

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

CITY OF CHILLICOTHE	:	
STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 02CA2682
	:	
v.	:	
	:	
GARY L. JOHNSON, JR.,	:	<u>DECISION AND JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	<u>RELEASED 5/28/03</u>

APPEARANCES:

COUNSEL FOR APPELLANT ¹ :	David H. Bodiker Ohio Public Defender
	Lori J. Rankin Assistant Ohio Public Defender 14 South Paint Street, Suite 54 Chillicothe, Ohio 45601-3202
COUNSEL FOR APPELLEE:	James E. Barrington 41 East Fourth Street Chillicothe, Ohio 45601

EVANS, P.J.

{¶1} Defendant-Appellant Gary L. Johnson, Jr., appeals the judgment of the Chillicothe Municipal Court, which found him guilty of operating a motor vehicle with a prohibited concentration of alcohol in violation of R.C. 4511.19(A)(3). Appellant asserts that

¹ Appellant was represented by other counsel below.

he received ineffective assistance of counsel because his trial counsel failed to object to the admissibility of his breath test results. Appellant further asserts that the trial court committed plain error by admitting the test results and that his conviction was against the manifest weight of the evidence.

{¶2} For the reasons that follow, we disagree and affirm the judgment of the trial court.

Trial Court Proceedings

{¶3} On May 5, 2002, Defendant-Appellant Gary L. Johnson, Jr., was arrested and charged with the following: (1) operating a motor vehicle with a prohibited concentration of alcohol (OMVS), a violation of R.C. 4511.19(A)(3); (2) operating a motor vehicle while under the influence of alcohol (OMVI), a violation of R.C. 4511.19(A)(1); (3) failure to control, a violation of R.C. 4571.202; and, (4) failure to wear a seat-belt, a violation of R.C. 4513.263. The facts that led up to appellant's arrest were as follows.

{¶4} At approximately 8:30 a.m., the morning of appellant's arrest, James Tribby was in his kitchen when he heard a crash outside. Mr. Tribby looked out the window closest to where the noise came from and observed a one-car accident. Mr. Tribby witnessed four individuals exit the vehicle, one from the driver's side wearing a black tee shirt; this individual was later identified as appellant. Mr. Tribby went outside and observed the individuals tossing beer

bottles over the guardrail and appellant screaming about losing his commercial driver's license (CDL). Mr. Tribby's wife called 9-1-1.

{¶5} Trooper James Fisher of the Ohio State Highway Patrol arrived on the scene and spoke to Mr. Tribby and appellant. Appellant indicated to the trooper that he was the driver of the vehicle at the time of the accident. Trooper Fisher administered field-sobriety tests upon appellant, at the conclusion of which he placed appellant under arrest for OMVI. The trooper transported appellant to the Ross County Law Enforcement Complex, where appellant submitted to a breath test. Appellant's breath test revealed a breath alcohol content of .16 per 210 liters of breath. At this point, appellant changed his story and indicated to Trooper Fisher that he was not driving at the time of the accident but that another occupant of the vehicle was.

{¶6} Appellant was arraigned on the above-mentioned charges on May 8, 2002, and he entered not guilty pleas to all the charges. Appellant subsequently filed a motion to suppress all evidence arising from appellant's arrest, and a hearing on the motion was scheduled. However, shortly before the motion was to be heard, it was withdrawn without explanation.

{¶7} On July 30, 2002, a jury trial was held in this matter. Mr. Tribby and Trooper Fisher testified to the facts already mentioned. In addition, Tracy Pontious, another occupant of the vehicle during the one-car accident, testified that Daniel Auten was

driving the vehicle at the time of the accident and that he did not have a driver's license. Appellant also testified at trial. He admitted that he was intoxicated the morning he was arrested and that he told Trooper Fisher that he was driving the car at the time of the accident. However, appellant further testified that he lied about driving the car because Auten was his friend and he did not want Auten to get in trouble. Finally, appellant testified that he was asleep in the back of the car when Auten woke him up and told him the car would not start. So appellant supposedly moved to the driver's seat and unsuccessfully tried to start the car. At this point, appellant stated that he looked at the hood of the car and noticed the damage caused by the accident.

{¶8} The jury found appellant guilty of all counts, and the trial court dismissed the OMVI charge as an allied offense of similar import. The trial court determined this was appellant's second offense and sentenced him to one hundred twenty days in jail. The trial court also fined appellant \$500, suspended his license for two years, and impounded his vehicle for ninety days.

The Appeal

{¶9} Appellant timely filed his notice of appeal and presents the following assignments of error for our review.

{¶10} First Assignment of Error: "The Defendant-Appellant, Gary L. Johnson, Jr., was denied the effective assistance of counsel in violation of his rights under the United States and Ohio

Constitutions when trial counsel failed to object to the admission of Mr. Johnson's BAC result and failed to move for acquittal on the OMVS charge under Criminal Rule 29."

{¶11} Second Assignment of Error: "The Defendant-Appellant, Gary L. Johnson, Jr., was denied the effective assistance of counsel in violation of his rights under the United States and Ohio Constitutions when trial counsel failed to present a coherent theory of defense."

{¶12} Third Assignment of Error: "The trial court committed plain error in violation of Mr. Johnson's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 16 of the Ohio Constitution by improperly admitting evidence of Mr. Johnson's BAC result."

{¶13} Fourth Assignment of Error: "The trial court erred in violation of Mr. Johnson's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 16 of the Ohio Constitution in upholding the jury's verdicts when the verdicts were against the manifest weight of the evidence."

{¶14} For purposes of our analysis, we address appellant's First and Second Assignments of Error conjointly.

I. Ineffective Assistance of Counsel

{¶15} In his First and Second Assignments of Error, appellant asserts that he received ineffective assistance of counsel in that

his trial attorney failed to object to the admissibility of his breath test results and failed to present a coherent defense theory.

{¶16} In *State v. Ballew*, 76 Ohio St.3d 244, 255, 1996-Ohio-81, 667 N.E.2d 369, the Supreme Court of Ohio stated that "[r]eversal of a conviction or sentence based upon ineffective assistance requires (a) deficient performance, 'errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment'; and (b) prejudice, 'errors *** so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" Id., quoting *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. Furthermore, "[a]s to deficient performance, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Ballew* at 255, quoting *Strickland* at 689. Additionally, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland* at 689. Finally, the United States Supreme Court has noted that "there can be no such thing as an error-free, perfect trial, and *** the Constitution does not guarantee such a trial." *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974.

A. Deficient Performance

{¶17} Appellant asserts that his trial counsel was deficient in that she failed to object to the admissibility of his breath test

results and present a coherent defense theory. We address each alleged deficiency in turn.

1. Breath Test Results

{¶18} Appellant is correct in his assertion that his trial counsel did not object to the introduction of his breath test results at trial. Specifically, appellant asserts that the state failed to lay a proper foundation for the introduction of the results and accordingly, that trial counsel was deficient by not objecting. Appellant contends that had trial counsel objected to the test results at trial, the results would not have been admitted and the trial court would have been forced to grant a subsequent motion for acquittal pursuant to Crim.R. 29, as it pertained to the OMVS charge under R.C. 4511.19(A)(3). However, the failure to object under the present facts was not an error on counsel's part.

{¶19} In *State v. French*, 72 Ohio St.3d 446, 1995-Ohio-32, 650 N.E.2d 887, the Supreme Court of Ohio held: "[A] defendant charged under R.C. 4511.19(A)(1) through (4) who does not challenge the admissibility of the chemical test results through a pretrial motion to suppress waives the requirement on the state to lay a foundation for the admissibility of the test results at trial. The chemical test result is admissible at trial without the state's demonstrating that the bodily substance was withdrawn within two hours of the time of the alleged violation, that the bodily substance was analyzed in accordance with methods approved by the Director of Health, and that

the analysis was conducted by a qualified individual holding a permit issued by the Director of Health pursuant to R.C. 3701.143." *Id.* at paragraph one of the syllabus.

{¶20} In the case sub judice, appellant's trial counsel filed a motion to suppress the breath test results, but later withdrew that motion after receiving discovery from the state. Accordingly, any objection to the admission of the test results on the basis that the state failed to lay a proper foundation (i.e., that the specimen was properly obtained and tested) would have been overruled because those issues are required to be resolved via a pre-trial motion to suppress. See *French*, supra. Furthermore, we cannot find that the performance of appellant's trial counsel was deficient by withdrawing the motion to suppress. "Where the record contains no evidence which would justify the filing of a motion to suppress, the appellant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion." *State v. Gibson* (1980), 69 Ohio App.2d 91, 95, 430 N.E.2d 954; see, also, *State v. Rutter*, Hocking App. No. 02CA17, 2003-Ohio-373.

{¶21} Accordingly, we cannot say that trial counsel's performance regarding the failure to object to the admission of the breath test results or make a motion for acquittal pursuant to Crim.R. 29 was deficient.

2. Coherent Defense Theory

{¶22} Appellant also asserts that his trial counsel was ineffective in that she did not present a coherent defense theory during the course of his trial. Specifically, appellant asserts that trial counsel was deficient in that she failed to argue or present evidence that at the time appellant was in the driver's seat, the vehicle was inoperable.

{¶23} Appellant cites the case of *State v. Moore* (Apr. 21, 1998), Franklin App. No. 97-APA07-896, for the proposition that defense counsel's failure to present a coherent theory of defense when one was readily available from the testimony in the record constitutes deficient performance. However, *Moore* states, "An accused has been denied effective assistance of counsel where defense counsel's strategy has been so outside the realm of legitimate trial strategy as to make ordinary trial counsel scoff at the hearing of it." *Id.*, citing *State v. Burgins* (1988), 44 Ohio App.3d 158, 160, 542 N.E.2d 707.

{¶24} The present record reveals that appellant's trial counsel did present a coherent theory of defense. While the inoperability of the vehicle is a defense to operating a motor vehicle while under the influence of alcohol, see *State v. Allberry* (Jan. 31, 1991), Hocking App. No. 90CA09, the application of this defense presumes that appellant was not the driver of the vehicle before the accident rendered the vehicle inoperable. In other words, appellant had to

show that he was not the driver of the car before the accident and that it was only after the accident rendered the vehicle inoperable that he entered the driver's compartment and attempted to restart the vehicle.

{¶25} Trial counsel was faced with a tremendous challenge.

First, Mr. Tribble testified that he observed appellant exit the vehicle from the driver's position almost immediately following the crash of the vehicle. Second, Trooper Fisher testified that appellant informed him that he was the operator of the vehicle at the time of the crash. Third, appellant testified that he did in fact tell the trooper at the scene that he was the driver of the vehicle at the time of the accident. It was not until after the investigation had concluded that appellant changed his story and placed his friend behind the wheel of the car. Furthermore, appellant admitted to the trooper, and at trial, that he was intoxicated at the time of the accident. Accordingly, while the inoperability defense may have prevented a conviction for an offense arising out of appellant's alleged re-entering of the vehicle and attempting to start it, that defense would not prevent a conviction based on his admitted driving prior to the accident.

{¶26} Our reading of the record reveals that appellant's trial counsel focused her attention on the most challenging portion of her case: overcoming appellant's admissions that he was the driver of the vehicle before the accident and that he was intoxicated at the

time he was driving. Trial counsel's strategy was not "so outside the realm of legitimate trial strategy as to make ordinary trial counsel scoff at the hearing of it." See *Burgins*, supra. Thus, appellant's trial counsel was not deficient in applying the strategy that she did.

B. Prejudice

{¶27} Since appellant has failed to show that his trial counsel's performance was deficient, appellant was not denied the effective assistance of counsel, and we need not address the issue of prejudice. Accordingly, we overrule appellant's First and Second Assignments of Error.

II. Plain Error in Admitting Breath Test Results

{¶28} In his Third Assignment of Error, appellant asserts that the admission of the breath test results was plain error.

{¶29} "Errors that arise during a trial that are not brought to the attention of the court are ordinarily waived and may not be raised on appeal unless there is plain error, i.e., but for the error, the outcome of the trial clearly would have been otherwise." *State v. McKee*, 91 Ohio St.3d 292, 294, 2001-Ohio-41, 744 N.E.2d 737 (citing Crim.R. 52(B); *State v. Johnson*, 88 Ohio St.3d 95, 111, 2000-Ohio-276, 723 N.E.2d 1054).

{¶30} The problem with appellant's argument is that it presumes that the trial court erred in admitting the results of the breath test. However, as we noted in addressing appellant's First

Assignment of Error, failure to raise the admissibility of the breath test results waives the issue for purposes of trial. See *French*, supra. Furthermore, we are unable to review the basis for the withdrawal of the motion to suppress. Thus, the trial court did not err in admitting into evidence the breath test results.

{¶31} In addition, appellant's conviction for OMVI would have been supported by other evidence, mainly appellant's own admissions that he was driving and intoxicated.

{¶32} Therefore, we overrule appellant's Third Assignment of Error.

III. Manifest Weight of the Evidence

{¶33} In appellant's Fourth Assignment of Error, he asserts that his conviction was against the manifest weight of the evidence because the record contains evidence that the vehicle was inoperable at the time appellant was in the operator's seat.

{¶34} "In determining whether a criminal conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *State v. Warren*, Athens App. No. 02CA29, 2003-Ohio-1196, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 (citing *State v. Martin*

(1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717). When making this determination, we sit as a thirteenth juror. *Thompkins* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211. Nevertheless, "[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *Martin* at 172.

{¶35} Our review of the entire record leads us to conclude that the jury did not clearly lose its way and create a manifest miscarriage of justice by finding appellant guilty of OMVS or OMVI. The record reveals that appellant admitted to driving the car at the time of the accident and that he was intoxicated. Furthermore, appellant's breath test results reveal concentrations of alcohol exceeding the limits specified in the statute.

{¶36} Accordingly, appellant's Fourth Assignment of Error is overruled.

Conclusion

{¶37} For the foregoing reasons, we overrule appellant's assignments of error in toto. Therefore, we affirm the judgment of the trial court.

Judgment affirmed.

Abele, J., and Kline, J.: Concur in Judgment and Opinion.

FOR THE COURT

BY:

David T. Evans
Presiding Judge