[Cite as *State v. Lovett*, 2005-Ohio-4601.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2004 CA 117
v.	:	T.C. NO. 04 CR 0475
JESSICA LOVETT	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 2nd day of September, 2005.

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WOLFF, J.

{¶1} Jessica L. Lovett pled no contest to possession of heroin and to possession of criminal tools, both felonies of the fifth degree, after the Greene County Court of Common Pleas overruled her motion to suppress evidence. The court found her guilty and sentenced her to eleven months of incarceration on both counts, to be

served concurrently. Lovett was subsequently granted a judicial release and placed on community control sanctions.

{¶2} Sugarcreek Township police officer Timothy Fallis provided the sole testimony during the hearing on Lovett's motion to suppress, which revealed the following facts.

{¶3} At approximately 2:34 p.m. on March 17, 2004, Officer Fallis was dispatched to CiCi's Pizza on Wilmington Pike in Sugarcreek Township. The dispatcher had reported that a female was either sick or unconscious behind the wheel of a van parked in the parking lot. When Officer Fallis arrived, he located a blue van, parked with the engine running. The officer parked his cruiser behind the van and approached the driver's side window. Officer Fallis observed Lovett in the driver's seat with her head resting against the window, apparently unconscious.

{¶4} Officer Fallis knocked lightly on the driver's window. When he got no response, he gradually knocked harder. When Lovett still did not respond, the officer began to open the door. As Lovett began to fall out of the vehicle, she awoke with a jerk and, with the officer's assistance, sat up in her seat. Lovett then grabbed for the gear shift. Officer Fallis reached into the van, turned off the engine, and took Lovett's keys. Officer Fallis testified that Lovett was "real dry-mouthed" and it "kind of took awhile [for her] to get her factors [sic] together about where she was at or what she was doing." Lovett indicated that she had just eaten and was sleeping before she went to work. The officer asked Lovett if she was diabetic; Lovett responded that she was not.

{¶5} During their conversation, Lovett reached in a "paddle-like fashion" to the right side of the driver's seat. Officer Fallis asked her to stop reaching. After she

reached again, Officer Fallis leaned over and saw Lovett's purse lying open inside in the van. He became concerned for his safety, and he "took control" of Lovett's hands. At that point, Officer Fallis observed a plastic bag containing what appeared to be Xanax tablets in Lovett's open purse. Officer Fallis grabbed the purse and took it out of the vehicle. He did not ask if Lovett had a prescription for Xanax. As the officer continued to talk with Lovett, he removed the plastic bag from Lovett's purse. Underneath, he observed what appeared to be a syringe.

{¶6} Fallis proceeded to ask Lovett questions regarding the syringe. He asked if she "was a user." Lovett responded that she was not. Lovett then stated that she was diabetic. She again denied that there were drugs inside. Officer Fallis stated, "Well, we'll send it off to the lab and we'll have it tested. I'll know what the substance is when it comes back from the lab." Shortly thereafter, Lovett admitted that there was heroin inside the syringe. At this juncture, additional officers arrived and Lovett was arrested. Although the timing is not clear from the record, sometime during his encounter with Lovett, Officer Fallis had received a report from the dispatcher that Lovett had a suspended driver's license. After Lovett's arrest, the police conducted a property inventory of her purse, which yielded additional evidence.

{¶7} On May 13, 2004, Lovett was indicted for possession of heroin, in violation of R.C. 2925.11(A), and for possession of criminal tools, in violation of R.C. 2923.24(A). Lovett moved to suppress the evidence, arguing that the pills and the syringe were not in plain view when they were seized by the officer. The trial court overruled the motion, reasoning:

{¶8} "The Court finds from the testimony and the evidence that the Officer had

sufficient cause to rouse the Defendant who was apparently sleeping or unconscious in her motor vehicle. The Officer then observed in plain view the Defendant's open purse after the Defendant made motions toward the purse which raised Officer safety concerns in the mind of the Officer. After observing the pills and the way they were packaged in the Defendant's purse, the Officer also observed the syringe underneath the pills when they were removed from the purse. The syringe contained heroin.

{¶9} "Based upon the evidence adduced at the hearing, the Court is of the view that the pills appeared to be contraband in plain view, and upon removing the same from the purse, resulted in the syringe containing heroin in plain view, and as a result was not unconstitutionally seized, and as a result, the Motion of the Defendant should be OVERRULED in its entirety."

{¶10} Lovett raises two assignments of error on appeal.

1. "THE COURT ERRED IN FAILING TO SUPPRESS EVIDENCE GAINED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS."

{¶11} In her first assignment of error, Lovett challenges the trial court's denial of her motion to suppress. She contends that the search and seizure of her purse violated the Fourth Amendment, because the state did not introduce evidence of the number of Xanax tablets that Officer Fallis saw prior to seizing the purse and because Officer Fallis failed to inquire about the possibility that Lovett legally possessed the drugs. Lovett further maintains that she was improperly questioned and coerced into admitting that the syringe contained heroin, because she was interrogated without being informed of her rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694.

{¶12} In reviewing the trial court's ruling on a motion to suppress evidence, this court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. See *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

{¶13} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution secure an individual's right to be free from unreasonable searches and seizures. A warrantless search and seizure by law enforcement personnel of an article or place in which an individual has a reasonable expectation of privacy is per se unreasonable, unless it falls within a recognized exception to the warrant requirement. *Minnesota v. Olson* (1990), 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85; *State v. Miller* (1991), 77 Ohio App.3d 305, 602 N.E.2d 296. Receptacles that are closed and have been secured against intrusion, such as a closed purse, demonstrate that expectation of privacy. See *State v. Jackson* (Aug. 13, 1999), Montgomery App. No.17605, citing *United States v. Chadwick* (1977), 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538.

{¶14} The plain view exception authorizes the seizure, without the necessity of a search warrant, of an illegal object or contraband that is immediately recognizable as such when it is in plain view of a law enforcement official. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 465-466, 91 S.Ct. 2022, 29 L.Ed.2d 564; *State v. Davie* (1993), 86 Ohio App.3d 460, 464, 621 N.E.2d 548; see, also, *Horton v. California* (1990), 496 U.S. 128, 136-137, 110 S.Ct. 2301, 110 L.Ed.2d 112. "Under [the plain view] doctrine, an officer may seize an item without a warrant if the initial

intrusion leading to the item's discovery was lawful and it was 'immediately apparent' that the item was incriminating." *State v. Waddy* (1992), 63 Ohio St.3d 424, 442, 588 N.E.2d 819; see also *State v. Kinley* (1995), 72 Ohio St.3d 491, 651 N.E.2d 419. Notably, the officer need not know that the items in plain view are contraband or evidence of a crime; it is sufficient that probable cause exists to associate the property with criminal activity. *Arizona v. Hicks* (1987), 480 U.S. 321, 326, 107 S.Ct. 1149, 94 L.Ed.2d 347.

{¶15} Upon review of the record, we find no fault with the trial court's conclusion that the plastic bag containing Xanax tablets and the syringe were properly seized under the plain view doctrine. When Officer Fallis first encountered Lovett, she appeared to be unconscious in a parked vehicle with the engine running. When she awoke, Lovett was "real dry-mouthed" and appeared "lost." Officer Fallis testified that Lovett had repeatedly reached toward her purse despite his request that she stop reaching. Officer Fallis was aware that Xanax is a prescription drug, and he testified that he had observed blue tablets which he believed to be Xanax, based on his past experience, in Lovett's open purse. Officer Fallis indicated that he did not believe that Lovett had a prescription for the medication because they were being transported in a plastic bag. Considering the totality of the circumstances, we agree with the state that Officer Fallis had probable cause to believe that the Xanax tablets were contraband. Although Officer Fallis could have inquired whether Lovett had a prescription for the pills, he was not required to know to a greater degree of certainty than probable cause whether Lovett, in fact, possessed the Xanax tablets illegally. In addition, we agree with the state that the number of pills is immaterial to whether the officer reasonably

believed that the pills were contraband. Accordingly, the trial court properly concluded that Officer Fallis lawfully seized the plastic bag containing the Xanax tablets under the plain view doctrine. Moreover, once the bag was removed from Lovett's purse, the syringe was also lawfully removed under the plain view doctrine.

{¶16} Next, Lovett claims that her Fifth Amendment rights were violated when Officer Fallis questioned her about the contents of the syringe without informing her of her *Miranda* rights. As noted by the state, Lovett failed to raise a Fifth Amendment argument before the trial court.

{¶17} "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364, paragraph one of the syllabus. This is true even when the assigned error implicates constitutional issues. *Bill's Corner Café v. Ohio Liquor Control Com'r* (Mar. 28, 1997), Clark App. No. 96-CA-93, citing *State v. Childs* (1968), 14 Ohio St.2d 56, 62, 236 N.E.2d 545. By not presenting the trial court with her Fifth Amendment argument, Lovett has waived it on appeal.

{¶18} Even if we were to address Lovett's argument, we would not agree with Lovett that she was in custody at the time that she told the officer that the syringe contained heroin. Although Lovett was seized and briefly detained at the time that she responded to Officer Fallis's questions, her freedom of movement was not curtailed to the degree associated with a formal arrest. See *State v. Thomas*, Montgomery App. No. 20643, 2005-Ohio-3064, ¶25-29. Thus, Lovett was not in custody for purposes of

Miranda, and she was not entitled to *Miranda* warnings prior to being questioned by Officer Fallis.

{¶19} The first assignment of error is overruled.

{¶20} 2. "APPELLANT WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶21} In her second assignment of error, Lovett claims that her trial counsel rendered ineffective assistance by failing to argue that her incriminating statement to Officer Fallis was involuntary, in violation of the Fifth Amendment.

{¶22} In order to demonstrate ineffective assistance of counsel, Lovett must establish that her counsel's representation fell below an objective standard of reasonableness and that she has been prejudiced by her counsel's deficient performance, i.e., that there exists a reasonable probability that, were it not for counsel's errors, the result of the Lovett's case would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. See *Strickland*, 466 U.S. at 689. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. See id.; *State v. Parker*, Montgomery App. No. 19486, 2003-Ohio-4326, ¶13.

{¶23} The state asserts that Lovett's trial court reasonably chose not to challenge the incriminating statement, because the suppression of Lovett's statements

would not have prevented the admissibility of the heroin. The state further asserts that Lovett was not prejudiced by her counsel's actions, because a finding that Lovett's Fifth Amendment rights were violated would not have resulted in the exclusion of the heroin, which was not derivative of her incriminating statement. We agree.

{¶24} At the time that Lovett indicated that there was heroin inside the syringe, Officer Fallis had already lawfully seized the Xanax tablets and the syringe. Thus, exclusion of Lovett's statement would not have affected the admissibility of the syringe and the heroin. In addition, because the Xanax and the syringe had been lawfully seized and, thus, the heroin and criminal tools would have been admissible at trial, there is no reasonable probability that the result of Lovett's case would have been different had her attorney successfully sought to exclude her statement that heroin was in the syringe. Accordingly, Lovett was not prejudiced by her trial counsel's failure to assert a Fifth Amendment challenge.

{¶25} The second assignment of error is overruled.

{¶26} The judgment of the trial court will be affirmed.

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FAIN, J., concurs.

GRADY, J., dissenting:

{¶27} I respectfully dissent from the decision of the majority, because the evidence the State offered fails to demonstrate the particular exception to the Fourth Amendment warrant requirement on which the State relied, which was that the criminal nature of the bag of pills the officer saw was immediately apparent, authorizing his seizure of the bag from Defendant's purse which, in turn, revealed the hypodermic

needle on which the charges against Defendant were based.

{¶28} In removing the bag of pills from Defendant Lovett's purse as he did, Patrolman Fallis performed a warrantless search for which probable cause is required. *Arizona v. Hicks* (1987), 480 U.S. 321, 94 L.Ed.2d 347, 107 S.Ct. 1149. It was the State's burden at the hearing on Defendant's Crim.R. 12(C) motion to suppress to demonstrate that probable cause existed. *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685.

{¶29} "'Probable cause to associate an object with criminal activity does not demand certainty within the minds of police, but instead merely requires that there be "a fair probability" that the object they see is illegal contraband or evidence of a crime.' *State v. Thompson* (1999), 134 Ohio App.3d 1, 4, 729 N.E.2d 1268, citing *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph one of the syllabus. Further, probable cause must " 'be viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of * * * arrest guided by his experience and training.' " *State v. Freeman* (Mar. 15, 2002), Trumbull App. No. 2001-T-0008, 2002 WL 408601, quoting *United States v. Davis* (C.A.D.C.1972), 458 F.2d 819, 821. 'In ascertaining the required probable cause to satisfy the "immediately apparent" requirement, police officers may rely on their specialized knowledge, training and experience.' *State v. Halczyszak* (1986), 25 Ohio St.3d 301, 25 OBR 360, 496 N.E.2d 925, paragraph four of the syllabus." *State v. Suter*, 132 Ohio Misc. 2d 6, 2005-Ohio-3461, at ¶ 18.

{¶30} In *Suter,* an officer who had seized and opened a container that fell from inside a suspect's clothing testified that, in his experience, narcotics are frequently

carried in such containers. That evidence, combined with the fact the container had been concealed in the defendant's clothing and the fact that one of the defendant's companions was a known drug dealer, was sufficient to create probable cause to seize the container and open it.

{¶31} Here, Defendant was alone. It was at mid-day, and she was found behind the wheel of her parked vehicle, passed out, with the motor running. Those facts are sufficient to portray a reasonable and articulable suspicion that she was operating a vehicle under the influence of alcohol or drugs in violation of R.C. 4511.19, but nothing in the way of a criminal violation other than that. Neither did that suspicion implicate her purse or its contents in the OMVI violation that was reasonably suspected.

{¶32} Officer Fallis testified that Defendant twice reached for her purse, the second time after he had told her not to. Fearing for his safety (T. 11), because he reasonably suspected that a weapon might be inside, Officer Fallis seized Defendant's purse. (T. 12). As the purse was open, his act revealed a plastic bag of pills inside the purse on top of its other contents. (T. 11). Officer Fallis recognized the pills to be Xanax, which he knew is a controlled substance for which a prescription is required. (T. 26). He then seized the bag of pills from Defendant's purse.

{¶33} The State might have sought to meet its burden by showing that, out of a concern for his safety, Officer Fallis acted reasonably when he removed the bag of pills to determine whether it concealed a weapon carried in the purse. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. More intrusive weapons searches based on a reasonable suspicion that a suspect may be armed and dangerous and which cannot be completed through a less cursory inspection are permissible. *State v. Mackey*

(2001), 141 Ohio App.3d 604. However, the State didn't argue that the officer seized the pills as a part of a weapons search. Neither did Officer Fallis testify that that was his purpose in removing the bag of pills. Instead, the State relied on the plain view exception to the warrant requirement which applies to seizures of contraband.

{¶34} Under the plain view exception, when an officer is lawfully in a position to see an article and its criminal nature is "immediately apparent," the officer may seize the article as evidence of criminal conduct. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564. Whether the "immediately apparent" requirement is satisfied is subject to the probable cause standard. *Arizona v. Hicks*.

{¶35} Officer Fallis testified that, based on his experience, the pills "appeared to be Xanax," which he knows is "a prescription drug." (T. 26). Its possession is criminal, however, only if it is possessed without a prescription. R.C. 2925.11(A), (B)(4). When asked whether he believed it was possible Defendant obtained the drug pursuant to a prescription, Officer Fallis testified: "It never crossed my mind due to the fact of (the pills) being in the plastic bag." (T. 29).

{¶36} Probable cause requires no more than a fair probability that an object seen is illegal contraband or evidence of a crime. *State v. Suter*. Certainty isn't required. However, in order for a fair probability to exist, the nexus between the object and whatever crime is involved must be such that the conclusion has a rational foundation. The fact that Defendant was asleep behind the wheel of her vehicle surely supports a reasonable suspicion that she was under the influence of alcohol or drugs, perhaps the very drugs the officer saw in her purse. However, it does not follow from that suspicion that she possessed those drugs illegally, without a prescription. Neither

does it follow from the way in which the pills were carried, in a plastic bag, that Defendant lacked a prescription for them.

{¶37} Officer Fallis testified that he had twenty years of law enforcement experience. (T. 4). Had he testified that his experience showed that illegal prescription drugs are typically carried in a plastic bag, probable cause would be easier to find. He didn't; and, more importantly, the State offered no evidence other than the officer's unsupported conclusion for the proposition that the criminal nature of the drugs was immediately apparent. Therefore, on the probable cause standard, the evidence the State offered was insufficient to demonstrate that the criminal nature of the bag of pills Officer Fallis saw was immediately apparent. *Coolidge v. New Hampshire*. That the alternative of legal conduct never crossed his mind doesn't portray probable cause or a basis to find it.

{¶38} Defendant wasn't indicted for any crime in connection with the Xanax that was seized. She was charged with two offenses arising from the hypodermic needle that was revealed when the bag of pills was removed from her purse. That evidence derived from the illegal seizure, and it therefore is likewise subject to suppression. *Nardone v. United States* (1939), 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307.

{¶39} The State also argued the inevitable discovery exception, contending that Defendant's arrest for driving under suspension would have permitted a search incident to arrest, revealing the syringe. *Nix v. Williams* (1984), 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377. However, the record does not support a finding that absent the seizure she would have been arrested on that charge, but only that she could have been. *State v. Taylor* (2000), 138 Ohio App.3d 139. The Fourth Amendment requires more. *Id*.

{¶40} I would reverse and remand.

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Copies mailed to:

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