[Cite as *State v. Medezmapalomo*, 2010-Ohio-4845.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JUAN MEDEZMAPALOMO Defendant-Appellant	JUDGES: Hon. Julie A. Edwards, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 10CA15 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Common Pleas Court, Case No. 2009CR0257H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 28, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY RICHLAND COUNTY, OHIO BY: KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	CHARLES M. BROWN Weldon, Huston & Keyser, L.L.P. 28 Park Avenue West Mansfield, Ohio 44902

Hoffman, J.

{¶1} Defendant-appellant Juan Medezmapalomo appeals his conviction and sentence entered by the Richland County Court of Common Pleas, on one count of possession of a deadly weapon while under detention, in violation of R.C. 2923.131(B), following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On April 10, 2009, the Richland County Grand Jury indicted Appellant on one count of possession of a deadly weapon while under detention, in violation of R.C. 2923.131(B), a felony of the first degree. At the time of the Indictment Appellant was an inmate at Mansfield Correctional Institution, serving a twenty-year to life sentence for aggravated murder. Appellant appeared before the trial court and entered a plea of not guilty at his arraignment on May 7, 2009. On June 19, 2009, defense counsel filed a motion to dismiss, alleging R.C. 2923.131, under which Appellant was indicted, violated the equal protection clause and the cruel and unusual punishment clause of the Ohio and United States Constitutions. The State filed a response in opposition thereto. Via Judgment Entry filed July 22, 2009, the trial court found Appellant's motion to dismiss to be without merit and overruled the same.

{¶3} The matter came on for jury trial on January 4, 2010. The following evidence was adduced at trial.

{¶4} In November, 2008, Appellant was an inmate at the Mansfield Correctional Institution. Appellant was housed in a single cell in Unit 4C, which is the segregation unit of the correctional facility. Corrections Officer Donald Conn was conducting rounds in Unit 4C at approximately 11:15pm on November 26, 2008, when he noticed the lights

were on in Appellant's cell. Officer Conn looked through the window of the cell door and observed Appellant squat down, turn around, and jab forward and sideways while holding a piece of metal approximately one foot in length. The officer left the area and called for backup. Within five minutes, Corrections Officers Michael Gibson and Gregory Ditmars, who were working as floaters within the facility, responded to Unit 4C. When the three officers reached the door of Appellant's cell, Officer Conn saw Appellant throw an object out of the window of his cell. Officer Conn believed the object Appellant discarded was the metal shank Appellant was previously brandishing. The three officers entered Appellant's cell and confronted him. Appellant told the officers he had thrown a cup out of the window. The officers secured Appellant and searched his cell. They did not find any additional contraband.

{¶5} Officers Gibson and Ditmars contacted the captain, who provided them with the keys to the fenced area surrounding Unit 4C. During their search, they discovered a metal shank stuck blade first into the ground located in the area under Appellant's cell window. Officers Gibson and Ditmars found some litter in the area, but did not find any cups in the area immediately underneath Appellant's cell window.

{¶6} Officers Gibson and Ditmars showed the metal shank to Officer Conn, who identified the weapon as the same shank he had seen in Appellant's possession. The officers prepared a conduct report and turned over the metal shank to Captain Robert Scott. Trooper Kevin Smith was assigned to investigate the incident. As part of his investigation, he measured the window in Appellant's cell. Trooper determined the window could be opened wide enough to allow Appellant to stick his hand out and drop the shank. Trooper Smith testified weapons are a serious problem at the correctional

facility, and he investigates fifty to sixty such incidents each year. The incidents have included assaults on guards or other inmates using handmade weapons, and have had serious and fatal consequences. Based upon his training and fourteen years of experience working in the prison, Trooper Smith opined the metal shank recovered outside Appellant's cell window was capable of inflicting death. The trooper explained the sharpness and angle of the point and the length were such that the weapon was capable of striking a major artery or puncturing a vital organ.

{¶7} Appellant testified on his own behalf. Appellant stated he had dropped only a cup out of his cell window and the shank in question did not belong to him. No other witnesses were called on Appellant's behalf.

{¶8} After hearing all the evidence and deliberating, the jury found Appellant guilty as charged. The trial court sentenced Appellant to a period of incarceration of five years and ordered the sentence be served consecutively to the aggravated murder sentence Appellant was serving. The trial court also imposed five years of mandatory post-release control.

{¶9} It is from this conviction and sentence Appellant appeals, raising the following assignments of error:

{¶10} "I. THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS ON THE BASIS OF THE EQUAL PROTECTION CLAUSE OF ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION AND OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

{¶11} "II. THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS ON THE BASIS OF OHIO REVISED CODE

SECTION 2923.131 VIOLATING THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION AND OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

{¶12} "III. APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION, AS WELL AS THE DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN ARTICLE 1 SECTION 16 OF THE OHIO CONSTITUTION."

I

{¶13} In his first assignment of error, Appellant asserts the trial court erred in overruling his motion to dismiss as R.C. 2923.131, the statute under which he was indicted, violates the equal protection clause of the Ohio and United States Constitutions.

{¶14} The standard for determining if a statute violates equal protection is "essentially the same under state and federal law." *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 353 Equal protection analysis begins with the rebuttable presumption that statutes are constitutional. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 361, 653 N.E.2d 212, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus; and *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300, 6 OBR 361, 452 N.E.2d 1337. " 'Equal protection of the law means the protection of equal laws. It does not preclude class legislation or class action provided

there is a reasonable basis for such classification. The prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws.' " *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-289, 595 N.E.2d 862, quoting *Dayton v. Keys* (1969), 21 Ohio Misc. 105, 114, 50 O.O.2d 29, 252 N.E.2d 655.

{¶15} The next step in equal protection analysis is to determine whether "a fundamental interest or suspect class is involved." *Conley,* supra at 289. We conclude, and the parties do not contest, the classification in this case does not involve a fundamental interest or a suspect class. Accordingly, "the classification will be subject to a 'rational basis' level of scrutiny." *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d 443, 447, 613 N.E.2d 574. Under rational-basis scrutiny, a statute will be held constitutional "if it bears a rational relationship to a legitimate governmental interest." Id. In applying this standard, classifications "are invalid only if they bear no relation to the state's goals and no ground can be conceived to justify them." *State v. Thompkins,* 75 Ohio St.3d 558, 1996 -Ohio- 264.

{¶16} Appellant argues there is no rational basis for establishing different penalty parameters where the conduct upon which a charge is brought is the same, i.e. having a deadly weapon while in detention. We disagree. We find the range of penalties bears a rational relationship to a legitimate governmental interest. The degree of felony charged for a violation of R.C. 2923.131 varies depending on the degree of the

underlying crime for which the offender is being detained. We find the legislature's decision to base the degree of a violation of R.C. 2923.131 is neither unreasonable nor arbitrary. The graduated penalty based upon the underlying offense is based on the reasonable assumption the detention facility population faces a greater risk from those individuals who have already been convicted of committing more serious offenses. We, therefore, conclude Appellant's challenge the statute is unconstitutional on its face as violating the equal protection clause lacks merit.[1]

{¶17} Appellant's first assignment of error is overruled.

II

{¶18} In his second assignment of error, Appellant contends the trial court erred in overruling his motion to dismiss as R.C. 2923.131 violates the cruel and unusual punishment clause of the Ohio and United States Constitutions.

{¶19} "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Weems v. United States* (1910), 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed. 793, 798. "[A] criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm, supra,* 463 U.S. at 290, 103 S.Ct. at 3009, 77 L.Ed.2d at 649; cf. *Harmelin v. Michigan* (1991), 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836. When the severity of a punishment is disproportionate to the offense for which it is imposed, the result is a violation of the Eighth Amendment to the United States Constitution and, concomitantly, Section 9, Article I of the Ohio Constitution. *Solem* at 284, 103 S.Ct. at 3006, 77 L.Ed.2d at 645;

[1] That is not to say, nor do we now determine, a challenge of the statute as being unconstitutional as applied to a certain defendant would be necessarily meritless.

State v. Chaffin (1972), 30 Ohio St.2d 13, 59 O.O.2d 51, 282 N.E.2d 46, paragraph three of the syllabus.

{¶20} The *Chaffin* decision, which was decided prior to *Solem,* set forth the standard that in order for a punishment to offend the Constitution, it must be " 'so disproportionate * * * as to shock the moral sense of the community.' " *Chaffin* at 17, 59 O.O.2d at 53-54, 282 N.E.2d at 49, quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69-70, 30 O.O.2d 38, 39-40, 203 N.E.2d 334, 336-337.

{¶21} As a general rule, a sentence within the statutory limitations is not excessive and does not violate the constitutional prohibition against cruel and unusual punishment. *State v. Ardner*. Appellant does not argue this rule of law. Rather, he submits the proposition "does not take into consideration the absolute concept that the legislature has enacted a statute which by its very term violates constitutional principles." Brief of Appellant at 9. Appellant submits R.C. 2923.131, as written, violates the constitutional "prohibition against cruel and unusual punishment due to the wide range of disparate and sentences available". Id.

{¶22} Upon our review of our record, we cannot say Appellant's being sentenced on a first degree felony for violating R.C. 2923.131 is "so disportionate to the offense as to shock the moral sense of the community." *Chaffin*, supra. As we stated, supra, the State has a legitimate governmental interest in deferring convicted offenders from possessing deadly weapons inside correctional facilities.

{¶23} Appellant's second assignment of error is overruled.

III

{¶24} In his final assignment of error, Appellant raises an ineffective assistance of counsel claim. Specifically, Appellant asserts defense counsel was ineffective for failing to object to other acts evidence.

{¶25} 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. *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, 538 N.E.2d 373. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

{¶26} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. “Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel.” *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180.

{¶27} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶28} Appellant submits defense counsel was ineffective for failing to object to other acts or wrongs in violation of Evid.R. 404(B).

{¶29} R.C. 2945.59 and Evid.R. 404(B) provide the rules for the admission or exclusion of other crimes, wrongs, or acts.

{¶30} R.C. 2945.59 states:

{¶31} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." *Id.*

{¶32} Evid.R. 404(B) provides:

{¶33} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

{¶34} Generally, these rules are to be construed against admissibility of the "other acts" evidence. *State v. Burson* (1974), 38 Ohio St.2d 157, 158, 311 N.E.2d 526.

{¶35} The other acts evidence to which Appellant refers occurred during the State's cross-examination of Appellant. The questioning proceeded as follows:

{¶36} "By Mr. Bishop [Prosecutor].

{¶37} "Q. Mr. Medezmapalomo, I understand you're from Cuba.

{¶38} "A. [Appellant] Yeah.

{¶39} "Q. Your family still lives in Cuba?

{¶40} "A. Yeah.

{¶41} "Q. You're the only one of your family that's here?

{¶42} "A. Yeah.

{¶43} "Q. Okay. And you have – correct me if I'm wrong. You've spent most of your time here in prison?

{¶44} "A. Well, in the United States?

{¶45} "Q. Yes.

{¶46} "A. Yeah.

{¶47} "Q. Convicted of robbery?

{¶48} "A. Robbery?

{¶49} "Q. Robbery? Didn't you do time for robbery?

{¶50} "A. Yeah. Felonious assault.

{¶51} "Q. Okay. Felonious assault. But wasn't there also a robbery?

{¶52} "A. Yeah.

{¶53} "Q. Okay. So you've spent the bulk of your time here in prison?

{¶54} "A. Yeah.

{¶55} "Q. You've gotten used to prison life?

{¶56} "A. Yeah.

{¶57} "Q. You know what the rules are?

{¶58} "A. Um-hum (affirmative).

{¶59} "Q. Yes?

{¶60} "A. Yeah, I know. I know the rules.

{¶61} "Q. And yet you've been written up a number of times, haven't you?

{¶62} "A. Yeah.

{¶63} "Q. Disobeying a direct order, smoking on the pod floor, having contraband in your cell, things of that nature?

{¶64} "A. That's part of surviving.

{¶65} "Q. In fact, there was at least one occasion when you were written up for smoking on the pod floor, and you said to the guards, I don't care, I'll beat the ticket anyway. Do you remember that?

{¶66} "A. I never said that.

{¶67} "Q. You never said that?

{¶68} "A. I got a ticket. I got a ticket.

{¶69} "Q. You've also been written up for using a shank, haven't you?

{¶70} "A. What do you mean?

{¶71} "Q. A knife, a shank a homemade weapon.

{¶72} "A. I have a chance. I don't have a chance after they find knife in my cell.

{¶73} "Q. Wasn't there an instance when you were written up for attacking one of the guards with a shank at Cuyahoga?

{¶74} "A. (The witness shook his head).

{¶75} "Q. Yes or no?

{¶76} "A. You're talking about 25 years ago.

{¶77} "Q. Well, I'm asking a question. Did you or did you not make a shank?

{¶78} "A. Excuse me. You ask this question almost 25 years ago.

{¶79} "Q. All right. Well, I'm just asking you to see if you're telling the truth or not.

{¶80} "A. Yeah, the truth."

{¶81} Transcript, Vol. II at 154-156.

{¶82} We agree with Appellant the prosecutor's questions regarding Appellant's prior incident regarding he possession of a shank 25 years ago was not permissible.[2] However, Appellant opened the door to this line of questioning during his direct examination.[3] Therefore, any objection made by defense counsel during cross

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[2] The prosecutor's questions regarding Appellant's past felony convictions were admissible to impeach Appellant's credibility. Any evidence of prior minor rules violations, even if improperly admitted, would not be sufficient to demonstrate prejudice under the second prong of *Strickland*.

[3] "Q. [Attorney Dale Musilli] * * * So you've even at some point handled a shank before at least once. Right?
"* * *
"Q. There are reports of you admitting that you had a shank - -
"A. Many, many year - -
"Q. - - in the past?
"A. In the past, yeah, yeah, a long time ago.
"Q. * * *
"A. But mine they find in my possession as my weapon. But this one here, I don't know where it come from.
"Q. You're telling us that the one that you saw yesterday, that's the first time you saw it?
"A. Yes, sir.
Transcript, Vol. II at 152.

examination would have been overruled. Accordingly, we find Appellant was unable to establish he was prejudice by defense counsel's failure to object.

{¶83} Appellant's third assignment of error is overruled.

{¶84} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JUAN MEDEZMAPALOMO	:	
	:	
Defendant-Appellant	:	Case No. 10CA15

For the reasons stated in our accompanying Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE