[Cite as *State v. Lewis*, 2015-Ohio-2285.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- TERESA A. LEWIS Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2014CA00178 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court, No. 2014TRD03951
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 8, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH MARTUCCIO Canton Law Director TYRONE HAURITZ Canton City Prosecutor ANTHONY J. FLEX Assistant City Prosecutor 218 Cleveland Ave. SW Canton, Ohio 44702	BERNARD L. HUNT 2395 McGinty Rd. N.W. North Canton, Ohio 44720

Hoffman, J.

{¶1} Defendant-appellant Teresa A. Lewis appeals her conviction entered by the Canton Municipal Court on one count of driving under suspension, in violation of R.C. 4510.14. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 17, 2014, Appellant visited the North Canton Medical Foundation for a doctor's appointment. After the appointment, she traveled to the Louisville Medicine Shoppe to fill a prescription given to her by her doctor.

{¶3} Following an OVI offense in September of 2013, Appellant had her driving privileges restricted. As a result, Appellant's driving privileges were limited to driving to and from: court, community service, DIP, drug counseling at Quest, medical appointments, and church. Her car had an Intoxalock machine installed, requiring she blow into the machine to start the vehicle.

{¶4} After leaving the Medicine Shoppe on June 17, 2014, Appellant drove her car to her daughter's house. Appellant maintains she was not feeling well and decided to stop at her daughter's house, who also suffers from the same medical condition. Upon leaving her daughter's home, Appellant was stopped by Louisville Police Officer Brandon Allensworth, who observed Appellant leaving the Louisville Giant Eagle parking lot. He later testified he noticed Appellant's bright yellow OVI license plate, and ran her information through LEADS.

{¶5} Pamela Purses, an employee of the Canton Municipal Court, testified herein Appellant's privileges included stopping for groceries or gas while travelling to and from an authorized location.

{¶6} Appellant was charged with driving under suspension, in violation of R.C. 4510.14. The matter proceeded to a jury trial on September 8, 2014. Appellant was found guilty of the charge. The trial court ordered Appellant surrender her driver's license and plates for 180 days and imposed a jail term of three days.

{¶7} Appellant appeals, assigning as error:

{¶8} "I. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE APPELLANT'S CRIMINAL RULE 29, MOTION FOR ACQUITTAL AND DIRECTED VERDICT.

{¶9} "II. THE APPELLANT WAS DENIED HER EFFECTIVE ASSISTANCE OF COUNSEL, WHICH VIOLATED HER RIGHTS UNDER THE 6TH AND 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION."

I

{¶10} Appellant maintains the trial court erred in denying her Criminal Rule 29 motion for judgment of acquittal.

{¶11} In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. *See, e.g., State v. Carter,* 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974(1995); *State v. Jenks,* 61 Ohio St.3d 259, 273, 574 N.E.2d 492(1991).

{¶12} Here, Appellant was convicted of driving under suspension, in violation of R.C. 4510.14, which reads,

> No person whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under section

> 4511.19, 4511.191, or 4511.196 of the Revised Code or under section 4510.07 of the Revised Code for a conviction of a violation of a municipal OVI ordinance shall operate any motor vehicle upon the public roads or highways within this state during the period of the suspension.

{¶13} Appellant admitted to the officer her driver's license was suspended with privileges, but asserted she was driving within her privileges. Appellant admits her privileges do not allow her to drive to her daughter's home and she did not stop for gas or groceries on the date in question. Rather, she stopped for her prescription, and then stopped at her daughter's home due to her medical condition.

{¶14} We find the trial court correctly overruled Appellant's Criminal Rule 29 motion for acquittal as viewing the facts in a light most favorable to the State; there was sufficient evidence for the jury to find the Appellant guilty of the charge. Appellant was stopped leaving her daughter's home on the day in question. She did not provide independent evidence of medical necessity, and the stop was not within her privileges under suspension.

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

II.

{¶16} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984); *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶17} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet *both* the deficient performance and prejudice prongs of *Strickland* and *Bradley. Knowles v. Mirzayance,* 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251(2009).

{¶18} To show deficient performance, appellant must establish that "counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052 at 2065.

{¶19} Thus, a court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in

the exercise of reasonable professional judgment. *Strickland* 466 U.S. 668 at 689,104 S.Ct. at 2064.

{¶20} In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." *Strickland,* 466 U.S. 668 at 689,104 S.Ct. at 2064. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland,* 466 U.S. 668 at 689,104 S.Ct. at 2064.

{¶21} An appellant must further demonstrate he suffered prejudice from his counsel's performance. See *Strickland,* 466 U .S. at 691 ("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"). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. To prevail on his ineffective-assistance claim, appellant must show, therefore, that there is a "reasonable probability" that the trier of fact would not have found him guilty.

{¶22} Appellant asserts counsel failed to object to the jury instructions regarding expert witnesses and failed to call Appellant's daughter as a witness to testify.

{¶23} At trial, the following exchange occurred on the record,

> MR. WISE: There was instruction with regard to expert witness testimony. I don't believe there was any expert witness called. I would

just ask do [sic] indicate to the jury that while that instruction was given, there was no witness qualified as an expert in this case.

THE COURT: Well, police officers are considered experts in their field.

MR. WISE: He had no training on the suspension. He talked about OVI training but no specialized training in traffic enforcement. I believe that's what he said.

THE COURT: I have to - - very [sic] time I read that instruction there is a police officer testifying.

MR. WISE: Okay.

THE COURT: Do you have any - - do you want me to give the jury instruction?

MR. FLEX: Well, I don't think an instruction's necessary. The jury decides if they - - if someone's an expert or not. They'll have those instructions in front of them, so.

MR. WISE: I mean, I'd ask for that instruction but that's obviously up to the judge.

THE COURT: I'm not sure exactly what the instruction is that you want.

MR. WISE: That there was no expert witness called in this case or no expert witness testified to driving under suspension outside of limited driving privileges.

THE COURT: I think they can make a determination whether the police officer or Ms. Purses were expert witnesses, so…

MR. WISE: That's fine, Your Honor. Thank you. Do you want to - -

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{¶24} While we disagree with the trial court's opinion the police officer in this case was testifying as an expert witness, we find giving either additional requested instruction would not reasonably change the outcome of the trial.

{¶25} Further, Appellant asserts counsel was ineffective in failing to call her daughter as a witness as a good faith defense to the charge.

{¶26} A reviewing court must adopt a deferential attitude to the strategic and tactical choices counsel made as part of a trial strategy. *State v. Griffie,* 74 Ohio St.3d 332, 333, 658 N.E.2d 764 (1996). Counsel's decision to not call Appellant's daughter as a witness will not be second guessed as trial strategy. Furthermore, there is no record of what Appellant's daughter would have testified to; therefore, Appellant cannot meet the second prong of the *Strickland* test.

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

{¶28} The judgment entered by the Canton Municipal Court is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur