[Cite as *State v. Linville*, 2017-Ohio-101.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104359

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TENNIS LINVILLE, III

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-601667-A

BEFORE: Laster Mays, J., McCormack, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: January 12, 2017

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant, Tennis Linville, III ("Linville"), appeals his sentence and asks this court to reverse the decision of the trial court and remand for resentencing. In addition, Linville asks this court to vacate the vehicle forfeiture and order the return of his vehicle. We affirm in part, reverse in part, and remand to the trial court.

{¶2} After pleading guilty to one count of aggravated vehicular assault, a fourth-degree felony in violation of R.C. 2903.08(A)(2)(b), and one count of driving while under the influence ("DWI"), a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(f), Linville was sentenced to 18 months imprisonment and a fine of $250 and court costs on the aggravated vehicular assault count. He was further sentenced on the DWI to a $1,075 fine plus court costs, and 180 days in jail that were suspended. The court also imposed restitution in the amount of $21,920 and advised Linville that upon release from prison, he would be supervised by the Adult Parole Authority for up to three years. Linville's driver's license was suspended for three years, and the court ordered the forfeiture of his vehicle.

I. Facts

{¶3} On November 7, 2015, Linville, while driving under the influence of alcohol, rear-ended another vehicle. In the vehicle was the victim and his son who both suffered injuries. The victim had three broken ribs on his left side, fragments of broken bones in his right knee, three dislocated disks in his lower spine, and four broken disks on the top

of his spine. The victim testified that as a result of his injuries, he has been unable to work, and has suffered economic harm of $21,920.

{¶4} During the sentencing, Linville took full responsibility for his actions and apologized to the victim and his son. Linville's attorney then began to address the court and was interrupted by the trial judge. The judge stated:

> COURT: After being at the police station for two hours, he tested positive at .20.
>
> ATTORNEY: Yes, Your Honor.
>
> COURT: They didn't test him for two hours.
>
> ATTORNEY: Right. Two hours 17 minutes, I believe, Your Honor.
>
> COURT: That's a long time. Time enough to clear up.
>
> ATTORNEY: It's a while.
>
> COURT: That means they got a weakened test result and it was still at a .2. He was there for two hours before they even tested him.

(Tr. 14.)

{¶5} The court then went on to discuss Linville's history with drunk driving, stating that he had two prior convictions for driving under the influence of alcohol and driving with a controlled substance in the vehicle. The court sentenced Linville to 18 months imprisonment, $21,920 restitution, and a period of postrelease control up to three years. The court also ordered six points on Linville's driver's license , a three-year driver's license suspension, and forfeiture of his vehicle. As a result, Linville has filed this timely appeal and assigns two errors for our review:

I. Appellant received ineffective assistance of counsel when his counsel failed to challenge an assumption relied upon by the trial court.

II. The trial court erred when it ordered the forfeiture of appellant's vehicle when it lacked authority to do so.

II. Ineffective Assistance of Counsel

A. Standard of Review

{¶6} In an appellate review,

> Reversal of a conviction for ineffective assistance of counsel requires a defendant to show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
>
> Defense counsel's performance must fall below an objective standard of reasonableness to be deficient in terms of ineffective assistance of counsel. *See State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Moreover, the defendant must show that there exists a reasonable probability that, were it not for counsel's errors, the results of the proceeding would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 1998 Ohio 363, 693 N.E.2d 772 (1998).

State v. Jones, 8th Dist. Cuyahoga No. 102260, 2016-Ohio-688, ¶ 14.

{¶7} In addition,

> To establish ineffective assistance of counsel, a defendant must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different. *Strickland* at 687-688, 694; *Bradley* at paragraphs two and three of the syllabus."

Id. at ¶ 15.

{¶8} Also,

> In evaluating a claim of ineffective assistance of counsel, a court must give great deference to counsel's performance." *Strickland* at 689. 'A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.' *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69."

Id. at ¶ 16.

B. Law and Analysis

{¶9} In Linville's first assignment of error, he argues that he received ineffective assistance of counsel when his counsel failed to challenge an assumption relied upon by the trial court. Linville asserts that the trial judge was incorrect in making the statement "that means they got a weakened test result and it was still at .2." (Tr. 14.) Linville asserts that this statement was used as a factor in sentencing that prejudiced him. He argues that his counsel should have objected to the court's statement because his blood alcohol level, could have been lower at the time of arrest, than when the police tested it. Linville argues that by not objecting or correcting the court's statement, his counsel was ineffective. We disagree. "[T]he failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 103. *See also State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988); *State v. Gumm*, 73 Ohio St.3d 413, 428, 1995 Ohio 24, 653 N.E.2d 253 (1995).

{¶10} Linville has not shown where his counsel's performance was deficient. However, even if we agree with Linville that counsel's performance fell below the objective standard of reasonableness, he still has failed to demonstrate how counsel's

deficiency prejudiced him. The record reveals that the court spent little time discussing Linville's blood alcohol level and more time admonishing him for his prior DUI convictions. The court read into the record a letter written by the victim and listened to an extensive recitation of the facts and the impact the accident had on the victim and his son. We find that Linville has not effectively demonstrated that he was prejudiced by his trial counsel's performance, we overrule Linville's first assignment of error.

III. Forfeiture of Personal Property

A. Standard of Review

{¶11} "A challenge based on a defect in a specification is effectively a challenge to an indictment." *State v. Schmidt*, 2014-Ohio-758, 9 N.E.3d 458, ¶ 7 (3d Dist.). *See State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 60-61 (reviewing a defendant's challenge to a specification under Crim.R. 12 standard for defenses and objections based on defects in the indictment).

{¶12} The standard of review for this defective-indictment case is plain error. *State v. Andera*, 8th Dist. Cuyahoga No. 92306, 2010-Ohio-3304, ¶ 15.

> Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights.

State v. Jones, 8th Dist. Cuyahoga Nos. 103290 and 103302, 2016-Ohio-7702, ¶ 92.

B. Law and Analysis

{¶13} In Linville's second assignment of error, he contends that the trial court erred when it ordered the forfeiture of Linville's vehicle when it lacked authority to do.

> Property is not subject to forfeiture in a criminal case unless the indictment, count in the indictment, or information charging the offense specifies, to the extent it is reasonably known at the time of filing, the nature and extent of the alleged offender's interest in the property, a description of the property, and, if the property is alleged to be an instrumentality, the alleged use or intended use of the property in the commission or facilitation of the offense. The specification shall be stated at the end of the body of the indictment, count, or information and shall be in substantially the following form:
>
> "SPECIFICATION (or SPECIFICATION TO THE FIRST COUNT). The grand jurors (or insert the person's or prosecuting attorney's name when appropriate) further find and specify that (set forth the alleged offender's interest in the property, a description of the property subject to forfeiture, and any alleged use or intended use of the property in the commission or facilitation of the offense)."

R.C. 2941.1417(A).

{¶14} The indictment did not contain this specification. The state concedes that forfeiture was not in the indictment or part of the plea. Therefore, it was improper for the trial court to order the forfeiture of Linville's vehicle. *See State v. Woods*, 5th Dist. Licking No. 12-CA-19, 2013-Ohio-1136, ¶ 44 ("Where the statutory requirements for forfeiture have not been met, we have no choice but to reverse the decision of the trial court and remand for further proceedings.") The state incorrectly argues that Linville must file an action in replevin. The state cites *State v. Sherrills*, 8th Dist. Cuyahoga No. 86478, 2006-Ohio-1074 to support their assertion. However, this case is only relevant if the court had already ordered the return of Linville's vehicle, and it was not returned to him. *See Sherrills* at ¶ 13 (the appellant argues that there was no compliance with the

court's order that the vehicle be returned to him and the court held that the appellant should have filed an action in replevin). We find, and the state concedes, that this was an unlawful forfeiture; Linville's second assignment of error is sustained, and we order the return of his vehicle.

{¶15} Judgment is affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that the appellee and appellant split costs herein taxed.

The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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.

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

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ANITA LASTER MAYS, JUDGE

TIM McCORMACK, P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY