[Cite as *State v. Clinard*, 2011-Ohio-876.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2010 CA 13
v.	:	T.C. NO. 08CR641
DARRELL L. CLINARD	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 25th day of February, 2011.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Darrell L. Clinard, filed February 4, 2010. On October 6, 2009, Clinard was granted judicial release from prison. Prior to the grant of judicial release, Clinard had been serving two consecutive one

year terms.

{¶ 2} Cllinard's criminal history herein began in case number 2004-CR-765, when he was convicted of intimidation and sentenced to a term of community control. While on community control, Clinard was charged with arson, in case number 2008-CR-641. On October 30, 2008, Clinard was sent to prison on both charges. Clinard's judicial release was granted on the condition that he "serve a sentence in the West Central Correctional Facility, Marysville, Ohio" ("West Central"). On October 27, 2009, Marcie Schaefer, a Clark County probation officer, filed an affidavit in which she averred that Clinard failed to complete his program at West Central. A violation hearing was held on December 14, 2009. On January 5, 2010, the trial court issued an Order revoking Clinard's community control. The entry provides, "For the offense of Arson, a fourth degree felony, defendant shall serve a prison term * * * of one (1) year, or the remaining balance of his sentence," to be served consecutively with Clinard's sentence for intimidation.

{¶ 3} At the violation hearing, the following exchange occurred[1]:

{¶ 4} "THE COURT: State ready?

{¶ 5} "MR. GREGORY MORRIS: Yes, we are, Your Honor. With the exception that I contacted Steve Oiler at Defense Counsel's request from Monday to come down here today, stated he would come down here today; but I have yet to see him present. As far as probation testifying, they can; but Mr. Morris, I think, wanted to have him here in regards to some of his allegations and the authorization for discharge. So I contacted him

[1]For clarity purposes, Mr. Gregory Morris is the State's attorney and Mr. Ronald Morris is defense counsel.

last Wednesday. He said he would be here, he hasn't - - I tried to call a few minutes ago where he doesn't answer I have his direct extension number (sic). So I don't know if he has forgot, if that's a problem or not.

{¶ 6} "Mr. Morris has handed me the new medical records that the Court - - does the Court have his medical records?

{¶ 7} "MR. RONALD MORRIS: No.

{¶ 8} "MR. GREGORY MORRIS: That I said I would let the Court look at. But other than that, I can present his discharge; but I don't have Mr. Oiler present at this time.

{¶ 9} "THE COURT: Did you want Mr. Oiler to testify for the Defense?

{¶ 10} "MR. RONALD MORRIS: He would not testify for the Defense, no, Your Honor.

{¶ 11} "* * *

{¶ 12} "THE COURT: Well then I'm confused. Why did you ask the prosecutor - -

{¶ 13} "MR. RONALD MORRIS: I noted that Mr. Oiler signed the report and at a hearing, he would probably be needed. Mr. Clinard's gonna deny the allegations in that report.

{¶ 14} "THE COURT: I see. But he was not subpoenaed to be here.

{¶ 15} "MR. GREGORY MORRIS: Mr. Morris asked me last Wednesday and I called him. He said he was in and out of the office. I said, 'Would you be here today at 11:00?' He telephoned me back that he would. So I've never really met Mr. Oiler and he said, 'Yeah, I will be here no problem. I will do what you need me to do.' He was very cooperative with me. I don't know if he just forgot."

{¶ 16} The judge then departed the courtroom, at 11:13 a.m., instructing the parties to remain there. The judge returned at 11:37, and Steve Oiler, having arrived, was called to the stand.

{¶ 17} Oiler testified that he is a counselor at West Central, and that Clinard was assigned to him when he was admitted to the facility. According to Oiler, within two weeks of his arrival, Clinard "said he wanted to leave because we didn't have the medical facilities to care for him." Oiler stated that Clinard "failed to let our screener know the extent of his back injuries." Oiler testified that Clinard "said he wanted to leave the program because

{¶ 18} he doesn't feel that we can give him the medical care that he needs for his back. He was in pain, and we couldn't give him the injections or we couldn't arrange to have him get the injections that he said he needed." According to Oiler's testimony, at "one point [Clinard] said if I can get insurance, you know, my insurance can cover it, I'll stay then. I said, 'Okay, that's fine. We'll see if we can do that.' And I don't know of any insurance he could get to cover him while he was incarcerated like that. Even after that, he changed his mind and said, 'I don't think there's anything you can do for me here.'" Oiler testified that Clinard refused to sign a medical release to allow Oiler to speak to his doctors. Oiler also testified that Clinard was dissatisfied that outside employment was not feasible for him while at West Central. Oiler stated that Clinard received an "unsuccessful discharge." On cross-examination, Oiler stated that Clinard threatened to throw a chair in the facility "if I didn't give him the discharge."

{¶ 19} Clinard also testified at the hearing. Clinard stated that he advised medical personnel at West Central of his "disc problems" when he arrived. According to Clinard, in

the "first week my back started to hurt in pretty moderate pain from standing and sitting continuously for moments of time and cleaning every morning. It's pushing the bathroom floors clean. That was about the most painful for me on my hands and knees."

{¶ 20} The following direct examination of Clinard occurred:

{¶ 21} "Q. You've been treated by Dr. Jeff Rogers before, right, and he's done some injections to your back?

{¶ 22} "A. Yes.

{¶ 23} "Q. And you supplied me with a report for that?

{¶ 24} "A. Yes.

{¶ 25} "MR. RONALD MORRIS: And I supplied the State a report on that.

{¶ 26} "MR. GREGORY MORRIS: Yes.

{¶ 27} "BY MR. RONALD MORRIS:

{¶ 28} "Q. What did Dr. Rogers do to your back?

{¶ 29} "A. Three spinal injections, epidurals.

{¶ 30} "Q. And did that make your back feel better?

{¶ 31} "A. Yes.

{¶ 32} "Q. And could you be a normal citizen after you had those injections?

{¶ 33} "A. Yes.

{¶ 34} "Q. Without those injections, what kind of pain do you experience?

{¶ 35} "A. On a scale of 1 to 10 daily, it's always a constant 5 or 6; and when it's aggravated, it's up there."

{¶ 36} Clinard denied that he wanted to leave West Central. He identified Defense

Exhibit A, which is a Medical Complaint Form that he completed. Thereon Clinard wrote, "I have previous disc problems and I was on the list for examination and epidural injections or surgery. I am now having moderate to severe pain on the lower right side in which I have only had pain on the left with a jolt type of pain down the left side. I am afraid I have injured something new or made the previous damage worse and I need to be examined as soon as possible. I normally sleep very light to begin with and with this pain I barely sleep at all. My orthopedic surgeon is Dr. Jeff Rogers in Centerville, Oh."

{¶ 37} Clinard later testified, when asked if he ever stated that he did not want to continue in the program, "I have to say I did say yes after I was denied medical. The nurse informed me to write a two-page request to be discharged."

{¶ 38} At the conclusion of the hearing, the court found Clinard had violated his community control by requesting discharge from West Central and ordered Clinard returned to prison. The court noted in part, "As far as the medical facility granting or giving the injections, they're gonna hold West Central responsible for it whether the Defendant agrees to hold them harmless or not, so there is just cause in terminating the Defendant from the program, whether or not it was some kind of ruse on the part of the Defendant to try to get out of the prison by misleading anybody * * * ."

{¶ 39} Clinard asserts two assignments of error. His first assignment of error is as follows:

{¶ 40} "THE TRIAL COURT PREJUDICED THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL BY DELAYING THE HEARING FOR PURPOSES OF SECURING AN UNSUBPOENAED WITNESS ON BEHALF OF THE

PROSECUTION."

{¶ 41} According to Clinard, "[b]ut for the efforts of the trial court judge [in allegedly securing the presence of Oiler], the case against the Appellant could not have gone forward and should have been dismissed." The State responds that the "trial court's sua sponte delay of the hearing served the interests of justice and did not violate Clinard's due process rights."

{¶ 42} While the State directs our attention to the appropriate standard of review for the grant or denial of a continuance, none was requested; the State indicated that it was ready to proceed in the absence of Oiler. The State advised the court that Oiler had been contacted in response to a request from defense counsel. It was counsel for Clinard who indicated that Oiler "would probably be needed" at the hearing. Defense counsel did not move the court for dismissal upon learning of Oiler's delayed arrival. The record does not reveal what actions, if any, the court took during the brief recess. Accordingly, we cannot find that the trial court violated Clinard's right to due process by briefly delaying the proceeding until Oiler had arrived.

{¶ 43} Clinard's first assigned error is overruled.

{¶ 44} Clinard's second assignment of error is as follows:

{¶ 45} "THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 46} Clinard makes three arguments to support this claim:

{¶ 47} "A. "The Appellant was denied effective assistance of counsel when the trial attorney failed to request dismissal of the action pursuant to Crimial Rule 29 when the

prosecutor was unable to proceed with a hearing due to the absence of his sole, unsubpoenaed witness against the defendant."

{¶ 48} "B. "The Appellant was denied effective assistance of counsel when the trial attorney failed to introduce documentary evidence in the form of medical records, which directly contradict the statements, including hearsay statements, of the sole witness against the Defendant."

{¶ 49} "C. "Whether Appellant is denied effective assistance of counsel when the trial attorney failed to subpoena witnesses to trial, that support the Defendant's compliance with institution rules and directly contradict the statements, including hearsay statements, of the sole witness against the Defendant."

{¶ 50} "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.

{¶ 51} The "'failure to call a witness to testify ordinarily is a matter of trial strategy that will not be second-guessed by a reviewing court.' *State v. Mills*, Greene App. No. 2002-CA-114, 2004-Ohio-267, ¶ 8, citing *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. Moreover, defense counsel's decision not to call a witness is afforded a presumption of reasonableness. *State v. Ramirez*, Clermont App. No. CA2004-06-046, 2005-Ohio-2662, ¶ 39." *Beavercreek v. LeValley*, Green App. No. 06-CA-51, 2007-Ohio-2105, ¶ 21.

{¶ 52} Clinard initially asserts, if "the State cannot produce evidence at hearing sufficient to prove its allegations the Appellant must be acquitted, pursuant to Crim.R. 29." Clinard confuses acquittal with dismissal; "an acquittal is a verdict of not guilty * * * ." *State v. Reeser* (Oct. 4, 1993), Montgomery App. No. 13612. Since the prosecuting attorney made clear that he was ready to proceed in the absence of Oiler, we cannot conclude that defense counsel's failure to request dismissal fell below an objective standard of reasonableness. Further, prejudice to Clinard, such that the outcome of the proceeding would have been otherwise had dismissal been requested, is not established.

{¶ 53} Clinard next asserts that his counsel was ineffective when he failed to introduce Clinard's medical records into evidence which would "demonstrate a pre-existing condition leading to legitimate requests for treatment, not requests based upon an addiction or drug seeking behavior as intimated by Mr. Oiler." The record before us contains no suggestion by Oiler that Clinard's request was motivated by drug addiction. We are unable to say whether the medical records would have had any effect on the outcome of the

proceeding, as they were not marked and identified, and their contents are unknown to us. Thus, we cannot find that Clinard's discharge was improperly rooted in his financial inability to pay for necessary medical treatment as opposed to a ruse as alluded to by the trial court. We note that Clinard expressed dissatisfaction that outside employment was not feasible and he refused to sign medical releases as requested by Oiler.

{¶ 54} Finally, Clinard asserts that he "informed his trial counsel that counselors at West Central had written positive reports about his participation in the program. If trial counsel had subpoenaed the counselors from West Central they would have testified that the Appellant would have completed the program but for his removal from it to appear in Court on the probation revocation."

{¶ 55} There is nothing in the record to support Clinard's contention that he requested counselors at West Central be subpoenaed or that they would provide favorable testimony. Clinard's assertions regarding the purported content of the testimony of the counselors at West Central is merely speculative, and we presume that defense counsel's decision not to subpoena the unnamed witnesses was reasonable. The failure to call a witness to testify is a matter of trial strategy that we will not second guess. *Beavercreek,* ¶21. Since prejudice has not been demonstrated, Clinard's second assigned error is overruled.

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

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FROELICH, J. and HALL, J., concur.

Copies mailed to:

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