[Cite as *In re K.J.*, 2012-Ohio-6242.]

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

In re K.J.

Court of Appeals No. L-11-1193

Trial Court No. JC11215467 (1-2)

DECISION AND JUDGMENT

Decided: December 31, 2012

* * * * *

Stephen D. Long, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, adjudicating appellant to be a delinquent child. Because we conclude that the record does not support a claim of ineffective assistance of counsel, we affirm.

{¶ 2} Appellant, K.J., then 15 years old, was alleged to be delinquent in June 2011. The complaint alleged that appellant had committed two counts of aggravated robbery, in violation of R.C. 2911.01, with a firearm specification alleged as to each, in violation of R.C. 2841.145. The charges stemmed from allegations that appellant had stopped two juveniles, J.T. and his friend J.D., and robbed them using a handgun. J.T.'s two 18-year-old twin sisters were also present at the time of the alleged robbery. Appellant entered a denial of the allegations and counsel was appointed to represent him.

{¶ 3} An adjudicatory hearing was held on July 1, 5, and 12, 2011. The parties stipulated that, at the time the alleged events occurred, appellant was 15 years old and the events took place in Lucas County, Ohio. The prosecution then presented the following evidence.

{¶ 4} J.T., a 17-year-old male, testified that on June 1, 2011, at approximately 11:30 p.m., he and a male friend, J.D., walked from his house in the 500 block of East Park Street, to a local convenience store in their neighborhood. The boys saw two black males with a Taser, following them on a bike. Fearing that "someone was trying to jump us," J.T. called his mother and sisters who were at home. At the store, J.T. purchased some candy and then he and J.D. began to walk home. J.T.'s twin sisters, M.T. and N.T., met them to walk the two boys home. A couple blocks from home, the boys and twins encountered a group of about ten juvenile males standing in the street in front of a house on the 200 block of East Park. J.T. stated that some of the youths, including appellant, approached him and J.D. on the sidewalk.

{¶ 5} J.T. testified that appellant told him to empty his pockets, but J.T. at first refused. Appellant allegedly asked one of the other male youths to "give me the pipe" and the youth handed appellant a .45 caliber handgun. At a little over an arm's length away, appellant allegedly shot past J.T.'s left shoulder. After that, J.T. then gave his cell phone and his candy to appellant. Appellant allegedly threw the candy on the ground and then walked about ten feet over to J.D. According to J.T., appellant then pointed the gun at J.D., and told him to empty his pockets. J.D. gave appellant $10 that was in his pocket. J.D. stated that he could see appellant because they were under a street light by the house at 247 East Park Street.

{¶ 6} J.T. then testified that appellant walked away. J.D., the twins, and J.T. left to walk back to J.T.'s mother's house on East Park Street. Once at home, J.T. and his mother called the police and reported the crime. J.T. described his assailant as the same height as himself, wearing a white T-shirt and blue and white basketball shorts, and who was known by the street name, "Smoke." J.T. then identified appellant in court as the person who robbed and fired the handgun at him.

{¶ 7} On cross-examination, J.T. acknowledged that he, his cousin, and his brother had been involved in an incident with appellant the previous summer. J.T. had feared he was going to be "jumped" by appellant and "some other dudes" but, on that occasion, nothing was taken from him and no one was hurt. In addition, the Toledo Police Department ("TPD") police report by the investigating TPD detective stated that J.T. had described his assailant as having "puffs" in his hair. At the hearing, J.T. said that the

TPD report contained a mistake, in that it was the person on the bike with the Taser, not appellant, who had the puffs hairstyle.

{¶ 8} The state also called 18 year old N.T., who said she and her twin sister met her brother, J.T., and his friend as they were walking home from the 7-Eleven store. N.T. said about eight "guys" came out from a house on the 200 block of East Park Street. She added that the guys from the house said, "On Kent" and "On Mercy Red, give me the gun," as they followed behind. N.T. said that those phrases indicated that the guys were in a gang called "The Manor." N.T. essentially corroborated J.T.'s version of the events which took place, and also identified appellant in court as "Smoke." N.T. also confirmed that appellant was the person who had the gun, shot past her brother, and robbed him and J.D. N.T. said that appellant and the other guys walked away and back to the house they had come from.

{¶ 9} N.T. said she, her sister, her brother, and J.D. walked to their house in the 500 block of East Park Street and called 911. After TPD police arrived at the home, N.T. gave a statement. She rode in the back of a police cruiser down the street where she pointed out the house from which the assailants had exited. Police then took her to another police car to view a person that police had picked up in the neighborhood. N.T. identified appellant, the person at the police car, as the assailant from earlier that evening. She acknowledged on cross that appellant was the only person police took her to view.

{¶ 10} J.T.'s other twin sister, M.T., also testified and corroborated the previous testimony. M.T., however, did not see the assailant, because she had been standing

approximately 12 feet away in the street, not on the sidewalk with her brother and his friend. Consequently, she could not identify appellant as the assailant.

{¶ 11} TPD Officer Joseph Taylor testified that he responded to the scene at J.T.'s home on East Park Avenue following the robbery incident. He spoke with J.T., J.D., and the twins and then took N.T. in the cruiser, who pointed out the house at 247 East Park where the incident allegedly took place. Officer Taylor said another police cruiser had arrived and the officers said they were in pursuit of a couple people who had run out of the back of the house and down the alley. Officer Taylor said he and his partner then got out to secure the front of the house, leaving N.T. in the back of the cruiser. He said he had everyone come out of the house and detained them on the front porch. Appellant was not among those on the porch. The officers then went through the house, found a couple more people hiding, but who were determined not to be involved with the earlier incident.

{¶ 12} Officer Taylor said that another officer had picked up a suspect who had been in the area and was detaining him. Officer Taylor then took N.T. to do a "one-on-one" identification of that suspect. Officer Taylor said the other officers put a spotlight on the suspect and N.T. positively identified him as the person who had used a gun and committed the robbery. That suspect was appellant who Officer Taylor identified again in court. Officer Taylor stated that one of the other victims, either J.T. or J.D., was also taken to do a one-on-one view, and appellant was again positively identified as the perpetrator.

{¶ 13} TPD Officer John Mattimoe then testified that on June 1, 2011, he responded at approximately 11:30 p.m. to a radio dispatch that identified a robbery suspect as a younger black male wearing a white t-shirt and blue and white or blue and yellow basketball shorts. Officer Mattimoe heard that a cruiser was chasing kids in an alley in the 200 block of East Park Street, near the 7-Eleven store. The officer drove to that area and stopped a juvenile, appellant, who was walking in the 200 block of East Park Street to arrest him for a curfew violation. Appellant was dressed in a white t-shirt and blue, white, and yellow basketball shorts under sweat pants. Officer Mattimoe said appellant was "really, really sweaty," his t-shirt was soaked in sweat, and he appeared to be out of breath. The juvenile told Officer Mattimoe that he was going to his brother's girlfriend's house, which was 247 East Park Street, where the robbery incident took place.

{¶ 14} Since appellant fit the description of the robbery suspect, Officer Mattimoe detained him in his cruiser until other police officers brought two witnesses to the robbery for a one-on-one identification. After the two witnesses positively identified appellant, Officer Mattimoe transported him to the police station to be interviewed. Ultimately, appellant was charged with robbery. The state rested its case.

{¶ 15} In his own defense, appellant then testified. Appellant said he was in ninth grade and got good grades. He stated that on the day of the robbery incident, he left his home at 5:00 p.m. to go to his cousin's house and then to his brother's girlfriend's house in the 200 block of East Park Street. At approximately 8:00 p.m., appellant stated that he

then went to his uncle's house on Warsaw Street until 8:30 p.m. Appellant said at about 9:00 p.m., he went to a park to play basketball for a "couple of minutes." He said he left the park "like 9, so 9:45" p.m., walked back to the house at 247 East Park Street, and went to sleep in his brother's girlfriend's upstairs bedroom until about 10:30 p.m. After he woke up, appellant said he stayed in the house until about 12:30. Appellant then stated that he was walking on the street at 1 or 12:45, on his way back to the house on East Park Street when he was stopped by police for a curfew violation. The officer asked him questions about robbing someone, which appellant denied.

{¶ 16} The officer placed him in the police car until another cruiser pulled up. The officer then had him stand by the side of the police car, and then put him back in the car for about 20 minutes. Appellant was then taken to the police station downtown and questioned after being advised of his *Miranda* rights. He was at the station for about two hours.

{¶ 17} On that night, appellant stated that he was wearing a white T-shirt and gray sweat pants with light blue shorts underneath. He said he had been wearing the sweatpants all day, even though he also said it had been hot and eighty degrees out. Appellant said he did not see the robbery incident, did not own a gun and had never fired one, and denied robbing anyone or being a Manor gang member. He also denied that he was sweating when he was stopped, stating he was just walking and not running.

{¶ 18} On cross-examination, appellant said he told the police officer who stopped him he was on his way home, even though he was walking toward the East Park Street

house. At trial, appellant said he had left the house to go home, but was on his way back to the house to call his mother to let her know he was coming home. He also said he had his sweatpants on all day, even to play basketball, even though it was hot all day. Appellant said the police officer who testified that he was out of breath and sweaty was lying. Appellant also acknowledged that he never told the investigating detective or other police that he had been asleep at the East Park Street house. He denied that he was even at the house when the police came and had everyone leave the East Park Street house. Appellant also denied knowing or ever seeing either of the victims or the twins. The prosecution spent a lengthy amount of time going over the sequence of events after 5:00 p.m. on the day of the incident. Appellant's testimony, although at times varied in details, was that he was not involved with the robberies.

{¶ 19} The court adjudicated appellant to be delinquent beyond a reasonable doubt on both robbery counts and on the firearm specifications. The court entered disposition as follows: appellant received a minimum commitment of one year to age 21 on each of the robbery charges, to be served consecutively, and one year as to each firearm specification. The one year firearm specifications merged with each other, but were mandatory to be served prior to the sentences for the robbery charges. Therefore, appellant was committed to the Department of Youth Services for an aggregate total of three years minimum to age 21.

{¶ 20} Appellant now appeals from that judgment, arguing the following sole assignment of error:

K.J. was denied effective assistance of counsel as guaranteed under the Sixth Amendment.

{¶ 21} The test for ineffective assistance of counsel in a juvenile delinquency case is the same as that for an adult criminal case. *See Jones v. Lucas Cty. Children Servs. Bd.*, 46 Ohio App.3d 85, 86-87, 546 N.E.2d 471 (6th Dist.1988). To establish a claim of ineffective assistance of appointed counsel, the juvenile must show that his counsel's representation "fell below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

{¶ 22} A properly licensed attorney is presumed to have acted in a competent manner. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). A court "must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, *supra*, at 689. Debatable trial tactics do not generally constitute deficient performance. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995), citing *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980). Therefore, the burden is on the defendant to prove otherwise. *State v. Lott*, 51 Ohio St.3d 160, 174-175, 555 N.E.2d 293 (1990). Generally, actions considered to be defense counsel's trial tactics or strategy will not establish a claim of ineffective assistance of counsel. *Strickland*, *supra*, at 689 and *State v. Griffie*, 74 Ohio St.3d 332, 658 N.E.2d 764 (1996). Nevertheless, ineffective assistance of counsel may be

demonstrated where counsel's action is "such a deviation from the norm that ordinary trial counsel would scoff at hearing of it * * *." *State v. Burgins*, 44 Ohio App.3d 158, 160, 542 N.E.2d 707 (4th Dist.1988).

{¶ 23} In this case, appellant sets out three issues in support of his argument that he was denied effective assistance of counsel: counsel's failure to file a request for discovery, failure to file a notice of alibi, and failure to subpoena and present testimony of family members residing in appellant's home.

Discovery Request

{¶ 24} Under Ohio law, generally, questionable trial tactics do not constitute a deprivation of the effective assistance of counsel. *Clayton*, *supra*. Specifically, "the decision of whether to submit a request for discovery 'is presumed to be a trial tactic which does not constitute ineffective assistance of counsel.'" *Toledo v. Flugga*, 6th Dist. No. L-06-1121, 2007-Ohio-98, ¶ 12, quoting *State v. Whittsette*, 8th Dist. No. 85478, 2005-Ohio-4824, ¶ 35.

{¶ 25} In this case, trial counsel did not file a request for discovery. Nevertheless, the record indicates that the prosecutor stated to the court that, despite the lack of such a request, all discovery had been exchanged. Therefore, appellant has failed to establish any prejudice by counsel's failure to request discovery.

Notice of Alibi

{¶ 26} Crim.R. 12.1 and R.C. 2945.58 require a defendant in a criminal case to give notice in writing of his intention to claim an alibi. If such notice is not timely filed,

the court *may* exclude evidence offered by the defendant to prove his alibi. Crim.R. 12.1. Where a notice of alibi is not filed and testimony regarding a defendant's alibi is not excluded, however, no prejudice occurs. *See State v. Ostrowski*, 30 Ohio St.2d 34, 43, 282 N.E.2d 359 (1972).

{¶ 27} In this case, again, it is true that trial counsel did not file a notice of alibi. The trial court, however, permitted testimony regarding appellant's alibi defense, that he was asleep in the East Park Street house when the robberies occurred. Therefore, again, no prejudice resulted from the failure to file a notice of alibi.

Subpoena of Witnesses

{¶ 28} A counsel's "decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 156. Moreover, a defendant has no constitutional right to determine trial tactics and strategy of counsel. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 150; *State v. Cowans*, 87 Ohio St.3d 68, 72-73, 717 N.E.2d 298 (1999).

{¶ 29} In this case, the only evidence at trial of possible other witnesses were appellant's brief references at the hearing to persons at the East Park Street house. At disposition, appellant's mother stated that she had witnesses to come in for appellant, but counsel did not try to help her bring them in to testify. Nevertheless, there is no evidence in the record that any such witnesses were available, of what they would have said, and that trial counsel knew they could help in the defense and failed to subpoena them.

Further, trial counsel is generally in the best position to determine whether any such witnesses would help or hinder his client's defense. In addition there is no evidence that such testimony would have altered the outcome of appellant's bench trial. If any new evidence exists outside the record which would, in fact, alter the outcome, such evidence would be the subject of a postconviction petition.

{¶ 30} Consequently, based upon our disposition of the issues in support of appellant's arguments, we cannot say that appellant's trial counsel was ineffective. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 31} The judgment of the Lucas County Court of Common Pleas, Juvenile Division, 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

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE