

IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
SENECA COUNTY

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STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 13-14-29

v.

LARRY O. WHITE, JR.,

OPINION

DEFENDANT-APPELLANT.

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Appeal from Seneca County Common Pleas Court  
Trial Court No. 14 CR 0121

Judgment Affirmed

Date of Decision: March 9, 2015

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APPEARANCES:

*Jonathan G. Stotzer* for Appellant

*Brian O. Boos* for Appellee

**ROGERS, P.J.**

{¶1} Defendant-Appellant, Larry O. White, Jr., appeals the judgment of the Court of Common Pleas of Seneca County convicting him of illegal cultivation of marihuana with a specification. On appeal, White argues the trial court improperly denied White's motion to suppress his statements to police officers in violation of his Miranda rights. He also argues he was denied effective assistance of counsel. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} On May 29, 2014, the Seneca County Grand Jury returned a one count indictment against White, charging him with one count of illegal cultivation of marihuana in violation of R.C. 2925.04(A)(C)(5)(d), a felony of the second degree. The indictment also carried a specification that White's alleged conduct occurred within 100 feet of a juvenile.

{¶3} The matter proceeded to trial on August 11, 2014. The State's first witness was Officer Brandon Bell of the Fostoria Police Department. On July 22, 2012, Officer Bell received a call to investigate an open burning complaint adjacent to 576 Spruce Street in Fostoria, Ohio. Officer Bell testified that once he arrived he could smell fresh marihuana coming from the residence and could see what appeared to be marihuana plants growing in the backyard. After he failed to make contact with anyone inside the house, Officer Bell testified that he contacted Detective Gabriel Wedge to secure a search warrant. While walking around the

house, Officer Bell observed what appeared to be marihuana residue and a glass pipe usually used to smoke marihuana through a window.

{¶4} Officer Bell testified that approximately five to ten minutes into the call, White appeared on scene. Officer Bell stated that White seemed agitated and angry. Officer Bell said that when he asked what he was doing there, White replied that he received a call about the activity around the house and wanted to check it out. He testified that White said he was working on the backyard. During this conversation, Officer Bell stated that White was confrontational and even threatened to assault Officer Bell.

{¶5} Officer Bell also stated that the occupants of the house, Brian Bolan, Natalie Chambers and three small children, eventually came out of the house. He testified that after Chambers and the children were searched, they were allowed to leave.

{¶6} Officer Cory Brian of the Fostoria Police Department was the next witness to testify. Officer Brian stated that while having a discussion with White on the sidewalk, White admitted to owning the marihuana plants. Officer Brian testified that White claimed they were his and that he grew them for personal use. Officer Brian also stated that White talked about the different genders of the plants and how these could not produce buds capable of being smoked for the purposes of getting high.

{¶7} Detective Wedge also testified that White admitted to him that the marihuana plants were his. Detective Wedge was able to record this conversation, and it was played for the jury.

{¶8} Ms. Chambers testified on behalf of the State. She stated that she had seen White water the marihuana plants on different occasions. She also testified that White was involved in Bolan's drug operation.

{¶9} White testified on his own behalf. During his testimony, White told the jury that he only admitted to owning the marihuana plants as part of a plan between him and Bolan. According to White, Bolan agreed to pay White \$25,000 if White admitted to owning the plants. White testified he received \$10,000 after he made the admission, but did not receive anything else.

{¶10} On August 12, 2014, the jury returned a guilty verdict on the charge of illegal cultivation of marihuana and the specification. The trial court issued its judgment entry of sentencing on August 13, 2014, which imposed a six year prison term.

{¶11} It is from this judgment White appeals, presenting the following assignments of error for our review.

*Assignment of Error No. 1*

**THE DEFENDANT RECIEVED [SIC] INEFFECTIVE ASSISTANCE FROM DEFENSE COUNSEL WHICH IMPACTED HIS CASE.**

*Assignment of Error No. II*

**THE TRIAL COURT ERRED IN FAILING TO SUPPRESS AND EXCLUDE THE STATEMENTS OF THE DEFENDANT IN VIOLATION OF HIS RIGHTS UNDER MIRANDA V ARIZONA IN CUSTODIAL INTEROGATION [SIC] CIRCUMSTANCES.**

{¶12} Due to the nature of White’s assignments of error, we elect to address them out of order.

{¶13} Before we address White’s assignments of error, we must first address the fact that White’s brief failed to conform to the Appellate Rules and the Local Rules of this court. Pursuant to Local Rule 11, assignments of error should “be separately argued in the briefs unless the same argument, and no other, pertains to more than one assignment of error.” App.R.12(A)(2) gives this court the authority to disregard an assignment of error if the appellant “fails to argue the assignment separately in the brief, as required by App.R.16(A).” However, in the interest of justice, we elect to address the merits of White’s arguments.

*Assignment of Error No. II*

{¶14} In his second assignment of error, White argues that his motion to suppress should have been granted as the admissions were obtained as a result of an illegal arrest and custodial interrogation in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We disagree.

{¶15} Initially, we note that both parties to this appeal state in their briefs that White was first indicted in August of 2013 in Case No. 12CR0136. In this previous case, White’s trial counsel apparently filed a motion to suppress, which was denied by the trial court. Both parties also agree that this case was voluntarily dismissed by the State without prejudice. In May of 2014, based upon the same conduct and facts in Case No. 13CR0136, White was re-indicted in Case No. 14CR0121. This subsequent case is now the subject of White’s appeal. In this case, White did not file a motion to suppress nor did he move the trial court to supplement the record to incorporate his previously filed motion to suppress.

{¶16} App.R. 9(A)(1) limits the record on appeal to “[t]he original papers and exhibits thereto filed in the trial court, the transcript of the proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court \* \* \*.” See *State v. Ishmail*, 54 Ohio St.2d 402, (1978), paragraph one of the syllabus (“A reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.”); *State v. Zhovner*, 3d Dist. Auglaize No. 2–12–13, 2013-Ohio-749, ¶ 12 (finding that materials attached to the appellate brief but not filed with the trial court were not properly before the reviewing court); *State v. Hartley*, 3d Dist. Union No. 14–11–29, 2012-Ohio-4108,

¶ 19 (same); *Deitz v. Deitz*, 3d Dist. Union No. 14-11-06, 2012-Ohio-130, ¶ 8 (same).

{¶17} Nothing in the record before us shows that a motion to suppress was filed in this particular case. Although White has attached a copy of a judgment entry denying a motion to suppress to his brief, neither the entry nor the motion was part of the trial court's proceedings from which White appeals. Since neither the motion to suppress nor the judgment entry denying that motion was before the trial court, we will not consider them.

{¶18} Accordingly, we overrule White's second assignment of error.

*Assignment of Error No. I*

{¶19} In his first assignment of error, White argues that he was denied effective assistance of counsel because his trial counsel failed to refile the suppression motion after the charges were refiled, which weakened his case. We disagree.

{¶20} An ineffective assistance of counsel claim requires proof that trial counsel's performance fell below objective standards of reasonable representation and that the defendant was prejudiced as a result. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, but for counsel's errors, the outcome at trial

would have been different.” *Id.* at paragraph three of the syllabus. “Reasonable probability” is a probability sufficient to undermine confidence in the outcome of the trial. *State v. Waddy*, 63 Ohio St.3d 424, 433 (1992), *superseded by constitutional amendment on other grounds as recognized by State v. Smith*, 80 Ohio St.3d 89, 103 (1997).

{¶21} Further, the court must look to the totality of the circumstances and not isolated instances of an allegedly deficient performance. *State v. Barnett*, 3d Dist. Logan No. 8-12-09, 2013-Ohio-2496, ¶ 45. “Ineffective assistance does not exist merely because counsel failed ‘to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it.’” *Id.*, quoting *Smith v. Murray*, 477 U.S. 527, 535, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

{¶22} Here, White contends that his trial counsel’s failure to file a motion to suppress resulted in prejudice to his case. He claims that had a motion to suppress been filed, then the trial court would have granted it. Absent his admissions to the police officers, White argues that the State would not have had enough evidence to convict him.

{¶23} This court has said that the “failure of trial counsel to file a motion to suppress does not constitute ineffective assistance of counsel per se.” *State v. Bofia*, 3d Dist. Henry No. 7-03-12, 2004-Ohio-3018, ¶ 8, citing *State v. Wilkins*, 3d Dist. Marion No. 9-02-23, 2002-Ohio-4234, ¶ 7, quoting *Kimmelman v.*

*Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). To prove ineffective assistance of counsel, the defendant must also prove that there was a reasonable probability that the motion would have been successful. *Wilkins* at ¶ 7.

{¶24} Here, White has not provided any argument which would demonstrate that a motion to suppress would have been granted in this case. His argument hangs its hat on White's statement that Officer Bell ordered White to stand on the sidewalk. However, at trial, both Officer Bell and Officer Brian testified that White was free to leave. Moreover, it is undisputed that White was never placed under arrest or otherwise restrained in any way until after he made the admission to Detective Wedge. Thus, White has failed to show he was in a custodial interrogation when he made his incriminating statements.

{¶25} Further, trial counsel's decision not to file a suppression motion may very well have been trial strategy. After White's motion to suppress was supposedly denied in Case No. 13CR0136, perhaps his attorney thought a new trial strategy was necessary. Indeed, at trial, White's main argument was that Bolan offered to pay White \$25,000 if White admitted to owning the marijuana plants. This argument inherently requires White's admissions.

{¶26} Therefore, we do not find that White was denied the effective assistance of counsel when his trial counsel made the strategic decision not to file a motion to suppress. Accordingly, we overrule White's first assignment of error.

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{¶27} Having found no error prejudicial to White in the particulars assigned and argued, we affirm the judgment of the trial court.

*Judgment Affirmed*

**SHAW and PRESTON, J.J., concur.**

/jlr