[Cite as *State v. Sudderth*, 2010-Ohio-2076.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 09CA16
vs.	:	
ISAIAH C. SUDDERTH,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: W. Joseph Edwards, 523 South Third Street, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: J.B. Collier, Jr., Lawrence County Prosecuting Attorney, and Jeffrey M. Smith, Lawrence County Assistant Prosecuting Attorney, 1 Veteran's Square, Ironton, Ohio 45638.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-7-10

ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment that denied a petition for postconviction relief filed by Isaiah C. Sudderth, petitioner below and appellant herein. Appellant assigns the following error for review:

> "THE TRIAL COURT ERRED IN FAILING TO MAKE SUFFICIENT FINDINGS OF FACT AND CONLCUSIONS [sic] OF LAW AND TO ADDRESS THE ISSUE RAISED IN APPELLANT'S POST-CONFICTION [sic] PETITION."

{¶ 2} In 2007, appellant was tried for the murder of Damon Pringle. At the

conclusion of trial, a question arose as to whether the jury should have been instructed on the crime of manslaughter. Trial counsel informed the court that his client did not want such an instruction and, apparently, preferred an all-or-nothing approach of either an acquittal or a murder conviction. At the conclusion of the trial, the jury returned a guilty verdict. The trial court sentenced appellant to serve an indefinite prison term of fifteen years. We affirmed appellant's conviction. See State v. Sudderth, Lawrence App. No. 07CA38, 2008-Ohio-5115 (Sudderth I).

{¶ 3} On July 11, 2008, appellant filed his petition for postconviction relief. He claimed that trial counsel was constitutionally ineffective for failing to fully apprise him of the "legal concepts of murder, self-defense, duty to retreat and voluntary manslaughter." Had appellant fully understood those concepts, he argues in his affidavit attached to his petition, he would have "asked for that jury instruction."

{¶ 4} The trial court denied appellant's petition. However, we reversed that judgment because it did not appear that the court fully considered appellant's arguments. Instead, the court had inadvertently considered the Sudderth I assignments of error. Thus, we remanded the case for further consideration. See State v. Sudderth, Lawrence App. No. 08CA25, 2009-Ohio-1938 (Sudderth II).

{¶ 5} On May 27, 2009, the trial court issued its judgment, together with findings of fact and conclusions of law, and again denied appellant's petition for postconvcition relief. Although this entry bears resemblance to the previous one, important differences exist including the court's conclusion that "[t]he law permits a rational trial strategy, including one which would force the jury to either acquit the Defendant or convict the Defendant without looking at a compromise such as manslaughter." This

appeal followed.

{¶ 6} Appellant asserts in his assignment of error that the May 27, 2009 judgment is virtually the same as the July 31, 2008 judgment that we previously found deficient. In short, appellant concludes that "the trial court did the exact same thing that gave rise to the appeal and [our] decision in Sudderth II." We disagree with appellant.

{¶ 7} We review this matter under the abuse of discretion standard of review. See State v. Hicks, Highland App. No. 09CA15, 2010-Ohio-89, for a full discussion of the appropriate standard of review in post-conviction relief petition matters. An abuse of discretion implies that a court's attitude is unreasonable, arbitrary or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217. Once again, the gist of appellant's argument in his petition for postconviction relief was that trial counsel was ineffective for not fully apprising him of various legal issues before appellant agreed to forgo a voluntary manslaughter jury instruction. Although the July 31, 2008 judgment did not address this specific issue, contrary to appellant's assertion the May 27, 2009 judgment did indeed address this argument and concluded that trial counsel's actions constituted permissible trial strategy. Thus, as far as the actual assignment of error is concerned, the trial court decided the issue appellant raised and supported its decision with sufficient findings of fact and conclusions of law.

{¶ 8} Appellant does not challenge the correctness of that ruling but, even if he did so, we readily agree with the trial court's conclusion on this point. Gambling that a jury will acquit on a higher charge, but might convict if instructed on a lesser charge, is an important and often-used strategy in the arsenal of the criminal defense bar. See

State v. Wilhelm (Aug. 5, 1996), Ross App. No. 95CA2123. Courts should not second-guess trial strategy, even when it backfires. See State v. Menton, Mahoning App. No. 07-MA-70, 2009-Ohio-4640, at ¶121; State v. Carter, Jefferson App. Nos. 07-JE-32 & 07-JE-33, 2008-Ohio-6594, at ¶51.

{¶ 9} Appellant and trial counsel opted to take the chance that the facts in the case sub judice are such that the jury might not find sufficient evidence for murder, but could find sufficient evidence for voluntary manslaughter. Their strategy did not work, however. Appellant cannot now manufacture issues at this late date so that he can retry the case.

{¶ 10} Accordingly, for these reasons, we find no merit to the assignment of error and no abuse of discretion committed by the trial court. Thus, we hereby overrule the assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

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

Harsha, J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.