

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-368
v.	:	(C.P.C. No. 08CR08-7192)
	:	
Keith A. James,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 1, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*,
for appellee.

Joseph D. Reed, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Keith A. James ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas convicting him on charges of trafficking in marijuana and possession of marijuana. For the reasons that follow, we affirm.

{¶2} On June 20, 2008, Columbus Police Detective Jerry Peters, a member of the High Intensity Drug Trafficking Awareness ("HIDTA") task force, which consists of federal, state, and local police officers working in drug interdiction, was contacted by Old Dominion Freight Lines regarding a suspicious package that was scheduled for delivery the next day. The package in question was a four by four by four foot crate. The bill of lading provided that it was to be delivered to the Joker's Wild Motorcycle Club at 378 West Park Avenue. Upon investigation, Detective Peters found that the address was nonexistent, but that there was a Joker's Wrath Motorcycle Club that was located at 368 West Park Avenue. Detective Peters testified that slight differences in the name of the addressee and in the address itself are commonly used to mislead law enforcement when shipping drugs.

{¶3} Based on that and other information, a search warrant was obtained, and the crate was opened. Inside, officers found four smaller boxes that, when opened, were found to contain a total of approximately 300 pounds of marijuana.

{¶4} The officers set up a controlled delivery for the next day, with Detective Peters driving the delivery truck while other members of the HIDTA task force conducted surveillance before and during the delivery. Appellant, Darryl Wood, and Rudolph Lynch were seen walking around the premises prior to the delivery. All three assisted with the unloading and placement of the crate. Wood signed for the shipment using the name "Will Phillips."

{¶5} After the crate was delivered, an alarm that had been placed on the crate alerted the officers that the crate had been opened. At that point, the officers entered the building and arrested appellant, Wood, and Lynch. Appellant was arrested in a

conference room that held a scale and plastic bags. After the arrest, police found in Wood's pocket a copy of a receipt showing a previous shipment delivered by Old Dominion. Appellant's name was on the receipt as the recipient. A second copy of the same receipt was subsequently found in Old Dominion's records.

{¶6} Appellant was indicted by the Franklin County Grand Jury on two counts: trafficking marijuana in an amount equal to or exceeding 20,000 grams in violation of R.C. 2925.03, and possession of marijuana in an amount equal to or exceeding 20,000 grams in violation of R.C. 2925.11, each a second-degree felony.

{¶7} Prior to the start of trial, appellant made a motion in limine seeking to exclude both of the receipts from the prior delivery that identified appellant as the recipient. The trial court sustained the motion as to the receipt found in Wood's pocket at the time of his arrest, but reserved ruling as to the receipt recovered from Old Dominion's records. During trial, the receipt found in Old Dominion's records was published to the jury, and some testimony regarding the receipt was elicited. However, when the state moved to enter the receipt as an exhibit at the conclusion of the trial, the trial court denied its admission. In its instructions to the jury, the court instructed the jury that it was only to consider the evidence regarding the Old Dominion receipt for the purpose of determining whether the shipment was delivered to the correct address.

{¶8} During trial, one of the witnesses called by the state was Duane Williams. Williams testified that after appellant was arrested, the two were incarcerated together. Williams stated that during the time they were incarcerated together, appellant told him he had been arrested for drug trafficking, described the circumstances of the arrest, and told him that he and Wood were members of the Joker's Wrath Motorcycle Club. During

presentation of his case, appellant elicited testimony from Deputy Sheriff Mandy Rennie, who testified that Williams and appellant were not incarcerated together immediately after the June 21, 2008 arrest. On rebuttal, the state recalled Deputy Rennie, who testified that, while the two were not incarcerated together at the time of the June 21 arrest, they were incarcerated in the same cell on or around July 2 and 3, 2008.

{¶9} The jury returned a verdict of guilty on both counts of the indictment.

Appellant filed this appeal, asserting three assignments of error:

I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT APPELLANT WHEN, AFTER GRANTING THE MOTION IN LIMINE FOR THE PRIOR DELIVERY DOCUMENT FOUND IN THE POCKET OF A CO-DEFENDANT, IT RESERVED RULING ON THE DUPLICATE DOCUMENT OBTAINED FROM THE FREIGHT COMPANY.

II. DEFENDANT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS THE RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO THE INTRODUCTION OF A TEXT MESSAGE AND THE PUBLICATION OF THE PRIOR DELIVERY DOCUMENT.

III. DEFENDANT APPELLANT WAS DENIED A FAIR TRIAL AS THE RESULT OF PROSECUTORIAL MISCONDUCT IN PUBLISHING INADMISSIBLE DOCUMENTS TO THE JURY AND SUBPORNING [sic] PERJURY.

{¶10} In his first assignment of error, appellant argues that the trial court erred when it granted his motion in limine to exclude the Old Dominion receipt found in Wood's pocket, but reserved ruling on that motion as to the copy of the receipt obtained from Old Dominion's records. That receipt was published to the jury, but was ultimately not entered into evidence.

{¶11} A trial court's decision on a motion in limine is a tentative, preliminary or presumptive ruling on an evidentiary issue that is anticipated to arise at trial. *State v.*

Grubb (1986), 28 Ohio St.3d 199. Because of the preliminary nature of a decision on a motion in limine, it could not have been error for the trial court to have reserved ruling on the motion pending further proceedings in the trial.

{¶12} Moreover, assuming that appellant's assignment of error can be construed as a claim that the trial court erred by allowing the receipt obtained from Old Dominion's records to be published to the jury, we find that no prejudice could have resulted from that publication. The exhibit was not entered into evidence, and therefore was not given to the jury during its deliberations. In addition, the trial court included an instruction to the jury that it was not to consider the evidence that was offered regarding the receipt for any purpose other than the issue of whether the shipment was delivered to the correct address. We must presume that juries follow the instructions that they are given. *State v. Clinkscale*, 122 Ohio St.3d 351, 2009-Ohio-2746.

{¶13} Accordingly, appellant's first assignment of error is overruled.

{¶14} In his second assignment of error, appellant argues that he was denied the effective assistance of counsel as a result of errors he alleges his trial counsel committed. In order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate that trial counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In evaluating counsel's performance, there is a strong presumption that all decisions fall within a wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343.

{¶15} Appellant argues that his trial counsel's performance was deficient in two respects. First, appellant argues that trial counsel's performance was deficient in the handling of the Old Dominion receipt with appellant's name showing as the recipient, as discussed in appellant's first assignment of error. Once the receipt had been published to the jury, trial counsel asked a number of questions about the receipt on cross-examination, which highlighted the fact that appellant's name was listed as the person who signed for the shipment.

{¶16} We cannot say that trial counsel's questions about the receipt fell outside the wide range of reasonable professional representation. It is clear from the questioning that counsel's strategy regarding the receipt was to claim that appellant's signature had been forged by Wood, and this was not an unreasonable strategy. Moreover, counsel ultimately succeeded in preventing the receipt from being entered into evidence, and the jury was instructed to limit its consideration of the evidence regarding the receipt.

{¶17} Appellant also argues that trial counsel's performance was deficient because counsel failed to object to testimony from Detective Christine Roberts regarding information she was able to retrieve from appellant's mobile phone, and then questioned Detective Roberts about that information on cross-examination. That information included a text message from a sender in California that had to do with a girl appellant had met in California and a concert. (Tr. III, 53.) Appellant argues that introduction of this evidence without objection allowed the jury to infer that appellant was involved with the drug shipment, which had originated in California, because he was in contact with someone in California.

{¶18} We cannot say that trial counsel's performance regarding the information retrieved from appellant's mobile phone was deficient. Counsel may have believed an objection would not have been successful, and in closing argument, counsel was able to argue that the lack of further investigation into the message's sender showed that the investigation was deficient. This conduct fell within the wide range of professional representation. Moreover, we cannot say that appellant was prejudiced by counsel's failure to object to introduction of the evidence obtained from appellant's mobile phone, because we cannot say that such an objection would have resulted in denial of its admission.

{¶19} Thus, appellant's second assignment of error is overruled.

{¶20} In his third assignment of error, appellant argues that he was denied a fair trial as the result of prosecutorial misconduct. In considering whether prosecutorial misconduct has occurred, we must consider: (1) whether the prosecutor's actions were improper, and (2) whether those actions prejudiced a defendant's ability to obtain a fair trial. *State v. Swisher*, 10th Dist. No. 08AP-1056, 2009-Ohio-3484, citing *State v. Smith*, 87 Ohio St.3d 424, 2000-Ohio-450; *State v. Keenan* (1993), 66 Ohio St.3d 402.

{¶21} First, appellant argues that the prosecutor acted improperly in publishing the receipt with appellant's name as the recipient that was obtained from Old Dominion's office to the jury. Appellant claims that the prosecutor should have known the document would be inadmissible, but knowingly published it to the jury. This conduct was not improper. The trial court had not ruled that the document was inadmissible at the time it was published to the jury, and had specifically reserved ruling on its admissibility at the time appellant's motion in limine was addressed.

{¶22} Next, appellant argues that the prosecutor suborned perjury by using Duane Williams' testimony regarding his conversation with appellant while the two were incarcerated. Appellant claims that the evidence showed that Williams and appellant were not incarcerated together, and that the prosecutor knew or should have known that the testimony was false. However, after Deputy Rennie testified that appellant and Williams were not incarcerated together after appellant's June 21, 2008 arrest, the prosecutor elicited testimony from Deputy Rennie in rebuttal showing that appellant and Williams were incarcerated together during a later time period. The prosecutor's use of this testimony cannot be characterized as suborning perjury.

{¶23} Therefore, appellant's third assignment of error is overruled.

{¶24} Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and TYACK, JJ., concur.
