[Cite as *State v. Beckett*, 2010-Ohio-755.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 NO 354
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
WENDELL E. BECKETT	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Noble County, Ohio Case No. 208-2008
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Clifford Sickler Noble County Prosecutor 409 Poplar Street, Suite A Caldwell, Ohio 43724
For Defendant-Appellant:	Atty. Chandra L. Ontko 217 North Eighth Street Ambridge, Ohio 43725
JUDGES:	
Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Mary DeGenaro	
	Dated: February 24, 2010

WAITE, J.

{¶1} Appellant, Wendell E. Beckett, appeals his conviction following a jury trial in the Noble County Court of Common Pleas for one count of assault on a corrections officer, a violation of R.C. 2903.13(A), a felony of the fifth degree. He was sentenced to an eleven month prison term, to be served consecutively to the prison term he was already serving. On appeal, he contends that he was provided ineffective assistance of counsel because he was not able to assist his counsel in presenting a defense at the time of trial.

{¶2} Appellant's first claim is premised upon a colloquy that took place with the trial court shortly before the jury was seated. Appellant had written a number of letters to the trial court, which the trial court acknowledged were not readily understandable. Consequently, the trial court invited Appellant to address his concerns prior to the commencement of the trial.

{¶3} Appellant claimed that his trial counsel had exerted considerable pressure on him to coerce him into entering a guilty plea. Appellant told the trial court that he had approached trial counsel about correspondence he sent to Governor Ted Strickland and Jerry Corlins regarding "certain staff at the correctional institution" and he thought that this correspondence might be important to his case. (Trial Tr., p. 2.) According to Appellant, counsel responded that a riot occurred at the correctional institution at Lucasville in 1993 and ten inmates were killed because they were "snitches." (Trial Tr., p. 2.) His trial counsel claimed that he represented one of the individuals charged in that incident. Appellant interpreted his counsel's statements as threats intended to scare him into entering a guilty plea. Next, Appellant stated:

{¶4} "I mean there's some issues with regard to the case or the trial might take place [sic] that I would like, you know, bring up [sic]. I don't know if [Appellant's trial counsel] has gathered information like stuff out at the correction [sic] that is part of my defense, like documents, witnesses, calling --- I don't know if he's gathered all these things I brought up with him. As I said most of the meetings that took place between him and myself [sic] there was some heated arguments instead of you know well, this is how this took place and this is how I feel maybe we should deal with it being that it went this way and the thing happened that way." (Trial Tr., p. 3.)

{¶5} Following Appellant's statement, the trial court asked Appellant's trial counsel if he could zealously represent his client. Appellant's trial counsel answered, "yes," then asked for a ten minute recess to talk with Appellant. When they returned to the courtroom, Appellant stated, "[y]our Honor, there's something I'd like to bring up before the jury comes in." The trial court responded, "we've already done that," and the jury was called into the courtroom. (Trial Tr., p. 4.)

{¶6} Next, Appellant contends that his trial counsel provided ineffective assistance when Appellant decided at the end of the state's evidence that he did not want to testify on his own behalf. Appellant's trial counsel requested a recess in order to make a record of the fact that Appellant refused to testify and that, without Appellant's testimony, he could not assert self-defense. (Trial Tr., pp. 92-93.) Appellant argues that his trial counsel did not explain the consequences of not presenting this defense to the jury. (Appellant's Brf., p. 8.)

{¶7} Because the record does not include the information that Appellant contends initially would have had an outcome determinative effect on the trial, we cannot speculate as to whether the information exists or would have had such an effect on the proceedings. Because Appellant's trial counsel actually made a record before the trial court that Appellant refused to testify on his own behalf, and informed the trial court and Appellant that he believed that Appellant would not be able to assert the defense of self-defense without his own testimony, we find that Appellant's second ineffective assistance of counsel argument must likewise fail. Therefore, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

ASSIGNMENT OF ERROR

{¶8} "THE APPELLANT HAS A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL AS THE APPELLANT WAS NOT ABLE TO ASSIST HIS COUNSEL IN PRESENTING A DEFENSE AT THE TIME OF TRIAL."

{¶9} In order to demonstrate ineffective assistance of counsel, a defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶10} Moreover, the petitioner has the burden of proof when claiming ineffectiveness because in Ohio, a properly licensed attorney is presumed competent. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289, 714 N.E.2d 905. In order to overcome this presumption, the petitioner must submit sufficient operative facts or evidentiary documents that demonstrate that the petitioner was prejudiced by the ineffective assistance. *State v. Davis* (1999), 133 Ohio App.3d 511, 515, 516, 728 N.E.2d 1111.

{¶11} With respect to Appellant's first claim, the information that he alleges was essential to his defense is not on the record. Simply stated, we cannot determine that the outcome of the trial would have been different based upon information that was never made a part of the record.

{¶12} The First District addressed a similarly amorphous ineffective assistance claim in *State v. Guidugli*, 157 Ohio App.3d 383, 2004-Ohio-2871, 811 N.E.2d 567. Faced with a claim that unidentified discovery materials and eyewitness testimony were not procured by trial counsel, the First District observed, "[a] claim of ineffective assistance of counsel * * * requires more than just supposition. Indeed, to the extent that the law engages in assumptions regarding the performance of trial counsel, they are all to be drawn in favor of competency, not against it." Id. at ¶22. The same is true here.

{¶13} Next, Appellant argues that he was not fully informed of the effect that his decision not to testify would have on his claim of self-defense. However, the trial transcript belies this claim. Appellant's trial counsel stated on the record:

{¶14} "Um, initially the Defendant expressed a desire to testify in the case, his constitutional right to make that decision. I can't make it for him. I asked him recently if he wished to testify and said he wasn't going to testify [sic], which is his constitutional right to decide. For the record I want it to be known, arguably in this case the defense of self defense is a liable defense that may not get to the jury should the Defendant choose not to testify. I want the Defendant to be aware that I am suggesting that he testify but it's his constitutional right." (Trial Tr., pp. 92-93.)

{¶15} Appellant responded, "[h]e's talking about self defense. I don't understand what he's meaning about self defense. It's my understanding there is no self defense. So I don't even want to get into a position where I'm saying I was trying to be self defending." (Trial Tr., p. 93.) When the trial court asked Appellant whether he wanted to testify, Appellant responded, "I would like to in the interest of justice and pursuit of that justice but as I stated earlier without certain questions being brought up in my defense I do not feel that it is a good idea for me to take the stand on my behalf." (Trial Tr., pp. 94-95.) The trial court made it clear that it did not intend to give the self-defense instruction based upon the evidence adduced at trial. (Trial Tr., pp. 95-96.)

{¶16} Once again, there is no indication on the record or in the brief as to the questions that Appellant believed that his counsel should have asked the witnesses.

However, it is clear from the statements made by Appellant and his trial counsel that Appellant knew he would not be able to claim self defense if he did not take the stand. To the extent that Appellant argued that he was not informed of the effect of his refusal to take the stand in his defense, his argument is contravened by the record.

{¶17} With respect to his first ineffective assistance argument, Appellant relies on speculative claims regarding evidence and witness testimony that cannot be substantiated by the record. With respect to his second ineffective assistance argument, the record clearly contradicts his claim that he was not fully informed regarding the effect of his decision not to testify at trial. For these reasons, Appellant's sole assignment of error is overruled and his conviction is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.