

[Cite as *State v. Allen*, 2009-Ohio-3505.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22835
v.	:	T.C. NO. 07 CR 3834
	:	
RALPH D. ALLEN	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 17th day of July, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Ralph D. Allen, filed July 15, 2008. On July 10, 2008, following pleas of not guilty and a bench trial, Allen was convicted of insurance fraud, in violation of R.C. 2913.47(B)(1), a felony of the fourth degree, three counts of aggravated arson, in violation of R.C. 2909.02(A)(1), felonies of the first degree,

and aggravated arson, in violation of R.C. 2909.02(A)(2), a felony of the second degree. The trial court sentenced Allen to one year on the charge of insurance fraud, and to three years on each charge of aggravated arson, all to be served concurrently, for a total sentence of three years.

{¶ 2} The event giving rise to this matter occurred on April 15, 2007, at approximately 6:00 a.m., at 381 Ingleside Avenue, Allen's residence in Riverside. Rhett Close, a Riverside police officer, testified that he was dispatched to the scene around 6:00 a.m., and he was first to arrive. He testified that it was dark outside at that time, and when he reached the house, "the smoke was so heavy that he could not see all the flames," but he knew the house was on fire. Close testified that there are no street lights in the area.

{¶ 3} According to Close, his cruiser is equipped with a camera system that has a forward and rear looking camera. When the cruiser lights are activated, the front camera is automatically activated as well. Close testified that he can also activate the rear camera and activate an audio recording device inside the cruiser.

{¶ 4} Close spoke to Allen at the scene, who indicated that no one was inside the residence. Firefighters arrived about two minutes after Close. Close instructed Allen to go inside the home of a neighbor because he was coughing from the smoke. Close then began to direct traffic to keep the scene clear for the fire department. Close left the scene at approximately eight o'clock to resume normal patrol duties, and he did not speak to Allen before he departed.

{¶ 5} A brief videotape of the appearance of the scene upon Close's arrival, recorded by his cruiser's camera, was shown to the trial judge. The following exchange occurred prior to

and after the viewing:

{¶ 6} “Q. Your Honor, with your permission we ask to play the first video here?”

{¶ 7} “* * *

{¶ 8} “THE COURT: * * * Have you seen this before, Mr. Murphy?”

{¶ 9} “MR. MURPHY: No, I have not, Your Honor.

{¶ 10} “MR. BARRANTINE: He was provided a copy to view.

{¶ 11} (Video being played)

{¶ 12} “* * *

{¶ 13} “Q. Sir, as we watch the video does what we see in this, the darkness of the area, is that fairly and accurately what you saw as you traveled?”

{¶ 14} “A. Yes, it is.

{¶ 15} “Q. * * * Unless you want us to watch the entire clip, Your Honor, the reason for us showing the video has pretty much been reached at this point.”

{¶ 16} According to Close, he was called back to the scene around 11:00 a.m. to meet Officer Whiteman and the State fire investigator. Upon arrival, Close spoke to officers on the scene and, he “was asked to have Mr. Allen have a seat in the back of my cruiser until which time detectives could arrive on scene.” Prior to placing Allen in the cruiser, Close testified that he activated the camera and audio recording system.

{¶ 17} The following exchange occurred:

{¶ 18} “Q. Your Honor, with your permission I would like to play the second video clip. This one is a little bit longer but there are only a couple of sections that I wanted to play. However, if the defense wants to hear the whole hour they’re certainly entitled to it.

{¶ 19} “THE COURT: Mr, Murphy?

{¶ 20} “MR. MURPHY: I can’t answer that question at this time, Your Honor.

{¶ 21} “THE COURT: Let me say that we ought to proceed this way. The state can go ahead and play what they want. At some point along this process you can review all of it and determine whether or not in your case you want to present the remainder.

{¶ 22} “MR. MURPHY: Let me say for the record that the prosecutor did provide me with a copy of the video, however I got the video from him, on, I believe it was Friday.

{¶ 23} “MR. BARRENTINE: Thursday.

{¶ 24} “MR. MURPHY: Thursday.”

{¶ 25} The State then played the following video exchange for the trial court:

{¶ 26} “MR. ALLEN: What do you think caused it, have they said yet?

{¶ 27} “MR. CLOSE: What’s that?

{¶ 28} “MR. ALLEN: It had to be - the only thing in there that could have done anything like that is I had a lit candle in there. I don’t see how it could of unless it fell over or something maybe.

{¶ 29} “MR. CLOSE: Yeah, I don’t know what - that’s why they’re the firemen.

{¶ 30} “MR. ALLEN: I had been asleep for four or five hours already. It couldn’t of took it that long (Indiscernible) my ex threatened to burn my house down or (indiscernible). If it wouldn’t have been for that smoke detector though I probably would have been a lot worse off. It was smoky already when I -

{¶ 31} “MR. CLOSE: Where did you have your smoke detector at?

{¶ 32} “MR. ALLEN: In the kitchen and, yeah, I heard that beeping and it made me

dream - was dreaming about a trash truck. It must have been the beeping noise or something. Because when I woke up that's the first thing that got my attention and then I seen all that smoke.

{¶ 33} "MR. CLOSE: Yeah, that would definitely wake you up, wouldn't it.

{¶ 34} "MR. ALLEN: I didn't realize what was going on.

{¶ 35} "* * *

{¶ 36} "MR. ALLEN: So I got up and started heading towards the door and I realized that my house was burning.

{¶ 37} "MR. CLOSE: Well, that would wake you up.

{¶ 38} "MR. ALLEN: My father just passed away, was hit by a car in the country while checking his mail and I had all his pictures, his personal stuff in there, that's the only thing really - I can buy new clothes. I can't replace that stuff. It really meant a lot to me.

{¶ 39} "MR. CLOSE: (Indiscernible).

{¶ 40} "MR. ALLEN: And my dresser and the closet (indiscernible).

{¶ 41} "MR. CLOSE: (Indiscernible).

{¶ 42} "MR. ALLEN: I know, I saw, my bedroom is unbelievable, I can't believe it. In that short of time it did all that. For what it didn't seem like but a few minutes and they were here and it was out. My god.

{¶ 43} "MR. CLOSE: They do a pretty good job.

{¶ 44} "MR. ALLEN: Yeah, they were here quick I'll give them that.

{¶ 45} "MR. CLOSE: I'm glad you weren't in there. I was the first one on scene and I wanted to make sure everybody was out of the house.

{¶ 46} (End of video).

{¶ 47} “MR. BARRENTINE: Your Honor, the next segment that we’ll play is about 25 minutes from now.

{¶ 48} “THE COURT: You may advance it.

{¶ 49} “* * *

{¶ 50} “MR. ALLEN: (Indiscernible). That’s crazy, man.

{¶ 51} “* * *

{¶ 52} “MR. ALLEN: I can’t believe he thinks I burnt my own house down. Why would I do such a thing? That’s crazy, man.

{¶ 53} “* * *

{¶ 54} “MR. ALLEN: I just watched my house burn down, everything I owned go up in smoke and now I’m being accused of it. It ain’t right man. But I can see what he’s saying. I did see the dark spots on the floor, (indiscernible) I’m not saying - he may be right, but somebody had to - why would someone do that? I was on that couch asleep, you know, why would someone try to set my - I mean, with me in it, that would be attempted murder. They’d have to be out of their mind to do that. You know it?

{¶ 55} “MR. CLOSE: (Indiscernible) is that?

{¶ 56} “MR. ALLEN: My sister.

{¶ 57} “MR. CLOSE: What’s her last name?

{¶ 58} “MR. ALLEN: Russell.

{¶ 59} “* * *

{¶ 60} “UNKNOWN: We will make sure that * * * she goes with her aunt, all right?

We're not going to leave her sitting here. And I'm going to tell her that we're taking you down to talk to you, all right?

{¶ 61} "MR. ALLEN: They are accusing me of burning my own house down.

{¶ 62} "* * *

{¶ 63} "* * *

{¶ 64} "* * *

{¶ 65} "* * *

{¶ 66} "UNKNOWN: I'm finishing with your daughter and I'm going to turn her over to her aunt and your mom, all right?

{¶ 67} "MR. ALLEN: What the hell did I do?

{¶ 68} "* * *

{¶ 69} "MR. ALLEN: Is there any way they can test that and see what kind of chemical was used?

{¶ 70} "* * *

{¶ 71} "MR. ALLEN: (Indiscernible) Yeah, I mean, there's no way nobody's going to (indiscernible) in that house. (Indiscernible) do that man. I mean, I got a couple who don't like me but I don't have nobody that would want to kill me. (Indiscernible.) These seats are really slippery.

{¶ 72} "MR. CLOSE: Yeah. They're not very comfortable and they're slippery. When we get back to post I'm going to need everything you've got on you (indiscernible) talk to you, okay? (Indiscernible) any type of property (indiscernible).

{¶ 73} "MR. ALLEN: Is this standard or something?

{¶ 74} “MR. CLOSE: Yeah.

{¶ 75} “MR. ALLEN: Why would I burn down my own house and upset my daughter.

{¶ 76} “MR. CLOSE: Well, I understand that but when the state fire marshal comes in he’s the investigator.

{¶ 77} “MR. ALLEN: I don’t know why. (Indiscernible). I wouldn’t burn my own house down, that would be crazy.

{¶ 78} “MR. CLOSE: (indiscernible) talk to them about it.

{¶ 79} “MR. ALLEN: (indiscernible) accused me of burning my own house down. (Indiscernible). How long is this going to take?

{¶ 80} “MR. CLOSE: I’m just your ride, buddy.

{¶ 81} “* * *

{¶ 82} “MR. ALLEN: I saw what he was talking about, though, the floor had like dark spots on it. But you know, I’ve had dogs, it could’ve been where a dog urinated and it went through the carpet and onto the floor. It could be anything.

{¶ 83} “MR. CLOSE: They’ll talk to you about (indiscernible).

{¶ 84} “MR. ALLEN: (Indiscernible) for some reason they would always go right in my hallway. And when I pulled the carpet up to replace it, I was actually going to use the wood floors, they was black just that is [sic]. Where they had urinated so much.

{¶ 85} “* * *

{¶ 86} (End of video)

{¶ 87} “Q. Officer Close, you’ve had a chance now to review what is labeled the fourth video clip starting at time 10:54. Does that clip fairly and accurately depict the conversation or

the statements that this defendant made in your presence while in the rear of your cruiser?

{¶ 88} “A. Yes it does.

{¶ 89} “Q. At one point in the video we see you take the defendant out of the cruiser and then place him back inside the cruiser. At that point is he under arrest?

{¶ 90} “A. Once he’s placed back in the cruiser, yes, he’s under arrest.

{¶ 91} “* * *

{¶ 92} “Q. One thing - we skipped over various parts of the video. At any point do you ask the defendant pointed questions concerning the origin of the fire, what happened, anything of that nature?

{¶ 93} “A. No, I did not

{¶ 94} “Q. Officer, once you arrived at post, what did you do with the cruiser camera video, the DVD itself?

{¶ 95} “A. I believe I took Mr. Allen in and after he was given to Detective Crigler and the state fire marshal, I went back out and retrieved that as evidence with a sergeant to open the disk up to take it out for evidence.

{¶ 96} “Q. Does that video appear to be in a complete form other than the sections obviously that we fast forwarded? Any additions or deletions?

{¶ 97} “A. No, there’s not.”

{¶ 98} On cross-examination, Close testified that when he returned to the scene, Officer Whiteman, the senior officer on the scene, instructed Close to place Allen in the back of his cruiser “pending investigation and the arrival of Detective Sergeant Crigler and the state fire marshal.”

{¶ 99} The following exchange subsequently occurred on cross-examination:

{¶ 100} “Q: Now, when was he placed under arrest?”

{¶ 101} “A: After he spoke with the fire marshal and was placed back in my cruiser the second time before being taken back to post.

{¶ 102} “Q. Was he told he was under arrest?”

{¶ 103} “A. I believe he was, yes.

{¶ 104} “Q. Do you know who told him he was under arrest?”

{¶ 105} “A. I do not. I was not with him every stage during the -

{¶ 106} “Q. Did you tell him he was under arrest?”

{¶ 107} “A. I did not tell him he was under arrest, no.

{¶ 108} “Q. Do you know who did?”

{¶ 109} “A. No, I do not.

{¶ 110} “Q. Do you know if he was advised of his rights at that point?”

{¶ 111} “A. No. He was not advised, he would have been done so in front of my camera and I did not advise him of his rights at that point, no.

{¶ 112} “Q. And so to your knowledge no one did advise him of his rights?”

{¶ 113} “A. Not to my knowledge.”

{¶ 114} Steve Southard, a deputy state fire marshal and investigator for the Ohio Fire Marshal’s Office in Columbus, testified regarding his investigation of the arson. Southard responded to the scene, spoke with Allen, and obtained his verbal consent to enter the residence to begin his “cause and origin investigation.” After examining the interior of the residence, Southard determined that the fire originated in the master bedroom. After shoveling the debris

out of the room to determine the fire's cause, Southard noted "an irregular burn pattern on the floor which through all my experience and training it appears to be an irregular pour patterns, an ignitable liquid pour pattern." Southard then brought his accelerant detection K-9 into the residence, and the dog alerted several times, almost exclusively in the master bedroom, indicating the presence of hydrocarbon. Southard concluded that the fire was purposely set using an accelerant.

{¶ 115} Southard testified that he interviewed Allen twice, once on the date of the arson, where Sergeant Crigler issued Allen's Miranda rights prior to interrogation, and once on August 21, 2007, where Allen was again administered his rights prior to interrogation. Southard testified that Allen told him, "he's in the smoke, he can see the smoke, and he sees - he goes to the kitchen and looks down the hallway towards the master bedroom and sees black smoke billowing out of the doorway towards him and then he exits the house leaving the door open." According to Southard, "the conditions would be very, very dark. He has no power or electricity to the house. The fire department are telling me that when they arrived it is dark out. And there is no ambient light around the structure, so therefore it appears to me that the defendant would not be able to see anything at all."

{¶ 116} Sergeant Kimberly Griffin testified that she was not the original detective on the investigation but that she took over for Sergeant Crigler. She testified that she interviewed Allen on August 21, 2007, along with Southard. State's exhibits 42 and 43, Allen's pre-interview forms, on which he placed his initials by each of his rights he waived, were admitted into evidence.

{¶ 117} Allen asserts one assignment of error as follows:

{¶ 118} “APPELLANT ASSERTS INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 119} Defense counsel initially waived opening statement until the presentation of Allen’s case, and Allen faults defense counsel for this failure, suggesting that he failed to present an opening statement because he was unfamiliar with the facts of the case. (We note that the defense did file a witness list with six witnesses.) Regarding the videotape that defense counsel had not viewed prior to trial, Allen argues, “An ordinary, reasonably prudent attorney has an obligation, a duty to review the facts of the case prior to when the actual trial takes place. The attorney deprives the Defendant a right to view the evidence, discuss it with counsel and also to discuss any defenses that might be applicable. This is to prevent the whole trial by ambush.” Allen argues that the portion of Close’s cross-examination, quoted above, suggests that Allen was not *Mirandized* prior to questioning, and Allen asserts, “[t]his clearly raises a Fifth Amendment issue. However, trial counsel never filed any motions to suppress or explored those issues with the client.” Finally, Allen argues that defense counsel merely “mimicked” the prosecutor’s inquiry during his cross-examination of firefighter Chad Countryman and was therefore ineffective.

{¶ 120} “We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel,

it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 121} Regarding defense counsel's failure to make an opening statement, we initially note that Allen does not argue how he was prejudiced by this failure, but in fact concedes in his brief that defense counsel's initial decision to reserve his opening "may not seem odd." Since Allen ultimately did not present evidence, "counsel obviated the need for an opening statement. Dispensing with an opening statement is not ineffective assistance of counsel *per se*. (citation omitted.)" *State v. Bays* (Jan. 30, 1998), Greene App. No. 95-CA-118. Further, this matter involves an uncomplicated fact pattern with one defendant, and it was tried to the bench. Since an opening statement would not have aided Allen's cause, we conclude that defense counsel's failure to provide one does not fall below the level of objectively reasonable assistance.

{¶ 122} Regarding defense counsel's failure to review the cruiser videotape ahead of trial, we note, again, Allen offers only conclusory assertions regarding his alleged prejudice. As to Allen's allegation of his resulting "trial by ambush," we note that the issue of such surprise is one related to the discovery process, and it does not involve the introduction of evidence by the State that is admittedly already in the possession of the defense. *State v.*

Burhman (Sept. 12, 1997), Greene App. No. 96 CA 145. (“Discovery * * * serves to prevent trial by ambush by enabling a defendant to review the State’s evidence against him or her.”)

{¶ 123} We agree, however, that counsel’s failure to familiarize himself with the evidence to be used against his client, which was admittedly in his possession, falls below an objective standard of reasonableness. We cannot conclude, however, that the outcome of the trial would have been otherwise had defense counsel viewed the segments prior to trial.

{¶ 124} We have reviewed the initial video segment of the scene as Close arrived, and it depicts the enveloping darkness that Close described. The State purportedly introduced it to discredit Allen’s statement to Southard that he was able to see smoke inside his dark home. The evidence, however, does not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid. R. 401. In other words, the evidence is not relevant to the issues of whether Allen created “a substantial risk of serious physical harm to any person” (R.C. 2909.02(A)(1), or committed insurance fraud (R.C. 2913.47(B)(1). Since the video segment has minimal probative value, its admission did not prejudice Allen.

{¶ 125} The second portion of the tape revealed voluntary statements made by Allen, who was not subject to interrogation at the time or entitled to *Miranda* warnings. “The United States Supreme Court has held that police officers have a duty to advise a suspect of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 369-73, 86 S.Ct. 1602, 16 L.Ed.2d 694, when their questioning of the suspect rises to the level of custodial interrogation.” *State v. Wood*, Greene App. No. 2006 CA 1, 2007-Ohio-1027;

State v. Carter (July 23, 1986), Hamilton App. No. C-840121 (“Appellant was in no way subject to ‘questioning initiated by law enforcement officers’ [*Miranda*, at 444] or to ‘any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know [were] reasonably likely to elicit an incriminating response * * *.”) Had defense counsel viewed the tape and objected to the admission of the above segment, his objections would have been overruled, and the outcome of the trial would have been unaffected.

{¶ 126} Next, Allen suggests, based upon the cross-examination of Close, in which Close admits ignorance regarding the administration of Allen’s *Miranda* rights, that defense counsel was deficient in failing to file a motion to suppress Allen’s statements. “The failure to file a suppression motion is not per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448. Rather, trial counsel’s failure to file a motion to suppress constitutes ineffective assistance of counsel only if the failure to file the motion caused Defendant prejudice; that is, when there is a reasonable probability that, had the motion to suppress been filed, it would have been granted.” (Citations omitted.) *State v. Wilson*, Clark App. 08CA0445, 2009-Ohio-2744, ¶ 11. The testimony of Southard and Griffin, along with the admission of both of Allen’s waiver of rights forms, establish that Allen was properly *Mirandized* prior to formal interrogation. In other words, there is nothing in the record to suggest that, had counsel for Allen filed a motion to suppress Allen’s statements, a reasonable probability exists that Allen would have prevailed at the suppression hearing.

{¶ 127} Finally, Allen argues his counsel was deficient for merely

“mimicking” the questions asked of Chad Countryman by the State during direct examination. “Trial counsel’s decision to cross-examine a witness and the extent of such cross-examination are tactical matters. *State v. Flors* (1987), 38 Ohio App.3d 133, 139, * * * . Thus decisions regarding cross-examination are within trial counsel’s discretion and cannot form the basis for a claim of ineffective assistance of counsel. *Id.*’ *State v. Shells*, Montgomery App. No. 20802, 2005-Ohio-5787. “[A]n appellate court reviewing an ineffective assistance of counsel claim must not scrutinize counsel’s strategic decision to engage, or not to engage, in a particular line of questioning on cross-examination.” *State v. Dorsey*, Franklin App. No. 04AP-737, 2005-Ohio-2334, at ¶ 2.’ *State v. Brodbeck*, Franklin App. No. 08AP-1134, 2008-Ohio-6961, ¶ 65.” *State v. Arnold*, Montgomery App. No. 22785, 2009-Ohio-2773, ¶ 60.

{¶ 128} There being no merit to Allen’s sole assigned error, it is overruled.

The judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

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