[Cite as *State v. Newbern*, 2008-Ohio-5712.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
ANTHONY A. NEWBERN	:	Case No. 2007 CA 0103
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	On Appeal from Richland County Court of Common Pleas, Criminal Division, Case No. 07-CR-0198D
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	November 4, 2008

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR Prosecuting Attorney Richland County, Ohio	CHARLES M. BROWN 28 Park Avenue West Mansfield, OH 44902
By: KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, OH 44902	

Delaney, J.

{¶1} Defendant-Appellant, Anthony A. Newbern, appeals his conviction and sentence for one count of escape, in violation of R.C. 2921.34(A)(1). Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On February 9, 2007, Med Central Hospital in Mansfield, Ohio reported a burglary to the Mansfield Police Department. The Mansfield Police Department conducted an investigation and determined Appellant was a suspect. On February 16, 2007, the investigation led Detective Parella to Appellant's residence at 327 ½ West 6th Street, Mansfield, Ohio.

{¶3} As Det. Parella pulled up to the residence, a man came out of the apartment and asked if the officer was looking for someone. Det. Parella indicated he was looking for the owners of a pickup truck identified in the investigation of the burglary. The man, who was the landlord of the apartment at 327 ½ West 6th Street, advised the detective that Appellant and his wife owned the truck, and that he had just spoken to them. When Det. Parella knocked on the door of the apartment, a woman, who was identified as Appellant's wife, answered the door and refused to allow officers into the residence. The landlord, however, who said he was in the process of evicting Appellant and his wife, gave permission to the officers to enter the residence.

{¶4} Once the officers gained entry into the residence, they found Appellant hiding behind a dresser in the attic. After Appellant refused orders to show himself and come out, Officer Rogers pulled Appellant from behind the dresser and handcuffed him.

Appellant was advised that he was being arrested for the burglary at Med Center Hospital.

{¶5} Officer Messer, Jr., escorted Appellant from the residence to one of the police cruisers. The steps leading down from the apartment were narrow, so the officer had to walk behind Appellant down the stairs. As Appellant and Officer Messer, Jr., reached a landing, Appellant jumped the last four steps and began running away from the officers. Three officers pursued Appellant. Appellant ran approximately a hundred and fifty yards, before Officer Messer, Jr., caught up to Appellant because Appellant ran into a snow bank. Officer Messer, Jr., tackled Appellant to the ground and took Appellant back into custody.

{¶6} On February 16, 2007, a complaint was filed in the Mansfield Municipal court charging Appellant with the February 8, 2007 burglary at Med Central Hospital. Appellant waived his right to a preliminary hearing and the case was bound over to the Richland County Grand Jury. Appellant was indicted on one count of burglary, in violation of R.C. 2911.12(A)(3), and one count of escape, in violation of R.C. 2921.34(A)(1).

{¶7} Prior to the trial, counsel for Appellant filed a motion to suppress. Appellant alleged therein that the evidence relating to the burglary was obtained as a result of the police's improper entry into Appellant's residence and should be suppressed. He further argued in his motion that the arrest resulting from the warrantless entry should also be suppressed.

{¶8} The trial court held an evidentiary hearing on the motion to suppress on June 11, 2007. At the hearing, Appellee conceded that the entry into Appellant's

residence was improper because the landlord did not have authority to give consent. On June 21, 2007, the trial court ruled by judgment entry that the police officers' entry into Appellant's residence was illegal as against the Fourth Amendment and evidence obtained as a result of the search and seizure could not be used at trial. The trial court denied Appellant's motion to suppress the arrest itself, finding the acts giving rise to the charge of escape occurred subsequent to the search and seizure. It further held in its judgment entry that the arrest may have been improper under the circumstances, but the lawfulness of the arrest was not an element under R.C. 2921.34 but an affirmative defense to the charge of escape.

{¶9} Appellant's jury trial commenced on September 27, 2007. Prior to trial, counsel for Appellant renewed his objection to the failure to suppress the actual arrest. The trial court overruled the objection.

{¶10} At the conclusion of the State's evidence, counsel for Appellant moved to dismiss the charges against Appellant. During his argument supporting his motion to dismiss, counsel did not address the escape charge. The trial court overruled the motion. Appellant did not take the stand or call any witnesses on his behalf.

{¶11} The jury found Appellant not guilty of the burglary charge, but found Appellant guilty of the escape charge and the element that the escape occurred while Appellant was under arrest for a third, fourth, or fifth degree felony. The trial court sentenced Appellant to four years in prison and three years of post release control.

{¶12} Appellant filed a timely appeal and raises three Assignments of Error:

{¶13} "I. THE TRIAL COURT COMMITTED ERROR BY REFUSING TO SUPPRESS THE EVIDENCE OF THE ARREST OF THE DEFENDANT-APPELLANT IN ITS JUDGMENT ENTRY RULING ON THE MOTION TO SUPPRESS.

{¶14} "II. DID THE TRIAL COURT ERR IN REFUSING TO GRANT THE OHIO CRIMINAL RULE 29(A) MOTION FOR ACQUITTAL AT THE END OF THE STATE'S CASE.

{¶15} "III. DEFENDANT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PROVIDED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, IN ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION, AS WELL AS THE DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION."

I.

{¶16} Appellant argues in his first Assignment of Error that the trial court erred in overruling Appellant's motion to suppress the evidence of the arrest in relation to the charge of escape. We disagree.

{¶17} R.C. 2921.34 provides in pertinent part:

{¶18} "(A)(1) No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement.

{¶19} "* * *

{¶20} "(B) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under this section if the detention is pursuant to judicial order or in a detention facility. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense only if either of the following occurs:

{¶21} "(1) The escape involved no substantial risk of harm to the person or property of another.

{¶22} "(2) The detaining authority knew or should have known there was no legal basis or authority for the detention.

{¶23} "(C) Whoever violates this section is guilty of escape."

{¶24} Appellant raises two challenges to his escape conviction. First, he argues the trial court should have suppressed the evidence of his arrest because the police did not have authority to enter his residence. Second, he argues that the arrest of Appellant was illegal and therefore was sufficient to establish the affirmative defense of irregularity or lack of jurisdiction as set forth in R.C. 2921.34(B). We find Appellant challenges the trial court's decision concerning the ultimate issue raised in his motion to suppress. If we assume the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger.* As the United

States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." Thus, in analyzing his first Assignment of Error, we must independently determine whether the facts meet the appropriate legal standard.

{¶25} Appellee concedes Appellant's arrest was the result of an illegal search and seizure. The question, as raised recently before this Court in *State v. Suiste*, 5th Dist. No. 2007CA00252, 2008-Ohio-5012, is whether Appellant's independent criminal activity of escape would have been "fruit of the poisonous tree" and thus subject to suppression. Id. at ¶ 22.

{¶26} The Fourth Amendment to the United States Constitution and Section 14, Article I, Ohio Constitution, prohibits the government from conducting unreasonable searches and seizures of persons or their property. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271. "However, an observation of a fresh crime committed during or after the arrest is not to be suppressed even if the arrest is unlawful." *Suiste*, supra, citing *State v. Ali*, 154 Ohio App.3d 493, 797 N.E.2d 1019, 2003-Ohio-5150, ¶ 13. "The Fourth Amendment's exclusionary rule, which [the defendant] seeks to invoke, does not sanction violence as an acceptable response to improper police conduct. The exclusionary rule only pertains to evidence obtained as a result of an unlawful search and seizure." Id. at ¶ 16, quoting *Akron v. Recklaw* (Jan. 30, 1991), Summit App. No. 14671.

{¶27} We find Appellant's escape to be a new crime, which occurred after the unlawful arrest. Pursuant to *Suiste*, supra, it is not to be suppressed even if the arrest was unlawful.

{¶28} Appellant next argues the trial court should have granted Appellant's motion to suppress based on the irregularity of the detention or lack of jurisdiction of the detaining authority. Appellee responds that the appropriate challenge to the lawfulness of the arrest is through the affirmative defenses of R.C. 2931.34(B), not through a motion to suppress.

{¶29} A "motion to suppress" is defined as a "[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation etc.), of U.S. Constitution." Black's Law Dictionary (6 Ed.1990) 1014. Thus, a motion to suppress is the proper vehicle for raising constitutional challenges based on the exclusionary rule first enunciated by the United States Supreme Court in *Weeks v. United States* (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and made applicable to the states in *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. *State v. French* (1995), 72 Ohio St.3d 446, 449, 650 N.E.2d 887.

{¶30} R.C. 2921.34(B) recognizes an affirmative defense to the charge of escape. The burden of going forward with the evidence of an affirmative defense and the burden of proof for an affirmative defense is upon the accused. R.C. 2901.05(A). We find R.C. 2921.34(B) to raise factual questions and such factual questions are not properly raised in a motion to suppress. *State v. Howard* (March 2, 1999), 2nd Dist. No. 98-CA27.

{¶31} Appellant's first Assignment of Error is overruled.

II.

{¶32} Appellant argues in his second Assignment of Error that the trial court erred when it overruled Appellant's motion for acquittal under Crim.R. 29(A). Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

{¶33} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶34} The standard of review for the sufficiency of evidence under a Crim.R. 29 appeal is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus, which states:

{¶35} "Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." See also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶36} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541 and *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991),

61 Ohio St.3d 259, superseded by the State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89.

{¶37} Specifically, an appellate court's function, when reviewing the sufficiency of the evidence to support a criminal conviction, is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks,* supra. This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Thompkins,* 78 Ohio St.3d at 386.

{¶38} Under R.C. 2921.34(A)(1), a person is guilty of escape if the person knows he is under detention and purposely breaks or attempts to break the detention. In reviewing the evidence in a light most favorable to the prosecution, the record reflects sufficient evidence to show Appellant knew he was under detention and purposefully broke or attempted to break the detention.

{¶39} The testimony presented at trial revealed that Officer Rogers and Detective Parella found Appellant hiding in the attic of the residence. Appellant refused the officers' orders to show himself and Officer Rogers had to pull him out from behind a dresser where he was hiding. The officers handcuffed Appellant and placed Appellant under arrest for burglary. (T. 136, 172-173).

{¶40} While Officer Messer, Jr., walked Appellant down the stairs from the apartment and to the police cruisers, Appellant jumped from the landing of the steps

and began running. He ran approximately 150 yards down the street while still handcuffed. Three officers pursued Appellant and Appellant was recaptured when Officer Messer, Jr., tackled Appellant in a snow bank. (T. 136-137, 139-140, 143-144).

{¶41} Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found Appellant knew he was under detention and purposefully broke or attempted to break the detention. The evidence was sufficient as a matter of law and the trial court did not err in overruling Appellant's motion for acquittal.

{¶42} Appellant also argues the trial court should have, on its own motion, entered a judgment of acquittal for the offense of escape based upon the evidence that there was no lawful arrest previously raised at the motion to suppress hearing. We find this argument has been resolved by our holding in the first Assignment of Error.

{¶43} Appellant's second Assignment of Error is overruled.

III.

{¶44} In Appellant's third Assignment of Error, he asserts he was denied the effective assistance of counsel. Specifically, Appellant cites to his trial counsel's failure to argue in his Crim.R. 29(A) motion that the underlying arrest was illegal and his counsel's failure to raise the affirmative defense of the irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority.

{¶45} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶46} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶47} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶48} This court must accord deference to defense counsel's strategic choices made during trial and "requires us to eliminate the distorting effect of hindsight." *State v. Post* (1987), 32 Ohio St.3d 380, 388.

{¶49} In evaluating appellant's claim of ineffective assistance of counsel, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.,* at ¶ 31, citing *Strickland,* supra, at 689. In addition, we are mindful that "[t]rial counsel cannot be second-guessed as to trial strategy decisions." *Id.* The law is well settled that counsel's actions that might be considered trial strategy are presumed effective and should not be second-guessed by a reviewing court. *State v. Adams,* 103 Ohio St.3d. at ¶ 30.

{¶50} Based upon our analysis and disposition of Appellant's first and second Assignments of error, we do not find counsel's performance to be ineffective for not arguing that underlying arrest was unlawful. Nor do we find counsel's failure to raise the

affirmative defenses of R.C. 2921.34(B) created a reasonable probability the outcome of the trial would have been different. R.C. 2921.34(B) states as follows:

{¶51} "(B) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under this section if the detention is pursuant to judicial order or in a detention facility. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense only if either of the following occurs:

{¶52} "(1) The escape involved no substantial risk of harm to the person or property of another.

{¶53} "(2) The detaining authority knew or should have known there was no legal basis or authority for the detention."

{¶54} Upon review of the evidence presented in this matter, we find there was evidence presented that Appellant's escape in fact did cause substantial risk of harm to other people. Appellant ran down a city street while handcuffed, causing three police officers to run after him. Appellant's escape was slowed by a snow bank but a police officer had to tackle Appellant to the ground in order to regain custody of Appellant. We cannot find the outcome of the trial would have been different under those facts.

{¶55} Appellant's third Assignment of Error is overruled.

{¶56} The judgment of the Richland County Court of Common Pleas is hereby affirmed.

By Delaney, J.

Gwin, J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ANTHONY A. NEWBERN	:	
Defendant-Appellant	:	Case No. 2007 CA 0103

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE