

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-207 (C.P.C. No. 07CR-9102)
Delanio L. Wright,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2009

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Rion, Rion & Rion, L.P.A., Inc., and *John H. Rion*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Delanio L. Wright, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of one count of carrying a concealed weapon in violation of R.C. 2923.12 and one count of improper handling of a firearm in a motor vehicle in violation of R.C. 2923.16, both felonies of the fourth degree, one count of having a weapon under disability in violation of R.C. 2923.13, a felony of the third degree, and one count of tampering with evidence in violation of R.C. 2921.12, a

felony of the third degree, with a firearm specification pursuant to R.C. 2941.141. Because (1) defendant did not demonstrate prejudice from trial counsel's failure to file a motion to suppress, (2) sufficient evidence supports defendant's conviction for tampering with evidence, and (3) defendant failed to demonstrate fundamental unfairness or a constitutional violation in his conviction for the firearm specification accompanying the tampering with evidence charge, we affirm.

I. Procedural History

{¶2} By indictment filed December 20, 2007, defendant was charged with one count each of carrying a concealed weapon, having a weapon under disability, improper handling of a firearm in a motor vehicle with a firearm specification, and tampering with evidence with a firearm specification. A jury trial commenced on February 24, 2009.

{¶3} According to the state's evidence, Officers Chris Journey and Christopher Meyer were on routine patrol on August 1, 2007 at approximately 1:00 a.m. when, as they observed traffic near the Bradley apartment complex, they saw a black Monte Carlo eastbound on West Rich Street. They noted the license plate on the Monte Carlo was not properly illuminated, but was so dimly lit the officers had difficulty discerning a license plate.

{¶4} The officers pulled out behind the vehicle, followed it eastbound, and "tried lighting it up with overhead lights and siren box." (Tr. 20.) The vehicle turned southbound into a parking lot after the overhead beacons were activated, and the cruiser followed the vehicle into the parking lot. As the vehicle stopped, the officers exited the cruiser as for a normal traffic stop, but the vehicle again started moving when the officers began to approach it. While the vehicle eased forward slowly and turned toward the right, the

officers saw the "driver was making aggressive movements between the seat and the center console." (Tr. 22.) Based on his experience as a police officer, Journey concluded the driver, later identified as defendant, was attempting to conceal something. The officers knew they were in a "high-crime, high-drug narcotic area," having found a lot of "dope and guns" there. (Tr. 24.)

{¶5} The officers drew weapons, and, anticipating that defendant possibly had a gun, Journey ordered defendant to show his hands. Defendant did not stop the car but continued drifting to the right until the vehicle hit a curb or parking barrier. As the officers ran up on the car with weapons drawn, defendant still was making the noted movements within the vehicle. Eventually defendant showed the officers his hands, but they testified he looked extremely nervous.

{¶6} Due to the aggressive movement they witnessed inside the car, the officers asked defendant to step out of the vehicle. Defendant had compact discs ("CDs") on his lap, and other CDs were on the driver's side floor board; the car still was in drive. The officers handcuffed defendant and walked him to the cruiser. Defendant consented to their searching him, and in his front left pants pocket they found ten live nine-millimeter Luger rounds. The ammunition led them to believe an as yet undiscovered gun was somewhere in the vehicle. Concerned for their safety and that of others in the area, they asked to search the vehicle; defendant consented.

{¶7} The officers found an empty CD housing in the center console and removed it. When Journey looked inside, he observed a nine-millimeter silver handgun. Inspection of the firearm revealed the chamber and magazine were loaded with the same type of rounds found on defendant.

{¶8} Defendant was taken to an interview room where he waived his constitutional rights and agreed to speak with the officers. He stated he had been robbed three times in three months and would rather "be tried by 12 than carried by six." (Tr. 31.) The gun was tested; both it and the gun safety were operable. No fingerprints could be lifted from the gun. A sample of DNA was recovered but never tested.

{¶9} Defendant's trial testimony differed significantly from that of the officers. According to defendant, he had been in Gallipolis with his brother on the night of his encounter with the officers. Although he had a Honda Accord, the car "broke down." (Tr. 87.) In order to be home for work on Monday, defendant borrowed a friend's car. Once he arrived in Columbus, he decided to stop to see his girlfriend because he did not want to drive all the way home. As he was coming down the street toward her apartment, he was listening to music. He testified that he got "into the parking space, and the next thing you know * * * there was a gun in [his] face." (Tr. 87-88.) Defendant stated that the officer "literally * * * snatched [him] out of the car and said get out." (Tr. 88.)

{¶10} Defendant explained that his car initially stopped and then drifted forward because he "was trying to get the car in park. This car is basically a piece of junk." (Tr. 89.) When he "went to put the car in park, it wouldn't go in park. So when [he] let up off the brake, it started to move again. That is when it goes into park. * * * [He] let it roll a little bit, and popped straight into park." (Tr. 89-90.) He also attributed his aggressive movements to the car and its contents, stating he was trying to put the car in park, had just changed the CDs, looked at a stack, and dropped three. At that time, the CDs in his lap fell to the floor; he attempted to grab them to put them back when the officers opened the door.

{¶11} Defendant stated he saw no sirens, did not see the officers until they confronted him, and saw the cruiser beacons only after he was out of the car. Defendant also testified the bullets were not in his pocket when he exited the car; instead, the officers brought them over from the car with the gun. He further stated the license plate light on the back of the vehicle was operating.

{¶12} Before the case was submitted to the jury, the firearm specification accompanying the offense of improper handling of a firearm in a motor vehicle was dismissed; the underlying count was presented to the jury. After the jury returned verdicts finding defendant guilty of all charges and the specification submitted to it, the trial court sentenced defendant accordingly.

II. Assignments of Error

{¶13} Defendant appeals, assigning three errors:

FIRST ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVE, IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS, FOR FAILING TO FILE A SUPPRESSION MOTION.

SECOND ASSIGNMENT OF ERROR

THE CONVICTION FOR TAMPERING WITH EVIDENCE SHOULD BE REVERSED BECAUSE THE EVIDENCE TO SUPPORT THE CONVICTION WAS INSUFFICIENT AS A MATTER OF LAW.

THIRD ASSIGNMENT OF ERROR

IT IS FUNDAMENTALLY UNFAIR AND A VIOLATION OF THE DUE PROCESS CLAUSE OF THE STATE AND FEDERAL CONSTITUTION TO ALLOW FOR A CONVICTION ON THE GUN SPECIFICATION.

III. First Assignment of Error—Ineffective Assistance of Counsel

{¶14} Defendant's first assignment of error asserts his trial counsel was ineffective in failing to file a motion to suppress all evidence retrieved from the scene of the traffic stop. Defendant asserts the officers lacked probable cause to stop him for the traffic violation, an improperly lit rear license plate.

{¶15} To prove ineffective assistance of counsel, defendant must show that counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. Defendant thus must demonstrate counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* Secondly, defendant must demonstrate that the deficient performance prejudiced the defense. *Id.* To meet the prejudice prong of the ineffective assistance of counsel claim, defendant must show that "counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable." *Id.* Unless defendant demonstrates both, it cannot be said his convictions "resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

{¶16} Just before trial proceedings were to begin, defense counsel informed the trial court "there was a motion to suppress that I felt very sure that I had filed. I have no explanation for why it is not in the file and why there is not a copy of it, but there isn't." (Tr. 5.) Counsel advised that she "would at this time do an oral motion to suppress." (Tr. 5.) The court responded that it "checked the file, and there was no motion to suppress filed." (Tr. 6.) The court further told defense counsel that "[t]he prosecutor has advised me that she never received a motion to suppress." (Tr. 6.) The court offered that if one were filed,

the court would be happy to see it; the court, however, informed defense counsel it was "not going to let you file it now." (Tr. 6.)

{¶17} When voir dire of the jury was completed, the trial court advised the parties how it would handle the issues concerning the motion to suppress. The court stated, defense counsel could "go ahead and examine the officers. If I make a determination there is no probable cause for the stop, I want you to go ahead and object to the testimony and move to strike it, and I will look at that issue at that point in time." (Tr. 6.) As the court explained, "it will be equivalent to a motion to suppress." (Tr. 6-7.)

{¶18} At the close of the state's evidence, defendant moved pursuant to Crim.R. 29; the trial court overruled the motion. The court also informed counsel that "for purposes of the record, if a suppression motion had been filed and these officers would have testified similarly to the way they testified before us today, I would have overruled the motion to suppress." (Tr. 80-81.)

{¶19} Defense counsel stated that, had a hearing been held on a motion to suppress, defendant would have presented a witness who "examined the car at the impound lot within a day or so of it being impounded." (Tr. 81.) Defense counsel explained the witness' "testimony would have been [that] within a day or two after the car was impounded, he went out to the impound lot and inspected the vehicle, it was 3:00 in the afternoon, a bright, sunny day." (Tr. 82.) According to defense counsel, the witness "turned on the lights. The license plate light was so bright that on that bright sunny afternoon that he was able to get pictures of it that registered on the camera." (Tr. 82.) Defense counsel did not have the pictures at trial, but explained the pictures were to be forwarded to the prosecutor, a transfer that apparently did not occur. Counsel further

stated that although the pictures were maintained on the witness's computer, "in December of '07 a car drove through the office and the glass destroyed the computer, and the computer crashed, otherwise, we would still have those pictures." (Tr. 83.)

{¶20} In concluding defendant's witness was not material to the issue, the court observed that "[e]ven if you had ten witnesses who saw the car at the impound lot, that doesn't change the testimony of the officers' belief at the time of the incident. Nobody is saying otherwise. At the time of the incident they could not see the license plate. What happened at the impound lot does not change the officers' testimony." (Tr. 81.) The court thus allowed its "ruling" to stand.

{¶21} Even if we assume, without deciding, that counsel was ineffective in failing to file a motion to suppress, defendant cannot prove prejudice. To do so, defendant needs to demonstrate the motion was meritorious and supports a reasonable probability the verdict would have been different had the motion been pursued. See *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶22} Here, we need not speculate about what the trial court might have done had the motion to suppress been filed. The trial court agreed to hear the officers' testimony and to consider it as if presented during a hearing on a motion to suppress. After doing so, the court concluded the motion to suppress would have been denied based on the officers' testimony that explained why they stopped defendant.

{¶23} Defendant nonetheless contends that, had a hearing been held on his motion to suppress, he would have presented the testimony of the witness who saw defendant's vehicle in the impound lot a day or two following the incident and would have testified that, at that time, the license plate light was more than adequate to illuminate the

license plate on the Monte Carlo. The trial court, however, accepted the proposition that defendant could present a witness who would so testify. The court also explained why the testimony would not affect its ruling on the motion: what was visible a day or two following the incident was not material to the court's determining the officers' perception at the time of the incident. Cf. *State v. Bower* (Mar. 15, 1996), 4th Dist. No. 94 CA 2053 (deferring "to the trial court's choice to believe the arresting officer's testimony concerning appellant's failure to drive on the right side of the roadway").

{¶24} Because the trial court in effect considered and, based on its assessment of the witnesses' credibility, denied defendant's motion, defendant cannot demonstrate the motion was meritorious or the result of the trial probably would have been different had the motion been filed. Defendant's first assignment of error is overruled.

IV. Second Assignment of Error—Sufficiency of the Evidence

{¶25} Defendant's second assignment of error contends the record lacks sufficient evidence to support his conviction for tampering with evidence. Defendant asserts the officers were not able to see into the vehicle to determine what defendant was doing, and the record thus presents no basis for concluding defendant was hiding a gun in the console of the vehicle.

{¶26} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶27} R.C. 2921.12(A) defines tampering with evidence and provides, as pertinent here, that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted shall * * * [a]lter, destroy, conceal, or remove any * * * thing, with purpose to impair its value or availability as evidence in such proceeding or investigation."

{¶28} Construed in the state's favor, the evidence is sufficient for a number of reasons. Initially, it explains defendant's movements. When the officers first viewed the inside of the vehicle, they saw none of the CDs were in the CD holder. Although that evidence alone may not suggest defendant's culpability, it does so when combined with other evidence that the CDs were not on the passenger seat, but in defendant's lap and on the floor, as if recently and hurriedly removed from the CD holder so the holder could be removed from the console. Supporting that conclusion, the officers testified to seeing defendant's movements between the seat and the console that suggested, in the context of all the evidence, defendant quickly was removing the CDs in order to hide the gun in the console where it would not be so readily discoverable. The evidence further revealed the CD holder could not be removed from the console while the car was in park. As a result, defendant had to leave the vehicle in drive in order to remove the CD holder and place the gun in the console. Such evidence, in turn, explains why the car continued to drift even after the officers signaled for defendant to stop.

{¶29} In addition, the evidence ties defendant to the gun. The search of defendant's pants pocket revealed ammunition that was identical to the ammunition found in the loaded gun discovered in the vehicle's console. The unlikelihood of such a factual scenario arising out of anything but defendant's possessing the gun allows a reasonable

conclusion that the gun was defendant's weapon. Indeed, even though defendant never admitted the gun was his, defendant told the officers in his interview that he had been robbed three times and would rather be "tried by 12 than carried by 6," thus suggesting defendant carried the gun for protection. Finally, defendant's motive to hide the gun is apparent because he realized his possessing the gun would violate his parole. With that evidence, the jury reasonably could conclude defendant was hiding a gun he possessed so it would not be discovered.

{¶30} In the final analysis, the evidence explains defendant's movements, ties the gun to defendant, and provides an explanation for why he carried it, and hid it. Because the evidence is sufficient to support defendant's conviction, his second assignment of error is overruled.

V. Third Assignment of Error

{¶31} Defendant's third assignment of error asserts his conviction is fundamentally unfair insofar as he was convicted of tampering with evidence, a gun, and then was convicted and sentenced on a gun specification relating to the same firearm. While defendant couches his assigned error as a violation of due process, he does not support his argument with case law. Rather his argument resolves to asserting the trial court acted in a fundamentally unfair way.

{¶32} As defendant acknowledges, R.C. 2929.14(D)(1)(e) precludes a trial court from imposing a prison term for violation of a firearm specification if the underlying offense is carrying a concealed weapon, improper handling of a firearm in a motor vehicle, or weapon under disability. The statute, however, does not prohibit sentencing on a firearm specification when the underlying felony is tampering with evidence. In the

absence of defendant's articulating a legal basis for concluding his fundamental fairness argument has merit, the language of R.C. 2929.14(D)(1)(e) constrains us in that it allows the trial court to sentence defendant on both tampering with evidence and an accompanying firearm specification, even though the evidence subject of the underlying felony was itself a firearm. Cf. *State v. Elersic*, 11th Dist. No. 2000-L-145, 2002-Ohio-2945 (concluding that had the legislature intended to exclude other offenses from R.C. 2929.14(D)(1)(e), it would have done so explicitly).

{¶33} Defendant's third assignment of error is overruled.

{¶34} Having overruled all three of defendant's assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
