

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

State of Ohio

Court of Appeals No. L-09-1268

Appellee

Trial Court No. CR0200901756

v.

Maurice Fench

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Maurice Fench, appellant, appeals a September 23, 2009 judgment of the Lucas County Court of Common Pleas. The judgment is a final judgment issued after a jury trial, convicting appellant on all three counts of a three count indictment, including firearm specifications. The convictions include:

{¶ 2} 1. under Count 1, aggravated burglary, a violation of R.C. 2911.11(A)(2) and a first degree felony, with a specification under R.C. 2941.145 that appellant displayed, brandished, indicated possession of or used a firearm;

{¶ 3} 2. under Count 2, aggravated robbery, a violation of R.C. 2911.01 and a first degree felony, with a specification under R.C. 2941.145 that appellant displayed, brandished, indicated possession of or used a firearm;

{¶ 4} 3. and under Count 3, felonious assault, a violation of R.C. 2903.11(A)(2) and second degree felony, with a specification under R.C. 2941.145 that appellant displayed, brandished, indicated possession of or used a firearm.

{¶ 5} The trial court sentenced appellant to serve seven years imprisonment for the aggravated burglary conviction under Count 1, seven years imprisonment for the aggravated robbery conviction under Count 2, and eight years imprisonment for the felonious assault conviction under Count 3. The trial court ordered that the sentences be served consecutively. The court also imposed, under R.C. 2929.14(D)(1), an additional consecutive mandatory prison term of three years for the firearm specification, for a total period of incarceration of 25 years of which three years are mandatory.

{¶ 6} Under the judgment, appellant is also required to reimburse the state and county for supervision, confinement, assigned counsel, and prosecution costs. Appellant was also ordered to pay additional costs pursuant to statute and to submit to DNA testing.

{¶ 7} Appellant asserts two assignments of error on appeal:

{¶ 8} "Assignments of Error

{¶ 9} "Assignment of Error No 1: Mr. Fench's rights under the 5th and 14th Amendments to the United States Constitution were violated when the court admitted evidence of his post-arrest silence.

{¶ 10} "Assignment of Error No. 2: Mr. Fench was denied the effective assistance of counsel guaranteed by the 6th Amendment to the United States Constitution and Article 1, Section 10 of the Ohio Constitution."

{¶ 11} The charges in the indictment arise out of an incident that occurred on April 3, 2009. At that time, two men surprised Leroy Cleveland in his home, fought with him, and robbed him. One of the men shot Cleveland twice with a firearm. Cleveland identified appellant as the shooter in his review of a photo array before trial and in his testimony at trial.

{¶ 12} Appellant also testified at trial and denied any involvement in the offenses. Appellant testified that he was elsewhere when the crimes occurred and with a friend, Charles McQuinn. McQuinn did not testify at trial. The trial court precluded his testimony upon objection by the state that appellant failed to provide timely notice of alibi as required under Crim.R. 12.1.

{¶ 13} Under Assignment of Error No. 1, appellant argues that the state improperly cross-examined him with respect to his post-arrest and post-*Miranda* silence when he testified at trial. Appellant contends that such impeachment is prohibited under *Doyle v. Ohio* (1976), 426 U.S. 610 as a violation of his constitutional right against self-incrimination.

{¶ 14} The state denies that *Doyle v. Ohio* applies. It argues that "[a] different rule applies if a defendant makes a post-*Miranda* statement and then testifies at trial to a different version of events." The state argues that appellant spoke to police but failed to mention that he had an alibi. The state admits, however, that the only statement to police was a general denial of guilt followed by a request to speak to an attorney.

Claimed Exception to *Doyle* based on Statement to Police

{¶ 15} We consider the state's claim that an exception to *Doyle v. Ohio* is presented due to a statement by appellant to police. The state's cross-examination of appellant at trial included:

{¶ 16} "Q. Assistant Prosecuting Attorney Lingo: So they took you in for questioning?

{¶ 17} "A. Yes, Sir.

{¶ 18} "* * *

{¶ 19} "Q. Okay. They were looking for specific people?

{¶ 20} "A. Yes. Yes, sir.

{¶ 21} "Q. Okay. And you know this gentleman seated here?

{¶ 22} "A. Yes, sir.

{¶ 23} "Q. Who is he?

{¶ 24} "A. Mr. Larry Anderson, detective.

{¶ 25} "Q. Okay. And did you see him that day?

{¶ 26} "A. Yes, sir.

{¶ 27} "Q. And did he ask you to talk to him?

{¶ 28} "A. Yes, sir.

{¶ 29} "Q. And did you tell him the story that you just told this jury that day?

{¶ 30} "A. He didn't ask about what I did. He asked specifically about the incident, and I couldn't tell him nothing about the incident if I wasn't there.

{¶ 31} "Q. All right. Let me ask you this again.

{¶ 32} "Mr. Harvey: Your Honor, I'm going to object and ask to approach.

{¶ 33} "The Court: You may approach.

{¶ 34} "(Thereupon, an off-the-record discussion was had at the bench.)

{¶ 35} "(Whereupon, the following discussion was had at the bench:)

{¶ 36} "Mr. Harvey: I would ask that the statements made by Mr. Holcomb (sic) requesting a lawyer and not making further statements be precluded from being asked by the prosecutor as they were unduly prejudicial to my client and invoking his right to have a lawyer present at all times during questioning. At the time of his arrest he was detained, placed in handcuffs. He was transported to the Lucas County Police Station wherein he was questioned by Detective Anderson. He asked for a lawyer after saying he had nothing to do with the event that the detective questioned him about, and any further inquiry would be prejudicial to my client as he has invoked his right to an attorney.

{¶ 37} "Mr. Lingo: Judge, I would say first by taking the stand he has waived his Fifth Amendment rights that he claimed at that time.

{¶ 38} "Secondly, since he is claiming he was not there, basically alibiing himself, then the State does have a right. * * * [T]he State can inquire as to why he did not, since he had an opportunity to speak to the detective, advise the detective of the same information at that time. I have never asked him if he invoked his rights, right to counsel. I just simply asked him did you have the opportunity to tell the detective and did you tell him that.

{¶ 39} "The Court: That was the question. The objection will be overruled. He did not ask him about his right to counsel.

{¶ 40} "(Discussion at the Bench concluded.)

{¶ 41} "The Court: You may continue.

{¶ 42} "Mr. Lingo: Thank you.

{¶ 43} "Q. (By Mr. Lingo) This detective right here, you saw that day?

{¶ 44} "A. Yes, sir.

{¶ 45} "Q. And you could have told him what you just told this jury, but you did not, isn't that true?

{¶ 46} "A. Yes, because he didn't ask. He didn't ask.

{¶ 47} "Q. He didn't ask you what happened that day?

{¶ 48} "A. No. He just basically was talking about this incident. I couldn't tell him about it. He just kept telling me what I could be facing, but all I told him, get me a lawyer."

{¶ 49} During closing argument, the prosecutor also stated: "Why didn't he just tell the officer and clear it up right then?"

{¶ 50} Under *Doyle v. Ohio*, the state may not use a defendant's post-arrest, post-*Miranda* silence for impeachment purposes, because of the "fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield* (1986), 474 U.S. 284, 291, quoting *South Dakota v. Neville* (1983), 459 U.S. 553, 565.

{¶ 51} In *State v. Osborne* (1977), 50 Ohio St.2d 211, the Ohio Supreme Court applied *Doyle v. Ohio* in a case where the defendant spoke extensively to police after receiving *Miranda* warnings but failed to inform police of an alibi defense. *Osborne*, 50 Ohio St.2d at 214. The *Osborne* defendant testified to an alibi at trial. The Ohio Supreme Court held that *Doyle* was distinguished by the defendant's decision not to remain silent and to provide information to police. The court held that impeachment of the defendant at trial based upon his failure to inform police of his alibi was permitted under *Doyle*:

{¶ 52} "If a defendant voluntarily offers *information to police*, his toying with the authorities by allegedly telling only part of his story is certainly not protected by *Miranda* or *Doyle*. A contrary rule would foreclose any cross-examination for fear that it might reveal impeaching information intentionally withheld and inextricably interwoven with that which was divulged." *Osborne*, 50 Ohio St.2d at 216 (Emphasis added). In

Osborne, the defendant spoke extensively to police. Here appellant gave a general denial of guilt and then requested an attorney.

{¶ 53} In the subsequent decision of *Anderson v. Charles* (1980), 447 U.S. 404, the United States Supreme Court recognized that *Doyle* does not prohibit cross-examination based upon prior inconsistent statements to police:

{¶ 54} "*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." *Anderson*, 447 U.S. at 408.

{¶ 55} In *Anderson*, the United States Supreme Court explained its decision in *Doyle*, stating that "the Due Process Clause of the Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings. The case involved two defendants who made *no postarrest statements about their involvement in the crime.*" *Anderson*, 447 U.S. at 407 (Emphasis added.).

{¶ 56} The *Anderson* defendants told police "you got to be crazy" and "I don't know what you are talking about." *Anderson*, 447 U.S. at 408, fn. 2. Under *Anderson*, neither communication constituted "postarrest statements about their involvement in the crime." *Anderson*, 447 U.S. at 407. Both lacked substance. See *State v. Brooks* (Mo. 2010), 304 S.W.3d 130, 133-134; *People v. Ridley* (1990), 199 Ill. App.3d 487, 493. The

court noted that neither contradicted the defendant's trial testimony. *Anderson*, 447 U.S. at 408, fn. 2.

{¶ 57} Appellant's statement to police in this case of a general denial of guilt coupled with a demand for an attorney lacks factual substance and offered no information to police. The general denial was not inconsistent with appellant's testimony at trial.

{¶ 58} We interpret the decisions in *Anderson*, *Doyle*, and *Osborne* to require a statement of factual information to police concerning the criminal event before a defendant is subject to impeachment at trial based upon post-*Miranda* silence, including a failure to raise an alibi defense. A statement to police of a general denial of guilt lacks factual substance to remove the case from the rule in *Doyle* prohibiting impeachment at trial based upon post-*Miranda* silence. *State v. Brooks*, 304 S.W.3d at 133-134; see *People v. Ridley*, 199 Ill. App.3d at 493.

{¶ 59} We conclude that the state's argument that appellant's statement of a general denial of any culpability to police with a contemporaneous demand to speak to an attorney subjected appellant to impeachment at trial based upon post-arrest and post-*Miranda* silence is without merit. Accordingly, the restrictions against impeachment under *Doyle v. Ohio* against post-arrest and post-*Miranda* silence apply in this case.

Claimed violation of *Doyle v. Ohio*

{¶ 60} The restrictions against impeachment based on silence announced in *Doyle v. Ohio* apply to post-*Miranda* silence. However, neither appellant nor the state

introduced evidence at trial identifying when or whether appellant received *Miranda* warnings.

{¶ 61} As an appellate court, our review of claimed trial court error is "limited to what transpired in the trial court as reflected by the record made of the proceedings." *State v. Ishmail* (1978), 54 Ohio St.2d 402, 405-406. An appellant bears the burden on appeal of demonstrating error by reference to matters in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, this court and other Ohio appellate courts have held that absent evidence in the record of when *Miranda* warnings were made, no claimed error under *Doyle v. Ohio* is presented on appeal. *State v. Cooper* (Nov. 18, 1999), 8th Dist. No. 75282; *State v. Scott*, 6th Dist. No. L-01-1337, 2003-Ohio-1402, ¶ 19; *State v. Exum*, 10th Dist. No. 05AP-894, 2007-Ohio-2648, ¶ 39.

{¶ 62} Appellant does not dispute the deficiency in the record. Rather, appellant seeks an order remanding this case to the trial court for it to conduct a post-trial Evid.R. 104(B) hearing on whether and when *Miranda* warnings were provided, following a procedure employed by the United States Court of Appeals for the Third Circuit in *United States v. Cummiskey* (3d Cir. 1984), 728 F.2d 200 under similar circumstances. Appellant does not claim that the decision of the federal court of appeals is binding on this court with respect to use of such a procedure.

{¶ 63} The *Cummiskey* court reasoned that impeachment evidence from impeachment of a defendant on the basis of post-arrest silence is conditionally relevant under *Doyle v. Ohio*, that is, relevant only upon a showing of the an absence of *Miranda*

warnings beforehand. *Cummiskey*, 728 F.2d at 205-206. The trial court record, however, failed to demonstrate when or if *Miranda* warnings were made to the defendant. The court remanded the case with instructions for the trial court to conduct a post-trial hearing under Fed.R.Evid. 104(b) to determine whether and when *Miranda* warnings were provided and to issue an order granting or denying a new trial based upon that finding. *Cummiskey*, 728 F.2d at 207.

{¶ 64} Ohio precedent recognizes the responsibility of an appellant to present evidence in the record to establish trial court error on appeal. We decline to remand this action to permit further trial court proceedings at this time on a matter that could have been determined effectively in the trial court in a pretrial motion to suppress or with a more specific objection at trial including proffer of evidence of the custodial nature of police questioning and the timing of *Miranda* warnings.

{¶ 65} We find appellant's Assignment of Error No. 1 is not well-taken.

Ineffective Assistance of Counsel

{¶ 66} Under Assignment of Error No. 2, appellant argues that his conviction resulted from ineffective assistance of counsel due to a failure to file a notice of alibi within the time required under Crim.R. 12.1. Alternatively, appellant argues counsel was deficient by failing to seek a continuance of the trial date to allow for alibi testimony at a future trial date.

{¶ 67} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "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."

Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 68} When considering a claim of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland v. Washington*, 466 U.S. at 689.

"Debatable trial tactics generally do not constitute a deprivation of effective counsel." *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶ 69} Crim.R. 12.1 concerns notice of alibi. It provides that "[w]henever a defendant in a criminal case proposes to offer testimony to establish an alibi on his behalf, he shall, not less than seven days before trial, file and serve upon the prosecuting attorney a notice in writing of the intention to claim alibi." Trial proceeded in this case on August 31, 2009. Trial counsel for appellant filed a notice of alibi on August 27, 2009. In the notice, trial counsel represented to the court that he did not become aware of the alibi witness until the day before, August 26, 2009. The notice was provided four days before trial, rather than the required seven days.

{¶ 70} The trial court considered the state's objection to alibi testimony immediately before trial on August 31, 2009. In ruling that alibi testimony would not be permitted under Crim.R. 12.1 due to late notice, the trial court noted that appellant was

indicted on April 13, 2009, was arraigned on April 16, 2009, and the state's argument that appellant would have known he was elsewhere, with someone else at the time the charged offense allegedly occurred, at least by the time of his arraignment in April 2009.

{¶ 71} Evidence is lacking in the record to demonstrate that appellant's trial counsel bore any responsibility for the late notice of alibi. The notice itself indicates otherwise, asserting that counsel first learned of the existence of the alibi witness the day before, on August 26, 2009. Appellant's claim that counsel was deficient in failing to timely file the notice of alibi is therefore without merit.

{¶ 72} Crim.R. 12.1 provides that a trial court may permit alibi testimony at trial despite late notice of alibi under the rule upon a determination that "in the interest of justice such evidence should be admitted." Trial counsel argued for the court to exercise its discretion under Crim.R. 12.1 to permit alibi testimony despite the late notice.

Counsel argued that the state was aware of the witness and had interviewed him on the day of the incident.

{¶ 73} In our view, the choice to seek discretionary leave to permit alibi testimony despite late notice rather than seeking a continuance of the trial date was a reasonable, tactical decision by trial counsel. The choice of one strategy over the other does not constitute ineffective assistance of counsel. This is particularly true given the likelihood a trial court might instinctively recoil against any request for a continuance over concerns to control its docket and desire to avoid unnecessary continuances.

{¶ 74} We find appellant's Assignment of Error No. 2 is not well-taken.

{¶ 75} On consideration whereof, the court finds that substantial justice was done the party complaining and appellant was not denied a fair trial. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs 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

Keila D. Cosme, J.
CONCUR.

JUDGE

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:
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