[Cite as *State v. Dobson*, 2010-Ohio-2339.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92669

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHAWN DOBSON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511710

BEFORE: Sweeney, J., Gallagher, A.J., and Dyke, J.

RELEASED: May 27, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Shawn Dobson ("defendant"), appeals his convictions for aggravated burglary, aggravated robbery, kidnapping, and having a weapon while under disability. After reviewing the facts of the case and pertinent law, we reverse and remand for a new trial.

{¶ 2} On April 13, 2008, three masked men approached Latasha Cook ("Cook") and her five-year-old daughter in the driveway of the house she rented on West 130th Street in Cleveland. Two of the men led her at gunpoint into her house. The third man remained outside. Cook's three other minor daughters were inside the house. One of the men held her daughters at gunpoint, while the other man led Cook upstairs at gunpoint and took her cell phone and $498 from inside her bra. This man hit her in the head with his gun and went downstairs. Cook followed down the stairs and tricked the men into thinking there was more money in her car. When the men were on the side entrance landing, Cook shut and locked the door behind them. One of Cook's daughters called 911. Cook eventually received seven stitches on her forehead.

{¶ 3} During the robbery, Cook called one of the men "Shawn," and asked him why he was doing this. Additionally, an operator called Cook's phone 11 minutes after Cook's daughter placed the call to 911; Cook told the operator that one of the assailants was her friend's baby's father. On April 14, 2008, Cook gave defendant's name to the police as one of the men who robbed her.

{¶ 4} On June 9, 2008, defendant was indicted on 11 counts, including: two counts of aggravated burglary; two counts of aggravated robbery; four counts

of kidnapping; two counts of felonious assault; and one count of having a weapon while under disability. The first ten counts included firearm specifications.

{¶ 5} Defendant pled not guilty, was declared indigent, and was appointed counsel. In September 2008, defense counsel withdrew from the case and another attorney was appointed. In November 2008, defendant fired his appointed counsel and notified the court that he wished to hire an attorney. On December 9, 2008, two attorneys filed a notice to appear on behalf of defendant, whose trial was scheduled to begin on December 16, 2008.

{¶ 6} On December 12, 2008, the State filed a motion to disqualify Sheronda Dobson ("Sheronda"), one of defendant's new attorneys, for the following reasons: she is defendant's sister; she became licensed to practice law in Ohio on November 17, 2008; and she had no experience trying felony cases to juries.

{¶ 7} On December 16, 2008, the court held a brief hearing on the State's motion, where the State elaborated on its position.

{¶ 8} "The State had filed a motion to disqualify the attorney only out of fear that if there is a conviction, we would have an automatic reversal for ineffective assistance of counsel.

{¶ 9} "Seeing that this is the defendant's sister, as well as the fact that she was sworn into the Bar three weeks ago and hasn't attended new lawyer training, our only fear is that in the event that there is a conviction, the fact that there is — this attorney has never tried a case and these are extremely serious charges, that

we would be facing an ineffective assistance of counsel reversal for those reasons."

{¶ 10} At the hearing, it was noted that defendant's other attorney, Shondra Longino ("Longino") had "limited experience," having assisted another attorney on two felony cases. The court questioned defendant about retaining Sheronda and Longino as counsel, asking, "You understand that you could have somebody with more experience?" Defendant stated that he understood and he wanted his sister and Longino to represent him. The court accepted defendant's "right to choose the counsel of his choice," and ordered Longino to be present for all proceedings.

{¶ 11} On December 23, 2008, the jury found defendant guilty of aggravated burglary in violation of R.C. 2911.11(A)(1), a first degree felony; aggravated robbery in violation of R.C. 2911.01(A)(1), a first degree felony; four counts of kidnapping in violation of R.C. 2905.01(A)(2), second degree felonies; and having a weapon while under disability in violation of R.C. 2923.13(A)(3), a third degree felony. The first six counts included one- and three-year firearm specifications.

{¶ 12} The court sentenced defendant to the maximum prison term for each count to run consecutively for an aggregate sentence of 60 years in prison.

{¶ 13} Defendant now appeals and raises 11 assignments of error for our review.

{¶ 14} "I. "Defendant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Ohio Constitution."

{¶ 15} Defendant argues that this case "involves a disturbing example of a complete breakdown in the adversarial system," as evidenced by counsel's incompetency. In the alternative, defendant argues that counsel's performance was deficient and deprived him of a fair trial.

{¶ 16} In support of his first argument, defendant cites *United States v. Cronic* (1984), 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657, which stands for the proposition that there are rare cases involving Sixth Amendment right to counsel violations, which are presumptively prejudicial. For example, the complete denial or absence of counsel, counsel's failure "to subject the prosecution's case to meaningful adversarial testing," or when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659.

{¶ 17} The *Cronic* Court noted that "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." Id. at 657. When a claim of ineffective assistance can be made "only by pointing to specific errors made by trial counsel," a complete breakdown of the adversarial process has not occurred.

{¶ 18} In the instant case, defendant was not denied counsel, nor did he fail to *attempt* to test the State's case. Additionally, the record reveals no reason why a competent attorney could not have effectively represented defendant. Accordingly, this case is not governed by *Cronic*.

{¶ 19} Before we analyze the effectiveness of defendant's counsel specifically, we provide a brief overview of the relevant law regarding the right to counsel to facilitate our review of defendant's arguments.

{¶ 20} The Due Process Clause of the Fourteenth Amendment ensures that a defendant receive a fair trial. In addition, the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." While the right to effective counsel stems from the right to a fair trial, the right to specific counsel of one's choice stems from "the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount." *United States v. Laura* (1979), 607 F.2d 52, 56, citing *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562; *Brooks v. Tennessee* (1972), 406 U.S. 605, 92 S.Ct. 1981, 32 L.Ed.2d 358. See, also, *McMann v. Richardson* (1970), 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763.

{¶ 21} Although various defense attorneys may have different strategies and trial tactics, it is axiomatic that legal representation remain "within the range of effective and competent advocacy * * *." *Laura*, supra at 56. Additionally, we note that a properly licensed attorney is presumed competent. *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623.

{¶ 22} While the right to counsel of one's choice is embedded in our jurisprudence, it is not without exceptions. *Wheat v. United States* (1988), 486 U.S. 153, 108 S.Ct. 1692, L.Ed.2d 140. For example, this right does not extend to those who require appointed counsel. See *State v. Cowans* (1999), 87 Ohio St.3d 68, 72, N.E.2d 298 (holding that "[a]n indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate 'good cause' to warrant substitution of counsel") (quoting *United States v. Iles* (C.A.6, 1990), 906 F.2d 1122, 1130).

{¶ 23} Ohio courts have also held that, in certain circumstances, it was not error for a court to deny a defendant's attempt to obtain new counsel immediately before trial. See, e.g., *State v. Murphy,* 91 Ohio St.3d 516, 524, 2001-Ohio-112, 747 N.E.2d 765. Furthermore, a defendant has no right to be represented by a non-lawyer. *State v. Keenan*, Cuyahoga App. No. 89554, 2008-Ohio-807, at ¶21.

{¶ 24} In *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140, 142, 126 S.Ct. 2557, 165 L.Ed.2d 409. the United States Supreme Court reviewed the "deprivation of a criminal defendant's choice of counsel * * *":

{¶ 25} "We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar. The court has, moreover, an 'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" Id. at 152 (internal citations omitted). See, also, *United States v. Voigt* (1996), 89 F.3d 1050, 1074

(holding that "where 'considerations of judicial administration' supervene, the presumption in favor of counsel of choice is rebutted and the right must give way") (internal citations omitted).

{¶ 26} With this framework in mind, we are being asked to answer the following question: If, by exercising his right to counsel of choice, defendant waived his right to effective counsel? We find that the United States Supreme Court answered this question in the negative, albeit under a different factual scenario.

{¶ 27} In *Wheat*, supra, the Court was faced with a potential conflict of interest when, two days before trial, the defendant wished to substitute his counsel with the attorney who was representing two of his co-defendants. All three defendants signed a waiver of the attorney's conflict of interest, despite that the government intended to call one of the co-defendants as a witness at Wheat's trial. The trial court denied the defendant's request for counsel of his choice and the Court of Appeals for the Ninth Circuit affirmed. See *Wheat v. U.S.* (1987), 813 F.2d 1399.

{¶ 28} The Supreme Court affirmed and held the following: "Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat*, 486 U.S. at 159. See, also, *Aetna Insurance Co. v. Kennedy* (1937), 301 U.S.

389, 393, 57 S.Ct. 809, 81 L.Ed.2d 1177 (holding that "courts indulge every reasonable presumption against waiver" of fundamental rights).

{¶ 29} Having established that defendant, in the instant case, did not waive his right to effective assistance of counsel, we review the allegations of specific errors his counsel made at trial.

{¶ 30} To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. In *State v. Bradley*, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel's performance if a defendant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. "The object of an ineffectiveness claim is not to grade counsel's performance." Id. at 143.

{¶ 31} Defendant alleges approximately 20 errors that his attorneys made at trial to support his claim of ineffective assistance of counsel. We review the most egregious.

{¶ 32} First, defense counsel's approach to this case was based on the notion that because there was no conspiracy charge in the indictment, if

reasonable doubt existed as to which masked man defendant was, he could not be convicted. However, this is not the law in Ohio.

{¶ 33} "The Supreme Court of Ohio clarified Ohio's position on the issue of complicity in *State v. Perryman* (1976), 49 Ohio St.2d 14, vacated in part on other grounds sub nom[.] *Perryman v. Ohio* (1978), 438 U.S. 911. The court unequivocally approved of the practice of charging a jury regarding aiding and abetting even if the defendant was charged in the indictment as a principal. Id. The court held that the indictment as principal performed the function of giving legal notice of the charge to the defendant. Id. Therefore, if the facts at trial reasonably supported the jury instruction on aiding and abetting, it is proper for the trial judge to give that charge. *Perryman*, supra at 27, 28." *State v. Payton* (April 19, 1990), Cuyahoga App. Nos. 58292 and 58346.

{¶ 34} Defense counsel's failure to know the law virtually nullified defendant's only theory of acquittal.

{¶ 35} Another allegation of defense counsel's ineffectiveness concerns the decision to try defendant's having a weapon while under disability charge to the jury, rather than to bifurcate it and try it to the court. This required the State to prove to the jury that defendant had a criminal record.

{¶ 36} This Court recently held that failure to bifurcate a having a weapon while under disability charge contributed to a finding of ineffective assistance of counsel. In *State v. Jenkins*, Cuyahoga App. No. 91100, 2009-Ohio-234, at ¶17, we held that although this failure alone would not "constitute ineffective assistance

of trial counsel, [it] add[s] to the cumulative nature of counsel's errors," because it could not conceivably be considered a trial tactic.

{¶ 37} Additionally, the record demonstrates that defense counsel did not meaningfully participate in selecting the jury, nor did defense counsel understand or properly use juror challenges. For example, defense counsel moved to strike a juror for cause because the juror said she was "kind of upset * * * [b]ecause it's the first week of winter break, and I'm here." The court denied the challenge, and stated: "Listen to me. I expect you two to know the rules. We had a discussion about this case before we started so don't tell me that you're going to make faces because that's not going to be acceptable to me."

{¶ 38} A review of R.C. 2945.25, R.C. 2313.42, and Ohio case law governing juror challenges for cause shows that defense counsel's motion was without merit. More importantly, however, in our opinion, it shows that defense counsel was woefully inexperienced.

{¶ 39} Subsequently, defense counsel moved to strike another juror for cause based on the same exact misunderstanding of the law.

{¶ 40} Subsequent to this, defense counsel attempted to use a peremptory challenge to a juror *after* the jury had been sworn in. At this point, the court's

{¶ 41} frustration with defense counsel became even more apparent, as it stated, "You know what? I'm trying very hard to be patient. * * * I am trying very hard to understand that this is your first trial and that it can be complicated."

{¶ 42} Defense counsel's errors continued throughout the trial. They put defendant on the stand to testify and allowed his prior criminal convictions — some of which were inadmissible under the rules of evidence — to be revealed to the jury. Defense counsel also elicited testimony from defendant about his lengthy stays in prison.

{¶ 43} Furthermore, during cross-examination of Cook, defense counsel failed to properly impeach her with the following information, which was available to defense counsel at the time of trial[1]: Cook's four prior felony convictions, which were admissible under the rules of evidence (one of which demonstrated her propensity to lie); the inconsistencies within Cook's testimony; the inconsistencies between Cook's testimony and her daughters' testimony; Cook's prior testimony that she was a PCP addict, who frequently hallucinated[2]; and Cook's March 2007

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[1]Defendant alleges in his second assignment of error that the trial court denied him the right to effectively cross-examine and impeach Cook. A careful review of the record shows that defense counsel attempted to impeach Cook, but was so unfamiliar with the Ohio Rules of Evidence and other pertinent law, that the attempt was unsuccessful. The court sustained approximately 15 objections by the State on the basis of inadmissibility of evidence. Many of these objections should have been overruled; however, defense counsel made no arguments and offered no law to support admissibility.

[2] In *State v. Bradley*, Cuyahoga County Common Pleas Court Case No. CR-464518, Cook testified as a witness that she smoked PCP "everyday," and as a result, had trouble with her memory. "I remember kind of sort of everything but kind of sort of I don't remember nothing. I only remember what I just read. If I wouldn't have read that, I couldn't have answered any of your questions. * * * I don't remember seeing nothing. You know, it's like cartoons or something. I don't know. It seemed real but then it may not be real. Then I don't know if it was real or I was hallucinating or what in the world was going on because, you know, I got an issue and I'm not sure of what happened. * * * I do have a memory problem and it is on record."

diagnosis of paranoid schizophrenia, bipolar, dissociative, and panic disorders by the Cuyahoga County Court Psychiatric Clinic.

{¶ 44} Given that the only evidence of defendant's guilt was Cook's testimony, her credibility was paramount to this case. See, generally, Evid.R. 609 (governing impeachment by evidence of prior criminal convictions); Evid.R. 608 (governing opinion, reputation, and specific conduct evidence of a witness's "character for truthfulness or untruthfulness"); Evid.R. 613(B) (governing impeaching a witness with a prior inconsistent statement).

{¶ 45} Having sufficiently reviewed the first prong of the *Strickland* test for ineffective assistance of counsel, we next turn to the second prong: whether the result of the trial would have been different had defense counsel been effective. However, in the instant case, we find that counsel's ineffectiveness so permeated defendant's trial that it is impossible to answer that question without doing so in the abstract.

{¶ 46} Rather, we raise the doctrine of cumulative error. The Ohio Supreme Court defined this doctrine in *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623. "Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." See, also, *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256.

{¶ 47} This case is unique and we limit our approach to the facts at hand. We find that defendant was deprived of his right to a fair trial because of the accumulated instances of his counsel's ineffectiveness.

{¶ 48} Assignment of Error I is sustained. Defendant's remaining assignments of error are moot.[3] App.R. 12(A)(1)(c).

{¶ 49} Judgment reversed and case remanded for a new trial.

It is ordered that appellant recover from appellee his 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.

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

JAMES J. SWEENEY, JUDGE

ANN DYKE, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS
IN JUDGMENT ONLY WITH SEPARATE
CONCURRING OPINION
SEAN C. GALLAGHER, A.J., CONCURRING IN JUDGMENT ONLY:

{¶ 50} I respectfully concur in judgment only with the majority opinion.

{¶ 51} The record in this case reflects that defense counsel's conduct clearly fell below that expected of a reasonably competent defense attorney

[3]See appendix.

and that Dobson was not afforded a fair trial because of his counsel's ineffectiveness. I agree that the case should be reversed and remanded for a new trial.

{¶ 52} As the majority recognizes, the right to counsel of one's choice is not without exceptions. Indeed, "[i]t is well settled that unlike the right to counsel, the right to choice of counsel is not absolute. Instead, there is only a right to professionally competent, effective representation. A court must balance the right for choice of counsel against the interest in the administration of justice." (Internal citations omitted.) *State v. Moore*, Cuyahoga App. No. 85828, 2006-Ohio-277.

{¶ 53} When exceptional circumstances exist, a defendant's right to counsel of his choice must give way to the fair and proper administration of justice. Further, a defendant may not use his right to counsel offensively to frustrate "the efficient and effective administration of criminal justice." See *State v. Hook* (1986), 33 Ohio App.3d 101, 103, 514 N.E.2d 721.

{¶ 54} When it becomes apparent that counsel is so lacking in competence that inadequate representation is being provided, a trial court sua sponte may correct it so as to prevent a mockery of justice. Trial courts should not be hesitant to employ the procedure of holding an in camera hearing to determine if the deficiencies noted are a part of trial strategy and, if not, to determine whether the defendant is being provided professionally

competent, effective representation. Where inadequate representation is being provided, a trial court may discharge counsel and appoint substitute counsel for the defendant. A trial court also has the ability to declare a mistrial or order a new trial on the basis of inadequacy of counsel's performance.

APPENDIX

"II. Defendant was denied his due process right to present a complete defense in violation of the Fourteenth Amendment of the United States Constitution and Article I, [Section] 16 of the Ohio Constitution.

"III. The trial court improperly permitted a police officer to bolster the credibility of the alleged victim's testimony.

"IV. Appellant was denied his due process right to a fair trial when the trial court erroneously permitted the prosecutor to cross-examining [sic] the defendant on his pre-trial silence.

"V. The trial court erred and violated defendant's due process right to a fair trial when it allowed the State to impeach him with prior convictions for fifth-degree drug offenses.

"VI. Counts Three and Eleven of defendant's indictment failed to include the requisite mental state and therefore were fatally defective.

"VII. The trial court erred by convicting and sentencing appellant of counts of kidnapping based on the same incident and committed with the same animus.

"VIII. The trial court erred by convicting and sentencing appellant of both aggravated robbery and kidnapping.

"IX. Appellant's consecutive sentences are contrary to law and violative of due process because the trial court failed to make and articulate the findings and reasons necessary to justify it.

"X. The trial court improperly considered defendant's decision to go to trial as a factor in imposing a 60-year prison sentence."