[Cite as *State v. Thames*, 2015-Ohio-626.]

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

STATE OF OHIO

Plaintiff-Appellee

v.

JIMMY L. THAMES, JR.

Defendant-Appellant

Appellate Case No. 26052

Trial Court Case No. 12CR3191

(Criminal Appeal from Common Pleas Court)

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O P I N I O N

Rendered on the 20th day of February, 2015.

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HALL, J.

{¶ 1} Jimmy L. Thames, Jr. appeals from his conviction and sentence following a no-contest plea to two counts of fifth-degree-felony marijuana trafficking.

{¶ 2} Thames' plea followed the trial court's denial of a suppression motion. After accepting the plea, the trial court found him guilty and imposed a community-control sanction. On June 16, 2014, Thames' appointed appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), asserting the absence of any non-frivolous issues for review. We notified Thames of the *Anders* brief and invited him to submit a pro se brief. Thames did not respond, and the matter came before us for disposition. In undertaking our review, we noted the absence of a suppression-hearing transcript from the record. On October 27, 2014, we ordered counsel for Thames to file the missing transcript. Counsel filed the transcript on December 29, 2014. On February 3, 2015, we granted Thames' counsel two weeks to file a supplemental brief either raising assignments of error in connection with the suppression hearing or advising us that no non-frivolous issues exist. Counsel responded by filing a supplemental *Anders* brief advising us that no non-frivolous issues exist with regard to the suppression hearing. As a result, the matter once again is before us for disposition.

{¶ 3} Although counsel's *Anders* brief and supplement thereto do not identify any potential appellate issues, the initial *Anders* brief does discuss the trial court's ruling on the suppression motion. Pursuant to our responsibilities under *Anders*, we have undertaken an independent review of the record, including the suppression-hearing transcript and a transcript of Thames' plea and sentencing hearings. We agree with appointed appellate counsel's assessment that there are no non-frivolous issues for review.

{¶ 4} The charges against Thames stemmed from two traffic stops. On February 27, 2012, Deputy Sheriff Fred Zollers stopped Thames for driving with a cracked windshield. (Suppression Tr. at 7-9). The vertical crack was on the driver's side and was large enough to obstruct the driver's view. (*Id*.). As he approached Thames' van, Zollers detected an overwhelming odor of air freshener coming from inside it. (*Id*. at 10). He also smelled a faint odor of marijuana and noticed that Thames seemed overly nervous. (*Id*. at 12). Based on these facts, Zollers requested a K-9 unit. The request occurred two or three minutes into the traffic stop. (*Id*. at 29). Zollers then had Thames step out of his vehicle. Thames consented to a weapons frisk. During the frisk, he made a sudden reach toward his waistband. (*Id*. at 14). The movement concerned Zollers, who then requested and received permission to reach into Thames' pockets. (*Id*. at 15). Upon doing so, Zollers found baggies of marijuana and roughly $4,600 in Thames' pockets. (*Id*. at 17-18). While Zollers was still dealing with Thames, the K-9 unit arrived. (*Id*. at 20). The unit arrived seventeen minutes after Zollers had initiated the traffic stop. (*Id*. at 29, 43). Zollers had not yet completed a citation or verified the drivers' licenses of Thames and a passenger in his car. (*Id*.). A police dog performed a free-air sniff and, within seconds, alerted on Thames' vehicle. (*Id*. at 45). Police searched the vehicle and found additional marijuana in a storage space above the driver's seat. (*Id*. at 47).

{¶ 5} The second traffic stop occurred on June 4, 2012. On that date, Deputy Sheriff Joshua Haas stopped Thames' vehicle for an expired-registration violation. (*Id*. at 50). Upon making contact with Thames, Haas detected an overwhelming odor of perfume and a faint odor of marijuana. (*Id*. at 52). He requested consent to search the vehicle, but Thames refused. (*Id*.). Haas proceeded to check the identification of Thames and a passenger. Due to the odor of marijuana, he also requested a K-9 unit. (*Id*. at 53). Another deputy arrived with a police dog

approximately sixteen minutes after the stop began. (*Id*. at 54). The dog alerted, and a search of Thames' vehicle resulted in the discovery of several baggies of marijuana. (*Id*. at 57-58, 68).

{¶ 6} We agree with appointed appellate counsel's assessment that no potentially meritorious issues exist with regard to either stop. A large windshield crack that obstructed Thames' view justified the first stop. *State v. Herron*, 2d Dist. Montgomery No. 25850, 2014-Ohio-3166, ¶ 25. Upon approaching the stopped vehicle, Zollers smelled air freshener and marijuana. "[T]he 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." *State v. Moore*, 90 Ohio St.3d 47, 48, 734 N.E.2d 804 (2000). Moreover, a K-9 unit promptly arrived and alerted on Thames' vehicle, providing an additional basis for probable cause. *State v. Greene*, 2d Dist. Mont. No. 25577, 2013-Ohio-4516, ¶ 24. Finally, as for the search of Thames' person, he consented to it while the traffic stop was in progress.

{¶ 7} The second stop was justified by the expired-registration violation. Haas approached the stopped vehicle and smelled marijuana, which itself provided probable cause for a search. The smell also justified a short investigatory detention for a K-9 sniff, which resulted in an alert and in the discovery of marijuana in Thames' vehicle.

{¶ 8} Having reviewed the suppression-hearing transcript, we agree with appointed appellate counsel that no non-frivolous issues exist for our review. The only potential issue we have found concerns Zollers' and Haas' qualifications to detect the smell of marijuana. As noted above, the odor of marijuana establishes probable cause to search a vehicle only when the odor is detected by a person qualified to recognize it. *Moore* at syllabus. Here Thames' written suppression motion did not challenge the deputies' qualifications to detect the smell of

marijuana. Their qualifications also were not specifically addressed during the suppression hearing. Zollers never touched upon his qualifications. Haas did testify, however, that he had made hundreds of narcotics arrests and that he was "confident" that what he smelled was burnt marijuana. (Suppression Tr. at 63). In post-hearing briefing, Thames addressed only Haas' ability to detect the smell of marijuana, arguing that it had not been established. (Doc. #24 at 3).

{¶ 9} Upon review, we conclude that any appellate argument regarding the qualifications of Zollers and Haas to detect the smell of marijuana would be frivolous. Thames did not raise the issue in his suppression motion or challenge their qualifications in that regard during the suppression hearing. This court addressed a similar issue in *State v. Cunningham*, 2d Dist. Montgomery No. 20059, 2004-Ohio-3088, reasoning:

> Presumably, defendant's counsel did not question that Officer Beall could smell marijuana in light of his extensive experience as a police officer. Had counsel objected, the prosecutor could have inquired further of Beall as to his training and experience in being familiar with the smell of marijuana.
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> * * * Counsel did not argue in the motion or at the hearing that the trial court should suppress the marijuana because Officer Beall was not qualified to smell the marijuana. Legal issues which are not raised in the trial court may not generally be raised for the first time in the appellate court. The general rule is that an appellate court will not consider any error which counsel for 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.

Id. at ¶ 25-26. **{¶ 10}** Although Thames did challenge Haas' qualifications in post-hearing

briefing, it was then too late for the prosecutor to inquire further on the issue. Therefore, we conclude, as in *Cunningham*, that Thames did not properly challenge the deputies' qualifications below. *See also State v. Walker*, 2012-Ohio-3303, 974 N.E.2d 1213, ¶ 32 (11th Dist.) ("[W]e note that appellant did not object to the officer's testimony regarding the odor of marijuana emanating from inside the vehicle. Thus, any error resulting from such testimony was waived.").

{¶ 11} We have considered the possibility that counsel's failure to challenge the deputies' qualifications might constitute ineffective assistance, but it does not. With regard to Deputy Haas, the trial court correctly found that his qualifications to detect the odor of marijuana fairly could be inferred from his experience making hundreds of narcotics arrests. Although Zollers provided no such testimony, the record reflects that he had not yet completed the traffic stop when the K-9 unit arrived. Therefore, the traffic stop was not impermissibly prolonged to allow the drug sniff, which independently provided probable cause for the vehicle search. Finally, even if we were to assume, arguendo, that Zollers briefly had extended the stop to allow the drug sniff, he had reasonable, articulable suspicion of criminal activity permitting him to do so. *See State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 15 (recognizing that reasonable, articulable suspicion of criminal activity may justify extending a traffic stop for a drug sniff). Upon approaching the stopped van, Zollers noted that Thames seemed exceptionally nervous. The deputy also smelled an overwhelming odor of air freshener and a faint odor of marijuana. Even if Zollers did not testify about his qualifications in marijuana-odor detection sufficiently to establish probable cause, we believe his testimony, at a minimum, met the reasonable, articulable suspicion standard.

{¶ 12} Finally, we have examined the remainder of the record, including a transcript of the plea and sentencing hearings. The transcript reveals a sentencing hearing held in compliance

with Crim.R. 11. In addition, we see no non-frivolous issue with regard to the trial court's imposition of a community-control sanction or any other potential error at sentencing.

{¶ 13} Appointed appellate counsel's request to withdraw is sustained, and the trial court's judgment is affirmed.

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FROELICH, P.J. and FAIN, J., concur.

Copies mailed to:

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Hon. Dennis J. Langer