[Cite as *State v. Watts*, 2016-Ohio-8318.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104188

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MILTON ARTHUR WATTS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-602160-A

BEFORE: Boyle, J., Keough, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: December 22, 2016

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Milton Arthur Watts, appeals his conviction, raising the following two assignments of error:

> I. The trial court erred in failing to grant trial counsel's motion to withdraw as counsel.
>
> II. The guilty verdict cannot be upheld because trial counsel provided ineffective assistance of counsel thereby violating appellant's right to counsel.

{¶2} Finding no merit to the appeal, we affirm.

A. Procedural History and Facts

{¶3} In December 2015, Watts was indicted on four counts: trafficking in violation of R.C. 2925.03(A)(2), a fourth-degree felony; two counts of possession of drugs in violation of R.C. 2925.11(A), fifth-degree felonies; and theft in violation of R.C. 2913.02(A)(1), a first-degree misdemeanor. Watts pleaded not guilty to the charges, and the matter proceeded to a jury trial.

{¶4} The charges arose in connection with Watts's conduct at a Marc's grocery store on December 21, 2015. According to the state's case at trial, Donna Kennedy, a loss prevention specialist with Marc's, spotted Watts in the Marc's "closeout section," stuffing shirts inside of his coat. Kennedy waited for Watts and his friend outside the store where she confronted them. Kennedy acknowledged that the two did not appear to have any merchandise on them, but nonetheless directed them back into the store so she could issue them a no trespass notice as a result of their attempted theft. On their way

back to Kennedy's office, Kennedy observed Watts pull out a packaged "summer sausage, salami" and attempt to set it down. At this point, Kennedy reprimanded Watts and grabbed the unopened summer sausage, which scanned for $5.29. Kennedy also directed Watts to provide his identification and to take off his coat, which Kennedy indicated was necessary "to check that there's nothing on you." Kennedy took the coat from Watts and discovered "a little bottle of powder stubs," which the state established tested positive for methamphetamine. Kennedy further testified that she observed "two little packs with white powder" inside Watts's wallet when he was getting his identification; the packs were later determined to contain methamphetamine and heroin. Kennedy retrieved all the items and ultimately turned the items over to the Brooklyn police when they arrived on the scene.

{¶5} The jury found Watts not guilty on the trafficking and theft charges but guilty on the two counts of drug possession. Following the verdict, Watts declined a presentence investigation report and asked the trial court to proceed directly to sentencing. The trial court sentenced Watts to a total term of seven months in prison.

{¶6} This appeal followed.

B. Motion to Withdraw as Counsel

{¶7} In his first assignment of error, Watts argues that the trial court erred in refusing to allow his trial counsel to withdraw from the case. Relying on Prof.Cond.R. 1.16 and Loc.R. 10(B) of the Court of Common Pleas of Cuyahoga County, Watts argues that the trial court should have allowed his trial counsel to withdraw because (1) Watts

"wished to discharge trial counsel"; and (2) trial counsel and Watts had a "fundamental difference in opinion regarding whether the matter should proceed to trial."

{¶8} We review a trial court's decision on a motion to withdraw as counsel under an abuse of discretion standard. *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 135. We therefore will not reverse a trial court's decision unless we find that the ruling was "unreasonable, arbitrary, or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). In this case, Watts fails to demonstrate how the trial court abused its discretion. Nor does he offer any authority in support of his argument that the trial court's refusal to grant trial counsel's motion to withdraw constitutes reversible error. Based on the record before us, we find no abuse of discretion.

{¶9} On the day before trial, Watts's trial counsel appeared before the trial court and orally requested to withdraw from the matter, indicating that he did not have "good feel on the relationship," that Watts was not receptive to his advisement of a plea deal, and that he did not believe that he could "effectively represent him in this matter." In response, the trial court specifically inquired as to trial counsel's definition of "effective representation" — to which defense counsel ultimately explained: "Just that it's very difficult to communicate. I try speaking with him, he speaks over me. It's a tough way to communicate." In their discussion, the trial court identified defense counsel's concern emanated from Watts's refusal to accept the plea deal and the risk of his being convicted on all counts if the matter proceeded to trial. The trial court then addressed Watts, reiterating that it was Watts's decision whether to take the plea — not the

lawyer's, and that his lawyer is obligated to represent him to the best of his ability, which he assumed his trial counsel would do.

{¶10} As recognized by the Ohio Supreme Court, the right to counsel "does not guarantee 'rapport' or a 'meaningful relationship' between client and counsel." *State v. Henness*, 79 Ohio St.3d 53, 65, 679 N.E.2d 686 (1997), quoting *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). "Hostility, tension, or personal conflict between an attorney and a client that do not interfere with the preparation or presentation of a competent defense are insufficient to justify the withdrawal of appointed counsel." *State v. Crew*, 8th Dist. Cuyahoga No. 86943, 2006-Ohio-4102, ¶ 17, quoting *State v. Dykes*, 8th Dist. Cuyahoga No. 86148, 2005-Ohio-6636, ¶ 7. Although Watts's trial counsel was clearly frustrated with Watts, there is no evidence in the record that the communication problems between the two prohibited his trial counsel from being effective.

{¶11} Further, contrary to Watts's insinuation on appeal, he never asked the trial court to remove or substitute his trial counsel. Instead, Watts expressly indicated his desire to proceed to trial the next day. Moreover, aside from Watts being acquitted of two of the four counts at trial, the record reflects that his trial counsel fulfilled his obligation in competently representing Watts at trial. Accordingly, we find no basis to conclude that the trial court abused its discretion in denying trial counsel's motion to withdraw.

{¶12} The first assignment of error is overruled.

C. Ineffective Assistance of Counsel

{¶13} In his second assignment of error, Watts argues that he was denied effective assistance of counsel in violation of his Sixth Amendment right. We disagree.

{¶14} To establish ineffective assistance of counsel, a defendant must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

1. Failure to File a Written Motion to Withdraw as Counsel

{¶15} Watts first argues that his trial counsel failed to provide effective assistance of counsel by failing to file his motion to withdraw in writing as required under Loc.R. 10(B). Watts presupposes that if his trial counsel had filed a written motion, the trial court would have granted it. However, there is no support in the record for this argument. The record shows that the trial court did not deny the motion because it was orally made; instead, the trial court properly denied the motion because the attorney's stated grounds did not warrant his withdrawal from the case. Thus, the failure to comply with Loc.R. 10(B) did not prejudice Watts and does not support a claim for ineffective assistance of counsel.

2. Motion to Suppress

{¶16} Watts next argues that his trial counsel was ineffective by failing to file a motion to suppress all evidence discovered by Kennedy during her search and seizure of him in violation of his constitutional rights. According to Watts, Kennedy was acting as an auxiliary police officer and under the direction of the Brooklyn Police Department when she illegally searched him and recovered the drugs.

{¶17} The failure to file a suppression motion is not per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52. Rather, a trial counsel's failure to file a motion to suppress constitutes ineffective assistance of counsel only if there is a reasonable probability that, had the motion to suppress been filed, it would have been granted. *State v. Wilson*, 2d Dist. Clark No. 08CA0445, 2009-Ohio-2744, ¶ 11. *See also State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291, 752 N.E.2d 859.

{¶18} The Fourth Amendment protects people against unreasonable searches and seizures. "[S]earches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶19} Ohio courts have held for many years, however, that "the constitutional right against unreasonable searches and seizures applies only to actions by the government and its officers and not to acts of private individuals." *State v. Cook*, 149 Ohio App.3d 422, 2002-Ohio-4812, 777 N.E.2d 882, ¶ 10 (2d Dist.), quoting *State v. McDaniel*, 44 Ohio

App.2d 163, 171, 337 N.E.2d 173 (10th Dist.1975). As a result, even if a private person conducts an illegal search, the evidence will not be barred by exclusionary rule as long as the government did not participate in the search. *McDaniel* at 171-172. As this court has previously explained,

> Under the interpretation of the Fourth Amendment set forth *in Burdeau* [*v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921)], most courts have held that evidence of crime obtained by private investigators and security guards, who hold no special sovereign authority; have no formal affiliation with the sovereign; or are not acting at the direction of or controlled by a governmental agency, is admissible at trial. This view is premised upon the rationale that the primary function of privately employed security officers is protection of their employers' property, rather than law enforcement. *See e.g., U.S. v. Francoeur* (5th Cir.1977), 547 F.2d 891, 893-94, cert. denied, 431 U.S. 918, 923; *State v. McDaniel* (1975), 44 Ohio App. 2d 163, 170-174.

State v. Hegbar, 8th Dist. Cuyahoga No. 49828, 1985 Ohio App. LEXIS 9538 (Dec. 5, 1985).

{¶20} But "[i]f a private party acts as a government agent, the protection against unlawful searches and seizures may apply." *State v. Cook*, 149 Ohio App.3d 422, 2002-Ohio-4812, 777 N.E.2d 882, ¶ 11 (2d Dist.), citing *State v. Morris*, 42 Ohio St.2d 307, 316, 329 N.E.2d 85 (1975), and *Burdeau*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed.

1048. "The test of government participation is whether, in light of all the circumstances, the private person acted as an instrument or agent of the state." *Id.*, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). "The cases in this area require a great deal of entanglement between the police and the private searcher before agency can be found." *State v. Jedd*, 146 Ohio App.3d 167, 172, 765 N.E.2d 880 (4th Dist.2001); *State v. Byerly*, 11th Dist. Portage No. 97-P-0034, 1998 Ohio App. LEXIS 3869 (Aug. 21, 1998).

{¶21} Here, the record reveals that Kennedy's actions cannot give rise to a Fourth Amendment violation because she is a private citizen — not a police officer or government law enforcement officer. We do not agree that Kennedy's statement on cross-examination that she is also "with the Brooklyn police auxiliary" and the fact that she completed a city of Brooklyn shoplifting form evidences that Kennedy was acting in her capacity as a member of the Brooklyn police auxiliary at the time that she stopped and searched him. Indeed, "[a] search made by a security employee employed by a department store, and acting solely on behalf of and for the benefit of such department store, does not constitute governmental action or participation, even though such employee is commissioned as a special deputy sheriff." *McDaniel* at paragraph three of the syllabus. There is simply no evidence in this record to support Watts's bald assertion that Kennedy was acting "under the direction of the Brooklyn Police Department." The record reflects that Kennedy was acting solely as a loss prevention specialist for Marc's. Notably, Kennedy expressly testified that she is not a law enforcement officer and that

she did not hold herself out to be a police officer. The record further reflects that Kennedy specifically had her manager call the police in order for Watts to be arrested and that the police only became involved after receiving the call. Watts does not raise any challenge with respect to the Brooklyn police officers and their arrest of him.

{¶22} Thus, given that the record does not support a finding that Kennedy was acting as a government agent to support a constitutional challenge under the Fourth Amendment, we find that the argument raised by Watts would not have been successful if asserted in a motion to suppress. We therefore cannot say that trial counsel was deficient in failing to file a motion that would have been futile.

{¶23} The second assignment of error is overruled.

{¶24} Judgment affirmed.

It is ordered that appellee recover from 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 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.

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR