

[Cite as *State v. Cantey*, 2009-Ohio-4423.]

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 08CA0044

Appellee

v.

JACQUELINE E. CANTEY

APPEAL FROM JUDGMENT
ENTERED IN THE
WAYNE COUNTY MUNICIPAL COURT
COUNTY OF WAYNE, OHIO
CASE No. CRB-08-04-00527

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 31, 2009

CARR, Judge.

{¶1} Appellant, Jacqueline Cantey, appeals her conviction for assault out of the Wayne County Municipal Court. This Court affirms.

I.

{¶2} On April 17, 2008, a complaint was filed, charging Cantey with one count of assault in violation of R.C. 2903.13(A), a misdemeanor of the first degree. The matter was tried to the court. At the conclusion of trial, the court found Cantey guilty. The trial court ordered a pre-sentence investigation report. The trial court subsequently sentenced Cantey to twenty days in jail, but stayed sentence pending appeal. Cantey filed a timely appeal, raising two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

“APPELLANT WAS NOT AFFORDED THE RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.”

{¶3} Cantey argues that trial counsel was ineffective for failing to file a motion to suppress and for failing to allow her to testify in her own defense. This Court disagrees.

{¶4} This Court uses a two-step process as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, to determine whether a defendant’s right to the effective assistance of counsel has been violated.

“First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

{¶5} To demonstrate prejudice, “the defendant must prove that there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.” *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691.

{¶6} This Court must analyze the “reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. The defendant must first identify the acts or omissions of his attorney that he claims were not the result of reasonable professional judgment. This Court must then decide whether counsel’s conduct fell outside the range of professional competence. *Id.*

{¶7} Cantey bears the burden of proving that counsel’s assistance was ineffective. *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶44, citing *State v. Colon*, 9th Dist. No. 20949, 2002-Ohio-3985, at ¶49; *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In this regard, there is a “strong presumption [] that licensed attorneys are competent and that the challenged action is the product of a sound strategy.” *State v. Watson* (July 30, 1997), 9th Dist. No. 18215. In addition, “debatable trial tactics do not give rise to a claim for ineffective assistance of counsel.” *Hoehn* at ¶45, quoting *In re Simon* (June 13, 2001), 9th Dist. No. 00CA0072, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Even if this Court questions trial counsel’s strategic decisions, we must defer to his judgment. *Clayton*, 62 Ohio St.2d at 49. The Ohio Supreme Court has stated:

“‘We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.’ *** Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client.” *Id.*, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶8} “[A] defendant is not deprived of effective assistance of counsel when counsel chooses, for strategical reasons, not to pursue every possible trial tactic.” *State v. Brown* (1988), 38 Ohio St.3d 305, 319, citing *State v. Johnson* (1986), 24 Ohio St.3d 87. In addition, “the end result of tactical trial decisions need not be positive in order for counsel to be considered ‘effective.’” *State v. Awkal* (1996), 76 Ohio St.3d 324, 337.

{¶9} The Ohio Supreme Court has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Specifically,

“‘Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to

address both components of the inquiry if the defendant makes an insufficient showing in one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶10} Cantey first argues that trial counsel was ineffective for failing to file a motion to suppress photographs of the victim's injuries, which photographs were taken by the police six days after the incident.

{¶11} A motion to suppress is properly filed in an attempt to exclude evidence "on the ground that it was illegally obtained." See Crim.R. 12(C)(3). Cantey fails to explain how photographs of the victim might have been illegally obtained. In addition, the victim authenticated the photographs of her injuries at trial. Cantey fails to explain how the photographs under these circumstances would not have been admissible. Accordingly, Cantey has failed to show how trial counsel committed any error or that she was prejudiced by counsel's action in this regard.

{¶12} Cantey next argues that trial counsel was ineffective for failing to allow her to testify in her own defense at trial.

{¶13} "The advice provided by a criminal defense lawyer to his or her client regarding the decision to testify is 'a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance.'" *State v. Essinger*, 3d Dist. No. 5-03-15, 2003-Ohio-6000, at ¶41, quoting *State v. Winchester*, 8th Dist. No. 79739, 2002-Ohio-2130, at ¶12. Moreover, this Court has repeatedly held that "[d]ecisions regarding the calling of witnesses are within the purview of defense counsel's trial tactics." *State v. Pordash*, 9th Dist. No. 05CA008673, 2005-

Ohio-4252, at ¶21, quoting *State v. Ambrosio*, 9th Dist. No. 03CA008387, 2004-Ohio-5552, at ¶10. Further, tactical decisions by trial counsel cannot form the basis for a claim of ineffective assistance of counsel. See e.g., *State v. Bradford*, 9th Dist. No. 22441, 2005-Ohio-5804, at ¶27; *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992, at ¶76. In this case, trial counsel's failure to present Cantey's testimony constitutes trial tactics and, therefore, does not substantiate a claim for ineffective assistance of counsel. Cantey's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“APPELLANT NEVER HAD THE CHANCE TO OBJECT AND GO OVER THE PRE-SENTENCE REPORT USED BY TRIAL COURT BEFORE SENTENCING AS GUARANTEED BY THE UNITED STATES CONSTITUTION.”

{¶14} Cantey argues that (1) trial counsel was ineffective for failing to discuss the contents of the pre-sentence investigation report with her, and (2) the trial court erred in failing to disclose the contents of the pre-sentence investigation report to her so that she could correct any factual inaccuracies therein. This Court disagrees.

{¶15} R.C. 2951.03(B)(1) requires the trial court to permit “the defendant or the defendant’s counsel to read” limited portions of the pre-sentence investigation report. Excluded from review are (a) any sentencing recommendations; (b) diagnostic opinions, the disclosure of which, in the court’s opinion, might seriously disrupt the defendant’s rehabilitation; (c) confidential sources of information; and (d) any other information, the disclosure of which, in the court’s opinion, might result in harm to the defendant or another person. *Id.* A review of the sentencing transcript indicates that Cantey apparently had the opportunity to review the pre-sentence investigation report. The trial court noted that photographs of the extensive injuries suffered by the victim were attached to the report. Cantey immediately responded, “They were

not, those were not her injuries.” It is unclear how Cantey might have seen the photographs attached to the pre-sentence investigation report, yet not have seen the report itself.

{¶16} The trial court noted during the sentencing hearing that Cantey cooperated in the preparation of the pre-sentence investigation report. Cantey makes no argument as to what information in the report might have been inaccurate, and she has not made the report part of the record for this Court’s review. We have long stated that the appellant is responsible for providing this Court with a record of the facts, testimony, and evidentiary matters necessary to support the assignment of error. *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 314. Finally, Cantey makes no argument as to how she was prejudiced if she in fact was not able to review the report. Cantey’s second assignment of error is overruled.

III.

{¶17} Cantey’s assignments of error are overruled. The judgment of the Wayne County Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

JACQUELINE CANTEY, pro se, Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.