[Cite as *State v. Lewis*, 2011-Ohio-4137.]

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

State of Ohio — Court of Appeals No. S-10-029

Appellee — Trial Court No. 09 CR 757

v.

James E. Lewis — **DECISION AND JUDGMENT**

Appellant — Decided: August 19, 2011

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio State Public Defender, and Melissa M. Prendergast, Assistant State Public Defender, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from the Sandusky County Court of Common Pleas, which found appellant, James Lewis, guilty of one count of failing to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B) and (C)(5)(a)(ii) and guilty of one count of abduction, in violation of R.C. 2905.02(A)(2), both third-degree felony

convictions. Appellant was ordered to serve concurrent five-year terms of incarceration in the Ohio Department of Rehabilitation and Corrections. On June 10, 2010, a notice of appeal was filed. For the following reasons, the judgment from the trial court is affirmed.

{¶ 2} From that judgment, appellant sets forth the following two assignments of error:

{¶ 3} "1. MR. LEWIS WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT COMPELLED MR. LEWIS TO STAND TRIAL WEARING IDENTIFIABLE JAIL CLOTHING.

{¶ 4} "2. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶ 5} The following undisputed facts are relevant to this appeal. On July 13, 2009, James Lewis stopped his commercial truck at the Vermillion Valley Service Plaza in Amherst Township, Lorain County, Ohio. Appellant was traveling with his wife and two young children. Subsequently, appellant and his wife, Spencer, had an argument. The altercation escalated. Appellant's wife called 9-1-1 to report a domestic disturbance.

Following the emergency call, appellant and his family entered the rig and began to drive away.

{¶ 6} In response to the emergency call, an Ohio State Highway Patrol trooper, Hoffman, arrived at the plaza through the exit ramp in an attempt to stop appellant's rig. Hoffman, with his overhead lights activated, blocked the exit ramp, but was unable to prevent the rig from leaving the plaza and a pursuit ensued. Shortly thereafter, five Ohio State Highway Patrol troopers joined in the pursuit of appellant. Throughout the pursuit, six police cruisers had their sirens and lights activated. Road spikes were laid in an attempt to stop appellant's truck. Although appellant indicated he would pull over, he did not stop or pull over for nearly one hundred miles.

{¶ 7} After the lengthy chase in a construction zone on Interstate 77, appellant finally pulled over his rig. The police apprehended him and safely secured Spencer and the children. Hoffman observed that the left side of Spencer's cheek was swollen. Interestingly, appellant subsequently alleged no memory of the highway pursuit on the purported basis of his high blood sugar level.

{¶ 8} On July 15, 2009, appellant was indicted by the Sandusky County Grand Jury on one count of failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B) and (C)(5)(a)(ii) and on three counts of abduction, in violation of R.C. 2905.02(A)(2). All four charges are third-degree felonies. The day before trial, appellant was visited by his counsel at the county jail in order to discuss potential resolution of appellant's case.

{¶ 9} A jury trial was held in the Sandusky County Court of Common Pleas on March 30, 2010. Immediately before trial, appellant and his counsel wanted to discuss a plea bargain. Due to his incarceration, appellant arrived wearing a prison issued orange jump suit. His counsel brought alternate clothes that he had purchased for appellant to change into. Appellant did not like the size which was larger than his ideal size. The trial court judge gave appellant a final opportunity to change and explicitly warned appellant that an appearance before a jury in jail clothing could prejudice his case. Instead, appellant stubbornly elected to forego wearing the civilian clothes furnished by his counsel and proceeded to wear the orange jump suit.

{¶ 10} The jury determined appellant was guilty of one count of failing to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B) and (C)(5)(a)(ii). He was also found guilty of one count of abduction, in violation of R.C. 2905.02(A)(2). Appellant was ordered to serve concurrent terms of five years in prison for the two third-degree felony convictions. On June 10, 2010, a notice of appeal was filed.

{¶ 11} In his first assignment of error, appellant contends he was deprived of his right to a fair trial and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution. Appellant maintains he was compelled to stand trial despite his appearance in an orange jump suit. We do not concur.

{¶ 12} Generally, a criminal defendant should not appear before the jury in prison clothes or restraints because it may impair the due process presumption of innocence. Fourteenth Amendment to the United States Constitution. *Estelle v. Williams* (1976), 425 U.S. 501, at 504, 96 S.Ct. 1691, 48 L.Ed.2d 126; *United States v. Brown* (2004), 367 F.3d 549, at 554. However, the court is not required to furnish alternate clothing. *Brown*, supra, at 554.

{¶ 13} Exposure of a defendant to a jury in restraints only requires relief when the exposure is so "inherently prejudicial" as to deny the defendant's constitutional right to a fair trial. *United States v. Waldon* (C.A.6, 2000), 206 F.3d 597, 607 (citing *United States v. Pina* (C.A.1, 1988), 844 F.2d 1, 8). Defendants are required to show actual prejudice where "[t]he conditions under which defendants were seen were routine security measures rather than situations of unusual restraint such as shackling of defendants during trial." *United States v. Moreno* (C.A.6, 1991), 933 F.2d 362, 368.

{¶ 14} In the matter before us, appearing in jail clothing was not so inherently prejudicial as to deny appellant's constitutional right to a fair trial or due process of law. Nor was it such a situation of unusual restraint. The record unambiguously and directly reflects appellant knowingly, voluntarily, and intelligently waived his right to challenge this point.

{¶ 15} The trial court judge specifically indicated that counsel for appellant purchased alternate clothing appropriate for a trial. In conjunction with this, the trial court judge explicitly asked appellant twice if he wanted to change into alternate clothing.

Appellant was informed that he would suffer the consequences of any inference the jury might draw from his attire. Appellant indicated he understood the possible consequences and nevertheless refused to change clothes. The fact that appellant's counsel did not measure appellant's exact size is irrelevant. Appellant was not compelled to wear the orange jump suit. Reasonable alternative attire was provided. Appellant refused it. Therefore, appellant's first assignment of error is not well-taken.

{¶ 16} In his second assignment of error, appellant contends his trial counsel provided ineffective assistance of counsel. We do not concur. The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The Sixth Amendment to the United States Constitution.

{¶ 17} The United States Supreme Court set forth a two-part test to determine ineffective assistance of counsel in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. First, he must demonstrate that trial counsel's conduct fell below an objective standard of reasonableness. Second, he must show that the errors were serious enough to create a reasonable probability that but for the errors, the result of the trial would have been different. See *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶ 18} The failure to prove either prong of the test makes it unnecessary for a court to consider the other prong. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 721

N.E.2d 52, citing *Strickland* at 697. Finally, judicial scrutiny of counsel's performance must be highly deferential. A trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance.

{¶ 19} The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the amendment envisions. See *Michel v. Louisiana* (1955), 350 U.S. 91, 100-101, 76 S.Ct. 158, 163-164, 100 L.Ed. 83. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

{¶ 20} Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See *United States v. Decoster* (C.A.D.C.1976), 624 F.2d 196, 208. The existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.

{¶ 21} Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

{¶ 22} Appellant contends that but for counsel's ineffective assistance, the result would have been different. Appellant maintains that because he did not remember the 98

mile chase, a plea of not guilty by reason of insanity should have been entered. We do not concur.

{¶ 23} In circumstances that indicate that entering a plea of not guilty by reason of insanity would be unsuccessful, a decision not to enter that plea is not unreasonable, for purposes of defendant's right to effective assistance of counsel. *State v. Anaya* (2010), 191 Ohio App.3d 602, ¶ 34.

{¶ 24} The defense of not guilty by reason of insanity must be entered at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial. Crim.R. 11(H). A trial court is given sound discretion to determine whether a defendant's reasons constitute "good cause" under Crim.R. 11(H); *State v. Lidge* (Apr. 7, 1993), 9th Dist. App. No. 15824. Thus, the trial court's decision will not be disturbed absent a showing of an abuse of discretion. The term abuse of discretion implies that the court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219.

{¶ 25} Appellant cites to and relies on *State v. Brown* (1992), 84 Ohio App.3d 414, 421-422, which states a "failure to enter a plea of not guilty by reason of insanity pursuant to Crim.R. 11 falls below an objective standard of reasonable representation." However, this reference is misplaced.

{¶ 26} In *Brown*, the defendant's counsel made no effort to challenge a psychiatric report that was submitted to the court by the prosecuting attorney. The defendant had no recollection of life for a period of several days, and no recollection of the crimes of which

he was accused. Counsel did not make any request to have the examining psychiatrist testify given the defendant's circumstances. As a result, the trial court found there was no trial tactic or strategy which would reasonably have led trial counsel under such circumstances to fail to enter a plea of not guilty by reason of insanity on behalf of his client.

{¶ 27} The case before us is not akin to *Brown* because the record irrefutably exhibits that appellant was coherent and could recollect the events in great detail both prior to and after the chase. The record reflects that appellant offered an explanation for the "little discussion" he had with his wife in which she was struck. Notably, appellant even disagreed with whether she had a red mark on her cheek after she was struck. Conversely, *Brown* was premised upon the party lacking any memory of the events.

{¶ 28} In point of fact, the record contains ample evidence from appellant's own testimony that runs counter to the claimed memory loss basis of the purported ineffective assistance of counsel. Appellant unambiguously conveyed that he could clearly remember the entire day's events leading up to the pursuit, including details of the argument immediately preceding the highway pursuit. Appellant articulates this memory in the following exchange:

{¶ 29} "Q: It was a discussion, is that how you remembered it?

{¶ 30} "A: Well, it was an argument over some stuff that happened in New York with her family and her. That's what we had an argument over.

{¶ 31} "* * *

{¶ 32} "Q: Do you remember what you were arguing about?

{¶ 33} "A: Well, like, some things you don't forget, yeah, okay.

{¶ 34} "Q: So what were you arguing about?

{¶ 35} "* * *

{¶ 36} "A: Well, okay, I feel -- you want me to tell, I'll tell if you request to tell. But it was an issue of a tax thing, some taxes that were filed in the state of New York, by her family. That the [sic] had found out that she was living with me in Kentucky and that's what -- they were looking for her and sent her a letter and that's why she took off with the two kids. That's why I filed for divorce. So it's more than what she's telling you."

{¶ 37} In addition to the recollection prior to the chase, the record reveals that appellant likewise recalled the events subsequent to the 98 mile pursuit. Appellant stated in pertinent part:

{¶ 38} "Q: Well, you do remember -- let's go back to the end of this. You do remember seeing that EMT; is that right?

{¶ 39} "A: I did not see that -- I don't remember that EMT personally.

{¶ 40} "Q: Or any EMT?

{¶ 41} "A: I remember being in an ambulance.

{¶ 42} "* * *

{¶ 43} "Q: I guess my point is this, you can kind of remember up at the plaza on the Ohio Turnpike to a point, and then you kind of remember at the other end, over in Akron, you saw the EMT. Is that kind of what your testimony was, do you agree?

{¶ 44} "A: I remember going back with my two kids. I remember going back to the truck. I don't remember how long we was there, whatever.

{¶ 45} "A: * * * I don't know how an hour or so can go by and you not remember, but like I said to you, I don't remember anything about the police or anything or what I told you. I remember the ambulance. I remember I was sick.

{¶ 46} "Q: But you do remember before and after this incident?

{¶ 47} "A: Well, I told you that part I remember."

{¶ 48} The record shows that appellant had no complaints after the highway chase. Appellant did not want to go to the hospital. He refused medical transportation. Consistent with this, the medical report from the responding paramedic indicated appellant had no loss of consciousness, no chest pain, no shortness of breath, and no headache. The record contains no evidence or indicia supportive of appellant's claims on appeal of memory loss such that a plea of not guilty by reason of insanity would have been indicated. Conversely, the record contains ample evidence undermining the legitimacy of such an assertion.

{¶ 49} As such, the trial court was reasonable when it determined appellant did not demonstrate good cause to allow a not guilty by reason of insanity plea subsequent to

arraignment. Appellant has wholly failed to establish a reasonable probability that the result would be different if such a plea had been entered.

{¶ 50} Lastly, as the Supreme Court of Ohio declared in *State v. Fulmer* (2008), 117 Ohio St.3d 319, ¶ 66, a diminished capacity defense is not recognized by Ohio courts. Therefore, directly attributing the high blood sugar level diabetic condition as a cause to appellant's behavior as a defense was simply unavailable to appellant at the outset. Appellant was not prejudiced in the matter before us. Given all of the foregoing, appellant's second assignment of error is not well-taken.

{¶ 51} Upon our careful review of the entire record, we find that substantial justice has been done. The judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs 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

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE