

[Cite as *State v. Walker*, 2009-Ohio-6702.]

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 08CA0059

Appellee

v.

SAUNDRA D. WALKER

APPEAL FROM JUDGMENT
ENTERED IN THE
WAYNE COUNTY MUNICIPAL COURT
COUNTY OF WAYNE, OHIO
CASE No. CRB-08-06-00860

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 21, 2009

Per Curiam.

{¶1} Appellant, Sandra Walker, appeals from the decision of the Wayne County Municipal Court. This Court affirms.

I.

{¶2} On May 29, 2008, Rittman Police Officer John Miller responded to a noise complaint at Walker’s apartment building. Upon arrival, he observed Walker through an open doorway, holding a white envelope. Officer Miller watched as Walker began to pull something out of the envelope. Officer Miller testified that after observing him in the doorway, Walker attempted to hide the envelope from him. When he looked in the envelope, he found a white pill that was later identified as Alprazolam, commonly referred to as Xanax. Walker informed Officer Miller that she had a prescription for the pill, but did not produce it for him.

{¶3} On June 16, 2008, Walker was charged with one count of possession of a controlled substance, in violation of R.C. 2925.11(C)(2). Walker pled not guilty to the charge,

and on October 27, 2008, the trial court held a bench trial. At the conclusion of trial, the trial court found Walker guilty of possession of a Schedule IV controlled substance and sentenced her to six months of community control. Walker's sentence was stayed pending appeal to this Court. Walker timely appealed and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“WAS THE TRIAL COURT’S VERDICT, THAT THE DEFENDANT WAS GUILTY OF POSSESSION OF DRUGS, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN THE DEFENDANT OFFERED TESTIMONY THAT SHE HAD A PRESCRIPTION FOR THE DRUG IN QUESTION?”

{¶4} In her first assignment of error, Walker contends that her conviction for possession of drugs was against the manifest weight of the evidence. She specifically contends that she offered testimony to prove her affirmative defense that she had a prescription for the drug in question. This Court does not agree.

{¶5} “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. CA19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring).

{¶6} A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

“an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶7} Pursuant to R.C. 2925.11(A) “[n]o person shall knowingly obtain, possess, or use a controlled substance.” This section does not apply to “[a]ny person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.” R.C. 2925.11(B)(4). Therefore, having a valid prescription is an affirmative defense to the charge of unlawful possession of a controlled substance. *State v. Skorvanek*, 9th Dist. No. 08CA009380, 2009-Ohio-1709, at ¶16. Walker was required to prove this affirmative defense by a preponderance of the evidence. *Id.*

{¶8} Walker admits that she was in possession of a single Xanax pill. However, she contends that the trial court’s verdict was against the manifest weight of the evidence because she testified that she had a prescription for the pill. This Court does not agree.

{¶9} Officer Miller testified that on May 29, 2008, he responded to a complaint regarding loud music at an apartment. He stated that when he arrived, he heard the music in an upstairs apartment. Officer Miller explained that he first listened to the occupants’ conversations, and he “heard a couple of things that made me feel that something was going on as far as drug related.” When he further approached the apartment, he noted the door was open and he observed Walker start to take something out of a white envelope and hand it to a man. Officer Miller identified himself and, as he did so, he observed Walker clench “the envelope like this and pull[] it to her side as if she was trying to conceal it from me and then she was holding her hand down to her side.” Initially, Walker denied that there was anything in the envelope, but then a pill fell out. Officer Miller testified that he knew the pill to be a prescription pill because of the markings. Walker informed Officer Miller that it was a Xanax and that she had a

prescription for it. Officer Miller confiscated the pill and informed Walker that she would need to produce the prescription. Officer Miller testified that Walker never produced the prescription.

{¶10} Walker testified that on May 29, 2008, she was visiting with a former neighbor when Officer Miller observed her with the pill. She explained that she had the pill in the envelope for approximately two and a half to three months. She stated that the pill was prescribed to her in August of 2007 and that she only took the pills as needed. She testified that she had a prescription for Xanax and had been taking them since April of 2006 when her son was killed. On cross-examination, Walker testified that in addition to the prescription from her regular doctor, an emergency room doctor also prescribed Xanax because she had a severe anxiety attack. She explained that she had the prescription Xanax bottle in her purse. She stated that she furnished the prescription at the Orrville Court. Despite Walker's testimony, the prescription bottle was not before the trial court as evidence.

{¶11} Based upon the record before this Court, we conclude that the trial court did not commit a manifest miscarriage of justice when it disbelieved Walker's testimony regarding her prescriptions. Officer Miller testified that it appeared that Walker was attempting to hide the pill when he approached her and that she denied that there was anything in the envelope. Although Officer Miller testified that Walker stated that she had a prescription, he further testified that the prescription was never furnished, despite a lengthy amount of time between the incident and the date of trial. Accordingly, this Court concludes that the trial court's verdict was not against the manifest weight of the evidence. Walker's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“WAS THE DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER APPOINTED COUNSEL FAILED TO INTRODUCE INTO EVIDENCE DEFENDANT'S PRESCRIPTION BOTTLE WHICH THE DEFENDANT TESTIFIED WAS LOCATED IN HER PURSE?”

{¶12} In her second assignment of error, Walker contends that she was denied the effective assistance of counsel when her counsel failed to introduce into evidence her prescription bottle. We disagree.

{¶13} To show ineffective assistance of counsel, Walker must satisfy a two prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, she must show that her trial counsel engaged in a “substantial violation of any *** essential duties to his client.” *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, she must show that her trial counsel’s ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. This Court need not address both *Strickland* prongs if Walker fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶14} This Court acknowledges that during the mitigation phase of her sentencing, Walker’s trial counsel stated that he believed he “failed his client” and that she should appeal on grounds of ineffective assistance of counsel. Specifically, trial counsel stated:

“Your Honor, I think I have failed my client in this case, um, she does have something that would back this up. Um, Your Honor it is a long story but I do understand what has happened here. Um, I would be advising Mrs. Walker to, um, appeal this case probably on the grounds of ineffective assistance.”

{¶15} However, counsel’s assertion that he “failed his client” in the absence of deficient conduct does not substantiate a claim for ineffective assistance of counsel where it does not otherwise exist. Although Walker’s trial counsel stated that he believed he had “failed his client,” he does not explain how or why. He does not admit that he knew of any prescription bottle that would exonerate his client. As will be discussed below, this Court cannot conclude on

the record before this Court that Walker's trial counsel was ineffective. Our analysis begins with the prejudice prong as it is dispositive.

{¶16} As explained above, having a lawful prescription is an affirmative defense to possession of a controlled substance. *Skorvanek*, supra, at ¶16; R.C. 2925.11(B)(4). Walker bore the burden of proving that she had a valid prescription for the pill by a preponderance of the evidence. *Id.* at ¶19. "A 'preponderance of the evidence' is defined in terms of probabilities: *** the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed". (Internal citations omitted.) *VanDyke v. Fisher*, 5th Dist. No. 2006 CA 0007, 2007-Ohio-4785, at ¶23. To this end, Walker's trial counsel elicited testimony from Walker that she had a prescription for the Xanax.

{¶17} Walker testified that she had a prescription for Xanax and mentioned that the written instructions on the bottle indicated that she was to take the pills as needed. On cross examination, Walker stated that she had her prescription bottle with her at trial. Walker's counsel declined to ask any questions on redirect examination and rested his case. Again, Walker was only required to prove her affirmative defense by a preponderance of the evidence. Trial counsel presented evidence for the trial court to weigh. The fact that the trial court did not find in her favor does not necessarily lead to a conclusion that her counsel was ineffective.

{¶18} On appeal, Walker contends that she was prejudiced by her trial counsel's failure to present her prescription bottle. Whether Walker's trial counsel's production of the prescription bottle would have aided her affirmative defense is speculative, as this Court has no way of knowing that the prescription bottle even existed, or if the bottle Walker testified to was

for the same prescription necessary to establish a complete defense to the crime. *State v. Ushry*, 1st Dist. No. C-050740, 2006-Ohio-6287, at ¶43. For example, the prescription bottle could have been for a different dosage of Xanax, or for an antibiotic, thus not aiding her defense. If the prescription bottle did indeed exist for the correct dosage of the Xanax in question, it could be a complete defense to the crime. However, without the actual bottle before this Court, any argument that it would have aided her defense is speculative.

{¶19} A direct appeal is not the appropriate context to present evidence outside the record. *State v. Siders*, 4th Dist. No. 07CA10, 2008-Ohio-2712, at ¶19. Without any evidence that the prescription bottle existed, this Court cannot conclude on direct appeal, as Walker requests, that the failure to produce the bottle as evidence resulted in prejudice.

{¶20} Accordingly, Walker's second assignment of error is overruled.

III.

{¶21} Walker's assignments of error are overruled. The judgment of the Wayne County Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

MOORE, P. J.
DISSENTS, SAYING:

{¶22} I respectfully dissent from the majority’s conclusion that the record does not support Walker’s claim of ineffective assistance of counsel.

{¶23} To prove ineffective assistance of counsel, Walker must show that her trial counsel violated an essential duty to her and that this violation resulted in prejudice. *Strickland*, 466 U.S. at 669. With regard to an appellate court’s standard of review, the Ohio Supreme Court has explained that “[u]pon direct appeal, appellate courts generally review claims of ineffective assistance of counsel on a de novo basis, simply because the issue originates at the appellate level[.]” *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679, at ¶53. While I agree with the majority that we are not bound by trial counsel’s statement that he believed that his client should appeal her case on grounds of ineffective assistance of counsel, I believe that a review of the context of trial counsel’s statement sheds a light on the issue that the majority and the State appear to disregard.

{¶24} Walker took the witness stand at trial and testified about her encounter with Officer Miller. She admitted being at the apartment complex and being in possession of a single Xanax tablet. She testified that she had a prescription for the medication. On cross-examination,

she explained that she presented the prescription bottle to the Orville Court. When the prosecutor challenged her about whether she had any proof with her in court, she said she had the prescription bottle right there in her purse. Neither the prosecutor nor defense counsel asked any further questions. The attorney did not ask for a recess to consult with his client; nor did he ask her to produce the bottle. He simply rested his case.

{¶25} At the conclusion of the trial, the following dialogue occurred:

“THE COURT: Mrs. Walker, it appears to me that even in fact if you had a prescription that could have been furnished. (Inaudible) of the Court, given that I find you guilty.

“***

“THE COURT: Mr. Rudy, would you like to offer mitigation for your client?

“MR. RUDY: Your honor, um, based on the evidence the Court had before it Your Honor, I do understand, um, the verdict. Your Honor, I think I have failed my client in this case, um, she does have something that would back this up. Um, Your Honor it is a long story but I do understand what has happened here. Um, I would be advising Mrs. Walker to, um, appeal this case probably on the grounds of ineffective assistance. *** Your Honor, throughout this case she has been, I think very straightforward and honest with me, um, and I would ask the Court to take that into consideration in fashioning sentence at this time.”

{¶26} The State contends that the decision not to produce the prescription bottle could have been a trial tactic, thus not violating an essential duty to his client. The State argues that trial counsel could have been aware that the prescription bottle was not for a valid Xanax prescription, that it was issued after the date of the offense, or that the pill did not come from the prescription bottle. In other words, the State argues that Walker’s counsel could have been attempting to shield her from perjuring herself and therefore, not producing the prescription bottle was a valid trial tactic.

{¶27} I infer from the conversation above that trial counsel knew of the existence of the prescription bottle and knew that it would support Walker’s affirmative defense. Otherwise his

statement that his client has “something that would back this up” makes no sense. Further, on direct examination trial counsel elicited testimony regarding Walker’s prescription. It defies logic that he would elicit testimony about the prescription if he knew, as the State contends, that the prescription was not valid or would not otherwise support her affirmative defense. Presumably trial counsel would not have pursued this line of questioning had he believed Walker would perjure herself. Indeed, trial counsel stated that Walker had been “very straightforward and honest” with him. This statement is totally inconsistent with the notion that counsel might have been guarding against his client perjuring herself. It was in the context of the court’s comment about the prescription evidence not having been offered to the court that counsel made his declaration that he had failed his client and would encourage her to appeal on the basis of ineffective assistance of counsel. From the facts gleaned from the record below together with the appropriate inferences to be drawn, *Gondor*, supra, I would conclude that trial counsel violated an essential duty to Walker, i.e., he failed to present all the necessary evidence to the court.

{¶28} As to the prejudice prong of the *Strickland* test, the majority explains that “[p]rejudice exists where there is a *reasonable probability* that the trial result would have been different but for the alleged deficiencies of counsel.” (Emphasis added.) *State v. Valez*, 9th Dist. No. 06CA008997, 2007-Ohio-5122, at ¶37, citing *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. While I agree with the statement of law, I do not agree that the majority has properly applied the standard to the facts in this case.

{¶29} To illustrate the importance of the Ohio Supreme Court’s use of the term *reasonable probability* we look to the definition of prejudice for purposes of plain error. Under a plain error analysis, this Court will only reverse if the appellant established that the outcome of the trial *clearly would have been different* but for the alleged error. *State v. Kobelka* (Nov. 7,

2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, and *State v. Phillips* (1995), 74 Ohio St.3d 72, 83. The prejudice standard for ineffective assistance of counsel, however, does not require this Court to conclude that the result would have definitely or clearly been different. Instead, we are required only to find that there is a *reasonable probability* that the result would be different, which I view to be a lower standard. I would conclude that based on the record before us, while there is not a certainty, there is a *reasonable probability* that had trial counsel pursued the production into evidence of the prescription bottle, the result would have been different. It appears from the above dialogue that trial counsel knew about the evidence concerning the prescription. He neither sought to introduce it, nor requested the court to re-open the evidence to permit him to introduce it.

{¶30} Although we cannot be certain that the prescription bottle would have necessarily supported her affirmative defense, the *Strickland* standard does not require us to be certain, only to conclude that a reasonable probability exists that the result would have been different. By determining that the absence of the prescription bottle renders Walker's claims speculative, the majority has stripped Walker of a remedy to her claim of ineffective assistance of counsel. It is without question that we cannot consider evidence outside the record on appeal. *State v. Ushry*, 1st Dist. No. C-050740, 2006-Ohio-6287, at ¶43. However, because Walker's case was heard in the municipal court, she is precluded from filing a petition for post-conviction relief in which she could properly present this evidence. *State v. Cowan*, 101 Ohio St.3d 372, 2004-Ohio-1583, (holding that "[a] municipal court is without jurisdiction to review a petition for post-conviction relief filed pursuant to R.C. 2953.21." *Id.* at syllabus.) Therefore, I would sustain Walker's second assignment of error. I would not address her first assignment of error.

APPEARANCES:

CRAIG R. REYNOLDS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.