 judgment entry of the Belmont County Court of Common Pleas convicting him of various drug-related offenses following a search of his vehicle during a traffic stop. Appellant attacks the trial court's denial of his late motion for leave to file a motion to suppress evidence resulting from that search. Appellant claims that he was awaiting additional police body camera video that was not provided during the discovery phase of the proceedings. He was informed that, due to the lapse of time, the video had been deleted. Appellant claims the trial court's denial amounts to an abuse of discretion. In the alterative, he argues that the destruction of the video amounts to a *Brady* violation and that his trial counsel was ineffective for failing to file a timely motion while investigating the issue. For the reasons that follow, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual And Procedural History

{¶2} Around 3:25 a.m. on May 6, 2023, Appellant was driving a dark colored GMC pickup truck near Jefferson Avenue and Wegee Road in the Village of Shadyside, Belmont County. While he had a passenger, this passenger is not involved in the instant proceedings.

{¶3} Officer Brenton Boston of the Shadyside Police Department initiated a traffic stop of the vehicle due to an issue with the lighting of Appellant's license plate and because the truck had an expired registration tag. (Trial Tr., p. 270.) Officers Brenen Collette (Shadyside Police Department) and Robert Shreve (Bridgeport Police Department) provided backup during the encounter. As Officer Boston approached the

driver, it is readily apparent that he suspected that drugs were in the vehicle, however, it is unclear why he held this suspicion. On reaching the driver's window, Officer Boston inquired of Appellant whether the vehicle contained "guns, drugs, knives, dead bodies, large amounts of U.S. currency?" (Boston Body Cam 1, 4:05.) When Appellant responded "no," Officer Boston asked Appellant if he had "any issue with me searching it at all?" Appellant replied: "you can search." Appellant did not indicate that his consent to search the vehicle was limited in any way.

{¶4} Appellant and his passenger exited the vehicle and waited with Officer Shreve in the area between the vehicle and Officer Boston's cruiser. Officer Boston led the search and Officer Collette assisted. Officer Boston focused his search on the driver's seat and the center console area. Officer Collette searched only the front passenger area. Officer Shreve did not participate in the search. Both Officers Boston and Shreve wore operable body cameras, however, the video on Officer Shreve's body camera was deleted in accordance with the department's policy and procedures at some point during the court case due to the length of time that had passed. Officer Collette did not have an operable body camera that day. However, his actions in assisting with the search can be seen on Officer Boston's body camera.

{¶5} Officer Boston searched the vehicle, stopping his search and walking back to his vehicle on multiple occasions. Each time he walked to and from his vehicle, he passed Appellant, his passenger, and Officer Shreve. At no point did Appellant attempt to discuss or convey anything to Officer Boston despite their close proximity.

{¶6} After searching for some time, Officer Boston located five twenty-dollar bills between the driver's seat and center console, and a single hypodermic needle in the

center console. After his discovery, he walked over and handcuffed Appellant, but specified Appellant was only being detained at that time. Despite Officer Boston informing Appellant what had been found at that stage of the search, Appellant did not object to a continuation of the search or attempt to limit the scope of the remaining search.

{¶7} During the search, Officer Boston discussed with Officer Collette several times that certain plastic pieces on the interior appeared to be loose or missing. In examining the loose parts, which can best be described as a plastic "tray" located in front of the area where the cup holders are found, Officer Boston discovered it was completely detached from the interior structure. This "tray" would ordinarily be expected to be secured to the interior by either a screw or a bolt. However, when Officer Boston lifted the edge, the entire tray lifted completely out of place with ease. When the tray was removed, baggies containing suspected methamphetamine were visible, along with a scale. Later testing revealed that the baggies contained a combined total of 149.53 grams of methamphetamine.

{¶8} Officer Boston brought the baggies over to Appellant, who insisted he did not know the drugs were in the vehicle, nor how they ended up underneath the tray. However, he conceded the vehicle belonged to him. The passenger also claimed to have no knowledge of the drugs. It appears that the officers allowed the passenger to leave, as no evidence linked him to the drugs or the vehicle.

{¶9} As a result of the search, on March 7, 2024, Appellant was indicted on one count of aggravated trafficking in drugs, a felony of the second degree in violation of R.C. 2925.03(A)(2), (C)(1)(d) with an attenuated forfeiture of money specification pursuant to R.C. 2941.1417(A), and one count of aggravated possession of drugs, a felony of the

second degree in violation of R.C. 2925.11(A), (C)(1)(c) with an attenuated forfeiture of money specification pursuant to R.C. 2941.1417(A). It appears that the parties stipulated there were several delays from the time of the offense to the indictment due to pending lab results.

{¶10} Relevant to the issues raised on appeal, Appellant was arraigned on March 11, 2024. By the time of this date, any timely motion to suppress would need to be filed on or before April 15, 2024. The day after Appellant's arraignment, March 12, 2024, the state provided discovery, which included Officer Boston's body camera video and police reports. On April 9, 2024, almost a month later, defense counsel inquired whether any dash camera videos from the police cruiser were available. The next day the state informed counsel that the cruisers were not equipped with dash cameras. On April 12, 2024, defense counsel made his first request for any body camera videos associated with Officers Collette and Shreve. When the state contacted Officer Shreve, who was no longer employed by the Bridgeport Police Department, it learned that his body camera video had been deleted in accordance with the department's policy and procedures due to the length of time that had passed from the date of the incident. They also learned that Officer Collette did not have an operable body camera that day.

{¶11} On April 22, 2024, Appellant's counsel filed a motion seeking leave to file a motion to suppress, seven days after the deadline and eight days prior to the scheduled trial date. Appellant's counsel claimed to have waited to receive all of the officers' video before formulating a motion to suppress, causing the need for late filing. On April 25, 2024, the trial court denied the motion, finding that no nexus existed between the perceived discovery issue and the suppression motion. Appellant proceeded to trial,

where the jury found him guilty on all counts as charged within the indictment. On May 14, 2024, the court sentenced Appellant to an aggregate total of eight to twelve years of incarceration with credit for fifteen days served. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

THE MATTER SHOULD BE REMANDED AND REVERSED BECAUSE APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

{¶12} Appellant argues that the trial court abused its discretion when it denied his motion for leave to file a motion to suppress. Appellant argues that his counsel did not receive all relevant discovery necessary for his motion to suppress. Appellant claims his delay was caused due to the state's failure to provide body camera video from Officers Collette and Shreve who were also involved in the search of his truck. Appellant posits that Officer Shreve's body camera might possibly contain evidence to indicate that he attempted to limit the scope of his consent to the search his vehicle, although he does not allege that he did, in fact, limit his consent. In the alternative, he argues that the purging of his body camera video amounts to a *Brady* violation. *See Brady v. Maryland,* 373 U.S. 83 (1963).

{¶13} The state contests the notion that it is somehow responsible for the failure of Appellant's trial counsel to timely file a motion to suppress. According to the state, because the arraignment was held on March 11, 2024, the deadline to file a timely motion to suppress would have been April 15, 2024. The state provided discovery to defense

counsel (which included Officer Boston's body camera video) on March 12, 2024. On April 9, 2024, defense counsel inquired only as to whether a dash camera video was available, and was informed the very next day that the vehicle was not equipped with a dash camera. Two days later, on April 12, 2024 (a Friday), defense counsel requested body camera video from Officers Collette and Shreve. The state explained that it had to contact Officer Collette (Shadyside Police Department) and Officer Shreve (employed by Bridgeport Police Department at the time of the encounter, but no longer employed there) to request further possible videos. On April 19, 2024, Appellant's counsel was told that neither officer had body camera footage available. Officer Collette did not have an operating body camera that day. However, his actions are recorded on Officer Boston's camera footage. Officer Shreve stayed with Appellant just behind the vehicle. His video had been purged by Shadyside Police Department in accordance with their policies and procedures. Hence, the state's position is that defense counsel received all existing discovery relative to the incident thirty-four days before the deadline, and did not request or even inquire whether anything else might be available until six days before the deadline to file a motion to suppress.

{¶14} A trial court is afforded a great amount of discretion in whether to grant a motion for leave. A challenge to that discretion raises a high bar. It is important to note that when reviewing a matter for an abuse of discretion, the question is not whether we would have reached the same decision. *State v. Mundt*, 2017-Ohio-7771, ¶ 5 (7th Dist.). Rather, we must determine whether the trial's court decision was far outside of the bounds of what a reasonable judge would decide.

{¶15} Crim.R. 12(D) provides: "All pretrial motions except as provided in Crim. R. 7(E) and 16(M) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions."

{¶16} If a defendant needs additional time, "the trial court may extend the time for filing pretrial motions. But once the time has expired, the defendant's failure to file a motion to suppress results in a waiver of that issue." *State v. Walters*, 2024-Ohio-3179, ¶ 17 (7th Dist.), citing *State v. Wade*, 53 Ohio St.2d 182 (1978), cert. granted, judgment vacated on other grounds, 438 U.S. 911 (1978). Pursuant to Crim.R. 12(H), the only way to revive an untimely motion to suppress after waiver is to establish "good cause" for the tardiness. *Id.* This Court has recent precedent where we have distinguished "good cause" (where the deadline has passed and motion for leave is filed) and "in the interests of justice" (before the deadline has passed and an extension is sought). *Id.* at ¶ 27.

{¶17} Recognizing these propositions of law, we turn to the time frame of this case. The incident occurred on May 6, 2023. Appellant was indicted on March 7, 2024. The delay from the arrest to indictment was part of a stipulated agreement between the parties. On March 12, 2024, the state produced discovery, which included the relevant police reports and Officer Boston's body camera video. It is clear from this discovery response that Officer Boston, as well as Officers Collette and Shreve, were all involved in the encounter with Appellant. Despite receiving information that multiple officers participated in Appellant's stop and that clearly only one body camera video was produced, Appellant's counsel took no further action until April 12, 2024, close to a year after the traffic stop and over a month after receipt of the first video.

{¶18} At that point, the deadline to file a motion to suppress was three days away. It should have been abundantly clear to counsel that at that point, it was impossible to wait and inquire into the possibility that there may be additional videos, and still file a timely motion to suppress. The prudent action at that juncture would have been to immediately file based on the discovery received, or to ask the trial court for an extension in accordance with Crim.R. 12.

{¶19} At the time Appellant's counsel raised the possibility of additional video, the parties were taking part in a status conference. Appellant's counsel could have initiated a conversation between the parties and the judge in regard to an extension of time to file a suppression motion. Instead, Appellant waited until "minutes" before the next status conference (on April 22, 2024), and only after the deadline had passed to file his request for leave to file a motion to suppress.

{¶20} While Appellant now attempts to place blame on the state for failing to inform him that no additional videos existed within the time to file his motion to suppress, we must highlight the fact that defense counsel did not even inquire whether other videos may exist until three days before this deadline. Further, Appellant's counsel did have the opportunity to review the video he promptly received, and could have filed a timely motion based on this video. *Compare with State v. Minor,* 2022-Ohio-327 (9th Dist.) (Discovery issues not caused by defendant where the state's procedures, including taking twenty-five days to provide a video, were causing the delay amidst the COVID pandemic and no evidence that defense counsel was derelict in his efforts.) We note that the motion Appellant sought to file, but was refused by the trial court, can only be based on the video Appellant received within days of his indictment.

{¶21} There is no question that Appellant waived the filing of a motion to suppress in this matter, and could only revive it with a showing of "good cause." "Good cause" has been found in instances where the state's delays were unreasonable, where leave was denied after new counsel was obtained, where the suppression issue could not have been raised before the expiration of the deadline, and where a trial date has not been scheduled. *State v. Williams,* 2017-Ohio-7371 (4th Dist.); *State v. Smith,* 2011-Ohio-602 (4th Dist.). Importantly, we first look to the language found in the motion for leave and the language the trial court used to deny leave.

{¶22} Appellant's motion stated that counsel "did not think it would be prudent to file multiple motions to suppress on various motions if one motion could be filed. Thus, a delay has occurred that was unavoidable for the sake of judicial economy." (4/22/24 Motion for Leave.) This record underscores that Appellant's classification of the delay as "unavoidable" is a stretch, at best. Counsel should have been alerted to his concerns on March 12, 2024, when he received information that multiple officers were involved in the search and knew he had been provided with only one body camera video. There is no logical reason why it took counsel another month to inquire about additional video, particularly as counsel knew the deadline to file a motion to suppress was imminent.

{¶23} While judicial economy can be a relevant factor in some cases, it is not, here, where Appellant was dilatory. Also, it is significant that trial occurred on April 30, 2024 and May 1, 2024. The April 30th trial date was set on March 13, 2024, after Appellant's arraignment. Thus, the motion for leave was filed only eight days before trial. *See Smith, supra* (a trial court does not abuse its discretion in denying leave where

scheduled trial is two weeks away.) Regardless, the trial court did not use Appellant's counsel's lack of diligence against Appellant.

{¶24} In its entry denying leave, the court concluded that "the defense has failed to establish a sufficient nexus between the perceived discovery issues and the basis for the suggested suppression." (4/25/24 J.E.) In other words, the "missing" video sought had no bearing on the issues that were likely to be addressed in the motion. This is because Officer Boston's body camera captured the entire search of the vehicle. Actions by the two officers involved in the search, Officers Boston and Collette, can be clearly seen on Boston's body camera video. While it is true that Officer Boston stepped away from the vehicle several times to make phone calls, the search was stopped during these periods. Further, it was Officer Boston who located the drugs and paraphernalia in this case. Officer Collette did not discover any evidence in the search, nor did he search within the vehicle's console area.

{¶25} Again, Appellant had Officer Boston's video long before the motion to suppress was due. The late suppression filing can only be based on this video, as it is the only one that exists. Hence, to the extent Appellant provides any basis for grounds to suppress in his motion, those grounds were known to him on March 12, 2024. While Appellant attempts to argue that if other body camera videos existed these "could have" been used to show that Appellant's consent to search did not include lifting a tray on his console, this argument piles speculation on top of speculation. Again, the motion Appellant sought to untimely file was based only on Officer Boston's video, and any and all grounds for filing would have been known to Appellant long before his filing deadlines.

{¶26} Appellant's claims are specious, based on this record. First, Appellant did not know until long after the search that the officers lifted the console tray, as he was not inside of or near the vehicle while it was searched. Hence, his speculation that he might have limited the search while it was taking place is highly doubtful. Second, Appellant's full consent is completely captured on video. Third, Officer Boston walked back to his vehicle several times during the search and passed by Appellant. Appellant knew the officer was conducting the search, yet at no point did Appellant attempt to speak to Officer Boston or seek to limit the search in any way. Instead, Appellant posits he "might" have said something to Officer Shreve. Appellant does not contend he actually did tell Officer Shreve during his detainment with the officer that he intended to limit the scope of his consent to search. He merely speculates that he might have offered some limitation to his earlier full consent. Regardless, the record reflects that Appellant has absolutely no support for his contention that he was justified in waiting to see if other body camera video existed that might, in some way, be relevant to a motion a suppress.

{¶27} In the alternative, Appellant contends that destruction of Officer Shreve's body camera video amounts to a *Brady* violation. At the outset, we note that an alleged *Brady* violation constitutes a constitutional challenge. The Ohio Supreme Court recently addressed a similar issue in *State v. Brown,* 2024-Ohio-749. While *Brown* involved defense counsel learning of the *Brady* material during trial, the court's rationale is useful, here, where defense counsel was aware there may be an issue prior to trial. The *Brown* Court noted its prior precedent: "[i]t is a general rule that an appellate court will not consider any error which counsel . . . could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial

court." *Id.* at ¶ 35, citing *State v. Glaros*, 170 Ohio St. 471 (1960), paragraph one of the syllabus. The Court rationalized that "[t]rial judges have considerable tools available to handle discovery violations * * *." *Brown* at ¶ 36. While the tools discussed in *Brown* may not apply here, the trial court in the instant matter may have been able to resolve the issue using similar mechanisms, such as an extension of the suppression deadline, if one had been requested on *Brady* grounds. As Appellant failed to raise the issue below, it is waived. However, even if Appellant did not waive the argument, the problems regarding the videos do not rise to the level of *Brady* material.

{¶28} There is no question Officer Collette did not have a working body camera, thus there can be no *Brady* issue as to any video. As the record shows Officer Boston's body camera video was provided promptly and in full, there is likewise no potential *Brady* issue as to his body camera video. The only video at issue is from Officer Shreve's body camera.

{¶29} Significantly, Officer Shreve did not participate in the search. He stood with Appellant and his passenger between the vehicle and Officer Boston's cruiser. Thus, his body camera only becomes relevant, if at all, for the period after Appellant provided full consent to search the vehicle, as Officer Boston obtained Appellant's consent and Boston's body camera recorded the complete discussion relevant to that consent.

{¶30} The *Brown* Court described the test delineated in *Brady* and also defined its relevant terms:

> In *Brady*, the United States Supreme Court held that a state violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by suppressing evidence favorable to the accused where the

> evidence is material to guilt. 373 U.S. at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. To establish a *Brady* violation, a defendant must demonstrate (1) that the evidence is favorable to the defendant, because it is either exculpatory or impeaching, (2) that the evidence was willfully or inadvertently suppressed by the state, and (3) that the defendant was prejudiced as a result. *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material - or prejudicial - " 'when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' " *Turner v. United States*, 582 U.S. 313, 324, 137 S.Ct. 1885, 198 L.Ed.2d 443 (2017), quoting *Cone v. Bell*, 556 U.S. 449, 469-470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009).

Brown at ¶ 30.

{¶31} First, we look to whether Officer Shreve's body camera footage would have been exculpatory or impeaching. Again, Appellant's full consent was recorded on Officer Boston's body camera. If this was also captured on Officer Shreve's body camera, it would have been redundant for this purpose. Appellant speculates that Officer Shreve's body camera may be relevant as to two potential issues: whether officers could have planted the drugs, and whether the search exceeded the scope of Appellant's consent.

{¶32} Beginning with the possibility of planting drugs, Officer Shreve did not participate in the search of the vehicle and was not in close proximity to the search. Officer Collette did not have an operating body camera. Hence, Officer Boston is the only officer to have an operable body camera during the search. If any drugs were planted, his was the only body camera on which such an act could be depicted. The video

obviously does not show such an act. Officer Shreve stood in an area behind the vehicle and Officer Boston's cruiser. His body camera would not have been in a position to detect any alleged efforts by Officers Boston or Collette to plant drugs.

{¶33} Moving to the search and the scope of consent, the law is well established. "The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution secure an individual's right to be free from unreasonable searches and seizures and require warrants to be particular and supported by probable cause." *State v. Telshaw*, 2011-Ohio-3373, ¶ 12 (7th Dist.). In order for a search or seizure to be lawful, there must be probable cause to believe evidence of criminal activity will be found and the search or seizure must be executed pursuant to a warrant, unless an exception to the warrant requirement exists. *State v. Ward*, 2011-Ohio-3183, ¶ 33 (7th Dist.).

{¶34} It is axiomatic that a person may waive Fourth Amendment rights by consenting to a search. *Davis v. United States*, 328 U.S. 582, 593-94 (1946); *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968).

{¶35} This Court has previously addressed the law as it pertains to the scope of consent.

> The scope of a consent search is limited by the bounds, and determined by the breadth, of the actual consent itself. The requirement of a warrant is waived only to the extent granted by the defendant in his consent. *United States v. Dichiarinte* ([C.A.7,] 1971), 445 F.2d 126. A suspect may delimit as he chooses the scope of the search to which he consents. *Florida v. Jimeno* (1991), 500 U.S. 248, at 252, 111 S.Ct. 1801, 114 L.Ed.2d 297. *State v. Casey* (May 26, 2000), 2d Dist. No. 99-CA-43,

> 2000 WL 679013, at * 3. Significantly, the subject of a search may limit the scope of consent and may withdraw or limit the scope of consent after a search has begun. *State v. Rojas* (1993), 92 Ohio App.3d 336, 339, 635 N.E.2d 66; see, also, *State v. Iacona* (Mar. 15, 2000), 9th Dist. No. CA 2891–M, 2000 WL 277911.

State v. Brown, 2004-Ohio-3364, ¶ 13 (7th Dist.)

{¶36} Again, Officer Boston's body camera captured the entire initial conversation related to consent:

> Officer Boston: All right, guys. So, is there anything inside the vehicle that shouldn't be? Guns, drugs, knives, dead bodies, large amounts of U.S. currency?
>
> Appellant: [Inaudible response]
>
> Officer Boston: Do you have any issue with me searching at all?
>
> Appellant: No, you can search.

(Boston Body Cam 1, 4:05.) It is clear from this video that Appellant did not restrict his consent to search his vehicle in any way. Thus, Officer Shreve's body camera would only be relevant if Appellant later attempted to limit the scope of the search. First, we note that Appellant was certainly within a reasonable distance of Officer Boston as he searched the vehicle, thus Appellant could have attempted to call out to him if he sought to limit the remainder of the search. If he had done so, it would be heard on Officer

Boston's camera footage. But Appellant does not allege that he attempted to gain Officer Boston's attention to limit the scope of his consent after initially giving unqualified consent.

{¶37} As previously noted, Officer Boston walked back and forth between the two vehicles on several occasions, passing by Appellant. Although Officer Boston walked right by Appellant on these occasions, Appellant did nothing to get the officer's attention for any purpose. When Officer Boston located the needle and money, he alerted Appellant to the officers' discovery and where the evidence was found. Appellant still made no attempt to stop the search or set limits on any further search. He certainly could have done so, and forced the officer to obtain a warrant to continue. Significantly, Appellant does not actually claim that he attempted to limit his consent at any time by any means. He merely speculates that he may have done so and it might have been captured on Officer Shreve's body camera, not that he is certain he made such an attempt. Appellant, however, would be expected to know if this had occurred.

{¶38} Beyond mere speculation, Appellant offers caselaw to suggest that he should not have had to specifically limit his consent, as the area searched by officers is not an area which consent typically covers. Most of the caselaw involves an officer using some sort of tool to remove paneling from a vehicle. In a case arising out of the Second District, the appellant consented to an officers' search of his vehicle. *State v. Rodriguez,* 83 Ohio App.3d 829 (2d Dist. 1992). During the search, two officers used a screwdriver to remove a panel which the Second District classified as a "dismantling of the car." *Id.* at *835. The court found the action akin to an officer breaking open a locked briefcase found in the trunk of car, and determined that it was equally unreasonable to think a

person who knew officers were searching for drugs would have acquiesced to a search that allowed officers to open panels using a screwdriver. *Id.*

{¶39} Here, Officer Boston testified that several pieces of the interior appeared to be loose or missing. Specifically, he testified "[t]here were multiple pieces missing, like from -- for instance, underneath the steering wheel where the plastic would be, there wasn't any plastic there." (Trial Tr., p. 271.)

{¶40} Officer Boston first located a hypodermic needle in the center console and five twenty-dollar bills between the console and driver's seat. (Trial Tr., p. 276.) Shortly thereafter, he lifted the console's "tray" which was not secured by means of a screw, bolt, or glue. Officer Boston can be seen simply lifting the edge of the tray and it instantly was removed with ease, without removing any screws or bolts, to expose the area underneath. The drugs, digital scale, and plastic baggies were immediately within sight. There was no need to manipulate or move any other object to view the contraband. Thus, it is no different than an officer lifting the lid to the center console to search inside. Based on these facts, Appellant cannot establish that his speculation about his consent was exculpatory, impeaching, or caused prejudice that would have changed the outcome of the proceedings.

{¶41} In addition, while it is unclear for the record why the state did not initially look for Officer Shreve's body camera footage at the time it produced Officer Boston's video, it appears to be nothing more than an oversight, possibly caused by the fact that he was employed by a different police department than the other two officers. Regardless, there is nothing in this record to indicate the state withheld any evidence or

that Bridgeport Police Department deleted the video in bad faith. In fact, it appears the video was deleted pursuant to established departmental policy.

{¶42} Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

IN THE ALTERNATIVE, APPELLANT'S COUNSEL WAS INEFFECTIVE WHEN FAILING TO FILE A TIMELY MOTION TO SUPPRESS EVIDENCE.

{¶43} In the event that his first assignment of error is unsuccessful, Appellant argues that he received ineffective assistance of counsel based on counsel's failure to file a timely motion to suppress the evidence obtained during the search of his vehicle. In essence, Appellant argues that his counsel should have filed a timely motion to suppress based on Officer Boston's body camera footage. Appellant also makes an unrelated argument that his counsel should have filed a motion to suppress based on his belief officers lacked authority to search his vehicle pursuant to R.C. 2935.26(A).

{¶44} The test for ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 2014-Ohio-4153, ¶ 18 (7th Dist.), citing *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Williams*, 2003-Ohio-4396, ¶ 107. In order to prove prejudice, "[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. A reasonable probability is a probability sufficient to undermine confidence in

the outcome." *State v. Lyons*, 2015-Ohio-3325, ¶ 11 (7th Dist.), citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Id*. at 693.

{¶45} R.C. 2935.26(A) provides limitations to an officer's ability to continue an encounter during a traffic stop. Here, however, the state is correct that as Appellant consented to a search of his vehicle, he nullified any implications of R.C. 2935.26(A). As Appellant's consent was at all times unrestricted, there appears to be no grounds to support a motion to suppress based on the video from Officer Boston's body camera. Hence, filing a suppression motion appears to be a futile act.

{¶46} As both are necessary, if one prong of the *Strickland* test is not met, an appellate court need not address the remaining prong. *Id*. at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter*, 2001 WL 741571 (7th Dist. June 29, 2001), citing *State v. Calhoun*, 86 Ohio St.3d 279, 289 (1999). "To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question." *State v. Spring*, 2017-Ohio-768, ¶ 19 (7th Dist.), citing *State v. Brown*, 2007-Ohio-4837.

{¶47} As previously discussed, Appellant cannot show that, but for the absence of Officer Shreve's video, the outcome of the proceedings would have been different. Appellant also cannot show that there was a basis for any motion to suppress, here, as there is no indication that officers planted evidence or that he attempted to limit the scope of his consent. As such, Appellant's second assignment of error is also without merit and is overruled.

Conclusion

{¶48} Appellant contends that the trial court erred in denying his motion seeking leave to file a tardy motion to suppress. However, the record establishes no fault on the part of the state for counsel's failure to timely file a motion, and the video available to counsel should have been sufficient to file a timely motion to suppress if any grounds existed. Appellant also argues that deletion of one of the body camera videos amounts to a *Brady* violation, however, the video could not have been either exculpatory or favorable to Appellant based on the facts of this case and he has not demonstrated prejudice. Appellant also contends that his counsel was ineffective for failing to file a timely motion to suppress. However, any such motion was not likely to be successful and Appellant cannot demonstrate that but for the attempt to untimely file the result of the proceedings would have been different. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, P.J. concurs.

Hanni, J. dissents; see dissenting opinion.

Hanni, J., dissenting.

{¶49} With regard and respect for my colleagues, I must dissent from the majority opinion. I would find that the trial court abused its discretion in denying Appellant's motion for leave to file a motion to suppress.

{¶50} Appellant was arraigned on March 11, 2024. Under the 35-day time limit of Crim.R. 12(D), he had until April 15, 2024 to file a motion to suppress. Appellant filed his motion for leave to file on April 22, 2024, seven days late. If a defendant fails to timely file a motion to suppress and the issue is waived, the defendant may still file a motion for relief from the waiver and the trial court may permit the defendant to file the motion for "good cause shown." *State v. Garrett*, 2005-Ohio-4832, ¶ 14 (2d Dist.), citing Crim.R. 12(H). Therefore, this case turns on whether Appellant put forth "good cause" for relief.

{¶51} On March 12, 2024, the State provided Appellant with a copy of Officer Boston's body cam footage. On April 12, the court held a status conference. At the conference, Appellant requested the body cam footage from the other two officers. The State promised to look for these recordings and forward them to Appellant if located. The court then recessed the status conference and scheduled it to resume on April 19. At the Friday April 19 conference, the State informed Appellant that no other videos existed. The next business day, Monday April 22, Appellant filed his motion for leave to file a motion to suppress.

{¶52} In support of the motion, Appellant noted that the traffic stop and resulting search involved multiple officers. Therefore, he believed body cam footage existed from each of the officers involved. He had intended to file one motion to suppress once he was able to view all of the body cam footage. It was not until April 19 that the State

informed him that the only body cam footage was from Officer Boston's camera, which it had already provided to him.

{¶53} In a Second District case, the appellate court found the trial court abused its discretion in disallowing an untimely motion to suppress. *State v. Sargent*, No. 3042 (2d Dist. Aug. 17, 1994). The court cited "the need to encourage defendants in cases such as this to use discovery to find out whether and how the State's procedures failed before they file a motion to suppress." *Id*. The court noted that in order to do this, some accommodation must be made for the defendant, especially when the defendant filed his motion promptly after receiving the State's disclosure. *Id*.

{¶54} Citing *Sargent*, *supra*, an Eighth District case found the trial court did not abuse its discretion in allowing an untimely motion to suppress. *State v. Wisniewski*, No. 74980 (8th Dist. Oct. 28, 1999). In that case, the court noted that defense counsel maintained that the defense requests for discovery had remained unanswered up until the actual date of the suppression hearing. *Id*. The court stated that "[s]uch discovery problems, in and of themselves, can provide a basis for extending the time in which to file a motion to suppress." *Id*.

{¶55} In this case, the State promptly provided Appellant with the body cam video from Officer Boston. But two other officers were present at the scene when Appellant was stopped and his truck searched. It was reasonable that defense counsel would think there were two other body cam videos that he should review before filing a motion to suppress. It was not until April 19, 2024, after the 35-day time for filing pretrial motions had passed, that the State informed him no other videos existed. It informed defense

counsel that the body cam video from Officer Shreve had been purged because it had been over one year and Officer Collette did not have an operable body cam that day.

{¶56} It would have been a better practice in this case for Appellant to have filed the motion to suppress before the deadline expired, even without yet knowing whether other videos existed. But I would find it was unreasonable under the circumstances of this case to deny the motion for leave.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.