[Cite as *In re G.S.*, 2010-Ohio-2132.]

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

IN RE:	:	
	:	Appellate Case No. 23430
G.S.	:	
	:	Trial Court Case No. JC 2008-335
	:	
	:	(Juvenile Appeal from
	:	Common Pleas Court)
	:	
	:	

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O P I N I O N

Rendered on the 14th day of May, 2010.

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FAIN, J.

{¶ 1} G.S., a juvenile, appeals from his delinquency adjudication and subsequent disposition. He contends that his adjudication is against the manifest weight of the evidence, and that his trial counsel was ineffective for: (1) not having sought to disqualify the trial judge who presided at the hearing; and (2) not having effectively cross-examined the trial judge's colleague, another judge of the same

court, who testified as a witness for the State.

{¶ 2} We conclude that the delinquency adjudication is not against the manifest weight of the evidence. We further conclude that ineffective assistance of counsel cannot be demonstrated upon this record. The record does not demonstrate a substantial likelihood that the result of the proceeding would have been more favorable to G.S. had his trial counsel sought to disqualify the trial judge. Counsel's cross-examination of the testifying judge, while gentle, appears to have been thorough and professional.

{¶ 3} The judgment of the trial court is Affirmed.

I

{¶ 4} G.S. was appearing before the Honorable Anthony Capizzi for an alleged probation violation. G.S. wanted to represent himself, and wanted to go to trial on the probation violation that day. Judge Capizzi informed G.S. that he had other matters scheduled, that G.S. would go to another substance abuse treatment program, but that he was going to be detained so that he could be taken to the treatment program. At this point, G.S. became "extremely upset," and a struggle ensued that involved a number of sheriff's deputies.

{¶ 5} G.S. was ultimately turned over by the deputies to detention authorities, and the proceedings were continued. G.S. was charged with assaulting Deputy Nathan Wilson, which would be a felony of the fourth degree if committed by an adult.

{¶ 6} The delinquency charge was tried before the Honorable Nick Kuntz, the

other judge of the Montgomery County Common Pleas Court, Juvenile Division. Deputy Wilson, Judge Capizzi, and a number of other witnesses testified. Following the hearing, Judge Kuntz adjudicated G.S. to be delinquent by reason of the assault upon Deputy Wilson. At a later dispositional hearing, Judge Kuntz ordered G.S. into the custody of the Department of Youth Services, but suspended that commitment upon the condition that G.S. successfully complete intensive probation for twelve months.

{¶ 7} From his adjudication and disposition, G.S. appeals.

II

{¶ 8} As a preliminary matter, we wish to address a subject raised in G.S.'s brief, in what is termed "Disclaimer to the Many Judges, Attorneys & Court Staff Involved," but appears to be almost in the nature of a lament:

{¶ 9} "This case serves as to why attorneys should refuse court-appointed appeals – and not just due to my disdain for research and writing. The lower-tiered pay, if it is ever received, doesn't occur until a year after receiving the case. Also, an appeal requires stating errors made by trial judges and attorneys, neither of which produces bonding friendships.

{¶ 10} "During this appeal, I have been treated well by judges, court reporters, and other legal staff, and treated well by the juvenile defendant and his family. However, I recognize I have disturbed court staff, magistrates, and potentially judges with my numerous calls, emails, and motions, *and will continue to disturb all involved during the review of this appeal*. If it's any consolation, hopefully this will be my last court-appointed appeal (no promises)." (Emphasis added.)

{¶ 11} As for the "lower-tiered pay," that is an unfortunate consequence of the dearth of public resources committed to the implementation of the Sixth Amendment right to counsel, and we sympathize with counsel in that regard.

{¶ 12} Although we cannot speak for the judges and other staff of the trial courts, we know from discussions with trial judges, that despite the occasional irritation of a reversal on appeal, the fact that appellate review is available is a comfort to most trial judges, who decide tough, close cases secure in the knowledge that further review is available. Similarly, appellate judges take comfort in the fact that the highest court in the system exists to assume the ultimate responsibility for resolving controversial legal issues.

{¶ 13} We can speak directly and confidently to the concern expressed in the italicized portion of the excerpt quoted from G.S.'s brief. We regard the efforts of appellate counsel (for both an appellant and an appellee) in preparing briefs as most helpful to us in performing our duty of appellate review. We know from experience with pro se appeals that it is almost always far more difficult to perform our duty of appellate review when we do not have the benefit of appellate counsel framing and refining the issues for our consideration. We regard the briefs of counsel as valuable resources to draw upon in performing our duty of rendering a prompt and sensible (we hope) resolution of the issues submitted to us. We in no way see ourselves as being in an antagonistic relationship with appellate counsel, upon whom we rely daily. And after all, even the oldest among the cadre of the appellate judiciary can still recall, if only dimly, when we were attorneys ourselves.

III

{¶ 14} G.S.'s First Assignment of Error is as follows:

{¶ 15} "APPELLANT'S VERDICT SHOULD BE OVERTURNED AS AGAINST THE MANIFEST WEIGHT OF EVIDENCE, BECAUSE DEFENDANT DID NOT KICK OR 'KNOWINGLY' OR 'RECKLESSLY' KICK THE OFFICER, AND DEFENDANT HAD A HABIT FOR RESISTING BUT NOT STRIKING."

{¶ 16} In this assignment of error, G.S. argues that there was a failure of proof by the State on the element that G.S. did knowingly cause, or did knowingly attempt to cause, physical harm to Deputy Wilson. R.C. 2903.13(A).

{¶ 17} Deputy Wilson testified:

{¶ 18} "A. During the struggle, we all kept telling him to stop resisting, stop resisting. And around that time, that's when I felt him kick me in my shin. And when he kicked me in my shin, I gave him a knee strike to his mid section.

{¶ 19} "Q. Okay. You said he kicked you in your shin?

{¶ 20} "A. Correct.

{¶ 21} "Q. What shin, what leg?

{¶ 22} "A. It would be the front of my right shin."

{¶ 23} Judge Capizzi, who was an eyewitness to this event in his courtroom, testified:

{¶ 24} "A. The Court Reporter's bench area. And I'm looking down to see what's happening, because I'm fearful for everybody in my courtroom because there were probably 30 people in the courtroom, or it seemed to be, anyways. And as the deputy is trying to get control of the young man, the young man kicks the deputy. They struggle.

{¶ 25} " * * * *

{¶ 26} "Q. During the – when you saw [G.S.] kick Deputy Wilson, did he appear to be kicking, or did he appear to be losing his balance?

{¶ 27} "A. He –

{¶ 28} "MR. SLYMAN [representing G.S.]: Objection, form, Your Honor.

{¶ 29} "THE COURT: Sustained.

{¶ 30} "BY MS. MAZANEC [representing the State]:

{¶ 31} "Q. Did it look to you like he was losing his balance?

{¶ 32} "A. No. I thought – it looked to me as if [G.S.] was trying to get away from the deputy by kicking him."

{¶ 33} The testimony of Deputy Wilson and Judge Capizzi, which the trial court evidently credited, is ample to find that G.S. kicked Wilson in the shin, and that this was not contact incidental to the deputies' struggle to get control of G.S., but an intentional act designed to assist G.S. in getting away from Deputy Wilson.

{¶ 34} G.S.'s First Assignment of Error is overruled.

IV

{¶ 35} G.S.'s Second Assignment of Error is as follows:

{¶ 36} "APPELLANT VERDICT [sic] SHOULD BE OVERTURNED AS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, BECAUSE DEFENDANT DID NOT COMMIT 'ASSAULT,' BECAUSE IF THERE WAS A KICK OR A BUMP OF THE FOOT, IT WAS A TRIVIAL BUMP OR HAD NO IMPACT ON THE OFFICER."

{¶ 37} Unlike Felonious Assault, in violation of R.C. 2903.11(A)(1), which

requires the causing of "serious physical harm," the offense with which G.S. was charged only requires that the offender "shall knowingly cause or attempt to cause physical harm to another," R.C. 2903.13(A), and that the victim be a peace officer while in the performance of his or her official duties, R.C. 2903.13(C)(3).

{¶ 38} As G.S. notes, we have previously opined: "Although we are not prepared to hold that any discomfort, however trivial, will satisfy the 'physical harm' element of Assault, we are satisfied that upon this record, the finder of fact could reasonably conclude that the punch to [the victim's] 'gut' was sufficiently painful to satisfy the 'physical harm' element." *State v. Hill*, Montgomery App. No. 20678, 2005-Ohio-3701, ¶ 34.

{¶ 39} The victim in *State v. Hill* testified that the blow to his gut "hurt," but did not specify the extent to which it hurt. Id., ¶¶ 28-29.

{¶ 40} In the case before us, Deputy Wilson did not even testify that the kick to his shin hurt him. Nevertheless, as the State points out, R.C. 2903.13(A) proscribes not only knowingly causing physical harm to another, but also proscribes a knowing attempt to cause physical harm to another. It is common knowledge that a kick to the front part of a person's shin is likely to cause significant pain, even if it is of a transitory nature. The culpable mental state of "knowingly" is set forth in R.C. 2901.22(B): "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 41} We determined, in Part III, above, that it was not against the manifest weight of the evidence for the trial court to find, as it evidently did, that G.S. intended to

kick Deputy Wilson in the front part of Wilson's shin. A seventeen-year old in G.S.'s position would be aware that a kick directed to the front part of another person's shin will probably cause that person to experience significant pain. Thus, even if, for whatever reason, the kick to Deputy Wilson's shin was not, in fact, painful, it was an intentional act likely to cause significant pain, and therefore constituted a knowing attempt to cause physical harm to Wilson.

{¶ 42} G.S.'s Second Assignment of Error is overruled.

V

{¶ 43} G.S.'s Third Assignment of Error is as follows:

{¶ 44} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FOLLOWING: A) COUNSEL DID NOT REQUEST A CHANGE IN VENUE AND THE JUDGES, GUARD, AND THE COURT REPORTER MAY BE PREJUDICED; AND B) BECAUSE TRIAL COUNSEL DID NOT EXCUSE HIMSELF EVEN THOUGH HE COULD NOT PUT FORTH A STRONG CROSS-EXAMINATION OF THE TESTIFYING JUDGE #1 DUE TO COUNSEL'S WORKING RELATIONSHIP AND FRIENDSHIP WITH THIS TESTIFYING JUDGE #1."

A

{¶ 45} Although G.S. couches the first part of his argument in terms of a failure of trial counsel to have requested a change of venue, it appears that the essence of his argument is that the judge who presided over the hearing, Judge Kuntz, being the sole colleague in a two-judge court with Judge Capizzi, who was a significant eyewitness in

the case, was likely to have been unduly influenced by that fact, or there would at least have been the appearance that the collegiality of the presiding judge and the witness judge would "strongly" influence the outcome. This would have supported an affidavit of bias and prejudice against the trial judge, or at least a suggestion to the trial judge that he ought to recuse himself.

{¶ 46} *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and *State v. Bradley* (1989), 42 Ohio St.3d 136, prescribe a two-step analysis of ineffective assistance of counsel claims. First, the appellant must show that there has been a substantial violation of an essential duty of defense counsel to his client. Second, it must be shown that there is a reasonable probability that the outcome of the proceeding would have been different but for the ineffective assistance.

{¶ 47} We are reluctant to find, on this record, that trial counsel violated a substantial duty to his client by failing to seek to disqualify the trial judge. Trial counsel is experienced, and may reasonably have concluded that the trial judge was a good judge for this case, notwithstanding his relationship with his testifying colleague. In fact, although the trial judge adjudicated G.S. to be delinquent, he did not commit G.S. to custody, but admitted him to probation, albeit upon condition of participating in an intensive treatment program.

{¶ 48} Even if we were to find that trial counsel had a duty to seek to disqualify the trial judge, we cannot find, on this record, that there is a substantial likelihood that the result would have been different had an effort been made to disqualify the trial judge, or to persuade him to recuse himself, or even if that effort had succeeded.

{¶ 49} In the context of satisfying the prejudice prong of *State v. Bradley*, supra,

and *Strickland v. Washington*, supra, a mere appearance of partiality, as opposed to a demonstration of actual partiality, is not enough. Otherwise, experienced trial counsel could follow a deliberate strategy of foregoing an attempt to disqualify a trial judge upon the basis of a mere appearance of partiality, secure in the knowledge that if the verdict should go against his client, in the form of a criminal conviction or an adjudication of delinquency, his client would be able to secure a second bite of the apple by assigning as error on appeal trial counsel's failure to have sought disqualification of the trial judge.

B

{¶ 50} G.S. next contends that trial counsel's relationship with Judge Capizzi, the testifying judge, impaired his cross-examination of Judge Capizzi to such an extent that trial counsel's failure to recuse himself, in favor of substitute counsel, amounted to ineffective assistance of counsel.

{¶ 51} We have read the entirety of trial counsel's cross-examination of Judge Capizzi. While gentle, it appears to have been thorough and professional. Counsel elicited testimony favorable to his client, such as the fact that Judge Capizzi did not see G.S. attempt to kick another deputy, that he only saw G.S. kick Deputy Wilson once, that the deputies were using their weight and their knees to keep G.S. on the ground, and the fact that G.S. was bleeding, in the area where his head was in contact with the ground.

{¶ 52} A relationship between trial counsel and a witness can work both ways. Trial counsel might be more reluctant to confront the witness with overtly hostile cross-examination; but the witness might, as a result of the friendly relationship with

counsel, be more willing to be more forthcoming, more co-operative with the cross-examiner, than the witness would otherwise be. Upon this record, we cannot say that trial counsel was ineffective in his cross-examination of Judge Capizzi, or that the result of the trial would likely have been otherwise had trial counsel relinquished his role and allowed another attorney to represent G.S.

{¶ 53} G.S.'s Third Assignment of Error is overruled.

VI

{¶ 54} G.S.'s Fourth Assignment of Error is as follows:

{¶ 55} "THE JUDGMENT SHOULD BE OVERTURNED UNDER THE 'CUMULATIVE ERROR DOCTRINE' BECAUSE THE JUVENILE WAS TREATED UNFAIRLY, AS THERE WAS AN INCENTIVE TO COVER-UP [sic] THE OFFICERS KNEEING THE JUVENILE IN THE FACE, BECAUSE THE VIDEO DISAPPEARED, BECAUSE JUDGE #1 MAY HAVE DISLIKED THE JUVENILE AS EVIDENCED BY THE FOUR MONTHS THE JUVENILE SPENT IN JAIL, BECAUSE OF POTENTIAL DISDAIN BETWEEN THE FAMILIES, BECAUSE OF THE POTENTIAL COLLUSION BETWEEN THE JUDGES AND COURT STAFF, AND BECAUSE THE JUVENILE DID TRIVIAL HARM TO THE OFFICER IF A KICK ACTUALLY DID OCCUR."

{¶ 56} G.S. cites *State v. DeMarco* (1987), 31 Ohio St.3d 191, for the proposition that multiple errors, no one of which is sufficiently prejudicial, in itself, to require reversal, may have a sufficient cumulatively prejudicial effect to require reversal.

{¶ 57} We have found no errors, whether prejudicial or harmless, so there is no error to cumulate. In this assignment of error, G.S. asserts a number of new claims, but the record does not support them. Judge Capizzi testified that although he thought

the camera system in his new courtroom was always on, he discovered after this incident that it had to be activated, and it had not been, so there was no video record of the incident. There is nothing in the record to suggest "collusion" between the judges and court staff, if something more sinister is meant than the ordinary working relationship between trial judges and court staff. There is nothing in the record to establish "potential disdain between the families." There is nothing in the record to establish that "Judge #1" (Judge Capizzi, who testified) disliked, or was otherwise prejudiced against G.S., and even if he were, he was not acting in an official capacity in this proceeding, but was merely a witness. Therefore, any prejudice he may have had against G.S., while fair game in cross-examination, could not constitute reversible error in the proceedings.

{¶ 58} Finally, the subject of the "trivial harm to the officer" has been addressed in Part IV, above.

{¶ 59} G.S.'s Fourth Assignment of Error is overruled.

VII

{¶ 60} All of G.S.'s assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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