[Cite as *State v. Kitzmiller*, 2019-Ohio-494.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

SHANE A. KITZMILLER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0018

Motion to Reopen

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Kathleen Bartlett, Judges.

JUDGMENT:
Overruled.

Atty. Robert Herron, Columbiana County Prosecutor and
Atty. Ryan P. Weikart, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Shane Kitzmiller, Pro se, #700-255
Belmont Correctional Institution, 68518 Bannock Rd., P.O. Box 540, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: January 15, 2019

PER CURIAM.

{¶1} Appellant Shane Kitzmiller has filed an application to reopen his appeal. He raises a sole assignment of error arguing that his counsel was ineffective for failing to address the trial court's designation of a man who had confessed to the crime as an unavailable witness. For the reasons provided, Appellant's application for reopening is denied.

Factual and Procedural History

{¶2} On July 3, 2016, a 73-year-old woman was putting groceries into her car at Aldi's parking lot in Calcutta, Ohio. Appellant pulled his car next to the woman and stole her purse, which contained her checkbook. On the same day, Appellant and his codefendant entered Walmart and used one of the victim's checks to purchase a large screen television set. Walmart surveillance video showed Appellant and his codefendant purchasing the television set with a check. Appellant and his codefendant are shown attaching the television set to the roof of their car. The video also showed Appellant throw an item into a trashcan, which was later discovered to be the victim's purse.

{¶3} On July 4, 2016, an Ohio State patrolman pulled over Appellant's car for a broken headlight. Appellant's codefendant was in the passenger seat. The patrolman discovered that Appellant was driving with a suspended license and ordered him and his codefendant out of the car. The patrolman searched the car and located two crack pipes, the victim's checkbook, and a check written out to Walmart. On the same date, Appellant was arrested and jailed. On August 18, 2016, Appellant was indicted on one count of robbery, a felony of the second degree in violation of R.C. 2911.02(A)(2), and

one count of receiving stolen property, a felony of the fifth degree in violation of R.C. 2913.51(A).

{¶4} A jury convicted Appellant of both counts on May 25, 2017. The trial court sentenced Appellant to eight years on the robbery conviction and one year on the receiving stolen property conviction. The trial court clearly ordered the sentences to run concurrently for an aggregate total of eight years of incarceration.

{¶5} On appeal, Appellant argued that the state violated his speedy trial rights by failing to bring him to trial within 90 days of his arrest in accordance with the "triple count provision." *State v. Kitzmiller,* 7th Dist. No. 17 CO 0018, 2018-Ohio-3769, ¶ 7. We affirmed the judgment of the trial court, holding that the triple count provision did not apply in this matter and Appellant conceded that he was brought to trial within 270 days after his arrest in accordance with R.C. 2945.71. *Id.* at ¶ 16.

Reopening

{¶6} Pursuant to App.R. 26(B)(1), a criminal defendant "may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." An applicant must demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). If the application is granted, the appellate court must appoint counsel to represent the applicant if the applicant is indigent and unrepresented. App.R. 26(B)(6)(a).

{¶7} In order to show ineffective assistance of appellate counsel, the applicant must meet the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Pursuant to *Strickland*, the applicant must

demonstrate both deficient performance of counsel and resulting prejudice. *Id*. at 687. See also App.R. 26(B)(9).

{¶8} An application for reopening must contain "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). See also *State v. Clark*, 7th Dist. No. 08 MA 15, 2015-Ohio-2584, ¶ 19.

ASSIGNMENT OF ERROR

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE TRIAL COURT ABUSING ITS DISCRETION FOR VIOLATING APPELLANT'S RIGHT TO COMPULSE [SIC] AND DECLARING JUSTIN SCHNEIDER AS AN UNAVAILABLE WITNESS.

{¶9} Appellant argues that his appellate counsel was ineffective for failing to raise the issue of whether the trial court erred when it determined Justin Schneider was an unavailable witness. Appellant contends that Schneider confessed to the charged offense but asserted his Fifth Amendment rights when asked to testify. Appellant argues that Schneider's confession should have been admitted to show the jury that someone else had confessed to the crime at issue.

{¶10} The state responds that, as shown by the record, Appellant procured a false confession from Schneider, an inmate apparently serving a prison sentence. According to the state, Schneider recanted his confession in a videotaped statement, saying that Appellant had coerced him to sign the confession because "he would be going to prison anyway." (Appellee's Brf., p. 1.) The state also argues that defense

counsel could not have called Schneider to testify about his recanted statement pursuant to Evid.R. 607(A).

{¶11} While Schneider's videotaped statement is not part of the appellate record, at trial both parties acknowledged that Schneider had recanted. Schneider was brought before the trial court outside of the jury's presence, where he stated he would plead the Fifth Amendment if asked to testify, because he faced the threat of an obstruction of justice charge for his false confession.

{¶12} Even if Appellant could demonstrate that appellate counsel's failure to raise the assignment of error constituted deficient performance, he has not shown prejudice. The record contains significant evidence of Appellant's guilt. A videotape was shown to the jury and was admitted into evidence depicting Appellant at WalMart purchasing the television with the stolen checkbook. In a parking lot surveillance video, he and his accomplice can be seen attaching the television set to the roof of their car. Appellant can also be seen disposing of the victim's purse in a nearby trashcan.

{¶13} Thus, even if Appellant could demonstrate deficient performance, he cannot show resulting prejudice. As such, Appellant's sole assignment of error is without merit and is overruled.

Conclusion

{¶14} As previously stated, in order to show ineffective assistance of appellate counsel, Appellant must demonstrate both deficient performance of counsel and resulting prejudice. Appellant has not satisfied either prong. Accordingly, Appellant's application for reopening is denied.

JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

JUDGE KATHLEEN BARTLETT

NOTICE TO COUNSEL

This document constitutes a final judgment entry.