[Cite as *State v. Daniel*, 2011-Ohio-1278.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 24267
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-1892
v.	:	
	:	
SHAWN D. DANIEL	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 18th day of March, 2011.

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FAIN, J.

{¶ 1} Defendant-appellant Shawn Daniel appeals from his conviction and sentence for Possession of Cocaine. Daniel claims that the trial court should have granted his motion to suppress because the State failed to prove that his car was searched pursuant to a standardized, written police tow policy, and he insists that trial counsel was ineffective for

failing to raise this issue below. Daniel maintains that the search warrant for his home was not based upon probable cause and that the evidence found in the trash cans behind his home should have been suppressed. We conclude that the officers conducted a lawful inventory search of Daniel's vehicle, and that trial counsel was not ineffective for electing not to challenge the police towing policy. We conclude that the search warrant for Daniel's home was based on probable cause, and that the evidence found abandoned in the trash can behind Daniel's home was admissible. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} In June, 2009, Dayton Police Officers Fuller and Halburnt were on patrol when they saw Daniel driving 40-45 m.p.h. in a 25-m.p.h. zone and running through a stop sign. They pulled Daniel over and learned that he had just left his home a few blocks away. After the officers found that Daniel was driving under multiple license suspensions, they arrested him. Conducting a search of his person incident to arrest, the officers found $1,210 on Daniel's person. The officers also obtained the key for Daniel's home.

{¶ 3} Because Daniel was being arrested, the officers inventoried the contents of Daniel's car and had it towed from the scene. In the car they found two bags of marijuana. They also found a black and gray backpack, from which emitted a strong chemical odor related to the processing of cocaine. Inside the backpack, the officers found a digital scale coated with cocaine residue.

{¶ 4} Officer Fuller left to seek a search warrant for Daniel's home. While the other officers waited for the warrant, they saw trash cans in the alley behind the residence. The

trash cans had the house number painted on them. The officers searched the trash cans and found a plastic bag with cocaine residue and a bottle of inositol, which is an agent used to cut cocaine. After the search warrant was obtained, the officers searched the home and found cocaine.

{¶ 5} Daniel was indicted on one count of Possession of Marijuana, one count of Possession of Cocaine, and two counts of Possession of Drug Paraphernalia. He filed two motions to suppress, both which the trial court overruled following a hearing on the motions. Daniel pled no contest to one count of Possession of Cocaine and was sentenced to one year in prison. From his conviction and sentence, Daniel appeals.

II

{¶ 6} Daniel's First Assignment of Error is as follows:

{¶ 7} "THE TRIAL COURT PREJUDICIALLY ERRED IN HOLDING THE SEARCH OF APPELLANT'S CAR WAS A 'LAWFUL INVENTORY SEARCH' WITHOUT THE STATE'S PROOF THAT THE INVENTORY WAS CONDUCTED PURSUANT TO A STANDARDIZED WRITTEN DAYTON POLICE PROTOCOL FOR A PROPER AND PARTICULARIZED PURPOSE AND NOT A DISGUISE FOR A SEARCH FOR EVIDENCE OF A CRIME."

{¶ 8} In his First Assignment of Error, Daniel claims that the trial court should have granted his motion to suppress, because the State failed to prove that his car was searched pursuant to a standardized, written Dayton Police protocol for inventory searches.

{¶ 9} When assessing a motion to suppress, the trial court is the finder of fact,

judging the credibility of witnesses and the weight of evidence. *State v. Jackson*, Butler App. No. CA2002-01-013, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. An appellate court must rely on those findings and determine "'without deference to the trial court, whether the court has applied the appropriate legal standard.'" Id., quoting *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. When the trial court's ruling on a motion to suppress is supported by competent, credible evidence, an appellate court may not disturb that ruling. Id., citing *State v. Retherford* (1994), 93 Ohio App.3d 586.

{¶ 10} A hearing on a motion to suppress is not intended to be a complete trial of the State's case. For that reason, Crim.R. 47 requires that a motion to suppress "shall state with particularity the grounds upon which it is made * * * ." The purpose of the rule is to give the State notice of what, specifically, it must prove to overcome the motion. *State v. Butt* (Aug. 29, 1997), Montgomery App. No. 16215, citations omitted. Therefore, the motion must state the legal and factual bases upon which it rests with sufficient specificity to put both the State and the trial court on notice of the issues to be decided. Id., citing *Xenia v. Wallace* (1988), 37 Ohio St.3d 216; *State v. Schindler*, 70 Ohio St.3d 54, 1994-Ohio-452. Daniel implicitly concedes that he did not specifically argue in the trial court that his car was not searched pursuant to a standardized, written police policy, since he has claimed in his Second Assignment of Error that trial counsel was ineffective for failing to do so. Having failed to raise the issue in the trial court below, he has waived the issue for purposes of appeal. *Xenia*, at 218.

{¶ 11} Nevertheless, we note that although Daniel failed to put the State on notice that it needed to offer detailed information on this issue, the officer who conducted the inventory

search testified, on re-cross-examination, concerning the Dayton Police Department's tow policy:

{¶ 12} "A. * * * . What you asked me was is it – are we allowed by policy to let anybody with a valid driver – to come and pick that car – we are not allowed to by policy to let anybody with a valid driver's license come take that car and drive it away. In fact, we have been specifically directed not to.

{¶ 13} "Q. Okay. So your position is at no point in time do you have discretion?

{¶ 14} "A. That's not my position. That's the City of Dayton's.

{¶ 15} "Q. Okay. That's the policy that you follow?

{¶ 16} "A. Correct."

{¶ 17} Earlier, during cross-examination, the following testimony was elicited from the same police officer by Daniel:

{¶ 18} "Q. Okay. So you searched the vehicle incident to the tow policy, correct?

{¶ 19} "A. Correct."

{¶ 20} At no point did Daniel object to the officer's testimony that he conducted the search of the vehicle incident to the tow policy, a fact Daniel elicited from the officer on cross-examination.

{¶ 21} Daniel insists that the policy itself should have been introduced in evidence. We find no fault with the trial court's conclusion, based upon the evidence before it, that the officers conducted a lawful inventory search of Daniel's vehicle.

{¶ 22} Daniel's First Assignment of Error is overruled.

III

{¶ 23} Daniel's Second Assignment of Error is as follows:

{¶ 24} "ALTERNATIVELY, APPELLANT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BY HIS TRIAL COUNSELS' INEFFECTIVE ASSISTANCE WITH REGARD TO THE STATE'S CLAIM TO A PROPER INVENTORY SEARCH."

{¶ 25} In his Second Assignment of Error, Daniel maintains that his trial counsel was ineffective for failing to specifically challenge the State's lack of proof of a standardized, written towing policy. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id.

{¶ 26} It is apparent from the written motions and the hearing testimony that trial counsel chose to focus the court's attention on the challenge to the search warrant for Daniel's home. This is a matter of trial strategy. "[T]he strategic decision of a trial attorney will not form the basis of a claim of ineffective assistance of counsel, even if there may have been a better strategy available." *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶ 27} Furthermore, we are aware that trial counsel is a very experienced criminal defense attorney. A quick search of cases turns up many cases specifically referring to the existence of a towing policy of the Dayton Police Department. It is likely that trial counsel was well aware of both the existence and details of the Dayton Police Department's

standardized, written towing policy, and therefore realized that any challenge to the inventory search along these lines would have been fruitless. Trial counsel's performance is not deficient for failing to raise a meritless issue. *State v. Taylor*, 78 Ohio St.3d 15, 43, 1997-Ohio-243.

{¶ 28} Daniel's Second Assignment of Error is overruled.

IV

{¶ 29} Daniel's Third Assignment of Error is as follows:

{¶ 30} "THE TRIAL COURT PREJUDICIALLY ERRED IN UPHOLDING THE SEARCH WARRANT FOR APPELLANT'S HOME."

{¶ 31} In his Third Assignment of Error, Daniel offers a cursory claim that absent the illegally obtained evidence from the search of his vehicle, there was no probable cause for the issuance of a warrant for the search of his home. "In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *State v. George* (1989), 45 Ohio St.3d

325, paragraph two of the syllabus, *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, followed.

{¶ 32} In this case, the search warrant was issued based upon several pieces of information. First, the issuing magistrate considered the evidence found during the inventory search: two bags containing a large amount of marijuana and a scale covered with cocaine residue. Additionally, Daniel was in possession of a relatively large amount of cash. Next, Daniel admitted that he had just left his home, a few blocks from where he was stopped. Although he later claimed that it was his mother's home, not his, both his suspended driver's license and his vehicle registration gave that address as Daniel's. Finally, officers recovered from the trash can in the alley behind Daniel's house a bag with cocaine residue and a bottle of inositol, an agent commonly used to cut cocaine. We conclude that this evidence provided probable cause for the issuance of the search warrant for Daniel's home.

{¶ 33} Daniel's Third Assignment of Error is overruled.

V

{¶ 34} Daniel's Fourth Assignment of Error is as follows:

{¶ 35} "THE TRIAL PREJUDICIALLY COURT (SIC) ERRED IN HOLDING THAT THE CONTRABAND SEIZED IN SEARCH OF APPELLANT'S HOME WAS SUBJECT TO THE 'INEVITABLE DISCOVERY' DOCTRINE."

{¶ 36} In his Fourth Assignment of Error, Daniel contends that the cocaine found in his home would not have been inevitably discovered. Because we conclude that there was probable cause to search Daniel's home, we need not consider the applicability of the doctrine

of inevitable discovery as it relates to the cocaine seized from the home.

{¶ 37} The State contends that in citing the inevitable discovery doctrine, the trial court was referring, not to the cocaine found in Daniel's home, but to the bag with cocaine residue and the inositol bottle found in his trash cans. The United States Supreme Court has held that one has no legitimate expectation of privacy in the contents of trash cans that he has placed out for trash pick-up. *California v. Greenwood* (1988), 486 U.S. 35, 40-41, 108 S.Ct. 1625, 100 L.Ed.2d 30. Therefore, we conclude that the bag and the bottle were abandoned property, for which no search warrant was required.

{¶ 38} Daniel's Fourth Assignment of Error is overruled.

VI

{¶ 39} All of Daniel's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY, P.J., and DONOVAN, J., concur.

Copies mailed to:

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