[Cite as *State v. Layne*, 2011-Ohio-3763.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-09-073
	:	O P I N I O N
- vs -		8/1/2011
	:	
FLOYD LAYNE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 09CR00216

Donald W. White, Clermont County Prosecuting Attorney and David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

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POWELL, P.J.

{¶1} Defendant-appellant, Floyd Layne, appeals his convictions in the Clermont County Court of Common Pleas for illegal assembly or possession of chemicals for the manufacture of drugs and conspiracy to commit the illegal manufacture of drugs.

{¶2} The relevant facts of the case are as follows:

{¶3} On March 13, 2009, appellant, an individual named Jack Keith, and two

women traveled in Keith's vehicle to the Eastgate Meijer store located in Clermont County. While appellant waited outside, Keith and the women entered Meijer and purchased two boxes of Sudafed.[1] The group paid in cash and purchased no other items at the store. A Meijer pharmacist on duty found the purchase to be suspicious and common among individuals engaged in the manufacture of methamphetamine. The pharmacist contacted the Union Township Police Department to report the activity, giving deputies a full description of Keith's vehicle, including the fact that the vehicle had New Mexico license plates. At that time, Officer Chris Holden was investigating another reported crime at the same Meijer store. Upon receiving the pharmacist's complaint, Officer Holden exited the store just as the vehicle matching the pharmacist's description exited the parking lot.

{¶4} Officer Holden attempted to follow the vehicle, but eventually lost sight of it. As Officer Holden returned to Meijer, he saw the vehicle again and resumed his pursuit. After stopping the vehicle, Officer Holden noticed appellant and one of the women making furtive, hurried gestures in the back seat. When a second police officer arrived, Officer Holden approached the vehicle and spoke to Keith. Officer Holden asked Keith what he purchased at Meijer and why he purchased it, at which time Keith explained he purchased Sudafed for methamphetamine purposes. Keith then asked to speak to Officer Holden in private, at which time he informed Officer Holden that there was a tank in the back of the vehicle that belonged to appellant and that he did not know what was in it.

{¶5} Officer Holden then spoke to appellant and asked him his name, age, date of birth, social security number, and address. Appellant responded that his name was James Layne, he was born in September of 1979, he was 39 years old, he did not know his social security number, and he resided at an address in Portsmouth, Ohio. Officer

1. Sudafed contains pseudoephedrine, which is a necessary ingredient in the manufacture of methamphetamine.

Holden then asked appellant if that information was correct because he could not be 39 years old if he was born in 1979, and appellant reiterated that he was born in September of 1979.

{¶6} While Officer Holden questioned the occupants of Keith's vehicle, Clermont County Narcotics Task Force agents searched the vehicle and found the tank Keith described. Agent Kenneth Mullis conducted a field test of the substance in the tank and discovered the tank contained anhydrous ammonia, another compound commonly associated with methamphetamine. Agent Mullis also discovered a glass jar containing a white powder residue, containers that appeared to contain gasoline and muriatic acid, a can of starter fluid, a blister package containing pills resembling Sudafed, a piece of paper with codes to decipher police dispatch instructions, a digital scale, a lithium battery, and salt. According to Agent Mullis, all of this evidence was consistent with methamphetamine production.

{¶7} Appellant was subsequently arrested and transported to the Clermont County jail. When Officer Holden ran a search on appellant's identity using the information appellant provided, he learned appellant had given him false information. When Officer Holden questioned appellant again, appellant admitted he had lied and subsequently gave Officer Holden the correct information.

{¶8} Appellant was charged with one count of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), and one count of conspiracy to commit the illegal manufacture of drugs in violation of R.C. 2923.01(A)(2).

{¶9} Following a bench trial, appellant was found guilty on both counts and received a sentence of three years in prison on each count, to be served consecutively. In the sentencing entry, the trial court ordered appellant to pay court costs and court-appointed counsel fees, but failed to announce these costs during the sentencing hearing.

{¶10} On December 11, 2009, appellant appealed the trial court's decision. On May 24, 2010, this court affirmed appellant's convictions, but remanded the portion of appellant's sentence ordering him to pay court costs and court-appointed counsel fees for a hearing on the matter. See R.C. 2941.51(D). Before the remand instructions were carried out, appellant filed a motion for reconsideration with this court, which was granted and appellant's appeal was dismissed for lack of jurisdiction. *State v. Layne*, Clermont App. No. CA2009-07-043, 2010-Ohio-2308, dismissed for lack of jurisdiction. On August 26, 2010, the trial court entered a new sentencing entry, at which time appellant filed the instant appeal, asserting four assignments of error for review.

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ERRED BY ADMITTING STATEMENTS OF A MEIJER STAFF PERSON TO A POLICE OFFICER IN VIOLATION OF MR. LAYNE'S RIGHT TO CONFRONT HIS ACCUSER UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶13} In his first assignment of error, appellant argues the trial court erroneously permitted Officer Holden to testify to out-of-court statements from a Meijer employee who did not testify during trial. Specifically, appellant argues Officer Holden improperly testified to the following statements made by a Meijer pharmacist:

{¶14} "[T]hree people came in [Meijer] and bought two boxes of Sudafed. [The Meijer pharmacy staff] watched them. They all walked out. And they all got in the same vehicle with New Mexico [license] plates."

{¶15} Appellant argues these statements were testimonial and were thus admitted in violation of his right to confront the declarant under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354; and *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266. The state argues appellant failed to file a pretrial motion to suppress Officer Holden's

testimony and therefore waived any objection thereto. The state also argues that no Confrontation Clause issue exists because appellant's stipulation relieved the state's obligation to call the Meijer pharmacist to testify to the same facts.

{¶16} Inasmuch as Officer Holden's testimony was not the subject of a timely motion to suppress, we agree with the state that any error regarding its admissibility was waived. Crim.R. 12(B)(3), (G) ("[f]ailure by the defendant to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision [C], or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for good cause shown may grant relief from the waiver[.]"). See, also, *State v. F.O.E. Aerie 2295*, *Port Clinton* (1988), 38 Ohio St.3d 53, 55.

{¶17} Regarding appellant's Confrontation Clause argument, we find no error exists as to that matter either.

{¶18} Prior to trial, appellant's counsel entered the following stipulation regarding the Sudafed purchase at Meijer:

{¶19} "THE STATE: [I]t's my understanding [the defense will] stipulate * * * the three co-defendants: Lenora Collins, Penny Conley, and Mr. Keith * * * all three of those individuals went [into Meijer] on the day in question, purchased Sudafed or products containing pseudoephedrine, a Schedule II drug which is the basis of the Illegal Assembly.

{¶20} "THE COURT: Is that correct[?]

{¶21} "THE DEFENSE: That's correct, Your Honor[.]"

{¶22} The Ohio Supreme Court has held on several occasions that "the submission of a stipulation of facts '[is] to be regarded * * * as [comparable to] a special verdict of a jury, expressing the result of the proof made by both parties[.]'" *Aerie* at 54,

quoting *Ish v. Crane* (1862), 13 Ohio St. 574, 580.

{¶23} In the case at bar, appellant clearly stipulated that his three companions entered Meijer on the date in question and purchased two boxes of Sudafed. This stipulation was tantamount to a "factual determination rendered by a jury," which dispelled the need to call the Meijer pharmacist to testify to the same facts. *Aerie* at 54. Therefore, appellant cannot argue he was deprived of his right to confront the Meijer pharmacist when he stipulated to the critical facts to which the pharmacist would have testified.

{¶24} For these reasons, appellant's first assignment of error is overruled.

{¶25} Assignment of Error No. 2:

{¶26} "THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OBTAINED FROM AN ILLEGAL SEARCH AND SEIZURE."

{¶27} The first portion of appellant's second assignment of error stems from his assumption that he would prevail on his first assignment of error. Specifically, appellant argues that upon the exclusion of the Meijer pharmacist's statements, the remaining evidence is insufficient to support a finding of guilt.

{¶28} However, as previously discussed, appellant's failure to file a pretrial motion to suppress this evidence constitutes a waiver of any objection thereto. Crim.R. 12(B)(3), (G). Accordingly, we reject this argument.

{¶29} As his second issue, appellant argues the Meijer pharmacist's statements were insufficient to give rise to a reasonable and articulable suspicion of criminal activity to justify stopping Keith's vehicle. As such, appellant argues the trial court "plainly erred" in admitting any evidence procured from the vehicle. See *Terry v. Ohio* (1967), 392 U.S. 1, 19-21, 88 S.Ct. 1868; *State v. Bobo* (1988), 37 Ohio St.3d 177.

{¶30} Appellant argues that a single report of a Sudafed purchase from one store does not justify a *Terry* stop or the resulting search of a vehicle and its occupants.

{¶31} Both the Fourth Amendment to the United States Constitution and Section 14, Article 1 of the Ohio Constitution guarantee the right of people to be secure from unreasonable searches and seizures. However, it is well-recognized that officers may briefly stop and detain an individual, without an arrest warrant and without probable cause, in order to investigate a reasonable and articulable suspicion of criminal activity. See *Terry*, 392 U.S. at 19-21. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances" as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶14.

{¶32} In *Wilson*, a pharmacist at a Bigg's store located in Deerfield Township witnessed defendant purchase two packages of generic Sudafed. Defendant and a friend were then seen leaving the parking lot in a vehicle with Tennessee license plates. The pharmacist notified the store's security guard, who contacted the police to report the activity. Officers soon located the described vehicle and executed an investigative stop, at which time they discovered numerous items associated with the manufacture of methamphetamine. This court held that these facts, coupled with the officers' training and experience, gave the officers sufficient reasonable and articulable suspicion to justify the investigative stop. Id. at ¶17.

{¶33} We find the facts in *Wilson* are sufficiently similar to the facts in this case to justify a similar holding. Specifically, the Meijer pharmacist witnessed three individuals enter the store, at which time they purchased two boxes of Sudafed and reconvened at a vehicle with New Mexico license plates. Appellant attempts to distinguish *Wilson* by arguing that the officers in *Wilson* "learned that the defendants had purchased only pseudoephedrine at *two* different stores in quick succession." (Emphasis added.) This

fact, standing alone, is insufficient to distinguish *Wilson* from the case at bar, particularly in light of the remaining similarities between the cases, including the out-of-state license plates and the officers', as well as the pharmacists', prior experience with Sudafed and its relation to the production of methamphetamine. While appellant argues more evidence was needed to justify the stop, we emphasize that "the standard for an investigative stop is not probable cause, but reasonable, articulable suspicion." *Wilson*, 2007-Ohio-2298 at ¶17.

{¶34} All facts considered, we find the officers in this case were performing their police duties in a conscientious manner. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response." *State v. Freeman* (1980), 64 Ohio St.2d 291, 295-296.

{¶35} In complete compliance with the above-quoted passage, the officers herein made a brief stop of appellant and his companions in order to investigate an eye witness' detailed account as to the events at Meijer. Accordingly, the officers operated under sufficient reasonable suspicion that appellant and his companions were engaged in the criminal act of assembling chemicals for the manufacture of methamphetamine. As such, the officers were justified in stopping and detaining appellant in order to investigate. See id.

{¶36} Because the statements and evidence obtained after the traffic stop were not subject to suppression, the admission of this evidence is not plain error. Crim.R. 52.

{¶37} Accordingly, appellant's second assignment of error is overruled.

{¶38} Assignment of Error No. 3:

{¶39} "MR. LAYNE'S COUNSEL WAS INEFFECTIVE."

{¶40} In his third assignment of error, appellant argues he was denied his right to the effective assistance of counsel.

{¶41} In reviewing a claim of ineffective assistance of counsel, an appellate court must determine: (1) whether counsel's performance fell below an objective standard of reasonable professional competence, and (2) if so, whether there is a reasonable probability that counsel's unprofessional errors prejudiced appellant such that he or she was deprived of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052. In performing its review, an appellate court is not required to examine counsel's performance under the first prong of the *Strickland* test if an appellant fails to prove the second prong of prejudicial effect. See *State v. Arrone*, Madison App. No. CA2008-04-010, 2009-Ohio-1456, ¶21.

{¶42} In order to demonstrate an error in counsel's actions, an appellant must overcome the strong presumption that licensed attorneys are competent, and that the challenged action is the product of sound trial strategy and falls within the wide range of reasonable professional assistance. *Strickland* at 690-691. In demonstrating resulting prejudice, an appellant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Id.

{¶43} In the case at bar, appellant identifies two alleged instances of ineffective assistance of counsel. First, appellant argues trial counsel was ineffective for failing to make a proper objection to Officer Holden's testimony regarding the Meijer pharmacist's statements. Specifically, appellant argues that had counsel properly objected, there is a reasonable probability that the result of the proceedings would have been different because the state could not have introduced the pharmacist's statements without first procuring the pharmacist for cross-examination. See *Crawford*, 541 U.S. at 68. We disagree.

{¶44} As previously noted, as a result of his stipulation, appellant cannot argue the state violated his right to confront a witness whose statements appellant upheld as true. Moreover, appellant cannot demonstrate that the result of the proceedings would have been different had appellant's counsel not stipulated to this evidence. The record reflects the state subpoenaed the pharmacist to testify to the events that transpired on the day in question, but released the pharmacist after appellant's counsel entered the stipulation. In other words, absent the stipulation, appellant would have had every opportunity to cross-examine the pharmacist pursuant to *Crawford*. Because appellant cannot show a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different, we reject his first argument.

{¶45} Secondly, appellant argues trial counsel was ineffective for failing to file a motion to suppress evidence procured as a result of the traffic stop.

{¶46} A failure to file a motion to suppress evidence seized does not necessarily constitute ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448. "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. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶65. See, also, *State v. Gibson* (July 3, 1980), 69 Ohio App.2d 91 (finding where there is no justification for filing a suppression motion, defendant has not met the burden of showing his counsel's performance was deficient). Even if the record contains some support for a motion to suppress, we presume that trial counsel was effective if counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act. *State v. Brown*, Warren App. No. CA2002-03-026, 2002-Ohio-5455, ¶11.

{¶47} We note that appellant made the same argument in his original appeal to this court in 2009. See *Layne*, 2010-Ohio-2308 at ¶43. While we subsequently dismissed

our decision for lack of jurisdiction, we agree with our prior conclusion that counsel could have reasonably presumed that the filing of a motion to suppress would have been futile, where the evidence showed the investigative stop was justified. Id. at ¶48. As the state correctly notes, appellant sets forth no new argument or evidence to alter our opinion on this matter. Under such circumstances, we find, as before, that appellant has failed to show counsel's performance was deficient or prejudicial.

{¶48} Accordingly, appellant's third assignment of error is overruled.

{¶49} Assignment of Error No. 4:

{¶50} "THE TRIAL COURT ERRED BY ADDING FINANCIAL SANCTIONS NOT IMPOSED IN OPEN COURT."

{¶51} In his fourth assignment of error, appellant argues the trial court erroneously imposed court costs and court-appointed counsel fees in the sentencing entry, even though the sanctions were not imposed during the sentencing hearing. Moreover, appellant asserts court-appointed counsel fees may only be imposed after a determination of his ability to pay pursuant to R.C. 2941.51(D). See, e.g., *State v. Shannon*, Preble App. No. CA2003-02-005, 2004-Ohio-1866, ¶3-4.

{¶52} The state concedes these errors and agrees with appellant that a remand is necessary to allow appellant to seek a waiver of the sanctions.

{¶53} Accordingly, we find the trial court's failure to make any determination in compliance with R.C. 2941.51(D) constitutes plain error that we may take immediate action to remedy. Cf. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954.

{¶54} Appellant's fourth assignment of error is sustained.

{¶55} The decision of the trial court is reversed as to the order to pay court costs and court-appointed counsel fees; all other portions of the decision are affirmed. This cause is remanded to the trial court for a determination pursuant to R.C. 2941.51(D)

regarding appellant's ability to pay court costs and attorney fees.

RINGLAND and PIPER, JJ., concur.