

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

State of Ohio

Court of Appeals No. WD-12-010

Appellee

Trial Court No. 2011CR0177

v.

Ronald Pheils

DECISION AND JUDGMENT

Appellant

Decided: May 31, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebbers and David E. Romaker, Assistant
Prosecuting Attorneys, for appellee.

Mollie B. Hojnicky, for appellant.

* * * * *

OSOWIK, J.

{¶1} This is an appeal from a judgment of the Wood County Court of Common Pleas that found appellant, Ronald Pheils, guilty of one count of reckless homicide and imposed a prison sentence of three years. For the following reasons, the judgment of the trial court is affirmed.

{¶2} On March 23, 2011, appellant went to the home of three-year-old Josh Cox to babysit while Josh's mother was at work. Appellant admitted to playfully tossing the child in the air several times at some point in an attempt to cheer him up. Shortly thereafter, appellant placed Josh in one of the bedrooms to sleep. Appellant heard a thud and, when he investigated, found the child face down on the floor, gasping for breath. Medical responders were called and Josh was taken to the hospital. Josh died three days later from abusive head trauma according to the coroner's report.

{¶3} On April 6, 2011, appellant was indicted on one count of reckless homicide, in violation of R.C. 2903.041, a felony of the third degree. Appellant pled not guilty and also agreed to a waiver of his speedy trial rights. On October 28, 2011, appellant was granted funds to hire a defense expert. On January 25, 2012, after trial to a jury, appellant was found guilty as charged and sentenced to 36 months. A timely appeal was filed.

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

FIRST ASSIGNMENT OF ERROR: The trial court abused its discretion when it denied appellant's motion to continue trial.

SECOND ASSIGNMENT OF ERROR: Appellant was denied effective assistance of counsel as guaranteed by the United States and Ohio Constitutions.

THIRD ASSIGNMENT OF ERROR: The trial court erred when it advised the state regarding trial strategy.

FOURTH ASSIGNMENT OF ERROR: The trial court's imposition of the sentence constituted an abuse of discretion.

{¶5} In support of his first assignment of error, appellant asserts that the trial court abused its discretion when it denied his third motion to continue trial, which he claims forced him to proceed to trial without an expert witness. Appellant argues that he had a limited amount of time to secure an appropriate expert witness due to the trial court's perceived delay in ruling on his motion for funding to hire a witness, and that the expert he ultimately contacted was unable to provide a report prior to trial due to professional obligations and the holiday season.

{¶6} It is well-settled in Ohio that the grant or denial of a continuance lies within the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981). Because of this, our review of the lower court's decision is conducted pursuant to the abuse of discretion standard of review. The term abuse of discretion connotes an unreasonable, arbitrary or unconscionable attitude by the trial court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶7} In evaluating a motion for continuance, the trial court should note, inter alia: the length of the delay requested, whether other continuances have been requested or received, possible inconvenience to the litigants, witnesses, opposing counsel and the court, and whether the requested delay is for legitimate reasons or for other factors relevant to the case. *Unger, supra*, at 67.

{¶8} We have evaluated appellant’s argument and find no persuasive evidence showing that the trial court’s attitude was unreasonable, arbitrary or unconscionable. In denying appellant’s request, the trial court noted that trial had already been continued twice upon appellant’s request, first for an additional two months and again for an additional four months. The trial court further commented that the defense was given extra time, beyond the requirements of Crim.R. 16(K), to provide expert witness reports.

{¶9} Given these facts and circumstances, we are unable to find that the trial court abused its discretion in denying a third trial continuance. Accordingly, appellant’s first assignment of error is not well-taken.

{¶10} In his second assignment of error, appellant asserts that trial counsel was ineffective for failing to timely locate an expert who was available to prepare a report and testify at trial. Appellant states that he was prejudiced by counsel’s lack of thorough trial preparation.

{¶11} *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standard for judging ineffective assistance claims: “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 687-688. Furthermore, “the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

{¶12} Our review of the record fails to show that counsel’s representation fell below an objective standard of reasonableness. Trial counsel recognized the potential value of securing an expert witness to rebut the state’s evidence as to the child’s cause of death and requested the necessary funds to hire one. For various reasons which may have been out of counsel’s control, an expert ultimately was not secured. Appellant has not established that trial counsel was ineffective for failing to obtain or present an expert witness to rebut the state’s evidence. *See State v. Yarger*, 6th Dist. No. H-97-014, 1998 WL 230648 (May 1, 1998).

{¶13} On consideration of the foregoing, we are unable to find that trial counsel was ineffective and, accordingly, appellant’s second assignment of error is not well-taken.

{¶14} In support of his third assignment of error, appellant asserts that the trial court inappropriately provided advice to the state during the trial. Appellant argues that the trial court’s actions indicated judicial bias.

{¶15} A trial judge is “presumed not to be biased or prejudiced, and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity.” *Weiner v. Kwiat*, 2d Dist. No. 19289, 2003-Ohio-3409, ¶ 90, quoting *Eller v. Wendy’s Internatl., Inc.*, 142 Ohio App.3d 321, 340, 755 N.E.2d 906 (10th Dist.2000). This court has stated that “a judge is presumed to be unbiased and unprejudiced in the matters over which he presides.” *State v. Pavlich*, 6th Dist. No. E-10-011, 2011-Ohio-802, ¶ 31, quoting *In re Disqualification of Olivito*, 74 Ohio St.3d 1261, 1263, 657

N.E.2d 1361 (1994). “Thus, the appearance of judicial bias or prejudice must be compelling to overcome the presumption of his integrity.” *Id.*

{¶16} In support of his claimed error, appellant refers to a sidebar discussion which occurred after the state objected to a line of questioning during the cross-examination of one of its witnesses. Apparently, defense counsel asked the witness if he was aware that trial counsel was appointed. The trial court overruled the objection and a discussion took place at sidebar as follows:

THE COURT: I will overrule your objection. But, you [the prosecutor] can ask [the witness] about whether he knew [trial counsel] was originally retained counsel.

[PROSECUTOR]: Okay. Can I then – I guess I have to see about closing, but then I can point out to the jury he was not always appointed.

THE COURT: Well, you can do that through your questioning of this witness or other witnesses, * * *.

{¶17} Appellant asserts that the foregoing exchange shows that the trial court was biased in favor of the state as it was “providing advice” to the prosecutor as to how she should proceed.

{¶18} As stated above, the appearance of judicial bias must be compelling to overcome the presumption of the trial court’s integrity. Nothing in the above-described dialog suggests bias or prejudice sufficient to overcome the presumption of judicial integrity. We find no error or defect in this aspect of the proceedings that would impact

appellant's substantial rights. Accordingly, appellant's third assignment of error is not well-taken.

{¶19} In support of his fourth assignment of error, appellant asserts that the trial court abused its discretion when it sentenced him to the maximum of 36 months. Appellant argues that his sentence is unreasonable and unsupported by the evidence before the court. Appellant further argues that the trial court should not have denied his request for a presentence investigation report because appellant was first-time offender.

{¶20} Upon imposing sentence, the trial court stated that it had carefully reviewed the record, all oral and written statements, the purposes and principles of sentencing and the seriousness and recidivism factors. *See State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. We therefore find that the trial court did not abuse its discretion in sentencing appellant to serve a 36-month prison term for the offense of reckless homicide, a violation of R.C. 2903.041, which is a felony of the third degree.

{¶21} As to the lack of a presentence investigation report, this court has stated that such reports are required only in instances when the court imposes community control sanctions or probation. *See State v. Cyrus*, 63 Ohio St.3d 164, 586 N.E.2d 94 (1992), syllabus; *State v. Lampkin*, 6th Dist. No. L-07-1149, 2008-Ohio-251; Crim.R. 32.2 In this case, appellant was sentenced to a term of imprisonment and there was no requirement that the court order a presentence investigation report. *See Cyrus, supra*.

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

{¶23} On consideration whereof, the judgment of the Wood County Court of Common Pleas 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, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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