**[Cite as *State v. Cooper*, 2009-Ohio-6275.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 09AP-511 |
| v. | : | (C.P.C. No. 07CR-04-2758) |
| Eva Lucas Cooper, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

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D E C I S I O N

Rendered on December 1, 2009

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*Richard Cordray*, Attorney General, *Jordan Finegold*, and *Brian Peters*, for appellee.

*Thompson Steward Hall, LLP*, and *Lisa Fields Thompson*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

**{¶1}** Eva Lucas Cooper, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found her guilty, pursuant to a jury verdict, of theft, in violation of R.C. 2913.02, which is a felony of the third degree. Appellant's appointed appellate counsel has advised this court that she has reviewed the record and cannot find a meritorious claim for appeal. As a result, she has filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, and has moved this court to withdraw as counsel. Because, after independently reviewing the record, we also

cannot find a meritorious claim to support an appeal, we agree with appellant's counsel. Accordingly, we grant counsel's request to withdraw and affirm the trial court's judgment.

**{¶2}** Appellant, a licensed practical nurse, founded a company, Cardinal Home Health Care ("Cardinal"), in January 2000. Cardinal offered skilled nursing care, home health services, and Meals on Wheels, and was also a durable medical equipment provider. In 2003, appellant began installing Mediset ("MD.2") machines in group homes. MD.2 machines automatically dispense pills to patients. Appellant learned about MD.2 machines from Health Watch, a health organization. Cardinal nurses filled the machines weekly and, during these visits, also provided individual sessions with patients at the group homes. The nurses spent approximately one hour per week at each group home. Cardinal paid $50 per month as a rental fee for each MD.2, and the group home providers did not have to pay anything for the use of the machines. Cardinal charged Medicaid for each patient to whom medication was being distributed through MD.2. Cardinal billed Medicaid for two hours per day, seven days per week, per patient who used the MD.2 machines. Evidence at trial from the Ohio Attorney General investigator indicated that any billing over 14 hours per week would trigger increased government oversight. Cardinal billed the machine dispensations as skilled nursing visits. Appellant was the sole person in the company that completed the Medicaid billing.

**{¶3}** In 2004, appellant and her business partner, Vincent Johnson, got into a dispute and Johnson obtained a temporary restraining order against appellant, which prohibited appellant from entering any of the Cardinal locations. Although Johnson was forced to allow appellant back into the business because she was the only person who knew how to complete the Medicaid billing, he eventually hired a billing specialist to

complete the Medicaid billing. At that time, the specialist and another employee who did the coding, Linda Gill, discovered that Cardinal had been billing Medicaid for the time the machines dispensed medication. Gill contacted the Ohio Attorney General and reported the billing practice. The Ohio Attorney General's investigator met with appellant, and appellant gave numerous reasons as to why she had authority to bill Medicaid in the manner she had, although she admitted she knew that, in order to bill for a skilled nursing visit, there had to be a face-to-face meeting between the nurse and patient.

**{¶4}** On April 17, 2007, appellant was indicted on one count of Medicaid fraud and one count of theft. Before trial, at the request of the State of Ohio, plaintiff-appellee, the Medicaid fraud charge was dismissed. A jury trial was held, at which appellant testified, raising the defense of mistake of fact. Appellant claimed she thought she was permitted to bill Medicaid for the MD.2 machines in the manner she had. On February 11, 2009, the jury found appellant guilty of the theft charge. A sentencing hearing was held, and, in a May 5, 2009 judgment entry, the trial court sentenced appellant to a period of community control for five years under basic supervision, and ordered appellant to perform 200 hours of community service, obtain verifiable employment, undergo a Netcare evaluation, and participate in any recommended treatment. The court also ordered appellant to pay restitution in the amount of $370,107.69. The court indicated that appellant would receive a prison term of three years if she violated community control. Appellant appeals the judgment of the trial court, and, as mentioned above, her counsel has filed an *Anders* brief, asserting the following potential assignment of error:

> Eva Lucas Cooper's attorney provided her with the ineffective assistance of counsel and violated her rights to due process and a fair trial.

**{¶5}** In *Anders*, the United States Supreme Court held that if, after a conscientious examination of the record, a defendant's counsel concludes that the case is wholly frivolous, she should so advise the court and request permission to withdraw. *Anders* at 744. Counsel must accompany her request with a brief identifying anything in the record that could arguably support the client's appeal. Id. Counsel also must: (1) furnish the client with a copy of the brief and request to withdraw; and (2) allow the client sufficient time to raise any matters that the client chooses. Id.

**{¶6}** Upon receiving an *Anders* brief, we must conduct a full examination of all the proceedings to decide whether the case is wholly frivolous. *Penson v. Ohio* (1988), 488 U.S. 75, 80, 109 S.Ct. 346, 350, citing *Anders* at 744. After fully examining the proceedings below, if we find only frivolous issues on appeal, we then may proceed to address the case on its merits without affording appellant the assistance of counsel. *Penson* at 80. However, if we conclude that there are non-frivolous issues for appeal, we must afford appellant the assistance of counsel to address those issues. *Anders* at 744; *Penson* at 80.

**{¶7}** Here, appellant's counsel satisfied the requirements in *Anders*. Appellant did not file a pro se brief. Accordingly, we will examine the potential assignment of error and the entire record below to determine if this appeal lacks merit. Appellant argues in her potential assignment of error that she received ineffective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466

U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id.

**{¶8}** An attorney properly licensed in the state of Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

**{¶9}** In the present case, appellant argues that her counsel was ineffective for failing to adequately present her affirmative defense of mistake of fact. Appellant argues her counsel inadequately presented her mistake-of-fact defense on the following two grounds: (1) her trial counsel failed to present R.C. 5111.02, 5111.026, and 42 C.F.R. 410.78 to the jury, which would have supported her argument that she believed she was permitted to bill in the manner she did; and (2) her trial counsel failed to call as witnesses representatives from Health Watch and Guardian, who could have supported her mistake-of-fact claim. Generally, mistake of fact is a defense if it negates a mental state required to establish an element of a crime, except that if the defendant would be guilty of a crime under facts as he believed them, then he may be convicted of that offense. *State*

*v. Pecora* (1993), 87 Ohio App.3d 687, 690. Mistake of fact is widely recognized as a defense to specific intent crimes such as theft since, when the defendant has an honest purpose, such a purpose provides an excuse for an act that would otherwise be deemed criminal. *Farrell v. State* (1877), 32 Ohio St. 456. Mistake of fact can, in an appropriate circumstance, negate either "knowingly" or "purposely." *State v. Snowden* (1982), 7 Ohio App.3d 358, 363.

**{¶10}** With regard to the first ground, appellant argues her trial counsel failed to present R.C. 5111.02, 5111.026, and 42 C.F.R. 410.78 to the jury, which would have supported her argument that she believed she was permitted to bill for the time the MD.2 spent dispensing medication under the "telemedicine" theory. Appellant points out that the jury submitted a question to the court during deliberations requesting that it be permitted to read the Ohio Revised Code and Code of Federal Regulations sections cited by her during her case-in-chief, and the trial court, without objection from the defense, denied the request. However, we find that appellant's counsel made no errors so serious as not to function as "counsel," and there exists no reasonable probability that, even if counsel would have presented these authorities, the result of the trial would have been different.

**{¶11}** A review of the provisions in R.C. 5111.02, which relate to the medical assistance program, fails to reveal that it could have even arguably aided appellant's defense of mistake of fact. R.C. 5111.02 gives the director of job and family services the powers to adopt, amend, or rescind, rules under R.C. Chapter 119 establishing the amount, duration, and scope of Medicaid services. The statute also generally indicates what the rules should establish, including reimbursement methods, reimbursement conditions, reimbursement amounts, and procedures for enforcing the rules. We fail to

see how this statute would be helpful to appellant's defense or how it relates to reimbursement for the MD.2 machines, and appellant fails to enlighten the court as to how it may have helped her at trial. Thus, her counsel was not deficient for failing to present this statute to the jury.

**{¶12}** With regard to R.C. 5111.026, neither this court nor the state can locate such a statute. The state indicates that Ohio H.B. No. 283 mentions an R.C. 5111.026, but the state asserts such is clearly inapplicable. Regardless, as this proposed statute was never enacted, it has no bearing on appellant's conduct, and appellant's trial counsel could not be deficient for failing to present it to the jury.

**{¶13}** As for 42 C.F.R. 410.78, that regulation relates to Medicare's, not Medicaid's, coverage for "telehealth services." Regardless, even if an analogy could be drawn to apply its provisions to Medicaid, which is at issue in the present case, the statute provides no support for appellant's defense. The types of services eligible for payment are specifically and exclusively listed, with pharmacologic management being the only arguable service applicable to the present circumstances. Regardless, subsection (b) makes clear that the general rule for payment under Medicare for telehealth services is that the telehealth consultation must be furnished by an interactive telecommunications system, which is defined under (a)(3) as multimedia communications equipment that includes, at a minimum, audio and video equipment permitting two-way, real-time interactive communication between the patient and distant site physician or practitioner. The use of an MD.2 machine does not involve a two-way, real-time interactive communication between a patient and a practitioner at a distant site. Furthermore, the exception in (d) to the interactive telecommunications system requirement applies only to

federal telemedicine demonstration programs conducted in Alaska and Hawaii. Therefore, because we find 42 C.F.R. 410.78 is not applicable and provides no arguable analogy to appellant's circumstances, appellant's trial counsel was not deficient in failing to present this regulation to the jury for its consideration. For the above reasons, appellant's trial counsel did not provide ineffective assistance by failing to present R.C. 5111.02, 5111.026, and 42 C.F.R. 410.78 to the jury.

**{¶14}** With regard to the second ground, appellant argues her trial counsel failed to call as witnesses unspecified representatives from Health Watch and Guardian, who could have supported her theory that MD.2 machines could have been arguably billed under "telemedicine." Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court. *State v. Madison*, 10th Dist. No. 08AP-246, 2008-Ohio-5223, ¶11, citing *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. An appellant has the burden to show that the witness' testimony would have significantly assisted the defense and would have affected the outcome of the case. *State v. Dennis*, 10th Dist. No. 04AP-595, 2005-Ohio-1530, ¶22. Here, appellant fails to explain what testimony these two organizations would have provided to support her claim that she mistakenly believed she could bill Medicaid for pill dispensation by a machine. Also, nothing in the record reveals what the purported witnesses would have testified to. Absent a showing of prejudice, this court will not consider such decisions ineffective assistance. *State v. Mathias*, 10th Dist. No. 06AP-1228, 2007-Ohio-6543, ¶36. Because nothing in the record arguably supports appellant's claim that the witnesses' testimony would have significantly assisted her defense or affected the outcome at trial, we can conclude only that defense counsel's failure to

present the testimony of representatives from Health Watch and Guardian was the result of reasonable trial strategy.

**{¶15}** Therefore, because our review of the entire record reveals no non-frivolous issue for appeal, and the issue assigned in appellant's brief lacks merit, we grant the motion of appellant's counsel to withdraw.

**{¶16}** Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed. The motion to withdraw filed by appellant's appellate counsel is granted.

*Judgment affirmed*.

McGRATH, and CONNOR, JJ., concur.

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