

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-046

Appellee

Trial Court No. 08 CR 028

v.

Richard Adams

DECISION AND JUDGMENT

Appellant

Decided: July 31, 2009

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Heather M. Baker, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, Appellant.

* * * * *

KNEPPER, J.

{¶ 1} Appellant, Richard Adams, appeals his conviction in the above-captioned case for: (1) failure to comply; (2) assault on a peace officer; and (3) obstructing official business. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On January 24, 2008, appellant was indicted on four counts: Count 1 charged him with aggravated robbery, pursuant to R.C. 2911.01(B), a felony of the first degree; Count 2 charged him with failure to comply with order or signal of police officer, pursuant to R.C. 2921.331(B), a felony of the third degree; Count 3 charged him with assault on a police officer, pursuant to R.C. 2903.13(A)(C)(3), a felony of the fourth degree; and Count 4 charged him with obstructing official business, pursuant to R.C. 2921.31(A), a felony of the fifth degree.

{¶ 3} At arraignment, counsel from the public defender's office was appointed to represent appellant, and appellant pleaded not guilty to all of the charges. In an order journalized March 27, 2008, the trial court denied appellant's request for new counsel and confirmed March 31, 2008 as the trial date.

{¶ 4} Evidence adduced at appellant's trial established the following facts. In the early morning hours of January 1, 2008, Officer Scott Herrick of the North Baltimore Police Department heard a vehicle peeling its tires outside his police station. Officer Herrick proceeded out the front door of the station and observed a pickup truck backing out of a parking space, spinning its tires. Officer Herrick got into his patrol car, activated his overhead lights and siren, and pursued the pickup truck as it pulled away from the parking space and continued on down the street.

{¶ 5} Officer Herrick observed the truck run a stop sign, and as he continued to pursue, the truck sped up. A chase ensued, with the pickup at one point cutting through a residential yard, narrowly missing an electrical pole. Finally, after making an abrupt turn

down an alley, the truck made a sudden stop. At this point, the pickup's occupants began to exit the vehicle.

{¶ 6} Officer Herrick drew his weapon to protect himself from what he felt was an unstable and potentially dangerous situation. Passengers Romiro Salaz and Anthony Waltermeyer, were ordered to the ground and to show their hands. When appellant's girlfriend, Christina Clark, emerged from the truck, she, too, was ordered to show her hands. Appellant, who was the driver of the truck, was the last person to leave the vehicle. Upon his exit, he immediately charged at Officer Herrick and smashed into him with his body. Officer Herrick, with his gun in one hand and appellant's sweatshirt in the other, tried to force appellant to the ground. Instead of complying with the officer's orders, appellant struck Officer Herrick in the chest and head and reached for his weapon. At that point, Officer Herrick subdued appellant by hitting him on the forehead with his pistol, knocking him to the ground.

{¶ 7} Appellant continued to fight, refusing to allow himself to be handcuffed as he was being arrested. Eventually, passenger Salaz sat on appellant's back in an effort to assist Officer Herrick.

{¶ 8} Once appellant was handcuffed, he was transported by ambulance to the hospital for treatment of the injury to his forehead. Both during the trip to the hospital and after his arrival, appellant continued to be both physically and verbally combative with the EMS crew and other medical personnel. He was given sedation and, thereafter,

received treatment for a laceration above his left eye. Later that day, appellant was released from the hospital and transported to the jail without incident.

{¶ 9} Following the presentation of all of the evidence in the case, the jury found appellant not guilty on Count 1, which charged appellant with aggravated robbery, and guilty on all of the remaining counts. Appellant was sentenced to serve 17 months in prison for assault on a peace officer, three years of community control for failure to comply, and three years of community control for obstructing official business. The sentences for community control were ordered to be served concurrently with one another and consecutive to the prison term.

{¶ 10} Appellant timely appealed his conviction, raising the following assignments of error:

{¶ 11} I. "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §10 OF THE CONSTITUTION OF THE STATE OF OHIO."

{¶ 12} II. "THE TRIAL COURT ABUSED ITS DISCRETION IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE OHIO AND UNITED STATES CONSITUTION[S] BY DENYING APPELLANT'S REQUEST FOR NEW COUNSEL."

{¶ 13} III. "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BY THE STATE AND CONTRARY TO LAW."

{¶ 14} Appellant argues in his first assignment of error that he was denied the effective assistance of counsel. Specifically, appellant claims: (1) that his trial counsel's time frame for investigating the crime scene was too close to trial to be effective; (2) that his trial counsel's choice not to retain an expert witness prejudiced his chances at the proceedings; and (3) that his trial counsel, by conceding appellant's guilt to the charge of obstructing official business during closing arguments, failed to represent appellant's interests as mandated by the rules of ethics.

{¶ 15} In order for a defendant to obtain a reversal of a conviction or sentence based on ineffective assistance of counsel, he must prove "(a) deficient performance ('errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment') and (b) prejudice ('errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable')." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 30, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶ 16} In evaluating appellant's claim of ineffective assistance of counsel, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at ¶31, citing *Strickland*, *supra*, at 689. In addition, we are mindful that "[t]rial counsel cannot be second-guessed as to trial strategy decisions." *Id.*

{¶ 17} We begin by considering appellant's claim that his trial counsel's time frame for investigating the crime scene was too close to trial to be effective. According

to the record, appellant's counsel went to the alleged crime scene one week before trial in order to photograph and observe the areas involved in the case. The mere fact that appellant's counsel waited until a week before trial to conduct the investigation is not in and of itself error. Even assuming, arguendo, that it was error, nothing in the record supports the notion that the timing of the investigation in any way compromised appellant's case.

{¶ 18} Next, we consider appellant's claim that his trial counsel's choice not to retain an expert witness prejudiced his chances at the proceedings. Specifically, appellant claims that had an expert witness been obtained by counsel, the expert's testimony would have shown that it was impossible for appellant to "peel" his tires in the way described by Officer Herrick, thereby creating doubt concerning the truthfulness of the officer's stated reason for initiating the pursuit of appellant's pickup. Appellant bases this argument on certain testimony by passenger Waltermeyer wherein he testified that there was "no way" appellant's tires could spin, because the truck is "an all-time four-wheel drive pickup". When asked to elaborate on this notion during cross-examination, Waltermeyer stated: "It ain't like you ain't got lockouts on it. It's an all-time four-wheel drive. There's no way it could have peeled out." Defense counsel subsequently asked whether this would be true, "even with the slippery pavement from rain," to which Waltermeyer answered, "It wasn't wet at the time. It rained probably about three or four hours earlier. It was windy and cold. By then the ground was dry."

{¶ 19} Testifying to the contrary, however, were both passenger Salaz and appellant's girlfriend, who stated that it was raining on the night in question. Testimony by Officer Herrick likewise indicated that the streets were "wet and slick." Given the conflicting statements about the weather that evening (and therefore its effect on the reasonable possibility of appellant's truck to "peel" its tires) and keeping in mind that a reviewing court must refrain from second-guessing trial strategy decisions, see *State v. Adams*, supra, at ¶ 31, we find that trial counsel's decision not to call an expert witness in no way amounted to deficient performance.

{¶ 20} Finally, we consider appellant's claim that his trial counsel was ineffective during closing arguments, when he conceded appellant's guilt to the charge of obstructing official business. Our review of the record reveals that by the time defense counsel stood to give his closing argument, he faced a jury that had heard eyewitness testimony of appellant's actions during the police chase and after the truck was stopped, which testimony clearly implicated appellant with respect to various aspects of the charge of obstructing official business. In discussing the charge, counsel recited the elements that are needed to establish the charge, and then acknowledged that those elements had been established in appellant's case.

{¶ 21} Despite this acknowledgement, appellant's counsel challenged the jury to hold the state to its burden of proof beyond a reasonable doubt as to each and every element of all of the offenses charged. In addition to asking the jury to hold the state to

the correct burden of proof, trial counsel pointed out possible shortcomings in the state's case and, at the same time, highlighted the strong points of his own case.

{¶ 22} As indicated above, the law is well settled that counsel's actions that might be considered trial strategy are presumed effective and should not be second-guessed by a reviewing court. *State v. Adams*, 103 Ohio St.3d at ¶ 31. With this standard in mind, and considering defense counsel's closing argument as a whole, we find that trial counsel's representation was not deficient and, further, did not result in prejudice to appellant's case.

{¶ 23} For all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 24} Appellant argues in his second assignment of error that the trial court denied appellant his right to due process when it denied his motion for new counsel. Appellant argues that his initially-appointed counsel announced in a letter dated March 3, 2008, that he would be withdrawing from appellant's case due to newly accepted employment and that another attorney from his former office would provide representation in appellant's case. According to appellant, "after discussions with new counsel" he was "not provided with an attorney that was willing to represent his interests zealously and therefore requested the Court to provide new counsel."

{¶ 25} An indigent defendant has no right to his choice of counsel. *State v. Murphy*, 91 Ohio St.3d 516, 523, 2001-Ohio-112. Furthermore, there is no right to a

"meaningful attorney-client relationship." *Id.*, quoting *Morris v. Slappy* (1983), 461 U.S. 1, 13-14. An indigent defendant must establish good cause in order to justify appointment of substitute counsel. *Id.*, citing *State v. Cowans* (1999), 87 Ohio St.3d 68, 72.

{¶ 26} The trial court has the discretion to deny requests that it finds to be unreasonable. See *id.* In making this determination, the court should weigh the defendant's interests in receiving new counsel against the public's interest in the prompt and efficient administration of justice. *Id.* Although a "total lack of communication preventing an adequate defense" is a factor to be considered, *id.*, quoting *United States v. Jennings* (C.A.6, 1996), 83 F.3d 145, 148, in order to warrant replacement of counsel, the breakdown in the attorney-client relationship must be of such a magnitude as to jeopardize the defendant's right to effective assistance of counsel. *State v. Coleman* (1988), 37 Ohio St.3d 286, 292.

{¶ 27} Given appellant's failure to articulate any particular reason or set of reasons for his request for substitution of counsel and, thus, his failure to establish a showing of good cause, we find that appellant was not denied due process and, further, that the trial court did not err in denying his request. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 28} Appellant argues in his third assignment of error that his conviction was against the manifest weight of the evidence. In particular, appellant complains that there was no credible testimony to establish: (1) that appellant peeled his tires; or (2) that

appellant assaulted Officer Herrick and/or was the aggressor in the confrontation with the officer.

{¶ 29} An appellate court considering the manifest weight of the evidence acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387. Here, the state presented the testimony of multiple eyewitnesses to the alleged crimes. This eyewitness testimony -- including that of passenger Salaz, who helped subdue appellant -- essentially confirmed Officer Herrick's recollection of the events. In addition, the cross-examinations of the state's witnesses did not undermine their direct examination testimony. Very simply, the jury viewed the evidence presented by the state and came to the rational conclusion that appellant had committed three of the offenses as charged.

{¶ 30} We find nothing in the record to suggest that the trier of fact lost its way, or that such a manifest miscarriage of justice occurred that a new trial should be ordered. For the foregoing reasons, appellant's third assignment of error is found not well-taken.

{¶ 31} For all of the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Richard W. Knepper, J.
CONCUR.

JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.