

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-09-024

Appellee

Trial Court No. TRC 0801904

v.

Paul L. Bickley

DECISION AND JUDGMENT

Appellant

Decided: March 19, 2010

* * * * *

Terry R. Griffith, Law Director, and Laura E. Alkire,
Assistant Law Director, for appellee.

Terrence R. Rudes, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Huron Municipal Court that found appellant guilty of one count of operating a motor vehicle while under the influence of alcohol, and one count of operating a motor vehicle while under the influence of alcohol

and refusing to submit to a chemical test after arrest. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "First Assignment of Error:

{¶ 4} "The court committed substantial prejudicial error in admitting police reports.

{¶ 5} "Second Assignment of Error:

{¶ 6} "The court committed substantial prejudicial error in admitting the complaints against the defendant.

{¶ 7} "Third Assignment of Error:

{¶ 8} "The prosecutor committed prosecutorial misconduct by making an improper comment in front of the jury.

{¶ 9} "Fourth Assignment of Error:

{¶ 10} "The court committed substantial prejudicial error in denying the defendant's motion to dismiss the refusal charge pursuant to Criminal Rule 29 at the end of the state's case.

{¶ 11} "Fifth Assignment of Error:

{¶ 12} "The defendant was provided ineffective assistance of counsel at trial which resulted in violation of his Fifth, Sixth, and Fourteenth Amendment Rights and his rights under Article I Sections Ten and Sixteen of the Ohio Constitution.

{¶ 13} "Sixth Assignment of Error:

{¶ 14} "The defendant was substantially prejudiced by an accumulation of error during the trial."

{¶ 15} The undisputed facts relevant to the issues raised on appeal are as follows. On October 14, 2008, at approximately 2:30 a.m., while driving on State Route 2 in Huron, Ohio, appellant was stopped by a police officer for a marked lane violation. Officer Terry Graham of the Huron Police Department observed appellant's pickup truck drift in and out of his lane several times. Graham activated his overhead lights but appellant continued driving; appellant eventually pulled onto the shoulder of the road where he drove for another several hundred yards before coming to a stop. Although appellant was initially observed on Route 2 in the city of Huron, by the time his truck came to a stop he was in Huron Township.

{¶ 16} After speaking to appellant and noting his slurred speech and red, glassy eyes, Officer Graham asked appellant if he would take a field sobriety test. Appellant agreed but ultimately did not perform two of the tests due to recent back surgery. Appellant exhibited all six of the "clues" on the horizontal gaze nystagmus test; he was then placed under arrest for driving while under the influence of alcohol. Appellant's truck was immobilized after it was determined that he had a prior OVI conviction and the officer who inventoried the vehicle found two open containers of beer in the passenger compartment. Upon arriving at the Huron Police Department, appellant refused the blood alcohol test.

{¶ 17} Appellant was charged with operating a motor vehicle while under the influence of alcohol, operating a motor vehicle while under the influence of alcohol and refusing to submit to a chemical test after arrest, failure to drive on the right hand side of the roadway, and an open container violation. Appellant entered not guilty pleas to all four charges. Following a jury trial on the first two charges and a trial to the bench on the remaining two, appellant was found guilty of all four charges. Appellant was sentenced to 120 days in jail with 100 days suspended. Additionally, he was placed on probation, ordered to pay fines and costs and ordered to complete an alcohol assessment. Appellant's driver's license was suspended for three years with occupational privileges. It is from that judgment that appellant appeals.

{¶ 18} In support of his first assignment of error, appellant asserts that the trial court erred by allowing "police reports" to be admitted into evidence. Appellant refers to only one document -- State's Exhibit D, which is a form captioned "Alcoholic Influence Report – Optional Interview." The "influence report" contains a series of questions and answers completed during the booking process. The questions relate to such subjects as whether the driver has had anything to drink and if so what and when, how recently he has eaten, and whether he has any physical defects. The "influence report" is printed on the reverse side of the "Impaired Driver Report" used by the Huron Police Department which indicates the results of the field sobriety tests.

{¶ 19} The record reflects that appellant's "influence report" was referenced in this case during Officer Graham's direct testimony. Defense counsel objected to any

testimony regarding the influence report. The prosecutor responded that she was attempting to admit only the "influence report," which was the officer's documentation of the defendant's answers to questions asked of him, not the impaired driver report on the reverse side. The trial court allowed the testimony to continue. Officer Graham then testified as to appellant's answers regarding such issues as when he stopped drinking, what he ate and when that evening, where he was earlier in the evening, and at what time the officer initiated the stop. The information contained in the "influence report" was cumulative of other evidence presented in this case by way of Officer Graham's testimony; the report contains only information testified to by the officer. Accordingly, we find that the trial court did not err by allowing the "influence report" to be admitted into evidence and appellant's first assignment of error is not well-taken.

{¶ 20} In his second assignment of error, appellant asserts that the trial court erred by allowing the complaints against him to be admitted into evidence. Appellant's sole argument in support is that the complaints -- the citations for having an open container and refusal to take the breathalyzer test -- had no relevance to the case. The record reflects that trial counsel did not object when the documents were referenced during testimony or when they were offered into evidence at the close of the state's case. As such, any error in this regard was waived by the failure to object unless plain error can be demonstrated. Appellant has not shown, nor can this court find, plain error with regard to admission of the citations. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 21} In his third assignment of error, appellant claims prosecutorial misconduct. Appellant asserts that the prosecutor, when responding to a defense objection to testimony regarding the alcohol influence report, inappropriately inferred that if appellant disagreed with the testimony, he could testify himself. The prosecutor made the following statement: "Your client can certainly testify if he wants to contradict what the officer says, and you'll have the opportunity to cross examine the officer."

{¶ 22} Appellant argues that the prosecutor's comment suggested that appellant would have to testify to rebut the evidence against him and that, if he were not guilty, he would do so. As it turns out, appellant did testify.

{¶ 23} As we stated above, because the defense did not object to the prosecutor's comment, this claim must be considered under a plain error analysis. Failure to object to the alleged misconduct of the prosecutor at trial means that an appellant will have waived all but plain error. *State v. Jones* (2001), 91 Ohio St.3d 335, 352. Further, "[p]lain error does not exist unless, but for the improper comments of the prosecutor, the outcome of defendant's trial would clearly have been different; that is, he would not have been convicted." *State v. Pillow*, 2d Dist. No. 07CA095, 2008-Ohio-6046, ¶ 48, citing *State v. Coben*, 2d Dist. No. 2001CA8, 2002-Ohio-914.

{¶ 24} The test for prosecutorial misconduct is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. The touchstone of analysis is "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219.

{¶ 25} Appellant states that the prosecutor's comment "** * * could have* influenced the defendant to take the stand where he would not otherwise have done so." (Emphasis added.) There is, of course, no way to know whether appellant would have testified if the prosecutor's comment had not been made. Appellant's argument is purely speculative.

{¶ 26} In light of the foregoing, and upon our review of the entire record of proceedings in the trial court, we find that appellant has not shown that the prosecutor's comment was improper or that he was prejudiced as a result. Accordingly, there was no plain error and appellant's third assignment of error is not well-taken.

{¶ 27} In his fourth assignment of error, appellant asserts that the trial court erred by denying the Crim.R. 29 motion to dismiss the breathalyzer refusal charge which he made at the end of the state's case. Appellant argues that the state failed to establish in its case in chief a prior conviction, which is an essential element of the breathalyzer refusal charge.

{¶ 28} Appellant's argument has several flaws. First, the Crim.R. 29 motion made by the defense after the state's case in chief did not raise the issue of appellant's prior OVI conviction. The motion was made on the basis that the court did not have jurisdiction over the case because the traffic stop ultimately occurred outside the limits of the city of Huron. After lengthy dialog between counsel and the court, the court dismissed the motion upon finding that, although appellant was within the limits of Huron Township when he finally brought his vehicle to a stop, the officer's initial observation of the marked lanes violation and the activation of his overhead lights

occurred with the city of Huron. The issue of appellant's prior conviction was not raised at the time the Crim.R. 29 motion was made. Ohio courts have held that if a defendant sets forth specific grounds in his motion for acquittal, he waives review of all grounds not specified. See *State v. Pruiett*, 9th Dist. No. 21889, 2004-Ohio-4321. Because appellant's counsel set forth specific grounds relating to jurisdiction in his Crim.R. 29 motion, but did not include any argument regarding the prior conviction charge, appellant has waived any Crim.R. 29 challenge with respect to the prior conviction charge.

{¶ 29} Second, as to the issue of a prior conviction, the record reflects that the parties entered into a stipulation that on July 15, 2004, the Elyria Municipal Court found appellant guilty of OMVI in violation of R.C. 4511.19. This stipulation was reduced to writing and admitted as Joint Exhibit 1.

{¶ 30} Third, the defense failed to renew the Crim.R. 29 motion at the close of its case, thereby waiving any error relating to the sufficiency of the evidence underlying the refusal conviction. See *State v. Novak*, 6th Dist. No. L-03-077, 2003-Ohio-563.

{¶ 31} Based on the foregoing, appellant's fourth assignment of error is not well-taken.

{¶ 32} In his fifth assignment of error, appellant asserts that he was denied effective assistance of counsel in several respects. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-prong test.

First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 33} First, appellant asserts that trial counsel was ineffective for failing to object in several instances. The failure to object is not a per se indicator of ineffective assistance of counsel because counsel may refuse to object for tactical reasons. *State v. Gumm* (1995), 73 Ohio St.3d 418, 428. Debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶ 34} Appellant contends that counsel was ineffective for objecting to testimony as to the alcohol influence report solely on the basis of hearsay. In light of our finding under appellant's first assignment of error that the trial court did not err by allowing the report to be admitted into evidence, we are unable to find that counsel was ineffective for failing to object to the report on some other basis. Appellant also argues that counsel should have objected to the introduction of the two traffic citations. In response to Assignment of Error No. 2, we found that the trial court did not err by allowing the complaints to be admitted into evidence. Therefore, we are unable to find that counsel was ineffective for failing to object. Additionally, appellant asserts that trial counsel

should have objected to hearsay testimony of Officer Graham, the arresting officer, and Officer Durbin, who provided backup after the stop, as to appellant's prior OVI conviction. A review of the transcript reveals that the officers' testimony as to appellant's prior OVI conviction was offered in both instances to explain why appellant's car was towed from the scene. In this instance, it is likely that trial counsel chose for tactical reasons not to emphasize the prior conviction. Additionally, counsel was obviously aware of appellant's stipulation as to the conviction, which would be entered into evidence as a joint exhibit.

{¶ 35} Based on the foregoing, we are unable to find that trial counsel was ineffective for failing to object in the instances cited by appellant.

{¶ 36} Appellant further asserts that trial counsel should have moved for dismissal of the breathalyzer refusal charge at the close of the state's case on the basis of the state's failure to prove a prior conviction. Although the stipulation as to the prior conviction was not entered into evidence until the close of all evidence, again, trial counsel was aware of the stipulation and a motion to dismiss the charge on that basis most likely would have been met with a reminder by the state of its existence. This argument is without merit.

{¶ 37} Appellant next asserts that trial counsel should have renewed the motion for dismissal pursuant to Crim.R. 29 at the close of all of the evidence. Appellant's motion for acquittal was based on the argument that the court did not have jurisdiction over the case. The undisputed evidence presented by the state showed that the officer initially

observed the marked lanes violation within the city of Huron. The jurisdictional argument would have failed had it been raised again at the close of all of the evidence since the defense offered no evidence to the contrary. This argument is without merit.

{¶ 38} Finally, appellant asserts that trial counsel should have moved for a mistrial based upon "unfair prejudice interjected by the state" through highly prejudicial testimony regarding his prior conviction. We note first that appellant stipulated to the prior conviction, and second that appellant testified in detail as to the circumstances surrounding the conviction. As we have already found that the trial court properly allowed testimony regarding the prior conviction, this argument is without merit.

{¶ 39} Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 40} As his sixth assignment of error, appellant asserts that he was denied a fair trial because of cumulative errors. In light of our findings as to appellant's first five assignments of error, we find that there is no cumulative error that would warrant the trial's reversal. Accordingly, appellant's sixth assignment of error is not well-taken.

{¶ 41} On consideration whereof, this court finds that appellant was not prejudiced or denied a fair trial and the judgment of the Huron Municipal Court is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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