[Cite as *State v. Vondrak*, 2009-Ohio-6757.]

STATE OF OHIO, NOBLECOUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-NO-358
	)	
TODD VONDRAK,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Noble County, Ohio Case No. 208-202
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Clifford N. Sickler Noble County Prosecutor 508 North Street Caldwell, Ohio 43724
For Defendant-Appellant	Attorney Chandra L. Ontko 217 North Eighth Street Cambridge, Ohio 43725

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 17, 2009

[Cite as *State v. Vondrak*, 2009-Ohio-6757.]
DONOFRIO, J.

{¶1} Defendant-appellant, Todd Vondrak, appeals from a Noble County Common Pleas Court judgment convicting him of assaulting a corrections officer, following a jury trial.

{¶2} Appellant was an inmate at the Noble County Correctional Institution. According to corrections officers Jared McGilton and Ronald Rankin, the two were sitting in the officer's area when appellant approached them and asked for his I.D., which had been taken from him by another officer earlier that day. Appellant became upset when the officers told him that they did not have his I.D. He left the area and went back to his "rack," his sleeping area. He returned 15-20 minutes later demanding the return of his I.D. and claiming that the officers were deliberately withholding it from him. Appellant refused to obey the officers' direct orders to return to the rack, removed his sweatshirt, assumed a fighting stance and stated, "[i]f you want to fight let's fight mother fucker." At that point, McGilton approached him and ordered him to place his hands on the wall to be cuffed. Appellant refused and swung at McGilton, striking him in the right eye. Both officers then restrained appellant.

{¶3} According to appellant, the two officers verbally harassed him when he asked them for his I.D. The officers then told him that they would return his I.D. if he ran an errand for them, but they refused to do so after he obliged. Appellant stated that he removed his jacket only because he knew that he was going to be handcuffed once Officer McGilton stood and approached him. Next, Officer McGilton slammed him into a wall. Then appellant threw a punch at Officer McGilton.

{¶4} A Noble County grand jury indicted appellant on one count of assault of a corrections officer in violation of R.C. 2903.13(A), a fifth-degree felony.

{¶5} Appellant's case went to trial on November 10, 2008. During deliberations, the jury asked two questions of the court: (1) could they have the correction's officers' reports that were presented in court and (2) could they have the audiotape of appellant's testimony. The court declined both of these requests. The jury found appellant guilty of assault. They further found that the assault occurred on

the grounds of the Noble Correctional Institution, that McGilton was an employee and that appellant was incarcerated there at the time, rendering the crime a felony assault.

{¶6} The court sentenced appellant to 11 months in prison to be served consecutive to any previous sentences. Appellant filed a timely notice of appeal.

{¶7} Appellant raises one assignment of error, which states:

{¶8} "THE APPELLANT HAS A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL AS APPELLANT'S COUNSEL FAILED TO REQUEST THAT CRUCIAL EVIDENCE BE ADMITTED, AND THE JURY COULD HAVE REASONED THAT THE APPELLANT WAS NOT GUILTY."

{¶9} During cross examination of the officers, appellant's counsel used their written statements in an attempt to show inconsistencies between their written reports and their testimony. (Tr. 57-62, 66). Counsel never moved to admit these statements into evidence.

{¶10} During deliberations, the jury sent a question to the court: "We were told there would be four particles of evidence, we only have one, number one [a picture of Officer McGilton's facial lacerations]. Are the C.O. [corrections officer] reports evidence, can we see them since they were presented in court?" (Tr. 107). The court denied this request and told the jury that they could only consider the one exhibit that was admitted. (Tr. 107).

{¶11} The jury then sent another question to the court asking if they could have the audio recording of appellant's testimony. (Tr. 107). Once again the court denied the request and instructed the jury to rely on its collective memory as to what was said. (Tr. 107).

{¶12} Appellant argues that his counsel's decision not to submit the officers' written statements into evidence was an error resulting in ineffective assistance of counsel. Appellant does not specify any inconsistencies that exist between the officers' testimonies and their written statements. Nonetheless appellant claims that if the jury had access to the written statements, it could have determined that they

were inconsistent with the officers' testimony and that the officers' testimony was not truthful. He contends that the jury could have reasoned that the officers assaulted him first and that he was acting in self-defense when he struck Officer McGilton. Therefore, appellant claims that his lawyer's failure to submit the written statements into evidence constitutes ineffective assistance of counsel.

{¶13} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. Id. To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley,* 42 Ohio St.3d at paragraph three of the syllabus.

{¶14} Appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289. In Ohio, a licensed attorney is presumed competent. Id.

{¶15} Appellant's argument for ineffective assistance of counsel rests on the fact that his attorney did not admit the officers' written statements into evidence after attempting to show inconsistencies in their testimony compared to the written statements on cross-examination. His argument relies heavily on the fact that the jury deliberated for over five and a half hours and requested additional evidence that they thought was to be admitted. However, appellant does not point out any inconsistencies that the jury could have found between the officers' written statements and their testimony. Appellant's contentions that the jury could have found inconsistencies, could have found that the officers were not testifying truthfully, and could have determined that appellant was acting in self-defense when he struck McGilton are all based upon supposition.

{¶16} "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. We cannot conclude that appellant's counsel's decision not to offer the officers' written accounts of the incident into evidence was ineffective assistance of counsel. Omitting the officers' written statements from evidence may very well have been a tactical move on the part of appellant's counsel. It could have shielded the jury from information that was detrimental to the defense. Or the statements could have matched up to be mostly consistent with the officers' testimony, thus giving their testimony even more credence.

{¶17} Moreover, appellant points to no specific inconsistencies that may have existed between the officers' written accounts of the incident compared to their testimony that could have brought the jury to reach a different conclusion as to his guilt. Consequently, there is no way to determine whether counsel's failure to admit the statements into evidence created a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Therefore, this court has no basis on which to find that counsel was ineffective or that appellant was prejudiced by counsel's performance.

{¶18} Accordingly, appellant's sole assignment of error is without merit.

{¶19} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., concurs.