[Cite as *State v. Clemm*, 2015-Ohio-594.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101291

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM CLEMM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-575825-A

BEFORE: McCormack, J., S. Gallagher, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 19, 2015

ATTORNEY FOR APPELLANT

Ruth R. Fischbein-Cohen
3552 Severn Rd.
#613
Cleveland, OH 44118

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Steven McIntosh
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, J.:

{¶1} Defendant-appellant William Clemm appeals from a judgment of conviction following a bench trial in which the court found Clemm guilty of two counts of theft. For the reasons that follow, we affirm the trial court.

Factual and Procedural History

{¶2} On July 10, 2013, Clemm was indicted on one count of theft, in violation of R.C. 2913.02(A)(2), and one count of theft, in violation of R.C. 2913.02(A)(3), both of which are felonies of the fifth degree. Following a bench trial, Clemm was convicted on both charges. On March 27, 2014, he was sentenced to one year of community control on each count, to be served concurrently.

{¶3} In early 2013, Gregory Sovrizal, the district manager for Dollar General, received notification of missing deposits from the Dollar Store located on Euclid Avenue. Upon further review, Sovrizal confirmed that there were two deposits that remained unaccounted for: the first deposit, dated March 1, 2013, was for the amount of $2,210.97; and the second deposit, dated March 6, 2013, was for the total amount of $1,879.85. On March 6, Sovrizal conducted his own investigation of the purportedly missing deposits. He examined the deposit log record (identified as the state's exhibit No. 2), which is a handwritten record that identifies and tracks the money entering the store through sales and exiting the store through deposits to the bank. He was able to validate all of the deposits, with the exception of the above two deposits. He testified that at the time of his initial investigation, he was unable to locate the confirmation bank slips for the March 1 and March 6 deposits from either the store or the bank.

{¶4} Sovrizal testified regarding Dollar General's company-wide store policy for handling money and making deposits, providing that every store manager is trained on how to document deposits in a deposit log in accordance with store policy. He stated that store managers are not permitted to develop their own system for completing the log or making deposits. He explained that the store's deposit log contains the date and time the deposit was made, the amount of the deposit, the bank bag number containing the deposit, and the signature of a store employee next to each deposit, identifying who prepared the deposit. The log also contains a section entitled "removal from store," which identifies the date, time, bank bag number, and who physically removed the money from the store and took it to the bank to be deposited. The final section of the log, entitled "validation," identifies who verified that the deposit was posted at the bank and at what time the verification was made, meaning that the bank provided a deposit slip confirming the money was delivered to the bank and counted.

{¶5} Sovrizal further testified that the standard operating procedure, which governs all store managers in Dollar General's 11,000 stores, dictates that when a deposit is late, meaning that the deposit does not post to the bank within two business days of the day of sales, Sovrizal would receive an email notification of a potential missed or late deposit for a specific date. He would then go to the store, examine the deposit log, and look for a deposit slip that was validated by the bank in order to confirm that a deposit was actually made. Based upon the sales volume of the Dollar General at this location, the manager would make two deposits per day.

{¶6} Sovrizal testified that at 2:00 p.m. on March 3, Clemm, who was the store manager at the time, removed the March 1 deposit of $2,210.97 from the store, as indicated by Clemm's signature under "removal from store" in the deposit log. The validation section was not completed, however, which means that there was no validation from the bank that the money

was delivered to the bank. Sovrizal stated that there would be no valid reason for leaving the validation blank, and "at this point, the money is missing. The money has not been posted at the bank."

{¶7} Regarding the purported missing deposit of $1,879.85 from March 6, Sovrizal testified that one deposit on March 6 in the amount of $453.91 was eventually verified, stating that following his initial investigation into the missing deposits, the store was able to confirm that a deposit in this amount was made by Clemm. He testified, however, that a second deposit, which amounted to $1,425.94, should have been made but was not. There is no indication in the deposit log that this deposit was ever prepared. According to Sovrizal, this second deposit was neither verified or confirmed by the bank with a bank confirmation slip, and the $1,425.94 remains missing.

{¶8} Sovrizal also provided that, in the course of his investigation into the missing deposits of March 1 and March 6, he identified other issues with deposits that revealed that "something was not correct." He explained that the February 28 deposit was actually not deposited until March 5, which violated the store's protocol. Additionally, Sovrizal noted that while the March 2 deposit was posted at the bank on March 7, "mysteriously," the later deposit for the business date of March 3 was actually posted at the bank on March 6, a day earlier.

{¶9} Sovrizal testified regarding a practice known as "rolling deposits," wherein a manager, using the two days in which to make a deposit, would take a deposit and then use funds from the next deposit to pay back the deposit he took. He explained that "even though it looks like money is being deposited for that business date, it's really not funds from that business date. It was funds that are taken from other days to make that deposit good." Recognizing "a bigger issue" with the deposit log in this particular store, Sovrizal then contacted the store's loss

prevention department. Loss prevention instructed Sovrizal to gather all of the facts concerning the missing deposits and to "secure everything" in order to continue the investigation.

{¶10} On March 7, Sovrizal met with loss prevention and he spoke with Clemm about the missing deposits. Clemm told Sovrizal that it was a banking error and the bank had all of the deposit slips in question. Thereafter, loss prevention permitted Clemm to retrieve the deposit slips from the bank in order to rectify the situation. Sovrizal testified that he followed Clemm to the bank, saw him park in the gas station parking lot adjacent to the bank, and watched Clemm sit in his car for approximately twenty minutes. Clemm then proceeded to go inside the bank, and he returned to his car approximately ten minutes later. When Clemm returned to the store, he did not have the missing deposit slips.

{¶11} Clemm, who testified on his own behalf, denied stealing money from the Dollar Store. He admitted, however, that money was missing on March 1 and deposits were missing on March 6 and that he completed the paperwork for those deposits. He also admitted that he completed the deposit log in his own fashion, it was "sloppy," and it was done on one particular day (not at the time each deposit was made) because of an impending audit:

> Every Saturday I went to the office and sat down and this log was filled out * * * because * * * one of the things that our store was audited on was whether or not this was filled out.
>
> So * * * anywhere that there was a signature issue or missing, which happened, someone would fill out any part of this and not have their signature here, I filled in all the blanks. A column here, removed from the store, usually it was me. But I just signed down the line every Saturday.
>
> This is just one of the many reports that when we knew or believed that we would undergo an audit, someone — we would gather all the paperwork, fill in all the blanks and sign all the — you know, put all the signatures and everything in the right place.

Clemm acknowledged that he would sign the deposit log even if he did not physically remove the money from the store. He admitted on cross-examination, however, that "it was a very sporadic process with filling it out" and he would sometimes complete the log in the middle of the week if he received a call from Sovrizal regarding a deposit or if he was expecting an audit.

{¶12} In an effort to explain the lack of verification of the March 1 deposit of $2,210.97, Clemm offered that the deposit log was incomplete because "[w]e were running so far behind with the deposits * * * there was a huge lag time from the time we actually made the deposits until we got accurate information from the bank * * *." He explained that it is possible that he "took a bunch of bags to the bank, [only] to find out that deposits were left in the safe." When asked about the missing deposit on cross-examination, Clemm stated that "[t]here were times where you would miss an entire deposit * * * and I would have filled out this [deposit log], but we, in fact, found that deposit days later." Clemm admitted that the signature next to this March 1 deposit in the "removal from store" section was his signature.

{¶13} Clemm further testified that, while he was aware of the Dollar Store's company policy regarding preparing deposits and taking deposits to the bank, he did not follow company policy in this regard, despite acknowledging that the policy was in place to protect the assets of the company. He agreed that his system of handling the store's money had "big issues." He testified, however, that the store he managed "required some adjustments because of special circumstances," and he "followed the way [he] was taught."

Assignments of Error

I. The verdict was not supported by competent sufficient evidence in derogation of William Clemm's right to due process, as protected by the Fourteenth Amendment to the United States Constitution.

II. William Clemm was rendered ineffective assistance of counsel.

Sufficiency of the Evidence

{¶14} In his first assignment of error, Clemm argues that the state failed to provide sufficient evidence upon which to convict him of theft.

{¶15} When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶16} Clemm was convicted of theft, in violation of R.C. 2913.02(A)(2), which provides that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * (2) [b]eyond the scope of the express or implied consent of the owner or person authorized to give consent." Under R.C. 2901.22(B), "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature."

{¶17} Clemm was also convicted of theft, in violation of R.C. 2913.02(A)(3), which provides that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [b]y deception." Deception is defined as

> knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

R.C. 2913.01(A).

{¶18} Here, the evidence demonstrated that Clemm, as store manager, was aware of the store policy on handling money and making timely deposits, including maintaining the deposit log. Store managers were not permitted to alter company policy on money handling. Contrary to company policy, Clemm created his own system of completing the deposit log and making the deposits. He testified that he would take "a bunch of bags" to the bank and would often miss deposits, which violated the store's policy. He acknowledged that he would complete the deposit log only once every week or when he knew the store would be audited, not within two days of the store's sales, as company policy mandated.

{¶19} The evidence also demonstrated that the manner in which several deposits were made were problematic, or "mysterious," and in direct contravention of company policy. For example, the March 2 deposit was posted at the bank on March 7, while the March 3 deposit was actually posted on March 6, a day before the March 7 posting.

{¶20} Moreover, Clemm specifically acknowledged that money was missing on March 1 and a deposit was missing on March 6. He also acknowledged his signature on the deposit log for March 1, indicating that he removed the deposit from the store on that date. The March 1 deposit was never verified by the bank as being deposited, and the money remains missing. Additionally, Clemm's signature is on the deposit log for the first deposit of March 6. The evidence demonstrates that the second deposit, however, was never made, and those funds remain missing.

{¶21} Viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found, beyond a reasonable doubt, that Clemm knowingly obtained or exerted control of the monies beyond the scope of Dollar General's consent where he developed his own admittedly "sloppy" manner of record-keeping in direct violation of company policy. The trier of fact could also reasonably infer that Clemm knowingly obtained or exerted control of the monies by deception by recording deposits only once per week or when he was expecting to be audited and depositing several deposits at a time that were non-sequential and often turned up missing, even if temporarily.

{¶22} Clemm's first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶23} In his second assignment of error, Clemm argues that he was rendered ineffective assistance of counsel due to trial counsel's failure to suggest an *Alford* plea in order that he may maintain his innocence.

{¶24} In order to establish a claim of ineffective assistance of counsel, Clemm must prove (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio, every properly licensed attorney is presumed to be competent, and therefore, a defendant claiming ineffective assistance of counsel bears the burden of proof. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶25} Counsel's performance will not be deemed ineffective unless and until the performance is proven to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Iacona*, 93 Ohio St.3d 83,

105, 752 N.E.2d 937 (2001). Furthermore, decisions on strategy and trial tactics are generally granted wide latitude of professional judgment, and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. Ashtabula No. 2005-A-0082, 2006-Ohio-6531, ¶ 35, citing *Strickland*. More specifically, trial counsel's tactical decisions in the plea bargaining process are generally immune from ineffective assistance of counsel claims. *State v. Hartley*, 3d Dist. Union No. 14-11-29, 2012-Ohio-4108, ¶ 21, citing *State v. Staten*, 7th Dist. Mahoning No. 03-MA-187, 2005-Ohio-1350.

{¶26} A guilty plea that is made contemporaneously with claims of innocence is known as an *Alford* plea. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). This plea can only be accepted once the trial court has inquired into the factual basis surrounding the charges in order to determine whether the defendant was making an intelligent and voluntary guilty plea. *State v. Corbett*, 8th Dist. Cuyahoga No. 99649, 2013-Ohio-4478, ¶ 6, citing *Alford*. The purpose of entering an *Alford* plea "is to avoid the risk of a longer sentence by agreeing to plead guilty to a lesser offense or for fear of the consequences of a jury trial, or both." *State v. Bailey*, 1st Dist. Hamilton No. C-030916, 2004-Ohio-6427, ¶ 7.

{¶27} We find that there is no evidence in the record to show that Clemm was prejudiced by counsel's failure to advise him of the possibility of an *Alford* plea or that he was prejudiced by failing to pursue an *Alford* plea. Here, Clemm was convicted of theft and received a sentence of one year of community control. First, the record does not demonstrate that had Clemm been advised of the possibility of an *Alford* plea, he would have agreed to plead guilty. Further, had Clemm engaged in an *Alford* plea, he would still have been convicted of the charges. And Clemm has failed to show that had he entered an *Alford* plea, he would have pleaded to a lesser offense or received a shorter sentence. In fact, the record shows that Clemm was offered an

opportunity to be entered into a diversion program or enter a plea of guilty to a misdemeanor theft with an agreement to pay restitution prior to trial; however, Clemm opted to proceed with a trial and risk the consequences.

{¶28} Because Clemm has failed to demonstrate that, were it not for counsel's errors, the result of the proceedings would have been different, he has failed to establish a claim of ineffective assistance of counsel. Clemm's second assignment of error is overruled.

{¶29} Judgment 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 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.

_____

TIM McCORMACK, JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR