[Cite as *State v. Woods*, 2009-Ohio-6169.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA3090
	:	
vs.	:	
	:	
PETER J. WOODS,	:	**DECISION AND JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	
	:	File-stamped date: 11-19-09

APPEARANCES:

Lori J. Rankin, Chillicothe, Ohio, for Appellant.

Michael M. Ater, Ross County Prosecutor, and Matthew S. Schmidt, Ross County Assistant Prosecutor, Chillicothe, Ohio, for Appellee.

Kline, P.J.:

{¶1} Peter J. Woods appeals the trial court's judgment convicting him of two counts of robbery, in violation of R.C. 2911.02. On appeal, he contends that he did not receive the effective assistance of trial counsel guaranteed under the Sixth Amendment to the United States Constitution because his counsel failed to: (1) file a motion to suppress evidence uncovered as the result of an apparently warrantless search of a hotel room; and (2) object to the admission of a state forensic report when the forensic analyst who prepared the report did not testify at trial. Because the record does not contain sufficient evidence to substantiate Woods' claim that his counsel should have filed a motion to suppress, and because Woods failed to show that any error involving the forensic report

was not trial strategy, we disagree and find that Woods' counsel's performance was not deficient. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} This case involves two separate incidents of robbery. The first occurred on July 10, 2008, around 10:00 p.m., at the AmeriStop Food Mart ("AmeriStop") in Chillicothe. The second occurred on July 14, 2008, around 1:45 p.m. at the Ross County Bank. After an investigation, the Ross County Grand Jury indicted Woods with two counts of robbery.

{¶3} At trial, Becky Detty stated that on July 10, 2008, around 10:15 p.m., as she worked at the AmeriStop Food Mart in Chillicothe, Woods walked into the store and asked her if she had change for a one hundred dollar bill. She started to hand him the change, and he stated that he wanted the money. She told him that he could not have it. He indicated that he had a gun. He then jumped over the counter and grabbed a bag of money.

{¶4} Detty positively identified Woods as the person who robbed the store on July 10.

{¶5} Ross County Bank teller Lauren Loeb testified that on July 14, 2008, at approximately 1:45 p.m., she observed a purple or plum car pull up to the front door of the bank but did not see anyone exit the vehicle. About five minutes later, a slender, white man in his twenties or thirties with a goatee and who wore sun glasses, a blue baseball hat, a long-sleeved blue shirt, and jeans walked into the bank and handed her a note that read, "hand over the money and no one will die." She opened her drawer and gave him the money. The man took the money and left. Loeb then hit the alarm and advised the head teller that the bank had been robbed. When she went to lock the door,

she saw the man who had robbed the bank running across the street to the alley where he had parked his car.

{¶6} Loeb stated that some of the money she gave the man was "bait" money. She stated that "bait" money is money that is photographed and then placed into a strap. She explained that by photographing the money, the bank documents the serial numbers of the "bait" money. She stated that the "bait" money she gave the man consisted of five hundred dollars, in twenty dollar denominations. Loeb testified that in total, she gave the man approximately $2,600.

{¶7} Francis Kennedy testified that on July 14, 2008, at approximately 1:45 p.m., she was sitting in the bank parking lot waiting for a friend when she saw a man pull up to the bank in a maroon, two-door, older model Chevy. She stated that the man tried to "idle" the car but could not and that he drove off within five minutes. She noticed that the man had on a hat and sunglasses. A few minutes after this man left, she saw a tall man walking to the bank. She observed him pull something white out of his pocket and enter the bank. A few minutes later, she saw the same man running out of the bank. Like Loeb, she described him as wearing jeans, a dark shirt, sunglasses, and a hat.

{¶8} Kevin Barnes, who lives about a block and one-half from the bank, stated that on July 14, 2008, at approximately 1:45 p.m., he was mowing his grass when he noticed a plum or purple car that he believed to be a Cavalier or Sunfire. He observed that the male driver was wearing a dark-colored shirt and an older baseball hat.

{¶9} Ross County Sheriff's Detective Captain Kevin Pierce testified that he investigated the robbery at the bank. He received a tip that caused him to focus his investigation on Woods. He requested Sergeant VanHoose to go to Woods' sister's house. However,

the officers did not locate anyone at Woods' sister's house. They subsequently executed a search warrant on the home and the vehicle at the home, which was a purple or plum Chevy Cavalier. Captain Pierce continued a search for Woods. He learned that Woods' sister, Stella Howard, reserved two rooms at the Holiday Inn Express. Captain Pierce, Sergeant VanHoose, and other officers went to the Holiday Inn. Captain Pierce and another officer went to one of the rooms and located Stella Howard and her husband. The other officers located Woods and his girlfriend in the second room registered to Howard. The officers searched the hotel room and discovered a large amount of money. He compared the copy of the "bait" money that the bank had given him to the money discovered in Woods' room and found that they matched. He was able to match three hundred twenty dollars in twenties to the list of bait money that the bank had provided.

{¶10} Ross County Sheriff's Detective Keith VanHoose testified that when the officers searched the hotel room in which they discovered Woods, they uncovered a little over one thousand dollars inside of a pillowcase. He stated that the officers matched sixteen of the twenty dollar bills to the list of bait money.

{¶11} Ohio Bureau of Criminal Identification and Investigation ("BCI") Forensic Scientist Andrew McCleland testified that Robin Roggenbeck conducted the initial analysis of the fingerprint evidence and generated a report. McCleland independently verified her identifications. He stated that although he did not look at the original submissions, he looked at images of the original submissions. McCleland explained that he looked at each of Roggenbeck's identifications and all of the submission prints and that he reviewed her report for accuracy. Both he and Roggenbeck started with the finger and palm print records from Woods. They both examined the latent lifts taken from the crime

scene. They discovered that the lifts from a vehicle had multiple identifications and that the handwritten note contained Woods' fingerprints.

{¶12} Chillicothe Police Detective James E. Lowe testified that he investigated the AmeriStop robbery. In the course of his investigation, he showed Detty two separate photographic arrays containing photographs of Woods. The first contained an older photograph of Woods, and the second contained a more recent photograph. She identified Woods as the perpetrator in each of the photographic arrays.

{¶13} On October 15, 2008, the jury found Woods guilty of both counts of robbery. On January 5, 2009, the trial court sentenced Woods to six years imprisonment for the first count and seven years on the second count, with the sentences to be served consecutively.

{¶14} Woods appeals the judgment of the trial court and asserts the following assignment of error: "The cumulative effect of the errors made by trial counsel denied Mr. Woods his constitutional rights to the effective assistance of counsel and a fair trial."

II.

{¶15} In his sole assignment of error, Woods asserts that the cumulative effect of trial counsel's alleged instances of ineffective assistance of counsel deprived him of a fair trial. He claims that trial counsel was ineffective in the following respects: (1) counsel failed to file a motion to suppress evidence recovered from the warrantless search of the hotel room; and (2) counsel failed to object to (a) the BCI fingerprint report, and (b) McCleland's hearsay testimony.

A.

{¶16} "'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; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To obtain a reversal due to ineffective assistance of counsel, a criminal defendant must show two things: (1) "that counsel's performance was deficient[,]" i.e. "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[,]" i.e., "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.

B.

{¶17} 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. Furthermore, a criminal defendant seeking to obtain a reversal on an ineffective assistance of counsel claim in the context

of a motion to suppress must show that a motion to suppress would have had a reasonable probability of success. See *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. In *Nields* the court noted: "[W]e have rejected claims of ineffective counsel when counsel failed to file or withdrew a suppression motion when doing so was a tactical decision, there was no reasonable probability of success, or there was no prejudice to the defendant." Id. at 34. (citations omitted). Additionally, when the record is unclear or insufficiently developed regarding the suppression issue, a defendant will have difficulty showing that the trial court would have granted a motion to suppress. See *State v. Taylor*, Washington App. No. 07CA11, 2008-Ohio-482, at ¶14, citing *State v. Morrison,* Highland App. No. 03CA13, 2004-Ohio-5724, at ¶16; *State v. Culbertson* (Nov. 13, 2000), Stark App. No. 2000CA00129 ("when counsel fails to file a motion to suppress, the record developed at trial is generally inadequate to determine the validity of the suppression motion"); *State v. Parkinson* (May 20, 1996), Stark App. No. 1995CA00208 ("Where the record is not clear or lacks sufficient evidence to determine whether a suppression motion would have been successful, a claim for ineffective assistance of counsel cannot be established.")

{¶18} Here, Woods has failed to show that his trial counsel's performance was deficient under the first prong of the *Strickland* test. The evidence in the record is not sufficiently developed to substantiate Woods' claim that trial counsel was ineffective for failing to file a motion to suppress. There is absolutely no evidence in the record to show that counsel's decision not to file a suppression motion constituted deficient performance or to show that the motion would have had a reasonable probability of success.

Consequently, Woods' argument that trial counsel rendered ineffective assistance of counsel by failing to file a motion to suppress is without merit.

C.

{¶19} Woods next argues that trial counsel was ineffective for failing to object to the following evidence presented at trial: (1) the BCI fingerprint report; and (2) McCleland's hearsay testimony. He asserts that admission of the report and the hearsay testimony violated his Confrontation Clause rights as enunciated in *Crawford v. Washington* (2004), 541 U.S. 36 and *Melendez-Diaz* (2009), 557 U.S. ---, 129 S.Ct. 2527.

{¶20} The Sixth Amendment to the United States Constitution guarantees a criminal defendant "the right * * * to be confronted with the witnesses against him[,]" i.e., the "right to confront those 'who "bear testimony"' against him." *Melendez-Diaz*, 129 S.Ct. at 2531, quoting *Crawford*, 541 U.S. at 51. Under the Confrontation Clause, "[a] witness's testimony against a defendant is * * * inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz*, 129 S.Ct. at 2531. The Confrontation Clause applies only to "testimonial statements," which the United States Supreme Court described as follows:

> "'Various formulations of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements * * * contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"

Melendez-Diaz, 129 S.Ct. at 2531, quoting *Crawford*, 541 U.S. at 51-52.

{¶21} In *Melendez-Diaz*, the court held that a lab analyst's "certificate" was the functional equivalent of an "affidavit," and thus constituted testimonial evidence. The certificate showed the results of the forensic analysis performed on substances seized from the defendant, reported the weight of the substance, and was sworn to before a notary public. The *Melendez-Diaz* court held that under these circumstances, the "'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" Id. at 2532, quoting *Davis v. Washington* (2006), 547 U.S. 813, 830. The court thus determined that because the analyst's statements contained in the "certificates" constituted testimonial statements, absent a showing that the analyst was unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine the analyst, the defendant was entitled to confront the analyst at trial. Id. at 2532.

{¶22} Here, the BCI report that Roggenbeck prepared was not sworn to before a notary public. Thus, it is not the functional equivalent of an affidavit. However, the report does state the findings of the analyst and the state used those findings at trial to help prove Woods' guilt without presenting the live testimony of the analyst who performed the initial testing procedures. McCleland testified at trial and stated that he verified Roggenbeck's findings and independently reviewed the evidence submitted. These facts raise the question of whether the BCI report constitutes "testimonial" evidence within the meaning of the Confrontation Clause. However, we do not need to resolve this question. Instead, we find an alternate basis upon which we may examine the admission of the complained-of evidence and testimony.

{¶23} A criminal defendant may waive his right to confront a witness. See *Melendez-Diaz*, 129 S.Ct. at 2534, fn. 3; see, also, *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, at ¶14. For example, a defendant waives his right to confrontation by failing "to object to the offending evidence[.]" *Melendez-Diaz*, 129 S.Ct. at 2534, fn. 3. In *Pasqualone*, the court held that an attorney can waive the client's right to cross-examine a lab analyst at trial and that the decision "whether to cross-examine a particular witness is properly viewed as a decision relating to trial tactics or strategy." *Id.* at ¶44.

{¶24} Here, Woods' trial counsel did not object at trial. Thus, trial counsel waived Woods' confrontation rights. The question then becomes whether counsel's decision to waive Woods' confrontation rights amounted to ineffective assistance of counsel.

{¶25} In *Pasqualone*, the court clearly held that counsel's decision as to whether to cross-examine a particular witness is a matter of trial strategy. Thus, under the first prong of the *Strickland* analysis, Woods' assertion that trial counsel's failure to cross-examine Roggenbeck constituted ineffective assistance of counsel is without merit.

{¶26} Not only does Woods fail to overcome the strong presumption that trial counsel's decision was reasonable, he also fails to show under the second prong of the *Strickland* test that counsel's decision deprived him of a fair trial, i.e., a trial with reliable results.

{¶27} We may disregard a constitutional error if the error was harmless beyond a reasonable doubt. See, e.g., *State v. Williams* (1983), 6 Ohio St.3d 281, 290. A constitutional error is harmless beyond a reasonable doubt "if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt." *State v. Williams* (1988), 38 Ohio St.3d 346, 349; *State v. Askew*, Ross App. No. 05CA2877, 2006-Ohio-4769, at ¶38.

{¶28} Here, the record contains other substantial and overwhelming evidence to support Woods' conviction. Law enforcement officers essentially caught Woods "red-handed" with the money stolen from the bank. They found him in a hotel room with the "bait" money from the bank. He was the only male present in that room. Regarding the AmeriStop robbery, the victim of that robbery positively identified Woods as the perpetrator in two separate photographic arrays and also positively identified him in court. This evidence is substantial enough to support his conviction beyond a reasonable doubt even without the allegedly improperly admitted BCI report and hearsay testimony. Thus, any alleged deficiencies in trial counsel's performance did not deprive Woods of a reliable trial or prejudice his defense.

{¶29} In conclusion, Woods has failed to show that his counsel committed any error, let alone cumulative error.

{¶30} Accordingly, based upon the foregoing reasons, we overrule Woods' sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., Concurring:

{¶31} I do not rely upon the presumption of a legitimate trial strategy to justify counsel's failure to preserve Woods' right of confrontation. But, McCleland's testimony, which was subject to cross-examination, provided the same evidence as the forensic report and the hearsay. Thus, I agree any error could only be harmless beyond a reasonable doubt.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant shall 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 Ross County Common Pleas Court 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 with Concurring Opinion.
Abele, J.: Concurs in Judgment and Opinion.

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.