[Cite as *Stow v. Issa*, 2010-Ohio-1346.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CITY OF STOW	C.A. No. 24863
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAVID N. ISSA	STOW MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2008 CRB 3595

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

Per Curiam

{¶1} Defendant-Appellant, David N. Issa, appeals from his conviction in the Stow Municipal Court. On appeal, he argues that the trial court erred when it denied his motion to suppress. For the following reasons, we affirm.

I.

{¶2} A Stow police officer responded to a call that a person in a store smelled like marijuana. The officer identified Mr. Issa based on the description provided in the call and waited in the parking lot for Mr. Issa to leave the store. When he exited, the officer approached him, asked to speak with him, and noticed the smell of marijuana.

{¶3} Mr. Issa agreed to speak with the officer. He also consented to a pat-down search, during which the officer located an empty holster. The officer asked Mr. Issa if he had recently smoked marijuana, and he answered that he had not. The officer asked him if he had a car in the

parking lot and whether there was marijuana in the car. Mr. Issa answered that he did have a car, but there was not marijuana in it.

{¶4} The officer asked for consent to search Mr. Issa's car. Mr. Issa asked the reason for the search. The officer suggested that a drug-sniffing dog could, or would, be brought to the car. Mr. Issa then consented to the search. During the search of the vehicle, the officer discovered marijuana.

{¶5} Mr. Issa was charged with possession of marijuana. He filed a motion to suppress the marijuana found during the search. A magistrate held a hearing and prepared a written decision that denied the motion to suppress. Mr. Issa filed objections, but did not attach an affidavit to his objections or timely file a transcript of the suppression hearing. The trial court adopted the magistrate's decision. Mr. Issa then pleaded no contest and appealed to this Court. He has assigned two errors for our review.

II.

ASSIGNMENT OF ERROR I

> "Appellant was denied his Constitutional right to be free of unreasonable searches and seizures, when the trial court denied Appellant's Motion to Suppress the evidence seized from the motor vehicle."

ASSIGNMENT OF ERROR II

> "Appellant was denied his Constitutional rights against self-incrimination, when the trial court denied Appellant's Motion to Suppress the evidence of admissions and consent given without benefit of *Miranda* warnings.

{¶6} In his first assignment of error, Mr. Issa argues that the trial court erred when it denied his motion to suppress. In his second assignment of error, he argues that the trial court should have suppressed the statements he made. We cannot consider Mr. Issa's arguments

because Mr. Issa did not provide this Court with the transcript necessary to resolve his assignments of error.

{¶7} This Court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. In so doing, we generally consider the trial court's action based on the nature of the underlying matter. *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18.

{¶8} Mr. Issa challenges the denial of his motion to suppress in large part upon alleged erroneous findings by the magistrate. However, "[a]ny claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9, quoting *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093.

{¶9} The issue addressed by the dissent, specifically whether the police officer told Mr. Issa he "could" or "would" bring in a drug-sniffing dog, was not raised either in the objections or on appeal. Moreover, Mr. Issa would be foreclosed from raising this issue on appeal pursuant to Crim.R. 19(D)(3)(b)(iv) in the absence of any such objection before the trial court.

{¶10} The basis of Mr. Issa's objections was that the magistrate failed to consider the totality of the circumstances before concluding that Mr. Issa voluntarily consented to the search of his automobile. The error raised by the objections necessarily implicates a consideration of the facts.

{¶11} Mr. Issa failed to provide a transcript of the hearing to the trial court. Crim.R. 19(D)(3)(b)(iii) requires that objections to factual findings be supported by a transcript. The party who objects to the magistrate's decision has the duty to provide a transcript to the trial court. *Weitzel v. Way*, 9th Dist. No. 21539, 2003-Ohio-6822, at ¶17. In cases where a transcript

is not available, however, Crim.R. 19(D)(3)(b)(iii) allows the objecting party to support his objections with an affidavit of all the relevant evidence adduced at hearing. When the objecting party fails to provide a transcript or affidavit, the trial court "'is limited to an examination of the [magistrate's] conclusions of law and recommendations, in light of the accompanying findings of fact only unless the trial court elects to hold further hearings.'" *Weitzel* at ¶18, quoting *Wade v. Wade* (1996), 113 Ohio App.3d 414, 418.

{¶12} Upon appellate review, this Court is limited to determining whether the trial court abused its discretion in adopting, rejecting, or modifying the magistrate's decision, where the objecting party failed to provide a transcript or affidavit to the trial court in support of his objection. *Weitzel* at ¶19. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id. Applying this standard of review, this Court cannot say that the trial court abused its discretion by overruling Mr. Issa's objections and adopting the magistrate's decision. Mr. Issa's assignments of error are overruled.

III.

{¶13} Mr. Issa's two assignments of error are overruled. The judgment of the Stow Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Stow Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

BELFANCE, J.
DISSENTS, SAYING:

{¶14} I respectfully dissent as I would conclude that the trial court abused its discretion when it adopted the magistrate's decision.

{¶15} Following a hearing before the trial court's magistrate, the magistrate filed a magistrate's decision. In that decision, the magistrate made two inconsistent findings about the same critical fact – what the officer told Mr. Issa about calling a drug dog. The magistrate first found that the officer told Mr. Issa that he "could" call a drug dog to conduct a sniff of Mr. Issa's

car. Later in his decision, the magistrate found that the officer told Mr. Issa he "would" call a drug dog if Mr. Issa did not consent to a search of his vehicle. Immediately following the second finding, the magistrate's decision notes that this probably had an impact on the voluntariness of Mr. Issa's consent.

{¶16} Mr. Issa objected to the magistrate's decision and argued that the second finding – the officer *would* call for a drug dog – supported the conclusion that his consent was not voluntary. The trial court's review of this issue was undoubtedly hampered by Mr. Issa's failure to timely provide the trial court with a transcript of the suppression hearing. The record reflects that Mr. Issa tried repeatedly to have a transcript prepared. Ultimately, a transcript was filed beyond the time allowed by Crim.R. 19(D)(3)(b)(iii), and the trial court did not consider it in reviewing the objections. He also did not submit an affidavit in lieu of a transcript. Crim.R. 19(D)(3)(b)(iii).

{¶17} This Court has held that "in the absence of a transcript of proceedings, affidavit, or additional evidentiary hearing, a trial court abuses its discretion when it fails to adopt a finding of fact made by a magistrate." *Crislip v. Crislip*, 9th Dist. No. 03CA0112-M, 2004-Ohio-3254, at ¶6. Where no transcript or affidavit is provided, appellate review of the trial court's findings is limited to whether the trial court abused its discretion in adopting the magistrate's decision. *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730.

{¶18} In this case, the trial court adopted only one of the magistrate's findings of fact, that the officer said he *could* call for a drug dog. Indeed, the trial court framed the legal issue before it based on its consideration of only the "could" finding, as it wrote in its journal entry adopting the magistrate's decision that the "only question then, is whether the officer's statement

that a drug sniffing canine *could* be dispatched vitiated Defendant's prior voluntary consent." (Emphasis added.) The trial court did not adopt – or even mention – the magistrate's conflicting finding, that the officer said he *would* call for a drug dog.

{¶19} The distinction between "could" and "would" is not merely a question of grammar. The difference in meaning between the two words is significant. The legal question before the trial was whether Mr. Issa's consent was valid under the totality of the circumstances. *State v. Childress* (1983), 4 Ohio St.3d 217, paragraph one of the syllabus, following *Schneckloth v. Bustamonte* (1973), 412 U.S. 218. The magistrate made two different findings on this key factual question.

{¶20} The trial court did not have discretion to accept one finding over another, because it did not have a transcript or affidavit to which it could refer. See *State ex rel. Duncan,* 73 Ohio St.3d at 730. It could have recommitted the matter to the magistrate to resolve the inconsistency or held a hearing to take evidence to resolve the dispute. But the trial court could not adopt one finding, frame the ultimate issue based on that fact, and ignore the magistrate's other, inconsistent finding of fact. To do so constituted an abuse of discretion. Thus, I would reverse the trial court's judgment and remand this matter to the trial court for further proceedings.

APPEARANCES:

NICHOLAS J. SCHEPIS, Attorney at Law, for Appellant.

BRIAN REALI, Law Director, and JOHN A. SCAVELLI, JR., Deputy Law Director, for Appellee.