[Cite as *State v. Edwards*, 2009-Ohio-3558.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JASON D. EDWARDS Appellant	C. A. No. 24546 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 08 2793

DECISION AND JOURNAL ENTRY

Dated: July 22, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Jason Edwards, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On August 24, 2008, Officer Scott Robertson observed Edwards traveling on his motorcycle in excess of the posted speed limit while heading north on Interstate 77. At a point where traffic slowed, Officer Robertson was able to approach Edwards' motorcycle. He activated the lights and sirens on his cruiser in an attempt to stop Edwards. Edwards then changed lanes and accelerated well beyond the posted speed limit. Upon pursuing Edwards further and nearing his motorcycle for a second time, Edwards continued driving, accelerating even more. Edwards stopped approximately two miles later, near the cruiser of a back-up officer who had entered the highway to assist Officer Robertson.

{¶3} Based on the foregoing conduct, Edwards was indicted for failure to comply with the order or signal of a police officer while causing a substantial risk of serious physical harm to persons or property, a third-degree felony, in violation of R.C. 2921.331(B) with a criminal forfeiture specification under R.C. 2941.1417; and possession of marijuana, a minor misdemeanor, in violation of R.C. 2925.11(A)(C)(3). Edwards waived his right to a jury trial and the matter proceeded to a bench trial on November 19, 2008.

{¶4} On the day of trial, Edwards pleaded guilty to misdemeanor possession of marijuana. At that same time, the State dismissed the criminal forfeiture specification without prejudice and the bench trial went forward on the remaining count. The trial court found Edwards guilty and sentenced him to one year incarceration, suspended on conditions, one of which was the mandatory loss of driving privileges for three years. Edwards now appeals from his convictions asserting three assignments of error for our review.

II

Assignment of Error Number One

"THE APPELLANT'S TRIAL COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL ALL TO THE PREJUDICE OF APPELLANT."

{¶5} In his first assignment of error, Edwards argues that his counsel was ineffective for failing to file a motion to suppress statements he made to police. Edwards further alleges that his counsel was ineffective based on: (1) his "fail[ure] to object at the introduction of wrongful expert testimony" from Officer Robertson; (2) his failure to challenge whether Officer Robertson's lights and sirens were working properly; (3) his admission during opening statements that Edwards was "exceeding the speed limit"; and (4) his questions to Edwards on direct examination as to the speed he was traveling during Officer Robertson's pursuit. We disagree.

{¶6} To prevail on a claim of ineffective assistance of counsel, Appellant must meet the two-prong test established in *Strickland v. Washington* (1984), 466 U.S. 668, 687.

> "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." *Strickland*, 466 U.S. at 687.

The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. To that end, we have stated that "debatable trial tactics do not give rise to a claim for ineffective assistance of counsel." *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶45, quoting *In re Simon* (June 13, 2001), 9th Dist. No. 00CA0072. In order to demonstrate prejudice, the defendant must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. Further, an appellate court need not analyze both prongs of the *Strickland* test if it finds that Appellant failed to prove either. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶7} First, Edwards asserts, without any supporting explanation or analysis, that his counsel should have filed a motion to suppress. Edwards does not identify whether it was his alleged statements to police at the time of his arrest or the written statements he later gave at the police station which should have been suppressed. We note, however, that the "[f]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel." *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384. "[I]n order to demonstrate deficient performance, [the defendant] must establish that a

basis existed to suppress [the evidence]." *State v. Taylor*, 9th Dist. No. 24054, 2008-Ohio-5238, at ¶3, quoting *State v. Adams*, 103 Ohio St.3d 508, 515, 2004-Ohio-5845, at ¶35. Having failed to identify what statements should have been suppressed, aside from failing to identify any basis upon which his statements could have been properly suppressed, Edwards has not demonstrated how his counsel was deficient in this regard. See *Taylor* at ¶3, 12.

{¶8} Next, we consider Edwards' remaining arguments as to Officer Robertson's testimony, the proper working order of the police cruiser's lights and sirens, and his counsel's statements during opening argument and direct examination. Though Edwards asserts that his counsel was ineffective in either permitting or not challenging the foregoing testimony, he does so by merely restating the testimony adduced by counsel at trial. He does not support his alleged error with any analysis of how the admission of such testimony constitutes deficient performance by counsel, nor does he direct us to any authority in support of his contentions of the same. App.R. 16(A)(7). Moreover, he fails to identify how Officer Robertson's testimony constituted "wrongful expert testimony" or how the outcome of his trial would have been any different but for the admission of the identified testimony. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶9} Finally, it is clear from the transcript that, although Edwards conceded on direct examination that he was speeding at the time of his arrest; he likewise maintained throughout his testimony that he was not doing so in an attempt to flee from Officer Robertson. Instead, he testified that he was speeding because he had lost track of his friends, who were also driving motorcycles in the area on that same day, and that he pulled over as soon as he saw Officer Robertson's lights and heard his sirens. Thus, its appears it was a calculated defense strategy to have Edwards admit that he was speeding, in anticipation that his perceived honesty would

bolster his testimony that he was not fleeing from police and that he did, in fact, stop once he realized he was being ordered to do so. That "[c]ounsel chose a strategy that proved ineffective, [while there may have been] another and better strategy available[,] does not amount to a breach of an essential duty to his client." *State v. Williams*, 9th Dist. No. 24169, 2009-Ohio-3162, at ¶37, quoting *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Thus, we "cannot say that counsel was ineffective simply because the trial strategy proved unsuccessful." *State v. McCoy* (Jan. 30, 2002), 9th Dist. No. 20656, at *4, quoting *State v. Frazier* (1991), 61 Ohio St.3d 247, 255. Accordingly, Edwards' first assignment of error is without merit.

Assignment of Error Number Two

> "THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AS (sic) NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶10} In his second assignment of error, Edwards argues that there was no evidence that his conduct constituted a "substantial risk of serious physical harm to persons or property." He maintains that the journal entry also supports this conclusion because it states he is guilty of "failure to comply with order or signal of police" and omits any reference to his guilt in relation to the penalty enhancement of "substantial risk *** to persons or property" which makes his conviction a third-degree felony. Thus, Edwards argues that without such evidence at trial and statement in his sentencing entry, he should be convicted of only first degree misdemeanor for his failure to comply. We disagree.

{¶11} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether

the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In *State v. Roberts*, this Court explained:

> "[S]ufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Accordingly, we address Edwards' challenge to the weight of the evidence first, as it is dispositive of his claim of sufficiency.

{¶12} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶13} A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary

power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶14} It is a violation of R.C. 2921.331(B) to "operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop." If in doing so "the offender cause[s] [] substantial risk of serious physical harm to persons or property[,]" the offense is a third-degree felony. R.C. 2921.331(C)(5)(a)(ii). "Substantial risk" is defined as "a strong possibility *** that a certain result may occur or that certain circumstances may exist." R.C. 2901.01(A)(8). "Serious physical harm to persons" is defined to include:

> "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> "(b) Any physical harm that carries a substantial risk of death;
>
> "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." R.C. 2901.01(A)(5).

Under R.C. 2901.01(A)(6), "serious physical harm to property" is defined as harm to property that "[r]esults in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace; [or] [t]emporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time."

{¶15} The State's only witness at trial was Officer Robertson. He testified that at approximately 1:30 p.m. on Sunday, August 24, 2008, while he was monitoring traffic from a

stationary position at the top of the Ridgewood Road entrance ramp to Interstate 77, he observed Edwards traveling on his motorcycle at approximately 70 – 75 miles per hour. He then entered the highway in an attempt to stop Edwards and warn him about his excessive speed, although he was unsure if he could catch up to him given the speed at which he was travelling. Because traffic "started to back up" near the intersection of Interstate 77 and Route 21, Officer Robertson was able to close in on Edwards, who was in the right-hand lane of traffic at that point. Officer Robertson testified that, until the point when he neared Edwards on the highway, he had not activated his lights or sirens because based on his experience, "if [a person on a motorcycle] see[s] your lights *** or hear[s] your siren, they're so far ahead of you that you'll never catch up."

{¶16} Officer Robertson testified that he was in the left-hand lane when traffic slowed and Edwards switched lanes into that same lane, positioning himself in front of the police cruiser. According to Officer Robertson, Edwards then "accelerated rapidly to well over 100 [miles per hour]. That's when I activated my lights and siren in an attempt to stop [Edwards'] motorcycle and that's when the pursuit began." Edwards did not slow or stop in response to Officer Robertson's lights and sirens. Officer Robertson radioed into his dispatcher that he had a motorcycle fleeing on the highway just south of the Route 18 exits. Though he was well behind Edwards again, Officer Robertson observed him switch lanes, slow to approximately 60 – 65 miles per hour, and "downshift the motorcycle in an attempt to either get off or travel down the [right-hand] lane again." Edwards did not leave the highway at either of the exit ramps. Instead, when Officer Robertson switched lanes again and neared to within "probably two car lengths behind him[,]" Edwards "took off again" and "accelerated rapidly to over 100 [miles per hour] again" despite the cruiser's lights and sirens behind him.

{¶17} Officer Robertson continued to pursue Edwards as he travelled north on the interstate. Edwards continued accelerating and passed a car on the right, then moved to the center lane. Based on Officer Robertson's call into dispatch, a Bath police cruiser entered the highway at the next entrance ramp with its lights activated. Officer Robertson testified that Edwards started to slow and pulled over under the bridge at Ghent Road at about the same time Officer Robertson was able to see the Bath police cruiser ahead of him and position himself behind Edwards' motorcycle once again. Officer Robertson further testified that he "was going to terminate the pursuit at that point[,] *** [b]ecause it's not worth a civilian's life or even Mr. Edwards' life to chase somebody on a motorcycle for a traffic violation."

{¶18} Upon cross examination, Officer Robertson testified he had his lights and sirens activated for approximately 2.3 miles before successfully stopping Edwards under the bridge near the highway's ramps. He admitted that Edwards did not run any traffic lights or stop signs, did not avert any police barrier, and was not cited for any other traffic violations other than the failure to comply which was the subject of the trial. He further testified that, at the time of the stop, Edwards admitted that he was speeding but informed the officers at the scene that he would never flee from police. Officer Robertson stated that he has been a police officer for approximately 23 years and that, although he did not activate any radar device when observing Edwards, he has been trained in such devices as well as in how to pace the speed of a car, which is how he visually estimated Edwards' speed that day. He also testified that, though his pursuit travelled in and out of Fairlawn's jurisdiction, he did observe Edwards travelling at approximately 100 miles per hour while within the Fairlawn city limits and noted that location on the maps introduced into evidence by the State.

{¶19} Edwards testified in his own defense, stating that he and several friends were travelling from Canton to Cleveland on their motorcycles that afternoon when he got separated from the others. He was not sure if the others were ahead of or behind him and that he was confused as to where he was, as he had never made that trip on a motorcycle by himself before. He testified that the first time he was aware that there was an officer behind him was at mile marker 138 near the Ghent Road bridge where he stopped. Upon noticing the lights and sirens, he "pulled over immediately." Edwards testified that he was wearing a full face helmet, but that it "impairs your peripheral vision and your hearing." He also stated that the safest way for him to position himself on the motorcycle is to have his legs pointing backward and torso pointing forward, but that as a result, his arms obstruct his ability to look in his rear view mirrors. He admitted that he "probably went 100 [miles per hour] or plus" but repeatedly denied that he would ever willfully flee from police, stating that he "stopped immediately when [he] heard *** the sirens [and until then] did not even know there was an officer behind [him]."

{¶20} Upon cross-examination, Edwards testified that he was "trying to find [his] friends *** but be safe [] at the same time" and noted that he "was being careful *** switching lanes, using turn signals," and "wasn't going 100 miles an hour constantly." Edwards did not recall pulling into the lane in front of Officer Robertson's cruiser and repeatedly stated that he never saw the cruiser's lights or heard its sirens until he pulled over under the Ghent Road bridge.

{¶21} Based on the foregoing, the State produced ample evidence to convict Edwards of failure to comply with a police order in a manner that posed a substantial risk of serious physical harm to persons or property. The evidence reveals that Edwards was travelling at speeds that were 10 – 20 miles per hour above the posted limit in mid-day weekend traffic, which at one

time was congested and slowed. He was frequently changing lanes while repeatedly accelerating to speeds in excess of 100 miles per hour, and did so after Officer Robertson had his lights and sirens activated ordering him to stop. Despite Edwards' testimony that he did not notice the police cruiser's lights or sirens until the point at which he did stop, we have repeatedly stated that "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony" in a bench trial. *State v. Abel*, 9th Dist. No. 08CA009506, 2009-Ohio-2516, at ¶15, quoting *State v. Cremeans*, 9th Dist. No. 22009, 2005-Ohio-261, at ¶6. Accordingly, we defer to the judgment of the trier of fact who found Officer Robertson's testimony more credible than that of Edwards.

{¶22} Furthermore, though Edwards' conduct may not have resulted in any harm to a person or property, we consider speed in excess of 100 miles per hour as adequate evidence that a substantial risk of such harm existed. *State v. Garrard*, 10th Dist. Nos. 06AP-653 & 06AP-685, 2007-Ohio-1244, at ¶44 (concluding that estimates of speed can support a conviction of substantial risk of serious physical harm to persons or property under R.C. 2921.331(C)(5)(a)(ii)). Given the rate of speed, time of day, traffic in the area, and length of the pursuit, that no harm occurred as a result of his actions "speaks to nothing more than [Edwards'] good luck and the careful driving on the part of other motorists on the road[.]" *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶19 (affirming a conviction under R.C. 2921.331 subject to enhancement where the defendant was travelling 10 – 15 miles per hour over the posted speed limit, ran two stop signs, and drove down the center of the road in a residential area while being pursued by police). Thus, we cannot conclude that the trial court lost its way and created a manifest miscarriage of justice in convicting Edwards of failure to comply with a police order

subject to a penalty enhancement for creating a substantial risk of serious physical harm to persons or property.

{¶23} Because we have determined that Edwards' conviction was not against the weight of the evidence, we need not address his challenge to the sufficiency of the same. See *Roberts*, supra, at *2. Accordingly, Edwards' second assignment of error lacks merit.

Assignment of Error Number Three

> "THE TRIAL COURT'S FAILURE TO FIND IN ITS JOURNAL ENTRY THAT DEFENDANT IS GUILTY AS TO SPECIFIC FINDINGS AS TO HARM TO PERSONS OR PROPERTY REQUIRE THAT APPELLANT BE FOUND GUILTY AS SET FORTH IN O.R.C. 2921.331(B) AND (C)(2) OF A MISDEMEANOR OF THE FIRST DEGREE."

{¶24} In his third assignment of error, Edwards argues that the journalization of his conviction omits a finding of guilt as to the penalty enhancement that he caused a substantial risk of serious physical harm to persons or property when he failed to comply with the police. Based on this omission, he asserts that he can only be convicted of and sentenced under the first degree misdemeanor charge.

{¶25} Edwards' cites to no authority for the proposition that a trial court's failure to specify in its journal entry that the defendant was found guilty of a penalty enhancement requires this Court to reverse his conviction. See App.R. 16(A)(7). This Court has previously stated that an "[a]ppellant bears the burden 'to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record.'" *State v. Fry*, 9th Dist. No. 23211, 2007-Ohio-3240, at ¶55, quoting *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3; App.R. 16(A)(7). Edwards has failed to meet this burden on appeal. *Fry* at ¶55. Moreover, we note that the journal entry specifically states that Edwards was found guilty of failure to comply "as contained in *** Count 1 of the Indictment [under R.C.] 2921.331(B), a felony of the

third (3rd) degree" which is consistent with the trial court's findings, incorporates the penalty enhancement contained in the indictment by reference, and is evident by a reading of the Revised Code provision cited in the journal entry. Accordingly, Edwards' third assignment of error is not well taken.

III

{¶26} Edwards' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

TONY DALAYANIS, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.