

[Cite as *State v. Moats*, 2009-Ohio-3063.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91646

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES MOATS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506052

BEFORE: Jones, J., Kilbane, P.J., and Stewart, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Charles Moats (“Moats”), appeals the judgment of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

{¶ 2} Moats was indicted in Case Number CR-506052 on January 30, 2008 in Cuyahoga County Common Pleas Court. He was charged with two counts of operating a motor vehicle while under the influence of alcohol. Count 1 charged Moats under R.C. 4511.19(A)(1)(a), operating a motor vehicle while under the influence of alcohol, a felony of the third degree. Count 2 charged Moats under the same revised code section, but as a felony of the fourth degree. He pled not guilty to all charges.

{¶ 3} On May 15, 2008, after a trial by jury, the jury returned guilty verdicts on both counts. Moats was sentenced to four years at the Lorain Correctional Institution.

{¶ 4} According to the facts, David Zaffino, a clerk at a Speedway store located in Middleburg Heights, testified that he saw Moats in his store on December 6, 2007, at approximately 3 a.m. Zaffino testified that Moats and another man pulled up to a gas pump and entered the store to purchase beer. The men appeared to be intoxicated. Zaffino told the men he could not sell them beer because of the late hour. One of the men re-entered the store and asked again to buy beer and Zaffino refused again. Zaffino described the two individuals as “unbalanced” and “red in the face.” Zaffino also testified that he has worked many third shifts and has seen many

intoxicated individuals. Zaffino also testified that the behavior of Moats and his passenger worried the other customers to the point where they began to ask him to do something about the two men. Zaffino then called the police.

{¶ 5} Middleburg Heights police officers arrived on the scene just as the men were getting ready to drive away. Patrolman Alameda testified that he observed Moats drive his vehicle across three lanes of traffic before going back to the curb lane. Patrolman Alameda activated his overhead lights and pulled the vehicle over into a LubeStop parking lot. When Moats lowered his window, Patrolman Alameda immediately noticed a strong odor of alcohol. In addition to the odor of alcohol, Moats was slow in retrieving his identification for Patrolman Alameda and spoke with a “slurring of speech, almost mush mouth, thick tongue type of speech...”¹

{¶ 6} Because of the slurred speech, delayed reactions, and strong odor of alcohol, Patrolman Alameda removed Moats from the vehicle in order to conduct field sobriety tests. Moats failed the field sobriety tests and was arrested. Moats was taken to the police station so that a blood alcohol (breath test) could be administered.

At the station while attempting to administer the test, Patrolman Meyerholtz, who is certified to administer the blood alcohol test, observed Moats to be sleepy and lethargic, describing him as “not really coherent.”² Moats, ultimately, refused to take the test. Finally, Detective Clift of the Middleburg Heights Police Department testified that when he was transporting Moats to Berea Municipal Court later on the morning of

¹Tr. vol. 2, p. 212.

December 6, 2007, Moats did not know where he was or how he ended up there.

Moats now appeals.

{¶ 7} Moats assigns five assignments of error on appeal:

{¶ 8} “[1.] The trial court erred in denying the appellant’s Criminal Rule 15 motion for deposition of his expert for use at trial;

{¶ 9} “[2.] Appellant’s convictions must be reversed as he was deprived of effective assistance of legal counsel at trial where the court excluded his doctor’s testimony;

{¶ 10} “[3.] The trial court erred in denying appellant’s Criminal Rule 29 Motion for Acquittal when there was insufficient evidence to prove the elements of operating a motor vehicle while under the influence of alcohol;

{¶ 11} “[4.] The Appellant’s convictions for operating a motor vehicle while under the influence of alcohol were against the manifest weight of the evidence;

{¶ 12} “[5.] The trial court erred in instructing the jury on the offense of refusal to submit to chemical testing where that offense was not charged in the indictment.”

LEGAL ANALYSIS

Criminal Rule 15 – Motion for Deposition of Expert

{¶ 13} Moats argues in his first assignment of error that the court erred in denying his Criminal Rule 15 motion for deposition of expert for use at trial. We do not find merit in his argument.

²Tr. vol. 1, p. 171.

{¶ 14} Ohio Crim.R. 15, Deposition, provides the following:

“(A) When taken.

“If it appears probable that a prospective witness will be unable to attend or will be prevented from attending a trial or hearing, and if it further appears that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information, or complaint shall upon motion of the defense attorney or the prosecuting attorney and notice to all the parties, order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.”

{¶ 15} In the case at bar, Moats filed a notice of deposition of his expert, Dr. Berenholz, on April 28, 2008. The State did not initially object to the taking of Dr. Berenholz’s deposition and the trial court granted Moats’s motion on April 30, 2008. The deposition was scheduled for Friday, May 9, 2008, three days before the May 12, 2008 trial. This was the third trial date.

{¶ 16} Earlier, on May 6, 2008, the State had filed a motion to reconsider the trial court’s granting of Moats’s motion to take deposition. The State argued that it filed the motion because Moats’s defense counsel had failed to provide it with copies of the medical records that Dr. Berenholz intended to introduce at trial. The State also filed a motion to compel, requesting the lower court to order Moats to produce the medical records. The court granted the State’s motion to reconsider and motion to compel on Thursday, May 8, 2008, the day before the scheduled deposition.

{¶ 17} The trial court stated that it granted the motion to reconsider because defense counsel had not provided Dr. Berenholz’s medical records prior to the

scheduled deposition date. The trial court provided additional guidance behind its ruling on the motion to reconsider in the record:

“Now, the reason I granted the motion to reconsider is because the State of Ohio in their motion indicate that you had not provided Dr. Berenholz’[s] medical records prior to the scheduled deposition date. It’s not fair to allege a defense and hire an expert witness to come in to court and not let the opposing side at least review the records which he bases his opinion. So that’s why I granted the motion.”³

{¶ 18} In addition, the lower court stated that defense counsel had the medical records since the end of February 2008, but never turned them over. Defense counsel erroneously claimed that he had no duty to turn over the discovery that the State requested.⁴ Moreover, the court further stated that the expert witness letter, dated April 1, 2008, did not even rise to the level of certainty that would be necessary in order for the court to allow him to testify as an expert witness. The court stated that “‘Possibly’ is very different than from ‘a reasonable degree of medical certainty.’”⁵

The court went on to state, “You had time to correct it, yet you did not correct it. And I don’t have any assurances that it’s correctable.”⁶ Therefore, even if the deposition would have gone forward, Dr. Berenholz’s opinion would not have met the standards of a reasonable degree of medical certainty.

³Tr. 10.

⁴Tr. 11.

⁵Tr. 14.

⁶Tr. 24.

{¶ 19} Although the medical records in this case were ultimately produced, they were not produced until Thursday, May 8, 2008, the day before the scheduled deposition, and only after the court had granted the State's motion to reconsider and motion to compel. The trial court has the power to exclude testimony of an expert for good cause. Here, not providing the State with the medical records until compelled, and then only providing them the afternoon before the deposition, constituted good cause to exclude the testimony.

{¶ 20} Accordingly, we find that the lower court did not err in denying Moats's Crim.R. 15 motion for deposition of his expert for use at trial.

{¶ 21} Moats's first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 22} In his second assignment of error, Moats claims that his defense counsel was ineffective. More specifically, Moats argues that he was deprived of effective assistance of counsel at trial where the court excluded his doctor's testimony. We find no merit in Moats's claims.

{¶ 23} A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. This requires two distinct lines of inquiry. First, we determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client[.]" *State v. Bradley* (1989), 42 Ohio

St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. When making this inquiry, we presume that licensed counsel has performed in an ethical and competent manner. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 24} Second, we determine whether “the defense was prejudiced by counsel’s ineffectiveness.” *Bradley*, at paragraph two of the syllabus. Prejudice requires a showing to a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at paragraph three of the syllabus.

{¶ 25} Our review of claims of ineffective assistance of counsel is undertaken with the understanding that we are not in a position to second-guess trial counsel. In *Strickland*, the United States Supreme Court stated, “[j]udicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after a conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, at 689. Debatable trial tactics will not form a basis for proving ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶45.

{¶ 26} In the case at bar, Moats argues that his trial counsel was ineffective because the testimony of his physician, Dr. Berenholz, was excluded. Moats presented the trial court with a copy of a letter, purported to be an expert opinion from Dr. Berenholz. Moats notified the court that Dr. Berenholz would not be available for

trial.⁷ Moats's trial counsel then filed a proper motion, which the lower court granted, ordering all parties to drive to Youngstown to take the deposition of the "expert witness."

{¶ 27} Subsequently, the State filed a motion to reconsider the trial court's decision to allow the deposition of the expert witness. The basis of the motion to reconsider was that Moats's counsel never provided the State with copies of the medical records to which the expert witness would be testifying about at his deposition. The trial court granted the State's motion preventing Dr. Berenholz from testifying. The record provides the following:

"THE COURT: She [the prosecutor] alleged in her brief that she filed a demand for discovery on April 11th."

"MS. KOWALSKI: Yes, Your Honor, we did file a demand for discovery on April 11th."

"THE COURT: And I assume that demand for discovery encompassed the medical records?"

"MS. DONOVAN: It includes all records that witnesses for the defense would be testifying to, expert or - -."

"MR. GARDNER: Judge, if I may correct myself. Yes, we did receive that. I did receive that from the prosecution, the standard discovery request."

{¶ 28} After correcting himself and stating that he did indeed receive the State's demand for discovery, defense counsel went on to claim that he was not under any

⁷Tr. vol. 1, p. 5.

obligation to turn the records over since he never asked the State for discovery.⁸ The trial court disagreed and told defense counsel that his interpretation of the law was incorrect:

“THE COURT: Mr. Gardner, you think the law says that. You’re the only one in the room who says that the law allows you to ambush your opponent. Do you want me to pull out Local Rule 21 and show it to you? You are not familiar with Local Rule 21 and disclosure of expert reports?”

“MR. GARDNER: *I am not,* your Honor, but the expert report that was -
-.”⁹

(Emphasis added.)

{¶ 29} Later, at trial on the morning of May 12, 2008, the trial court provided additional details regarding its decision to exclude Dr. Berenholz from testifying as a witness:

“Mr. Gardner, I could give you a continuance for three months, but given this letter, *which does not state anything that would be admissible in a court of law, this Court has no assurance that you would have a witness who would be able to provide any kind of testimony on behalf of Mr. Moats at any time.* This letter was written six weeks ago. You indicated in chambers to us that - - *and I indicated - - that was a month ago - - that this would not be admissible testimony. You had time to correct it, yet you did not correct it. And I don’t have any assurance that it’s correctable.* So we’re going to go forward with trial and Dr. Berenholz is not going to be a witness.”¹⁰

(Emphasis added.)

⁸Tr. vol. 1, p. 11, 13, 16.

⁹Tr. vol. 1, p. 16.

¹⁰Tr. vol. 1, p. 23 - 24.

{¶ 30} In addition to the lack of admissibility of Dr. Berenholz's testimony, it is clear that Moats's poor performance on the field sobriety tests was a primary part of the State's case against Moats and reinforces the lower court's ruling.

{¶ 31} The record shows that Moats's attorneys' actions were well within the parameters of effective assistance of counsel. We conclude that Moats's attorneys made valid and proper strategic decisions in regard to their client's welfare. These decisions fell well within the ambit of debatable trial tactics and do not establish that counsel violated an essential duty to Moats. See *State v. Panza*, Cuyahoga App. No. 84177, 2005-Ohio-94, ¶24; *State v. Irwin*, Hocking App. No. 03CA13, 2004-Ohio-1129, ¶33.

{¶ 32} Here, it was defense counsel's tactical decision not to turn over Moats's medical records that were to be used by an expert witness during a deposition. This was not a substantial violation of defense counsel's duties to his client as counsel had a strategy in mind when preparing for trial that did not include allowing the State to see defense counsel's evidence. The lower court soundly rejected Moats's argument that he should be allowed to have his expert testify by deposition. The lower court rejected Moats's argument because he failed to produce the medical records and failed to provide the lower court with any evidence that his expert's opinion would have risen to the level of a "medical degree of certainty" necessary for Dr. Berenholz's testimony to be admissible at trial. Accordingly, we find no evidence of ineffective assistance of counsel on the part of Moats's trial counsel.

{¶ 33} Accordingly, Moats's second assignment of error is overruled.

Motion for Acquittal and Manifest Weight of the Evidence

{¶ 34} Due to the substantial interrelation between Moats's third and fourth assignments of error, we shall address them together. Specifically, Moats argues that the lower court erred in denying his motion for acquittal and his convictions were against the manifest weight of the evidence.

{¶ 35} Crim.R. 29(A) states that a trial court "shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense or offenses." When reviewing sufficiency of the evidence, an appellate court must determine "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, 273, 574 N.E.2d 492. The Supreme Court has determined that, in essence, sufficiency is a test of adequacy. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. Also see, *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677.

{¶ 36} Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may, nevertheless, conclude that the judgment is against the weight of the evidence. Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jurors that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, their verdict shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a

question of mathematics, but depends on its effect in inducing belief. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the fact finder’s resolution of the conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio- 52, 678 N.E.2d 541.

{¶ 37} As to a claim that a judgment is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Martin* (1983), 20 Ohio App.3d 172, 20 Ohio B. Rep. 215, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 38} The record in the case at bar verifies that significant evidence was presented at the trial court. More specifically, Moats argues that the State’s witness observed Moats almost entirely while he was not driving and Moats also argues that the testing and observations done by the police were not performed correctly; and that the observations and tests were invalid. However, he only makes bare

assertions or claims of error on the part of the police. Moats fails to present any evidence to support these bare assertions.

{¶ 39} The evidence in the record does not support Moats's claims of error. Here, Patrolman Alameda performed the Horizontal Gaze Nystagmus (HGN) test and observed six indicators that Moats was suffering from alcohol impairment. Only four indicators are necessary to determine alcohol impairment. Moats was also given the one-legged stand field sobriety test. He did not tell the officer that he had any limitations that would prevent him from completing the test until after he failed the test. During the one-legged stand, the officer observed Moats swaying, putting down his foot multiple times, and raising his arms from the sides more than six inches, all of which are indicators for impairment. Patrolman Alameda also observed a urine stain on Moats's pants at the time he was being tested.

{¶ 40} Moats was also given the finger-to-nose test. Moats was unbalanced and unable to complete the test because police feared he would fall face first in the parking lot, as evidenced by the dashcam video and testimony given. In addition to the video, Patrolman Alameda testified that based on his education, training, and experience Moats was under the influence of alcohol or drugs at the time of testing.

{¶ 41} After Moats failed the field sobriety tests, he was arrested and taken to the police station so that a blood alcohol (breath test) could be conducted. However, when Patrolman Meyerholtz attempted to administer the test, Moats refused. The State submitted its exhibit two, which documented Moats's refusal. Patrolman

Meyerholtz testified that he observed Moats to be sleepy, lethargic, and not really coherent.

{¶ 42} Accordingly, based on the evidence in the record we find Moats's convictions to be proper. Moreover, 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. There is nothing in the record to suggest that the jury lost its way and created such a miscarriage of justice as to require a reversal of Moats's convictions.

{¶ 43} Moats's third and fourth assignments of error are overruled.

Jury Instruction

{¶ 44} Moats argues in his fifth and final assignment of error that the lower court erred in instructing the jury on the offense of refusal to submit to chemical testing where that offense was not charged in the indictment.

{¶ 45} In the case at bar, Moats initially objected to the jury instruction. The trial court then agreed to, at Moats's request, insert the phrase, "The Defendant claims he was never offered such a test," after the first sentence in the jury instruction. Moats did not object to the instruction after the phrase he requested was added. "Absent plain error, the failure to object to improprieties in the jury instructions, as required by Crim. R. 30 is a waiver of the issue on appeal." *State v. Underwood* (1983), 3 Ohio St.3d 12, 13.

{¶ 46} The use of the refusal as evidence of a defendant being under the influence is controlled by an authorized jury instruction. *City of Middleburg Heights v.*

Henniger, Cuyahoga App. No. 86882, 2006-Ohio-3715. The actual jury instruction used in *Henniger* was as follows:

“Evidence has been introduced indicating the defendant was asked but refused to submit to a chemical test of his breath to determine the amount of alcohol in his system, for the purpose of suggesting that the defendant believed he was under the influence of alcohol. If you find the defendant refused to submit to said test, you may, but are not required to, consider this evidence along with all the other facts and circumstances in evidence in deciding whether the defendant was under the influence of alcohol.”

Id.

{¶ 47} The relevant jury instructions that the lower court sought to use in the case at bar were identical to the instructions used in *Henniger*. In fact, the only changes to the instructions occurred when Moats’s request to insert the phrase, “The Defendant claims he was never offered such a test,” after the first sentence in the jury instruction, was granted by the lower court.

{¶ 48} “The admission or exclusion of evidence and the giving of jury instructions rest in a trial court’s sound discretion. In order to find an abuse of that discretion, an appellate court must determine the trial court’s decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment.” *State v. Chambers*, Stark App. No. 2005CA00277, 2006-Ohio-958.

{¶ 49} The addition of Moats requested phrase and its subsequent approval by the lower court constituted a proper and authorized jury instruction. Accordingly, we find that the lower court’s actions were proper and therefore did not constitute an abuse of discretion.

{¶ 50} Moats's fifth assignment of error is overruled.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR