

[Cite as *State v. Scott*, 2009-Ohio-3464.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91981

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLYDE SCOTT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506223

BEFORE: Gallagher, P.J., Kilbane, J., and McMonagle, J.

RELEASED: July 16, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Steve W. Canfil
1370 Ontario Street
Standard Building
Suite 2000
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Kevin L. Rosenberg
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

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).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Clyde Scott, appeals his conviction from the Cuyahoga County Court of Common Pleas, claiming ineffective assistance of counsel. Finding no merit to this appeal, we affirm.

{¶ 2} Scott was charged with receiving stolen property (motor vehicle). At trial, the victim testified that she parked her 2003 Dodge Caravan on the street across from her daughter's house at approximately 11 a.m. The victim testified that she locked her vehicle and kept the keys in her pocket. She discovered her minivan missing at approximately 3 p.m. and reported it to the police. She testified that she did not know Scott or give him or anyone else permission to drive her vehicle.

{¶ 3} Sergeant Thomas Shoulders of the Cleveland Police Department testified that he observed a minivan pull into a gas station at Fulton Road and Lorain Avenue. He noticed the vanity plate and realized that the vehicle had been reported stolen earlier that day. Sgt. Shoulders saw Scott sitting in the driver's seat when the car's engine shut off. Two males exited the vehicle and went into the store; Scott followed. Sgt. Shoulders confirmed that the car was stolen and then requested backup.

{¶ 4} When backup arrived, Sgt. Shoulders entered the gas station and assisted in taking the three males into custody, including Scott. One of the males was Scott's brother, a juvenile, who was in possession of a flathead screwdriver.

{¶ 5} Sgt. Shoulders testified that keys were jammed in the ignition, but upon removal, the ignition cylinder came right out. He testified that there was visible damage to the steering column. Sgt. Shoulders had to use the flathead screwdriver to restart the vehicle so officers could take the car back to the police station.

{¶ 6} The victim testified that when her car was returned to her, it was “trashed” and “reeked of smoke.” She also testified that she could not turn the vehicle off and had to leave it running all night.

{¶ 7} Scott’s brother testified for the defense. He stated that he did not tell Scott that the vehicle was stolen. He testified that the vehicle was started before Scott entered, implying that Scott could not have known the vehicle was stolen. He testified that Scott would not have gotten into a stolen vehicle.

{¶ 8} Scott testified on his own behalf, denying any knowledge that the vehicle was stolen. Scott testified that he thought it was a “rock rental,” meaning someone traded it for crack cocaine. Scott was found guilty of receiving stolen property.

{¶ 9} Scott appeals, advancing one assignment of error for our review, which states the following:

{¶ 10} “Appellant was denied his right to effective assistance of counsel at trial, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.”

{¶ 11} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel

was seriously flawed and deficient and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102.

{¶ 12} Scott argues that his trial attorney's mistake during direct examination of his witness permitted the prosecutor to present to the jury evidence of Scott's bad character and similar bad acts to the crime charged. Scott contends that the error was compounded by the trial attorney's failure to request cautionary instructions, which would have explained to the jury the permissible use of such evidence.

{¶ 13} Scott further points out that his trial attorney admitted that she had made a serious legal error when she asked Scott's brother, a defense witness, "Is it because [the defendant] wouldn't have gotten in the car with you if he had known [it was stolen]?" Counsel also admitted that her question lacked any strategic or tactical consideration or justification.

{¶ 14} "Mere inexperience or unskillfulness, mistakes or errors of judgment, and improper trial strategy in connection with the case are ordinarily insufficient to justify setting aside a judgment of conviction because of the claimed incompetency of retained counsel for the accused." *State v. Peoples* (1971), 28 Ohio App.2d 162, 275 N.E.2d 626, paragraph five of the syllabus. "The judgment of conviction is void

where retained counsel's representation has been so inadequate as to make the trial a farce and a mockery of justice, thereby denying the accused of a fair trial (due process of law) or invading his constitutional right to the effective assistance of counsel." *Id.*, paragraph six of the syllabus.

{¶ 15} A thorough review of the transcript does not support Scott's contention that his trial counsel was incompetent. Although counsel's question was admittedly a mistake, we do not find that this mistake rises to the level of seriously flawed or deficient representation.

{¶ 16} Further, *Strickland*, *supra*, at 687, stated the following:

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable."

{¶ 17} Here, Scott has failed to articulate how the result of his trial would have been different had his attorney not mistakenly opened the door to his prior criminal record. In this case, there was overwhelming proof of Scott's guilt before Scott's record was put before the jury. Since Scott has not shown that he was prejudiced by his attorney's mistake, we overrule Scott's sole assignment of error.

Judgment affirmed.

It is ordered that appellee recover from 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. 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
CHRISTINE T. MCMONAGLE, J., CONCUR