LEXSEE 1984 OHIO APP LEXIS 11133

State of Ohio, APPELLEE, VS Michael L. Weirich, APPELLANT

C.A. NO. WMS-84-8

COURT OF APPEALS OF OHIO, SIXTH DISTRICT, COUNTY OF WILLIAMS

1984 Ohio App. LEXIS 11133

October 5, 1984

PRIOR HISTORY: [*1]

APPEAL FROM BRYAN MUNICIPAL COURT, NO. TR83-C-6408

JUDGES:

John J. Connors, Jr., P.J., Peter M. Handwork, J., CONCUR.

Andy Douglas, J., concurs in judgment only.

OPINION:

DECISION AND JOURNAL ENTRY

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

This is an appeal from the Bryan Municipal Court of Williams County, Ohio. Michael L. Weirich, appellant herein, was arrested on November 26, 1983, and charged with a violation of R.C. 4511.19(A)(1) and (3).

On December 1, 1983, appellant entered a plea of not guilty, and filed a motion to suppress all testimony of the arresting officer as well as the results of the intoxilyzer tests made after his arrest. Appellant filed a similar motion on February 1, 1984. n1 The motion to suppress addressed the question of whether the arresting officer had probable cause to stop the appellant.

The case came to trial on February 7, 1984.Appellant requested that the trial court hold a hearing and rule upon the motion to suppress before proceeding to trial on the charge against him. The trial court, over appellant's objection, [*2] chose instead to rule upon the motion during trial. Thereupon, the state called the arresting officer to the witness stand, and questioned him as to the existence of probable cause in stopping the appellant. During the state's direct examination of the officer, the trial court found that the state had established probable cause. The motion to suppress was subsequently overruled, and appellant found guilty as charged.

Appellant was sentenced, and then filed a timely notice of appeal in this court. Appellant assigns as error the following:

"THE COURT ERRED IN HEARING BOTH THE MOTION TO SUPPRESS CONTEMPORANEOUSLY WITH THE TRIAL OF THE CASE."

Appellant's argument, in essence, is two-fold: first, appellant states that the trial court did not permit him to present any evidence as to whether or not the arresting officer had probable cause to stop appellant. Second, appellant states that the trial court did not permit appellant to cross-examine said officer before the trial court made a determination on the motion to suppress.

Thus, the issue presented to us for review may be stated as follows: "Whether the trial court commits prejudical error if said court fails to rule upon [*3] the defendant's motion to suppress evidence prior to trial - where said evidence was allegedly obtained without probable cause, in violation of the defendant's fourth amendment right to be secure against unreasonable seizures - before the defendant, in the course of the trial, has an opportunity to present any evidence on his own behalf and before he may cross-examine the witness against him?"

First, we turn our attention to Crim. R. 12:

"(E) Ruling on motion. A motion made before trial other than a motion for change of venue, shall be timely determined before trial. * * *"

We note that the plain language of Crim. R. 12(E) does not vest the trial court with any discretion as to when such motions are to be determined. n2

In the case sub judice, a particularly good reason why trial courts must follow Crim. R. 12(E) is illustrated. As

noted, supra, appellant objected to having the motion to suppress submitted contemporaneously with the trial on the grounds that a ruling on the motion would probably lead to a final disposition of the case.Surely, this a good reason to rule upon the motion prior to, and independently of, the trial of the case. Counsel for appellant explained [*4] to the trial court:

"[I]f the Court overrules the motion we'll probably ask the Court for a short recess and seriously consider entering a no contest plea . . . [.]"

The case went to trial, and before the state had rested its case, the motion was overruled. Thereupon, counsel for appellant interrupted the proceedings and requested a recess, so that his client might consider withdrawing his plea of not guilty and entering a plea of no contest. The trial court responded:

"[T]he Court will not receive a no contest plea. If the defendant wishes to enter a guilty plea the Court will receive that."

We find that Crim. R. 12(E) is intended to prevent such prejudice to a defendant. We note the case of State v. Young (1966), 8 Ohio App. 2d 51, wherein the court addressed "the inherent danger of unnecessarily delaying a hearing on a motion to suppress." Young, supra, at 53. We note the language stated in the Young case, supra, which is as follows:

"* * * [W]here the evidence was heard by the court, the defendant was at least entitled to an independent hearing upon the motions without submitting himself at the trial itself and without having the same evidence presented upon [*5] the motions used in the determination of his guilt or innocence at the trial. The failure to conduct a hearing on the motions to suppress prior to the trial, coupled with the subsequent disallowal of any independent hearing upon such motions, effectively denied the defendant the right to refute any of the testimony presented by the prosecution upon the issues surrounding the arrest, the search, and probable cause, and thus prevented the defendant from challenging the constitutional validity of the evidence used to establish his guilt." Young, supra, at 54.

Second, we address the question of whether the appellant was given an opportunity to be heard on his motion to suppress the evidence. After the state had rested its case, the trial court offered appellant the opportunity to cross-examine the arresting officer. The trial court also reiterated that the motion had been overruled. The court addressed counsel for appellant as follows:

"[Y]ou have the opportunity to present evidence on the question of probable cause at this time if you wish to do so."

Furthermore:

"The witness chair is right there, . . . if you have any witnesses you wish to put in it."
(Appellant chose [*6] not to present any evidence, and informed the court that he would preserve the issue as to the court's disposition of the motion to suppress on appeal.)

Appellee has briefed this court on several cases which stand for the proposition that evidence which is excluded may not be assigned as error unless a proffer is made as to what said evidence would have shown. n3 We do not question the soundness of this reasoning; however, we find it inapplicable to this case. Appellant had an opportunity to present whatever evidence he chose as to probable cause (or lack thereof), but only after the trial court had overruled a motion to suppress it. Furthermore, it is clear from a careful examination of the record, that at no time during these proceedings did the trial court indicate that the motion would be reconsidered in light of whatever evidence appellant presented. If a defendant's "opportunity to be heard" is to have any meaning, it must mean that this "opportunity" is accorded before a determination is made against him. To require a defendant to place into the record evidence as to probable cause, where said evidence will carry no discernible weight to the trial court's determination [*7] -- precisely because that determination has already been adversely made -- is to require the performance of an empty gesture. Such an opportunity is specious.

Finally, we note the case of Edgerton v. DeLaet, unreported decision, Williams County Court of Appeals (6th Dist.), C.A. No. WMS-82-12, decided October 22, 1982. In Edgerton, supra, this court held that so long as a defendant is accorded notice and an opportunity to be heard, "[t]he fact that both the hearing on the motion to suppress and the trial itself were heard at the same time may have inconvenienced appellant, but it certainly did not amount to a violation of due process." We recognize that the due process clause of the fourteenth amendment may not require a pre-trial hearing and determination of a motion to suppress. We find, however, that Crim. R. 12(E), does so require. We hold, therefore, that the failure to determine a defendant's motion to suppress before trial denies defendant a fair trial.

On consideration whereof, the court finds that appellant was prejudiced and prevented from having a fair trial. The judgment of the Bryan Municipal Court of Williams County is reversed, and cause is remanded to said [*8] court for further proceedings in accordance with law and not inconsistent with this decision. Costs of this appeal are taxed against appellee, pursuant to App. R. 24.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate

Procedure.See also Supp. R. 4, amended 1/1/80.

n1 Appellant complied with Crim. R. 12; the motion to suppress was filed before trial. Crim. R. 12:

"(B) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:

* * *

"(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegaly obtained. Such motion shall be filed in the trial court only."

See also State v. James (1980), 68 Ohio App. 2d 227, at the first paragraph of the syllabus.

n2 Fed. R. Crim. P. 12(e) does allow the trial court to exercise its discretion; however, Rules 12(e)'s "for good cause" provision is strictly construed in favor of the movant-defendant. Rule 12(e) states as follows:

"(e) Ruling on motion. [*9] A motion made before trial should be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. * * *"

See, e.g., United States v. Fay (10th Cir., 1977), 553 F. 2d 1247 (unless trial court shows good cause for delaying the determination until trial, defendant is prejudiced.)

n3 See State v. Hipkins (1982), 69 Ohio St. 2d 80, 82-83; see also Pokorny v. Local 310 (1973), 35 Ohio App. 2d 178, at the third paragraph of the syllabus.