

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1241

Appellee

Trial Court No. CR0200803832

v.

Timothy Pettaway

DECISION AND JUDGMENT

Appellant

Decided: June 18, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Andrew J. Burton, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which convicted appellant of having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. For reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Timothy Pettaway, sets forth the following four assignments of error:

{¶ 3} “I. Appellant’s First Assignment of Error: Defense counsel’s failure to rebut the State’s evidence presented at the motion to suppress hearing establishing consent to search the residence constituted ineffective assistance of counsel.

{¶ 4} “II. Appellant’s Second Assignment of Error: The trial court erred in denying the defendant’s motion to suppress on the grounds that a protective sweep properly yielded the handgun ultimately found.

{¶ 5} “III. Appellant’s Third Assignment of Error: Defense counsel’s failure to object to hearsay testimony presented at trial regarding consent to search the house for a weapon constituted ineffective assistance of counsel.

{¶ 6} “IV. Appellant’s Fourth Assignment of Error: Defense counsel’s failure to object to the admittance of the gun as State’s Exhibit 4 was ineffective assistance of counsel.”

{¶ 7} The following undisputed facts are relevant to the issues raised on appeal. On October 23, 2008, Toledo police officers were engaged in a traffic stop in North Toledo when they heard nearby gun shots. Officers immediately traveled to the vicinity of the gunfire and discovered appellant standing on a porch. Officers observed appellant holding a firearm in his right hand. When directed to drop the weapon, appellant fled into the house.

{¶ 8} Immediately following appellant's retreat into the dwelling, officers next observed him through a window running up the stairs. Additional officers arrived on the scene. The dwelling was entered with force due to the urgent safety issue. Upon entry, the officers conducted a warrantless protective sweep. Appellant was recovered and escorted outside. Several other persons, including a female and her three minor children, were also present inside the home. The woman advised the officers that she could not tell them where the gun was located because appellant would kill her. According to the reporting officer, the woman's concerns appeared credible.

{¶ 9} Officers testified that the woman occupying the premises consented to the premises being searched for the firearm. The firearm was located in an upstairs bedroom closet. It was determined to be operable.

{¶ 10} Appellant was indicted for having weapons while under disability, in violation of R.C. 2923.13(A)(3), a felony of the third degree. Appellant filed a motion to suppress. An evidentiary hearing was held on March 26, 2009. On May 18, 2009, the motion was denied. On July 19, 2009, appellant waived the right to jury trial. The case proceeded to a bench trial. Appellant was convicted of the charge and sentenced to a three year term of incarceration and a \$5,000 fine. Timely notice of appeal was filed.

{¶ 11} We will first address appellant's second assignment of error as the balance of the assignments are rooted in a common legal premise. As such, they

will be addressed simultaneously. Appellant's second assignment of error asserts that the trial court erred in denying his motion to suppress evidence. Appellant claims that the recovered firearm was not obtained as a result of the protective sweep, and thus required a warrant or consent to search in order to comply with the Fourth Amendment.

{¶ 12} It is well-established that when considering a motion to suppress, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve factual questions and evaluate witness credibility. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. It is similarly well-established that an appellate court will not disturb a trial court's motion to suppress judgment so long as it is supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594.

{¶ 13} We note at the outset, the trial court determined that the woman gave consent to search the residence. The determination was based on testimony from officers at the scene which was found to be more competent and credible than the conflicting testimony of appellant and his girlfriend. While this court recognizes the discrepancies between testimonies, the trial court is properly given deference as the finder of fact. Further, the record reveals that the officers limited their activity to the proper role and scope of discovering and removing a serious and potential danger, a loaded handgun. The officers possessed the reasonable belief that in order to create a safe environment, not only for themselves but for the

occupants as well, it was necessary to retrieve the recently discharged firearm. We find that the firearm was discovered within the scope of the protective sweep. Accordingly, we find appellant's second assignment of error not well-taken.

{¶ 14} Appellant's first, third, and fourth assignments of error are commonly rooted in the underlying legal premise that appellant was denied effective assistance of counsel. These assignments respectively assert that defense counsel's failure to rebut evidence presented at the motion to suppress hearing, failure to object to hearsay testimony presented at trial, and failure to object to the admittance of the firearm constituted ineffective assistance of counsel.

{¶ 15} A claim of ineffective assistance of counsel is reviewed under the two-part test found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2520, 80 L.Ed.2d 674. To prevail on the claim, appellant must show: "(1) that the defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to the defendant's case." *State v. McGee*, 7th Dist. No. 07 MA 137, 2009-Ohio-6397, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. See, also, *Strickland*, supra, at 694.

{¶ 16} We have carefully reviewed and considered appellant's claims of deficient representation and find no evidence that appellant was prejudiced by counsel's alleged missteps. Counsel's failure to rebut evidence at the motion to suppress hearing was not prejudicial given our finding that the protective sweep

was justified. Similarly, on the same basis as noted above, counsel's failure to object regarding the issue of consent to the search we have determined was proper and not prejudicial. Finally, counsel's failure to object to the state's admission of the firearm was not prejudicial or outcome determinative given the context of a proper protective search. Wherefore, we find the first, third and fourth assignments of error not well-taken.

{¶ 17} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R.

24.

JUDGMENT AFFIRMED

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
