Not Reported in N.E.2d, 1993 WL 370823 (Ohio App. 5 Dist.)

Court of Appeals of Ohio, Fifth District, Guernsey County.

STATE of Ohio, Plaintiff-Appellee,
v.
Daniel FRANCIS, Defendant-Appellant.

No. 91-CA-06.
Sept. 3, 1993.

Criminal Appeal from Common Pleas Court, Case No. 90CR105. Affirmed.
C. Keith Plummer, Pros. Atty., Cambridge, for plaintiff-appellee.

Paul Croushore, Columbus, for defendant-appellant.

OPINION

FARMER, Judge.
*1

On September 25, 1990, the Grand Jury of Guernsey County indicted appellant, Daniel Francis. Subsequently, appellee, State of Ohio, moved and was granted permission to amend the original indictment which it did so amend. Thereafter, appellee again moved to amend the indictment. The court granted appellee's motion to amend which was unopposed as to the amendments of counts one and two, and the court took under advisement the motion to amend count three which was opposed by appellant's counsel. Said counsel then filed a motion to quash or strike the second amended indictment.

By judgment entry dated January 29, 1991, the trial court stated, “[b]y agreement of the parties, the state's motion to compel discovery along with the defendant's motion to strike are hereby settled,” allowing the case to proceed with appellant charged on the original indictment as amended.

The case came on for trial on April 15, 1993. After a one week trial, the jurors found appellant guilty on all counts.

Appellant filed a notice of appeal. We note that said appeal was dismissed by this court on January 7, 1992, for failure to file a brief after repeated extensions. On January 14, 1993, appellant filed a motion for delayed reconsideration of the dismissal of the appeal, which was granted by this court on February 11, 1993. This matter is now before this court for consideration.

Assignments of error are as follows:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ALLOWING THE CASE TO GO FORWARD ON AN INVALID INDICTMENT WHERE THE FORM AND CONTENT OF AN INDICTMENT WERE LACKING.

SECOND ASSIGNMENT OF ERROR

THE RECORD REVEALS THAT THE CONDUCT OF DEFENSE COUNSEL FELL BELOW AN OBJECTIVE STANDARD OF REASONABLE REPRESENTATION.

I

Appellant's first assignment of error claims that there was an invalid indictment lacking in form and content. At oral argument, appellant stated that he felt that this assignment was without merit and should be withdrawn. We concur.

Assignment of error one is overruled.

II

Appellant claims that his trial attorney was ineffective and that the record reveals that said defense counsel's conduct fell below an objective standard of reasonable representation to the prejudice of appellant. We disagree.

In reviewing this assignment of error, we are governed by the two-prong test enumerated in *Strickland v. Washington* (1984), 466 U.S. 668, and *State v. Bradley* (1989), 42 Ohio St.3d 136, which states the following in paragraphs two and three of the syllabus:

2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, followed.)

3. To show that a defendant has been prejudiced by counsel's deficient performance, 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.

Appellant's position is that there are numerous errors by defense counsel that satisfy the two-prong test for appellate review. We will discuss each as is pointed out in the assignment of error.

PRE-TRIAL ERRORS

Appellant argues that defense counsel failed to file a timely motion for independent analysis of an audiotape purported to be a tape of appellant and the informant. The record reveals that the cut-off date for motion filing established by the trial court after a lengthy motion hearing and continuance of the trial was April 5, 1991. Appellant's counsel filed his motion in the eleventh hour on April 5, 1991, nevertheless within the filing motion deadline.

Defense counsel explained to the trial court (T. 66-70, 75-76) the reasons for the lateness in filing the motion. The trial court rejected the motion citing that the tape had been known to defense counsel since December 1990. Appellant does not assign as error the trial court's refusal

to grant the motion. We find that defense counsel filed the motion within the cut-off date and therefore find no ineffective assistance of counsel on this issue.

Appellant argues that defense counsel did not file for a jury view timely. The motion was filed on April 9, 1991. The record clearly indicates that defense counsel offered testimony and drawings of the scene of appellant's home (through the testimony of appellant's common-law wife) and the bar, Someplace Else (through the deputies and appellant himself). We find that the error was remedied and therefore find no ineffective assistance of counsel on this issue.

The final pre-trial error cited by appellant is the increase of security in the courtroom because of a threat made against the trial court judge's family. This occurred after the noon hour during *voir dire* and before the jury was sworn. (T. 137.) Appellant complains that defense counsel should have pursued the matter. We find no evidence in the record that the threat was in any way related to the trial *sub judice* and therefore find no ineffective assistance of counsel on this issue.

TRIAL

Appellant argues that during the trial, defense counsel permitted witnesses to reference an audiotape-recording of appellant and the informant and invited the use of the tape upon rebuttal. The trial court had withheld ruling on the admissibility of the audiotape pending his decision on its relevancy balanced against its probative value. (T. 80.) After the direct testimony of appellant and during appellee's cross-examination, the trial court found that under Evid.R. 403(A), the tape could be played with a limiting and cautionary instruction to the jury. (T. 1154.) The record then notes (T. 1178) that the tape was played.

We find there is no record of the audiotape in the appeal *sub judice.* App.R. 9 states that "[p]roceedings recorded by means other than videotape must be transcribed into written form." Upon a review of the court of common pleas file, we find a purported transcript of the audiotape supplied during discovery proceedings. The trial court has properly disallowed that transcript during the course of the trial. (T. 1153.) When portions of the transcript necessary to resolve issues are not part of the record, we must presume regularity and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

Accordingly, assignment of error two is overruled.

The judgment of the Court of Common Pleas of Guernsey County, Ohio, is hereby affirmed.

SMART, P.J., and READER, J., concur.

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