[Cite as *State v. Hall*, 2010-Ohio-2623.]

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

State of Ohio

Appellee

v.

Willie L. Hall

Appellant

Court of Appeals Nos. L-09-1219
L-09-1220

Trial Court Nos. CR0200902019
CR0200901609

DECISION AND JUDGMENT

Decided: June 11, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicki, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is a consolidated appeal from two judgments of the Lucas County Court of Common Pleas that found appellant guilty of one count each of attempted burglary, having a weapon while under disability, carrying a concealed weapon and

aggravated possession of drugs. For the reasons that follow, the judgments of the trial court are affirmed.

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

{¶ 3} "First Assignment of Error: The Appellant was denied his right to counsel as guaranteed by the United States and Ohio Constitutions when the court did not grant trial counsel's Motion to Withdraw.

{¶ 4} "Second Assignment of Error: The trial court abused its discretion in denying trial counsel's Motion to Withdraw as counsel.

{¶ 5} "Third Assignment of Error: The Appellant was not afforded effective assistance of counsel as required by the United States and Ohio Constitutions."

{¶ 6} The undisputed facts relevant to the issues raised on appeal are as follows. On March 25, 2009, appellant was indicted on one count of burglary in violation of R.C. 2911.12(A)(1) and (C). (Trial court Case No. CR09-1609) On April 1, 2009, appellant retained attorney Paul Geller to represent him. On April 17, 2009, appellant was indicted on three additional charges arising from the burglary: having a weapon while under disability in violation of R.C. 2923.13(A)(2); carrying a concealed weapon in violation of R.C. 2923.12(A)(2) and (G) and aggravated possession of drugs in violation of R.C. 2925.11(A) and (C)(1)(a). (Trial court Case No. CR09-2019)

{¶ 7} The burglary charge proceeded to trial by jury on May 4, 2009, but resulted in a mistrial when the jury was unable to reach a unanimous verdict. On May 29, 2009, appellant retained Geller to represent him as to the three additional charges. On June 29,

2009, the burglary charge again proceeded to trial. At that time, Attorney Geller made an oral motion to withdraw as appellant's counsel. It appears from the record that after a lengthy discussion involving the court, appellant and counsel, Geller remained as appellant's attorney. This issue will be addressed at greater length under appellant's first assignment of error.

{¶ 8} On June 30, 2009, the jury found appellant guilty of attempted burglary. Sentencing was set for July 13, 2009, and at that time, Attorney Geller again moved the court to withdraw as appellant's counsel in both cases. Geller's motion was granted and new counsel appointed. Sentencing was continued.

{¶ 9} On August 7, 2009, appellant withdrew his not guilty pleas to the charges of having a weapon while under disability, carrying a concealed weapon and aggravated possession of drugs, and entered a no contest plea to each charge. The trial court accepted the pleas and found appellant guilty.

{¶ 10} On September 12, 2009, appellant was sentenced to a term of imprisonment for the convictions in Case Nos. CR09-1609 and CR09-2019. We note that, while appellant has appealed from both judgments, his assignments of error arise solely from his trial and conviction on the burglary charge.

{¶ 11} In his first assignment of error, appellant asserts he was denied his right to counsel when the trial court denied defense counsel's oral motion to withdraw made on the day of the June 29, 2009, jury trial. Appellant argues that he articulated justifiable dissatisfaction with counsel and that his request was not made in bad faith or for the

purpose of delay. He asserts he was denied his right to counsel of his choice, although Geller was retained.

{¶ 12} It is the trial court's duty to balance a defendant's right to counsel of his choosing against the public interest in the administration of justice. *State v. Marinchek* (1983), 9 Ohio App.3d 22. Trial courts generally tip the balance in favor of the defendant when there exists a total lack of cooperation and trust between counsel and the defendant. *State v. Dukes* (1986), 34 Ohio App.3d 263; *State v. Pruitt* (1984), 18 Ohio App.3d 50. Conversely, the balance is tipped in favor of the orderly and efficient administration of justice when defendant's request for new counsel is for purposes of delay or made in bad faith. See *Dukes*; *Pruitt*.

{¶ 13} We believe this issue can be resolved with a careful reading of the discussion which transpired after Attorney Geller moved to withdraw.

{¶ 14} Appellant cites the beginning of the discussion between the trial court, appellant and Geller:

{¶ 15} "MR. GELLER: After talking to my client some more this morning, I would move to withdraw. It has been – I guess we have irreconcilable differences at this point. I know there has been some telephone calls and –

{¶ 16} "THE COURT: You have to be more specific than that.

{¶ 17} "MR. GELLER: Well, he has no confidence in me trying the case. He indicates I'm working for the prosecutor. He wants me to call a witness in the burglary

case, Mr. Davis, who I said I will not call because I think it is not proper to call him philosophically, and he says he doesn't want to talk to or deal with me as his lawyer.

{¶ 18} "THE COURT: Is that correct, Mr. Hall?

{¶ 19} "THE DEFENDANT: (Nodded affirmatively)

{¶ 20} "THE COURT: You have to speak for the record. You can't shake your head yes or no.

{¶ 21} "THE DEFENDANT: Yes.

{¶ 22} "THE COURT: What's the problem?

{¶ 23} "THE DEFENDANT: I don't trust him.

{¶ 24} "THE COURT: Why?

{¶ 25} "THE DEFENDANT: He wanted me to take a plea to something I didn't do.

{¶ 26} "THE COURT: You have the funds to hire your own counsel? You hired Mr. Geller.

{¶ 27} "THE DEFENDANT: Could I get some of my money back that I gave him?

{¶ 28} "THE COURT: No. He went to trial for you. That will be between you and him, but he went to trial for you and ended up with a hung jury. So you have the funds to hire your own counsel?

{¶ 29} "THE DEFENDANT: I could come up with it, yes.

{¶ 30} "THE COURT: How long will it take you?

{¶ 31} "THE DEFENDANT: Three weeks probably."

{¶ 32} Appellant does not quote or discuss the rest of the discussion. However, a review of the remainder of the discussion between the trial court, appellant and his attorney is necessary for a clear and complete understanding of this claimed error. The dialog continued as follows:

{¶ 33} "THE COURT: Well, you understand all of this is going to delay resolution of your case. All the time on the speedy trial clock is going to stop because you're asking to get rid of your counsel who has already tried this case and is familiar with the facts. You're asking for new counsel who – you will need to hire new counsel, which you indicate will take 3 weeks, and then it's going to take new counsel time to get up to speed, so it's probably going to be at least 6 weeks or so before we can have a new trial date, and the speedy trial clock stops, so all that time – it's not going to count against your speedy trial clock. You understand that?

{¶ 34} "THE DEFENDANT: Yeah.

{¶ 35} "THE COURT: And you don't feel that he can zealously represent you?

{¶ 36} "MR. GELLER: You understand what zealously means?

{¶ 37} "THE DEFENDANT: (Indicated negatively.)

{¶ 38} "THE COURT: I mean, vigorously represent you?

{¶ 39} "MR. GELLER: I think the Court is saying to have your best interest. I'm sorry, Your Honor, I –

{¶ 40} "THE COURT: You think he can vigorously represent you?

{¶ 41} "THE DEFENDANT: I don't understand you, sir.

{¶ 42} "THE COURT: You think – do you trust him to represent you?

{¶ 43} "THE DEFENDANT: Besides the plea – he keep trying to pressure me to take the plea. Besides that, yeah, but –

{¶ 44} "THE COURT: Besides – well, that's your choice to take the plea or not. If you don't want to take the plea, then we go to trial, but let me ask you this. Assume – because that's your call. Assume you don't take the plea. Do you trust him to try the case for you?

{¶ 45} "MR. GELLER: You understand the Judge?

{¶ 46} "THE DEFENDANT: Yeah, yeah. I'm thinking.

{¶ 47} "THE COURT: He's familiar with the facts. He's familiar with the witnesses. You understand that Mr. Geller has a wealth of trial experience, a lot of trial experience. You understand that?

{¶ 48} "THE DEFENDANT: Yes.

{¶ 49} "THE COURT: You think – you trust him to try this case, the burglary case again?

{¶ 50} "THE DEFENDANT: Kind of in between.

{¶ 51} "THE COURT: Well, we have to make a decision. We have a jury downstairs. You've been able to talk to him about your defense in this case?

{¶ 52} "THE DEFENDANT: A little bit.

{¶ 53} "THE COURT: Well, you talked to him before in the previous trial about the defense of this case.

{¶ 54} "THE DEFENDANT: Yeah.

{¶ 55} "THE COURT: Okay. And you've talked to him since. He has a transcript of that trial. You understand that?

{¶ 56} "THE DEFENDANT: Yeah.

{¶ 57} "THE COURT: He knows what everybody has said. He's prepared to go. Are you comfortable with him defending you on this burglary case?

{¶ 58} "THE DEFENDANT: Yeah, yeah.

{¶ 59} "THE COURT: You don't have any problems communicating with him?

{¶ 60} "THE DEFENDANT: No.

{¶ 61} "THE COURT: Okay. We'll call the jury up."

{¶ 62} Shortly after the foregoing, another discussion ensued regarding a disagreement between defense counsel and appellant as to whether or not to call a particular witness. Defense counsel then asked the court if he could have a moment to speak to his client. After speaking with appellant, counsel informed the court that they were ready to go forward. The trial court then addressed appellant as follows:

{¶ 63} "THE COURT: Mr. Hall, you're comfortable with this?

{¶ 64} "THE DEFENDANT: Yes.

{¶ 65} "THE COURT: Mr. Geller representing you? You trust him to try this case being familiar with the facts, the witnesses and everything?

{¶ 66} "THE DEFENDANT: Yes."

{¶ 67} While it is evident from the transcript that appellant had concerns about Mr. Geller's representation, it is also clear that the trial court addressed appellant's concerns. The trial court discussed how the trial of appellant's case might be impacted if he had to retain new counsel and asked him several times if he trusted his attorney. Appellant voiced his concerns but was not insistent on obtaining new counsel. Although at one point when appellant was asked by the court if he trusted his attorney he responded that he was "kind of in between," appellant stated after further questioning that he was comfortable having Geller defend him and that he did not have any problems communicating with his attorney. There is no indication in the record that appellant was pressured into going forward with Geller as his counsel or that the situation had deteriorated to the point of a "total lack of cooperation and trust." See *Dukes* and *Pruitt*, supra.

{¶ 68} Based on the foregoing, this court finds that appellant was not denied his right to counsel. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 69} In his second assignment of error, appellant asserts that the trial court abused its discretion by denying Mr. Geller's motion to withdraw as counsel.

{¶ 70} A trial court has discretion to decide whether to grant a continuance during the course of a trial for the substitution of counsel. That decision will be reversed only if the court has abused its discretion. *Pruitt*, supra. The term "abuse of discretion" connotes more than an error of judgment or law; rather, it implies an attitude on the part

of the trial court that was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶ 71} The trial court in this case did not deny Geller's oral motion to withdraw. It is clear from a reading of the extensive discussion set forth above that Geller and appellant consented to going forward with the trial. The record clearly demonstrates that the trial court inquired at length as to appellant's concerns and then determined that appellant was willing to proceed with Geller's representation. There is no indication in the record that the trial court's actions were unreasonable, arbitrary or unconscionable. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 72} In support of his third assignment of error, appellant asserts that he was denied effective assistance of trial counsel in several respects.

{¶ 73} It is well-established that in order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate that trial 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. *Strickland v. Washington* (1984), 466 U.S. 668, 686. The standard of proof requires appellant to satisfy a two-pronged test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show by a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. Id. In Ohio, a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156.

{¶ 74} Appellant first argues that counsel should have requested that the court voir dire a juror when it was brought to the court's attention after testimony had begun that the juror "knew of" one of the detectives in the case. The record reflects that, after calling both parties into chambers, the court stated that the juror had notified the bailiff that she "knows of him * * * They worked on a case * * *." According to the court, the juror said it would not affect her ability to be impartial. The trial court then asked counsel if either of them wished to voir dire the juror. The prosecutor stated that he was not going to call that particular detective as a witness. Attorney Geller stated: "He's not testifying. His credibility is not going to be at issue." Geller then waived voir dire and stated he was not going to move to strike the juror.

{¶ 75} Appellant argues that there is a reasonable probability that the juror was affected by her "relationship" with the detective and that but for her presence in the jury room the outcome of the trial would have been different. We find, however, that there is no evidence that this particular juror's remaining on the jury affected the outcome of appellant's trial. Further, the juror stated that "knowing of" the detective would not affect her ability to be fair and impartial. We therefore find that defense counsel's decision not to voir dire the juror was a matter of trial strategy and this argument is without merit.

{¶ 76} Next, appellant argues that defense counsel made a statement during closing argument that conceded to the jury that it would have no other option than to convict him. The statement challenged by appellant was as follows: "Now, I know the prosecutor is going to say all this argument makes no sense, and he's probably right."

Appellant claims that counsel's statement amounted to a failure to zealously argue on his behalf.

{¶ 77} Generally, counsel is entitled to considerable latitude in opening and closing arguments. See *State v. Ballew* (1996), 76 Ohio St. 3d 244. An appellate court must bear in mind when reviewing the record that both the defense and the prosecution are given wide latitude in their arguments as to what the evidence has shown and what reasonable inferences may be drawn therefrom. *State v. Morales*, 6th Dist. No. L-07-1231, 2008-Ohio-4619, ¶ 28. Because isolated incidents of misconduct are harmless, the closing argument must be viewed in its entirety to determine whether the defendant has been prejudiced. See *State v. Stevens*, 2d Dist. No. 19572, 2003-Ohio-6249.

{¶ 78} Having reviewed defense counsel's closing argument in its entirety, we find that appellant has not demonstrated that he was prejudiced by counsel's statement as quoted above. Therefore, this argument is without merit.

{¶ 79} Appellant also argues that counsel should have subpoenaed appellant's mother, whose testimony he claims was necessary to support his alibi. The record reflects that appellant's mother was present at the beginning of the trial and that she left the courtroom when counsel asked for separation of witnesses. At the close of the state's case, defense counsel advised the court that he had asked appellant's mother to wait outside the courtroom. The prosecutor confirmed that he saw her in the hallway and then noticed her leave. Appellant argues that if his mother had been subpoenaed, she would have stayed until she was called to testify. This court is well aware, however, that issuing

a subpoena does not guarantee that a witness will present herself to testify. This argument is without merit.

{¶ 80} We have carefully reviewed the record for any objective or compelling indicia that but for the perceived errors of counsel the outcome of appellant's trial would have been different. There is simply no such evidence in the record. Appellant has not shown that counsel's representation fell below an objective standard of reasonableness, thereby prejudicing his defense. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 81} On consideration whereof, the judgments of the Lucas County Court of Common Pleas are affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENTS 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

Thomas J. Osowik, P.J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE