[Cite as *State v. Benner*, 2018-Ohio-4788.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff – Appellee -vs- KENNETH L. BENNER Defendant – Appellant	JUDGES: Hon. William B. Hoffman, P.J Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 18-CA-31 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Licking County Court of Common Pleas, Case No. 16-CR-00688
JUDGMENT:	Vacated and Remanded
DATE OF JUDGMENT ENTRY:	November 26, 2018
APPEARANCES:	
For Plaintiff-Appellee NATHANIEL H. HURST Asst. Prosecuting Attorney 20 North Second Street 4th Floor Newark, OH 43055	For Defendant-Appellant JAMES A. ANZELMO Anzelmo Law 446 Howland Drive Gahanna, OH 43230

Hoffman, P.J.

{¶1} Defendant-appellant Kenneth L. Benner appeals his conviction and sentenced entered by the Licking County Court of Common Pleas, after the trial court found him guilty following its acceptance of his no contest plea. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE

{¶2} On November 10, 2016, the Licking County Grand Jury indicted Appellant on one count of aggravated possession of drugs, in violation of R.C. 2925.11(A)(C)(1)(b), a felony of the third degree. The trial court issued a Summons on Indictment the same day, ordering Appellant to appear on November 29, 2016. After Appellant failed to appear, the trial court issued a warrant for his arrest. Appellant was subsequently arrested and brought before the trial court for an initial appearance on December 15, 2016. The trial court placed Appellant on pre-trial release supervision with a weekly reporting requirement.

{¶3} Appellant appeared for arraignment on December 20, 2016, and entered a plea of not guilty. The trial court conducted a pretrial on January 19, 2017. Appellant appeared at the pretrial, however, he had previously failed to report for pre-trial release supervision since his initial reporting on December 19, 2016. As a result, the trial court had issued a capias for Appellant's arrest.

{¶4} Appellant failed to appear for jury trial on March 7, 2017, and the trial court again issued a capias for his arrest. Appellant was arrested on or about May 10, 2017. The trial court granted Appellant leave to file a motion to suppress out of rule on May 18, 2017. In his motion to suppress, Appellant argued the police officers lacked probable

cause to knock on the door of his hotel room to investigate a domestic dispute; therefore, any evidence obtained as a result of the unconstitutional warrantless search and seizure should be suppressed. The trial court scheduled a hearing on the motion to suppress for August 4, 2017, but Appellant failed to appear. Via Judgment Entry filed August 4, 2017, the trial court denied Appellant's motion to suppress due to his failure to appear at the hearing.

{¶5} The trial court set a second trial date of August 22, 2017. After Appellant failed to appear, the trial court issued another warrant. Appellant was arrested on the outstanding warrants on October 29, 2017. Appellant posted bond. The trial court appointed new defense counsel on November 16, 2017. The state provided new counsel with discovery on November 28, 2017. After Appellant again failed to report on December 18, 2017, the trial court issued yet another warrant. Counsel for Appellant filed a second motion to suppress on January 4, 2018. The trial court denied the motion, reasoning "the defendant has had ample time to file motions and has indeed filed them." January 5, 2018 Judgment Entry.

{¶6} On March 21, 2018, Appellant appeared before the trial court, withdrew his former plea of not guilty, and entered a plea of no contest. The trial court determined there was a factual basis for the plea and found Appellant guilty. The trial court sentenced Appellant to community control for a period of three years, including completion of an approved halfway house program. The trial court also ordered Appellant to pay costs and fees.

{¶7} It is from his conviction and sentence Appellant appeals, raising the following assignments of error:

I. THE TRIAL COURT ERRED BY DENYING BENNER'S MOTION TO SUPPRESS EVIDENCE OBTAINED IN VIOLATION OF HIS RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES GUARANTEED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 14, ARTICLE I OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (R. 62).

II. BENNER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION. (R. 113). (MAR. 21, 2018 TR. 25).

I

{¶8} In his first assignment of error, Appellant maintains the trial court erred in denying his motion to suppress based upon his failure to appear at the suppression hearing.

{¶9} A defendant has a constitutional right to be present, absent a waiver of this right or other extraordinary circumstances, at every stage of his trial. *Illinois v. Allen* (1970), 397 U.S. 337; *State v. Williams* (1983), 6 Ohio St.3d 281, 286. In Ohio, this due process right is embodied in Crim.R. 43(A) which states a “defendant shall be present at * * * every stage of the trial.” The defendant's physical presence, however, is not required when purely procedural questions are presented, such as preliminary pretrial motions

which do not affect the substantial rights of the defendant. *State v. Williams* (1969), 19 Ohio App.2d 234, 240-241. Finally, a defendant's attorney may waive his client's right to be present. *Id.* at 243.

{¶10} "[A] hearing on a motion to suppress evidence, at which testimony of a witness is received, whether held before or during the trial of a case, is such a part of a trial as to require the presence of the accused." *Mentor v. Caswell* (11th Dist. 1997), 123 Ohio App. 3d 256, 258, 704 N.E.2d 26. (Citation omitted.) A defendant may waive his right to appear at a suppression hearing by the act of failing to appear where his attorney represents to the court that the failure to appear was deliberate. *Id*. at 259.

{¶11} In support of his position, Appellant relies upon *Caswell*, supra. Although *Caswell* is distinguishable, we find it instructive. In *Caswell,* the defendant filed a motion to suppress evidence, received notice of the hearing, but failed to appear. *Id*. at 257. The defendant's attorney appeared at the hearing, along with her co-defendant and her co-defendant's attorney. *Id*. at 258. The defendant's attorney moved for a continuance of the suppression hearing, but the court denied the motion and proceeded with the hearing. The trial court allowed the defendant's attorney to participate through cross-examination of the police officer who testified. *Id.* The trial court ultimately denied the defendant's motion to suppress. The defendant appealed. On appeal, the Eleventh District found the trial court abused its discretion in proceeding with the suppression hearing in the appellant's absence. The *Caswell* Court explained:

> Although the docket and the evidence indicate that appellant had been properly notified of the date and time of the suppression hearing, the

> record does not reflect why she failed to appear or, more important, if her failure to appear was deliberate or involuntary.
>
> If further inquiry via evidence indicated that there was no satisfactory or excusable reason for appellant's absence, the trial court still had numerous methods at its disposal to compel her appearance and to sanction appellant *other than denying her the right to be present and to participate* in what was clearly a critical stage of the proceedings. *Id*. at 259.

{¶12} In the case sub judice, the record does not reflect why Appellant failed to appear.

{¶13} The state contends there was no error here because Appellant did not request a continuance as occurred in *Caswell* and, as such, the trial court could not deny a continuance. The state adds the trial court did not proceed with the hearing in Appellant's absence as did the trial court in *Caswell*, which resulted in reversal.

{¶14} The state also cites *State v. Brown,* 9th Dist. No. 23637, 2008-Ohio-2670, and *State v. Vaughn*, 7th Dist. Mahoning App. No. 13 MA 136, 2015-Ohio-5595, in support of its position.

{¶15} In *Brown*, the Ninth District found the trial court did not abuse its discretion in denying Brown's motion to suppress without a hearing after he failed to appear. *Id*. at 34. The *Brown* Court noted Brown had failed to provide any authority supporting his contention. *Id*. at para. 30. The Court continued:

> Furthermore, Crim.R. 12(F), which governs the trial court's ruling on motions, including a motion to suppress, "does not mandate an evidentiary hearing on every motion to suppress." *State v. Djuric,* 8th Dist. No. 87745, 2007-Ohio-413, at ¶ 32, citing *State v. Johnson* (Apr. 2, 1992), 8th Dist. No. 60402. "In order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Shindler* (1994), 70 Ohio St.3d 54, at syllabus, citing Crim.R. 47 and *Xenia v. Wallace* (1988), 37 Ohio St.3d 216. The record reflects that Brown's September 6, 2006 motion to suppress failed to include any specific legal or factual assertions. Brown merely asserted that "the arresting officer was without reasonable suspicion to search either [Brown] or his household and was without probable cause to arrest [Brown]." *Id*. at 31.

{¶16} Although there are some factual similarities between *Brown* and the instant appeal, we find two substantive distinctions which makes *Brown* inapplicable. First, Brown's motion to suppress lacked specific legal or factual assertions. In the instant action, Appellant's motion did not. Second, Appellant's motion to suppress was predicated upon the warrantless search of his hotel room and the police officers' lack of probable cause. "When a defendant moves to suppress evidence recovered during a warrantless search, the state has the burden of showing that the search fits within one of the defined exceptions to the Fourth Amendment's warrant requirement." *State v. Banks-*

Harvey, 152 Ohio St.3d 368, 2018-Ohio-201, para. 18, citing *Athens v. Wolf* (1974), 38 Ohio St.2d 237, 241, 313 N.E.2d 405. In *Brown*, police had obtained a search warrant; therefore, the defendant had the burden of going forward. *Id*. at ¶4.

{¶17} As discussed, supra, although a defendant has a constitutional right to be present at all critical stages of trial, a defendant may waive the right. Appellant failed to appear at the hearing. He was, however, represented by counsel, who was present. Appellant was not a necessary witness at the hearing because the burden to prove an exception to the warrant requirement rested upon the state. Nothing precluded the trial court from going forward and taking evidence even in Appellant's absence if he waived his appearance.

{¶18} We also find the state's reliance on *Vaughn*, supra, to be misplaced as that case is factually distinguishable from the instant action. In *Vaughn*, Vaugh filed a motion to suppress the witness's identification of him as the perpetrator, asserting the identification procedure was unnecessarily suggestive and the witness's identification was unreliable. *Id.*at para. 3. The trial court scheduled a hearing on the motion to suppress, however, Vaughn failed to appear. *Id*. at para. 4. The trial court denied the motion to suppress due to Vaughn's failure to appear. *Id*. Vaughn's case proceeded to trial. At trial, the witness identified Vaughn as the perpetrator. *Id*.

{¶19} On appeal, Vaughn challenged the trial court's denial of his suppression motion based upon his failure to appear at the hearing. *Id*. The Seventh District Court of Appeals undertook a plain error analysis, ultimately finding no error in the trial court's decision to deny Vaughn's motion to suppress due to his failure to appear at the hearing. *Id*. at para. 36. The *Vaughn* Court found, "Even if the trial court had sua sponte continued

the hearing and decision on the motion until a later date, which it was not required to do, the motion would have been denied. In fact, the trial court later stated during trial, but out of the presence of the jury: 'I want the record to be clear that [the identification] wouldn't have been suppressible anyhow'." *Id*. Herein, we have no such clear pronouncement by the trial court Appellant's motion to suppress would have been denied even if evidence had been presented at a suppression hearing.

{¶20} We conclude Appellant waived his presence at the suppression hearing. We disagree with the *Caswell* Court's requirement a defendant's attorney must affirmatively represent to the trial court the defendant's failure to appear was deliberate before finding a waiver occurred. Where a defendant has been properly notified of the suppression hearing at which the state of Ohio has the burden of going forward to justify a warrantless search, and where the defendant's attorney does not move to continue the hearing due to the defendant's absence [unlike what occurred in *Caswell*], we find the defendant waives his right to be present.

{¶21} Based upon the foregoing, we find the trial court erred in denying Appellant's motion to suppress based solely upon Appellant's absence. Accordingly, we vacate Appellant's conviction and sentence, and remand the matter for a hearing on the motion to suppress. If after hearing the evidence, the trial court overrules Appellant's motion to suppress, the trial court can reinstate his conviction and sentence. Alternatively, if the trial court grants Appellant's motion to suppress, the trial court should initiate further proceedings according to the law.

{¶22} Appellant's first assignment of error is sustained.

II

{¶23} This Court has recently addressed and rejected this argument in *State v. Davis*, 5th Dist. Licking App. No. 17-CA-55, 2017-Ohio-9445, and *State v. Harris*, 5th Dist. Muskingum App. No. CT2018-0005, 2018-Ohio-2257. Appellant cites nothing in his Brief to prompt us to reconsider our prior rulings. Accordingly, we adhere to our decisions in *Davis*, supra, and *Harris*, supra, and overrule Appellant's second assignment of error.

{¶24} We note this issue is currently pending before the Ohio Supreme Court on a certified conflict between *Davis*, supra, and *State v. Springer*, 8th Dist. Cuyahoga No. 104649, 2017-Ohio-8861. *State v. Davis*, 152 Ohio St. 3d 1441, 2018-Ohio-1600.

{¶25} Appellant’s conviction and sentence are vacated and the matter remanded to the trial court for further proceedings consistent with this opinion and the law. Costs to Appellee.

By: Hoffman, P.J.

Delaney, J. and

Baldwin, J. concur