

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Appellee,	:	CASE NOS. CA2019-12-094
	:	CA2019-12-095
- vs -	:	<u>OPINION</u>
	:	11/9/2020
KELLY W. FRITZ,	:	
Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2018 CR 00482

D. Vincent Faris, Clermont County Prosecuting Attorney, Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for appellee

W. Stephen Haynes, Clermont County Public Defender, Robert F. Benintendi, 302 East Main Street, Batavia, Ohio 45103, for appellant

HENDRICKSON, P.J.

{¶1} Appellant, Kelly W. Fritz, appeals from a decision of the Clermont County Court of Common Pleas denying in part his motion to suppress evidence obtained from the search of a motor vehicle. For the reasons set forth below, we affirm the trial court's decision.

{¶2} In June 2018, following a traffic stop and search of a motor vehicle, appellant,

a passenger in the vehicle, was arrested and indicted on one count of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(2) and one count of aggravated possession of drugs in violation of R.C. 2925.11(A), both felonies of the first degree as the amount of methamphetamine found equaled or exceeded 100 times the bulk amount. Each count was accompanied by a major drug specification and the aggravated trafficking in drugs count included a forfeiture specification for \$2,039 in cash that was found on appellant at the time of his arrest.

{¶3} Appellant pled not guilty to the charges and filed a motion to suppress evidence obtained from the search of the vehicle and from the search of appellant's person on the grounds that (1) there was no reasonable, articulable suspicion for the stop of the vehicle, (2) appellant's detention was "unlawfully extended" to allow a K-9 search, (3) the K-9's alert was unreliable as the deputy conducting the K-9 search failed to comply with the policies and procedures of the Clermont County Sheriff's Office, (4) the K-9's alert did not give "probable cause to [s]earch the [v]ehicle because the officer had all occupants remain inside a vehicle narcotics had just been removed from, and only deployed his K-9 knowing the K-9 would [i]ndicate [p]ositively on [r]esidual [o]dors," (5) the search of the vehicle and the containers in the vehicle was unlawful, and (6) the search of the vehicle was not a valid search incident to arrest. Appellant also sought to suppress from evidence any statements he made to law enforcement that were taken in violation of his Fifth and Sixth Amendment rights.

{¶4} A hearing on appellant's motion to suppress was held on April 29, 2019. At this time, the state presented testimony from two Clermont County Sheriff's deputies. Deputy Robert Bailey, a K-9 handler, testified that around 12:00 p.m. on June 4, 2018, he was stationed on State Route 32 near the McKeever Pike intersection in Clermont County,

Ohio when he observed a silver SUV traveling eastbound commit a marked lanes violation by crossing over the fog line. As the SUV passed by him, Deputy Bailey noticed that the driver and front seat passenger were very rigid and were pushing themselves back in their seats, as if to conceal themselves. The driver's hands were fixed at a ten and two o'clock position on the steering wheel. Based on his 21 years of experience as a law enforcement officer, Deputy Bailey found the driver's and passenger's behavior suspicious. The deputy continued to observe the SUV and witnessed it completely cross over the white fog line on two more occasions. The deputy pulled behind the SUV and, when the vehicle stopped at a red light, he ran the vehicle's registration. The vehicle was registered to an older gentleman, which further raised the deputy's suspicion as the driver of the SUV appeared to be a younger individual.

{¶5} Deputy Bailey initiated a traffic stop. As he approached the vehicle from the passenger side, the driver of the SUV called out the deputy's first name. Deputy Bailey recognized the driver, Carey Storer, from his contacts with the community and from Storer's prior arrest for illegal narcotics.¹ Deputy Bailey testified that prior to the date of the traffic stop, he had received information that Storer was engaged in "some type of illegal narcotic distribution."

{¶6} In addition to Storer and the front seat passenger, Deputy Bailey noticed that there were three individuals sitting in the back seat of the SUV. Deputy Bailey testified that everyone in the SUV appeared to be very nervous – more nervous than what is typical for a traffic stop. The occupants avoided making eye contact with the deputy, had labored breathing, and had visible pulsating carotid arteries. When the deputy asked where the

1. The record contains inconsistent spellings of the SUV driver's name. We will refer to the driver as "Carey Storer."

vehicle was coming from, there was a very long pause before Storer responded that they were coming from "East Fork." The long pause, combined with the deputy's observations of the occupants' nervousness, led Deputy Bailey to believe the vehicle's occupants wanted to conceal their travels and increased his suspicion that they were engaged in some type of criminal activity inside the SUV.

{¶7} As he observed the backseat passengers, Deputy Bailey noticed that appellant, who was sitting in the middle of the backseat, was clutching a black backpack between his legs. Deputy Bailey testified that his lack of knowledge about the bag's contents and appellant's nervousness caused him to be concerned for his safety, as it was possible the bag contained something that could be used to harm him.

{¶8} Storer informed Deputy Bailey that he was driving with a suspended license. Deputy Bailey explained that when an individual is driving without a valid license, his procedure is to see if another person in the vehicle has a valid license and can legally operate the vehicle. If not, then a third party needs to be called to drive the vehicle away or the vehicle needs to be towed. Deputy Bailey obtained the names and identification of the SUV's occupants. When appellant provided his name and information, Deputy Bailey recognized appellant's name from prior drug-related reports.

{¶9} Rather than returning to his patrol car to run the SUV's occupants' information, Deputy Bailey provided the information to his communications center so that it could do a records check. The deputy explained that he remained with SUV as he was alone on scene and wanted to keep an eye on the SUV's occupants.

{¶10} From dispatch, Deputy Bailey learned that Jamie Shouse, a backseat passenger, had a felony drug warrant for his arrest. Deputy Bailey secured Shouse as he remained seated in the SUV. As Shouse stood to exit the SUV from the rear passenger-

side door, an Altoids tin fell from Shouse's lap onto the ground. When Deputy Bailey picked up the tin and shook it, he did not hear the rattling of mints inside. Instead, Deputy Bailey heard a "solid sound" inside the tin. Upon opening the tin, Deputy Bailey found a baggie containing a crystal substance, which he believed was methamphetamine. Deputy Bailey conducted a search incident to Shouse's arrest and discovered Shouse had two cell phones on his person. Based on his training and experience, Deputy Bailey testified the discovery of two cell phones was indicative of drug trafficking. Deputy Bailey believed that additional contraband could be found inside the SUV as, in his experience, when one person in a vehicle has contraband, others in the same vehicle do as well.

{¶11} Deputy Bailey explained that because he is a K-9 handler and his K-9, Mox, was in the back of his vehicle, he could not transport Shouse. He therefore called for another deputy to respond to the scene. While waiting, Deputy Bailey had Shouse sit on the ground while he watched the four people who remained in the SUV, all of whom continued to act very nervous and avoid eye contact. After approximately ten minutes, Deputy Patton arrived on scene. Within a minute of Deputy Patton's arrival, Shouse was secured in Patton's patrol car, the Altoids tin was secured in Deputy Bailey's vehicle, and Deputy Bailey had retrieved Mox so that he could walk Mox around the silver SUV.

{¶12} Deputy Bailey testified about his training and experience as a K-9 handler, stating that he had been certified by the Ohio Police Officer Training Academy ("OPOTA") for nearly 15 years. After undergoing an extensive seven-week training program to initially be certified by OPOTA, Deputy Bailey underwent bi-yearly and yearly recertifications for the K-9 partners he worked with in the field. Deputy Bailey testified that his current K-9, Mox, was first trained and certified by OPOTA in 2011 in the drug detection of marijuana, cocaine, heroin, and methamphetamine. Deputy Bailey and Mox were recertified by OPOTA in 2013,

2015, 2016, 2017, 2018, and 2019. Their 2018 recertification occurred in February 2018, just a few months before the June 4, 2018 traffic stop of the silver SUV.

{¶13} Regarding the recertification process, Deputy Bailey explained that he and Mox had to complete a testing phase wherein contraband was hidden in two types of controlled environments, one in a vehicle setting and one in a room setting. Neither the deputy-handler nor the K-9 knew where the drugs were placed in either of the environments. There were twelve contraband hides with two "blanks" in the mix, meaning that no narcotics were hidden in the "blank" room or "blank" vehicle. Although a K-9 team can have one miss, where the K-9 fails to detect the narcotics, the K-9 may not have any false positive alerts in order to meet the recertification requirements. In 2018, Mox had an accuracy of 100 percent during the recertification tests.

{¶14} In addition to the OPOTA recertifications, Deputy Bailey and Mox trained an additional 16 hours a month together. Part of the monthly training was in the area of narcotics detection. Deputy Bailey testified he kept an accurate compilation of all the statistics from the controlled setting practice hides he and Mox participated in, and Mox had an accuracy rate of 100 percent between the time of Mox's February 2018 recertification and the June 4, 2018 traffic stop.

{¶15} Deputy Bailey testified that when he walked Mox around the silver SUV on June 6, 2018, Mox's behavior changed when he reached the rear passenger door. Mox increased his sniffing and assumed a different body posture before he gave a final trained response, or positive alert, by sitting and staring at the rear passenger door to indicate that a drug odor was emanating from that area. Deputy Bailey testified Mox's change of behavior and his final trained response were consistent with the pair's training, experience, and certification. Deputy Bailey denied giving any intentional or unintentional cues to Mox

to indicate he wanted the K-9 to give a positive alert.

{¶16} After Mox's positive alert at the rear passenger door, Deputy Bailey placed Mox back in his patrol car. The deputy then returned to the silver SUV and had appellant exit the backseat. Deputy Bailey conducted a pat down of appellant to ensure his safety, and during the pat down, the deputy felt something with a granular, crunching sound in appellant's pants pocket. Deputy Bailey, believing the substance could be methamphetamine, removed the substance and discovered a bag with three smaller baggies inside it. Inside each of the smaller baggies was a crystal substance. Deputy Bailey placed appellant in handcuffs and sat appellant on the ground by the rear, passenger tire of the SUV. The door to the SUV remained open and the three remaining passengers in the vehicle remained seated inside the SUV.

{¶17} After sitting appellant on the ground outside the SUV, Deputy Bailey retrieved the black backpack appellant had previously been clutching between his legs. Upon opening the backpack, Deputy Bailey discovered a plastic gallon bag holding smaller baggies that contained a crystal substance as well as three tupperware containers containing a crystal substance. Subsequent testing of the substances found on scene established that the crystal substances were, in fact, methamphetamine.

{¶18} After finding the methamphetamine in the black backpack, Deputy Bailey removed the remaining passengers from the SUV. Deputy Bailey turned to where appellant was sitting on the ground and advised appellant of his *Miranda* rights. When Deputy Bailey asked appellant if he understood those rights, appellant gave an affirmative nod. Deputy Bailey asked appellant what was in the backpack and appellant responded that he "didn't want to talk about it." Appellant did not request counsel at this time.

{¶19} Deputy Bailey then asked the remaining passengers of the SUV what

substance was in the backpack. At that time, appellant spoke up and said, "it was his, and it was ice." Deputy Bailey explained that "ice" is a street name for methamphetamine.

{¶20} Deputy Bailey proceeded to issue the driver of the SUV a citation for driving with a suspended license. When questioned about the amount of time a traffic stop typically takes, Deputy Bailey testified that a traffic stop that results in a warning usually takes around 15 minutes and a stop that requires the issuance of a citation usually takes 18 minutes. However, the deputy explained that when the driver of a vehicle has a suspended license, the traffic stop can last between 30 minutes to an hour since the vehicle will either need to be towed or a third party with a valid license will need to arrive to drive the vehicle away. Deputy Bailey further testified that a stop that involves a felony warrant arrest also takes longer than a typical traffic stop because the warrant must be confirmed and arrangements made for pickup of the arrested individual since he is unable to transport others in his K-9 patrol unit.

{¶21} Deputy Yvonne Sheppard testified she was called to the scene of the traffic stop on June 6, 2018 to do a pat down of two female occupants of the silver SUV. While conducting the pat down, she heard Deputy Bailey advise appellant of his *Miranda* rights. Deputy Sheppard did not hear appellant request an attorney. She did, however, hear appellant respond, "It's mine. It's all mine," when questioned about the contraband recovered on scene.

{¶22} After hearing the foregoing testimony, the trial court took the matter under advisement. On August 1, 2019, the court issued a decision granting in part and denying in part appellant's motion to suppress. The court granted the motion to suppress as it related to appellant's inculpatory statements claiming ownership of the methamphetamine found in the backpack. However, the court denied the motion to suppress the physical

evidence obtained during the search of appellant's person and the backpack found in the SUV, finding that there was probable cause for the traffic stop based on the marked lanes violation, that the traffic stop was not unreasonably prolonged by the canine sniff, that the K-9's alert to narcotics was reliable, and that there was probable cause for the search of the SUV, including the backpack found inside of it.

{¶23} Following the denial of his motion to suppress, appellant entered into plea negotiations with the state. On November 6, 2019, he pled no contest to first-degree aggravated trafficking in drugs (methamphetamine), with the accompanying forfeiture specification, in exchange for the state dismissing the major drug specification and the aggravated possession of drugs count.² The trial court accepted appellant's no contest plea, found him guilty, and subsequently sentenced him to an eight-year mandatory prison term. The court also ordered \$2,039 in cash found on appellant forfeited, as agreed to by the parties.

{¶24} Appellant appealed from the partial denial of his motion to suppress, raising two assignments of error for our review.

{¶25} Assignment of Error No. 1:

{¶26} THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

{¶27} In his first assignment of error, appellant argues the trial court erred in denying his motion to suppress evidence obtained during the search of the motor vehicle and the backpack. Appellant does not challenge the trial court's finding that Deputy Bailey had

2. Pursuant to the parties' plea agreement, the state amended the indictment to specify that the amount of the drug involved equaled or exceeded 50 times the bulk amount, but was less than 100 times the bulk amount, thereby permitting the court to sentence appellant to any of the prison terms available for a first-degree felony instead of a mandatory 11-year sentence for aggravated trafficking in drugs.

probable cause to initiate a traffic stop after observing multiple marked lanes violations. Nor does he challenge the court's finding that the traffic stop was not unreasonably prolonged. Rather, appellant challenges whether Deputy Bailey had probable cause to search the vehicle or the backpack found in the backseat following Mox's positive alert, contending that the free-air sniff conducted by Deputy Bailey and Mox was unreliable and "tainted" for two reasons. First, he contends the positive alert was unreliable as Mox had been exposed to the scent of methamphetamine immediately prior to the free-air sniff, when Deputy Bailey secured the Altoids tin full of methamphetamine in his patrol vehicle with Mox still in the vehicle. Second, he contends Mox's positive alert at the rear passenger side of the SUV is unreliable as there is "simply no way to determine if Mox's alert was to the methamphetamine recently discovered from Mr. Shouse," who had exited the motor vehicle from the rear passenger side door, "or the alert indicated additional contraband was contained in the vehicle." Appellant challenges whether Mox's alert provided probable cause to believe additional contraband could be found in the vehicle.

{¶28} "Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact." *State v. Leder*, 12th Dist. Clermont No. CA2018-10-072, 2019-Ohio-2866, ¶ 17. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* An appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Dallman*, 12th Dist. Clermont Nos. CA2017-11-056 and CA2017-11-057, 2018-Ohio-2670, ¶ 10. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 12.

{¶29} "The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution guarantee the right to be free from unreasonable searches and seizures." *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶ 7, citing *State v. Orr*, 91 Ohio St.3d 389, 391 (2001). However, the exterior sniff of an automobile "by a trained narcotics dog to detect the odor of drugs is not a search within the meaning of the Fourth Amendment to the Constitution." *State v. Grenoble*, 12th Dist. Preble No. CA2010-09-011, 2011-Ohio-2343, ¶ 30; *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637 (1983). See also *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834 (2005). When a trained narcotics dog alerts to the odor of drugs from a lawfully detained vehicle, probable cause to search a vehicle and its contents exists. *State v. Blatchford*, 12th Dist. Preble No. CA2015-12-023, 2016-Ohio-8456, ¶ 38; *State v. Cruz*, 12th Dist. Preble No. CA2013-10-008, 2014-Ohio-4280, ¶ 18. Regarding the reliability of a canine search, the United States Supreme Court has held that "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." *Florida v. Harris*, 568 U.S. 237, 246-247, 113 S.Ct. 1050 (2013).

{¶30} Appellant concedes that Deputy Bailey and Mox are a certified K-9 unit, that they have undergone extensive training, certification, and recertification, and that Mox's accuracy rate at drug detection was 100 percent as of his February 2018 certification. He nonetheless argues Mox's alert was unreliable because it was possible Mox alerted to a residual odor of methamphetamine rather than to the presence of additional narcotics in the SUV. The Supreme Court addressed appellant's concerns in *Harris*, stating in relevant part as follows:

The Florida Supreme Court treated a dog's response to residual odor as an error, referring to the "inability to distinguish between

[such] odors and actual drugs" as a "facto[r] that call[s] into question [the dog's] reliability." * * * But that statement reflects a misunderstanding. *A detection dog recognizes an odor, not a drug, and should alert whenever the scent is present, even if the substance is gone (just as a police officer's much inferior nose detects the odor of marijuana for some time after a joint has been smoked).* In the usual case, the mere chance that the substance might no longer be at the location does not matter; a well-trained dog's alert establishes a fair probability – all that is required for probable cause – that either drugs or evidence of a drug crime * * * will be found.

(Emphasis added). *Id.* at 426, fn. 2.

{¶31} Accordingly, the fact that Mox could have alerted to a residual odor of drugs does not mean that there was not probable cause for the search. Mox's positive alert at the rear passenger side of the vehicle gave Deputy Bailey probable cause to believe that drugs or evidence of a drug crime would be found in the SUV. Deputy Bailey's subsequent search of the SUV and its contents, including the black backpack, was therefore lawful.

{¶32} Additionally, even without Mox's positive alert, Deputy Bailey had probable cause to search the SUV. The automobile exception to the warrant requirement authorizes "warrantless searches of motor vehicles * * * if police have probable cause to believe that the vehicle contains evidence relevant to a crime and that exigent circumstances exist necessitating a search or seizure." *State v. Sullivan*, 12th Dist. Preble No. CA2018-10-016, 2019-Ohio-2279, ¶ 20, citing *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280 (1925). "The mobility of automobiles creates the exigent circumstance and is the traditional justification for this exception to the Fourth Amendment's warrant requirement." *Id.*, citing *California v. Carney*, 471 U.S. 386, 391, 105 S.Ct. 2066 (1985).

{¶33} "As it relates specifically to an automobile search, probable cause is 'a belief reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction.'" *State v.*

Durham, 12th Dist. Warren No. CA2013-03-023, 2013-Ohio-4764, ¶ 32, quoting *State v. Popp*, 12th Dist. Butler No. CA2010-05-128, 2011-Ohio-791, ¶ 27. See also *State v. Kessler*, 53 Ohio St.2d 204, 208 (1978). The determination of probable cause is fact-dependent and turns on what the officer knew at the time he conducted the search. *Durham* at ¶ 32. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157 (1982).

{¶34} The totality of the circumstances known by Deputy Bailey provided probable cause for the search of the vehicle and the backpack found therein. Prior to the search, Deputy Bailey observed that all of the SUV's occupants appeared very nervous. The occupants avoided making eye contact, had labored breathing, and had visible pulsating carotid arteries. When Deputy Bailey identified the occupants of the vehicle, he recognized appellant's name from prior drug-related reports. Deputy Bailey likewise knew the driver of the SUV had a prior arrest for illegal narcotics and the deputy had recently received information that Storer was engaged in "some type of illegal narcotic distribution." When dispatch ran the names of the SUV's occupants, Deputy Bailey was advised that Shouse, another occupant, had a felony drug warrant for his arrest. Then, when Shouse exited the SUV, an Altoids tin containing methamphetamine fell out of the vehicle. A search of Shouse's person resulted in the discovery of two cellphones, which Deputy Bailey knew from his experience was indicative of drug trafficking. Finally, when Deputy Bailey removed appellant from the backseat of the SUV and patted him down for officer safety, the deputy discovered appellant had multiple baggies of methamphetamine in his pants pocket. All of these circumstances led to a reasonable belief that illegal drugs would be found in the SUV and created probable cause for the search.

{¶35} Accordingly, for the reasons stated above, we conclude that there was probable cause for the warrantless search of the SUV and the backpack contained therein. The trial court did not err in denying appellant's motion to suppress evidence obtained from a search of the vehicle. Appellant's first assignment of error is overruled.

{¶36} Assignment of Error No. 2:

{¶37} APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE.

{¶38} In his second assignment of error, appellant argues his trial counsel was ineffective for not clearly laying out his "residual odor" challenge to the reliability of Mox's alert.

{¶39} "In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must prove that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance." *State v. Davis*, 159 Ohio St.3d 31, 2020-Ohio-309, ¶ 10, citing *State v. Bradley*, 42 Ohio St.3d 136, 141-142 (1989) and *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). "Thus, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.*, citing *Bradley* at paragraphs two and three of the syllabus. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bradley* at 142, quoting *Strickland* at 694. The failure to satisfy either the deficiency prong or the prejudice prong of the test is fatal to a claim of ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000).

{¶40} We find that appellant cannot demonstrate that he received ineffective assistance of counsel. Even if counsel had set forth a more thorough argument regarding the reliability of Mox's positive alert, such an argument would not have prevailed. As set

forth in our resolution of appellant's first assignment of error, an alert to a residual odor still provides probable cause for a search. *See Harris*, 568 U.S. at 246, fn. 2. Additionally, even without Mox's positive alert, under the totality of the circumstances presented in this case, Deputy Bailey had probable cause to search the motor vehicle for drugs or evidence of drug crimes. Therefore, as appellant could not prevail on his motion to suppress, he cannot establish that he was prejudiced or received ineffective assistance by trial counsel. Appellant's second assignment of error is overruled.

{¶41} Judgment affirmed.

RINGLAND and M. POWELL, JJ., concur.