**[Cite as *State v. Robinson*, 2010-Ohio-4533.]**

**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**MONTGOMERY COUNTY**

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| STATE OF OHIO | : | |
| | : | Appellate Case No. 23175 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 08-CRB-4557 |
| v. | : | |
| | : | (Criminal Appeal from Dayton |
| RAY I. ROBINSON | : | Municipal Court) |
| | : | |
| Defendant-Appellant | : | |
| | : | |

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O P I N I O N

Rendered on the 24th day of September, 2010.

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JOHN J. DANISH, Atty. Reg. #0046639, by STEPHANIE L. COOK, Atty. Reg. #0067101, City of Dayton Prosecutor's Office, 335 West Third Street, Room 372, Dayton, Ohio 45402
Attorneys for Plaintiff-Appellee

KENT DePOORTER, Atty. Reg. # 0058487, and SHA HINDS-GLICK, Atty. Reg. #0080822, 7501 Paragon Road, Dayton, Ohio 45459
Attorneys for Defendant-Appellant

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FAIN, J.

**{¶ 1}** Defendant-appellant Ray Robinson appeals from his conviction and sentence for Improperly Handling a Firearm in a Motor Vehicle, in violation of R.C. 2923.16(C), following a no-contest plea. Robinson contends that the trial court erred in overruling his motion to suppress evidence, because the City of Dayton Police

Department's tow policy gives police officers too much discretion in deciding when they should tow vehicles. Robinson contends that the degree of discretion afforded violates the Fourth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment Due Process Clause of the United States Constitution.

**{¶ 2}** We conclude that the trial court did not err in overruling the motion to suppress. The tow policy expressly authorizes officers to use discretion in deciding whether to impound vehicles, and there is no evidence that the decision to impound Robinson's vehicle was a pretext for an evidentiary search. We further conclude that the police officer's search of Robinson's bag did not violate the Fourth Amendment's proscription against unlawful searches and seizures. The officer had probable cause to believe that the bag contained marijuana, and the motor vehicle exception to the warrant requirement applied, even though the vehicle was in police custody and awaiting towing to a police lot. Accordingly, the judgment of the trial court is Affirmed.

I

**{¶ 3}** This case is before us as a result of Robinson's successful motion to reopen his appeal. In December 2009, we filed our original opinion, affirming Robinson's conviction and sentence for Improperly Handling a Firearm in a Motor Vehicle. See *State v. Robinson*, Montgomery App. No. 23175, 2009-Ohio-6395. Robinson filed a motion for reconsideration, which we construed as both a motion for reconsideration under App. R. 26(A), and a motion to reopen under App. R. 26(B).

We granted only the motion to reopen, concluding that appellate counsel, who was also trial counsel, was ineffective, because she had abandoned an argument in support of Robinson's motion to suppress. See *State v. Robinson* (January 19, 2010), Montgomery App. No. 23175 (unreported decision and entry granting motion to reopen).

**{¶ 4}** Our original opinion held that Robinson's trial counsel had abandoned an argument that the Dayton Police Department (DPD) policy on towing and inventory searches gives police officers too much discretion. *Robinson*, 2009-Ohio-6395, ¶ 2. We also concluded that the police officer's search of a locked bag in Robinson's trunk violated the department's tow policy. Id. at ¶ 45. Because the officer had an independent basis for the search, however, the search did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures, and the exclusionary rule did not apply. Id. at ¶ 53-56.

**{¶ 5}** Robinson now raises the issue of whether the tow policy violates the Fourth Amendment, because it allows police officers too much discretion to decide when they should tow vehicles. The facts pertinent to that issue are as follows.

**{¶ 6}** In late March 2008, Dayton police officers Jason Barnes and Craig Coleman were on patrol, and observed Robinson failing to signal a right-hand turn while turning onto McCabe Avenue. After initiating a traffic stop, Barnes approached the vehicle and observed smoke. He also smelled a very strong odor of marijuana from inside the car. Upon being asked about the source of the marijuana, Robinson opened up the ashtray and handed a marijuana joint to Coleman. The officers also learned that Robinson's license had been suspended, and placed him under arrest.

**{¶ 7}** Barnes decided to tow the car, because of the strong odor of marijuana coming from inside the vehicle, and because Robinson had been driving with marijuana lit in the car. Barnes also did not feel the car should be left on the side of the road, because someone could break in. Barnes testified that DPD's towing policy allowed him discretion in deciding whether to tow cars where the driver had been arrested.

**{¶ 8}** DPD's towing policy was revised in May 2005, and provides as follows:

**{¶ 9}** "I. When to Tow a Vehicle * * *

**{¶ 10}** "A. Driver/Owner Arrested: Vehicles operated by drivers without an operator's license, while under suspension, operating under the influence or where the vehicle was used in the commission of a crime may be towed from where they were stopped, including private property. If an officer elects not to tow the vehicle and leave it legally parked, a Tow-in/Liability Waiver (Form F-472) must be completed by the operator/registered owner of the vehicle.

**{¶ 11}** "1. RCGO 76.08 describes circumstances, which allow a vehicle to be impounded due to an arrest. It states, in part, 'Members of the Police Department are authorized to remove or direct the removal of a vehicle under any of the following circumstances . . . (C) Arrest and detention of driver. Whenever the driver or person in charge of any vehicle is placed under arrest and taken into custody and detained by police under circumstances which leaves or will leave a vehicle unattended.' " Joint Exhibit 1, p. 1.

**{¶ 12}** Section I of the tow policy provides other instances where vehicles may be towed, including situations where vehicles contain evidence, are towed from the

scene at the owner's request, are parked on a city street with no license plates, or are abandoned. The policy does not provide specific criteria for deciding whether to tow in cases where arrests are made; officers have authority to tow whenever an arrest will leave a vehicle unattended.

**{¶ 13}** Section IV(B) contains rules for inventorying towed vehicles in arrest situations. In pertinent part, the rules state that:

**{¶ 14}** "1. Inventory property inside the vehicle's passenger compartment, glove box, console, and trunk prior to towing. Secure all property inside the trunk, except money or valuable items. Place money and valuable items in the Property Room. Place vehicle trunk key (if separate) with the driver's personal effects, and leave ignition key with the vehicle. In cases where vehicle forfeiture will be sought, the officer will make every attempt to release all vehicle contents to the owner or the owner's designee.

**{¶ 15}** " * * *

**{¶ 16}** "4. If there is reasonable cause to believe that contraband or criminal evidence is in the vehicle in areas not covered by the inventory, place a 'HOLD' on the vehicle so a search warrant can be obtained.

**{¶ 17}** "5. Inventory the contents of closed containers (boxes, bags, and unlocked suitcases), prior to locking them in the truck. Do not open locked containers but list them on the vehicle inventory. Any container taken to the Property Room must be opened and inventoried for safety purposes." Joint Exhibit 1, p. 2.

**{¶ 18}** After deciding to impound the vehicle, Barnes inventoried the contents

of the car. When Barnes opened the trunk, he noticed a strong odor of marijuana coming from the trunk. Barnes was not immediately able to pinpoint the source of the odor, but then noticed a strong odor being emitted from a black briefcase bag, of the type that people throw over their shoulders to carry. The bag had a small padlock connecting the zippers together so that the bag could not be unzipped easily without removing the padlock.

**{¶ 19}** Barnes picked up the bag, which was heavier than he expected. The bag was soft, was made of cloth, and was zipped. Barnes was able to open the zipper an inch or two. Upon looking inside, he saw bags of marijuana and a handgun. At that point, Barnes removed the bag and placed it in his cruiser. After taking Robinson to jail, Barnes opened the bag and discovered four bags of marijuana, a loaded weapon, a loaded spare magazine, a digital scale with marijuana residue, three unknown white pills, and a bag of clear plastic bags. Barnes did not obtain a warrant before initially unzipping the bag or before opening it completely, because he did not feel he needed to obtain a warrant.

**{¶ 20}** Robinson was subsequently charged with Improperly Handling a Firearm in a Motor Vehicle, in violation of R.C. 2923.16(C). After his motion to suppress was overruled, Robinson pled no contest to the charge, was found guilty, and was sentenced to thirty days in jail and a $100 fine. Robinson was given credit for two days jail time, and the remaining time was suspended. The court ordered the gun destroyed, but stayed the order pending appeal.

II

**{¶ 21}** Robinson's sole assignment of error in the reopened appeal is as follows:

**{¶ 22}** "THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS BECAUSE THE TOW POLICY OF THE DAYTON POLICE DEPARTMENT ALLOWED TOO MUCH DISCRETION TO OFFICERS IN DETERMINING WHEN THEY SHOULD TOW A VEHICLE IN VIOLATION OF THE FOURTH AMENDMENT AS APPLIED TO THE STATES VIA THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION."

**{¶ 23}** Under this assignment of error, Robinson contends that "impoundment" and "inventory" involve different Fourth Amendment considerations. According to Robinson, the purpose of impoundment is to further public safety, while an inventory is intended to protect an owner's property while in police custody, to insure against claims of lost or stolen property, and to guard the police from danger. Robinson contends, therefore, that an inventory can be validly done only after a lawful impoundment, which must be based on standardized police procedures. Thus, because the tow policy gives officers too much discretion in deciding when to impound vehicles, the impoundment was not based on standardized procedures and was not lawful.

**{¶ 24}** The standards for reviewing decisions on motions to suppress are well established. In ruling on a motion to suppress, the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford* (1994), 93 Ohio

App.3d 586, 592 (citation omitted). Accordingly, when we review suppression decisions, "we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." Id.

**{¶ 25}** In the case before us, there is really no dispute about the facts, because the only witnesses at the suppression hearing were the police officers who had conducted the search. The trial court also did not rule specifically on the issue of the tow policy, because defense counsel failed to bring it to the trial court's attention at the suppression hearing. The issue was raised, however, in Robinson's pre-trial suppression motion. Under the circumstances, a more appropriate method of review would be the standard for ineffective assistance of counsel, which requires a showing of both "deficient performance, and resulting prejudice." *In re J.W.*, Montgomery App. No. 19869, 2003-Ohio-5096, ¶ 8, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

**{¶ 26}** "To show deficiency, the defendant must show that counsel's representation fell below an objective standard of reasonableness. * * * Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance. * * * The adequacy of counsel's performance must be viewed in light of all of the circumstances surrounding the trial court proceedings. Id. Hindsight may not be allowed to distort the assessment of what was reasonable in light of counsel's perspective at the time.

**{¶ 27}** "Even assuming that counsel's performance was ineffective, the

defendant must still show that the error had an effect on the judgment. * * * Reversal is warranted only where the defendant demonstrates that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Jackson*, Champaign App. No. 2004-CA-24, 2005-Ohio-6143, ¶ 29-30 (citations omitted).

**{¶ 28}** We conclude that Robinson's trial counsel fell below an objective standard of reasonableness by failing to raise the tow policy issue at the suppression hearing. The issue then becomes whether suppression would have been granted, but for trial counsel's error.

**{¶ 29}** Warrantless searches are considered " 'per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions.' " *City of Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218. An inventory search is one exception, and "permits police to conduct a warrantless search of a vehicle in order to inventory its contents after the vehicle has been lawfully impounded." *State v. Clancy*, Montgomery App. No. 18844, 2002-Ohio-1881, 2002 WL 628124, * 2 (citation omitted).

**{¶ 30}** In *Clancy*, we noted that although the inventory exception and impoundment are often intermingled, they involve different considerations. Id. We observed that:

**{¶ 31}** " 'Impoundments by the police may be in furtherance of "public safety" or "community caretaking functions," such as removing "disabled or damaged vehicles," and "automobiles which violate parking ordinances, and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic." ' * *

* If not supported by probable cause, impoundment must be consistent with the police 'caretaking' role, which is completely unrelated to the investigatory function. * * *

**{¶ 32}** "The reasons that permit impoundment of a vehicle are distinct from the permissible reasons for conducting an inventory search of an impounded vehicle, ' "which are 'to protect an owner's property while it is the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.' " ' " Id. at * 2-3, quoting from *U.S. v. Duguay* (C.A.7 1996), 93 F.3d 346, 352, which in turn quotes from *Colorado v. Bertine* (1987), 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739.

**{¶ 33}** Based on the above reasoning, we concluded in *Clancy* that a vehicle must first be lawfully impounded in order for police to perform a valid inventory search. 2002 WL 628124, * 3. Subsequently, in *State v. Bozeman*, Montgomery App. No. 19155, 2002-Ohio-2588, 2002 WL 1041847, we considered the validity of an impoundment where the arrested party was not the owner of the automobile, and the City of Dayton's impoundment policy failed to address such situations. The officer in the case had testified that he was allowed to use his discretion in situations not covered by the tow policy. We concluded that this meant that Dayton's policy was "wholly discretionary," and was no policy at all. 2002 WL 1041846, * 4. We stated that:

**{¶ 34}** "Put simply, Emerson's testimony that Dayton's policy, regarding whether to impound a car when the driver is arrested and not the registered owner, is wholly discretionary presents us with no real policy at all. He points to no factors

that police are required to consider in exercising their use of discretion. He has therefore failed to demonstrate that the requirements of the policy are consistently followed, so as to assure that impoundments are not being used as a mere pretext to search. Despite the State's argument to the contrary, we cannot conclude that a wholly discretionary determination by police whether to impound a vehicle confined to the unfettered discretion of a police officer constitutes a standardized, routine policy or practice, that takes their actions outside of the warrant requirements of the Fourth Amendment." Id.

**{¶ 35}** Relying on *Bozeman*, Robinson contends that the DPD's tow policy is wholly discretionary, and invalid, because it gives police officers exclusive discretion to decide when vehicles may be towed. Robinson contends that a wholly discretionary decision by police is not a standardized policy that takes an officer's actions outside the warrant requirements.

**{¶ 36}** In response, the State contends that the existence of an independent basis for the search moots the issue of whether the DPD tow policy allows officers too much discretion. The State also argues that the Supreme Court of Ohio has already resolved the constitutionality of a similar tow policy in *Blue Ash v. Kavanaugh*, 113 Ohio St.3d 67, 2007-Ohio-1103.

**{¶ 37}** In *Bozeman*, we ultimately reversed the trial court's grant of the defendant's motion to suppress, based on the Supreme Court of Ohio's decision in *State v. Murrell*, 94 Ohio St.3d 489, 2002-Ohio-1483. We concluded that even though the State had failed to set forth sufficient evidence of a standardized policy for impounding vehicles when the driver is arrested and the owner is not present, the

officer could properly search the passenger compartment of the automobile as a contemporaneous incident of the arrest. Id. at * 5.

**{¶ 38}** Unlike *Bozeman*, the search in the case before us was not limited to the passenger compartment of the car. Instead, the incriminating evidence was discovered during a search of the trunk. The State argues, however, that the automobile exception to the warrant requirement applies, because the scent of marijuana alone is sufficient to establish probable cause to search the automobile.

**{¶ 39}** In *State v. Moore,* 90 Ohio St.3d 47, 2000-Ohio-10, the defendant was stopped for a traffic violation. When the defendant opened his car window, the officer smelled a "strong odor of fresh burnt marijuana emanating from the vehicle" and from the defendant. Id. at 47. The defendant denied any knowledge of the odor or of illegal substances. After having the defendant exit the vehicle, the officer searched him and found drug paraphernalia. The officer also discovered a burnt marijuana cigarette in the ashtray. Based on these facts, the Supreme Court of Ohio concluded that "the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement." Id. at 48.

**{¶ 40}** In a later decision, however, the Supreme Court of Ohio specifically stated that the holding in *Moore* does not extend to authorize the search of the trunk of a vehicle merely because an odor of marijuana has been detected from the interior of the vehicle. *State v. Farris,* 109 Ohio St.3d 519, 2006-Ohio-3255, ¶ 50. The court stressed that:

**{¶ 41}** "A trunk and a passenger compartment of an automobile are subject to

different standards of probable cause to conduct searches. In *State v. Murrell* (2002), 94 Ohio St.3d 489, 764 N.E.2d 986, syllabus, this court held that '[w]hen a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.' (Emphasis added.) The court was conspicuous in limiting the search to the passenger compartment.

**{¶ 42}** "The odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause for a warrantless search of the trunk of the vehicle." Id. at ¶ 51-52 (Citation omitted).

**{¶ 43}** In the case before us, Officer Barnes saw smoke in the interior of Robinson's car and smelled the odor of marijuana. When Barnes asked Robinson where the marijuana was, Robinson told Barnes that the marijuana was in the ashtray. Robinson then opened the ashtray and handed the marijuana joint to Officer Coleman. Under *Farris*, the police officer would have had probable cause to search the passenger compartment of Robinson's car, but would not have had probable cause to search the trunk. We therefore, reject the State's contention that an independent basis existed for searching the trunk.

**{¶ 44}** Returning to the issue of the tow policy, we note that the City of Dayton revised its tow policy in 2005. The policy currently provides that vehicles may be towed where the operator is arrested under circumstances that leave the vehicle unattended. The policy still gives officers discretion, because they can decide not to tow, and leave a vehicle legally parked. In addition, Dayton Revised Code of Governmental Ordinances (R.C.G.O.) 76.07 provides that officers are authorized to

impound vehicles under the circumstances enumerated in R.C.G.O. 76.08. These circumstances include the arrest and detention of drivers, whenever "the driver or person in charge of any vehicle is placed under arrest and taken into custody and detained by police under circumstances which leaves or will leave a vehicle unattended." R.C.G.O. 76.08(C).

**{¶ 45}** *Bozeman,* the case relied upon by Robinson, does not control our decision, because it involved a situation that was not covered by the tow policy at all, and there were no factors that informed the officer's discretion whether to tow vehicles. In contrast, the case before us involves a situation that is covered by the tow policy. One might still question whether officer discretion is significantly limited by a policy that gives officers the ability to order a tow whenever a vehicle will be left unattended – even if it could be legally parked, or a relative or friend could be called to move the vehicle. In these situations, nothing essentially prevents the police from deciding to tow vehicles and inventory the contents any time they wish to rummage through the contents of a vehicle. Despite this possibility, the State is correct when it contends that the issue has been resolved by the decision of the Supreme Court of Ohio in *Blue Ash.*

**{¶ 46}** The defendant in *Blue Ash* was stopped on Interstate I-71 for driving with expired license plates. The driver also had an expired driver's license. 2007-Ohio-1103, ¶ 2. The police officer decided to impound the vehicle for the following reasons: the tags and driver's license had been expired for more than three months; the defendant could not lawfully drive the vehicle away; and the vehicle could not be parked or pushed to a safe location on the highway. Id. at ¶ 3.

The police department's tow policy gave officers discretion to decide whether to impound vehicles. Id.

**{¶ 47}** After a drug-detection dog alerted on the door handles of the vehicle, the officer decided to search the car, due to the positive alert. Before the officer could do so, the defendant informed him that a gun was in the center console. Id. at ¶ 5. No drugs were ever located. Id. at ¶ 5, n.1.

**{¶ 48}** The trial court overruled the defendant's motion to suppress, and the court of appeals reversed the trial court. Id. at ¶ 8. Upon review, the Supreme Court of Ohio held that the motion to suppress was properly overruled. The court first determined whether the lawful detention for a traffic violation became unlawful when the officer decided to impound the vehicle and deploy the drug-detection dog. In discussing this issue, the court noted that in *South Dakota v. Opperman* (1976), 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000:

**{¶ 49}** "The United States Supreme Court concluded that a routine inventory search of a lawfully impounded vehicle is not unreasonable within the meaning of the Fourth Amendment when performed pursuant to standard police practice and when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded vehicle. The court held that '[i]n the interests of public safety and as part of what the Court has called "community caretaking functions," * * * automobiles are frequently taken into police custody. * * * The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.' " *Blue Ash*, 2007-Ohio-1103, ¶ 11.

**{¶ 50}** The only specific "procedure" mentioned in *Blue Ash* is that the police department left the decision on whether to impound vehicles to the officer's discretion. Id. at ¶ 4. The Supreme Court of Ohio noted that R.C. 4513.51 allowed police officials to impound automobiles that come into their possession as a result of the performance of an officer's duties or that have been left on public streets or other property open to the public. Id. at ¶ 13. The court also observed that the Blue Ash Code of Ordinances allowed police to impound vehicles left unattended on a highway where they constitute an obstruction to traffic, and to impound vehicles that are stolen, are abandoned, are not roadworthy, or are parked where parking is prohibited. Id. at ¶ 14-15. The Supreme Court of Ohio concluded that the police officer was authorized to use his discretion to impound under both the statute and the local ordinance. Id. at ¶ 16.

**{¶ 51}** In reaching this holding, the Supreme Court of Ohio did not discuss analytical differences between "impoundment" and "inventory," and did not rely on any criteria guiding the officer's discretion. The court limited its consideration to whether the impoundment was "merely a pretext for an evidentiary search of the impounded vehicle." Id. at ¶ 16. The court also rejected the defendant's argument that the police officer was not following "standardized procedures" under *Colorado v. Bertine*, because the officer's authority to impound was discretionary. The court stressed that "*Bertine* requires standardized procedures with regard to inventory searches, not impoundment." Id. at ¶ 18. And finally, the court rejected the defendant's argument that he should have been permitted to call a tow truck as an alternative to impoundment. In this regard, the Supreme Court of Ohio stressed that

"The *Bertine* court observed that although giving the defendant in that case an opportunity to make alternative arrangements for his vehicle would have been possible, '[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.' " Id. at ¶ 19, quoting from *Colorado v. Bertine* (1987), 479 U.S. 367, 373-74, 107 S.Ct. 738, 93 L.Ed.2d 739.

**{¶ 52}** Accordingly, as interpreted by the Supreme Court of Ohio in *Blue Ash*, if an officer is expressly authorized to use discretion in deciding whether to impound a vehicle, the pertinent inquiry is whether the impoundment was merely a pretext for an evidentiary search.

**{¶ 53}** Applying these standards to the case before us, we note that the DPD tow policy, as well as R.C.G.O. 76.07-08, provide police officers with discretion in determining whether vehicles should be impounded. There is also no evidence that the decision to tow Robinson's vehicle was a pretext for an evidentiary search. The impoundment, therefore, was lawful. Furthermore, even though Officer Barnes violated the inventory policy when he opened Robinson's closed bag, by that time he had an independent basis for the search. *Robinson*, 2009-Ohio-6395. In this regard, we stated in our prior opinion that:

**{¶ 54}** "Barnes had probable cause to believe that the bag contained contraband when he detected the odor of marijuana emanating from it. He detected the odor before he searched within the bag. As the State points out, *Michigan v. Thomas, supra*, holds that where there is probable cause, a warrant is not required to search within a motor vehicle, even when the vehicle is in police custody preparatory

to being towed. As the United States Supreme Court opined, ' * * * the justification to conduct such a warrantless search [under the motor vehicle exception to the warrant requirement] does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant. [Footnote omitted.]' * * *

**{¶ 55}** " 'The police may search an automobile and the containers within it [without a warrant] where they have probable cause to believe contraband or evidence is contained.' * * *

**{¶ 56}** "Thus, Barnes's search of the bag did not violate the Fourth Amendment's proscription against unlawful searches and seizures. He had probable cause to believe that the bag contained marijuana, and the motor vehicle exception to the warrant requirement applied, even though the vehicle was in police custody and awaiting towing to a police lot." *Robinson*, 2009-Ohio-6395, ¶ 53-55 (citations omitted).

**{¶ 57}** Accordingly, even though Robinson's attorney was deficient in failing to raise the issue of the tow policy at the suppression hearing, Robinson was not prejudiced as a result. Robinson's sole assignment of error is overruled.

III

**{¶ 58}** Robinson's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and GRADY, JJ., concur.

Copies mailed to:

John J. Danish
Stephanie L. Cook
Kent DePoorter
Sha D. Hinds-Glick
Hon. Bill C. Littlejohn