[Cite as *State v. Maines*, 2009-Ohio-2474.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO		:	JUDGES:
		:	W. Scott Gwin, P.J.
	Plaintiff-Appellee	:	Julie A. Edwards, J.
		:	Patricia A. Delaney, J.
-vs-		:	
		:	Case No. 2008 CA 00083
DANNY MAINES		:	
		:	
	Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Licking County Court Of Common Pleas Case No. 08 CR 00033
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 22, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
TRACY VANWINKLE Assistant Prosecuting Attorney 20 South Second Street, 4th Floor Newark, Ohio 43055	ANDREW T. SANDERSON Burkett & Sanderson, Inc. 21 West Church Street, Ste. 201 Newark, Ohio 43055

Edwards, J.

{¶1} Appellant, Danny Maines, appeals a judgment of the Licking County Common Pleas Court convicting him of failing to provide notice of change of address as a registered sex offender (R.C. 2950.05(E)(1)) and sentencing him to a term of three years incarceration. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} In 1998, appellant was convicted in the Licking County Common Pleas Court of four counts of gross sexual imposition involving a victim under the age of thirteen. He was adjudicated to be a sexually-oriented offender. As part of his registration requirements, appellant was required to notify the Sheriff's Department of any change in his address.

{¶3} On November 28, 2007, Deputy Greg Collins, the officer in charge of registering sex offenders for the Licking County Sheriff's Department, went to appellant's address at 201 West Church Street in Newark. The officer went to the apartment as a part of a random verification of sex offenders' addresses. Appellant was not at home at the time, but appellant's landlord verified that appellant resided at that address. Appellant worked out of town at the time, remodeling apartments in Dayton and Cincinnati, and generally was only home on weekends.

{¶4} At some point during the weekend after the random verification, appellant telephoned his girlfriend, Tammy McCoy, and told her he had moved. He told Tammy that the owner of the building where he lived and another large man told him he had ten minutes to pack his things and get out of the apartment. Appellant called Tammy from his brother-in-law's home.

{¶5} Appellant did not report his change in address to Deputy Collins. In December, Collins received information that appellant was no longer living at the West Church Street address. He mailed a warning letter to appellant at that address by certified mail which was returned unclaimed. During December and early January, Tammy McCoy telephoned the deputy several times on Danny's behalf. Deputy Collins told her that appellant needed to contact the sheriff's office. Appellant left one message for Collins, but when Collins attempted to return the call, he could not get through because appellant had no remaining minutes on his prepaid cell phone.

{¶6} On Sunday, January 13, 2008, appellant was arrested in a motel in Licking County. Deputy Collins interviewed him the next day. Appellant admitted that he had moved and not provided a new address. He told the deputy that he was working in Dayton during the week and was home on weekends. He claimed that, during the week, he was stranded at his work site, and had no money and no way to communicate with the sheriff's department. He told Deputy Collins that he was looking for a place to live and had lived with his mother and his brother-in-law.

{¶7} Appellant was indicted by the Licking County grand jury on January 18, 2008, for failing to provide notice of a change of address as a person required to register as a sexually-oriented offender. The case proceeded to jury trial in the Licking County Common Pleas Court. Appellant presented no evidence at trial. He was convicted as charged and sentenced to three years incarceration. He assigns two errors to this court on appeal:

{¶8} "I. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DUE TO THE FAILURE OF COUNSEL TO PROPERLY VOIR DIRE POTENTIAL JURORS DURING THE PROCEEDINGS BELOW.

{¶9} "II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN FAILING TO STRIKE PREJUDICIAL TESTIMONY FROM THE RECORD AND FAILING TO INSTRUCT THE JURY TO DISREGARD THE SAME."

I

{¶10} In his first assignment of error, appellant argues that counsel was ineffective in jury selection. Appellant specifically argues that counsel's failure to properly question Ms. Kintz, a potential juror who was a former police officer, resulted in his inability to have her removed for cause. As a result, he had to use a peremptory challenge to remove her. Appellant argues that counsel also failed to properly question Mr. Folk, whose sister worked in a police payroll department until her death three days before trial, and could not successfully challenge him for cause as a result of counsel's failure to properly question him. Appellant argues that because counsel had to use a peremptory challenge on Ms. Kintz, he only had one peremptory challenge left. And, therefore, counsel for appellant had to forego using that challenge if he had wanted to remove someone on the jury panel, because that removal could have resulted in Mr. Folk getting a spot on the actual jury panel.

{¶11} Pursuant to *Strickland v. Washington*, to establish ineffective assistance of counsel, appellant must show (1) a deficient performance by counsel, i.e., a performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the

proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. When examining counsel's trial strategy, reviewing courts must not use hindsight and must bear in mind that different trial counsel will often defend the same case in different manners. *Strickland*, supra at 689; *State v. Keenan*, 81 Ohio St.3d 133, 152, 1998-Ohio-459, 689 N.E.2d 929. For these reasons, ineffective assistance of counsel claims may not be based upon debatable strategic and tactical decisions. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171, 656 N.E.2d 643.

{¶12} Ms. Kintz stated in voir dire, in response to the court's questions, that she worked for the Johnstown Police Department as a patrol officer for about seven-and-a half years. When asked if that would cause her to give greater or lesser weight to the testimony of law enforcement officers, she responded that it would not. Tr. 20-21. When asked if her past employment would hurt her ability to be fair or impartial if she were selected as a juror, she responded that it would not. Tr. 21.

{¶13} Mr. Folk indicated, in response to the court's questioning, that his sister worked in payroll for the Columbus Police Department. She died three days before trial. Like Ms. Kintz, Mr. Folk indicated that his sister's employment would not cause him to give greater or lesser weight to the testimony of police officers and would not hurt his ability to be fair and impartial if selected as a juror. Tr. 24-25.

{¶14} When making challenges for cause, the following colloquy occurred between the court and counsel for appellant regarding Ms. Kintz:

{¶15} "MR. COOPER: Fourteen, Elma Kintz, former police officer.

{¶16} "THE COURT: Any other particular reason?

{¶17} "MR. COOPER: Would affect her ability to be fair and impartial being an officer for seven years.

{¶18} "THE COURT: Okay. Ms. Vanwinkle.

{¶19} "MS. VANWINKLE: I believe the Court directly asked her, Your Honor, if she could be fair and impartial or if she would weigh the testimony of law enforcement officers more heavily than any other witnesses and I think she indicated she could be fair and impartial.

{¶20} "THE COURT: I think that's what she said. I'll overrule your challenge for cause to Kintz. I wanted to ask why she left, but I decided maybe that was too close.

{¶21} "MR. COOPER: And it might have been some of my confusion, but having not tried a case before you, I didn't know if I could ask her - -

{¶22} "THE COURT: Absolutely.

{¶23} "MR. COOPER: - - specifically. Because I was told not to inquire specifically of jurors.

{¶24} "THE COURT: I'm sorry.

{¶25} "MR. COOPER: I'll know that next time. I don't think I have any other challenges for cause." Tr. 63-64.

{¶26} The record reflects the following colloquy between counsel for appellant and the court regarding challenging Mr. Folk for cause:

{¶27} "MR. COOPER: I would count 23, Mr. - -

{¶28} "THE COURT: Folk.

{¶29} "MR. COOPER: - - Folk. His sister worked in payroll at the police department, but she passed three days ago. I would just be concerned about him being a juror.

{¶30} "THE COURT: He said he could be fair and impartial. On that basis I'd overrule your challenge. I'm not going to ask any more of that either. I left that for your - - I left that for you to do.

{¶31} "MR. COOPER: Now that I understand now, I won't miss it again." Tr. 65-66.

{¶32} While the record does reflect that counsel was unclear as to his role in questioning jurors in this particular trial court, appellant's claim that had counsel questioned these jurors further, a bias would have been revealed that would have removed them for cause is speculative at best. Ultimately, neither juror was seated on the panel which decided appellant's case because counsel used a peremptory challenge on Ms. Kintz, and Mr. Folk was seated as an alternate. Nothing in the record demonstrates that the jury as seated was not fair and impartial.

{¶33} In addition, the record does not support appellant's claim that he failed to use his final peremptory challenge in an effort to avoid Mr. Folk's placement on the final panel. Mr. Folk was not the next person who would have been seated on the panel had counsel used his final peremptory challenge. Appellant was given an opportunity to use a peremptory challenge on Mr. Folk as an alternate and chose to allow Mr. Folk to sit as

an alternate. Tr. 69. If counsel felt that he did not want Mr. Folk on the jury panel, he would have presumably taken the opportunity to challenge him as the alternate.

{¶34} Appellant has not demonstrated that counsel's performance fell below a reasonable standard of representation, nor has he demonstrated a reasonable probability in a change in the outcome of the trial had counsel questioned the prospective jurors in a different manner.

{¶35} The first assignment of error is overruled.

II

{¶36} In his second assignment of error, appellant argues that the court erred in not striking the following testimony of Deputy Collins and giving a curative instruction:

{¶37} "Q. Prior to working on this case here today, had you ever seen Mr. Maines in person?

{¶38} "A. I may have seen him when I was working the jail, I may have recognized him from there, but only there." Tr. 123.

{¶39} Counsel objected and moved for a mistrial on the basis that the witness testified that he may have seen appellant in jail, which was an inappropriate comment on appellant's character. The state responded that the proper resolution would not be a mistrial, but would be to strike the testimony and give a curative instruction that the testimony be disregarded. The court overruled the objection. The court told counsel he would include an instruction concerning other acts with the final instructions.

{¶40} When counsel discussed the proposed final jury instructions with the court, counsel for appellant noted that the instruction didn't necessarily address his specific objection to Deputy Collins' testimony. However, when asked what he wanted

the court to do, counsel responded that he was comfortable with the instruction because he didn't "really believe there's more the Court can do." Tr. 194. The judge stated that, in listening to the testimony, he did not take it to mean appellant was in jail for any other type of offense, and that the jury was aware that appellant had a prior conviction leading to his classification as a sexually-oriented offender, and that the court did not want to draw attention to the comment through the instruction. The court included the following language in the final instructions to the jury:

{¶41} "Evidence was received about the commission of crimes other than the offense with which the Defendant is charged in this trial. That evidence was received for a limited purpose. It was not received and you may not consider it to prove the character of the Defendant in order to show that he acted in conformity with that character. If you find that the evidence of other crimes is true and that the Defendant committed it, you may consider that evidence only for the purpose of deciding whether it proves the Defendant's obligation to register as a sex offender." Tr. 230-31.

{¶42} Evid. R. 404(B) prohibits the admission of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith. The admission or exclusion of relevant evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. We will not disturb a trial court's evidentiary ruling unless we find the ruling to be an abuse of discretion. *State v. Adams* (1980), 62 Ohio St. 2d 151, 404 N.E.2d 144. In addition, the decision whether to give a curative instruction lies within the sound discretion of the trial court, and will not be reversed on appeal unless the decision is

unreasonable, arbitrary, or unconscionable. *State v. Alexander*, Franklin App. No. 06AP-647, 2007-Ohio-4177, ¶36.

{¶43} While the better practice in the instant case would have been to strike the deputy's testimony and give a curative instruction, we cannot find that the court's failure to do so rose to the level of an abuse of discretion. In the instant case, appellant's bill of information in his underlying case, showing that he was indicted for four counts of gross sexual imposition involving a child under the age of 13, was admitted into evidence. Appellant's judgment of conviction and sentence was also admitted into evidence, showing he was convicted of all four counts and sentenced to two years incarceration on each count, to be served consecutively. The judgment also shows that he received credit for 74 days of time served. Nothing in the deputy's comment indicates that he saw appellant at the jail for a crime other than those presented to the jury, and the jury was well aware that appellant had a past criminal record and most likely spent time in prison.

{¶44} Further, the evidence demonstrated that when arrested for failing to register a change of address, appellant admitted that he had moved and not notified the sheriff's department. Appellant has not demonstrated that any possible error in the court's failure to strike the isolated testimony and give a curative instruction was prejudicial in the instant case.

{¶45} The second assignment of error is overruled.

{¶46} Accordingly, the judgment of the Licking County Common Pleas Court is affirmed.

By: Edwards, J.

Gwin, P.J. and

Delaney, J. concur

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JUDGES

JAE/r0408

[Cite as *State v. Maines*, 2009-Ohio-2474.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DANNY MAINES	:	
Defendant-Appellant	:	CASE NO. 2008 CA 00083

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES