[Cite as *State v. Nickelson*, 2018-Ohio-250.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 16 BE 0039
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION AND
	)	JUDGMENT ENTRY
SHAROD DESHAWN NICKELSON,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Application for Re-opening

JUDGMENT: Denied.

APPEARANCES:

For Plaintiff-Appellee:

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No Brief Filed

For Defendant-Appellant:

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JUDGES:
Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: January 19, 2018

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PER CURIAM.

{¶1} Defendant-Appellant Sharod Deshawn Nickelson has filed a timely application to reopen the direct appeal from his criminal conviction. For the following reasons, the application is denied.

{¶2} Appellant was convicted of two counts of drug trafficking upon a no contest plea in the Belmont County Common Pleas Court. He appealed based on the trial court's denial of his motion to suppress evidence. Appellant claimed the warrantless entry into his hotel room was unlawful because the hotel did not take an affirmative act to divest him of his status as a room occupant and the officers did not have actual or implied knowledge he had been evicted. This court concluded the hotel did take affirmative acts to evict him and the officers had knowledge of the eviction in progress which they were asked to help effect. *State v. Nickelson*, 7th Dist. No. 16 BE 0039, 2017-Ohio-7503, ¶ 22. We noted the hotel engaged in private acts of dominion by demanding police assistance in the eviction. *Id.* at ¶ 23-24.

{¶3} Appellant further protested the trial court's application of the independent source rule used by the trial court to alternatively uphold the entry into the hotel room via a search warrant. (And, he asserted the results of the second search warrant would be excluded as the fruit of the poisonous tree if his other arguments succeeded.) After reviewing the independent source rule, we upheld the application of the rule in this case upon finding the trial court reasonably concluded the detective's decision to seek the warrant was not prompted by what was observed during the other officers' initial entry and the information obtained from the initial entry was not presented to support the application for the warrant. *Id.* at ¶ 26-32.

{¶4} On November 17, 2017, Appellant filed a timely application to reopen our August 30, 2017 decision. A criminal defendant may apply for reopening of an appeal from the judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). The application for reopening must contain: "One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). The application

must demonstrate there is a "genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). The inquiry utilizes the standard two-part test for ineffective assistance of counsel where both prongs must be met: deficient performance and resulting prejudice. *See State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); App.R. 26(B)(2)(d). *See also State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (if the performance was not deficient, then there is no need to review for prejudice and vice versa).

{¶5} In evaluating an alleged deficiency in performance, an appellate court's review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142–143, 538 N.E.2d 373 (1989), citing *Strickland*, 466 U.S. at 689. *See also State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995) (a court should not second-guess the strategic decisions of counsel). Instances of debatable strategy very rarely constitute ineffective assistance of counsel. *See State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987). There are "countless ways to provide effective assistance in any given case." *Bradley*, 42 Ohio St.3d at 142, citing *Strickland*, 466 U.S. at 689.

{¶6} On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Carter*, 72 Ohio St.3d at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶7} Appellant proposes three assignments of error he claims appellate counsel should have briefed. First, he claims: "THE AFFIDAVIT ATTACHED TO

THE SEARCH WARRANT FAILED TO PROVIDE PROBABLE CAUSE WHICH VIOLATES THE WARRANT CLAUSE OF U.S. CONSTITUTION, AMENDMENT IV."

{¶8} Appellant notes the detective relied on statements of a hotel manager and employees as to their observations; he did not personally observe the suspicious activity in the hotel parking lot. Appellant contends the detective's affidavit was ambiguous, "bareboned," and facially lacking in a recital of probable cause. He concludes the detective's recitations in the affidavit were insufficient to support a belief there was drug trafficking occurring. He states this would have precluded the trial court from applying a good faith exception, which it did not in any event.

{¶9} In the affidavit, the detective said the general manager of the Comfort Inn advised the detective: a male registered for room 313 under Appellant's name that afternoon, presenting a Michigan driver's license; since that time there has been "a lot of suspicious activity with cars pulling into the parking lot and this male going from car to car and people entering the hotel and leaving within a few minutes"; and the manager watched this activity in plain view and on a video system with other hotel staff. From the information the detective received from the manager, he concluded "it sounded like possible drug activity." The affidavit noted a criminal history check on Appellant showed a drug trafficking conviction and arrests for felonious assault and carrying a concealed weapon. The affidavit also referred to a subsequent call from a hotel employee who told the detective "the traffic is picking up at the hotel" and the general manager instructed her to call (after she called her manager to report the continued occurrences).

{¶10} Appellant's suppression motion, supplemental memorandum in support, and motion to reopen the suppression hearing did not specifically raise a claim that the affidavit was facially lacking in a recital of probable cause. Instead, the defense proceeded under the theory the warrant only contained probable cause because it suggested the male approaching cars was Appellant (and he argued this information should be excluded as false).

{¶11} Establishing probable cause is not as demanding as an adjudicatory hearing standard but requires "more than a mere suspicion of guilt." *See, e.g., In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 42, quoting *State v.*

Iacona, 93 Ohio St.3d 83, 93, 752 N.E.2d 937 (2001). Underlying "all the definitions" of probable cause is "a reasonable ground" for belief; "as the very name implies, we deal with probabilities." *Brinegar v. United States*, 338 U.S. 160, 174-175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). Probable cause is a flexible, common-sense standard which does not demand any showing the belief is correct or more likely true than false. *See also Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). *See Iacona*, 93 Ohio St.3d at 93 (it is a flexible concept grounded in fair probabilities which can be gleaned from considering the totality of the circumstances). Additionally, probable cause for a warrant can be based on evidence that would qualify as hearsay or would otherwise not be admissible if presented in a criminal trial. *See United States v. Ventresca*, 380 U.S. 102, 107-108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

{¶12} Counsel was not required to argue every possible suppression argument in order to render constitutionally ineffective assistance. Counsel had wide discretion to choose the issues to argue in support of suppression and the errors to be assigned on appeal. *See Tenace*, 109 Ohio St.3d 451 at ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Attempting to address too many issues can result in a dilution of the force of the stronger arguments. *Jones*, 463 U.S. at 751-752 ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal"). Counsel's judgments are entitled to strong deference as there is a wide range of reasonable professional assistance. *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, ¶ 8. We do not find a genuine issue as to ineffective assistance of counsel in the failure to challenge the face of the affidavit at the trial or appellate level.

{¶13} Appellant also points out trial counsel argued certain information should have been omitted from the probable cause determination as the affidavit used to obtain the search warrant contained false statements. Appellant asserts ineffective assistance of appellate counsel was rendered by failing to maintain this argument on appeal. Specifically, the detective's affidavit submitted in support of the search warrant failed to inform the issuing judge: the evicting officers came to the

conclusion Appellant was the person the hotel staff observed approaching vehicles in the parking lot and Appellant had already been arrested after officers noticed him holding pills while they were effecting an eviction. Defense counsel noted it was the defense's burden to prove by a preponderance of the evidence the statements were false or made with reckless disregard for their truth, citing *Franks v. Delaware*. (Tr. 6-7).

{¶14} Appellant cites to pages 72-73 of the April 22, 2016 suppression transcript and pages 53-61 of the June 16, 2016 suppression transcript. The detective testified the hotel staff indicated to him the person approaching the cars was Appellant. (Tr. 71). He said he learned from post-arrest information provided by the officers at the hotel that the person approaching cars did not appear to be Appellant. (Tr. 72-73). At the second hearing, the detective explained he drafted the affidavit based upon what the hotel employees told him over the phone and was merely reciting their belief in the affidavit. The detective said: he was in the process of preparing the affidavit when he was surprised by the arrest; he had planned on waiting until morning to submit the affidavit; and he did not base the warrant application on what the evicting officers learned during the eviction. He knew Appellant had been arrested while holding a bag of pills but did not inform the judge issuing the warrant.

{¶15} As we recited in the direct appeal, the assistant prosecutor advised the detective to utilize only information learned from the hotel employees in the affidavit without adding newly learned details about the officers' eviction of Appellant. *Nickelson*, 7th Dist. No. 16 BE 0039 at ¶ 8. The prosecutor argued to the trial court this was not designed to mislead the court but was to maintain the independent source of information separate from the warrantless entry by the officers effecting the eviction. Appellant provides no support for the suggestion a detective must forgo the independent source route when he is in the middle of applying for a search warrant and advise the court about the drugs already discovered in the room. The non-use of the intervening arrest is what the independent source rule entails. *See Nickelson*, 7th Dist. No. 16 BE 0039 at ¶ 28, reviewing *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (police entered the defendant's apartment to wait

a day for an in-progress search warrant after they arrested the defendant in a common area of the building; the Court held the search warrant was the product of an independent source). As observed in the direct appeal, the rule states the information obtained during the initial entry cannot be presented to support the issuance of the search warrant. *Nickelson*, 7th Dist. No. 16 BE 0039 at ¶ 28, citing *Murray v. United States*, 487 U.S. 533, 542 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

{¶16} As to information on the observation of Appellant holding drugs during an eviction, the disclosure of this information would not have diminished probable cause in any event. As to the detective's belief the hotel employees' identified Appellant as the person approaching cars, the trial court heard the arguments and testimony at the original suppression hearing and allowed more questioning at a reopened suppression hearing. Any hearing required by *Franks* was thus held, but the information disclosed did not persuade the trial court there were outcome determinative false statements in the affidavit. For instance, if the detective's statement that Appellant approached the vehicles were to be categorized as false and the falsity attributed to the detective, the issue would then be whether the defense established by the preponderance of the evidence that the false statement was necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 171-172, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The trial court's entry found sufficient probable cause for the search warrant of the hotel room even excluding any known conflicting information on identification of the person approaching cars from the hotel. In other words, the court essentially believed there was an articulable suspicion the activity was related to a room rented by Appellant regardless of who repeatedly traversed between the hotel and various vehicles in the parking lot, and the totality of the circumstances and rational inferences gave rise to a fair probability Appellant's room was the source.

{¶17} In any event, it is clear from the affidavit the observations contained therein were not those of the detective. The detective explained how he was relaying what he was told by hotel employees. *See id.* at 171 (the issue is whether the non-governmental agent told the affiant what he attested they told him). He testified at the final hearing he did not know the information identifying Appellant as the person

approaching vehicles was incorrect at the time he made the statement to the judge. (2d Tr. 57-59). The evaluation of such testimony is within the province of the trial court, and we do not substitute our judgment based upon mere disagreement. The failure to include all of these issues in the appellate brief does not suggest a serious deficiency in appellate counsel's judgment or lead down a path resulting in prejudice.

{¶18} Finally, even if one of these issues should have been raised, our decision as to the search warrant's validity under the independent source rule was an alternative holding. This leads to Appellant's next proposed assignment of error, which states: "THE APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS WHEN HE WAS UNJUSTIFIABLY EVICTED FROM HIS HOTEL ROOM BY POLICE OFFICERS IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

{¶19} The trial court stated a hotel can properly terminate a hotel guest's occupancy rights for unauthorized activities and found the hotel did affirmatively terminate Appellant's rights. In concluding there was an affirmative act of eviction by the hotel and the officer had actual or implied knowledge of the eviction in progress, this court observed, "Appellant does not argue the hotel lacked good reason to evict him and seemingly acknowledges *the hotel* staff could have properly evicted him by taking affirmative actions to repossess the room, including unlocking his door." *See Nickelson*, 7th Dist. No. 16 BE 0039 at ¶ 21. From this, Appellant contends counsel overlooked a critical point as to whether the hotel's decision to evict him was unjustified. Appellant argues the eviction from his room had to be supported by "justifiable cause." *See generally Nickelson*, 7th Dist. No. 16 BE 0039 at ¶ 23, citing *United States v. Bautista*, 362 F.3d 584, 590 (9th Cir.2004) (referring to whether management "justifiably terminated" the guest's control of the room). Appellant concludes the request to evict him was fundamentally unfair and violated his due process rights as "the evidence did not establish that appellant had violated any rules of the hotel or any law which supported his eviction from the room."

{¶20} Appellant bases his argument on his construction of certain portions of the testimony. He states the hotel staff admitted he was not the person approaching the vehicles and claims they did not actually see the unidentified person approach his

room at the hotel, citing pages 35, 39, and 47 of the second suppression hearing transcript. At page 35, the manager was asked about a female along with a male in a white hat who an employee on the next work shift described in a statement as the people approaching cars; the manager watched this on video later. She said the person in the white hat was not Appellant (who was sitting before her at the hearing). At page 39, another employee was asked if the person in the white hat approaching the cars was Appellant (who was sitting before her in court) and she answered in the negative. When asked why she believed the activity was originating from this room, she answered at page 47: "They were going up to the third floor where that room was."

{¶21} These excerpts do not establish the employees knew it was not Appellant at the time they called the police and then demanded an eviction. Furthermore, regardless of who approached the vehicles, the testimony attributed the trafficking to the room rented to Appellant. In addition to stating the suspected traffickers "were going up to the third floor where that room was," the employee answered "yes" when asked if the individuals engaging in suspicious activity were all going back to the room Appellant rented. (2d Tr. 47, 52). The manager testified she witnessed much activity after Appellant checked in: "with people coming from the room to the parking lot. I had cars pulling into the parking lot to where nobody was getting out of their cars"; "I seen two individuals kept going *to the room* and going to cars that were in the parking lot;" and "there was two individuals where you could clearly see something was going on, suspicious wise, *going from that room* to a car. I had four cars at a time pull into my parking lot in the very beginning while I was there, and these individuals were going from car to car." (2d Tr. 30, 36) (emphasis added). The employees also indicated they watched the approach to Appellant's third floor room live via the video surveillance system.

{¶22} Moreover, at the earlier suppression hearing, testimony was presented that the manager indicated to the detective the activity was occurring from Appellant's room. (Tr. 52). The situation was so extreme the manager called the detective with the drug task force to make a report, an employee on a later shift called him as well when "traffic picked up," and an employee later called 911. When officers arrived,

two employees described "the activity that was coming from a specific room and out to the parking lot." (Tr. 14, 92). They had an activity log and video from multiple surveillance cameras. It was also related that, after witnessing the vehicular traffic visiting the hotel parking lot and the encounters with these vehicles by two individuals who repeatedly progressed in and out of the hotel stairwell and to the third floor room, the hotel employees expressed they were too fearful to accompany the officers in order to effect the eviction of Appellant that they desired. In sum, a genuine issue of ineffective assistance of appellate counsel has not been demonstrated. Declining to brief an argument on whether the hotel lacked justification for desiring to evict Appellant was not deficient performance or outcome-determinative under the facts of this case.

{¶23} Appellant's third and final proposed assignment of error contends: "TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO PURSUE AND OR USE EXCULPATORY EVIDENCE VIOLATING [APPELLANT'S] DUE PROCESS RIGHTS." Appellant states his attorney watched the surveillance video but then rendered ineffective assistance of counsel by failing to submit it as evidence at the suppression hearing. The video is not part of the record in these proceedings. *See, e.g., State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001) (if establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal); *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978) (the appellate court is limited to the record on direct appeal). Counsel could have concluded the video was more incriminating than the testimony presented at the hearing.

{¶24} Appellant also contends the state failed to save all footage from the hotel. Appellant states: if the evidence was materially exculpatory, his rights were violated; and if the evidence was potentially useful, his rights were violated only if there was a showing of bad faith. *See Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (good faith of prosecution is irrelevant if evidence is "material either to guilt or to punishment"). To be considered materially exculpatory, the defendant has the burden to prove the evidence would have played a significant

role in the defense, possessed an exculpatory value which was apparent before it was destroyed, and could not be replaced with comparable evidence by other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). The "mere possibility" an item may have helped the defense or affected the outcome of the trial, does not establish "materiality" in "the constitutional sense." *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549 (1991), quoting *United States v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

{¶25} In the direct appeal, we noted one of the original purposes of the second suppression hearing was to inquire about video footage from the third floor hallway that was not preserved when the hotel copied the video footage for law enforcement. *See Nickelson*, 7th Dist. No. 16 BE 0039 at ¶ 11. At the suppression hearing, defense counsel complained the portion of the video showing the eviction by officers was not preserved. (2d Tr. 68, 71). This footage was no longer available as the hotel's system overwrites prior footage after approximately two months. (2d Tr. 25-26).

{¶26} An officer testified: he asked the hotel to copy the footage from the video surveillance system; as the footage would not fit on a flash drive, the hotel asked for an external hard drive; and another officer returned the external hard drive after the hotel copied video footage onto it. (2d Tr. 16-18). The hotel manager testified there were 16 cameras on the property. The third floor had two motion-activated cameras. (2d Tr. 22-23). She said the hotel owner did the copying of data onto the external hard drive as she was "not that technical." (2d Tr. 28). She was involved in the decisions on what to copy and stated: "We tried to get what, you know, what – when I seen what I seen on there." (2d Tr. 26, 33-34). When asked whose decision it was to not copy the officers entering the room, she replied: "I don't know. I don't remember. I just remember putting some stuff on there." (2d Tr. 26-27). An officer was present during the copying; she denied the officer made any request to exclude any footage. (2d Tr. 27). Another hotel employee testified she was present when the hotel owner and the manager copied the video for an officer

who was present, but she was not involved in any decisions on what to copy. (2d Tr. 44-46).

{¶27} There is no indication the video of the third floor hallway as the officers approached Appellant's room would have been exculpatory. Even if this footage could be considered potentially useful for the suppression hearing as to how the eviction proceeded, there is no indication of bad faith. This was a private entity's failure to copy and save the footage from the third floor video camera recorded after the suspicious activity took place (where all camera views were not relevant to the case). The video that was copied was provided to the defense. Finally, we note the footage of the eviction was estimated to have been on the hotel system for two months after the incident before it was automatically overwritten. There is no genuine issue of ineffective assistance of appellate counsel in refraining from briefing a *Brady* argument as to the hotel's failure to copy the frames involving the eviction.

{¶28} For all of the foregoing reasons, Appellant's application to reopen is denied.

Robb, P.J. concurs.

Waite, J., concurs.

DeGenaro, J., concurs.