**[Cite as *State v. Benjamin*, 2009-Ohio-4774.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-appellee, | : | Case No: 08CA3249 |
| | : | |
| v. | : | |
| | : | **DECISION AND** |
| AKIE BENJAMIN, | : | **JUDGMENT ENTRY** |
| | : | |
| Defendant-appellant. | : | File-stamped date: 9-08-09 |

**APPEARANCES:**

Richard M. Nash, Portsmouth, Ohio for appellant.

Mark E. Kuhn, Scioto County Prosecutor, and Danielle M. Parker, Scioto County Assistant Prosecutor, Portsmouth, Ohio for appellee.

Kline, P.J.:

**{¶1}** Akie Benjamin appeals his two convictions of Possession of Drugs (including the forfeiture of $2,019 in cash) in the Scioto County Common Pleas Court. On appeal, Benjamin contends that the trial court erred when it found his money was subject to forfeiture. However, we find that Benjamin forfeited this argument because he failed to object before the trial court. And we do not find plain error. Benjamin next contends that he was afforded ineffective assistance of counsel. We disagree, finding that Benjamin has failed to demonstrate either deficient performance by his counsel or any likelihood that the outcome of the trial would have differed. Accordingly, we affirm the judgment of the trial court.

I.

**{¶2}** On October 25, 2007, the Portsmouth Police Department received information that an individual named Markki Bender and an unknown black male were engaged in drug trafficking out of room 39 at the Royal Inn. Todd Michael Bryant and Steven Timberlake, both narcotics investigators with the Portsmouth Police Department, investigated this tip. The investigators parked their vehicle on the street and walked towards the Royal Inn. As they stepped out of their vehicle, they observed (from a distance) Bender putting some items in a white Monte Carlo. As Timberlake and Bryant approached, they lost sight of the vehicle and the hotel. When they saw the hotel again, the door to room 39 was shut, and the white Monte Carlo was gone.

**{¶3}** Bender was on probation, and she was under the supervision of Mark Malone of the Portsmouth Municipal Court. The record is unclear as to when, but at some point in time, Mark Malone arrived on the scene.

**{¶4}** The officers then went to the hotel office to see if the occupants of room 39 had checked out. The owner said that Bender had rented the room, and she had just checked out and turned in the key. Bryant testified that Bender had previously been known to engage in drug trafficking, including trafficking with individuals from Franklin County. Bryant asked for and received a key to the room to see if any incriminating evidence remained.

**{¶5}** Bryant walked to room 39 and heard voices from the interior of the room. He then walked back to the office to ensure that the occupants had checked out. The owner again confirmed that the occupants had checked out and asked the police to enter the room to see who was inside.

**{¶6}** Bryant, Timberlake, and Malone went to the hotel room and attempted to enter using the key. The door opened enough that the officers could see Bender sitting in the room, but a chain lock prevented the officers from opening the door fully. Despite the officers' demands, the occupants did not undo the chain lock. The officers then forced the door open. Upon doing so, they saw Bender sitting rolling a marihuana joint. Bender was seated on a bed facing Benjamin.

**{¶7}** After the officers gained entry, Malone took charge of Bender, while Bryant patted down Benjamin. During this frisk, Bryant felt something that was consistent with crack cocaine in Benjamin's left front pocket and removed a baggy. Bryant continued the pat down and found pills in Benjamin's right front pocket as well as $2,019 in cash.

**{¶8}** An expert testified that the baggy taken from Benjamin's left front pocket contained 9.9 grams of crack cocaine. The police found fifty-three pills in Benjamin's right front pocket. An expert testified that, of those pills, forty contained 3, 4-Methylenedioxymethamphetamine ("MDMA"), commonly referred to as "ecstasy."

**{¶9}** On November 26, 2007, a Scioto County Grand Jury returned a four count indictment against Benjamin. The indictment charged Benjamin with possession and trafficking charges for both the MDMA and the crack cocaine. It also contained a forfeiture specification for the $2,019 in cash found on Benjamin's person.

**{¶10}** On January 16, 2008, the trial court issued a bench warrant for Benjamin's arrest as a result of his failure to appear for a scheduled hearing. The Scioto County Sheriff's office returned the warrant indicating that they had executed the warrant on February 20, 2008.

**{¶11}** At trial, the state dismissed the original trafficking charges and proceeded to try the case based solely on the possession charges. Benjamin was convicted of Possession of Drugs in an amount weighing more than five grams and less than ten grams, a felony of the third degree in violation of R.C. 2925.11(A) & (C)(4)(c). Benjamin was also convicted of Possession of Drugs in an amount equal to or exceeding the bulk amount but less than five times the bulk amount, a felony of the third degree in violation of R.C. 2925.11(A) & (C)(1)(b). The jury also determined that the money on his person was subject to forfeiture to the State of Ohio. The trial court then sentenced Benjamin to a term of imprisonment of five years for each offense to be served consecutively. The trial court also ordered the forfeiture of the money at issue.

**{¶12}** Benjamin now appeals and asserts the following two assignments of error for our review. I. "The trial court erred in ordering forfeiture when the state failed to prove by a preponderance of the evidence that the money seized from Appellant was derived from proceeds the Defendant obtained from the commission of a felony drug offense." II. "Appellant was prejudiced by ineffective assistance of counsel when he was denied his Sixth Amendment Right to effective representation."

II.

A.

**{¶13}** Benjamin contends in his first assignment of error that the forfeiture of the $2,019 was error because the state did not prove by a preponderance of the evidence that the money seized was derived from proceeds Benjamin obtained from the commission of a felony drug offense.

**{¶14}** Ohio law provides that the following categories of property are subject to forfeiture to the state: "(1) Contraband involved in an offense; (2) Proceeds derived from or acquired through the commission of an offense; (3) An instrumentality that is used in or intended to be used in the commission or facilitation of [a felony.]" R.C. 2981.02. The jury convicted Benjamin of two felony drug possession charges. The jury in this case was instructed as follows: "You will return a verdict of forfeiture if you find by the greater weight of the evidence that the $2019.00 was derived directly or indirectly from any proceeds that the Defendant obtained directly or indirectly from the commission of a felony drug abuse offense or act." Transcript at 118. The jury was not instructed that they could find the money subject to forfeiture because it was an instrumentality used or intended to be used in the commission of an offense. Proceeds in this context "means any property derived directly or indirectly from an offense." R.C. 2981.01(B)(11)(a).

**{¶15}** Benjamin now contends that the state failed to prove that the money at issue derived from proceeds he had obtained from the commission of a felony drug offense. Benjamin essentially is complaining that the state introduced insufficient evidence to sustain the jury's determination that Benjamin must forfeit the $2,019 to the state. However, Benjamin made no motion in the court below contesting the sufficiency of the evidence.

**{¶16}** In a criminal action the failure of an attorney to move for a judgment of acquittal does not forfeit an argument based on sufficiency of the evidence. *State v. Carter* (1992), 64 Ohio St.3d 218, 223; see, also, *State v. Davidson*, Ross App. Nos. 04CA2771, 04CA2773, 2004-Ohio-6828, at ¶6. However, "A forfeiture action, while criminal in nature, is a civil proceeding against the seized property." *State v. Watkins*,

Jefferson App. No. 07 JE 54, 2008-Ohio-6634, at ¶31, citing *State v. Lilliock* (1982), 70 Ohio St.2d 23; see, also, *State v. Lilly*, Scioto App. No. 01CA2821, 2003-Ohio-2595, at ¶18. In a civil proceeding, a party challenges the sufficiency of the evidence introduced at trial under Civ.R. 50. See *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 220 (considering motions for directed verdicts and judgment notwithstanding the verdicts in terms of sufficient evidence). Failure to make a motion under Civ.R. 50 forfeits that issue on appeal. See *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 206-07 (holding that a failure to make a Civ.R. 50 motion at the close of all evidence forfeits the issue even if the party moved for a directed verdict under Civ.R. 50 at the close of his opponent's case in chief).

**{¶17}** Benjamin's first assignment of error concerns the sufficiency of the evidence in a civil proceeding where Benjamin failed to object at the trial court level. Arguably, the civil rules do not apply as this proceeding was held pursuant to statute. See *Hinkle, Cox, Eaton, Coffield, & Hensley v. Cadle Co.* (1996), 111 Ohio App.3d 713, 716. Nonetheless, the legislature provided that a person contesting the legality of a forfeiture must file a motion. "A person aggrieved by an alleged unlawful seizure of property may seek relief from the seizure by filing a motion in the appropriate court that shows the person's interest in the property, states why the seizure was unlawful, and requests the property's return." R.C. 2981.03(A)(4).

**{¶18}** Absent a motion at the trial court, Benjamin must demonstrate that the forfeiture of this money constitutes plain error. "The plain error doctrine is applicable in civil cases only where the error 'seriously affects the basic fairness, integrity, or public reputation of the judicial process.'" *Rocky v. Rockey*, Highland App. No. 08CA4, 2008-

Ohio-6525, at ¶10, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122-123, 1997-Ohio-401. Benjamin provides no argument for why the holding of the trial court implicates the fairness, integrity, or public reputation of the judicial process. Nor is such an argument apparent from the record. Therefore, we do not find plain error.

**{¶19}** Accordingly, we overrule Benjamin's first assignment of error.

B.

**{¶20}** Benjamin next contends that he was denied the effective assistance of counsel in the trial court. He contends that his counsel was ineffective because his counsel failed to file either a suppression motion or to argue Benjamin should have been found guilty of a lower level offense.

**{¶21}** "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright,* Washington App. No. 00CA39, 2001-Ohio-2473, unreported; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient* * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense* * *[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. "Failure to satisfy either prong is fatal as the accused's burden requires proof of both elements."

*State v. Hall*, Adams App. No. 07CA837, 2007-Ohio-6091, at ¶11, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205.

**{¶22}** Benjamin first contends that his trial counsel was ineffective for failing to file a motion to suppress the drugs seized by the police.

**{¶23}** The failure to file or pursue a motion to suppress does not automatically constitute ineffective assistance of counsel. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384; see, also, *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, at ¶65. To 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. *Brown* at ¶65, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, at ¶35. Benjamin must show that a motion to suppress would have had a reasonable probability of success. *State v. Chamblin*, Adams App. No. 02CA753, 2004-Ohio-2252, at ¶34, citing *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291.

**{¶24}** Both the Ohio and the United States Constitutions require an officer to have reasonable suspicion of criminal activity before engaging in an investigatory stop. *Terry v. Ohio* (1968), 392 U.S. 1, 21; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, fn.1. "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* at 21. "A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." *Andrews* at 88.

**{¶25}** Pursuant to *Terry*, the police have the authority to reasonably "search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual[.]" *Terry* at 27. If, during this search for weapons, an officer "feels an object whose contour or mass makes its identity [as contraband] immediately apparent * * * its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context." *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375-76. We have previously "recognized that '[t]he right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed.'" *State v. Abernathy*, Scioto App. No. 07CA3160, 2008-Ohio-2949, at ¶37, quoting *State v. Evans* (1993), 67 Ohio St.3d 405, 413.

**{¶26}** Benjamin contends for various reasons that the tip the officers received could not support the required reasonable suspicion to support either a stop or a frisk under the *Terry* case. However, in this case, the police had considerably more than an unsubstantiated tip. They knew that Benjamin was in the company of Bender, an individual known to engage in drug trafficking; that Benjamin was present in a hotel room that he had no right to be present in; and that Bender was engaged in preparing marihuana for use. These facts combined with the tip provide sufficient articulable facts to justify a reasonable suspicion that Benjamin may have been engaged in drug trafficking.

**{¶27}** The cases cited above note that where an individual may be reasonably suspected of drug trafficking, an officer may appropriately frisk the suspect for weapons. Further, the "plain touch" doctrine indicates that contraband discovered during this frisk

is admissible. We, therefore, find the police had the authority to frisk Benjamin for weapons.

**{¶28}** Benjamin contends that the scope of the frisk exceeded the permissible bounds of the Fourth Amendment. At trial, Bryant said, "I conducted a pat down; found what was consistent to be crack cocaine in his, like I said, I believe it was his left front pocket. I removed it. It appeared to be two bags of crack cocaine." Transcript at 64-65. In context, Bryant is testifying that based on feel, he believed the unknown object was crack cocaine before he removed it from the pocket. Under *Dickerson*, the officer need not know with certainty that the object is contraband, rather the officer need only have probable cause to believe the object is contraband. *Dickerson* at 376 ("Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures."). Probable cause is a concept based on the totality of the circumstances. See *State v. Walker*, Ross App. No. 08CA3030, 2009-Ohio-1903, at ¶33. We must not only consider what an officer felt during the frisk, but also what an officer knew before the frisk. Under these circumstances, and viewing the evidence as it would be understood by those in law enforcement, we are satisfied that the officer in this case had probable cause to believe that the object was crack cocaine when he seized it.

**{¶29}** The subsequent items found during the frisk are irrelevant for Fourth Amendment analysis. When the officer removed the crack cocaine, he had probable cause to arrest Benjamin for the possession of crack cocaine and to search Benjamin

incident to that lawful arrest. "The right of a police officer to search a suspect incident to a lawful arrest has been a long recognized exception to the warrant requirement of the Fourth Amendment." *State v. Scasny*, Ross App. No. 04CA2768, 2004-Ohio-4918, at ¶20, citing *Chimel v. California* (1969), 395 U.S. 752.

**{¶30}** Therefore, we find that Benjamin has failed to show that a motion to suppress would have had a reasonable probability of success. Consequently, Benjamin has failed to show that his counsel's performance was deficient under the first prong of the *Strickland* test.

**{¶31}** Benjamin also contends his attorney should have argued that the jury should have convicted him of only a fifth degree felony rather than a felony of the third degree. Essentially, Benjamin's argument is that forty unit doses of MDMA is four times the bulk amount, but these doses only weighed 12.2 grams. Under R.C. 2925.01(D)(1)(c), the bulk amount of a schedule I stimulant is "[a]n amount equal to or exceeding thirty grams or ten unit doses of a compound, mixture, preparation, or substance[.]" Therefore, Benjamin contends that his counsel should have argued he was liable only for conviction of a fifth degree felony because he did not possess four times the bulk amount by weight, notwithstanding the fact he did possess four times the bulk amount by dosage.

**{¶32}** To resolve this issue, we must interpret R.C. 2925.01(D)(1)(c). Interpreting a statute is a question of law, and "[w]e review questions of law de novo." *State v. Elkins,* Hocking App. No. 07CA1, 2008-Ohio-674, at ¶12, quoting *Cuyahoga Cty. Bd. of Commrs. v. State,* 112 Ohio St.3d 59, 2006-Ohio-6499, at ¶23.

**{¶33}** R.C. 2925.01(D)(1)(c) defines bulk in the disjunctive. "[T]he state is required to prove either weight or dosage, but not both." *State v. Howell* (1981), 5 Ohio App.3d 92, 93. The fact that Benjamin possessed less than four times the bulk amount by weight is no defense to possessing four times the bulk amount by dosage. Therefore, Benjamin's attorney did not offer deficient performance by failing to make such an argument.

**{¶34}** Benjamin also raises various other complaints related to the performance of his counsel at trial. He notes the brevity of his counsel's opening statement, and also argues his counsel's cross examinations of the prosecution's witnesses were deficient. Defense counsel on the record indicated that he could have been better prepared. "I could be better prepared, but at the same time Judge, he was a no show. I mean he was on the run for I don't know how long. We did have a couple pre-trials; I talked to him; talked to him on the phone once or twice. But, I could be better prepared, but it's not my fault, it's not the Prosecutor's fault. The man wouldn't reply to my letters. He was on the run. He wouldn't talk to me at the last pre- trial[.]" Transcript at 4.

**{¶35}** Certainly, the defense counsel in Benjamin's case could have been better prepared, but counsel indicated that the cause of his undeveloped defense was the intransigence of his client. Even if we presume the performance of Benjamin's counsel was deficient, nonetheless Benjamin has failed to demonstrate any likelihood the outcome would have been different with a more prepared counsel.

**{¶36}** At trial, the state's witness testified that he retrieved the drugs from Benjamin's person. The state also produced an expert witness who testified that the drugs were indeed drugs. Benjamin provides no argument for what his meritorious

defense would have been. He provides neither a basis for attacking the credibility of the state's witnesses, nor does he point to any affirmative defense his counsel could have raised. And we can discern neither from the record. Under these circumstances, Benjamin has failed to demonstrate prejudice in this case.

**{¶37}** Accordingly, for the above stated reasons, we overrule Benjamin's second assignment of error and affirm the judgment of the trial court.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment and Opinion as to Assignment of Error II;
Concurs in Judgment Only as to Assignment of Error I.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**