[Cite as *State v. Brooks*, 2010-Ohio-1119.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NOS. 23386 23387
v.	:	T.C. NO. 08 CRB 1342 08 TRD 8383
MARK BROOKS	:	
Defendant-Appellant	:	(Criminal appeal from Municipal Court)
	:	

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O P I N I O N

Rendered on the 19th day of March, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notices of Appeal of Mark Brooks, filed March 30, 2009, from case number 08-CRB-1342, and April 2, 2009, from case number 08-TRD-8383. Brooks appeals from the judgment of the Municipal Court of Kettering, criminal division, convicting him of speeding, in violation of R.C. 4511.21(D),

and impersonating a police officer, in violation of R.C. 2921.51. At sentencing, Brooks received a fine of $75.00 for the speeding violation, and his license was suspended for 60 days. For impersonating a police officer, Brooks was fined $200.00 and assessed court costs. His appeals have been consolidated.

{¶ 2} On July 2, 2004, Deputy Fred Zollers of the Montgomery County Sheriff's Office observed Brooks, on his motorcycle, traveling at a high rate of speed in a sixty-five mile per hour zone. Using his laser speed-measuring device, Zollers determined that Brooks was traveling at 100 miles per hour. Zollers initiated a traffic stop. When approached, Brooks indicated that he knew the reason for the stop. When told he was traveling at 100 miles per hour, Brooks responded, "for this bike, it's no big deal, you know." Zollers obtained Brooks' license and confirmed that it was valid and that Brooks had no outstanding warrants.

{¶ 3} When he returned to Brooks, Zollers explained that he was citing him for speeding and warning him regarding his reckless operation of the motorcycle. After Brooks signed the ticket, Zollers asked him if he was familiar with the location of the Kettering Municipal Court where he was summoned pursuant to the citation. Brooks responded, "Yeah, I'm an officer." Brooks then displayed his wallet, which contained a badge cut-out, but there was no badge in the wallet. Zollers asked Brooks where he worked, and Brooks responded that he "worked the North Channel, I worked for Perry. Now I work for Miami Valley Campus Police." Brooks then handed Zollers a plastic Miami Valley Campus Police ID containing his photograph and his name. Zollers returned to his cruiser, radioed his supervisor, and then he returned to Brooks and told him that he

was going to go through with the citation, despite the fact that Brooks had identified himself as a police officer.

{¶ 4} Right after the stop ended, Zollers met with his supervisor, and his supervisor contacted the Miami Valley Campus Police to verify Brooks' employment. Zollers learned that Brooks had been terminated. Zollers' supervisor further determined that Brooks was no longer employed by Perry Township. Zollers and his supervisor then proceeded to Brooks' residence, arrested him, and took him into custody for impersonating a police officer.

{¶ 5} A bench trial was held on December 17, 2008. Zollers testified regarding the stop of Brooks. Zollers stated he was positioned in between the median of northbound and southbound 675, "running laser" in the northbound lanes. Zollers stated that he has training and experience, and is certified, in the use of a laser speed-measuring device, and that he operated his device according to his training. Zollers' Incident Report, which was admitted into evidence, indicates that Zollers utilized an LTI 20/20 device. Zollers testified the device "read a hundred miles per hour in approximately seven hundred and some odd feet." The citation indicates that he measured Brooks' speed from a distance of 767.6 feet.

{¶ 6} Brooks moved to strike Zollers' testimony "until a proper foundation is laid for the operation of the machine, and calibrations that have to be done before the reliability of the machine can be ascertained." Zollers testified that he checked the calibration of the unit to insure it was in proper working order on July 2nd. According to Zollers, the unit was in proper working order that day. Zollers indicated that the device has a "little red bead" that is used to track vehicles. Regarding how he positioned the laser, Zollers stated, "you're

trained to position it towards the * * * front license plate of the vehicle, but due to being a motorcycle, * * * you shoot for the front tire area where the headlight is. * * * Since there's no license plate on the front of the motorcycle, but it's the same idea." Zollers also testified that he has the ability to give a visual estimate of speed, and that Brooks "was clearly passing other vehicles that were traveling the posted speed limit."

{¶ 7} Sergeant Robert Reidy of the Miami Valley Hospital Campus Police Department, ("MVH") testified that Brooks was previously employed at MVH. Reidy testified three identification badges were issued to Brooks in the course of his employment, and that after he was terminated, Brooks only returned two of the badges. Reidy stated that the MVH police officers are commissioned through the Dayton Police Department and are considered "Dayton Special Police Officers."

{¶ 8} Lieutenant James M. Berkshire testified that he is the Operations manager of MVH, and that he supervised Brooks during his employment with MVH. According to Berkshire, Brooks was employed from February 25th until he was subject to an investigatory suspension on June 3rd for sexual harassment. A termination form regarding Brooks' employment was completed on June 6th.

{¶ 9} In its Decision, after summarizing the evidence, the trial court determined in part as follows: "Turning first to the charge of speed, the Court notes the aforementioned evidence

{¶ 10} regarding the speed violation was not refuted or challenged by the Defendant. The Court finds the State has provided sufficient proof beyond a reasonable doubt that the Defendant violated the aforementioned statute regulating the operation of a motor vehicle as

it relates to the posted speed limit. The Court makes a separate finding based upon the speed the Defendant operated the motorcycle, the amount of traffic, and the area where the offense occurred, that the Defendant's operation of the motorcycle was in willful and wanton disregard of the safety of others and himself, as well as the property of others."

{¶ 11} The Court further determined, "It is clear the Defendant represented himself to Deputy Zollers as a private police officer both by statement as well as displaying his MVH Campus Police ID. The representation of his member status of MVH Campus Police was in the present tense, although his affiliation with the MVH Campus Police terminated about one month before the occurrence. The controlling statutory language is clear that a 'private police officer' is one who is privately employed in a police capacity. * * *

{¶ 12} "* * * The Defendant did act with purpose to present himself to Deputy Zollers as an actively employed private police officer."

{¶ 13} Brooks filed two briefs herein, as well as a Reply to the brief of the State. Regarding his conviction for speeding, Brooks asserts 11 assignments of error. Brooks' first assignment of error is as follows:

{¶ 14} "THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF R.C. 4511.21(D) IN THAT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT ARE NOT SUSTAINED BY SUFFICIENT EVIDENCE AND ARE CONTRARY TO LAW,"

{¶ 15} "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a

reasonable doubt.' *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, * * * ." *State v. McKnight*, 107 Ohio St.3d 101, 112, 2005-Ohio-6046, ¶ 70.

{¶ 16} R.C. 4511.21(D)(2) prohibits a driver from operating a motor vehicle on a highway at a speed exceeding 65 m.p.h.

{¶ 17} Having reviewed the record in a light most favorable to the prosecution, we conclude that the State provided sufficient evidence that Brooks operated his motorcycle at excessive speed, in violation of R.C. 4511.21(D)(2). Zollers, who is certified in the operation of his laser device, testified that his device indicated that Brooks was traveling at one hundred miles an hour, and that he visually observed Brooks speeding before employing the laser device. Brooks indicated that he knew he had been stopped for speeding. As the trial court noted, the defense offered no evidence which refuted Zollers' testimony. Accordingly, we conclude that any rational trier of fact could have found the elements of speeding proven beyond a reasonable doubt. Brooks' first assignment of error is overruled.

{¶ 18} We will next address Brooks' fourth and fifth assignments of error. They are as follows:

{¶ 19} "THE TRIAL COURT ERRED WHEN IT CONVICTED THE DEFENDANT IN VIOLATING R.C. 4511.21(D) WHEN THE CITING OFFICER NEVER TESTIFIED TO THE ORIGIN OF HIS LiDar CERTIFICATION," And,

{¶ 20} "THE TRIAL COURT ERRED WHEN IT CONVICTED THE DEFENDANT IN VIOLATING R.C. 4511.21(D) WHEN THE CITING OFFICER NEVER

TESTIFIED TO THE ORIGIN OF HIS RADAR CERTIFICATION FOR THE PURPOSE OF VISUAL SPEED ESTIMATION."

{¶ 21} "A velocity reading made by a speed detection device is authenticated by the satisfaction of three criteria:

{¶ 22} "A. The type of apparatus purporting to be constructed on scientific principles must be accepted as dependable for the proposed purpose by the profession concerned in that branch of science or its related art. * * *

{¶ 23} "B. The particular apparatus used by the witness must be one constructed according to an accepted type and must be in good condition for accurate work. * * *

{¶ 24} "C. The witness using the apparatus as the source of his testimony must be one qualified for its use by training and experience. *East Cleveland v. Ferell* (1958), 168 Ohio St. 298, 301, quoting Wigmore, *The Science of Judicial Proof* at 450." *State v. Reck* (Dec. 21, 1994), Darke App. No. CA 1352.

{¶ 25} Brooks' brief is addressed to the third criterion. According to Brooks, the velocity reading "could not be used as evidence that the defendant was speeding absent evidence that officer was trained and qualified to administer radar device." Brooks relies upon *City of New Middletown v. Yeager*, Mahoning App. No. 03 MA 104, 2004-Ohio-1549, and *State v. Brown*, Medina App. No. 02CA0034-M, 2002-Ohio-6463. In *Yeager*, the issue before the court was "whether the state produced evidence that the radar machine was operating properly and that the officer was qualified to use the radar device." *Yeager*, ¶ 1. The citing officer "testified that he used radar to detect the speed of Yeager's vehicle. * * * He also testified that the radar machine was calibrated and operating properly." Yeager

argued that the state "failed to identify the type of 'radar' that was used and failed to establish [the officer's] qualifications for using the device." Id., ¶ 5. In reversing the conviction for speeding, the trial court determined, "the unknown and unspecified radar device could not be used as evidence of Yeager's speed while operating a motor vehicle." Id., ¶ 11.The court determined that the officer's testimony that the machine was calibrated and operating properly provides sufficient evidence to establish the machine was operating properly. Id., ¶ 12. Finally, the court determined, "[t]he testimony as to the officer's qualifications to use the radar device, however, is nonexistent; the record is devoid of any evidence that the officer was trained and qualified to administer the radar device." Id., ¶ 13.

{¶ 26} In *Brown*, the court took judicial notice of the reliability of the radar unit at trial. Id., ¶ 5. Brown argued in part that the State failed to prove that the radar unit was working properly and that the officer operating it was qualified to do so. Id. Based upon the officer's testimony regarding the testing he performed on the unit, the Ninth District determined that the unit was properly working, but that the State failed to prove that the officer was qualified to operate the unit; "[s]pecifically, the only evidence presented as to the qualifications of [the officer] was the fact that he was trained on the radar unit on two separate occasions. Absent further evidence, such as a certificate of training, [the court could not] say that the State demonstrated that Deputy Locher was qualified to operate the radar unit." Id., ¶ 12.

{¶ 27} Here, the device used by Zollers is identified in his incident report as an LTI 20/20. Zollers stated that he was certified and experienced in its use, and he described his training in the use of the device. From the record before us, we conclude that Zollers is

qualified in the use of the LTI 20/20, and that the trial court did not err in convicting Brooks based upon Zollers' testimony. Brooks' fourth and fifth assignments of error are overruled.

{¶ 28} We will next address Brooks' tenth assignment of error. It is as follows:

{¶ 29} "THE TRIAL COURT ERRED WHEN IT CONVICTED THE DEFENDANT ON VIOLATING R.C. 4511.21 WHEN IT WAS NOTED IN THE DECISION AND JUDGMENT THAT THE DEFENDANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 30} According to Brooks, the trial court's mention that Brooks did not refute or challenge the evidence regarding Brooks' speeding violation establishes ineffective assistance. Brooks argues, his "attorney had a duty to refute and challenge the evidence associated with the speed charge."

{¶ 31} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * * . Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial

strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 32} We see no ineffective assistance. Brooks indicated to Zollers that he knew that he had been stopped for speeding, and when he was told how fast he was going, he replied, "that's nothing for this bike." Counsel moved to strike Zollers' testimony regarding Brooks' speed until a proper foundation had been laid. Since the evidence conclusively established that Brooks was speeding, the outcome of the trial could not have been otherwise if Brooks' counsel "refuted" or "challenged" the evidence, and Brooks' tenth assignment of error fails.

{¶ 33} We will next address Brooks' second, sixth, seventh, eighth and eleventh assignments of error. They are as follows:

{¶ 34} "THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF R.C. 4511.20 IN THAT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT ARE NOT SUSTAINED BY SUFFICIENT EVIDENCE AND ARE CONTRARY TO LAW," And,

{¶ 35} "THE TRIAL COURT ERRED WHEN IT CONVICTED THE DEFENDANT ON VIOLATING R.C. 4511.20 WHEN THE DEFENDANT WAS NEVER CHARGED WITH SUCH VIOLATION." And,

{¶ 36} "THE TRIAL COURT ERRED WHEN IT CONVICTED THE DEFENDANT ON VIOLATING R.C. 4511.20 WHEN THE CITING OFFICER NEVER TESTIFIED TO THE ORIGIN OF HIS LiDAR CERTIFICATION," And,

{¶ 37} "THE TRIAL COURT ERRED WHEN IT CONVICTED THE

DEFENDANT ON VIOLATING R.C. 4511.20 WHEN THE CITING OFFICER NEVER TESTIFIED TO THE ORIGIN OF HIS RADAR CERTIFICATION FOR THE PURPOSE OF VISUAL SPEED ESTIMATION," And,

{¶ 38} "THE TRIAL COURT ERRED WHEN IT CONVICTED THE DEFENDANT ON VIOLATING R.C. 4511.20 WHEN IT WAS NOTED IN THE DECISION AND JUDGMENT THAT THE DEFENDANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 39} As the trial court's Decision and Judgment provides, Brooks was only charged with speeding and impersonating a police officer, and not a violation of R.C. 4511.20. Brooks' sentencing entry notes, "Ct. finding of recklessness." R.C. 4510.15 provides, "Whenever a person is found guilty under the laws of this state, or under any ordinance of any political subdivision of this state, of operating a motor vehicle in violation of any such law or ordinance relating to reckless operation, the trial court * * * in addition to or independent of all other penalties provided by law, may impose a class five suspension of the offender's driver's * * * license * * * from the range specified in division (A)(5) of section 4510.02 of the Revised Code." "A law or ordinance prohibiting speeding is a prohibition 'relating to reckless operation' of a motor vehicle within the meaning of [former] Section 4507.34 * * *, and authorizes suspension of a driver's license." *Akron v. Willingham* (1957), 166 Ohio St. 337. R.C. 4510.02 provides, "(A) When a court elects or is required to suspend the driver's license * * * of any offender from a specified suspension class, for each of the following suspension classes, the court shall impose a definite period of suspension from the range specified for the suspension class:

{¶ 40} * * *

{¶ 41} "(5) For a class five suspension, a definite period of six months to three years."

{¶ 42} Clearly R.C. 4510.15 authorizes a license suspension for reckless operation. Brooks' suspension was shorter than the period of time prescribed by the statute for reckless operation. Thus, he has suffered no prejudice and we note his 60 day suspension has been served. Brooks' second, sixth, seventh, eighth and eleventh assignments of error are overruled.

{¶ 43} Brooks' third assignment of error is as follows:

{¶ 44} "THE TRIAL COURT ERRED WHEN IT ORDERED ALL PRO SE PLEADING BY THE DEFENDANT STRICKEN FROM THE RECORD SUBSEQUENT TO COUNSEL APPOINTMENT."

{¶ 45} According to Brooks, he "filed some pleadings including a Discovery Request, Motion to Dismiss, and Motion to Suppress.

{¶ 46} "On October 6, 2008, the Trial Court advised Brooks in open court that if any further pleading[s] were to be filed the[y] would be stricken from the record. Such Order violated Brooks' right to due process of law and preemptively disallowed Brooks from addressing the Court in future hearings."

{¶ 47} The record reflects that on October 6, 2008, Brooks' retained counsel was granted leave to withdraw, and counsel was appointed to represent Brooks. The Order Brooks asserts as error does not appear in the transcript of October 6th. Further, the motion to dismiss and the motion to suppress were only filed in 2008-CRB-1342 and not the traffic

case. Finally, regarding Brooks' pro se motions, we note that the following exchange occurred prior to Brooks' trial:

{¶ 48} "COURT: Thank you. Is there any preliminary matter or matters the Court should address before we commence trial?

{¶ 49} "[Counsel for Brooks]: Your Honor, as you know, I came into this case a little late. A private counsel had been retained, and then discharged. Mark has, there's been some documents filed in the Court. He and I have met since those documents were filed, since I became involved in the case. I believe there's before the Court a Motion to Suppress that's been filed. I believe that was filed pro se.

{¶ 50} * * *

{¶ 51} "I've, in my conversations with Mark, I believe he agrees with me at this time there is no Motion to Suppress that would lie given the facts of this case. So I would orally ask to withdraw that motion.

{¶ 52} * * *

{¶ 53} "Your Honor with regard to the remaining Motion, I believe it's a Motion to Dismiss. * * * Unfortunately there's no evidence before the Court yet. The arguments made are arguments that will be made at the appropriate time, that is at the end of the State's case if need be, then at the end of the defense case. So I believe that Motion has been filed prematurely. We don't have supporting affidavits. There's nothing the Court can consider evidence. It's just argument. There are facts contained, but they're not sworn facts. They're not sworn to in an affidavit so it's not in a form at this particular time that the Court would entertain the Motion to Dismiss, so* * *I guess we'll just withdraw that Motion* *

*."

{¶ 54} There being no merit to Brooks' third assigned error, it is overruled.

{¶ 55} Brooks' ninth assignment of error is as follows:

{¶ 56} "THE TRIAL COURT ERRED WHEN IT STRUCK THE DEFENDANT'S MOTION WITH SUPPORTING MEMORANDUM TO VACATE DECISION AND JUDGMENT AS A RESULT OF THE MOTION FILED PRO SE BY THE DEFENDANT."

{¶ 57} Brooks' appeal is limited to the decision of March 6, 2009 and not the trial court's decision of March 12, 2009 striking Brooks' Motion to Vacate Decision and Judgment. His ninth assignment of error is overruled.

{¶ 58} Regarding Brooks' conviction for impersonating a police officer, Brooks asserts five assignments of error. We will first address Brooks' assignments of error one, three and four together. They are as follows:

{¶ 59} "THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF R.C. 2921.51(B) IN THAT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT ARE NOT SUSTAINED BY SUFFICIENT EVIDENCE AND ARE CONTRARY TO LAW," And,

{¶ 60} "THE TRIAL COURT ERRED WHEN IT CONVICTED THE DEFENDANT OF R.C. 2921.51(B) ON AN ASSUMPTION RATHER THAN MATTERS OF FACT," And,

{¶ 61} "THE TRIAL COURT ERRED WHEN IT CONSIDERED THE POSITION THE DEFENDANT WAS ACCUSED OF IMPERSONATING THAT OF A 'PRIVATE

POLICE OFFICER' AS DEFINED BY R.C. 2921.51(A)(2)."

{¶ 62} R.C. 2921.51(B) provides in relevant part, "No person shall impersonate a peace officer, private police officer * * *." "'Private police officer' means any security guard, special police officer, private detective, or other person who is privately employed in a police capacity." R.C. 2921.51(A)(2). "'Peace officer' means a sheriff, deputy sheriff, marshal, deputy marshal, member of the organized police department of a municipal corporation, or township constable, who is employed by a political subdivision of this state; * * * ." R.C. 2921.51(A)(1). " 'Impersonate' means to act the part of, assume the identity of, * * * or display the identification of a particular person or of a member of a class of persons with purpose to make another person believe that the actor is that particular person or is a member of that class of persons." R.C. 2921.51(A)(3).

{¶ 63} The record makes clear that Brooks identified himself as an "officer" to Zollers, and that he told him that he was presently employed with the Miami Valley Campus Police, facts Brooks does not dispute. Brooks displayed his MVH identification card to Zollers, although Lieutenant Berkshire testified that Brooks was no longer employed there on the date of the incident. Sergeant Reidy stated that the MVH police officers are commissioned through the Dayton Police Department and are "Dayton Special Police Officers."

{¶ 64} While Brooks asserts in his brief that he is a "peace officer" within the meaning of R.C. 2921.51(A)(1), he was not currently employed at the time of the offense in any police capacity as the statute requires, as the trial court noted. Assignments one, three and four are overruled.

{¶ 65} Brooks' second assignment of error is as follows:

{¶ 66} "THE TRIAL COURT ERRED WHEN IT ORDERED ALL PRO SE PLEADING BY THE DEFENDANT STRICKEN FROM THE RECORD SUBSEQUENT TO COUNSEL APPOINTMENT."

{¶ 67} This assigned error is duplicative of the third assigned error above in the traffic case, and it is overruled.

{¶ 68} Brooks' fifth assigned error is as follows:

{¶ 69} "THE TRIAL COURT ERRED WHEN IT STRUCK THE DEFENDANT'S MOTION WITH SUPPORTING MEMORANDUM TO VACATE DECISION AND JUDGMENT AS A RESULT OF THE MOTION FILED PRO SE BY THE DEFENDANT."

{¶ 70} This assigned error is duplicative of the ninth assigned error above in the traffic case and it is overruled.

{¶ 71} The judgment of the trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

Copies mailed to:

James F. Long
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Hon. Thomas M. Hanna