[Cite as *State v. Martin*, 2011-Ohio-2174.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio	Court of Appeals No. F-10-008
Appellee	Trial Court No. 09-CR-000175
v.	
Edward B. Martin	**DECISION AND JUDGMENT**
Appellant	Decided: May 6, 2011

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney,
for appellee.

James F. Schaller, II, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas which denied appellant's motion to suppress the evidence recovered in an Ohio turnpike traffic stop. For the reasons set forth below, this court affirms the judgment of

the trial court, in part, and also remands the case to the trial court, in part, to address procedural issues pertaining to court costs and the cost of appointed counsel.

{¶ 2} Appellant, Edward B. Martin, sets forth the following four assignments of error:

{¶ 3} "I. The trial court committed prejudicial error by denying Martin's motion to suppress.

{¶ 4} "II. Martin Received Ineffective Assistance of Counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Constitution of the State of Ohio.

{¶ 5} "III. The trial court erred in imposing costs in the sentencing entries where it failed to do so orally at the sentencing hearing.

{¶ 6} "IV. The trial court erred in imposing the costs of appointed counsel where it failed to make an affirmative determination that Martin has, or reasonably may be expected to have, the means to pay such costs."

{¶ 7} The following undisputed facts are relevant to the issues raised on appeal. On November 1, 2009, at approximately 1:00 a.m., appellant was stopped by the Ohio State Highway Patrol ("O.S.H.P.") for traveling at a rate of speed nearly 40 m.p.h. in excess of the speed limit. Appellant was recorded by an O.S.H.P. trooper driving at 104 m.p.h. on the Ohio Turnpike in Fulton County, Ohio.

{¶ 8} As the trooper approached appellant's rented SUV, he detected a strong odor of burnt marijuana from a distance of at least 15 feet away from the vehicle. The trooper

removed appellant from the vehicle, mirandized appellant, and searched appellant's person. Shortly thereafter, appellant disclosed to the trooper that he would discover a "blunt" (marijuana cigarette) concealed in a cigarette box in the vehicle.

{¶ 9} Based upon the foregoing, the trooper secured the presence and assistance of another O.S.H.P. unit at the scene. Upon the arrival of the second trooper, appellant's front seat passenger was removed from the vehicle. During this process, the strong odor of burnt marijuana could be detected again by the troopers emanating from appellant's vehicle. During the course of questioning, the responses conveyed by the passenger frequently conflicted with the responses furnished by appellant.

{¶ 10} Given the strong odor of marijuana emanating from the vehicle detected by both troopers at the scene, in conjunction with appellant's admission of a concealed marijuana cigarette inside the vehicle, the troopers preceded to conduct a permissible warrantless search of the vehicle pursuant to *Maryland v. Dyson* (1999), 527 U.S. 465, 466.

{¶ 11} In the course of searching the vehicle, the troopers first recovered a plastic baggie of raw marijuana in the glove compartment which had not been disclosed by appellant. The troopers subsequently recovered the marijuana cigarette concealed inside a cigarette box that appellant had conceded would be found inside the vehicle. During this process, one of the troopers likewise detected a persistent, generalized odor of marijuana for which he could not immediately ascertain the source.

{¶ 12} As the troopers proceeded to search an open, uncovered cargo area of the vehicle, a duffel bag and a vacuum pack food saver were observed. An orange bucket placed inside the duffel bag contained multiple, separate packages of material that field tested positive to be marijuana. The positive field tests were subsequently confirmed by follow-up lab testing. A firearm was also recovered.

{¶ 13} On November 17, 2009, in the wake of this incident, appellant was indicted on one count of possession of marijuana, in violation of R.C. 2925.11, a felony of the third degree, one count of trafficking in marijuana, in violation of R.C. 2929.03, a felony of the third degree, one count of improperly handling a firearm in a motor vehicle, in violation of R.C. 2923.16, a felony of the fourth degree, one count of possession of criminal tools, in violation of R.C. 2923.24, a felony of the fifth degree, and one count of permitting drug abuse, in violation of R.C. 2925.13, a felony of the fifth degree.

{¶ 14} On December 22, 2009, appellant filed a motion to suppress. On January 13, 2010, a hearing on the motion to suppress was conducted. The motion was denied. On January 26, 2010, a jury trial commenced. Appellant was convicted on all counts except the improper handling of a firearm. The jury was unable to reach a verdict on that count. On April 21, 2010, appellant was sentenced to a total term of incarceration on all counts of four years. This appeal ensued.

{¶ 15} In the first assignment of error, appellant asserts that the trial court erred in denying the motion to suppress. Appellant concedes that the troopers had probable cause to search the vehicle upon detecting the odor of the burnt marijuana. In addition,

appellant likewise concedes that the discovery of the additional raw marijuana during the first portion of the search can constitute probable cause for a more thorough search for contraband. Appellant nevertheless asserts that the troopers lacked probable cause to search the open, uncovered cargo area and thus the motion to suppress should have been granted.

{¶ 16} Appellate review of a disputed motion to suppress determination presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is, therefore, in the best position to resolve factual questions and evaluate witness credibility. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. A disputed motion to suppress judgment supported by competent, credible evidence must not be disturbed. *State v. Fanning* (1982), 1 Ohio St.3d 19.

{¶ 17} In conjunction with the above controlling legal framework, this court held in a strikingly similar case that the strong smell of marijuana in the passenger compartment constituted adequate probable cause to search the duffel bags located in an SUV cargo area for potentially concealed marijuana. *State v. Gonzales*, 6th Dist. No. WD-07-060, 2009-Ohio-168.

{¶ 18} We have carefully reviewed and considered the record of evidence in this matter. The record establishes that appellant was stopped for traveling on the Ohio Turnpike at a rate of speed of 104 m.p.h. at 1:00 a.m. The record reflects the trooper who initiated the traffic stop detected a strong smell of burnt marijuana from a distance of approximately 15 feet from the vehicle. The record reflects that appellant conceded that

a marijuana cigarette concealed inside a cigarette box would be discovered inside the passenger compartment. The record reflects that in searching for the contraband disclosed by appellant, the troopers first recovered an additional baggie of raw marijuana and detected a generalized odor of marijuana permeating the vehicle.

{¶ 19} We find that the above described facts and circumstances, evaluated in conjunction with the controlling legal principles on motion to suppress determinations and the highly analogous *Gonzales* decision of this court, establishes ample competent, credible evidence in support of the disputed motion to suppress determination. Wherefore, we find appellant's first assignment of error not well-taken.

{¶ 20} In appellant's second assignment of error, he asserts that trial counsel was ineffective in failing to object to a lab report submitted into evidence by appellee. In support, appellant contends that the report failed to comply with the R.C. 2925.51(D) requirement that it, "contain notice of the right of the accused to demand * * * the testimony of the person signing the report."

{¶ 21} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. This requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must then show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984),

466 U.S. 668. In addition, this test is applied in the context of Ohio law that holds that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 22} The disputed lab report expressly states in relevant part, " * * * if the accused or his attorney demands the testimony of the person signing the report, by serving the demand upon the prosecuting attorney within seven days from the accused or the accused's attorney's receipt of the report." Appellant asserts that although the disputed report clearly and precisely delineates how the accused or his attorney may demand the testimony of the person signing the report, it nevertheless fails to suffice as adequate notice that the accused has the "right" to demand the testimony of the person signing the report. We are not persuaded by appellant's position.

{¶ 23} On the contrary, we find that the plain meaning of the language used in the report foregoes the possibility of any reasonable person concluding that an accused lacks or may lack the ability or right to demand the testimony of the person who signed the report. The report clearly conveys that right in a direct, conclusory fashion. The right in question is stated by the report as a fact, not an uncertain possibility. The process to enforce that right is then described. There is no ambiguity in the report language that could reasonably be construed as failing to satisfy R.C. 2925.51(D).

{¶ 24} The record clearly demonstrates the lack of any deficiency in the lab report language that would have precluded its admissibility. As such, the failure to object to its admission cannot constitute representation by counsel below an objective standard of

reasonableness. Wherefore, we find appellant's second assignment of error not well-taken.

{¶ 25} Appellant's third and fourth assignments of error are not in dispute between the parties and will be addressed simultaneously. In the third assignment of error, appellant contends that the trial court erred in failing to orally impose costs at the sentencing hearing. In the fourth assignment of error, appellant contends that the trial court erred in imposing the costs of appointed counsel upon appellant in the absence of an affirmative determination that appellant possesses the means to pay for those costs. Appellee does not dispute these matters and concedes the necessity for remand to the trial court to address these limited, procedural matters. Wherefore, we find appellant's third and fourth assignments of error well-taken.

{¶ 26} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is hereby affirmed, in part. The judgment ordering appellant to pay costs in general and fees for appointed counsel is reversed. The case is remanded to the trial court for the limited purpose of addressing the procedural cost matters. The necessity of this is not in dispute. Appellant and appellee are ordered to each pay one-half of the cost of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.