

[Cite as *State v. Shannon*, 2009-Ohio-2444.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 07 MA 210
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
HENRY SHANNON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of  
Common Pleas of Mahoning County,  
Ohio  
Case No. 06 CR 261

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains  
Mahoning County Prosecutor  
Atty. Rhys B. Cartwright-Jones  
Assistant Prosecuting Attorney  
21 West Boardman Street, 6<sup>th</sup> Floor  
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Aaron T. Snopek  
34208 Aurora Road, No. 303  
Solon, Ohio 44139

JUDGES:

Hon. Cheryl L. Waite  
Hon. Joseph J. Vukovich  
Hon. Mary DeGenaro

Dated: May 19, 2009

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WAITE, J.

{¶1} Appellant Henry Shannon was convicted in 1989 on three counts of rape with a sexually violent predator specification. The court sentenced him to 8 to 25 years in prison on each count, to be served concurrently. He was paroled in 2004, and one of the terms of his parole was that he not leave Ohio without permission from the Adult Parole Authority. He missed a meeting with his parole officer in 2005 and was later arrested in Chicago while still on parole. His parole was revoked and he was returned to prison. He was also charged in Mahoning County with escape, because he left the state of Ohio in violation of the terms of his parole. The escape charge was a second degree felony. He was convicted following a jury trial and sentenced to another eight years in prison, to be served consecutively to his prior sentences.

{¶2} Before his trial on the escape charge, he filed a motion to dismiss on double jeopardy grounds. He argued that when his parole was revoked, the revocation itself served as punishment for violating the terms of his parole. He claimed that he could not be punished for escape based on a violation of the terms of his parole because he had already been punished by the parole authority. The trial court heard the motion immediately prior to trial. Appellant's counsel noted at the motion hearing that the argument he was making had been rejected by the Ohio Supreme Court in *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250. The court overruled the motion in part because counsel conceded that it was an invalid argument. The trial court was correct in its ruling. The sanction imposed by

the parole authority is an administrative sanction that is part of the original sentence, and does not prevent further prosecution for escape.

{¶3} Appellant also argues on appeal that his counsel was ineffective for failing to object to hearsay evidence presented at trial. Although hearsay evidence may have been submitted at trial, counsel's failure to object can be categorized as a trial tactic and does not constitute ineffective assistance of counsel. Appellant's arguments are overruled and the conviction and sentence affirmed.

{¶4} In Appellant's first assignment of error he states:

{¶5} "The trial court erred by subjecting the Appellant to trial, and by convicting him in violation of his right not to 'be subject for the same offense to be twice put in jeopardy' as contained in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution."

{¶6} Appellant's argument is based on the Double Jeopardy Clause, which states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". Fifth Amendment to the United States Constitution. "[D]ouble jeopardy principles protect 'only against the imposition of multiple criminal punishments for the same offense \* \* \* and then only when such occurs in successive proceedings' ". *State v. Martello*, supra, 97 Ohio St.3d, at ¶8.

{¶7} Appellant argues that the trial court subjected him to multiple punishments for the same offense in violation of the Double Jeopardy Clause. Appellant specifically contends that, before trial on the escape charge, he had already once been punished by the Adult Parole Authority when his parole was

revoked for leaving the State of Ohio and for missing a meeting with his parole officer. Appellant's argument is without merit.

{¶8} This case can be resolved on the basis of the holding in *Martello*, and Appellant's counsel was aware of this even as he argued his motion to the trial court. In *Martello*, the defendant was serving post-release control arising from burglary and theft convictions. He had completely served his entire six-month prison term. He failed to report to his parole officer and was charged with escape under R.C. 2921.34(A)(1). He was also ordered by the Adult Parole Authority to serve 91 days in prison for violating the terms of post-release control. The defendant filed a motion to dismiss on double jeopardy grounds, and the motion was granted. The state appealed, and the judgment of the trial court was affirmed on appeal, but was reversed by the Ohio Supreme Court.

{¶9} The Supreme Court explained: "It has long been recognized that double jeopardy principles do not prohibit the imposition of every additional sanction that could be labeled 'punishment' in common parlance." *Id.* at ¶8. The Court analyzed whether the 91 day sentence could be considered "criminal punishment" for purposes of double jeopardy analysis. The Court concluded that any punishment imposed by the Adult Parole Authority was civil in nature and amounted to nothing more than the reinstatement of punishment already imposed as part of the original criminal prosecution. *Id.* at ¶26. Since it was only a reinstatement of the original punishment, it did not constitute an additional punishment in a second proceeding by which double jeopardy could attach. The Court concluded that the longstanding rule

in both Ohio and in federal courts was that a criminal defendant could be convicted of the new charge of escape regardless of any decision by a parole authority to reinstate the original sentence or impose additional administrative sanctions for the parole violation. *Id.* at ¶38.

{¶10} Appellant has not cited any authority contradicting the holding of *Martello*. He cites general cases explaining the nature of the double jeopardy clause, but fails to cite any specific case that holds or even contemplates that an escape conviction is barred if it is based on the violation of a term of parole. Because Appellant's counsel conceded that his argument was meritless at the time he argued his motion, and because he presents no new argument on appeal, we cannot rule in his favor. Appellant's first assignment of error is overruled.

{¶11} Appellant's second assignment of error states:

{¶12} "The Appellant was denied the effective assistance of counsel in violation of his rights as contained in the Sixth Amendment to the United States Constitution."

{¶13} In Appellant's second assignment of error he alleges ineffective assistance of counsel based on counsel's failure to raise hearsay objections during trial. Appellant contends that the state relied on hearsay to prove that he was in Chicago. Appellant argues that his counsel could have obtained a dismissal of the charge if the hearsay objections had been upheld, since the state could not have proven an essential element of the case. Appellant's argument is without merit.

{¶14} In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.2d 136, 538 N.E.3d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶15} To determine whether counsel was ineffective, the defendant must show that counsel's performance was deficient by committing errors so serious that counsel was not functioning as such, and that counsel's deficient performance prejudiced the defense to the extent that counsel's errors were so serious they deprived the defendant of a fair trial. *Strickland* at 687.

{¶16} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. In evaluating whether a petitioner has been denied the effective assistance of counsel, the Ohio Supreme Court has held that the test is, "whether the accused, under all the circumstances, \* \* \* had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus. A reviewing court must determine, "whether there has been a substantial violation of any of defense counsel's essential duties to his client," and, "whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623. To show that he has been prejudiced, the defendant must prove that there exists a reasonable probability that, but for counsel's errors, the result of the

trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, 538 N.E.2d 373.

{¶17} An attorney's decision on whether or not to raise an objection is a trial tactic, and even debatable trial tactics do not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. Furthermore, "the failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, 830, ¶103.

{¶18} Appellant contends that his trial attorney should have raised a variety of hearsay objections. According to Evid.R. 801(C), hearsay is, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible as evidence, unless the evidence falls within one of the many exceptions to the hearsay rule.

{¶19} The state argues that the testimony at issue was not offered to prove the truth of the matter asserted, and as such, was not hearsay. Hearsay statements, by definition, are offered to prove the truth of the matter asserted. Evid.R. 801(C). Appellee is correct that testimony of law enforcement officers explaining subsequent investigative activity is not subject to exclusion under the hearsay rule if the testimony is not offered to prove the truth of the matters being asserted. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401. This argument sidesteps Appellant's argument somewhat, because Appellant contends that the parole officers'

testimony could only be offered as substantive evidence that he left Ohio and was found in Chicago, thus proving one of the essential elements of the escape charge.

{¶20} Most of the evidence discussed in Appellant's brief is not hearsay evidence. He cites a variety of statements made by the two witnesses from the Adult Parole Authority describing how they tried to locate Appellant and have him extradited from Chicago back to Ohio. The points in their testimony in which Mr. Pezzuolo and Mr. Ervin mention that they spoke with someone in the Chicago Police Department do not actually convey any statements made by any particular police officer from Chicago. Even if Pezzuolo and Ervin had actually repeated a statement from a Chicago police officer specifically relating that the Chicago police had Appellant in custody, this type of statement would likely fall within the "present sense impression" exception to the hearsay rule: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness." Evid.R. 803(1). If Appellant was in the custody of the Chicago police, and someone from the Chicago police department confirmed this fact during the time Appellant was in custody, the police would be conveying their present sense impression of the fact that Appellant was in custody. It appears from the record that any hearsay objection would have been futile. Raising a futile objection would only give the prosecution a chance to repeat and emphasize the fact that Appellant had fled Ohio in violation of his parole, and may have given the impression that Appellant's counsel was petty, foolish, or simply did not understand the rules of evidence.

{¶21} It is also difficult to find any harm in the admission of the alleged hearsay testimony when the very fact that Appellant had been extradited from Chicago should have sufficed as proof that Appellant had left the geographic area of Ohio.

{¶22} Appellant has not established any deficient performance by his counsel. Assuming arguendo that counsel's performance was deficient, Appellant attempts to show that he was prejudiced by his counsel's actions by citing a number of moments during the trial when the prosecutor referred to Appellant as a rapist or sex offender. However, Appellant's conviction for a violent sexual crime was an element of the escape charge that was brought against him. Clearly, no error was caused when the prosecutor raised the issue of this conviction during his trial. See R.C. 2921.34(A)(2)(b) (describing the charge of escape for a defendant sentenced for a violent sexual crime and whose sentence has been modified to include geographic restrictions). It is not at all clear how the references to Appellant's conviction as a rapist show that he was prejudiced by counsel's failure to object to statements regarding Appellant's location in an extradition from Chicago. There appears no logical nexus between these references, hearsay or otherwise. Appellant has not shown any prejudice in counsel's failure to object to alleged hearsay testimony, and thus, he failed to establish the second requirement of *Strickland*. Since he failed to demonstrate either prong of *Strickland*, Appellant's second assignment of error is overruled.

{¶123} Appellant's two assignments of error are unpersuasive. His right to be free of double jeopardy was not violated when he was both convicted on an escape charge and also had his parole revoked after he left Ohio without permission. The parole revocation was merely the reinstatement of his prior sentence for his rape conviction and was not an additional punishment for purposes of double jeopardy analysis. Furthermore, his counsel was not ineffective for failing to raise futile objections to alleged hearsay evidence. The judgment of conviction and sentence is affirmed in full.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.