

[Cite as *State v. Mallory*, 2010-Ohio-4249.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93736

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MYICHEL MALLORY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518130

BEFORE: Blackmon, J., Rocco, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 9, 2010

ATTORNEY FOR APPELLANT

John F. Corrigan
19885 Detroit Avenue, Apt. #335
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Nathaniel Tosi
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Myichel Mallory appeals his conviction for aggravated robbery and assigns the following two errors for our review:

“I. Whether the trial court violated appellant’s constitutional right to exercise his Fifth Amendment privilege against self-incrimination pursuant to the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution when the State of Ohio deliberately sought to inform appellant’s jury that he refused to make a written statement after being advised of his constitutional rights.”

“II. Whether appellant was prejudiced by ineffective assistance of counsel.”

{¶ 2} Having reviewed the record and relevant law, we affirm Mallory’s conviction. The apposite facts follow.

Facts

{¶ 3} On November 2, 2008, the Family Dollar Store located at Miles Avenue and East 93rd Street was robbed. The cashier and store manager both testified that a masked man entered the store with a gun and ordered money from the safe. Because the safe took too long to open, the manager gave him the money from the cash registers. After the robber left, one of the customers ran out of the store and saw the man escape on a bike. The customer told the

police which direction the robber went. The robbery was recorded on the store security camera. However, the video was not clear enough to be able to see the face of the robber.

{¶ 4} The officers searched the area streets looking for the suspect. One of the officers came upon a witness who said she saw a man trying to fix a bike, which was parked on the sidewalk. The police then located the suspect and a chase ensued. He was eventually captured. Mallory had a bag of money containing \$255.11, consisting of 100, one dollar bills, \$55.11 in change, and several twenty and ten dollar bills. He told the arresting officer without being questioned, "I'm homeless. What am I supposed to do? I can't find a job."

{¶ 5} When Detective Joseph Daugenti arrived on the scene, Mallory was in the back of the zone car. He read Mallory his Miranda rights then proceeded to question him. He stated that Mallory was very cooperative. He asked Mallory why he did it, and Mallory responded that he was homeless and needed bus fare and food. Mallory then proceeded to show the officers the route he took to the store and the route he took to escape. He showed them where he changed his clothes immediately after the robbery. He also showed the officers where he threw his gun. Because the area was heavily wooded, the gun was not recovered. However, Mallory admitted the gun was a .380

semiautomatic gun. The video of the robbery indicated the gun used was the exact size and style of a .380 semiautomatic handgun.

{¶ 6} Mallory testified that he told Detective Daugenti that he committed the crime. However, he stated the admission was a lie, and that he only admitted to committing the crime because he was homeless and it was winter. Jail would provide him with shelter and food.

{¶ 7} The jury found Mallory guilty of aggravated robbery and the accompanying firearm specification. The trial court sentenced him to three years for the aggravated robbery count and three years for the firearm specification to be served consecutively for a total of six years in prison.

Miranda Violation

{¶ 8} In his first assigned error, Mallory argues he should be discharged because his due process rights were violated during his trial. He raises the issue whether the detective's testimony that he refused to give a written statement to the officer during his arrest violated due process under *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91.

{¶ 9} At the time of his arrest, Mallory was Mirandized, and thereafter he waived his rights. He gave the detective a full oral confession to the crime and two days later refused to give a written statement. During the trial, when the state raised his failure to give a written statement, Mallory did not

object. Unless we can find prejudice, Mallory's assigned error fails; consequently, plain error does not exist.

{¶ 10} In *State v. Sims*, Cuyahoga App. No. 84090, 2005-Ohio-1978, a case somewhat similar to this one, we held that testimony regarding defendant's refusal to sign a written statement was an isolated occurrence and not offered to establish defendant's guilt, citing *State v. Ervin*, Cuyahoga App. No. 80473, 2002-Ohio-4093. In *Ervin*, we adopted the "single isolated comment" standard and held when the evidence of guilt is overwhelming, a single reference to a defendant's post-arrest silence does not violate due process; our standard is one of harmless error.

{¶ 11} Later in *State v. Person*, 167 Ohio App.3d 419, 2006-Ohio-2889, 855 N.E.2d 524, we clarified both *Sims* and *Ervin* and held as a matter of law that prejudice occurs automatically when due process is violated. In *Person*, the defendant was Mirandized, invoked his rights, and later at trial the state commented on his refusal to make a statement. Citing *Doyle*, we made it clear that once a defendant invokes his silence, the state shall not penalize him by commenting on his silence at trial.

{¶ 12} In *Person*, we distinguished *Sims* and held that the "single isolated comment" was inapplicable because *Person* had never waived his rights. Moreover, there was no overwhelming evidence of *Person's* guilt at

trial. Thus, the error in *Person* was harmful, and the tainted evidence was used to establish his guilt. We believe that Mallory's case is more like *Sims*, and as such, the error was harmless.

{¶ 13} Mallory is correct that the prosecution elicited testimony from the detective that he had refused to give a written statement and that the prosecution upon cross-examination of him referenced his refusal to make a written statement for impeachment purposes.

{¶ 14} Nevertheless, we must look at the record and determine whether but for the tainted evidence Mallory would not have been convicted. The tainted evidence being the reference to the refusal to give a written statement.

{¶ 15} The strongest evidence the state had was Mallory's confession to the crime that he gave freely and accurately after he was Mirandized. Mallory showed the detective what route he took to and from the store. He showed where he changed his clothes after the robbery and the area where he threw the gun. Upon being arrested, he told the arresting office, "I'm homeless. What am I supposed to do? I can't find a job." He was also found with a bag of money containing \$255.11. The amount included 100, one dollar bills, \$55.11 in change, and several twenty and ten dollar bills.

{¶ 16} Although the gun was not recovered, Mallory's description of the gun he used looked like the type of gun used as shown on the store's videotape.

He was seen leaving the scene on a bike in the direction he was apprehended and a witness told the officer he saw a male trying to fix a bike. Mallory also testified at trial where he admitted that he told Detective Daugenti that he committed the robbery. Consequently, Mallory's oral confession and the testimony of the state's witnesses were sufficient to inevitably lead to a finding of Mallory's guilt. Thus, the comment was harmless, and this assigned error is overruled.

Ineffective Assistance of Counsel

{¶ 17} In his second assigned error, Mallory argues his counsel was ineffective for failing to object to the state's questions regarding Mallory's refusal to place his oral statements into writing.

{¶ 18} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance. *Id.* at paragraph two of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.

Id. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343-674, 693 N.E.2d 267.

{¶ 19} We determined in the first assigned error that no error occurred by the state questioning the detective regarding Mallory's refusal to reduce his statements to writing. Therefore, Mallory has not shown but for his attorney's error, the result of the proceedings would have been different. Accordingly, Mallory's second assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR