IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT WAYNE GRAYSON, JR.,	)	**NOT FOR PUBLICATION**
Appellant,	)	
-vs.-	)	**No. M-2015-934**
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Robert Wayne Grayson, Jr., while represented by counsel, was found guilty by a jury of the misdemeanor of Driving a Motor Vehicle While Under the Influence of Drugs (Count 1) in violation of 47 O.S.Supp.2013, § 11-902(A)(4), and of Failure to Carry Insurance/Security Verification Form (Count 2) in violation of 47 O.S.2011, § 7-602. Trial was before the Honorable John M. Gerkin, Special Judge, in the District Court of Washington County, Case No. CM-2014-430. On October 5, 2015, in accordance with the jury's verdicts as to punishment, Judge Gerkin sentenced Appellant to one (1) year in the county jail and a fine of $1,000.00 on Count 1 and to thirty (30) days and a fine of $250.00 on Count 2, to be served consecutively.

Appellant appeals his convictions and raises the following propositions of error:

I. Appellant was denied due process when the trial judge failed to grant a continuance.

II. Ineffective assistance of counsel prejudiced Appellant.

Having thoroughly considering the propositions of error and the entire record before this Court, including the original record, transcript, and briefs of the

parties, the Court **FINDS** Appellant has not demonstrated error warranting reversal or modification.

Appellant's offenses arose from a minor vehicle collision caused by Appellant on October 6, 2014, at an intersection in the City of Bartlesville. On the day of jury trial, but prior to its commencement, defense counsel orally moved for a continuance of the trial on grounds she needed additional time to investigate evidence coming from an eye examination report that Appellant had provided to her the day before. That report contained information revealing there could be evidence that one of several field sobriety tests administered to Appellant by a police officer at the scene of the collision, more specifically a horizontal gaze nystagmus test (HGN), might be flawed or suspect because it was administered without Appellant wearing his eyeglasses. Judge Gerkin denied counsel's motion on learning that the trial had been continued once before, that Appellant had not maintained contact with his attorney, and that although he long knew of his eye condition, he delayed getting that information about it to his counsel until the "eleventh-hour." (Tr. 9.)

Appellant's Proposition I contends the trial court's failure to grant the continuance was error. At 12 O.S.2011, § 668,[1] it states, "A motion for a continuance, on account of the absence of evidence, *can be made only upon affidavit*, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be . . . ." *Id.* (emphasis added). Appellant made his motion without this prerequisite affidavit. In *Waterdown v. State*, 1990 OK CR 65, ¶ 5, 798 P.2d 635, 638, the Court "determine[d] that the provisions of Section 668 must be

[1] In *Lane v State*, 65 Okl.Cr. 192, 196, 84 P.2d 807, 810 (Okl.Cr. 1938), the Court held Section 668 of the Code of Civil Procedure had been made applicable to criminal proceedings under a provision that is now found at 22 O.S.2011, § 584.

met before the trial court shall act on the motion or this court shall review the failure to grant a continuance as a proposition of error on appeal."[2] Because Appellant did not present an affidavit with his motion for continuance, this Court will not review the District Court's failure to grant him a continuance.

In Proposition II, Appellant contends that he was denied the effective assistance of counsel when his court-appointed attorney did not adequately investigate the issue of whether medication Appellant said he was taking would have caused the nystagmus observed by police when administering an HGN test. Appellant argues that this lack of investigation prevented counsel from effectively cross-examining the officer who testified at trial, "[I]f you've been consuming an alcoholic beverage or intoxicant, it will cause the nystagmus to jerk." (Tr. 155.)

On appeal, appellate counsel asserts that neither Lortab nor Norco—the drugs that the trial evidence revealed Appellant may have taken several hours before the auto collision—are medications that will cause nystagmus. Appellate counsel also asserts that the trial court's denying of the continuance hindered his trial counsel's ability to investigate the effects of ingesting Lortab or Norco on an HGN test. Tendered for filing in connection with this ineffective assistance claim is a "Motion to Supplement Appeal Record" asking for an evidentiary hearing at which Appellant could present proof of this medical evidence.

We find Appellant's ineffective assistance claim is without merit. Apart from the field sobriety tests, a lay witness and two police officers testified that

---

[2] The only exception recognized in *Waterdown* was that a trial judge may "allow[ ] a party, when warranted due to new evidence, surprise or other valid reasons, sufficient time to prepare the affidavit and written motion required [by Section 668]." *Waterdown*, ¶ 5, 798 P.2d at 638. As Appellant did not ask for additional time to prepare an affidavit, this exception would not apply in his case.

Appellant exhibited outward signs of intoxication. Additionally, both officers revealed that Appellant not only failed the HGN test, but two other field sobriety tests administered to him. We therefore do not find there is a reasonable probability of a different outcome had trial counsel challenged the officer's statement in the manner portended on appeal. Additionally, we find that as a matter of trial strategy, defense counsel may have wanted to avoid presenting evidence that might suggest Appellant had ingested a different intoxicant, i.e., one medically known to cause nystagmus, and that he did so in addition to his prescribed pain medication, a medication that Appellant testified he had been taking for years without any intoxicating effect.

A viable claim of ineffective assistance of counsel requires proof of both deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984) ("First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.") In order to prove prejudice, a 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." *Id.* at 694, 104 S.Ct. at 2068.

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688, 104 S.Ct. at 2065. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689, 104 S.Ct. at 2065. To rebut that presumption requires proof that the alleged deficient act could not have been a part of a legitimate trial strategy. *Id.* ("[T]he defendant must

overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'").

Because the acts of trial counsel alleged to be deficient in Proposition II fail both of these requirements, even should the medical evidence desired by the Motion to Supplement be true, Appellant's proposition does not demonstrate he possesses a viable claim of ineffective assistance. His Motion should therefore be denied.

DECISION

The Clerk of this Court is directed to file of record the Motion to Supplement Appeal Record, tendered by Appellant on May 23, 2016, and that Motion is hereby **DENIED**. The Judgments and Sentences imposed on October 5, 2015, in the District Court of Washington County, Case No. CM-2014-430, are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM DISTRICT COURT OF WASHINGTON COUNTY,
THE HONORABLE JOHN M. GERKIN, SPECIAL JUDGE

APPEARANCES AT TRIAL

LINDA M. GAMBILL-BRANSTETTER
415 SOUTH DEWEY AVE., SUITE 302
BARTLESVILLE, OKLAHOMA 74003
ATTORNEY FOR DEFENDANT

WILL D. DRAKE
ASSISTANT DISTRICT ATTORNEY
WASHINGTON COUNTY COURTHOUSE
420 SOUTH JOHNSTONE
BARTLESVILLE, OKLAHOMA 74003
ATTORNEY FOR STATE OF OKLAHOMA

APPEARANCES ON APPEAL

RANA HILL
OKLA. INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
SHERI M. JOHNSON
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCURS IN PART/DISSENTS IN PART
LEWIS, V.P.J.: CONCUR
JOHNSON, J.: CONCUR IN RESULTS
SMITH, J.: CONCUR

RA