

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090389
	:	TRIAL NO. B-0900941
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
AUBURY GAINES,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

After his suppression motion was denied, defendant-appellant Aubury Gaines pleaded no contest to possession of cocaine.<sup>2</sup> The court accepted Gaines's plea, found him guilty, and sentenced him to two years' community control along with a six-month driver's license suspension. In this appeal, Gaines contends that his statements made to police should have been suppressed because he was given an inadequate *Miranda* warning. We agree.

In February 2009, Officer Sandra Stevenson responded to a 911 call reporting that shots had been fired in the vicinity of several apartment complexes. On arrival, bystanders directed Stevenson to a green SUV that was possibly involved in the shooting. Stevenson traveled toward the Hunter's Court apartment complex, and as

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> R.C. 2925.11(A).

she exited from her squad car, she saw a man, whom Stevenson later identified as Gaines, walk from behind the green vehicle toward an apartment building. The man appeared to be holding a white bag.

As Stevenson arrived, she contemporaneously radioed headquarters, advising that there were numerous subjects present, and that she had seen a “subject walking from the SUV involved in the shooting to[ward] the last house on the right.” When another responding officer asked Stevenson what the man walking away from the scene was wearing, Stevenson responded, “I didn’t notice because [I] was too busy keeping [my] eyes on everybody else.”

As Stevenson was investigating the shooting and talking with the other subjects, Gaines appeared from behind one of the apartment buildings and approached the scene. Gaines was told to remain at the scene while Stevenson left to search for evidence. Stevenson searched an area behind the apartment building that she had seen Gaines walk toward and retrieved a white bag containing marijuana and crack cocaine hidden in a barbecue grill.

Meanwhile, another officer arrested Gaines on an outstanding warrant for failure to appear and placed him in the back seat of a squad car. Stevenson returned with the bag of drugs and advised Gaines that he had the “right to remain silent; anything you say can and will be held against you in a court of law; if you cannot afford an attorney one will be appointed for you.” Gaines acknowledged that he understood his rights, and he eventually told Stevenson that he had placed the bag behind the apartment building because the other men standing around the green car had asked him to do so.

### ***I. The Suppression Hearing***

In moving to suppress his statements, Gaines argued that the statements made, and evidence gathered, were the result of an unlawful search, seizure, and interrogation.

Stevenson testified that she had properly given *Miranda* warnings to Gaines, and when questioned about them, she recited from memory the warnings she had given. Though Stevenson testified that Gaines had been properly advised of his rights, when testifying at the suppression hearing, she omitted from her recitation that Gaines had the right to an attorney during questioning. As we have noted, Stevenson testified that she had given the following warning: you have the “right to remain silent; anything you say can and will be held against you in a court of law; [and] if you cannot afford an attorney one will be appointed for you. Do you understand your rights?”

On appeal, Gaines argues that his statements should have been suppressed because he was not properly informed of his right to an attorney during questioning.

### ***II. Miranda Warnings***

Based on Officer Stevenson’s testimony, we hold that Gaines was inadequately advised of his *Miranda* rights. Failure to convey the “right to an attorney” deprives the defendant of basic information that has been held essential since *Miranda v. Arizona*.<sup>3</sup> Recently, the United States Supreme Court held that a *Miranda* warning must reasonably convey to the suspect that he has the right to the presence of an attorney during questioning.<sup>4</sup> In that case, the right-to-an-attorney warning was properly conveyed when the detectives informed a suspect that he had

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<sup>3</sup> *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602.

<sup>4</sup> *Florida v. Powell* (2010), \_\_\_ U.S. \_\_\_, 130 S.Ct. 1195, 1204.

“the right to talk to a lawyer before answering [any questions].”<sup>5</sup> But in this case, Stevenson only informed Gaines that “if you cannot afford an attorney one will be appointed for you,” skipping over his right to an attorney. This warning did not adequately convey the right to an attorney during questioning.

We note that, at the suppression hearing, Gaines did not object to the inadequate *Miranda* warning as Stevenson was testifying, and that because the error went without objection, we review the proceedings for plain error. An error is plain error only if it is obvious,<sup>6</sup> and if “but for the error, the outcome of the trial clearly would have been otherwise.”<sup>7</sup> Under this rule, the defendant bears the burden of showing how the error affected his substantial rights, and even if this burden is met, the court has the discretion to disregard the error or to correct it to “prevent a manifest miscarriage of justice.”<sup>8</sup> Thus, we will overturn a conviction due to plain error only if the outcome clearly would have been different absent the error.<sup>9</sup>

Although we apply a plain-error analysis, the state argues that even under harmless error, a standard far more deferential to the defendant, failure to suppress the statement was harmless because there was substantial evidence that would have proved Gaines’s guilt. When a defendant objects to an error at trial, we review it under a “harmless error” standard and assess whether the error had an effect on the defendant’s substantial rights.<sup>10</sup> If the defendant satisfies this burden, the state must demonstrate that the error did not prejudice the defendant.<sup>11</sup> Though the state argues that Gaines cannot show prejudice under the harmless-error standard, we are

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<sup>5</sup> Id. at 1197.

<sup>6</sup> *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶71.

<sup>7</sup> *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus.

<sup>8</sup> *State v. Perry*, 101 Ohio St. 3d 118, 2004-Ohio-297, 802 N.E.2d 643.

<sup>9</sup> *State v. Miller*, 1st Dist. No. C-070691, 2008-Ohio-5899.

<sup>10</sup> *Perry*, supra, at fn.8.

<sup>11</sup> Id.

convinced otherwise. In fact, we hold that, under the more stringent plain-error analysis, Gaines's conviction was not free from prejudice.

Stevenson testified that she saw a man carrying a white bag and walking away from an SUV that had two men standing nearby. The man was walking toward the apartment complex, but she was unable to notice what he was wearing because she "was too busy keeping [her] eyes on everybody else." Then Gaines walked to the scene and stood near the SUV. She later identified Gaines as the same man she had seen walking toward the complex, and after Gaines was detained, she found a bag of drugs hidden in a barbecue grill behind the building.

On these facts alone, there appear to be factual questions that would have changed the outcome of this case if Gaines's statements had been suppressed. First, was Gaines the man actually seen walking behind the apartment complex? Second, even if he was the man that Stevenson identified, did the white bag found behind the building belong to Gaines? And finally we note that Gaines would have been on better ground to negotiate a plea bargain or to enter a not-guilty plea had the trial court suppressed his statements. Therefore, we are convinced that the failure to suppress Gaines's statements was outcome-determinative. We reverse the judgment of the trial court and remand this case for further proceedings in accordance with the law.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on May 12, 2010

per order of the Court \_\_\_\_\_  
Presiding Judge