State of Ohio, Plaintiff-Appellee, v. Donzalla Justice, Defendant-Appellant.

No. 96APA05-616

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1996 Ohio App. LEXIS 5858

December 24, 1996, Rendered

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment reversed; cause remanded.

COUNSEL: Michael Miller, Prosecuting Attorney, and Eric Tarbox, for appellee.

Judith M. Stevenson, Public Defender, and David L. Strait, for appellants.

JUDGES: PETREE, J. YOUNG and CLOSE, JJ., concur.

OPINION BY: PETREE

OPINION

(REGULAR CALENDAR)

OPINION

PETREE, J.

Defendant, Donzalla Justice, appeals from a judgment of the Franklin County Court of Common Pleas finding her guilty of one count of aggravated trafficking in drugs, in violation of R.C. 2925.03, and raises three assignments of error, as follows:

"[I.] Appellant was deprived of effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution due to the failure of trial counsel to (1) litigate a valid motion to suppress the fruits of an illegal search and (2) object to irrelevant and highly prejudicial testimony.

"[II.] The trial court erred in failing to conduct a hearing and rule on a properly filed defense motion to suppress.

"[III.] The [*2] judgment of the trial court is not supported by sufficient, credible evidence, and is contrary to the weight of the evidence."

At defendant's trial, the state presented the following testimony regarding the events leading up to defendant's arrest. On September 27, 1995, Columbus Narcotics Detective James Hagan was assigned to duty at Port Columbus International Airport. Detective Hagan and his partner, Detective Stan Lisska, were monitoring America West Flight No. 280, scheduled to arrive at 8:50 a.m. from El Paso, Texas via Las Vegas, Nevada to Columbus. Detectives Hagan and Lisska, who were standing near the baggage claim area for America West Airlines, observed defendant coming down the escalator. Defendant was wearing a dark T-shirt, jeans and a jacket tied around her waist with the back of the jacket hanging down the back of her legs; she was carrying only two plastic shopping bags.

Detective Hagan noticed defendant look at the detectives several times on her way to the baggage claim area. Defendant retrieved one suitcase from the baggage carousel and hurriedly walked toward the north doors of the terminal. Both detectives followed defendant; Detective Hagan saw her glance [*3] backward two or three times.

As defendant was about to exit the terminal, the officers approached her. Detective Hagan identified himself and his partner as police officers and asked to speak to defendant. Detective Hagan told defendant that he was the K-9 officer at the airport and that his dog, who was trained to sniff luggage for drugs such as amphetamines, marijuana, cocaine and heroin, had "hit" on her suitcase. However, on cross-examination, Detective Hagan admitted that the dog had never sniffed defendant's suitcase, and he described his contrary statement to defendant as an "investigative technique." Defendant agreed to talk to the officers.

Detective Hagan verified with defendant that she had just flown to Columbus on America West Flight No. 280. After noticing the tag on defendant's luggage bore the name Doris Johnson, Detective Hagan asked defendant for her airline ticket and identification. Defendant produced a one-way cash ticket from El Paso to Las Vegas to Columbus in the name of Doris Johnson. When asked, defendant admitted that her name was not Doris Johnson. She then produced an Ohio driver's license with the name Donzalla Justice.

Explaining that flights from [*4] the west are often monitored for drug trafficking, Detective Hagan inquired as to why defendant had an airline ticket and luggage bearing the name Doris Johnson. Defendant explained that she knew someone who worked for America West Airlines and purchased the tickets at a discount. Defendant also stated that her suitcase contained some clothing owned by her cousin, who was scheduled to arrive in Columbus on a flight later that morning.

Detective Hagan asked defendant if she would consent to a search of her suitcase, but did not inform her than she could refuse consent. Defendant replied, "Sure, go ahead." Upon opening defendant's suitcase and two plastic bags, Detective Lisska found no contraband. The detectives did not do a pat-down search of defendant's person, however, as it is police policy not to have male detectives search female suspects. While the search of the suitcase was being conducted, Detective Hagan inquired as to defendant's business in El Paso. According to Detective Hagan, defendant's answer was "vague."

Although no contraband was found in the suitcase, the officers were unsatisfied with the investigation and wanted to continue it. A port authority uniformed officer [*5] arrived, and Detective Hagan asked him to do a warrant check. According to Detective Hagan, defendant became "nervous" and asked to use a telephone. Detective Hagan summoned Sergeant Luzio, a back-up officer who had been standing nearby, to escort defendant to the telephone, which was around the corner.

In the meantime, Detective Hagan asked the port authority officer if a female communications technician was available to conduct a pat-down search of defendant's person. When the communications technician arrived, she and Detective Hagan went around the corner to where the telephones were located. Sergeant Luzio was standing alone; he told Detective Hagan that on the way to the telephone, defendant had asked permission to use the restroom. Assuming that the investigation was completed, Sergeant Luzio consented. The communications technician went into the restroom, then came out and told Detective Hagan that defendant was already in a stall. The communications technician, Sergeant Luzio, Detectives Hagan and Lisska and a port authority officer entered the restroom and observed defendant's suitcase open on the floor of the stall. Defendant was standing on the toilet looking out and said [*6] she would be out in a minute; she then said that the toilet would not flush. Although the testimony is a bit unclear, it appears that everyone but defendant left the restroom. Once outside the door, Detective Hagan heard the toilet flush and defendant say "Oh, shit."

Upon defendant's request, the communications technician took her to another restroom. Defendant was still carrying her suitcase when she went into the second restroom. Thereafter, defendant returned to Detective Hagan.

Shortly thereafter, based upon a discussion with a port authority officer, Detective Hagan told defendant that she would need to accompany the officers to the airport narcotics office so that they could verify possible outstanding traffic warrants. After the warrants were verified, defendant was placed under arrest. Her suitcase was searched again, this time by Sergeant Luzio. The second search produced a Ziploc baggie containing cocaine; a clothes dryer sheet was wrapped around the baggie. A wet, black T-shirt with tape on the outside was rolled up around the contraband. According to Detective Lisska, had the T-shirt containing the contraband been in the suitcase at the time of the initial search, [*7] he would have easily discovered it. Defendant told Detective Hagan that the drugs must belong to her cousin; she had not put them in the suitcase and knew nothing about them.

Defendant testified at trial that her cousin had invited her to accompany him on a trip to El Paso, Texas; that he knew a woman who could get discount tickets, but the tickets would not be in defendant's name; that he asked defendant if he could put some of his clothing in her

suitcase; and that he would return to Columbus on a later flight.

Defendant further testified that she was not carrying cocaine on her person or in her suitcase at the time of her initial encounter with the detectives; that she told the officers she was willing to let the drug-sniffing dog sniff her and/or her clothing to prove that she was not concealing drugs on her body; and that the officers said that would not be necessary.

She further testified that the female communications technician patted her down before she entered the restroom; that she opened her suitcase on the restroom floor in order to retrieve a sanitary item from the suitcase; that the communications technician was in a position to observe whether defendant removed anything [*8] from her suitcase while in the restroom; and that she did not attempt to conceal or destroy any contraband while she was in the restroom.

On December 4, 1995, defendant was indicted on one count of aggravated trafficking in drugs in violation of R.C. 2925.03. On February 1, 1996, defendant filed a motion to dismiss/suppress evidence, alleging that the police lacked probable cause to stop, detain, search and arrest her. Defendant further alleged that the evidence obtained incident to the illegal search must be suppressed.

A pre-trial statement filed March 7, 1996 indicates that the motion to suppress was pending and that a pre-trial ruling was necessary. A criminal case processing sheet dated March 7, 1996 indicates that the suppression hearing and trial were scheduled for April 1, 1996.

On April 1, 1996, defendant's motion for continuance was granted, new counsel having been substituted for defendant. The case proceeded to jury trial on May 1, 1996; however, there is no indication in the record that any disposition was made as to the motion to suppress. Following trial, the jury found defendant guilty as charged in the indictment.

Defendant was sentenced to three to fifteen years [*9] with three years actual incarceration. A mandatory fine of $ 5,000 was suspended due to indigency and incarceration. In addition, the court ordered defendant's driver's license suspended for a period of three years. Thereafter, upon defendant's motion, the trial court granted defendant permission to participate in the Franklin County Home Incarceration Program, including work release authorization.

By the first assignment of error, defendant argues that she received ineffective assistance of counsel because her trial counsel failed to litigate the motion to suppress and failed to object to the admission of irrelevant and unfairly prejudicial testimony.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel "made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington* (1984), 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052. The test in Ohio for determining effective assistance of counsel is whether the accused, under all the circumstances, had a fair trial and substantial justice was done. *State v. Hester* (1976), 45 Ohio St. 2d 71, 79, 341 [*10] N.E.2d 304. In *State v. Lytle* (1976), 48 Ohio St. 2d 391, 358 N.E.2d 623, the Supreme Court of Ohio proposed a two-step inquiry as to the question of whether a defendant was deprived of the effective assistance of counsel:

> " *** First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *Id.* at 396-397.

To establish that counsel's performance was deficient, "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland, supra*, at 687. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694. A properly licensed attorney is presumed competent; a defendant bears the burden of showing ineffective assistance of counsel. *State v. Hamblin,* (1988), 37 Ohio St. [*11] 3d 153, 155-156, 524 N.E.2d 476.

Defendant first argues that trial counsel's failure to litigate the motion to suppress amounted to ineffective assistance of counsel. Although defendant's former counsel filed a pre-trial motion to suppress, no hearing was held on the motion prior to the commencement of trial; hence, no disposition was ever made on the motion. Defendant argues that, had the motion been properly litigated, the evidence would have shown that the initial stop and continuing detention by the police violated her constitutional rights, and, therefore, the evidence seized should have been suppressed.

The Sixth Amendment guarantee of the assistance of counsel does not require defense counsel to file or pursue a motion to suppress in every case. *State v. Flors* (1987), 38 Ohio App. 3d 133, 139, 528 N.E.2d 950, citing

Kimmelman v. Morrison (1986), 477 U.S. 365, 385-386, 91 L. Ed. 2d 305, 106 S. Ct. 2574. "Where the record contains no evidence which would justify the filing of a motion to suppress, the appellant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion." *State v. Gibson* (1980), 69 Ohio App. 2d 91, [*12] 95, 430 N.E.2d 954. Counsel is not ineffective for failing to raise a claim that was not meritorious. *State v. Ratcliff* (1994), 95 Ohio App. 3d 199, 206, 642 N.E.2d 31. On the other hand, counsel's failure to file or pursue a meritorious claim, if such failure prejudices the defendant, may constitute ineffective assistance of counsel and warrant reversal. *State v. Freeman* (Dec. 12, 1995), 1995 Ohio App. LEXIS 5483, Franklin App. No. 95APA03-321, unreported (1995 Opinions 5203). In *Freeman*, this court, citing *State v. Garrett* (1991), 76 Ohio App. 3d 57, 600 N.E.2d 1130, found that failure to file or pursue a motion to suppress, which *could possibly have been granted* and which implicated matters critical to the defense, constituted ineffective assistance of counsel. *Id.* at 5205. Applying *Freeman* to the instant case, we must determine whether defendant's motion to suppress could possibly have been granted had it been litigated.

We first address the validity of the police officers' initial contact with defendant and search of her luggage incident to the initial contact.

The Fourth Amendment to the United States Constitution guarantees "the right of the [*13] people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures *** ." However, it is well-settled that not every encounter between a citizen and a law enforcement official implicates the Fourth Amendment guarantees against unreasonable searches and seizures. *United States v. Mendenhall* (1980), 446 U.S. 544, 552, 64 L. Ed. 2d 497, 100 S. Ct. 1870. Fourth Amendment scrutiny is not triggered where a police officer approaches a person in a public place, requests to speak to her, receives permission do so and then asks questions. *Florida v. Bostick* (1991), 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382; *Florida v. Royer* (1983), 460 U.S. 491, 499, 75 L. Ed. 2d 229, 103 S. Ct. 1319. The Fourth Amendment is not implicated because the person is not required to answer any questions and is free to walk away. *Id.* at 498. These encounters between police and citizens are considered consensual encounters; they do not involve coercion or restraint of liberty.

The fact that the person requesting information is a law enforcement official and identifies himself as such does not elevate a consensual encounter to the level of a seizure, [*14] which would require some level of objective justification. *Id.* at 497; *Mendenhall, supra* at 555. Similarly, a law enforcement officer's request to examine a person's identification does not make an encounter nonconsensual, *Immigration and Naturalization Service v. Delgado* (1984), 466 U.S. 210, 221-222, 80 L. Ed. 2d 247, 104 S. Ct. 1758, nor does the request to search a person's belongings. *Bostick, supra*. Only when a law enforcement official has restrained a person's liberty by either physical force or a show of authority will the guarantees of the Fourth Amendment be implicated. *Mendenhall, supra*, at 553. A person is seized within the contemplation of the Fourth Amendment only if, in view of the totality of the circumstances, a reasonable person would believe that he or she was not free to leave. 446 U.S. at 555. In *Mendenhall*, the Supreme Court set forth the following factors to consider in determining whether a seizure has occurred: the threatening presence of several officers; the display of a weapon; physical touching of the person; the use of language or tone of voice indicating that compliance with the officer's request might be compelled; uniformed [*15] attire of the officer; and summoning the citizen, as opposed to approaching the citizen and identifying oneself as a law enforcement officer. *Id.* Absent some evidence that one or more of these circumstances is present, a law enforcement officer's contact with a citizen cannot, as a matter of law, amount to a seizure of that person. *Id.*

In the instant case, the evidence shows that, upon their initial encounter with defendant, the officers were not in uniform; they approached defendant and did not summon her to them. In addition, her path was not blocked. The officers did not display a weapon; did not touch defendant; and did not use language or a tone of voice indicating that compliance might be compelled. The officers requested to see her ticket and identification; defendant readily provided this information. The officers did not physically restrain defendant or restrain her freedom of movement. No physical force was used, nor was there evidence which would suggest a show of authority sufficient to have conveyed to a reasonable person that, by the officers' conduct and words, defendant was not free to leave. Thus, the evidence offered at trial provides facts from which a trier [*16] of fact could conclude that, based on the totality of the circumstances, the officers' initial encounter with defendant was consensual and not a seizure under the Fourth Amendment.

Furthermore, testimony regarding the warrantless search of defendant's bag during the initial encounter provides facts from which a trier of fact could conclude that defendant's constitutional rights were not violated. The United States Supreme Court has held that, although searches generally violate the Fourth Amendment when they are conducted without a warrant and without probable cause, one exception to the general rule is the consent search. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041. In order to rely upon the consent exception to the Fourth Amendment's warrant

requirement, the government must prove by clear and positive evidence that the consent was freely and voluntarily given. *Royer, supra*, at 497. Such a matter is a question of fact to be determined from the totality of the circumstances:

> "Unlike the objective 'reasonable person' standard for determining whether there as been a seizure, the standard for determining the voluntariness of [*17] a consent is subjective. But evaluating the totality of the circumstances surrounding a purported consent requires consideration of the same factors relevant to a determination of whether there has been a seizure. In addition, the defendant must be aware of that to which he is consenting." *State v. Lawrence* (Nov. 21, 1995), 1995 Ohio App. LEXIS 5143, Franklin App. No. 95APA04-459, unreported (1995 Opinions 4961, 4969).

A trier of fact could conclude that the record contains no evidence to suggest that defendant's consent to the search of her luggage was anything but voluntary. Defendant readily agreed to the search of her bags without complaint or objection. There is no indication in the record, nor does defendant argue, that she was not aware of that to which she consented. Although defendant was not advised of her right to refuse consent, the United States Supreme Court has held that knowledge of the right to refuse consent is a factor to be considered but is not a requirement of voluntary consent. *Schneckloth, supra*, at 227. Based upon the facts as presented at trial, a trier of fact could conclude that the search of defendant's luggage at the time of the initial [*18] encounter was pursuant to defendant's voluntary consent.

Thus, we find that defendant's motion to suppress, based upon her argument that the initial encounter with the police and the search of her luggage incident to that encounter violated her constitutional rights, was not meritorious and, therefore, could not possibly have been granted. Accordingly, defendant's claims that counsel was ineffective for failure to litigate the motion to suppress based on these issues must fail.

However, a consensual encounter may ripen into a seizure depending upon the subsequent conduct of the officers or authorities. While the facts suggest defendant consented to the officers' initial request to search her luggage, if a trier of fact concluded that the subsequent sequence of events constituted an unlawful seizure, the evidence obtained after the unconstitutional seizure would have be suppressed as the "fruit of the poisonous tree." *State v. McMillan* (1993), 91 Ohio App. 3d 1, 5-6, 631 N.E.2d 660.

As previously noted, a person is "seized" within the meaning of the Fourth Amendment, when, in view of all the surrounding circumstances, a reasonable person would believe she was not free to leave. [*19] *Mendenhall, supra*, at 554. A Fourth Amendment seizure will not be unconstitutional if it was reasonable. *Terry v. Ohio* (1968), 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868. To establish the existence of reasonable suspicion for a seizure, a police officer must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 21.

A meritorious argument could be made that defendant was seized after the officers initially searched her luggage and found no contraband. Defendant asked the officers' permission to use the telephone - a clear indication that she believed she was not free to leave the area. Although defendant was granted permission to use the telephone, Detective Hagan summoned Sergeant Luzio to escort defendant to the telephone. Furthermore, when it was discovered that defendant had gone into the restroom alone, three police officers, one port authority officer and one airport communications technician entered the restroom after her. Defendant was then told by the officers that she had to go to the airport narcotics office; she was not simply asked to accompany them.

[*20] These facts could suggest to a trier of fact that the officers' conduct following the initial encounter with defendant could have been considered by defendant to be coercive, and a threatening "show of authority," under *Mendenhall*, so that defendant was effectively "seized." Under these conditions, defendant's belief that she was not free to leave in such a situation would be quite reasonable.

Having determined that the evidence provides facts from which a trier of fact could conclude that a seizure did indeed take place, we must next determine whether the facts would allow a trier of fact to conclude that such seizure was reasonable. To be reasonable, a seizure must be supported by "a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia* (1980), 448 U.S. 438, 440, 65 L. Ed. 2d 890, 100 S. Ct. 2752. The facts indicate that even though no contraband was found during the officers' initial search of defendant's luggage, the officers still suspected that defendant was carrying drugs. Detective Hagan testified that defendant, upon her arrival at the airport, exhibited certain conduct and characteristics consistent with those [*21] of a drug courier. A drug courier profile has been established to aid the Federal Drug Enforcement Administration and local narcotics units in identifying drug couriers upon their arrival at monitored airports. Among the characteristics which arouse suspicion of illegal drug

activity are: an arrival from a notorious source of narcotics; being one of the first or last to deplane; carrying little or no luggage; looking around, surveying the terminal, or exhibiting signs of extreme nervousness; arriving from a resort area with no tan; purchasing an airline ticket with cash; traveling under an assumed name; an early morning arrival when narcotics security is typically relaxed; making a phone call immediately upon reaching the terminal; and having prior drug arrests. See *Mendenhall, supra*, at 547; *State v. Frost* (1991), 77 Ohio App. 3d 644, 647, 603 N.E.2d 270; *State v. Hassey* (1983), 9 Ohio App. 3d 231, 232, 459 N.E.2d 573.

During his trial testimony, Detective Hagan specifically identified only three characteristics indicative of a drug courier: defendant arrived from a "source city" for cocaine; defendant arrived on an early morning flight, when law enforcement activity [*22] is relaxed; defendant looked at him and his undercover partner several times as she got her luggage and hurried away from the baggage carousel toward the exit. However, during the course of the consensual encounter, the officers discovered that defendant fit several other characteristics consistent with the drug courier profile: defendant appeared to be nervous; her airline ticket had been purchased in another name; and the ticket had been paid in cash.

However, while similarity with the drug courier profile is sufficient to initiate further investigation, this court has held that merely because a suspect fits several of the characteristics contained in the profile, does not alone provide police officers with the reasonable suspicion required to justify an investigative stop. *Hassey* at 235. Many of the characteristics contained in the profile, when taken singularly or when only a few are observed, describe conduct that could easily be exhibited by various types of travelers, all with innocent motives. *Reid, supra*, at 441. As such, police officers must rely on additional factors to provide the reasonable suspicion to make a valid stop. *Hassey*, at 235.

In the instant case, [*23] the facts in the record suggest that the officers continued to detain defendant based solely upon their observation that defendant exhibited certain characteristics consistent with that of a drug courier. No evidence suggests that additional factors existed upon which the officers could justify the continuing detention. Defendant cooperated fully during the initial encounter with the police and consented to the search of her luggage. Having found no contraband during the initial search, and having no additional factors upon which to rely to continue the investigation of defendant, it appears that the officers no longer maintained a reasonable suspicion that defendant was engaged in criminal activity. These facts, if presented before a trier of fact at a suppression hearing, could provide a meritorious argument that the stop was unreasonable.

Having determined that the facts could have provided a meritorious argument that the second search of defendant's luggage was preceded by an impermissible seizure of defendant's person, it is reasonable to conclude that defendant could have presented a meritorious argument that the evidence obtained after the unconstitutional seizure should have [*24] been suppressed as the "fruit of the poisonous tree." *McMillan, supra*. Thus, the motion to suppress should have been litigated. No reasonable trial tactic explains defense counsel's failure to litigate the motion to suppress. Had the motion to suppress been granted, it is reasonably probable that the charge against defendant would have been dismissed. Accordingly, defense counsel's failure to litigate the motion to suppress was both deficient and prejudicial to defendant. Accordingly, first assignment of error is sustained.

The second argument raised by defendant in her first assignment of error suggests that defense counsel breached an essential duty by failing to object to irrelevant, inadmissible and unfairly prejudicial testimony. More specifically, defendant argues that defense counsel was ineffective for failing to object to Detective Hagan's testimony regarding the drug courier profile.

Testimony offered by law enforcement officials regarding the use of "drug courier profiles" for the purpose of explaining why a particular person was approached as a possible drug courier is well accepted. *Mendenhall, supra*, at 547, fn. 1. Moreover, the instant case is clearly distinguishable [*25] from *State v. Roquemore* (1993), 85 Ohio App. 3d 448, 620 N.E.2d 110. In *Roquemore*, the prosecution's expert witness testified after the fact about a crime scene assessment he had conducted by looking at crime scene photos, police reports and a pathological report. The expert witness used the "profile" to give an opinion that a crime occurred. *Id*. at 452. In the instant case, Detective Hagan's testimony concerning the drug courier profile was not offered on the issue of guilt or innocence, but only to explain his use of the drug courier profile characteristics in deciding to approach defendant. Thus, defense counsel was not ineffective for failure to object to this testimony.

By the second assignment of error, defendant contends that the trial court erred in failing to conduct a hearing and rule on the motion to suppress. Given our disposition of the first assignment of error, however, the second assignment of error is moot, and we decline to address it. App.R. 12(A).

By the third assignment of error, defendant contends that her conviction was not supported by sufficient evidence and was against the manifest weight of the

evidence. However, we cannot make such a determination [*26] as the present time. Once a trial court hearing is held on the suppression motion and ruled on according to law, defendant may or may not be convicted of the crime for which she was indicted. For this court to decide those issues at this time would be premature. Accordingly, defendant's third assignment of error is overruled.

For the reasons set forth herein, defendant's first assignment of error is sustained, the second assignment of error is moot, the third assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is reversed and the cause is remanded to conduct a suppression hearing and to determine whether defendant was seized and whether such seizure was lawful.

Judgment reversed;

cause remanded.

YOUNG and CLOSE, JJ., concur.