[Cite as *State v. James*, 2010-Ohio-5361.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94400

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

D'JUAN JAMES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-530488

BEFORE: Dyke, J., Blackmon, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 4, 2010

ATTORNEY FOR APPELLANT

Mary Elaine Hall, Esq.
645 Leader Building
526 Superior Avenue, East
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Erica Barnhill, Esq.
Assistant County Prosecutor
1200 Ontario Street
Cleveland, Ohio 44113

ANN DYKE, J.:

{¶ 1} Defendant D'Juan James appeals from his conviction for receiving stolen property. For the reasons set forth below, we affirm defendant's conviction, but we reverse in part and remand to the trial court for the limited purpose of the proper imposition of postrelease control pursuant to R.C. 2929.191.

{¶ 2} On October 30, 2009, defendant was charged with one count of receiving a stolen motor vehicle, in violation of R.C. 2913.51(A). He pled not guilty, and the matter proceeded to a jury trial on December 15, 2009.

{¶ 3} The state presented the testimony of Richard Steidel, the owner of the vehicle, and Lyndhurst Police Officers Mark McConville and Craig Traci.

{¶ 4} Richard Steidel testified that at approximately 11:15 p.m. on October

24, 2009, he left work and returned to his home on Highland Road in Richmond Heights about half an hour later. Steidel parked his 1997 red Dodge Intrepid in the driveway, with the keys in the ignition, and began unloading groceries. A few moments later, he heard his car being started. The vehicle was gone by the time Steidel got outside. Steidel called 911, and less than one hour later, the police informed Steidel that the vehicle had been recovered near Richmond Mall, about ten minutes away.

{¶ 5} Officer McConville testified that the Lyndhurst police monitor radio traffic of nearby cities, and at around midnight, he was monitoring Richmond Heights radio traffic. McConville heard a broadcast that a dark red or maroon Intrepid was stolen from Highland Road. A few minutes later, Officer McConville observed a red or dark maroon Intrepid being driven by a black male. McConville further observed that the driver was wearing a black knit cap and a black jacket.

{¶ 6} McConville activated the lights of his police cruiser and began following the Intrepid. The vehicle crossed over three lanes of traffic and sped down an alley. McConville pursued the vehicle and observed it stop in the alley next to La Fiesta Restaurant. McConville further observed the driver exit the vehicle and run to the north, behind the restaurant.

{¶ 7} McConville radioed that he was in pursuit, exited his vehicle, and fled after the driver. According to Officer McConville, he received a radio transmission approximately 30 seconds later indicating that Officer Traci had

apprehended a male who matched the description of the fleeing driver. Officer McConville went to the location of the stop and determined that this individual, whom he identified in court as defendant, matched the description of the driver. No other pedestrians were in the area.

{¶ 8} On cross-examination, Officer McConville testified that he only observed the man in the vehicle for about three or four seconds.

{¶ 9} Officer Traci testified that he was proceeding north on Richmond Road when he heard Officer McConville's broadcast of the suspect fleeing on foot. As a result of obtaining this information, Officer Traci turned east onto Wilson Mills Road and, seconds later, observed a male matching the description of the suspect at the southwest corner of the Firestone and La Fiesta Restaurant parcel. According to Officer Traci, no other pedestrians were in this area. Officer McConville arrived on the scene and identified this man, identified in court as defendant, as the driver he had seen in the Intrepid. Officer Traci told the defendant to get on the ground, but he refused to do so.

{¶ 10} On cross-examination, Officer Traci admitted that his police dog was not used in this matter to track the scent from the car to an assailant. The police officer stated that the dog was trained for narcotics and could not "put a human scent inside a vehicle," but could "track the route that the person fleeing took and where that person ended up when the scent was lost." He also admitted that the Richmond Heights Police Department did not check for fingerprints.

{¶ 11} Defendant was subsequently convicted of the charge of receiving

stolen property, a felony of the fourth degree. The trial court sentenced him to 18 months imprisonment and a term of postrelease control. At sentencing, the trial court stated:

{¶ 12} "[W]hen you get out, you are going to be monitored by the Parole Board, the Adult Parole Board. They are going to monitor you for three years.

{¶ 13} "If you violate any of the terms and conditions of parole, they will bring you back and sentence you to one-half of anything I just sentenced you to."

{¶ 14} The court's journal entry of sentencing stated:

{¶ 15} "Postrelease control is part of this sentence for up to 3 years."

{¶ 16} Defendant now appeals and assigns three errors for our review.

{¶ 17} For his first assignment of error, defendant asserts that the trial court incorrectly imposed a term of postrelease control sanction of "up to three years" and that this error cannot be remedied pursuant to the nunc pro tunc procedures outlined in R.C. 2929.191(C) and *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. In opposition, the state maintains that the trial court correctly imposed postrelease control and that no correction is needed.

{¶ 18} Pursuant to R.C. 2967.28(C), the conviction for receiving stolen property, a fourth-degree felony, subjected appellant to postrelease control for "up to" three years. See, also, *State v. Yeager,* Summit App. No. 25125, 2010-Ohio-3848.

{¶ 19} R.C. 2967.28(C) provides:

{¶ 20} "Any sentence to a prison term for a felony of the third, fourth, or fifth

degree * * * shall include a requirement that the offender be subject to a period of postrelease control of *up to three years* after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of postrelease control is necessary for that offender." (Emphasis added.)

{¶ 21} Under this subsection of the statute, the trial court has no discretion as to the length of the postrelease control, as that is determined by the parole board. *State v. Robertson,* Medina App. No. 07CA0120-M, 2009-Ohio-5052; cf. *State v. Garcia,* Hancock App. No. 5-01-12, 2001-Ohio-2262; *State v. Hite* (Dec. 14, 2000), Cuyahoga App. No. 77374.

{¶ 22} Pursuant to R.C. 2929.19(B)(3)(d), a trial court must, at his sentencing hearing, notify a defendant who is convicted of a third, fourth, or fifth degree felony that he may be supervised under R.C. 2967.28.

{¶ 23} At the sentencing hearing in this matter, the trial court notified defendant at the time of sentencing that he would be subject to three years of postrelease control and that if he violated the terms and conditions of postrelease control, he could be sentenced for up to one-half of his prison term. The trial court therefore complied with its duties under R.C. 2929.19(B)(3)(d) and (e).

{¶ 24} With respect to the journal entry, defendant insists that the trial court failed to impose a definite term of postrelease control. *State v. Sweeney,* Cuyahoga App. No. 92265, 2009-Ohio-5963. Under R.C. 2967.28, defendant was subject to a discretionary period of up to three years of postrelease control.

State v. McCauley, Cuyahoga App. No. 86946, 2006-Ohio-4587. We therefore cannot say that the trial court erred in indicating that postrelease control is part of the sentence for up to three years. *State v. Robertson,* supra; cf. *State v. Garcia,* supra; *State v. Hite*, supra.

{¶ 25} We note, however, that the trial court erred by failing to include in the journal entry issued in this matter the term of incarceration that could be imposed if defendant violated the terms of postrelease control. *State v. Hairston,* Cuyahoga App. No. 94112, 2010-Ohio-4014; *State v. Holloway,* Cuyahoga App. No. 93809, 2010-Ohio-3315.

{¶ 26} In *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, at paragraph two of the syllabus, the Supreme Court addressed R.C. 2929.191, the statutory remedy to correct the trial court's failure to properly impose postrelease control, and held, in relevant part, as follows:

{¶ 27} "For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." Id.

{¶ 28} The *Singleton* Court stated:

{¶ 29} "Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, those who

did not receive notice that the parole board could impose a prison term for a violation of postrelease control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates postrelease control." Id.

{¶ 30} The Court further held that the R.C. 2929.191 hearing pertains only to the "flawed imposition of postrelease control" and that the legislature intended to "leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose postrelease control at the original sentencing." Id.

{¶ 31} Defendant asserts that the remedy outlined in *Singleton* is unconstitutional and cannot be applied herein. This court has repeatedly applied the remedy outlined in *Singleton*, so we reject this contention. *State v. Hairston,* supra; *State v. Holloway,* supra.

{¶ 32} For his second assignment of error, defendant asserts that the trial court erred in denying his motion for acquittal because the state presented

insufficient evidence that he received a stolen motor vehicle.

{¶ 33} Pursuant to Crim.R. 29(A):

{¶ 34} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶ 35} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace,* 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386.

{¶ 36} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins,* 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 37} The elements of receiving stolen property are set forth in R.C. 2913.51 as follows:

{¶ 38} "(A) No person shall receive, retain or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through the commission of a theft offense.

{¶ 39} "* * *

{¶ 40} "(C) Whoever violates this section is guilty of receiving stolen property. * * * If the property involved is a motor vehicle, * * * receiving stolen property is a felony of the fourth degree."

{¶ 41} In this matter, defendant asserts that there was insufficient evidence to convict him because he was not found in the stolen vehicle but was arrested at another location, the police dog did not alert to his scent, and his fingerprints were not found in the stolen car.

{¶ 42} Here, the state's evidence linking defendant to the stolen car was that defendant was apprehended approximately 30 seconds later in the same parking lot where the car was abandoned and that he matched the description obtained by Officer McConville. This evidence, though circumstantial, strongly links defendant to the stolen car, especially in light of the evidence that no others were in this area. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded that defendant had possession and control of the stolen vehicle. Cf. *State v. Roby,* Putnam App. No. 12-09-09, 2010-Ohio-1498.

{¶ 43} With regard to defendant's contention that the police dog did not link his scent to the motor vehicle, the record indicates that the dog was not used to determine scents in this matter. Nothing about the dog supports an acquittal in this case. Similarly, as to the lack of fingerprint evidence, the record indicates that no fingerprint analysis was performed, and the reference to fingerprints does not support an acquittal.

{¶ 44} The second assignment of error is without merit.

{¶ 45} For his third assignment of error, defendant maintains that he was denied effective assistance of counsel because his trial attorney did not present a case-in-chief to demonstrate the lack of reliability of eyewitness identification, the significance of the police dog's inability to track the defendant's scent, and the importance of the lack of fingerprint evidence.

{¶ 46} In order to establish a claim of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Madrigal,* 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, 721 N.E.2d 52.

{¶ 47} A properly licensed attorney is presumed competent. *State v. Calhoun,* 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905. Judicial scrutiny of counsel's performance is highly deferential, and the defendant must overcome

the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland v. Washington,* supra.

{¶ 48} Further, a defendant is not deprived of effective assistance of counsel when counsel chooses, for strategic reasons, not to pursue every possible trial tactic. *State v. Coulter* (1992), 75 Ohio App.3d 219, 230, 508 N.E.2d 1324, citing *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523. Decisions regarding the calling of witnesses fall within the ambit of trial tactics, and the mere failure to subpoena witnesses for a trial is not a substantial violation of defense counsel's essential duty absent a showing of prejudice. Id., citing *State v. Hunt* (1984), 20 Ohio App.3d 310, 486 N.E.2d 108. In addition, counsel is not ineffective for failing to raise non-meritorious claims. *State v. Ford,* Franklin App. No. 07AP-803, 2008-Ohio-4373.

{¶ 49} Finally, the failure to prove any one prong of the *Strickland* two-part test makes it unnecessary for a court to consider the other prong. *Strickland v. Washington,* 466 U.S. at 697.

{¶ 50} Applying the foregoing, we conclude that defendant's trial counsel could have reasonably determined that introduction of evidence concerning eyewitness reliability would be pointless in light of the fact that no others were in the area, and the fact that defendant was found in extremely close proximity to the car approximately 30 seconds after it was abandoned.

{¶ 51} As to defendant's trial counsel's failure to present evidence that the dog did not link defendant to the vehicle, the record does not demonstrate that

the dog made no connection to defendant. Rather, the dog was not used to track scents in this matter. It was therefore within counsel's reasonable strategic choices to make limited reference to the dog.

{¶ 52} Similarly, as to the absence of fingerprint evidence, the record indicates that no fingerprinting was done, and not that the vehicle was determined not to have defendant's fingerprints. Counsel may therefore have reasonably decided as a matter of trial strategy that he had sufficiently addressed the issue of fingerprints.

{¶ 53} We therefore find no trial error, so the third assignment of error is without merit.

{¶ 54} Defendant's conviction is affirmed, but we reverse the sentence and remand to the trial court for the limited purpose of the proper imposition of postrelease control pursuant to R.C. 2929.191.

It is, therefore, considered that said appellant and appellee split the costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

ANN DYKE, JUDGE

PATRICIA ANN BLACKMON, P.J., and

FRANK D. CELEBREZZE, JR., J., CONCUR