

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
MARION COUNTY**

**STATE OF OHIO**

**CASE NUMBER 9-05-39**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**DARRELL PORT**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: June 5, 2006**

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**ATTORNEYS:**

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For Appellant.**

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For Appellee.**

**Shaw, J.**

{¶1} The defendant-appellant, Darrell Port (“Port”), appeals the October 5, 2005, Judgment of conviction and sentence entered in the Court of Common Pleas, Marion County, Ohio.

{¶2} On May 6, 2005, Sheri Gorre (“Gorre”) reported to the Marion Police Department that she had been assaulted two days earlier by her former boyfriend, Port. On May 9, 2005, Gorre went to the Marion General Hospital Emergency Room as she was advised to do since she claimed that Port had headbutted her. The doctor concluded that Gorre received a broken brow bone and a broken nose which would have required a heavy blow to her face.

{¶3} Over the next ten days, the Marion Police Department made multiple attempts to locate Port to interview him regarding the alleged assault. On May 16, 2005, Gorre called the Marion Police Department to report that she was having further problems with Port. Marion Police Officer Rob Musser went to Gorre’s house, spoke with her, and obtained a description of Port’s vehicle. As a result, Officer Musser stopped Port’s vehicle at 10:26 p.m. approximately two blocks from Gorre’s house.

{¶4} When Officer Musser stopped Port’s vehicle he approached the driver’s side and immediately noticed that there was a strong odor of burnt

marijuana coming from the car. Therefore, he called for an additional officer. Within a few minutes, Major Randy Caryer arrived and approached the passenger's side of the vehicle. Port was in the driver's seat and his current girlfriend, Starla Mullins was in the front passenger seat.

{¶5} Officer Musser and Major Caryer both shined their flashlights into the vehicle while speaking with Port. In addition, the lights from one of the police cruisers helped partially illuminate the inside of Port's vehicle. Both officers were making special efforts to make sure that Port did not have any weapons and to follow safety precautions during the stop.

{¶6} Ultimately, Officer Musser asked Port to get out of the vehicle. As Port complied with the request, Major Caryer reported to Officer Musser that there was a knife on the driver's seat that Port had been sitting on during the stop. The knife was a Winchester seven and one half inch lock blade pocket knife that was in the open position. Officer Musser escorted Port to the back of the vehicle and patted him down for additional weapons. No other weapons were found. Major Caryer seized the knife from Port's vehicle. Port was then asked about the knife. He admitted that the knife was his and claimed that he had the knife on the car seat for protection against David Daniels.

{¶7} On May 19, 2005, Port was indicted with one count of Felonious Assault in violation of R.C. 2903.11(A)(1), a felony of the second degree and one

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count of Carrying a Concealed Weapon in violation of R.C. 2923.12(A), a felony of the fourth degree.

{¶8} On August 29, 2005, a jury trial was commenced. During the trial, the State presented the testimony of ten witnesses, including Gorre, who recanted some of her allegations regarding the assault charge by stating that the broken bones in her face were the result of her headbutting Port. Port did not present any evidence at trial. On August 30, 2005, the jury returned a verdict of not guilty for Felonious Assault and guilty for Carrying a Concealed Weapon.

{¶9} On October 5, 2005, the Judgment of conviction and sentence was filed sentencing Port to seventeen months in prison and a term of three years of post release control by the parole board.

{¶10} On November 2, 2005, Port filed a notice of appeal raising the following assignments of error:

*Assignment of Error 1*

**THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT-APPELLANT'S CONVICTION FOR CARRYING A CONCEALED WEAPON**

*Assignment of Error 2*

**DEFENDANT-APPELLANT'S CONVICTION FOR CARRYING A CONCEALED WEAPON IS CONTRARY TO THE MANIFEST WEIGHT OF EVIDENCE**

*Assignment of Error 3*

**DEFENDANT-APPELLANT RECEIVED PREJUDICIALLY  
INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION  
OF HIS SIXTH AND FOURTEENTH AMENDMENT  
RIGHTS, AS WELL AS HIS RIGHTS UNDER SECTION 10,  
ARTICLE I, OHIO CONSTITUTION**

{¶11} Ports's first and second assignments of error focus on the sufficiency and manifest weight of the evidence in this case. These two assignments of error shall be considered together because both require a close examination of the evidence. Port specifically alleges that the State failed to prove beyond a reasonable doubt that the knife found on the seat of Port's vehicle was concealed or was a deadly weapon.

{¶12} In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, the Ohio Supreme Court set forth the sufficiency of the evidence test as follows:

**An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing 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.**

{¶13} In contrast, when reviewing whether a verdict is against the manifest weight of the evidence, the appellate court must review the entire record, weigh all of the evidence and all of the reasonable inferences, consider the credibility of the

witnesses and determine whether in resolving conflicts in the evidence, the fact finder “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721.

{¶14} Port was convicted of Carrying a Concealed Weapon in violation of R.C. 2923.12. Pursuant to R.C. 2923.12(A),

**No person shall knowingly carry or have, concealed on the person’s person or concealed ready at hand, any of the following:**

- (1) A deadly weapon other than a handgun;**
- (2) A handgun other than a dangerous ordnance;**
- (3) A dangerous ordnance.**

Furthermore, R.C. 2923.11(A) defines “deadly weapon”:

**“Deadly weapon” means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.**

### **Concealed Weapon**

{¶15} For purposes of R.C. 2923.12, the test for determining “concealment” is set forth in *State v. Pettit* (1969), 20 Ohio App.2d 170, 173-74, 252 N.E.2d 325, as the following:

**a weapon is concealed if it is so situated as not to be discernable by ordinary observation by those near enough to see it if it were not concealed, who would come into contact with the possessor in the usual associations of life; but that absolute invisibility is not required, since ordinary observation does not extend to a**

**search unusually careful, thorough or detailed, made because of suspicion that contraband which is not visible by ordinary observation may in actuality be present.**

Furthermore, the Ninth District Court of Appeals found that a weapon need not be totally hidden from observation in order to render it concealed within the meaning of the statute. *State v. Brandle* (1996), 116 Ohio App.3d 753, 689 N.E.2d 94, citing *State v. Coker* (1984), 15 Ohio App.3d 97, 472 N.E.2d 747. In conclusion, it is not necessary to prove that the weapon was carried in such a manner or in such a location as to give absolutely no notice of its presence under any observation; rather, it is sufficient to prove that ordinary observation would give no notice of its presence. *Coker*, 15 Ohio App.3d at 98.

### **Deadly Weapon**

{¶16} In *State v. Johnson* (2003), 8th Dist. App. No. 81299, 2003-Ohio-4177, the court held that there was evidence to support a finding that the knife was a deadly weapon because the police testified that defendant had told them that he was carrying the knife for his own protection because he had been robbed. Therefore, there was sufficient evidence to provide that the defendant was carrying the knife for use as a weapon. Furthermore, in *State v. Manning* (February 16, 2001), 2nd Dist. App. No. 18347, the court held that a knife was a deadly weapon even though the blade was less than two inches in length, was concealed inside a

cylinder, the defendant did not use the knife as a weapon, and the defendant testified that he had used the knife to cut wires and clean fish.

{¶17} In this case, Officer Musser testified at the trial that:

**A: Darrell opened up the car door, he started to get out, Major Caryer was on the passenger's side observing the passenger, and he yelled to me, "Knife, knife" two times.**

**\*\*\***

**Q: Now, what did you do when Major Caryer yelled "knife"?**

**A: I took a couple steps towards the front of the car, I looked --- I had my flashlight out, I looked in and I saw the knife. I held Darrell by his right arm. He was already still getting out of the car. I had escorted him out and we started to walk towards the back of the vehicle.**

**\*\*\***

**Q: Now, did anybody do anything with the knife?**

**A: Yes. \*\*\* Major Caryer walked around, secured the knife, and put it into my cruiser.**

**Q: So Major Caryer's the one that actually recovered the knife?**

**A: Yes.**

**Q: Now, did you – after Major Caryer yelled "knife", did you observe the knife yourself?**

**A: Yes, I did. I had to take a different angle to see the knife, though.**

**Q: And was that before Major Caryer had recovered it?**

**A: Yes.**

**Q: Can you tell the jury exactly where that knife was located?**

**A: It was located on the driver's seat, on the right half of the seat.**

**\*\*\***

**Q: Where was the knife recovered in relation to where the Defendant had been seated?**

**A: When I saw the knife it was probably mid thigh back on the driver's seat, on the right half of the seat.**

**Q: Was that observable before the Defendant got out of the vehicle?**



**A:** No, it wasn't.

**Q:** Do you know if the knife was where he would have actually been seated on top of it?

**A:** That's where I assume it was. I had observed him the entire time I was at the – I had the whole contact with him. And when he got up there was no way that anybody could have put the knife underneath him because I would have seen that.

**Q:** Now, when you had the Defendant get out of the vehicle did you lose sight of him at any point between the time you told him to get out of the vehicle and he actually got out of the vehicle?

**A:** No, I didn't.

\*\*\*

**Q:** Now, this knife, can you --- that you saw on the seat, you said at about mid thigh?

**A:** Yes.

**Q:** Can you describe that knife for us?

**A:** It was a Winchester lock blade pocket knife, and it was locked in the open position, the blade exposed.

**Q:** So when you say "open position", you mean what?

**A:** I mean the pocket knife was open ready for use.

\*\*\*

**Q:** As an Officer are knives something you have particular concern about?

**A:** Yes.

**Q:** And why's that?

**A:** They are deadly.

**Q:** And why do you say they're deadly?

**A:** A knife blade can be used to cut, stab, slice. That's definitely a safety concern.

**Q:** And in your experience are they something that can, in fact, cause death?

**A:** Yes, they are.

**Q:** Now, with respect to this knife, after you found it, did you talk to the Defendant about this knife?

**A:** Yes, I did. \*\*\*

**Q:** And what did he say?

**A:** He said he had it for protection. That he was having problems with – with someone – I believe he said his name was David Daniels.

**Q: So he had it for protection because he was having problems with a David Daniels?**

**A: Yes.**

**Q: Did he admit that was his knife?**

**A: Yes.**

Aug. 30, 2005 Trial Trans. p. 277-292. In addition, Major Caryer testified at his deposition as follows:

**A: \*\*\* I know the Officer asked Mr. Port to step out of the car, and as he leaned forward to start getting out of the car I saw a fairly large lock blade knife underneath his left thigh. Told the Officer there was a knife there -**

**Q: Let's back up a second. When you first approached the car you said you saw the Defendant seated in the driver's seat?**

**A: Yes.**

**Q: Did you see the knife at that time?**

**A: No.**

**Q: Why not?**

**A: It was underneath his leg.**

**Q: And so he actually had to move his leg in order for you to be able to see it?**

**A: Correct.**

**Q: You said it was a lock blade. Was it closed or open?**

**A: It was an open lock blade.**

**\*\*\***

**Q: You said the knife was right under his right thigh. Could you explain for us exactly, you know, where the blade was; whether it was facing straight out towards the steering wheel or -**

**A: The knife was with the point pointing towards the dash, the handle pointing towards the back of the seat, and it was right underneath his right thigh laying right in line with his leg. So if his leg's - the knees pointed towards the dash, the point of the knife was towards the dash.**

**Q: Okay.**

**A: And by the hip, the handle would have been towards the hip.**

**Q: Okay. \*\*\***

Aug. 12, 2005 Depo. of Major Caryer p. 4-5, 17-18.

{¶18} In sum, in reviewing the totality of the evidence, we cannot conclude that the trial court clearly lost its way or created a manifest miscarriage of justice. Furthermore, after viewing the entire record and the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found the essential elements of Carrying a Concealed Weapon were proven beyond a reasonable doubt. Accordingly, Port's first and second assignments of error are overruled.

{¶19} Port alleges in his second assignment of error that his trial counsel failed to raise the affirmative defense to Carrying a Concealed Weapon and he failed to request jury instructions on his affirmative defense.

{¶20} R.C. 2923.12(D) provides,

**It is an affirmative defense to a charge under division (A)(1) of this section of carrying or having control of a weapon other than a handgun and other than a dangerous ordnance that the actor was not otherwise prohibited by law from having the weapon and that any of the following apply:**

\*\*\*

**(2) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor, a member of the actor's family, or the actor's home, such as would justify a prudent person in going armed.**

\*\*\*

**(4) The weapon was being transported in a motor vehicle for any lawful purpose, was not on the actor's person, and, if the weapon was a firearm, was carried in compliance with the applicable**

**requirements of division (C) of section 2923.16 of the Revised Code.**

{¶21} In order to prevail on a claim of ineffective assistance of counsel,

Port must establish both of the following:

- 1. Trial counsel made errors so serious he was no longer functioning as counsel in the manner guaranteed by the Sixth Amendment; and**
- 2. There is the reasonable probability that were it not for trial counsel's errors, the results of the trial would have been different.**

See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Thus, under this standard, Port must show that his counsel's performance fell below an objective standard of reasonable representation and that prejudice arose from that deficient performance. *Bradley*, 42 Ohio St.3d at 142. Furthermore, the court must look to the totality of the circumstances and not isolated instances of an allegedly deficient performance. *State v. Malone* (Dec. 13, 1989), Montgomery App. No. 10564.

{¶22} In this case, Officer Musser testified that during the stop Port stated the following with respect to the knife that was found in the vehicle:

**A: He said he had it for protection. That he was having problems with – with someone – I believe he said his name was David Daniels.**

**Q: So he had it for protection because he was having problems with a David Daniels?**

**A: Yes.**

**Q: Did he admit that was his knife?**

**A: Yes.**

**Q: Did he suggest that he had any other use for the knife other than to have it for protection against David Daniels?**

**A: At the time, no. \*\*\***

Aug. 30, 2005 Trial Trans. p. 292. Furthermore, Major Caryer testified that

Port said:

**Daniels was assaultive and was causing some kind of problems. He actually said that Daniels was a bad ass. He had been in the marines and that he had assaulted somebody a few days before that.**

Aug. 12, 2005 Depo. of Major Caryer p. 8.

{¶23} Upon review, it is our conclusion that the claim of ineffective counsel regarding the failure to raise an affirmative defense or to request jury instructions on an affirmative defense is meritless. R.C. 2923.12(D) provides that it is an affirmative defense that the weapon was carried or kept ready at hand by the actor for *defensive purposes* while the actor was engaged in a *lawful activity* and had *reasonable cause to fear a criminal attack*. There is nothing in the record to support a claim that Port had a legitimate reason to fear for his safety such as would justify a prudent person in being armed, or that counsel's decision not to pursue a presentation of an affirmative defense was not a sound strategic decision to prevent opening doors at trial that may not have been in the defendant's best interest. Furthermore, Port has not demonstrated that had his counsel raised this

defense, the result of the proceeding would have been different. Therefore, Port's third assignment of error is overruled.

{¶24} Accordingly, Port's assignments of error are overruled and the October 5, 2005 Judgment of conviction and sentence entered in the Court of Common Pleas, Marion County, Ohio is affirmed.

*Judgment affirmed.*

**BRYANT, P.J., concurs.**

**ROGERS, J., concurs separately.**

{¶25} **ROGERS, J., concurring separately.** I concur with the majority's decision in this case. I write separately to stress the fact that a knife is not, per se, a deadly weapon.

{¶26} It is common knowledge that many people carry pocket knives. It is also common knowledge that knives, as well as many other objects commonly carried, can be used as a weapon and are capable of inflicting death. The definition of a deadly weapon is contained in R.C. 2923.11(A) and reads as follows:

**“Deadly weapon” means an instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.**

{¶27} This is a two part definition. First, it requires a finding that the “instrument, device or thing [is] *capable of inflicting death.*” *Id.* (Emphasis added.) Second, it requires a finding that the “instrument, device or thing [is] \* \*

\* *designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.*” Id. (Emphasis added.)

{¶28} Most objects, including pens, pencils, and automobiles, will meet the first portion of this definition, which is generally an objective test. The second portion is often more subjective, and the same “instrument, device or thing” may meet the definition in certain circumstances and, yet, not meet the definition in other circumstances. For example, an automobile is generally a device used for transportation, is not designed as a weapon and, generally, not used as a weapon. However, when directed by a person with the intent to do physical harm, it is being used as a weapon and can certainly be capable of causing death.

{¶29} I am concerned by the majority opinion’s reference to the case of *State v. Manning*, supra, as apparent authority for finding a knife with a blade of less than two inches to be a deadly weapon. The *Manning* Court obviously took into consideration the circumstances of a high crime area, the early morning hour, the unusual nature of the instrument and the defendant’s statement that he “had no weapons or anything that would ‘stick’ the officer.” Id. Furthermore, it was not a unanimous decision.

{¶30} The general rule is that a folding knife is not a deadly weapon, unless and until some extrinsic fact or circumstance distinguishes it from the norm. *Columbus v. Dawson* (1986), 28 Ohio App.3d 45, 46 (a knife is not

presumed to be a deadly weapon, even if it is concealed); *State v. Cathel* (1988), 127 Ohio App.3d 408, 412 (a knife is not considered “in and of itself” to be a deadly weapon under the statute); *State v. Anderson* (1981), 2 Ohio App.3d 71, 72 (when an instrument is readily identifiable as one capable of inflicting death, such as a knife, proof of either additional element [designed/possessed, carried or used as a weapon] is nonetheless essential to sustain a conviction for carrying a concealed weapon).

{¶31} In *Cathel* the knife had a four inch blade, locked into place and bore the trademark “Deerslayer.” 127 Ohio App.3d at 412. The *Cathel* Court took issue with the trial court’s finding that the trial produced “no indication that the \* \* \* knife was being used for \* \* \* any type of purpose other than to be used as a weapon.” *Id.* Additionally, the *Cathel* Court noted that:

**Contrary to the trial court’s implication, it is not a defendant’s burden to negate the elements of a crime; it is the state’s burden to prove them. To convict [for] carrying a deadly weapon, the state must prove either 1) that the knife was designed or specifically adapted for use as a weapon, or 2) that the defendant possessed, carried, or used the knife as a weapon.**

*Id.*

{¶32} In *Anderson*, the instrument was a folding knife with locking, four-inch blade, and bore the insignia “007” on the side. 2 Ohio App.3d at 72. The *Anderson* Court also noted that:



**As this court has noted, in *State v. Sears*, to sustain a conviction for carrying a concealed weapon the state must not only show that the offending instrument was capable of inflicting death --an element easily established with respect to many objects --but also, and more importantly here, that the instrument was either: (i) designed or specially adapted for use as a weapon.**

**See also *State v. Deboe*; *State v. Orlett*. When an instrument is readily identifiable as one capable of inflicting death, such as a knife, proof of either additional element is nonetheless essential to sustain a conviction for carrying a concealed weapon under R.C. 2923.12.**

Id. (Citations omitted.)

{¶33} The facts of the case sub judice are clear and are distinguishable from the usual situation of an individual driving a car to the office or a gentlemen carrying a folding pocket knife. In the case sub judice, the blade was open and the knife ready at hand. It required no extra motion or manipulation to render the knife “operational” and capable of inflicting serious physical harm or death. In addition, Port stated to the police that he was carrying the knife for protection. There is a reasonable and obvious inference that he meant he was carrying the knife as a weapon. Under the circumstances of this case, the evidence supports the conclusion that Port was carrying a deadly weapon. The evidence also supports the conclusion that the “weapon” was concealed. I, therefore, concur in the result reached by the majority.