

[Cite as *State v. Cash*, 2010-Ohio-4454.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24975

Appellee

v.

KENNETH D. CASH

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 12 4209 (B)

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

CARR, Judge.

{¶1} Appellant, Kenneth Cash, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Rashan Lewis was murdered on December 20, 2008. Several individuals were indicted on criminal charges stemming from Mr. Lewis’s death. On January 6, 2009, the Summit County grand jury returned an indictment against Kenneth Cash for aggravated robbery in violation of R.C. 2911.01(A)(1)/(3), a felony of the first degree; and robbery in violation of R.C. 2911.02(A)(1)/(2), a felony of the second degree. Subsequently, on January 27, 2009, the Summit County grand jury returned a supplemental indictment charging Cash with murder in violation of R.C. 2903.02(B), a special felony; aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree; and tampering with evidence in violation of R.C.

2921.12(A)(1), a felony of the third degree. The murder and aggravated robbery charges in the supplemental indictment contained firearm specifications pursuant to R.C. 2941.145.

{¶3} A jury trial was originally set for April 8, 2009. The trial date was continued to June 1, 2009, and then later continued to August 3, 2009. On July 29, 2009, Cash, by and through counsel, filed a motion for a continuance on the basis that defense counsel would not be available due to a scheduling conflict. The case proceeded to trial as scheduled on August 3, 2009. On August 5, 2009, the State dismissed the aggravated robbery and robbery charges. That same day, the jury found Cash guilty of murder with a gun specification; aggravated robbery with a gun specification; and tampering with evidence. On August 24, 2009, Cash was sentenced to a term of fifteen years to life for the crime of murder with parole eligibility after fifteen full years; a term of five years for aggravated robbery; and a term of one year for tampering with evidence. Cash was also sentenced to two three-year mandatory sentences for the firearm specifications attached to the murder and aggravated robbery charges. The sentences for murder and aggravated robbery were imposed consecutively to each other, but concurrently to the sentence imposed for the tampering with evidence conviction. The sentences for the firearm specifications were to run concurrently to each other, but consecutively to the other sentences. The total sentence imposed was a minimum of twenty-three years.

{¶4} On appeal, Cash raises three assignments of error.

II.

ASSIGNMENT OF ERROR I

“DEFENDANT WAS PROVIDED WITH INEFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF HIS ATTORNEY’S FAILURE TO PREPARE FOR TRIAL IN A TIMELY MANNER.”

{¶5} In his first assignment of error, Cash argues that defense counsel’s lack of preparation for trial equated to ineffective assistance of counsel. This Court disagrees.

{¶6} In order to prevail on a claim of ineffective assistance of counsel, Cash must show that “counsel’s performance fell below an objective standard of reasonableness and that prejudice arose from counsel’s performance.” *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. Thus, a two-prong test is necessary to examine such claims. First, Cash must show that counsel’s performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith* (1997), 79 Ohio St.3d 514, 534, citing *Strickland*, 466 U.S. at 687. Second, Cash must demonstrate that but for counsel’s errors, there is a reasonable probability that the results of the trial would have been different. *Id.*

{¶7} The Supreme Court of Ohio has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Specifically,

“Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.” *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶8} It is well-settled 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, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Even if this Court questions trial counsel’s strategic decisions, we must defer to his judgment. *Id.* The Ohio Supreme Court has stated:

“We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.’ *** Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client.” *Id.*, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶9} In support of his assignment of error, Cash argues that trial counsel rendered ineffective assistance of counsel by failing to adequately prepare for trial. Cash notes that, “[g]enerally, experienced defense counsel recognize when a case is likely to proceed to trial.” Cash asserts that trial counsel had a “duty to properly maintain his court calendar to allow him adequate preparation time for each and every one of his cases.” Cash argues that trial counsel’s focus was on another case which resulted in inadequate preparation for trial in this matter.

{¶10} On July 29, 2009, defense counsel for Cash filed a motion for a continuance of trial on the basis that defense counsel was representing a different client in a case which was scheduled to go to trial on July 30, 2009. Defense counsel explained in the motion that the trial in the other case was originally scheduled for July 27, 2009, but had been rescheduled. While the defense counsel stated in the motion that he “[would] not be available due to a scheduling conflict[,]” defense counsel did not specifically state that he would not be prepared to proceed in Cash’s case. A review of the transcript reveals that, on August 3, 2009, the following exchange took place between the trial judge and defense counsel prior to the commencement of trial:

“THE COURT: Is there anything that we need to talk about before we bring the jury out?”

“MR. WELLS: Well, Your Honor, I talked to your bailiff, and I did file a motion to continue as I was in trial last Thursday and Friday. It was originally scheduled for Monday and Tuesday. Judge Stormer moved it to Thursday and Friday so it clogged my schedule a little bit.

“Obviously I filed – wouldn’t file a motion to continue unless I felt it was necessary, but it’s my understanding that you denied that motion, so –

“THE COURT: All right. And we’re ready, prepared to – ready to go forward today.”

{¶11} In support of his assignment of error, Cash points to the aforementioned comments of counsel prior to the commencement of trial, as well as the arguments made in support of the motion for continuance itself, as evidence that defense counsel was not prepared for trial. Cash also notes that this case was delayed further on August 3, 2009, in part, because defense counsel had to step out of the courtroom to hear the verdict in his other case. Cash has not pointed to any evidence in the record, however, which would tend to show that the performance of defense counsel fell below an objective standard of reasonableness. Defense counsel’s comment that he “felt it was necessary” to file a motion for a continuance is not akin to making an admission that he was unable to render competent representation. While counsel stated in his motion that he had a scheduling conflict due to another trial, he did not indicate that he was not prepared to represent Cash. Furthermore, Cash makes the general assertion that “[t]he only real evidence inculcating Cash was the testimony of the co-defendants.” While Cash has established that trial counsel was occupied with a trial in a different case during the week prior to the trial in this case, he has not demonstrated that but for counsel’s errors, there is a reasonable probability that the results of the trial would have been different. Cash has not identified any specific instances where defense counsel’s tactics and strategy would have been different but for a lack of preparation. We, therefore, overrule the first assignment of error.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN FAILING TO RULE ON THE CONTINUANCE MOTION AND IN PROCEEDING WITH THE TRIAL DESPITE DEFENSE COUNSEL’S REQUEST FOR A CONTINUANCE SO THAT HE COULD PROPERLY PREPARE TO REPRESENT HIS CLIENT.”

{¶12} In his second assignment of error, Cash argues that the trial court erred by not ruling on his motion for a continuance prior to the commencement of trial. This Court disagrees.

{¶13} The trial date in this case was continued several times and was set to go forward on August 3, 2009. As noted above, defense counsel filed a motion for a continuance of trial on July 29, 2009. The basis for the motion was that defense counsel was representing a different client in a case which was scheduled to go to trial on July 30, 2009. In his motion, defense counsel noted that Cash was “in agreement with the continuance of his trial” and waived his speedy trial rights.

{¶14} The record indicates that the trial court did not formally rule on the motion. However, “this Court has previously held that ‘when a trial court fails to rule upon a [pretrial] motion, it will be presumed that it was overruled.’” *Bank One, N.A. v. Lytle*, 9th Dist. No. 04CA008463, 2004-Ohio-6547, at ¶18, quoting *Franco v. Kemppel Homes, Inc.*, 9th Dist. No. 21769, 2004-Ohio-2663, at n4. The discussion which took place on the record prior to the commencement of trial indicated that defense counsel had an understanding that the motion for a continuance had been denied. Nevertheless, while the trial court did not expressly deny the motion for a continuance, the trial court did not err when it failed to specifically rule on Cash’s motion for a continuance as the motion was deemed to be denied upon the commencement of trial.

{¶15} The second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE SENTENCE IMPOSED BY THE TRIAL COURT IS VOID AS IT VIOLATES THE SENTENCING STATUTE WHICH PROHIBITS A TRIAL COURT FROM IMPOSING MULTIPLE TERMS OF INCARCERATION ON TWO FIREARM SPECIFICATIONS WHEN THE UNDERLYING OFFENSES ARE PART OF A SINGLE TRANSACTION.”

{¶16} In his third assignment of error, Cash contends that the sentence imposed by the trial court is void as it violates the sentencing scheme which prohibits multiple terms of incarceration on firearm specifications. This Court disagrees.

{¶17} In support of his argument, Cash cites to R.C. 2929.71(B) for the proposition that only one three-year term of incarceration on a firearm specification shall be imposed if any of the underlying felonies were committed as part of the same act or transaction. Cash contends that because the charges in this case arose from the same transaction, the trial court’s sentence which imposed separate sentences on the firearm specifications is void. In response, the State argues that by running the sentences concurrently, Cash received only one actual term of incarceration for the firearm specifications. The Court notes that the former R.C. 2929.71 has been replaced by R.C. 2929.14(D).

{¶18} R.C. 2929.14(D)(1)(a) states:

“Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

“***

“(ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender’s person or under the offender’s control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense[.]”

{¶19} The Ohio legislature has set forth a general prohibition on imposing separate prison sentences on offenders under R.C. 2929.14(D)(1)(a) for felonies committed as part of the same act of transaction. Specifically, R.C. 2929.14(D)(1)(b) states:

“If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120 of the Revised Code. Except as provided in division (D)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.”

However, as the Eighth District has noted, a “significant exception to this general rule was enacted effective September 9, 2008.” *State v. Bonner*, 8th Dist. Nos. 93168, 93176, 2010-Ohio-2885, fn1. The exception is set forth in R.C. 2929.14(D)(1)(g), which states:

“If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies is aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (D)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.”

{¶20} In this case, Cash was convicted of murder with a firearm specification, aggravated robbery with a firearm specification, and tampering with evidence. Because Cash was convicted of murder and aggravated robbery, the trial court was required under R.C. 2929.14(D)(1)(g) to impose a prison term for each of the two most serious specifications of which Cash was convicted. By sentencing Cash to three-year terms of incarceration on each of the firearm specifications and running the sentences concurrently, the trial court complied with R.C. 2929.14(D)(1)(g).

{¶21} The third assignment of error is overruled.

III.

{¶22} Cash's three 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.

DONNA J. CARR
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

KAREN H. BROUSE, Attorney at Law, for Appellant.

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