

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

State of Ohio

Court of Appeals No. E-09-006

Appellee

Trial Court No. 2007-CR-666

v.

Keenan Bonner aka Grissom

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Gary H. Levine, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Erie County Court of Common Pleas which, following a jury trial, found appellant, Keenan Bonner, guilty of aggravated burglary with a firearm specification, in violation of R.C. 2911.11(A)(2), a first degree felony, and aggravated robbery with a firearm specification,

in violation of R.C. 2911.01(A)(1), a first degree felony. Appellant was sentenced on January 8, 2009,¹ to serve five years incarceration for each count, plus three years actual incarceration for the firearm specifications, to be run consecutively, for a total of 16 years incarceration. Appellant timely appealed and raises the following assignments of error:

{¶ 2} "1. Appellant was deprived of the effective assistance of counsel where trial counsel's inquires of appellant during direct examination elicited a response that he had not testified at a probable cause hearing in juvenile court.

{¶ 3} "2. The trial court has manifested hostility toward the appellant during its inquiry of defense witness Justin Shine, resulting in prejudice to the defense violating the Due Process Clause of the Constitution."

{¶ 4} This matter arises out of an incident occurring on June 16, 2007, at approximately 2:30 a.m., wherein three individuals, with guns, entered the home of Ashley Tucker. The assailants held a gun on Ms. Tucker's brother, Alex Tucker, while they removed his pants and took them. Mr. Tucker told police that \$1,400 cash had been in his pants. The assailants also held guns on Jerry Evans, who remained in the kitchen with Mr. Tucker, and on Ms. Tucker, who had fled to her three-year-old daughter's bedroom to protect her. Although the assailants wore bandanas over their faces, the

¹The judgment entry of sentencing was journalized on January 9, 2009.

Tuckers informed police that appellant and Justin Stowers² were two of the three assailants.

{¶ 5} Appellant testified in his own behalf at trial and asserted an alibi offense for the time of the incident. Appellant stated that he and Jordan Smoot were at the hospital until approximately 9:00 p.m. on June 15, 2007, celebrating the birth of appellant's nephew, and were then taken by appellant's sister to the home of Alycea Carter, where they spent the night. Carter, Smoot, and Lateshya Johnson, who was also allegedly present in Carter's home that night, corroborated appellant's alibi.

{¶ 6} Appellant argues in his first assignment of error that his trial counsel was ineffective for asking appellant if he testified at his probable cause hearing in juvenile court and violated appellant's right to due process by calling into question his Fifth Amendment right against self-incrimination. Appellant asserts that trial counsel's question provided the state with grounds to attack appellant's veracity.

{¶ 7} In order to establish ineffective assistance of counsel, appellant must demonstrate that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington* (1984), 466 U.S. 668, 686. Appellant must also show that trial counsel's "deficient performance prejudiced the defense." *Id.* Specifically, to establish ineffectiveness, appellant must

²Stowers testified at trial that he pled guilty to the burglary and robbery incident in this case.

show that, but for counsel's deficient performance, there is a reasonable probability the result of the trial would have been different. *Id.*

{¶ 8} In this case, during his direct examination by trial counsel, appellant testified regarding his alibi. On cross-examination, the state questioned appellant concerning why Carter had only told appellant's counsel that appellant was with Carter at the time of the incident, and not the police or prosecution. Specifically, the state asked appellant why Carter did not testify at appellant's probable cause hearing that appellant could not have committed the crimes because he was with her at the time of the incident.

{¶ 9} On redirect, trial counsel addressed the issue of why appellant's alibi was never raised earlier. Specifically, trial counsel elicited testimony that she was appellant's third counsel in the case, that appellant had informed each attorney regarding his alibi, and that he was unaware how else he was supposed to disclose his alibi. Regarding the probable cause hearing, the following colloquy occurred:

{¶ 10} "Q. How many – did you have any witnesses testify at your probable cause hearing?

{¶ 11} "A. No, ma'am.

{¶ 12} "Q. In fact, you did not even call any of the police officers concerning anything about – about the case at your probable cause hearing, did you?

{¶ 13} "A. No, ma'am.

{¶ 14} "Q. In fact, no police officers even testified at your probable cause hearing, correct?

{¶ 15} "A. No, ma'am.

{¶ 16} "Q. And you did not take the stand to share that information at your probable cause hearing, did you?

{¶ 17} "A. No, ma'am.

{¶ 18} "Q. And did you – how old were you at the time of your probable cause hearing?

{¶ 19} "A. I think I was 16.

{¶ 20} "Q. Did you know what to do with that information?

{¶ 21} "A. No, ma'am.

{¶ 22} "* * *

{¶ 23} "Q. And have you ever been through this kind of or that kind of, in the Juvenile Court, proceeding before?

{¶ 24} "A. No, ma'am.

{¶ 25} "Q. And did you know what to do with your case information?

{¶ 26} "A. No, ma'am.

{¶ 27} "Q. I mean, had you planned to try this case yourself?

{¶ 28} "A. No, ma'am.

{¶ 29} "Q. And did you have any special knowledge or experience on where and whom to take this information to?

{¶ 30} "A. No, ma'am."

{¶ 31} When placed in context, it is evident that trial counsel's line of questioning was not erroneous and did not call appellant's veracity into question. The state had suggested to the jury that the existence of an alibi should have been raised at the probable cause hearing. On appellant's redirect, trial counsel hoped to eliminate any question in the jury's mind regarding whether appellant, or any other witness, had testified at the probable cause hearing, yet failed to assert the existence of an alibi.

{¶ 32} As such, we find that trial counsel's questioning was a trial tactic used in an attempt to overcome the state's suggestion that the alibi was not brought forth in a timely manner. Accordingly, we find that trial counsel's representation was not deficient when she asked appellant if he had testified at his probable cause hearing, did not violate appellant's constitutional rights, and did not prejudice appellant. Appellant's first assignment of error is found not well-taken.

{¶ 33} Appellant argues in his second assignment of error that the trial court demonstrated hostility toward a defense witness by asking the witness of what felony he had been convicted. Specifically, the defense called Justin Shine to testify that Ms. Tucker stated to him that she never saw appellant's face and that she and Mr. Tucker did not know who actually committed the offense. At the conclusion of Shine's testimony, defense counsel asked him whether he had a prior history of a felony conviction. Shine testified that it was behind him and that it had occurred five years prior. Defense counsel then explained to Shine that she asked " * * * for purposes of being earnest and forthright before this court, * * * so that, you know, we can demonstrate to them that we're not

attempting to hide anything or be covert about anything * * *." Neither defense counsel, nor the state, ever asked Shine what his felony conviction was.

{¶ 34} At the conclusion of counsels' examination of Shine, the trial court stated in a sidebar, "Okay. I just think it's unfair that the jury doesn't know what his past is. Is somebody going to ask what he's been convicted of or do you want the court to do that?" Defense counsel offered to ask, but the trial court said, "No, that's all right. I'll do it. You can rebut * * *." Thereafter, the following colloquy took place:

{¶ 35} COURT: "Mr. Shine, you were – on direct, it was eluded that you have a past. What have you been, felony wise, what have you been convicted of?"

{¶ 36} SHINE: "Well, I swallowed some drugs, didn't know what was going to happen."

{¶ 37} COURT: "Well, don't get into the facts of it, just what were you convicted of, what are the charges?"

{¶ 38} SHINE: "It was supposed to be possession and tampering with evidence. They dropped the possession, tampering with evidence. I got five years papers. Probably under the circumstances what happened –"

{¶ 39} COURT: "That's okay. You've been convicted of possession of cocaine and tampering with evidence?"³

{¶ 40} SHINE: "Right."

³On redirect, defense counsel clarified with Shine that, in fact, he had only been convicted of tampering with evidence.

{¶ 41} A defendant must object to allegedly biased or impartial judicial comments, in order to give the judge an opportunity to correct the error by curative instruction or otherwise, and failure to object waives all but plain error, i.e., that but for the error the outcome of the trial would have been different. *State v. Brown* (Dec. 4, 1998), 6th Dist. No. L-97-1333, citing *State v. Wade* (1978), 53 Ohio St.2d 182, 188, vacated and remanded on other grounds (1978), 438 U.S. 911. No objection was raised by defense concerning the trial court's examination of Shine. As such, appellant has waived all but plain error in this regard.

{¶ 42} A trial judge is presumed to have acted in a fair and impartial manner. *In re Disqualification of Kilpatrick* (1989), 47 Ohio St.3d 605, 606. Upon review, we find that the record fails to reveal that the trial court's questioning of Shine demonstrates bias or hostility against Shine or appellant, and, therefore, find no plain error. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 43} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal 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.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.