[Cite as *State v. Allen*, 2009-Ohio-2572.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91107

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID JIMMIE ALLEN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-489462

BEFORE: Jones, J., Kilbane, P.J., and Boyle, J.

RELEASED: June 4, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, David Jimmie Allen ("Allen"), appeals his conviction of murder. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

{¶ 2} Allen was indicted on December 5, 2006 for the aggravated murder of Jennifer McKenzie. Allen was charged with aggravated murder, in violation of R.C. 2903.01, with one- and three-year firearm specifications as outlined in R.C. 2941.145.

{¶ 3} On February 8, 2007, the trial court ordered that Allen be referred for competency to stand trial. On August 22, 2007, the trial court found appellant competent to stand trial. Two days earlier, on August 20, 2007, Allen had filed a motion to suppress eye witness identification testimony and oral statements. On August 24, 2007, the trial court denied Allen's motion to suppress oral statements. On August 27, 2007, the trial court denied Allen's motion to suppress eye witness identification testimony.

{¶ 4} Allen filed a motion in limine to exclude his prior bad act—physically beating the victim just two weeks before her murder. Contemporaneous with this motion, appellant filed a motion in limine to exclude the firearm seized from him in October 2006. On October 9, 2007, the trial court denied both of these motions.

{¶ 5} On October 10, 2007, Allen executed a written waiver of his right to a jury trial, and the lower court began its bench trial on October 11, 2007. The trial proceeded through October 12, 2007. After the completion of the October 12, 2007 trial session, the lower court ordered the trial to resume on October 15, 2007.

{¶ 6} On or about October 15, 2007, the State learned that the shell casings originally found at the murder scene, and the firearm later found on Allen, had new evidentiary value. This new evidentiary value stemmed from the fact that the shell casings originally found at the murder scene were mistakenly labeled as .22 caliber.

{¶ 7} In October 2006, Allen was arrested in Summit County, Ohio, in possession of a .25 caliber firearm. Because the shell-casings at the scene were labeled as .22 caliber, they were never scientifically compared to the .25 caliber firearm found on Allen.

{¶ 8} During a trial recess, the State further examined the shell casings, and immediately requested that they be tested and compared to the firearm seized from Allen. This testing was conducted prior to the testimony of the State's ballistics expert. The Cleveland Police Department compared the shell casings to the firearm recovered from Allen. Scientific testing revealed that the shell casings found at the murder scene were in fact .25 caliber, and not .22 caliber as originally labeled. Scientific testing also revealed that the spent shell casings were fired from the firearm found on Allen.

{¶ 9} Immediately thereafter, the State informed Allen of the new information. Allen then requested a one-day continuance to assess his position. This motion was granted by the lower court. On October 16, 2007, Allen made oral motions to exclude the newly discovered evidence and for a mistrial. The trial court denied the motions.

{¶ 10} Allen then requested a continuance for the purpose of hiring a ballistics expert to test the shell casings, slugs, and firearm. The lower court granted this

motion, allowed for an expert at state expense, and continued the case until November 29, 2007. On November 29, 2007, the case was called for trial. However, Allen requested a continuance, and the lower court granted the motion and continued the matter until February 4, 2008. On January 25, 2008, Allen filed a formal motion for a mistrial. The trial court subsequently denied this motion.

{¶ 11} On February 4, 2008, the trial resumed. The State called its ballistics/firearms expert and then rested. Allen did not call any lay or expert witnesses, nor did he offer any expert reports. Allen rested and closing arguments from both sides were heard. On February 7, 2008, the trial court found Allen guilty of murder in violation of R.C. 2903.02 and guilty of the one- and three-year firearm specifications in violation of R.C. 2941.141. On that same day, Allen was sentenced to three years on the firearm specification, which was to be served prior to, and consecutive to, a 15-to-life sentence on the murder charge. On March 4, 2008, Allen filed a notice of appeal with this court.

{¶ 12} On July 10, 2006, at approximately 8 p.m., Jennifer McKenzie was found dead in her apartment. The victim's father, Samuel McKenzie, found her lying face down in the living room doorway. She had two gunshot wounds, one in the head and one to the chest. The victim left behind three young children. Jamila was four, while Janiah and Jayla were 20-month-old twins. Allen is the father of these children and was also the victim's boyfriend. Allen dated the victim for a couple of years. Allen lived with the victim from January 2006 until three weeks prior to her murder.

{¶ 13} During the course of the investigation, the police focused on Allen as a suspect. This was based largely on interviews with Jacqueline Carson, Ms. McKenzie's friend, and Lashonda Williams, a neighbor. Ms. Carson was with the victim, Ms. McKenzie, on the day of her death. Ms. Carson advised the police that Allen was the victim's boyfriend and she described an incident which occurred on June 28, 2006 in which the victim was assaulted. Ms. Williams's testimony was more direct. She stated that she observed Allen waiting in the bushes and then running into the apartment behind the victim when she entered the building. Shortly thereafter, she heard "breaking sounds" coming from the apartment.

{¶ 14} After the first four months of their cohabitation, Allen claimed that the victim began to change. He stated that she was always complaining that he should get a job. Three weeks before the victim was murdered, she told Allen that the future of their relationship was unclear. She alluded to the fact that there was another man. The victim told Allen that he could no longer do certain things for her. On June 28, 2006, just 13 days before her murder, the victim told Ms. Carson that she did not want to see Allen anymore and she was tired of him hounding her.[1]

{¶ 15} According to the victim's father, Allen and the victim had a tumultuous relationship. Allen echoes this when he reported that his relationship with the victim was wild and that they fought often, mostly verbally, but sometimes physically. Allen was intimidating toward the victim and pushed the victim around. Before the murder,

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[1]Tr. 74-75.

on June 28, 2006, when Allen was estranged from the victim and no longer residing at the Cedar Ave. apartment, he showed up there and brutally beat her. She had contusions to the head and back, an abrasion to her lip and eye, and a shoe print to her back. Allen described this fight as, him going off on her, causing her to go to the hospital and get stitches.[2]

{¶ 16} On the morning of July 10, 2006, the victim got her kids dressed and sent them off to daycare. The victim then went with Ms. Carson to a vocational program they were currently attending. They arrived at the program at 8:15 a.m. and returned home at 3:59 p.m. On that same day, around 4:30 p.m., Ms. Williams, was on her front porch and saw the victim getting off the bus. As the victim got closer to the door, Ms. Williams observed Allen run from behind the bushes and follow the victim into the building. It did not appear that the victim knew that Allen was behind her. As Ms. Williams observed Allen running after the victim, she noted that Allen had one hand under his shirt.

{¶ 17} After observing Allen following the victim into the building, Ms. Williams heard rumbling noises and objects breaking from inside the victim's building. Ms. Williams then heard music blasting from the victim's apartment. Later, Ms. Williams met with police and identified Allen from a photo array.

{¶ 18} Sometime after 3:45 p.m. on July 10, 2007, the victim's father, Samuel McKenzie, received a phone call from the daycare that the victim had not yet picked

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[2]Tr. 411.

up her kids. Mr. McKenzie was then asked if he could pick up the kids. He called his daughter, however there was no response. Ms. Carson also called the victim seven more times, but there was no answer. Mr. McKenzie picked up the children and went to his daughter's apartment building. First, he went to Ms. Carson's house to see if she had seen his daughter. Ms. Carson stated that she had seen the victim a few hours earlier. Upon arriving at his daughter's residence, Mr. McKenzie left his grandchildren and fiancé in the car and entered the door to his daughter's apartment building. Upon entering the building, Mr. McKenzie saw his daughter's wallet and recognized her Social Security card in it. He then went upstairs to her apartment and found the door unlocked. He proceeded down the hallway and immediately recognized the victim lying in the living room doorway face down. He then dialed 911.

{¶ 19} Allen assigns two assignments of error on appeal:

{¶ 20} [1.] "The trial court erred in failing to declare a mistrial, in violation of Defendant's rights to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution."

{¶ 21} [2.] "Defendant was denied his right to effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶ 22} Allen argues in his first assignment of error that the trial court erred in failing to declare a mistrial. We do not find merit in his argument.

{¶ 23} Trial courts enjoy broad discretion in ruling on motions for mistrial. *State v. Lacona*, 93 Ohio St.3d 83, 100, 2001-Ohio-1292, 752 N.E.2d 937; *State v. Sage*

(1987), 31 Ohio St.3d 173, 182, 31 Ohio B. 375, 510 N.E.2d 343. Absent an abuse of discretion, a reviewing court will not reverse a trial court's decision regarding a motion for a mistrial. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. See, e.g., *State v. Moreland* (1990), 50 Ohio St.3d 58, 61, 552 N.E.2d 894; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 24} In examining whether a mistrial is appropriate, a court should use a balancing test under "which the defendant's right to have the charges decided by a particular tribunal is weighed against society's interest in the efficient dispatch of justice." Id.; see, also, *United States v. Scott* (1978), 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65. "Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 462-463, 93 S.Ct. 1066, 35 L.Ed.2d 425.

{¶ 25} Here, Allen argues that the State's last minute discovery of key evidence regarding the proper caliber of the bullet resulted in basic unfairness. The State conceded that it was in possession of the shell casings for over a year, and the firearm for almost a year. However, the State said that if it had been aware that the shell casings were mislabeled it would have tested the shell casings and their relationship to the firearm before the trial.

{¶ 26} The assistant county prosecutor viewed the shell casings a second time with a Cleveland police homicide detective , and ordered immediate testing on the

shell casings and their relationship to the firearm. The State furnished the test results to Allen as soon as they became known. The State conceded that this discovery unexpectedly and significantly changed the evidentiary value of the firearm and shell casings. However, the State never conceded or stated that this newly discovered evidence constituted error or irregularity in the proceedings. We agree with the State's position. There is nothing in the evidence demonstrating that this late discovery constituted any basic unfairness or abuse of discretion on the part of the lower court.

{¶ 27} Allen was previously aware of the State's evidence and could have tested it at any time. Moreover, after the newly discovered evidence was disclosed, the lower court gave defense counsel ample additional time to modify any trial strategy needed to address the caliber mislabeling. In October 2007, the lower court continued trial until November 29, 2007. Later, the trial date was continued again, this time from November 29, 2007 until February 4, 2008. Accordingly, Allen had nearly four months to consider the caliber mislabeling or engage in any desired plea negations. However, Allen declined to do so.

{¶ 28} In addition, Allen failed to demonstrate how the shell casing mislabeling would have meaningfully and significantly altered any questioning of lay witnesses Samuel McKenzie, Jackie Carson and Lashonda Williams. Allen further failed to demonstrate why he did not motion the lower court to have the "non-ballistics" witnesses recalled for the purposes of asking them any questions based on this

newly discovered evidence. Allen also failed to demonstrate how his cross-examinations were affected in any way that prejudiced him.

{¶ 29} Allen argues that the mislabeling affected his trial strategy. However, considering trial counsel had approximately four months to consider this newly discovered evidence and its effects on the trial, it is unlikely that counsel was unprepared or treated unfairly. Given the many changes that occur in any trial, counsel is expected to adjust trial strategy on a frequent basis. Attorneys often call different witnesses, modify original case theory, ask different questions, and admit different exhibits than originally intended. In many cases, those decisions must be made in real-time. In this case, Allen had several months to alter any necessary trial strategy techniques. Moreover, the lower court granted Allen's request to continue trial two times.

{¶ 30} Accordingly, we find no evidence of arbitrary, unreasonable, or unconscionable conduct on the part of the trial court. In fact, the evidence demonstrates that the lower court thoroughly reviewed all necessary options prior to denying Allen's motions to exclude evidence and motions for mistrial. The court's decision was proper, involved the weighing of several remedial options, and did not involve any abuse of discretion on the part of the trial court. We find no error on the part of the lower court.

{¶ 31} Accordingly, Allen's first assignment of error is overruled.

{¶ 32} Allen argues in his second assignment of error that he was denied his right to effective assistance of counsel. However, a review of the evidence demonstrates that Allen's second assignment of error is also without merit.

{¶ 33} 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.3d 136, 538 N.E.2d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To determine whether counsel was ineffective, appellant must show that: (1) counsel's performance was deficient, in that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and (2) counsel's deficient performance prejudiced the defense in that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland.*

{¶ 34} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301, 209 N.E.2d 164. In evaluating whether a petitioner has been denied the effective assistance of counsel, the Ohio Supreme Court 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.

{¶ 35} In reviewing a trial court's ruling on a motion to suppress, a reviewing court must keep in mind that weighing the evidence and determining the credibility of

witnesses are functions for the trier of fact. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. A reviewing court, however, must decide de novo whether, as a matter of law, the facts meet the appropriate legal standard. *State v. Martin*, Cuyahoga App. No. 89030, 2007-Ohio-6062.

{¶ 36} An anonymous tip that a person is carrying a gun is, *without more*, insufficient to justify a police officer's stop and frisk of that person. *Florida v. J.L.* (2000), 529 U.S. 266, 120 S.Ct. 1375; 146 L.Ed.2d 254. (Emphasis added.)

{¶ 37} In addition, *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317; 76 L.Ed.2d 527, dealt with an anonymous tip in the probable cause context. In *Gates*, the court abandoned the "two-pronged test" of *Aguilar v. Texas* (1964), 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, and *Spinelli v. United States* (1969), 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637, in favor of a "totality of the circumstances" approach to determining whether an informant's tip establishes probable cause.

{¶ 38} In *Alabama v. White* (1990), 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301, the United States Supreme Court addressed the reliability of an anonymous tip:

> **{¶ 39}** "The opinion in *Gates* recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.' Id., at 237. *This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a Terry stop.* But the tip in *Gates* was not an exception to the general rule, and the anonymous tip in this case is like the one in *Gates*: '[it] provides virtually nothing from which one might conclude that

[the caller] is either honest or his information reliable; likewise, the [tip] gives absolutely no indication of the basis for the [caller's] predictions regarding [Vanessa White's] criminal activities.' 462 U.S., at 227. By requiring 'something more,' as *Gates* did, ibid., we merely apply what we said in *Adams*: 'Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized,' 407 U.S., at 147. Simply put, a tip such as this one, standing alone, would not "'warrant a man of reasonable caution in the belief" that [a stop] was appropriate.' *Terry*, supra, at 22, quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)."

{¶ 40} (Emphasis added.)

{¶ 41} The case at bar is distinguishable from *J.L.* and *Gates*. In *J.L.*, the description simply stated that a young black male was wearing a plaid shirt and standing at a particular bus stop. Here, the informant provided very specific information regarding the perpetrator, his companion and where they were going. The perpetrator was described as six feet tall, 195 to 200 pounds, wearing striped shirt, blue jogging pants, sunglasses and a do rag. The accompanying individual in this case was described as wearing a burnt orange jumpsuit thereby resulting in much more descriptive and unique description than in *J.L.* or *Gates*.[3]

{¶ 42} Moreover, the police in *J.L.* did *not* receive specific information regarding the companions or the type of clothing that the two other individuals at the bus stop were wearing. This is distinguished from the case at bar, where the police did receive specific detailed information regarding the individual with Allen. In addition to the unique description and additional information regarding the second individual, the description in the case at bar involved a perpetrator with a gun in an

[3]In *J.L*, the perpetrator was simply described as a black male wearing a plaid shirt.

area where there were many children. The close proximity of the perpetrator and the weapon to school age children at the library and nearby public school further distinguishes this case from *J.L.* and *Gates*.

{¶ 43} *Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation.* Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. *In re Long*, Stark App. No. 2004-CA-00377, 2005-Ohio-3825. (Emphasis added.)

{¶ 44} A review of the totality of the circumstances demonstrates that the informant's tip established probable cause on the part of the police and justified the search. Here, Detective Gilbride, of the Cleveland Police Department, observed two men walking east toward Central Hower High School. One man was wearing a striped shirt and carrying a white plastic bag in his left hand, and the second man was wearing a burnt orange jumpsuit. All of the information that the informant related to Detective Gilbride was corroborated by the detective's observations.

{¶ 45} Appellant's arrest was proper. Here, Detective Gilbride received an anonymous tip that a male had a firearm in the library, which is per se illegal. Due to the location of the library, hundreds of children and citizens could have been in the library at that time. A description of Allen and his companion was provided. The time at which Allen would be leaving and walking toward a high school, another place where it is per se illegal to possess a handgun, was also provided.

{¶ 46} Here, Detective Gilbride observed Allen just as the informant described. The suspect was wearing exactly what the caller said, carrying a plastic bag and heading toward the high school with a companion dressed as the caller described. The police had reasonable grounds to have seized and searched appellant. The search and seizure of the handgun was proper. The chances that a motion to suppress the firearm by defense counsel would have succeeded are unlikely. Accordingly, the evidence in this case demonstrates that it was well within acceptable trial strategy for defense counsel to not file a motion to suppress. Therefore, Allen's argument fails the first prong of the *Strickland* test.

{¶ 47} Assuming arguendo, Allen's argument concerning his motion to suppress was well-founded, Allen's argument fails the second prong of *Strickland* as well. As previously mentioned, there is significant evidence of appellant's guilt in this case. Allen had motive and opportunity to kill the victim.

{¶ 48} Less than two weeks before she was killed, the victim was beaten by Allen. Allen beat the victim badly enough that she had to go to the hospital for stitches and related treatment. This fight occurred less than two weeks before the murder. Moreover, there is testimony that the relationship between the victim and Allen had changed and the victim was upset that Allen did not have a job. There is also testimony from Jackie Carson, Lashonda Williams, and others supporting the trial court's decision.

{¶ 49} Moreover, less than a month and a half after the victim was found dead by way of gunshot wounds, Allen was arrested with a loaded handgun in Summit

County, Ohio. The caliber of the handgun was the same caliber of the handgun that killed the victim, .25 caliber. In addition, ten days after the murder, Allen, crying profusely, hysterical, and messed up, called his father.[4] Allen was talking to his father and then blurted, "I just snapped."[5] Allen then expressed concerns about getting the needle and that he wouldn't get a fair shot.[6]

{¶ 50} The record in this case demonstrates overwhelming evidence of guilt on the part of Allen. Accordingly, the exclusion of the firearm would not have changed the guilty verdict. Nothing in defense counsel's performance prejudiced the defense. There were no errors so serious as to deprive defendant of a fair trial. Allen fails the second prong of the *Strickland* analysis.

{¶ 51} We find no ineffectiveness of the part of trial counsel. In addition, we find that it was not the actions of trial counsel, but rather the weight of the evidence that resulted in Allen's conviction.

{¶ 52} Therefore, Allen's second assignment of error is overruled.

{¶ 53} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution. The defendant's

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[4]Tr. 328.

[5]Tr. 328, 336.

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.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS IN JUDGMENT ONLY (SEE SEPARATE OPINION);
MARY JANE BOYLE, J., CONCURS WITH JUDGE MARY EILEEN KILBANE'S SEPARATE OPINION

MARY EILEEN KILBANE, P.J., CONCURRING IN JUDGMENT ONLY:

{¶ 54} I concur in the judgment to affirm appellant's conviction. I write separately because I do not find this case distinguishable from *Florida. v. J.L.*, supra.

{¶ 55} Nevertheless, I believe that the judgment should be affirmed because, even if the trial court would have granted a motion to suppress, the outcome of the case would have been the same. A review of the record shows that the State did not need the gun to convict Allen due to the overwhelming amount of evidence against him. As such, Allen's ineffective assistance of counsel argument fails the second prong in *Strickland*, supra.

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[6]Tr. 328.

{¶ 56} The victim's friend, Jacqueline Carson, testified that two weeks earlier, Allen had seriously physically harmed the victim. The victim's neighbor, Lashonda Williams, testified that she saw Allen hiding in the bushes at the victim's apartment, observed him follow the victim inside the building, and then heard breaking sounds from inside the victim's unit. Finally, Allen's father stated that, ten days after the incident, Allen told him that he had just "snapped." A review of this evidence demonstrates that there was sufficient evidence to convict appellant, with or without the gun.