

[Cite as *State v. Collins*, 2009-Ohio-3182.]

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : Case No. 08CA3254  
 :  
 vs. :  
 :  
 RICHARD C. COLLINS, : DECISION AND JUDGMENT ENTRY  
 :  
 Defendant-Appellant. :

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APPEARANCES:

COUNSEL FOR APPELLANT: Justin R. Blume, Mowery & Blume, 9050 Ohio River Road, Wheelersburg, Ohio 45694  
COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, 602 Seventh Street, Portsmouth, Ohio 45662

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CRIMINAL APPEAL FROM COMMON PLEAS COURT  
DATE JOURNALIZED: 6-22-09

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. Richard C. Collins, defendant below and appellant herein, was found guilty of (1) drug trafficking in violation of R.C. 2925.03(A)(2)&(C)(4); (2) drug possession in violation of R.C. 2925.11(C)(4); and (3) tampering with evidence in violation of R.C. 2921.12(A)(1).

{¶ 2} Appellant assigns the following error for review:

"APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION."

{¶ 3} On March 3, 2008, police made a "controlled purchase" of crack cocaine from appellant's residence at 709 Lincoln Street, Apartment 1, in Portsmouth. Police returned on March 5, 2008 to execute a search warrant. Appellant refused to open the door and told officers to "hold on, hold on," as other individuals in the residence began to flush bags of crack cocaine down the toilet. Police rushed into the bathroom in time to gather a few bags from the toilet. A subsequent "flush" of the sewer line yielded more bags of crack cocaine.

{¶ 4} The Scioto County Grand Jury returned an indictment that charged appellant with two counts of drug trafficking, drug possession and tampering with evidence. Appellant pled not guilty and the matter came on for a jury trial. At trial, the police involved with execution of the warrant recounted their version of events. Appellant testified in his own defense and claimed that the drugs belonged to his roommate, Donpeire Johnson. Appellant denied allowing Johnson to use his apartment as a "crack house."

{¶ 5} After hearing the evidence, the jury found appellant guilty of the aforementioned charges. The trial court sentenced appellant to serve eight years for trafficking and eight years for possession, with the sentences to be served concurrently. Appellant also received four years for tampering with evidence, to be served consecutively to the other sentences for an aggregate twelve year prison term. This appeal followed.

{¶ 6} Appellant asserts in his assignment of error that he received constitutionally ineffective assistance from trial counsel. The gist of his argument is that counsel had no trial strategy, did not give a meaningful opening statement, made no objections and did not question him regarding a "prior roommate." In short, appellant concludes, "trial counsel did little more than occupy space." We, however, are not persuaded.

{¶ 7} Criminal defendants have a constitutional right to counsel, including the right to the effective assistance from counsel. See McCann v. Richardson (1970), 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763; State v. Stout, Gallia App. No. 07CA5, 2008-Ohio-1366. To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; also see State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. Goff (1998), 82 Ohio St.3d 123, 139, 694 N.E.2d 916.

{¶ 8} To establish deficient performance, a defendant must show that counsel's performance fell below an objective level of reasonable representation. To establish prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See State v. Conway, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶95. Failure to establish either element is generally fatal to the claim. State v. Conley, Pike App. No. 08CA784, 2009-Ohio-1848, at ¶33; State v. Jones, Scioto App. No. 06CA3116, 2008-Ohio-968, at

¶14. Therefore, if one element is dispositive, a court need not analyze both elements. See State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52.

{¶ 9} In the case sub judice, appellant contends that "[i]f trial counsel had made any effort to explain his client's position or even attempted to rebut the State's case any [sic] a meaningful way there is a reasonable chance that the jury would not have convicted [him]." We do not believe, however, that the outcome of appellant's trial would have been different if trial counsel had performed in the manner argued in appellant's brief.

{¶ 10} First, we point out that trial counsel did rebut the prosecution's case and cross-examine the prosecution's witnesses. Second, the gist of that cross-examination, as well as appellant's testimony, was that the contraband belonged to a roommate and appellant was unaware of the activity in his apartment. Third, appellant's claim that he was unaware of his roommate's drug selling activity involves an issue of credibility. The jury obviously did not believe his account.<sup>1</sup>

{¶ 11} We also disagree with many of the alleged instances of "error" that appellant cites in his brief. Trial counsel had a strategy to show that without appellant's knowledge, the roommate possessed and sold drugs from appellant's residence. Additionally, as to the brevity of trial counsel's opening statement, the transcript reveals

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<sup>1</sup> A jury, sitting as trier of fact, is in the best position to view the witnesses and to observe their demeanor, gestures and voice inflections, and to use those observations to weigh credibility. Myers v. Garson (1993), 66 Ohio St.3d 610, 615, 614 N.E.2d 742; Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Appellate courts must not simply second-guess a jury's determination on those issues. See e.g. State v. Vance, Athens App. No. 03CA27, 2004-Ohio-5370, at ¶10; State v. Bowers, Hocking App. No. 06CA7, 2007-Ohio-3986, at ¶40.

a brief conversation between appellant and trial counsel before that statement was given, thereby suggesting input from appellant himself.

{¶ 12} As for trial counsel's alleged failure to question appellant about a prior roommate (before Donpeire Johnson), appellant concedes in his brief that the trial court sustained the prosecution's objection to that line of questioning. Thus, it would have been futile to further pursue this subject. We also question the relevance of that information to the cause sub judice. Finally, the evidentiary objections that appellant claims constitute a deficient performance all involve minor issues on cross-examination. Even assuming, arguendo, that the trial court would have sustained such objections, we do not believe that such action would have altered the trial's outcome.

{¶ 13} Accordingly, we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

#### JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court

dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: \_\_\_\_\_

Peter B. Abele, Judge

#### NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.