[Cite as *State v. Templeton*, 2015-Ohio-2791.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-46
	:	
v.	:	Trial Court Case No. 2013-CR-607
	:	
TEDDY TEMPLETON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 10th day of July, 2015.

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HALL, J.

{¶ 1} Teddy Templeton appeals from his felony convictions for operating a vehicle

under the influence of alcohol. Finding no error, we affirm.

I. Background

{¶ 2} On September 3, 2013, Templeton was indicted on two counts of operating a vehicle under the influence of alcohol—one a violation of R.C. 4511.19(A)(1)(a) and the other a violation of R.C. 4511.19(A)(1)(i), for having a concentration of alcohol in his urine of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters. Both counts alleged that Templeton had previously been convicted of or pleaded guilty to a felony OVI offense.

{¶ 3} On November 19, 2013, Templeton retained new counsel and filed a motion to suppress. A suppression hearing was held on January 3, 2014, at which the State presented the testimony of the Clark County police officer who stopped Templeton, the Clark County Sheriff's office property clerk, and a forensic toxicologist. On January 13, Templeton filed a request for transcripts of the suppression hearing.

{¶ 4} The jury trial had originally been scheduled for January 22, 2014, but by entry filed January 23, the trial court re-scheduled the trial for March 5. Templeton filed, on January 31, a motion to continue the trial because one of the expert witnesses he had retained was unavailable on March 5. The trial court summarily overruled the motion. On February 25, Templeton filed a motion to continue the trial because he had not received the suppression-hearing transcripts. He also filed a motion requesting the transcripts again. The trial court summarily overruled Templeton's request for a continuance and his motion for the transcripts.

{¶ 5} The trial was held on March 5. During cross-examination of the officer who stopped Templeton, defense counsel asked whether the officer "tricked" Templeton into

taking a urine test. (Tr. 149). The officer replied, "He'll have to testify whether he was tricked or not. I just informed him of the facts of what was going on." (*Id*. at 150). Defense counsel moved for a mistrial, arguing that the officer's statement "goes against his [Templeton's] Fifth Amendment right to remain silent." (*Id*.). The trial court overruled the motion and instructed the jury that a criminal defendant has the right not to testify and that the choice to exercise this right cannot be considered evidence of guilt.

{¶ 6} The jury found Templeton guilty on both counts. The jury also found that he has previously been convicted of a felony OVI offense.[1] Templeton was sentenced to 5 years in prison and his driver's license was suspended for life.

{¶ 7} Templeton appealed.

II. Analysis

{¶ 8} Templeton assigns three errors to the trial court, challenging the overruling of his motion for the transcripts, the overruling of his motion for a mistrial, and the overruling of his motions to continue.

A. Overruling Templeton's motion for transcripts of the suppression hearing

{¶ 9} The first assignment of error alleges that the trial court erred by overruling Templeton's motion for transcripts of the suppression hearing.

{¶ 10} Templeton bases his argument on the principle that, "[i]n a criminal case, the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal," *State v. Arrington*, 42 Ohio St.2d 114, 326 N.E.2d 667 (1975), paragraph one of the syllabus; *see also Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971) (saying that "as a

[1] The trial court found, in the judgment of conviction, that he has 15 prior OVI convictions, some of which are felonies.

matter of equal protection, * * * the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal"). This principle, in essence, is that an indigent defendant has the same right to a transcript that a defendant with money has to one. But Templeton was not asking for free transcripts because he was indigent. While he may have had appointed counsel at first, it appears from the record that early on he obtained his own attorney.[2] And the trial court did not deny his request because he could not afford to pay for the transcripts.

{¶ 11} Templeton says in his February 25 motion to continue that after he filed his January 13 transcript request (at which time the trial was set for January 22nd) he was told that "the hearing was too soon to get the transcripts done." "Since the hearing was continued to a further date," Templeton continues, "Counsel had requested the transcripts be prepared for the Trial." Templeton says that later he left several messages with the "Clerk of Courts" "indicating that transcripts were still necessary and please advise on when they could be prepared." But he says, the "Clerk of Courts" never responded. Templeton says that on February 25 he contacted the court again and left messages for "the Clerk and for Judge's Assistant to contact Counsel's office." He did manage to talk to the court reporter, Templeton says, and she told him that she "had no knowledge of the filed request of January 13, 2014, thus transcripts were not prepared." The court reporter said that she would be out of town for the next three days and that she would not have enough time to prepare the transcripts before trial.

{¶ 12} Without question, a trial court should efficiently and promptly provide for the production of requested transcripts when ordered by the court for an indigent defendant

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[2] In November 2013, Templeton filed a "Substitution of Counsel" notice.

or when payment has been secured. Here we are unable to conclude that the lack of production of the transcript was through the fault of the court as opposed to the lack of diligence on behalf of the attorney. Nevertheless, we perceive a more fundamental problem in that Templeton never says why he needed the transcripts, or how he was prejudiced thereby. He did not give the trial court a reason, nor does he give us a reason, broadly saying only that he "needed the transcript of the motion to suppress hearing for an effective defense of his case," (Brief on Behalf of Defendant-Appellant, 9). Even though Templeton now has the suppression-hearing transcript for purposes of appeal (a transcript was filed in July 2014), he does not point to anything in it that would have helped him at trial, like inconsistencies between the trial testimony and the suppression-hearing testimony. Thus regardless of any error, we cannot reverse the trial court's ruling, because Templeton fails to show that he was prejudiced by not having the transcript. *See* App.R. 12(B).

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

B. Overruling Templeton's motion for a mistrial

{¶ 14} The second assignment of error alleges that the trial court erred by overruling Templeton's motion for a mistrial. Templeton contends that the police officer's statement on cross-examination that Templeton will "have to testify whether he was tricked or not" incurably prejudiced Templeton's Fifth Amendment right to remain silent.

{¶ 15} "Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). "In other words, there must be a showing of prejudice. 'The decision whether to grant a mistrial lies within the trial court's sound discretion.' 'In order to demonstrate that a

trial court has abused its discretion in denying a motion for a mistrial, a criminal appellant must show that the trial court's decision was arbitrary, unreasonable, or unconscionable.' " (Citation omitted.) *State v. Patel*, 2d Dist. Greene No. 2010-CA-77, 2011-Ohio-6329, ¶ 6, quoting *State v. Patterson*, 188 Ohio App.3d 292, 2010-Ohio-2012, 935 N.E.2d 439, ¶ 69 (2d Dist.).

{¶ 16} This is the context in which the police officer's statement was made:

Q. It normally requires that in order to obtain a blood draw that you get a warrant?

A. It's present of that case.

Q. And, in this case, with your knowing that's what McNeely says, because you're up on it like I am, you know that it says that absent exigent circumstances you have to get a warrant? But knowing that, you say, you got priors, you've got to take this chemical test?

A. Yeah.

Q. And that was coercive?

A. That's what the 2255 says.

Q. Essentially, you tricked him into taking this test?

A. I just went and informed him that he had no choice but to take the test.

Q. Which is a forced urine draw—

A. I guess—

Q. And you and I know each other so we are talking over each other. I want—my question to you was you tricked him, right?

> A. He'll have to testify whether he was tricked or not. I just informed him of the facts of what was going on.

(Tr. 149-150). Thereafter the trial court gave this curative instruction:

> The Defendant in a criminal case is presumed innocent. I told you this at the beginning of the trial. He carries that presumption of innocence with him unless or until the State of Ohio is able to prove him guilty beyond a reasonable doubt. One of the rights a criminal Defendant has, which I'm sure something of which you're all aware, is that he has a right against self-incrimination. He cannot be forced to take the witness stand. He has the right to take the witness stand if he so chooses, but that's a decision to be made by him and his attorney. If he chooses not to take the witness stand, that is his constitutional right and you're not to consider that for any purpose.

(*Id*. at 153). Templeton did not testify. He contends that the curative instruction could not undo the damage.

{¶ 17} We do not think that the officer's statement incurably prejudiced Templeton. Defense counsel asked the officer if he tricked Templeton, and the officer's answer was a reasonable response to the question. The officer cannot say whether Templeton took the urine test because he was deceived. Only Templeton knows why he agreed to take the test. Moreover, "[i]t is presumed that the jury obeys the instructions of the trial court." (Citation omitted.) *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 54. Given the context of the officer's testimony and above-quoted instruction, we do not find the statement to be an impermissible comment on Templeton's right to remain

silent and we further must assume that the jury did not consider Templeton's decision not to testify as evidence of his guilt.

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

C. Overruling Templeton's motions to continue

{¶ 19} The third assignment of error alleges that the trial court erred by overruling Templeton's motions to continue the trial.

{¶ 20} The January 31 motion to continue is based on Templeton's assertion that an expert witness he was planning to call at trial was unavailable on the trial date. And the February 25 motion to continue is based on Templeton's not having the suppression-hearing transcripts. The trial court summarily overruled both motions, without explanation.

{¶ 21} Templeton contends that the court failed to consider all of the circumstances surrounding the requests—the length of the delay requested, whether other continuances had been requested and received, whether the requested delay was for legitimate reasons, whether Templeton contributed to the circumstance that gave rise to the request. *See State v. Unger*, 61 Ohio St.2d 65, 67-68, 423 N.E.2d 1078 (1981) (saying that a court should consider these factors when evaluating a motion to continue).

{¶ 22} Again, the problem here is that Templeton fails to show prejudice. He does not say what testimony the expert would have given or why the testimony would have changed the outcome of the trial. Nor does Templeton say why he needed the suppression-hearing transcripts or what difference the transcripts would have made at trial. He did not explain any of this to the trial court, and he does not explain any of this to us. So even assuming that the trial court did err, we cannot reverse its rulings. *See* App.R.

12(B).

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

III. Conclusion

{¶ 24} We have overruled the three assignments of error presented. Thus the trial court's judgment is affirmed.

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FAIN, J., concurs.

FROELICH, P.J., concurring:

{¶ 25} I am concerned about the denials of the motions for continuance based on the unavailability of the Appellant's expert and based on the lack of a transcript of the motion to suppress; and of the summary denial of the motion for a transcript.

{¶ 26} I concur with the majority that there is no suggestion at the trial or appellate level of the expert's testimony (and how its absence prejudiced the Appellant) or how the lack of a transcript (which has now been prepared) caused prejudice. However, this is not to conclude that the rulings were not prejudicial error, but simply that this record does not support such a finding.

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