[Cite as *State v. Woodard*, 2010-Ohio-2949.]

# IN THE COURT OF APPEALS

# ELEVENTH APPELLATE DISTRICT

# ASHTABULA COUNTY, OHIO

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2009-A-0047** |
| - vs - | : | |
| LORRIE L. WOODARD, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 135.

Judgment: Affirmed.

*Thomas L. Sartini*, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

*Ariana E. Tarighati*, 34 South Chestnut Street, Suite 100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

**{¶1}** Appellant, Lorrie L. Woodard, appeals the judgment entered by the Ashtabula County Court of Common Pleas, confirming the jury's verdict of guilty on one count of possession of cocaine, in violation of R.C. 2925.11, a felony of the fifth degree.

**{¶2}** The instant case emanates from a traffic stop effectuated by Officer Christopher Defina of the Ashtabula City Police Department on March 12, 2008.

**{¶3}** Officer Defina testified to the following:

**{¶4}** At approximately 11:00 p.m., Officer Defina observed a vehicle displaying expired license plates. Officer Defina stopped the vehicle. Officer Defina further stated that he recognized the passenger as Ms. Woodard, as he had previously observed her in a high drug area. Officer Defina asked Ms. Woodard to step out of the vehicle. When asked if she had anything illegal in her purse, Ms. Woodard responded that she had a crack pipe. Officer Defina testified that when he looked into the vehicle, he noticed a crack pipe "sitting on top of her purse." Ms. Woodard was arrested and transported to the Ashtabula City jail. While being transported, Officer Defina testified that he asked Ms. Woodard if she had any other illegal objects in her purse, as it would be checked and inventoried upon entering the jail. Officer Defina stated that Ms. Woodard then responded that she had "some flakes of crack cocaine in her purse probably." Upon searching her purse, Officer Defina found a small bag containing flakes of crack cocaine.

**{¶5}** At trial, Ms. Woodard testified that upon being asked to step out of the vehicle, she informed Officer Defina that she had a crack pipe in her purse. Ms. Woodard stated that the crack pipe was "down in the bottom of a wallet." Woodard denied admitting to Officer Defina that she had crack cocaine in her purse when in transit to the jail. During the booking process, Ms. Woodard testified that her purse was taken "into another room and [she] was told it was searched." Ms. Woodard testified that she "did not carry around cocaine."

**{¶6}** The jury returned a verdict of guilty, and Ms. Woodard was sentenced to a two-year period of community control. Ms. Woodard filed a timely notice of appeal and asserts the following assigned errors:

**{¶7}** "[1.] Trial counsel's deficient performance prior to and during the trial deprived the defendant-appellant of the effective assistance of counsel in violation of her Sixth and Fourteenth Amendment rights.

**{¶8}** "[2.] Prosecutorial misconduct rendered defendant-appellant's trial fundamentally unfair in violation of the Constitutions of Ohio and the United States.

**{¶9}** "[3.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence in violation of Article IV of the Ohio Constitution."

**{¶10}** Under the first assignment of error, Woodard claims her trial counsel was ineffective as he failed to file a motion to suppress and failed to object both to the evidence of her prior misdemeanor conviction and when the prosecutor "commented on the defense's failure to call Mr. Weir as a witness."

**{¶11}** In evaluating ineffective assistance of counsel claims, Ohio appellate courts apply the two-part test enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668. See, *In re Roque*, 11th Dist. No. 2005-T-0138, 2006-Ohio-7007, at ¶11. (Citations omitted.) First, it must be determined that counsel's performance fell below an objective standard of reasonableness. Id. Second, it must be shown that prejudice resulted. Id. "Prejudice exists when 'the result of the trial would have been different' but for counsel's ineffectiveness." Id. Appellate courts "must always recall that a properly-licensed counsel is presumed competent" and that trial counsel is afforded strong deference regarding strategy. Id.

**{¶12}** "There is a strong presumption in Ohio that a licensed attorney is competent. *** Accordingly, to overcome this presumption, a defendant must show that the actions of his attorney did not fall within a range of reasonable assistance. ***

**{¶13}** "Furthermore, debatable 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* (Dec. 21, 2001), 11th Dist. No. 97-L-254, 2001 Ohio App. LEXIS 5857, at *5-6. (Internal citations omitted.)

**{¶14}** "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, citing *State v. Clark*, 11th Dist. No. 2002-A-0056, 2003-Ohio-6689, at ¶28. "If case law indicates the motion would not have been granted, then counsel cannot be considered ineffective for failing to prosecute it." *Gaines*, supra, at ¶17, citing *State v. Edwards* (Sept. 5, 2000), 10th Dist. No. 99AP-958, 2000 Ohio App. LEXIS 3971, at *8.

**{¶15}** Woodard has failed to point to any evidence in the record demonstrating there was a reasonable probability that the trial would have resulted in a different outcome had the motion to suppress been filed. Further, Woodard has failed to cite to any case law to support her position. Instead, Woodard makes the conclusory statement that the officer did not have the authority to search her and, absent this search, she would not have been arrested.

**{¶16}** In *Maryland v. Wilson* (1997), 519 U.S. 408, 414, the United States Supreme Court extended the rule announced in *Pennsylvania v. Mimms* (1977), 434 U.S. 106 to passengers of a vehicle and held:

**{¶17}** “[D]anger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”

**{¶18}** Officer Defina testified that he ordered Woodard out of the vehicle. Once she was outside of the vehicle, Officer Defina conducted a pat-down search of her person. When asked if she possessed anything illegal in her purse, which was located inside the car in the center console, it is undisputed that Woodard voluntarily responded that it contained a crack pipe.

**{¶19}** In *Florida v. Royer* (1983), 460 U.S. 491, the United States Supreme Court analyzed whether the simple questioning of an individual constitutes a seizure requiring Fourth Amendment protection. Answering in the negative, the *Royer* Court stated:

**{¶20}** “Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.” Id. at 497. See, also, *State v. Robinette* (1997), 80 Ohio St.3d 234, 241 (determining that an officer “was justified in briefly detaining [the appellant] in order to ask him whether he was carrying any illegal drugs or weapons pursuant to the drug interdiction policy, because such a policy promotes the public interest in quelling the drug trade.”)

**{¶21}** Woodard was then placed under arrest for possession of drug paraphernalia. A search incident to a lawful arrest is an exception to the warrant requirement under the Fourth Amendment. "Searches may also extend to the personal effects of an arrestee. [The Supreme Court of Ohio has] held that the search of a purse is reasonable under the Fourth Amendment in certain circumstances, *State v. Mathews* (1976), 46 Ohio St.2d 72, *** and the United States Supreme Court has held that it is reasonable for police to search any container or article on a defendant's person—including a shoulder bag—in accordance with established inventory procedures. *Illinois v. Lafayette* (1983), 462 U.S. 640 ***." *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, at ¶13. (Parallel citations omitted.)

**{¶22}** In this case, Officer Defina stated that en route to the jail, he informed Woodard that her purse would be subject to an inventory search. It is the testimony of Officer Defina that Woodard then stated that her purse contained a "small baggy with some crack flakes." However, even if the testimony of Woodard is believed, that is, that she never admitted to having crack cocaine in her purse when in transit to the jail, the record demonstrates that the narcotics would have been inevitably discovered as part of the officer's routine inventory search.

**{¶23}** The Supreme Court of Ohio, in *Illinois v. Lafayette* (1983), 462 U.S. 640, 643, addressed whether, "consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station house incident to booking and jailing the suspect." Answering in the affirmative and holding that an individual's shoulder bag was a valid inventory search, the Court stated:

**{¶24}** "The justification for such searches does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search. Here, every consideration of orderly police administration -- protection of a suspect's property, deterrence of false claims of theft against the police, security, and identification of the suspect -- benefiting both the police and the public points toward the appropriateness of the examination of respondent's shoulder bag." Id. at syllabus.

**{¶25}** We further conclude that the inventory search was conducted in good faith as to satisfy the Fourth Amendment under *Illinois v. Lafayette*, supra. See, also, *State v. Combs*, 2d Dist. No. 22346, 2008-Ohio-2883, at ¶6 (stating that "it is sufficiently clear that inventory searches of arrested persons and the personalty that they intend to bring with them into the county jail are a customary and typical procedure in Montgomery County.") Officer Defina testified that, pursuant to the established procedures at the Ashtabula City jail, Woodard's purse would have been searched. Officer Defina testified to the following:

**{¶26}** "Q: ***. Have you ever worked in the Ashtabula city jail?

**{¶27}** "A: Yes.

**{¶28}** "Q: And in what capacity did you work in that jailhouse?

**{¶29}** "A: Corrections officer.

**{¶30}** "Q: Okay. When a person is arrested and they're brought to the Ashtabula city jail, as a former corrections officer in that jail, what procedures do you follow to do to book somebody?

**{¶31}** "***

**{¶32}** "A: *** any property they bring in the jail, we go through every piece of it and log it.

{¶33} "Q: Okay, would you have looked in her purse or would one of the corrections officers have looked in her purse?

{¶34} "A: Absolutely."

{¶35} Based on the evidence in the record, we hold that Woodard's trial counsel was not ineffective for failing to file a motion to suppress since case law establishes it would have been futile. *Gaines* at ¶17.

{¶36} Next, we analyze whether evidence of Woodard's prior misdemeanor conviction was proper during the jury trial. Again, Woodard has failed to provide any case law or support for this argument on appeal. Nevertheless, in the interest of justice, we will review her argument on appeal.

{¶37} During trial, Woodard testified on her own behalf. Upon being questioned on direct examination as to the conversation between herself and Officer Defina, Woodard stated:

{¶38} "The conversation was based on because I could not understand why he had come and asked me to step out of the vehicle to begin with, or even wanted to search me, because I have no prior record. And he said it's because I was known, and I asked him what he meant by that, and he said well, I see you all the time riding with different men."

{¶39} On cross-examination, the following colloquy occurred:

{¶40} "Q: It's your testimony here today that you have no prior convictions for anything?

{¶41} "A: I didn't say for anything, I said for drugs, for the crack.

{¶42} "Q: You have no prior convictions for anything involving drugs?

{¶43} "A: There's about four years ago, there was a paraphernalia charge.

**{¶44}** "Q: So you do have a prior conviction for drug paraphernalia?

**{¶45}** "A: For drug paraphernalia."

**{¶46}** Pursuant to Evid.R. 609(A), a party may use a witness's prior convictions to impeach his testimony. The rule is limited, however, in that it only allows impeachment by evidence of conviction of a crime to crimes punishable by death or imprisonment in excess of one year or crimes involving dishonesty or false statement. Evid.R. 609(A)(2) and (3).

**{¶47}** In this scenario, however, Woodard "opened the door" on direct-examination by testifying that she did not have a prior record. Therefore, while a misdemeanor drug paraphernalia charge is not contemplated by Evid.R. 609, the prosecutor's line of questioning was appropriate under Evid.R. 405(A), as it was used to rebut or impeach Woodard's testimony on direct-examination. Under Evid.R. 405(A), "inquiry is allowable into relevant specific instances of conduct" during "cross-examination."

**{¶48}** "Sometimes these specific instances of conduct can involve relevant prior criminal convictions. In this situation, the prosecution is not limited only to the type of convictions described in Evid.R. 609. *** This is because the evidence is not offered for the purposes described in that rule, namely, for attacking the general credibility of the witness. Rather, the evidence is to rebut the character evidence initially presented by the defense.

**{¶49}** "The rebuttal can cover any relevant convictions, including misdemeanors otherwise inadmissible under Evid.R. 609, but subject to the other applicable rules of evidence. See *State v. King* (Aug. 30, 1995), 9th Dist. No. 16921, 1995 Ohio App. LEXIS 3812. Indeed, the rebuttal evidence can consist of misdeeds less serious than

misdemeanor convictions in the proper circumstances. See *State v. Gest* (1995), 108 Ohio App.3d 248, 258 *** (evidence of defendant's prior arrests where defendant denied having any prior arrests on direct examination); *State v. Robinson* (1994), 98 Ohio App.3d 560 *** (evidence of prior juvenile court adjudications where defendant introduced evidence of his peaceful character on direct examination); *State v. Jones* (Feb. 10, 1992), 5th Dist. No. CA-8680, 1992 Ohio App. LEXIS 563 (evidence of prior marijuana smoking where appellant denied usage and asserted he was a good parent on direct examination)." *State v. Eldridge*, 12th Dist. No. CA2002-10-021, 2003-Ohio-7002, at ¶43-44. (Footnote and parallel citations omitted.)

**{¶50}** Once an appellant makes a false statement on direct-examination that would lead the jury to believe she has always been a law-abiding citizen with no prior record, she puts her record at issue. As it was proper for the prosecution to ask the above-stated questions on cross-examination, Woodard's trial counsel was not ineffective for failing to object.

**{¶51}** Woodard also claims trial counsel did not object to the prosecutor's comments during closing arguments that she failed to call Mr. Weir, the driver of the vehicle, as a witness. Upon a review of the record, however, we find this argument without merit. The prosecutor's argument was not improper, since the remarks were in response to Woodard's closing argument at trial. During closing argument, Woodard's attorney argued that Woodard did not possess the cocaine. Woodard's attorney then stated, "[t]he driver of the vehicle sat there in the vehicle next to this purse that was there in the [console] the entire time Miss Woodard was taken out of the vehicle, patted down, searched. *** We're not making accusations on Mr. Weir but that's something that I want you to think about and consider when you're deliberating."

**{¶52}** During rebuttal, the prosecutor stated the following:

**{¶53}** "And what about Mr. Weir? There has been no evidence put on by the defense or by the State, that Mr. Weir may have slipped something into that purse, none whatsoever. Defendant never stated Mr. Weir may have slipped something into her purse. She never did tell us that on that stand. And where's Mr. Weir? He's not here to tell us that he did that either. So that's a dead end. That's something to cloud your vision about what the facts of the case are."

**{¶54}** The record reveals the prosecutor was attempting to refute the strategy taken by Woodard's attorney; thus, defense counsel was not ineffective for failing to object.

**{¶55}** Under her second assignment of error, Woodard alleges the prosecutor engaged in prosecutorial misconduct as he questioned her regarding a prior misdemeanor conviction, her prior drug use, and vouched for Officer Defina's credibility. For the reasons that follow, we find Woodard's assignment of error without merit.

**{¶56}** "[P]rosecutorial misconduct will not be a ground for error unless the defendant is denied a fair trial." *State v. David*, 11th Dist. No. 2005-L-109, 2006-Ohio-3772, at ¶66, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

**{¶57}** First, Woodard claims the prosecutor erred in asking her about her prior misdemeanor conviction; however, as we noted above, this line of questioning was proper, as Woodard "opened the door" on direct-examination.

**{¶58}** We further note that the trial court, in its jury charge, instructed the jury as follows:

**{¶59}** "Testimony was introduced that the defendant, Lorrie L. Woodard, was convicted of a criminal act. This testimony may be considered for the purpose of

helping you to test the credibility or weight to be given to this testimony. It cannot be considered for any other purpose."

**{¶60}** Second, Woodard claims the prosecutor "vouched for the officer over her testimony." We find no such evidence in the record. Rather, the prosecutor, during closing arguments, simply outlined the evidence presented at trial and suggested inferences that might be drawn from the evidence and testimony presented. "[The prosecutor] can say, 'The evidence supports the conclusion that the defendant is lying, is not telling the truth, is scheming, has ulterior motives, including his own hide, for not telling the truth.'" *State v. Draughn* (1992), 76 Ohio App.3d 664, 670. (Citations omitted). The prosecutor cannot say, however, "'I believe these witnesses,' because such argument invades the province of the jury, and invites the jury to decide the case based upon the credibility and status of the prosecutor. *** In a sense, such argument by the prosecutor injects himself into the trial as a thirteenth juror, and claims to himself the first vote in the jury room." Id. (Citations omitted). In this matter, the prosecutor's statements did not inject himself into the trial or invite the jury to decide the case based on his credibility. This argument of Woodard is not well-taken.

**{¶61}** Finding no instances of prosecutorial misconduct in the record, Woodard's second assignment of error is not well-taken.

**{¶62}** Under her third assignment of error, Woodard alleges the evidence was against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

**{¶63}** "'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in

resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

**{¶64}** On appeal, Woodard states that the case "was essentially a he said/she said situation" and, therefore, the jury lost its way when it concluded, after hearing the evidence, that she was guilty of possession of cocaine.

**{¶65}** At trial, the jury heard the testimony of both Officer Defina and Woodard. They both testified that Woodard admittedly possessed a crack pipe in her purse. Although their testimony differs as to the cocaine found in Woodard's purse, the jury was free to believe Officer Defina, as the weight to be given to the evidence and the credibility of witnesses are primarily matters for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In assessing the witnesses' credibility, the jury, as the trier-of-fact, had the opportunity to observe the witnesses' demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, at *5-6. Thus, the jury was "clearly in a much better position to evaluate the credibility of witnesses than [this] court." Id.

**{¶66}** As previously noted, Officer Defina testified that Woodard admitted she possessed cocaine in her purse. Officer Defina further testified that a small bag was found in Woodard's purse containing flakes of crack cocaine.

**{¶67}** The jury, after having the opportunity to listen to the witnesses and judge their credibility, was free to believe that Woodard possessed the crack cocaine found in her purse. We defer to the judgment of the jury and find that their verdict did not create

such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Woodard's third assignment of error is without merit.

**{¶68}** Based on the opinion of this court, the judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.