

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SHERRY LINDSAY

Defendant-Appellant

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JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 16-CA-24

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Municipal Court,
Case No. 15TRC03759

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

December 15, 2016

APPEARANCES:

For Plaintiff-Appellee

TRICIA MOORE
40 West Main Street
Newark, OH 43055

For Defendant-Appellant

ANDREW T. SANDERSON
73 North Sixth Street
Newark, OH 43055

Farmer, P.J.

{¶1} On April 28, 2015, Ohio State Highway Patrol Trooper Ryan Mann charged appellant, Sherry Lindsay, with one count of driving under the influence in violation of R.C. 4511.19(A)(1)(a) and one count of marked lanes violation under R.C. 4511.33. The "influence" did not involve alcohol, but prescription medications. Appellant had consented to a blood test.

{¶2} On May 19, and August 13 and 17, 2015, appellant filed motions to suppress, challenging the legality of the stop and the results of the blood test. A hearing was held on October 12, 2015. By judgment entry filed January 21, 2016, the trial court denied the motion, finding a lawful stop and detention. The trial court also noted the issue of the blood test results was not raised with sufficient specificity to be heard during the suppression hearing.

{¶3} On April 11, 2016, appellant pled no contest to the charges. By judgment entry filed same date, the trial court found appellant guilty and sentenced her to thirty days in jail, twenty-seven days suspended.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DUE TO THE FAILURE OF TRIAL COUNSEL TO STATE SUPPRESSION CLAIMS WITH SUFFICIENT PARTICULARITY TO RAISE THE SAME BEFORE THE TRIAL COURT."

II

{¶6} "THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DUE TO THE FAILURE OF TRIAL COUNSEL TO CHALLENGE THE CONSTITUTIONALITY OF THE CONTINUED DETENTION OF THE DEFENDANT HEREIN."

I, II

{¶7} Appellant claims she was denied the effective assistance of trial counsel for her counsel's failure to state with specificity issues related to the blood test results and failure to challenge the constitutionality of her continued detention. We disagree.

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

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.)

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.

SUPPRESSION MOTION

{¶9} Appellant argues the motion to suppress lacked sufficient specificity and as a result, the trial court did not hear the issue pertaining to the collection of the blood sample.

{¶10} In the first motion to suppress filed on May 19, 2015, defense counsel challenged in Branch II the "reported results of defendant's blood specimen," arguing "Defendant is not charged with a violation that requires evidence of a chemical test or its reported results. Hence, such blood specimen and related results are irrelevant."

{¶11} In a second motion to suppress filed on August 13, 2015, defense counsel supplemented the arguments relative to an unlawful stop. Under Branch III, defense counsel requested dismissal of the OVI charge as "defendant consumed no alcohol, defendant took her medication as prescribed, and defendant did not abuse her medications."

{¶12} In a third motion to suppress filed August 17, 2015, defense counsel challenged in Branch I the blood test results and in particular, the refrigeration of the blood sample, and argued Ohio Adm.Code 3701-53-05(F) was not complied with by the state which states: "While not in transit or under examination, all blood and urine specimens shall be refrigerated." Defense counsel further argued the state's "discovery response does not comply with OAC 3701-53-05(B), (C), or (E)" which state the following:

(B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohols shall be used as a skin antiseptic.

(C) Blood shall be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested.

(E) Blood and urine containers shall be sealed in a manner such that tampering can be detected and have a label which contains at least the following information:

- (1) Name of suspect;
- (2) Date and time of collection;
- (3) Name or initials of person collecting the sample; and
- (4) Name or initials of person sealing the sample.

{¶13} At the commencement of the October 12, 2015 suppression hearing, the prosecutor asked for clarification as to what was to be argued during the hearing. October 12, 2015 T. at 4. Defense counsel and the trial court engaged in a protracted discussion, with defense counsel arguing the issue of the blood test was not solely limited to refrigeration. *Id.* at 4-10. The trial court concluded the following (*Id.* at 10):

So, we can address branches one and two of the May 19th motion, we can address branches one, two, and three of the August 13th motion, and we'll address the time lapse from collection to mailing, as it relates to the sole branch of the August 17th motion. But The Court's not going to require The State to put on any evidence in regards to the ambiguous

allegation that B, C, and E weren't complied with. So, that's what The Court's ruling is.

{¶14} The prosecutor then argued the results of the blood test were not a suppression issue, but an evidentiary issue at trial. *Id.* at 12. The trial court concluded the following (*Id.*):

Well, I think The State's right in its argument. It's not an issue of a violation of the defendant's constitution rights. It's an evidentiary issue that wouldn't necessarily be adjudicated during the course of the trial by way of a motion in limine. I'm going to go ahead and reconstrue that portion of the motion to be a motion in limine to preclude the introduction of any blood test results. Because of the nature of this charge, and I will grant that, with the condition that The State would be permitted to introduce that only if they call an expert in order to relate back to the time of operation, how that might affect her ability to drive. But, from a suppression issue, it's not a constitutional argument, it's an evidentiary one. So, that will be The Court's ruling on the lotion (sic) in limine.

{¶15} Whether this ruling was right or wrong is not challenged sub judice. Therefore, we will not address the appropriateness of the ruling. We note the trial court did leave the issue open for review at trial as to the admissibility of the blood test results.

{¶16} Appellant did not go to trial, but pled "not contest." Given the status of the record, we find the matter has not been properly preserved for appeal. The trial court was aware that admissibility of the blood test results remained an issue and would have to be properly addressed at trial.

{¶17} Upon review, we find the suppression motions filed by defense counsel were sufficient to overcome any claim of ineffective assistance of counsel.

CONTINUED DETENTION

{¶18} Appellant argues a prolonged detention between the initial stop by Granville Police Officer Justin Woodyard until the arrival of Trooper Mann. Generally when there is no record, we cannot rule on these types of issues; however, the suppression hearing transcript establishes certain facts.¹

{¶19} Officer Woodyard was dispatched to investigate a possible impaired driver. October 12, 2015 T. at 15. Officer Woodyard observed appellant commit marked lanes violations. *Id.* at 16-17. Because he was outside his jurisdiction, he contacted the Ohio State Highway Patrol for assistance. *Id.* at 16. Officer Woodyard was instructed to pull over the vehicle until a trooper arrived. *Id.* The stop occurred at approximately 22:06. *Id.* at 18; Plaintiff's Exhibit 4. Upon stopping appellant, he questioned appellant as to "why I was seeing the marked lanes violation, why she was very lethargic while speaking to me, why she was very slow in reacting to different things I was asking for." *Id.* at 23. Officer Woodyard estimated the time lapse from stop to the arrival of Trooper Mann was fifteen minutes. *Id.* at 25-26.

¹When the issue of duration of detention was raised during the hearing, defense counsel argued the issue. October 12, 2015 T. at 32-33.

{¶20} Trooper Mann arrived on the scene at approximately 22:16, within two minutes after receiving the dispatch. *Id.* at 30; Plaintiff's Exhibit 3. Once Trooper Mann took control of the stop, he observed obvious indications that appellant was under the influence of medication, and appellant admitted she had taken "some medications that were prescribed to her, including Percocet and some other central nervous system depressants." *Id.* at 31. Based on these personal observations and admissions, Trooper Mann arrested appellant for OVI, and transported her to Licking Memorial Hospital for a blood test per appellant's consent. *Id.* at 35-36, 48.

{¶21} We find the delay of approximately ten minutes waiting for a trooper to respond was not unwarranted since Officer Woodyard had sufficient suspicion and belief from his personal observations that appellant was impaired.

{¶22} Upon review, we find do not find any deficiency by defense counsel on this issue, and no ineffective assistance of counsel.

{¶23} Assignments of Error I and II are denied.

{¶24} The judgment of the Municipal Court of Licking County, Ohio is hereby affirmed.

By Farmer, P.J.

Hoffman, J. and

Delaney, J. concur.

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