

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89180

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GORAN JOVANOVIĆ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-476063

BEFORE: Sweeney, P.J., Blackmon, J., and Dyke, J.

RELEASED: November 21, 2007

JOURNALIZED:

[Cite as *State v. Jovanovic*, 2007-Ohio-6196.]

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[Cite as *State v. Jovanovic*, 2007-Ohio-6196.]
JAMES J. SWEENEY, P.J.:

{¶ 1} Defendant-appellant, Goran Jovanovic (“defendant”), appeals following his conviction and sentence for carrying a concealed weapon. Defendant asserts that the trial court erred by admitting certain evidence and that he was denied the effective assistance of counsel. For the reasons that follow, we affirm.

{¶ 2} At trial, the State presented the testimony of Cleveland Police Officer Lentz whose testimony included the following: On December 28, 2005, Officer Lentz, and his partner, Officer Rudin, were patrolling the area of East 55th Street and Dolloff around 1:05 a.m. They observed a 1993 aqua Ford go through a traffic light and fail to signal at a “somewhat high rate of speed.” The officers performed a traffic stop of the vehicle at East 55th Street and Bellford in Cleveland.

{¶ 3} Officer Lentz approached the driver, while Officer Rudin approached the passenger side of the vehicle. Officer Lentz identified defendant as the driver. Defendant told Officer Lentz he did not have a driver’s license or insurance. Officer Rudin determined that defendant’s driving privileges had been suspended.

{¶ 4} With the intent of arresting defendant for driving under suspension, Officer Lentz asked defendant to step out of the vehicle. Officer Lentz conducted a pat-down search of defendant for weapons. Prior to that, defendant had not responded to Officer Lentz’s question as to whether he had anything sharp on his person. Officer Lentz discovered that defendant had a two- and three-quarter inch knife lock blade concealed between his waistband underneath his jacket. The blade

of the knife had a serrated edge. Officer Lentz believes defendant stated he had the knife for protection because of the area.

{¶ 5} Officer Lentz testified that the knife would be able to produce a stab wound and could slice a person. He also testified that the knife was capable of causing death to a human being if it were used as a weapon. Defendant was arrested.

{¶ 6} Officer Lentz further explained that there were two other occupants who were removed from the vehicle. The officers observed an open beer in the vehicle near the front seat passenger's feet. The front seat passenger had no identification and was placed under arrest. The officers patted him down and found crack cocaine.

{¶ 7} A female was in the rear passenger's seat and was observed making "furtive movements." She was asked to step out of the car and the officers found a crack pipe in the area where she had been seated. It was also determined that this female owned the vehicle.

{¶ 8} Officer Lentz testified that the other occupants were charged with drug violations. He also offered testimony concerning his experience investigating drug cases. He indicated that he was familiar that people who sell drugs are often armed and that those who purchase drugs are oftentimes at risk of physical harm by others.

{¶ 9} On cross-examination, Officer Lentz testified that he did not observe defendant with any drugs. He also stated that the knife he recovered from defendant

could be used for purposes such as whittling and scathing nuts. Defendant's statement that he had the knife for protection was not included in the police report.

{¶ 10} Officer Rudin also testified at trial, which consisted of essentially the same testimony given by Officer Lentz. In addition, Officer Rudin testified about the "21 foot rule" that permits officers to use deadly force if an individual within that distance pulls out a knife.

{¶ 11} After the State rested, the defense placed on the record a "continuing objection to the facts and circumstances of the other two people who were arrested in the car." The State responded by indicating its belief that the testimony was relevant to the facts and circumstances surrounding defendant's arrest and also to the defendant's state of mind. The defense reiterated an objection on the basis that such evidence was "not relevant" and would be "extremely prejudicial under [Evidence] Rule 403 and that area should not have been entered into." The court overruled the objection finding the evidence was more probative than prejudicial and that it went specifically to the elements of "knowingly as well as deadly weapon."

{¶ 12} Both at the close of the State's case-in-chief and after the defense rested, defendant moved the court to dismiss the charge against him pursuant to Crim.R. 29. The court denied defendant's motions.

{¶ 13} The jury found defendant guilty of carrying a concealed weapon in violation of R.C. 2923.12, including a prior conviction for an offense of violence. The

court imposed a six-month prison term. We address defendant's two assignments of error below.

{¶ 14} "I. The trial court erred by allowing prejudicial other acts evidence to be introduced to the jury."

{¶ 15} Defendant maintains that the trial court admitted certain "other acts" evidence in violation of Evid. Rule 404(B) and R.C. 2945.59. Specifically, defendant refers to Officer Rudin's and Lentz's testimony concerning the other occupants of the vehicle, the drugs and paraphernalia recovered from the vehicle, and general testimony about drug dealing and drug buying.

{¶ 16} Evid.R. 404(B) provides:

{¶ 17} "(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 18} None of the evidence complained of pertains to other acts by the defendant. Instead, the evidence concerns the facts and circumstances surrounding defendant's arrest. Accordingly, it does not qualify as other acts of the defendant under Evid.R. 404(B).

{¶ 19} Further, the evidence was properly admitted as proof of defendant's intent or his plan concerning his possession of the knife. See *State v. McBride*

(Sept. 25, 1986), Cuyahoga App. No. 50676, quoting *State v. Thompson* (1981), 66 Ohio St.2d 496.

{¶ 20} R.C. 2923.12 (A) (1) provides:

{¶ 21} “No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:

{¶ 22} “(1) A deadly weapon other than a handgun ***.”

{¶ 23} Under R.C. 2923.11(A) “deadly weapon” means “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.”

{¶ 24} The facts and circumstances surrounding defendant's arrest were relevant and probative of defendant's intent and purpose in carrying the knife that was concealed on his person.

{¶ 25} Assignment of Error I is overruled.

{¶ 26} “II. Counsel failed to afford the appellant his right to effective assistance of counsel.”

{¶ 27} In order for this Court to reverse a conviction on the grounds of ineffective assistance of counsel, we must find that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Counsel's performance is deficient if it falls below an objective standard of reasonable representation. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph

two of the syllabus. To establish prejudice, “the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.” Id. at paragraph three of the syllabus.

{¶ 28} Defendant maintains that his counsel was ineffective for failing to object to Officer Rudin’s testimony concerning the “21 foot rule” and for not requesting a limiting instruction concerning the other occupants of the vehicle. These alleged deficiencies in counsel’s performance do not amount to ineffective assistance based on this record.

{¶ 29} The “21 foot rule” testimony was very brief wherein Officer Rudin simply explained that officers are permitted to use deadly force on people who brandish knives within 21 feet of them. There was no evidence presented that defendant brandished the knife. Rather, defense counsel effectively established during the cross-examination of Officer Lentz that defendant did not brandish the knife. Officer Lentz repeatedly testified that the knife was concealed and that he even asked defendant why he did not disclose his possession of it. Defense counsel also established that defendant did not struggle with the officers.

{¶ 30} In addition to this evidence, other evidence in the record included that defendant told Officer Lentz he had the knife for protection. The record reflects that defense counsel did object to the testimony concerning the other occupants of the vehicle, which the trial court overruled. A limiting instruction in this regard would arguably highlight this testimony to the jury thus providing a sound reason for trial

counsel not to request it. See *State v. Cox*, Butler App. No. CA2005-12-513, 2006-Ohio-607, ¶¶30-31 (failure to request a limiting instruction is a reasonable trial strategy and not the ineffective assistance of counsel, where requesting the instruction could bring undue attention to the objectionable testimony).

{¶ 31} Considering the record, there is not a reasonable probability that the outcome of defendant's trial would have been different had defense counsel objected to the "21 foot rule" testimony and/or requested a limiting instruction concerning the other occupants of the vehicle.

{¶ 32} Assignment of Error II is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and

ANN DYKE, J., CONCUR