

[Cite as *State v. Tyson*, 2001-Ohio-1382]

**COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT**

**JUDGES:**

STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
:		
	Hon. John W. Wise, J.	
Plaintiff-Appellee	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	
FRANK TYSON	:	Case No. 2000CA00361
	:	
	:	<u><b>O P I N I O N</b></u>
	:	
Defendant-Appellant	:	

**CHARACTER OF PROCEEDING:** Criminal Appeal from the Common Pleas Court, Case No. 2000CRO849

**JUDGMENT:** Affirmed

**DATE OF JUDGMENT ENTRY:** 9/24/2001

**APPEARANCES:**

**For Plaintiff-Appellee**

**RONALD MARK CALDWELL  
Appellate Division  
P.O. Box 20049  
Canton, Ohio 44701-0049**

**For Defendant-Appellant**

**KRISTINE W. BEARD  
4571 Stephen Circle N.W.  
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***Boggins, J.***

This is an appeal from the Court of Common Pleas of Stark County.

The appellant was convicted by a jury of kidnaping, burglary, failure to comply with the order of a police officer, receiving stolen property and grand theft of a motor vehicle.

The facts preceding the indictment of appellant are that a truck was stolen from one Dana Novelli on East Tuscarawas Street in Canton, Ohio when such owner had stopped to investigate two sweepers sitting on the side of the street.

A black male walked past him and apparently entered the truck and proceeded to drive away. Mr. Novelli attempted to cling to the vehicle but was unable to prevent the theft.

Subsequently, State Highway Patrolman Haymaker observed the truck and a chase ensued with the truck going over an embankment into a strip mine and into the back entrance of Republic Steel.

A second truck located on Republic's plant area was then taken and driven through a police barricade. It violated several traffic control devices, struck parked cars, two houses and a utility pole.

The driver exited the truck and proceeded on foot with Patrolman Haymaker in pursuit.

He ran into a house occupied by Latonya Hill and her minor children, Brittany and Dwyone, on Second Street N.E., seized Brittany and used her as a shield before the Patrolman.

**In attempting to flee the residence, he was captured.**

Appellant asserted he was not the thief but was standing on the street when sprayed with mace by the patrolman and was merely fleeing such unwarranted attack when he entered the Hill home with consent.

The appellant was identified by Brittany Hill and her brother, who also verified the patrolman's version as to the events in the home. Dwyone Hill had also observed appellant leave the crashed truck prior to entering his home.

Latonya Hill, according to the children, was asleep on the second floor during these events.

The Appellant raises five Assignments of Error:

I.

TRIAL COUNSEL FAILED TO PRESENT THE TESTIMONY OF AN EXCUPATORY [SIC] DEFENSE WITNESS AND A [SIC] LAY PROPER FOUNDATION FOR THE INTRODUCTION OF PRIOR INCONSISTENT STATEMENTS THEREBY DENYING APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL.

II

THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT DUE PROCESS BY DENYING APPELLANT'S MOTION TO CONTINUE THE TRIAL IN ORDER TO PROVIDE COUNSEL WITH ADEQUATE TIME TO PREPARE FOR APPELLANT'S DEFENSE.

III

THE IMPOSITION OF INDIVIDUAL MAXIMUM SENTENCES AND AN AGGREGATE CONSECUTIVE MAXIMUM SENTENCE IS

**AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.[SIC] AND CONTRARY TO LAW.**

**IV.**

**THE TRIAL COURT ABUSED ITS DISCRETION IN EXCUSING A PROSPECTIVE AFRICAN AMERICAN JUROR FOR CAUSE.**

**V.**

**THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.**

**I**

The first Assignment of Error asserts a lack of effective assistance of counsel as to the failure to offer potential testimony of Laytona Hill as an exculpatory witness.

A claim of ineffective assistance of counsel requires a two prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 113 S.Ct. 838, 122 L.Ed. 2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption

exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley, supra* at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* It is with this framework in mind that we address the instances of alleged ineffectiveness of counsel raised by appellant in the instant case.

Here, there were several factors to consider as to Laytona Hill. Her children verified the patrolman's testimony and, according to the son, his mother was asleep and was not a witness to the events.

Clearly, trial strategy could be a reason to avoid possibly pitting the children against their mother or involving parental influence.

Trial strategy is not ineffective assistance of counsel. *State v. Coleman* (1989), 45 Ohio St.3d 298.

Therefore, the first Assignment of Error is not well taken as ineffective assistance of counsel has not been demonstrated.

## II

The second Assignment of Error relates to the denial of a motion to continue the trial date.

The procedural history in this cause is that appellant was originally represented by Attorney Steven LoDico.

The arraignment was August 4, 2000.

On August 28, 2000, Mr. LoDico moved to withdraw as counsel. Such motion was denied on September 6, 2000.

Such motion was renewed. A hearing was held on September 21, 2000.

The trial court approved Attorney LoDico's motion and contacted Attorney Wayne Graham to provide counsel. Appellant refused to see Mr. Graham. (T. at 7-9).

Trial date was set for October 2, 2000, with appellant informed of the need to engage counsel promptly.

Another hearing was held on September 27, 2000. No replacement attorney had been secured at this time but appellant advised the court of his intention to hire Attorney Haupt.

The trial court moved the trial date to October 5, 2000.

Another hearing was held on October 4, 2000. Mr. Haupt had declined to represent appellant.

Appellant signed a time waiver and the trial court appointed Mr. Graham as counsel orally on October 5, 2000, followed by an Entry of October 10, 2000. Mr. Graham was present at the October 5th hearing at which the trial was again rescheduled, this time for October 26, 2000, as a firm date.

On such date, Mr. Graham and co-counsel Darrell Holland appeared and advised the trial court that Mr. Holland was retained the previous week and moved for a continuance for preparation time.

The requested continuance was denied.

The grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial court. *State v. Unger* (1981), 67 Ohio St.2d 65. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

In determining whether a trial court abused its discretion in denying a motion for a continuance, an appellate court should consider the following factors: (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconveniences to witnesses, opposing counsel and the court; (4) whether there is a legitimate reason for the continuance; (5) whether the defendant contributed to the circumstances giving rise to the need for the continuance; and other relevant factors, depending on the unique facts of each case. See: *State v. Unger, supra*; *State v. Holmes* (1987), 36 Ohio App.3d 44.

Here, Attorney Graham knew of his appointment on October 5, 2000, and the firm trial date set, after two continuances, for October 26, 2000. No request for a third continuance was filed prior to the trial date.

The trial court was presented with the scenario that appellant, after being cautioned



by the court, had failed to take steps to engage counsel. Also, ample preparation time, at

Stark County, Case No. 2000CA00361

8

least from the Entry of appointment of October 10, 2000, existed. The mere fact of the additional retention of Mr. Holland the week before trial did not alter the available preparation time for Attorney Graham.

Obviously, Mr. Holland was aware of the trial date when he accepted representation.

The trial court therefore did not abuse its discretion in denying the continuance.

The second Assignment of Error is overruled.

### III

The third Assignment of Error addresses the imposed sentences and alleges that such are against the manifest weight of the evidence.

While the issue of the absence of sufficient evidence in support of the manifest weight argument normally is raised as to the determination by the fact finder (the jury) as to a conviction, the same concepts would logically apply to the sentencing decisions of the trial court.

We are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758, unreported. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E Morris Co.*

*v. Foley Construction* (1978), 54 Ohio St.2d 279.

Stark County, Case No. 2000CA00361

9

Appellant is required to show by clear and convincing evidence that the sentences were not supported by fact or applicable law. Revised Code §2953.08(G); *State v. Boylen* (2000), Stark App.No. 1999-CA-00278, unreported, WI-171997.

The trial court *subjudice* considered the principles and purposes of R.C. §2929.11, the seriousness of the several crimes and likelihood of recidivism factors of R.C. §2929.13.

It also found that the shortest prison terms would demean the seriousness of the appellant's conduct and not adequately protect the public.

It considered the presumptions of R.C. §2929.13(D).

It found that appellant had committed the worst forms of the subject crimes and that he posed the greatest likelihood of recidivism and that consecutive sentences were necessary to protect the public and were not disproportionate in relation to the seriousness of the conduct and the danger posed to the public.

The trial court had before it the testimony of the witnesses, the video chase (State's Exhibits 1, 7 and 8) and the prior extensive criminal history with imprisonment.

The chase shown on the videos exhibited a complete disregard for the public's safety with violations of traffic signals, and damage to parked cars and property.

The patrolman was injured in subduing appellant.

The eleven year old child was used as a shield.

The appellant admitted he was a thief with an extensive record. (T. at 329, 342-343).

The trial court clearly had a sufficient basis to support the sentences and the consecutive application together with finding that each crime was a separate offense. No violation of law occurred.

The third Assignment of Error is therefore overruled.

Stark County, Case No. 2000CA00361

10

#### IV

The fourth Assignment of Error is clearly not well taken.

Potential Juror 258 was excused for cause, not upon a peremptory exercise. This juror had been married to a member of appellant's family. He stated that he could not find the appellant guilty because of the family relationship. (T. 115-116).

No racial issues were present other than the fact that such juror was the only African American member of the panel.

*Boston v. Kentucky* (1986), 476 U.S. 79 is inapplicable.

#### V

The fifth Assignment of Error again deals with manifest weight of the evidence.

In addition to the discussion under the third Assignment, the standard of review of review for manifest weight and sufficiency of the evidence challenges is set forth in *State v. Jenks* (1981), 61 Ohio St.3d 259, syllabus two:

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 to 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.

The weight to be given the evidence introduced at trial and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, syllabus. Further, it is not the function of an appellate court to substitute its judgment for that of the fact finder. *Jenks, supra*, at 279.

In the case *sub judice* sufficient evidence supported the decisions by the jury.

Stark County, Case No. 2000CA00361

11

The fifth Assignment of Error is found lacking in merit.

The judgment of the trial Court is affirmed.

By: Boggins, J.

Gwin, P.J. and

Wise, J. concur

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JUDGES

[Cite as *State v. Tyson*, 2001-Ohio-1382]

**IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO**

**FIFTH APPELLATE DISTRICT**

**STATE OF OHIO** :

**JUDGMENT ENTRY**

**Plaintiff-Appellee** :

**CASE NO. 2000CA00361**

**-vs-**

**FRANK TYSON** :

**Defendant-Appellant** :

**For the reasons stated in our Memorandum-Opinion, the judgment of the  
Common**

**Pleas Court of Stark County, Ohio, is affirmed . Costs to appellant.**

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**JUDGES**