

[Cite as *State v. Butt*, 2009-Ohio-6814.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

ROBERT A. BUTT, JR.

Defendant-Appellant

Appellate Case No. 22774

Trial Court Case No. 2006-CR-4452

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 23rd day of December, 2009.

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Defendant-Appellant, *pro se*

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FAIN, J.

{¶ 1} Defendant-appellant Robert A. Butt, Jr. appeals from an order of the Montgomery County Common Pleas Court overruling his petition for post-conviction relief following an evidentiary hearing. Butt contends that the trial court's decision is not supported by the evidence.

{¶ 2} We conclude that the record supports the trial court's conclusion that Butt failed to prove that his trial counsel was constitutionally ineffective, in the sense that the result would likely have been different had counsel conducted a more thorough investigation of an alibi that Butt said could be established by a "Bud and Torey," who were not otherwise identified, and for whom no address was provided.

I

{¶ 3} Butt was convicted in 2007 of two counts of Aggravated Robbery and two counts of Aggravated Burglary. Each charge carried a firearm specification. Butt was sentenced to a prison term of eleven years. We affirmed Butt's conviction and sentence in a judgment rendered May 30, 2008. See, *State v. Butt*, Montgomery App. No. 22105, 2008-Ohio-2587.

{¶ 4} Butt subsequently filed a petition for post-conviction relief. In his petition, Butt asserted that he was denied the effective assistance of counsel. Specifically, he claimed that trial counsel failed to adequately investigate the defense of alibi and then failed to timely file a notice of alibi, thereby precluding him from asserting the defense at trial. Butt further claimed that Dayton Police Detective, Douglas Baker, was aware of the potential alibi but failed to provide the information to the defense.

{¶ 5} The trial court overruled the State's motion for summary judgment and

held an evidentiary hearing on the petition. At the hearing, Butt presented the testimony of Michael “Bud” Gardner and Lawrence Zunbrun, both of whom testified that Butt was present at a party with them at the time the offenses were committed. The party was allegedly held at the downstairs apartment located at 34 Huffman Avenue. Gardner testified that, shortly after the offenses, he informed the Dayton Police of Butt’s attendance at the party, but no one ever contacted him again, and he did not attempt to make any further contact with the police. Zunbrun testified that he did not inform anyone, before the trial, of Butt’s attendance at the party.

{¶ 6} Trial counsel, Brian Weaver, also testified at the hearing. According to Weaver, Butt notified him of the alibi, but failed to provide any information other than the fact that he could not have committed the offenses because he was with “Bud and Torey” at the time. Butt did not give his trial counsel full names or an address to utilize in investigating the alibi.

{¶ 7} Likewise, the investigating detective, Douglas Baker, testified that Butt did not give him an address, full names or any type of descriptions upon which to base an investigation of the claimed alibi. Baker testified that Butt merely stated that he was with Bud and Torey on Huffman, and that this information was reflected in Baker’s written report. Baker’s report also indicates that he went to the apartments located at 34 Huffman Avenue upon receiving a tip that a firearm stolen during the subject offenses had been taken there and presented for sale. Baker was unable to contact anyone at the two apartments located in the building, but did leave his card at each residence. Baker testified that no one from the apartment building contacted him regarding the stolen firearm or a potential alibi.

{¶ 8} In his own testimony at the hearing on his petition, Butt corroborated the fact that he did not provide any more information to counsel or the detective. Indeed, he testified that he did not tell anyone about Zunbrun's presence at the party.

{¶ 9} Following the hearing, the trial court denied the petition. Butt appeals from the order denying his petition for post-conviction relief.

II

{¶ 10} Butt's sole assignment of error states as follows:

{¶ 11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT WHEN IT DENIED HIS PETITION FOR POST CONVICTION RELIEF MAKING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 12} Butt contends that the trial court should have granted him post-conviction relief. In support, he claims that the record demonstrates that his trial counsel failed to adequately investigate and present his claim of an alibi thereby establishing that he was denied the effective assistance of trial counsel.

{¶ 13} In order to prevail on a claim of ineffective assistance of counsel, Butt must show that: (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense so as to deprive him of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687. To establish deficient performance, Butt must show that trial counsel's performance fell below an objective level of reasonable representation. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶ 95. To establish prejudice, Butt must show a reasonable probability exists that, but for the alleged errors, the result of the proceeding would have been different. *Id.* Butt has

the burden of proof on the issue of counsel's ineffectiveness, because a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, at ¶ 62.

{¶ 14} Butt's argument hinges upon his contention that trial counsel failed to adequately investigate, and subsequently present, his claimed alibi defense, and that counsel improperly chose to pursue a different defense strategy. Trial counsel testified, at the post-conviction relief hearing, that he chose to pursue a strategy that did not depend upon the claimed alibi because he was unable to obtain information sufficient to present an alibi defense. Counsel further testified that he sent an investigator out to pursue Butt's reference to "Bud and Torey," but that Butt had not provided enough information to enable the investigator, or counsel, to locate any alibi witnesses. Counsel testified that Butt did provide him with enough information to find witnesses who did testify at trial in support of counsel's trial strategy.

{¶ 15} "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v Washington*, 466 U.S. 668, 690-691.

{¶ 16} "The reasonableness of counsel's actions may be determined or

substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. * * * And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions * * *." *Id.*

{¶ 17} In the case before us, the issue of trial counsel's effectiveness, or lack thereof, depends upon whether the testimony provided by Gardner and Zunbrun was more credible than that of Detective Baker and attorney Weaver. Although Gardner claimed that he informed Baker that Butt was at the party, Baker denied receiving this information. Weaver and Baker both testified that the only alibi information they received was Butt's own statement that he was with "Bud and Torey" at an address on Huffman Avenue, which he did not disclose, and which they were unable to locate.

{¶ 18} The trial court found that Butt failed to provide information sufficient to permit the detective, investigator or counsel to pursue the alibi claim. The court further found that counsel's representation was not deficient, and that counsel pursued a viable trial strategy despite the lack of the alibi defense. Thus, the trial court concluded that Butt failed to establish his claim of ineffective assistance of counsel.

{¶ 19} The issue of witness credibility is for the finder of facts to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The

factfinder may accept or reject all, part, or none of the testimony of each witness. *State v. Antill* (1964), 176 Ohio St. 61, 67. “Because the trier of fact sees and hears the witnesses and is particularly competent to decide ‘whether, and to what extent, to credit the testimony of particular witnesses,’ we must afford substantial deference to its determinations of credibility.” *In re J.S.*, Montgomery App. No. 22063, 2007-Ohio-4551, ¶ 50, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 20} From our review of the record, we agree with the trial court. Butt failed to provide enough information for investigation of the alibi defense. Furthermore, we cannot say that the trial court erred, as the finder of fact, by failing to credit Gardner’s testimony that he informed Detective Baker of the alibi. We agree with the trial court’s conclusion that counsel did not act deficiently; that counsel did seek to investigate the alibi, but that counsel was unable to find witnesses who could establish the alibi, or who could lead to witnesses who could establish the alibi. Faced with an inability to pursue an alibi defense, trial counsel chose to pursue another trial strategy. This record does not demonstrate that trial counsel (a veteran criminal defense practitioner) was ineffective in making the choices he did.

{¶ 21} Butt’s sole assignment of error is overruled.

III

{¶ 22} Butt’s sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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Hon. Michael Tucker