[Cite as *State v. Rivera*, 2012-Ohio-3755.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-10-194
	:	O P I N I O N
- vs -	:	8/20/2012
ANGEL D. RIVERA,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-01-0148

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Scott Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Angel D. Rivera, appeals from his conviction in the Butler County Court of Common Pleas for possession of marijuana. Rivera argues his trial counsel provided him with ineffective assistance by not filing a motion to suppress evidence seized by police as a result of their warrantless entry and search of a residence at which he was purportedly staying as a house sitter. For the reasons that follow, we disagree with Rivera's argument and affirm his conviction for possession of marijuana.

{¶ 2} On December 30, 2010, Detective Jill Ebbing of the Fairfield Township Police Department learned that there had been a home invasion on Fayetta Drive and that one of the persons in the home, who was later identified as Rivera, had been shot in the face and taken to the hospital. Detective Ebbing was ordered to go to the scene of the shooting to collect "evidence and those kinds of things[.]"

{¶ 3} Detective Ebbing was the first detective to arrive at the crime scene; she was later joined by Detective Mark Sons. While investigating the crime scene, the detectives noticed there was blood on the carpet and that the back door of the residence had been kicked in. Detective Ebbing also noticed two U-Haul boxes in the residence "that seem[ed] quite out of place" because the residence looked like it had "been lived in, and it didn't look like someone was just moving into it."

{¶ 4} When the detectives "were getting ready to clear the house and release the house," they remembered there was a puppy in the residence. At first, the detectives placed the puppy in a bedroom, but realized it could not stay there since there "was stuff [in the bedroom that the puppy] could eat." The detectives then decided to go to the basement to see if there was a cage for the puppy or if it would be suitable to leave the puppy in the basement with some food and water until Rivera's family could come and take it.

{¶ 5} When Detective Ebbing went to the basement, she saw there were several bags of trash, pieces of cellophane, and feces lying on the basement floor, which led her to conclude that the puppy had pulled the cellophane out of the garbage bags and then chewed on it. She also saw that one of the garbage bags was open, and when she looked in it, she saw there was something packaged and wrapped with cellophane, which had been cut open with an "X." Upon seeing the cellophane and the garbage bags, Detective Ebbing called for Detective Sons to come to the basement so that she could tell him they could not leave the puppy down there and that she believed they had "stumbled" onto something that required

them to obtain a search warrant.

{¶ 6} When Detective Sons came down to the basement, he looked down and saw a bag of marijuana in an open drawer of a dresser that was sitting at the bottom of the basement stairs. The detectives then saw a number of U-Haul boxes in the basement, including several that were under the basement steps and another four in the back corner of the basement. One of the boxes was open, and when the detectives looked down into it, they saw "the same cellophane, green cellophane, that did not appear to be opened or used[,]" but "appeared still tight and around something." At that point, the detectives called in the police department's drug investigation unit and requested that a search warrant be obtained for the residence.

{¶ 7} Agent Lenny Hollandsworth of the Fairfield Township Police Department met with Detective Ebbing shortly thereafter and obtained a search warrant for the residence. Agent Hollandsworth and his fellow officers, including Detective Sons, executed the warrant and found 20,000 grams or 850 pounds of marijuana packed in bundles and placed inside the U-Haul boxes. The marijuana had an estimated value of $1,000 per pound. While the officers were executing the warrant, Detective Sons found some paperwork for a rental storage unit. The officers then obtained a search warrant for the storage unit and discovered that a Ford Ranger pickup truck was being stored there. Later that evening, Agent Hollandsworth and Detective Sons went to Rivera's residence and spoke with Rivera's younger brother, J.R., who Agent Hollandsworth estimated to be 15 or 16 years old. J.R. told the officers he was present at the time the shooting occurred and provided the officers with a list of items he wanted from the residence.

{¶ 8} Two days after the shooting, Agent Hollandsworth visited Rivera in the hospital. Rivera told the agent that he had been "house sitting" the residence for the past "couple weeks" for a guy named "Francisco," who was paying him $350 to $500 to watch the

residence. Rivera also told the agent that, at Francisco's request, he had put the lease and utilities for the residence, along with the rental storage unit, in his (Rivera's) name. Rivera admitted he knew about the marijuana in the boxes at the residence and said that several days prior to the robbery, Francisco returned to the residence and got a couple of the boxes of marijuana to sell. Rivera said that during the robbery, he heard what sounded like boxes being dragged up the steps. When Agent Hollandsworth told Rivera about the two boxes that were found in the living room, Rivera told the agent that, prior to the robbery, the boxes had not been in the living room and had not been empty.

{¶ 9} Rivera was indicted on one count of trafficking in marijuana, a first-degree felony, in violation of R.C. 2925.03(A)(2) and one count of possession of marijuana, a second-degree felony, in violation of R.C. 2925.11. Following a jury trial, Rivera was acquitted of the trafficking charge but found guilty of the possession charge. The trial court sentenced him to a mandatory eight-year prison term for possession of marijuana.

{¶ 10} Rivera now appeals his conviction and assigns the following as error:

{¶ 11} APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, WHICH DENIAL RESULTED IN PREJUDICE.

{¶ 12} Rivera argues his trial counsel provided him with ineffective assistance of counsel by failing to file a motion to suppress evidence of the marijuana seized by police as a result of their warrantless entry and search of the residence at which he had been purportedly staying as a house sitter. We disagree with this argument.

{¶ 13} In Ohio, a properly licensed attorney is presumed to be competent. *State v. Gondor*, 112 Ohio St. 3d 377, 390-91, 2006-Ohio-6679, ¶ 62. To overcome this presumption, the defendant must prove that he was denied his constitutional right to the

effective assistance of counsel by showing that (1) his defense counsel's performance "fell below an objective standard of reasonableness[,]" *and* (2) the deficient performance prejudiced him in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694 A defendant's failure to make a sufficient showing on either the "performance" or "prejudice" prongs of the *Strickland* standard will doom the defendant's ineffective assistance claim. *Id*. at 687.

{¶ 14} A failure by defense counsel to file a motion to suppress does not constitute ineffective assistance of counsel, *per se*. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶ 65. To establish ineffective assistance of counsel in this type of situation, "a defendant must prove that there was a basis to suppress the evidence in question." *Id.* However, there are often significant "difficulties" in "attempting to establish in hindsight that a suppression motion would have been granted on the basis of evidence contained in a trial transcript." *State v. Morrison*, 4th Dist. No. 03CA13, 2004-Ohio-5724, ¶ 16. "[T]he record developed at trial is generally inadequate to determine the validity of the suppression motion" that defense counsel supposedly should have filed. *State v. Culbertson*, 5th Dist. No. 2000CA00129, 2000 WL 1701230, *4 (Nov. 13, 2000), citing *State v. Parkinson*, 5th Dist. No. 1995CA00208, 1996 WL 363435, *3 (May 20, 1996). Where the record lacks sufficient evidence to enable an appellate court to determine whether a suppression motion would have been successful if filed, a defendant cannot prevail on a claim that his or her defense counsel provided ineffective assistance by not filing such a motion. *Morrison*, *Culberson* and *Parkinson*.

{¶ 15} Under the Fourth Amendment to the United States Constitution, when a police officer conducts a search and seizure inside a home without first obtaining a warrant, the

search and seizure are deemed presumptively unreasonable unless an exception to the warrant requirement applies. See *Payton v. New York*, 445 U.S. 573, 586-587, 126 S.Ct. 1943 (2006). One such exception to the warrant requirement is for "exigent circumstances," including the need to protect or preserve life or avoid serious injury, which render "the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-394, 98 S.Ct. 2408 (1978). Another exception is the "plain view" exception, which allows a police officer to seize contraband or evidence of a crime within the officer's "plain view," provided that the officer is lawfully present at the place where the evidence can be seen in plain view, the officer has a lawful right of access to the evidence, and the incriminating nature of the evidence is immediately apparent. *Horton v. California*, 496 U.S. 128, 132-137, 110 S.Ct. 2301 (1990). However, there is no "murder scene" or "crime scene" exception to the search warrant requirement. See *Mincey* at 392-395 and *Flippo v. West Virginia*, 437 U.S. 385, 11-15.

{¶ 16} Rivera asserts that when Detectives Ebbing and Sons arrived at the residence, there was no exigent circumstance that justified their decision to enter the residence and conduct a search without first obtaining a warrant, since he was either at, or in transport to, the hospital, and all other persons inside the residence had been located. Therefore, he contends, Detectives Ebbing and Sons had no right to search the premises, which led to the discovery of the marijuana. We find this argument unpersuasive.

{¶ 17} Rivera's argument ignores the fact that Detectives Ebbing and Sons had completed their investigation of the home invasion of the residence and were preparing to "release" the house and leave it when they remembered that there was a puppy in the residence. The record does not indicate what evidence, if any, the detectives uncovered as a result of their investigation of the residence. However, the record does show that the detectives discovered the marijuana *after* they had completed their investigation pertaining to

the home invasion.

{¶ 18} Detective Ebbing went into the residence's basement to find a safe location where the puppy could be left. Once she was in the basement, Detective Ebbing saw, in plain view, certain conditions that caused her to conclude that the basement was not a safe place to leave the puppy and that she had "stumbled" onto something that indicated she and Detective Sons needed to obtain a warrant. While it is not clear from the trial transcript as to what exactly caused Detective Ebbing to arrive at either of these two conclusions, it can be inferred from the detective's testimony that her concern about leaving the puppy in the basement arose from the facts that feces and several trash bags were lying on the basement floor, since Detective Ebbing testified that the puppy had been chewing on the trash bags and had managed to pull out some of the cellophane that had been inside the trash bags, as the cellophane was strewn all over the basement floor. It can also be inferred from Detective Ebbing's testimony that she became concerned about the presence of illegal drugs once she saw that something inside one of the trash bags had been packaged and wrapped with cellophane and then cut open with an "X." Once Detective Ebbing arrived at these two conclusions she called for Detective Sons to come to the basement so that she could tell him about the conclusions she had drawn.

{¶ 19} When Detective Sons came down to the basement at Detective Ebbing's request and looked down into an open drawer of the dresser sitting at the bottom of the basement steps, he could see the marijuana lying in the drawer, in plain view. Both detectives then observed other evidence in plain view, which indicated that the contraband had been shipped to the residence, including the cellophane that was strewn all over the basement floor, as well as the moving boxes in the basement. *See generally*, *State v. Mullins*, 12th Dist. No. CA2007-08-194, 2008-Ohio-3516, ¶ 16 (officer testified that in his experience, plastic or cellophane is commonly the manner in which drugs are carried). As a

result, the detectives obtained a search warrant to seize the marijuana.

{¶ 20} The detectives were justifiably concerned about the puppy's welfare and therefore sought to leave it in a place where it would be safe and secure and have access to food and water until someone from Rivera's family could come and care for it. It might be argued that Detective Ebbing's testimony that she had "stumbled" onto something in the basement that required her and Detective Sons to obtain a warrant proves that she was engaged in a search of the premises rather than simply looking for a secure place to leave the puppy. However, the detectives had a right to look after the animal's welfare, and therefore Detective Ebbing had a right to ask Detective Sons to come to the basement so that she could explain to him why they could not leave the puppy there. Consequently, Detective Sons had a right to come down to the basement, at which point the marijuana came into his plain view.

{¶ 21} Rivera contends that "[n]o Ohio court has addressed application of the exigent circumstances exception for protection of life or property to the caretaking of animals[.]" He also contends that courts which have addressed the issue have upheld searches and seizures in these circumstances only where the animal's life is in jeopardy. He concludes by arguing that Detective Ebbing's concerns about the puppy "simply do not rise to 'an immediate need for [the police's] assistance for the protection of life or property[,]'" as this court has found necessary for the exigent circumstances exception to the warrant requirement to apply. *State v. Kilburn*, 12th Dist. No. CA96-12-130, 1998 WL 142412 (Mar. 3, 1998). We find this argument unpersuasive.

{¶ 22} In *State v. Goulet*, 21 A.3d 302, 312-313, 314 (R.I., June 16, 2011), police officers were dispatched to the defendant's residence based on a report that the defendant had shot his dog. *Id*. at 312. When the officers arrived, the defendant, who was standing in the driveway, told the officers he "had a lot of dogs and a lot of guns." *Id*. Based on the

defendant's demeanor and his statement that he had a lot of guns, the officers handcuffed the defendant and placed him in the back of their patrol car. Then, the officers, without obtaining a search warrant, conducted a "cursory walk" of the defendant's property, at which time they found a dog collar on top of freshly dug earth and a .22 caliber rifle in a shed. *Id*. at 312-313.

{¶ 23} The defendant moved to suppress the evidence seized by the officers, but the trial court denied the motion. The Supreme Court of Rhode Island affirmed the trial court's ruling that "a warrantless search of the curtilage[1] [of the defendant's house]—and the seizure of evidence found during the search—was permissible under the emergency doctrine and plain-view exceptions to the Fourth Amendment's warrant requirement." In support of its decision, the Rhode Island Supreme Court quoted its prior decision in *Duquette v. Godbout*, 471 A.2d 1359 (R.I.1984), in which it stated:

> The emergency doctrine requires that the responding officer have a reasonable belief that his assistance is required to avert a crisis. *People v. Lenart,* 91 A.D.2d 132, 134, 457 N.Y.S.2d 878, 880 (1983); *State v. Sanders,* 8 Wash.App. 306, 312, 506 P.2d 892, 896 (1973). This standard is less stringent than the determination of probable cause which a police officer must make in the typical exigent-circumstances situation. Such a standard is permissible in an emergency situation since the motivation for the intrusion is to preserve life and property rather than to search for evidence to be used in a criminal investigation.

Goulet at 313, quoting *Duquette,* 471 A.2d at 1362.

{¶24} Other jurisdictions have also applied the exigent circumstances or emergency doctrine exceptions to the warrant requirement in cases involving the welfare of animals. See, e.g., *People v. Chung*, 110 Cal. Rptr. 3d 253 (Cal.App.2d Dist.2010) (exigent circumstances existed which allowed officers to enter defendant's condominium, without a

1. "Curtilage" is "[t]he land or yard adjoining a house[,]" Black's Law Dictionary (8th Ed. 2004) 411-412, which is "[s]o intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134 (1987).

warrant and against defendant's wishes, in order to check welfare of a dog that lived there and that the officers reasonably believed to be in distress); *People v. Burns*, 197 Colo. 284, 593 P.2d 351 (1979) (exigent circumstances justified warrantless search of premises to locate missing calf that ran the risk of dying from lack of nourishment due to separation from its mother). *See also* Annotation, *Necessity of Rendering Medical Assistance as Circumstances Permitting Warrantless Entry or Search of Building or Premises*, 58 A.L.R. 6th 499, Section 62 (2010) (discussing cases involving "[a]nimals in need of emergency assistance").

{¶25} Contrary to what Rivera contends, the record in this case shows that the detectives had a reasonable belief that the puppy's life was in danger, and therefore were justified in taking the action they did. Because the animal in question was a puppy, the detectives acted reasonably in trying to find a secure location within the residence where the puppy could be left. The detectives were aware that Rivera, who the detectives reasonably presumed to be the puppy's owner, had been taken to the hospital with a serious wound, and there was no indication when someone would come to the residence to care for the puppy.

{¶26} Rivera contends that his younger brother, J.R., was at the residence and could have cared for the puppy. However, there is no evidence to show that either Detective Ebbing or Detective Sons were aware that J.R. was in a position to take care of the puppy at the time they had to decide what to do about the animal. Indeed, Detective Ebbing testified that when she and Detective Sons were at the residence investigating the home invasion, she saw J.R. sitting in the back of a police cruiser. We also disagree with Rivera's assertion that the detectives were obligated to confiscate the puppy in order to protect it. Detectives Ebbing and Sons did not act unreasonably in going to the basement to look for a cage or some space there in which the puppy could be left with food and water until Rivera's relatives or acquaintances could come and care for it. Moreover, there is nothing in the record to

indicate that the detectives were using their concern about the puppy's welfare simply as a pretext to search for drugs or other contraband at the residence.

{¶27} Rivera also argues his trial counsel provided him with ineffective assistance by not moving to suppress the evidence seized from the residence, on the grounds that (1) the affidavit submitted by Agent Hollandsworth to obtain the search warrant for the residence failed to show the existence of probable cause, and (2) any evidence obtained derivatively of this violation, including the evidence obtained as a result of the second search warrant and any statements he made to police, were also subject to exclusion. We find this argument unpersuasive.

{¶28} Initially, the state contends that, since Hollandsworth's affidavit "was only offered at trial for identification purposes, and was not admitted into evidence[,]" the affidavit "is not part of the appellate record and cannot be considered by a reviewing court on direct appeal." However, even if we assume that the affidavit *is* part of the record on appeal, Rivera still cannot prevail on his argument that the affidavit was insufficient to establish probable cause.

{¶29} In *State v. George*, 45 Ohio St. 3d 325, paragraph two of the syllabus, (1989), the court, following *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983), stated:

> In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a *de novo* determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.

{¶30} In this case, the affidavit submitted by Agent Hollandsworth provided a substantial basis for the issuing judge's conclusion that there was a fair probability that marijuana would be found on the premises, even though the affidavit failed to contain any information about Detective Ebbing's past experience dealing with illegal drugs. Additionally, Agent Hollandsworth was permitted to rely on the hearsay observations of Detective Ebbing. *State v. Wilson*, 156 Ohio App.3d 1, 2004-Ohio-144, ¶ 11 (8th Dist.).

{¶31} Furthermore, the case on which Rivera relies in support of this argument, *State v. Birdsong*, 5th Dist. No. 2008 CA 00221, 2009-Ohio-1859, is distinguishable from this case. *Birdsong* involved a police officer's warrantless search of a vehicle after the officer detected the odor of marijuana. The Fifth District found that the trial court erred when it denied the defendant's motion to suppress, since the state failed to present any evidence of the officer's training or experience in detecting the odor of marijuana. *Id.* at ¶ 16. However, an appellate court is required in cases like *Birdsong* to engage in a *de novo* review of a police officer's decision that probable cause existed to justify a warrantless arrest or search, or that reasonable suspicion existed to justify a stop or search of a vehicle. See *Ornelas v. United States*, 517 U.S. 690, 697-698, 116 S.Ct. 1657 (1996). By contrast, when the police seek the guidance of a detached and neutral magistrate, as the police did here, the magistrate's decision is owed "great deference," and neither the trial court nor the appellate court is permitted to substitute its judgment for that of the magistrate's. *George*, 45 Ohio St. 3d 325, paragraph two of the syllabus.

{¶32} In light of the foregoing, Rivera has failed to show that a motion to suppress the evidence seized from the residence at which he was purportedly staying as a house sitter would have been successful if filed and litigated, and therefore he has failed to establish his claim of ineffective assistance of counsel.

{¶33} Accordingly, Rivera's sole assignment of error is overruled.

{¶34} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.