

[Cite as *State v. Wilson*, 2009-Ohio-2744.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 08CA0045
vs.	:	T.C. CASE NO. 07CR0853
EREGON WILSON	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 5th day of June, 2009.

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GRADY, J.:

{¶ 1} Defendant, Eregon Wilson, appeals from his conviction and sentence for carrying concealed weapons and having weapons while under a disability.

{¶ 2} On the night of August 28, 2007, Springfield police officers David Allen and Dana Lewis were dispatched to the

Ronez apartment complex at 1946 Prim Drive in Springfield, on a report that a male and female in a parked car in front of that complex were arguing or fighting. When Officer Allen arrived he observed a Pontiac Grand Prix with windows that were steamed up. Officer Allen observed one person sitting in the passenger seat and believed he saw another person moving around inside the vehicle. Officer Allen approached the passenger side of the vehicle while Officer Lewis approached the driver's side.

{¶ 3} Officer Allen made contact with a female in the passenger seat, who identified herself as Jessica Givens. When Officer Allen asked Givens if anyone else was in the car, Givens replied that her boyfriend was in the back seat. Officer Allen was able to see what looked to him like a body lying on the back floor of the vehicle and covered by a sheet.

Officer Allen opened the back door of the vehicle and pulled back the sheet. Defendant immediately sat up, revealing a black handgun that was underneath him.

{¶ 4} Officer Allen yelled "gun," and Officer Lewis immediately came around the vehicle and the two officers pulled Defendant out of the vehicle, handcuffed him, and secured the weapon. Defendant told the officers the gun was not loaded, which turned out to be true. A further search of

the vehicle produced two live rounds of ammunition for the gun on the driver's seat, in plain view. A check of the vehicle's license plates disclosed that the registered owner was a relative of Jessica Givens.

{¶ 5} Defendant was indicted on one count of carrying concealed weapons, R.C. 2923.12(A), one count of having weapons while under a disability, R.C. 2923.13(A)(3), and one count of receiving stolen property. R.C. 2913.51(A). The matter proceeded to a jury trial.

{¶ 6} At trial, the State dismissed the receiving stolen property charge. Defendant testified that the gun was not his, that he did not know it was there, and that it must have been wrapped up in the blanket that covered him. He also testified that when police arrived Jessica Givens was outside the vehicle, not sitting in the passenger seat, and that her sister was also present.

{¶ 7} The jury found Defendant guilty of carrying concealed weapons and having weapons while under a disability. The trial court sentenced Defendant to concurrent prison terms totaling four years. Defendant filed a notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF

COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 9} 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. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must demonstrate that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 10} Defendant argues that his trial counsel performed in a deficient manner by failing to file a motion to suppress evidence for a violation of Defendant's Fourth Amendment rights that occurred when police stopped and seized him without any reasonable suspicion of criminal activity.

{¶ 11} The failure to file a suppression motion is not per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448. Rather, trial counsel's failure to file a motion to suppress constitutes ineffective assistance of counsel only if the failure to file the motion

caused Defendant prejudice; that is, when there is a reasonable probability that, had the motion to suppress been filed, it would have been granted. *State v. Pillow*, Greene App. No. 07CA95, 2008-Ohio-6046; *State v. Jackson*, Cuyahoga App. No. 86542, 2006-Ohio-1938; *State v. Henry* (July 9, 1999), Montgomery App. No. 17261.

{¶ 12} The Fourth Amendment protects people against unreasonable searches and seizures. A stop of an individual by police for investigative purposes, albeit brief, which involves any restraint upon that citizen's freedom to walk away constitutes a "seizure" governed by the Fourth Amendment's reasonableness standard. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 1889. In *State v. Broomfield* (Sept. 13, 1996), Clark App. No. 95-CA-0103, this court observed:

{¶ 13} "Warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment, subject to only a few well recognized exceptions. *Katz v. United States* (1967), 389 U.S. 347. One of those exceptions is the rule regarding investigative stops, announced in *Terry v. Ohio, supra*, which provides that a police officer may stop an individual to investigate unusual behavior, even absent a prior judicial warrant or probable cause to arrest, where the officer has a

reasonable, articulable suspicion that specific criminal activity may be afoot. *Id.*

{¶ 14} ** * *

{¶ 15} "Whether an investigative stop is reasonable must be determined from the totality of the circumstances that surround it. *State v. Freeman* (1980), 64 Ohio St.2d 291. The totality of the circumstances are '\... to be viewed from the eyes of the reasonable and prudent police officer on the scene who must react to the events as they unfold.' *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, citing from *U.S. v. Hall* (C.A.D.C.1976), 525 F.2d 857, 859; *State v. Freeman, supra*, at 295."

{¶ 16} When Officer Allen opened the rear passenger door of the vehicle and pulled the sheet back to see who was underneath it, he engaged in a search of that vehicle. At that time the following facts and circumstances were known. Officer Allen was performing his duty to investigate the police dispatch that involved a man and a woman inside a vehicle in front of that apartment complex who were arguing or fighting. The female passenger in the vehicle stated that her boyfriend was in the back of the vehicle. Officer Allen observed something that resembled a human body on the rear floor of the vehicle underneath a sheet or blanket.

{¶ 17} The totality of these facts and circumstances, and the inferences reasonably drawn from them, are sufficient in our opinion to give rise to a reasonable suspicion or belief that criminal activity was afoot, or that the person under the blanket might be in distress and in need of immediate assistance or aid. That is sufficient to permit a prudent officer in those circumstances to investigate those matters without a warrant pursuant to *Terry* or the exigent/emergency circumstances exception. *State v. Taylor* (2001), 144 Ohio App.3d 255; *State v. Sharpe*, 174 Ohio App.3d 498, 2008-Ohio-267.

{¶ 18} Once Officer Allen pulled back the sheet and Defendant sat up, which caused a handgun that had been lying underneath Defendant to become visible, officers could seize that evidence pursuant to the plain view doctrine. *State v. Dillard*, 173 Ohio App.3d 373, 2007-Ohio-5651.

{¶ 19} Officer Allen's conduct did not violate Defendant's Fourth Amendment rights. Because there is no reasonable probability that a motion to suppress the evidence, had one been filed, would have succeeded, counsel did not perform in a deficient manner by failing to file such a motion.

{¶ 20} Defendant's assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And FAIN, J., concur.

Copies mailed to:

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Hon. Richard J. O'Neill