[Cite as *State v. Hill*, 2015-Ohio-897.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2013-CA-108
	:	
v.	:	Trial Court Case No. 13-CR-527
	:	
BRIAN HILL	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 13th day of March, 2015.

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HALL, J.

{¶ 1} Brian Hill appeals from his convictions for improperly furnishing firearms to a

minor and involuntary manslaughter. We affirm.

I. FACTS

{¶ 2} Sometime after 10:00 p.m. on July 16, 2013, Timothy Henery drove 17-year-old Dustin Wade to Brian Hill's house in Springfield, Ohio, ostensibly to buy some weed. When they arrived, Henery stayed in the car while Wade went inside. Wade came out not with weed but with a small handgun. While Henery drove, Wade fiddled with the gun. Suddenly, Henery heard a loud bang. He slammed on the brakes and looked over at Wade. Wade's eyes were big as he lifted up his shirt and then fell over. Wade had accidentally fired the loaded gun and shot himself. Henery rushed to Springfield Regional Medical Center where Wade soon died.

{¶ 3} Less than two hours later, around 1:16 a.m., Springfield detective Travis Baader interviewed Hill at the police department. Before asking Hill any questions, Baader read him his *Miranda* rights and Hill signed a waiver of rights form and agreed to talk. Hill told Baader that Dustin Wade had repeatedly asked Hill about purchasing a gun so Hill arranged for a man named 'Tom,' who had a gun for sale, to come to Hill's house where 'Tom' sold the gun to Wade. In addition to Hill's admission that he arranged the sale, he said he manipulated the weapon to remove the clip and placed both the clip and the handgun back in the case before delivery. He also said he received $15 for his part in the transaction. After the first interview, Hill was released. About twelve hours later that day, at 1:30 p.m., Detective Baader interviewed Hill a second time. Baader asked Hill for more information about 'Tom'. Hill said that 'Tom' had recently gotten out of prison but could remember little else about the man. Near the end of the interview, Baader left the room, telling Hill that he would be back to let him know what was going on. When Baader

returned, he told Hill that he had talked to the prosecutor's office and that it had decided to charge Hill with improperly furnishing a gun to a minor and manslaughter. Hill was now under arrest, Baader continued, and was therefore not free to leave. During their subsequent conversation, Hill admitted that he was guilty of getting Wade the firearm (the facts of which he had already expressed in the original interview.) Hill also said there was no 'Tom,' the real name of the person who sold Wade the gun was 'Damian'. Hill also admitted that he made up the story about the man's recent release from prison. Detective Baader was never able to find, or confirm the existence of either 'Tom' or 'Damian'.

{¶ 4} Hill was indicted on charges of improperly furnishing firearms to a minor in violation of R.C. 2923.21(A)(1) and involuntary manslaughter in violation of R.C. 2903.04(A) (causing the death of another as a proximate result of committing a felony). A jury found him guilty on both counts, and he was sentenced to eight years in prison.

{¶ 5} Hill's appeal raises an argument that trial counsel should have filed a motion to suppress Hill's statements to the police at the second interview. Our initial inquiry included review of the written trial transcript and exhibits 15 and 16, which were purported to be disks containing videos of the first and second police interviews. However, exhibit 16 contained a file of only 1KB size listed as a WLMP file which we perceived was either an incorrect file or perhaps a setup file to play portions of the video of the second interview which were contained on the prosecutor's laptop. (T. 288.) By order filed December 1, 2014, we gave the parties the opportunity to submit a reviewable recording of Exhibit 16, the second interview. On December 10, 2014, the State submitted a disk containing the entire second interview with an explanation of those portions which were believed to have been played for the jury.

II. ANALYSIS

{¶ 6} The sole assignment of error alleges that trial counsel rendered ineffective assistance because he failed to file a motion to suppress the statements that Hill made during the second interview.

{¶ 7} "Reversal of a conviction for ineffective assistance requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 75, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 8} Not filing a motion to suppress does not necessarily constitute ineffective assistance of counsel. *State v. Wilson*, 2d Dist. Clark No. 08CA0045, 2009-Ohio-2744, ¶ 11, citing *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). For instance, it is not ineffective if "there was no reasonable probability of success." *State v. Nields*, 93 Ohio St.3d 6, 34, 752 N.E.2d 859 (2001). Accordingly, "[t]o establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question." (Citation omitted.) *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 65.

{¶ 9} Hill contends that his statements at the second interview would have been suppressed because the *Miranda* warnings he was given before the first interview were stale and he was not given fresh *Miranda* warnings before the second interview. Regardless of whether the first warnings were stale, the record does not show that

warnings were required in regard to most of the second interview. We have reviewed the entirety of the video of the second interview. It is apparent that Hill had no reasonable argument that he was in custody during a majority of the questioning.

{¶ 10} "Police are not required to administer *Miranda* warnings to everyone whom they question." *State v. Biros*, 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997), citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). Warnings need not be given "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon* at 495. "Only custodial interrogation triggers the need for *Miranda* warnings." *Biros* at 440, citing *Oregon* at 494. A person is in custody when "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983).

{¶ 11} Although the record is not precise about what parts of the second interview were shown to the jury, the entirety has been reviewed by us to evaluate whether a motion to suppress would have had a reasonable chance of success. At the beginning of the second interview it is apparent Hill is not in custody when he reiterates that he arranged for the firearm sale and he responds to further requests designed to divulge the identity of 'Tom.' After about 15 minutes, he is informed that he is going to be charged and arrested. Indeed, that Hill was arrested toward the end of the interview suggests that he was not in custody. *Miranda* warnings would not be not required at all up to the point that he was in custody. *Compare State v. Petitjean*, 140 Ohio App.3d 517, 523-524, 748 N.E.2d 133 (2d Dist.2000) (saying that the fact that a defendant comes to the police station voluntarily is significant to the finding that the defendant was not in custody). Even

after the point Hill was told he will be arrested, and assuming that all of Hill's subsequent statements were played to the jury, for the most part those statements were consistent with his prior admissions or volunteered and not in response to questioning. Admission of those repeated or volunteered statements would not constitute prejudicial error. After he was informed that he would be arrested, Hill was again questioned about 'Tom.' That is when Hill said the gun-seller's true name was really 'Damian.' But even if we conclude that discrete subset of statements would have been excluded because of a *Miranda* violation, those statements alone are insufficient to find prejudicial error when the evidence is overwhelming that Hill brokered and participated in the sale of the firearm to the minor.

{¶ 12} Perhaps more importantly, if new *Miranda* warnings were required part-way through the second interview, we would determine that the warnings given at the beginning of the first interview by the same officer at the same police department just twelve hours earlier were sufficient, as was Hill's signed wavier of those rights. In *State v. Roberts*, 32 Ohio St.3d 225, 513 N.E. 2d 720 (1987), the Ohio Supreme Court adopted the totality of circumstances test to determine if *Miranda* warnings are stale. The criteria to be considered are:

> " * * * (1) [T]he length of time between the giving of the first warnings and subsequent interrogation, * * * (2) whether the warnings and the subsequent interrogation were given in the same or different places, * * * (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, * * * (4) the extent to which the subsequent statement differed from any previous statements; * * * [and] (5)

> the apparent intellectual and emotional state of the suspect. * * * " (Citations omitted.)

Id at 232, 513 N.E. 2d 726, quoting *State v. McZorn*, 288 N.C. 417, 434, 219 S.E.2d 201, 212 (1975). Here the length of time between the two interviews was twelve hours, both interviews were at the same police station although in different interview rooms, the same officer conducted the interviews, the second interview focused on trying to locate 'Tom' who Hill had said at the first interview was the seller of the gun for the deal Hill brokered, and there is nothing to indicate that Hill was unable to comprehend the proceedings. Hill appears to have been at the police station voluntarily and the interview was cordial and polite. The result in *Roberts* was that *Miranda* warnings were not stale after 24 hours and after considering all the circumstances in the record, we would determine they were not stale here which means that a motion to suppress alleging a *Miranda* violation would have been unsuccessful.

{¶ 13} Finally, to the extent that the record may be imprecise, "an appellant bears the burden of showing error by reference to matters in the record." (Citation omitted.) *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). " '[If] the record is not clear or lacks sufficient evidence to determine whether [there is a reasonable probability that] a suppression motion would have been successful, a claim for ineffective assistance of counsel cannot be established.' " *State v. Rucker*, 9th Dist. Summit No. 25081, 2010-Ohio-3005, ¶ 50, quoting *State v. Parkinson*, 5th Dist. Stark No.1995CA00208, 1996 WL 363435, *3 (May 20, 1996).In this case, the appellant has failed to demonstrate evidence in the record sufficient to permit us to determine that there is a reasonable probability that a motion to suppress the statements at the second

interview would have been successful or that prejudice resulted. Accordingly, we cannot say that trial counsel was required to file a motion to suppress in this case and therefore we cannot conclude that counsel rendered ineffective assistance.

{¶ 14} The sole assignment of error is overruled.

{¶ 15} The judgment of conviction is affirmed.

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FROELICH, P.J., and WELBAUM, J., concur.

Copies mailed to:

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