

[Cite as *State v. Stover*, 2016-Ohio-7202.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DESMOND STOVER

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 16CA02

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court of
Common Pleas, Case No. 15CR750 D

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 22, 2016

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Desmond Stover appeals his criminal convictions entered by the Richland County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 14, 2015, Officer Michael Haines of the Mansfield Police Department responded to a 911 dispatch call concerning a large group of individuals, described as drug dealers, fighting in the street near the area of Helen Avenue in Mansfield, Ohio. Upon arrival, Officer Haines observed around seven to ten people in the street, and made an approach to investigate the situation. Officer Haines said to the group, "Hey, everyone stop, come over here and talk to me." Everyone stopped, except for Appellant, who moved away from the group and the officers.

{¶3} Officer Haines then identified himself, telling Appellant to stop walking away. Appellant turned, looked at the officer, and kept on walking. Appellant then took off running between two houses. Officer Haines called to dispatch regarding the fleeing individual, and began pursuing Appellant. Officer Webb accompanied Officer Haines in pursuing Appellant. During the pursuit, Officer Haines observed Appellant reach into his gray sweatpants, grab something and throw it.

{¶4} Officer Webb also observed Appellant reach into his pockets several times during the pursuit and saw a black object come out. Officer Webb was in front of Officer Haines during the pursuit. Officer Webb indicated to Officer Haines the direction in which the object was thrown, and made a mental note of the location in order to return to the area after Appellant was apprehended.

{¶15} Officer Webb eventually caught Appellant, wrestling him to the ground. Officer Haines used a taser to subdue Appellant. Approximately \$1600 was found on Appellant's person.

{¶16} Minutes later, Officer Webb retraced the route of pursuit to look for the object or objects thrown by Appellant. He returned to the spot he indicated the object had been thrown. Officer Webb found a handgun there. Subsequent testing demonstrated the firearm was operable. In DNA testing, Appellant's profile could not be excluded from the 16 genetic markers.

{¶17} Appellant was indicted by the Richland County Grand Jury on one count of tampering with evidence, in violation of R.C. 2921.12; one count of having weapons under disability, in violation of R.C. 2923.13; one count of receiving stolen property, in violation of R.C. 2913.51; and one count of obstructing official business, in violation of R.C. 2921.31.

{¶18} The matter proceeded to jury trial. The trial court entered a directed verdict dismissing the charge of receiving stolen property. The jury returned verdicts of guilty as to the remaining counts.

{¶19} Appellant was sentenced to three years in prison on the weapons under disability charge; two years on the tampering with evidence charge; and three months on the obstructing official business charge. The court imposed the sentences on the tampering with evidence charge and the weapons under disability charge consecutively,

and ran the term imposed on the obstructing official business charge concurrent to the felony terms.¹

{¶10} Appellant appeals, assigning as error:

{¶11} “I. DESMOND STOVER WAS DENIED HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE WHEN TRIAL COUNSEL STIPULATED TO AN ELEMENT OF THE OFFENSE DURING HIS JURY TRIAL.

{¶12} “II. DESMOND STOVER'S CONVICTION FOR TAMPERING WITH EVIDENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

I.

{¶13} In the first assignment of error, Appellant maintains he was denied effective assistance of counsel when his trial counsel stipulated to his prior felony conviction relative to the charge of having weapons under disability, in violation of R.C. 2923.13.

{¶14} Reversal of a conviction for ineffective assistance of counsel requires a defendant to show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel's performance must fall below an objective standard of reasonableness to be deficient in terms of ineffective assistance of counsel. See *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Moreover, the defendant must show there exists a reasonable probability, were it not for counsel's

¹ The trial court's sentencing entry indicates a 3 month sentence as to Count 5, but we find no Count 5 in the Indictment.

errors, the results of the proceeding would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998).

{¶15} In evaluating a claim of ineffective assistance of counsel, a court must give great deference to counsel's performance. *Strickland* at 689. "A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014–Ohio–2175, ¶ 69.

{¶16} "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. See *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (counsel is 'strongly presumed' to make decisions in the exercise of professional judgment). Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. See *Bell*, supra, at 702, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914; *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Strickland*, supra, at 689, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)". *Yarborough v. Gentry* (2003), 540 U.S. 1, 8, 124 S.Ct. 1, 6, 157 L.Ed.2d 1.

{¶17} The Ohio Supreme Court has stated "[w]e will ordinarily refrain from second-guessing strategic decisions counsel make at trial, even where counsel's trial strategy was questionable. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 16 O.O.3d 35, 402 N.E.2d 1189." *State v. Myers* (2002), 97 Ohio St.3d 335, 362, 780 N.E.2d 186, 217.

{¶18} Appellant was convicted of having weapons under disability, in violation of R.C. 2923.13, which reads,

(A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

{¶19} The following exchange occurred at the close of the State's evidence at trial:

MR. BOYD: There is the issue of the ... Do you have a certified copy of the convictions?

MR. BENOIT: Yes.

MR. BOYD: Okay.

MR. BENOIT: That's Exhibit 1. I didn't introduce it through anybody.

MR. BOYD: I just hadn't seen this.

THE COURT: You are stipulating that?

MR. BOYD: Yes. I just didn't see it. It's fine. It is what it is.

Tr. at p. 249.

{¶20} We find Appellant's counsel made a tactical decision to stipulate to the prior felony conviction, rather than prejudice Appellant by allowing the State to present testimony to the jury regarding Appellant's prior criminal history.

{¶21} Furthermore, we find Exhibit 1 was arguably self authenticating pursuant to Evidence Rule 902(4), which reads,

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of a jurisdiction, state or federal, or rule prescribed by the Supreme Court of Ohio.

{¶22} Furthermore, there is nothing in the record to demonstrate Appellant was not the individual identified in the prior felony conviction or the prior conviction would have proven to have been improperly certified. *State v. Galloway*, 5th App. Dist. No. 2003-CA-0086, 2004-Ohio-2273.

{¶23} Accordingly, we find Appellant has not demonstrated he was denied the effective assistance of counsel pursuant to *Strickland*, as trial counsel made the tactical decision not to challenge the introduction of the prior felony conviction in order to avoid testimony before the jury with regard to Appellant's prior criminal history. Further, Appellant has not demonstrated but for the alleged error the outcome of the trial would have been otherwise.

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

II.

{¶25} In the second assignment of error, Appellant argues his conviction for tampering with evidence is against the manifest weight of the evidence.

{¶26} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and “in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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.’” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997–Ohio–52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶27} The jury convicted Appellant of tampering with evidence, in violation of R.C. 2921.12, which reads:

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

{¶28} Appellant argues he did not possess or throw the firearm in question, a black .9mm Taurus handgun. As set forth in the Statement of the Facts and Case above, Officer Haines observed Appellant reach into his pants, trying to grab something and throw it. Tr. at 128. He stated Officer Webb was ahead of him at the time. Id.

{¶29} Officer Webb testified he saw Appellant reach into his pockets, and throw a black object. Specifically, he testified,

A. And it's like right there I see Mr. Stover doing this in his pockets.

Q. Okay.

A. Go into his pockets.

Q. Okay.

A. I saw him go in several times and saw a black object come out.

Q. Okay. How many throwing motions did you see?

A. Probably three.

Q. Were you able to pick out any other objects, or if there were any other objects thrown?

A. No.

Q. But you did take note of what?

A. I took note that he went in his pocket and he threw a black object.

I could tell that.

Q. Okay.

A. Other than that, I couldn't tell.

Q. Okay, and did you do anything or say anything to kind of give yourself a landmark or something like that so you knew where you needed to go back or anything like that?

A. Absolutely. I actually yelled back to Officer Haines that he was throwing stuff that way, so hopefully both of us could remember exactly where to go back and try to find whatever the object was.

Tr. at 235-236.

{¶30} Officer Webb testified, after apprehending and subduing Appellant, he returned minutes later to the spot where he saw Appellant throw the object, and found a handgun there. Tr. at 239. The handgun was later identified as a black Taurus .9mm and testing demonstrated the firearm was operable.

{¶31} Based upon the evidence presented at trial, we do not find the jury lost its way.

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

{¶33} Appellant's convictions in the Richland County Court of Common Pleas are affirmed.

By: Hoffman, J.

Farmer, P.J. and

Wise, J. concur