

[Cite as *State v. Newett*, 2017-Ohio-7313.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103518

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARNELL NEWETT

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-572437-A
Application for Reopening
Motion No. 504141

RELEASE DATE: August 23, 2017

FOR APPELLANT

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ANITA LASTER MAYS, J.:

{¶1} On February 1, 2017, the applicant, Darnell Newett, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Newett*, 8th Dist. Cuyahoga No. 103518, 2016-Ohio-7605, in which this court affirmed his convictions for aggravated murder, murder, felonious assault, aggravated robbery, aggravated burglary, kidnapping, and tampering with evidence. Newett argues that his appellate counsel should have argued (1) that the convictions for aggravated burglary and felonious assault should have merged as allied offenses, (2) that the convictions for aggravated robbery and aggravated burglary should have merged as allied offenses, (3) that the convictions for aggravated robbery and felonious assault should have merged as allied offenses, (4) that the appellate counsel should have argued manifest weight of the evidence better, and (5) that the trial judge improperly prohibited him from testifying at trial in violation of his constitutional rights. On February 15, 2017, the state of Ohio filed its brief in opposition. For the following reasons, this court denies the application.

{¶2} On the afternoon of March 5, 2013, Rhonda Jackson's boyfriend discovered her murdered body in her apartment.¹ Her body had over 70 stab, slicing, or cutting wounds. Additionally, the medical examiner would testify that she had suffered blunt force injuries and compression of the neck; all these wounds contributed to her death. Newett lived four apartments from Jackson; they would visit each other, and there was evidence that they took drugs together.

¹ The evidence at trial showed that the boyfriend was at work during the time of the murder.

{¶3} When the police began their investigation, they noticed that there were blood stains on both the inside and outside of Jackson's front door. They also discovered a pile of clothes in a nearby dumpster: a beige shirt, two wallets, a pair of black boots, a pair of jeans, a pair of black gloves, and a knife with a broken tip. It appeared that the boots, jeans, and shirt had blood stains. Subsequent forensic analysis indicated that the blood stains were consistent with a spatter-producing event and that the blood stains found on the jeans were consistent with kneeling in blood. The jeans also contained various cards in the front pocket. A Medicare card and a Humana prescription card were in the name of Darnell Newett, and an Ohio ID card and an RTA card were in the name of Darnell Newett, Sr. DNA from the interior of the boots was consistent with Newett, and the DNA from the stain on the exterior of the boot was consistent with Jackson. Similarly, DNA from the jeans interior was consistent with Newett, and DNA from the blood stain on the knee of the jeans was consistent with Jackson. One of the wallets, a grey one, showed Jackson as the main DNA contributor; Jackson's boyfriend also identified the wallet as Jackson's. Similar results were obtained from the gloves. There was also evidence that Jackson's wallet may have had as much as \$850 in it on the day of the murder.

{¶4} During trial, Newett's ex-wife testified that in the fall of 2016, Newett told her that his apartment had been broken into and that he thought Jackson had set him up. She further stated that Newett said he was going to "f**k Jackson up." Another neighbor testified that on the day of the murder, Newett had changed clothes.

{¶5} Based on this evidence, the jury found Newett guilty of two counts of aggravated murder, murder, felonious assault, aggravated robbery, aggravated burglary, kidnapping, and tampering with evidence. At sentencing the judge considered the arguments as to which counts should merge as allied offenses. Defense counsel argued that all counts should merge. The judge ruled that all of the murder counts, felonious assault, and kidnapping counts should merge, but none of the others. The state selected aggravated murder for sentencing. The trial judge sentenced Newett to 25 years to life for aggravated murder, ten years each for aggravated robbery and aggravated burglary, and three years for tampering with evidence. The sentences for aggravated robbery, aggravated burglary, and tampering with evidence were to be served concurrently with each other, but consecutively to the sentence for aggravated murder, for a total of 35 years to life.

{¶6} Newett's appellate counsel argued that the paucity of evidence meant that there was insufficient evidence to convict Newett of aggravated murder (R.C. 2903.01(A) — prior calculation and design) because there was no evidence of prior calculation and design, rather than in the heat of the moment. He noted instantaneous deliberation does not constitute prior calculation and design. The multiple wounds indicated rage, not cold-blooded murder. Moreover, the ex-wife's testimony was problematic because she made inconsistent statements and the threat was made at least three months before the murder.

{¶7} In the second assignment of error, appellate counsel argued that there was insufficient evidence to convict Newett of aggravated murder under R.C. 2903.02(B) — during a robbery, because there was no definitive evidence that Jackson still had the \$850 she might have had on her or that Newett had taken the \$850. The only evidence of theft was that Jackson’s wallet was found in the dumpster. As a corollary, if there was insufficient evidence to prove aggravated murder under R.C. 2903.03(B), then there would also be insufficient evidence to prove aggravated robbery.

{¶8} Finally, appellate counsel argued manifest weight: the incriminating evidence was the forensic evidence. However, the excess number of police officers investigating the crime scene contaminated and compromised the forensic evidence, leaving it unreliable.

{¶9} Now, Newett argues that his appellate counsel was ineffective because, inter alia, he should have argued that the lesser counts should have merged into each other. In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

{¶10} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney’s work must be highly deferential. The court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too

easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland* at 689.

{¶11} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate’s prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.” *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every “colorable” issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶12} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must

further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶13} Newett first argues that the trial court should have merged aggravated burglary with felonious assault or at least conduct an allied offenses analysis for those two crimes.² To the extent that Newett is arguing that the trial court did not conduct an allied offenses analysis, the argument is unpersuasive. The trial court explicitly considered merging aggravated robbery and aggravated burglary with the other charges and heard argument on the point. The prosecutor contended that those two crimes were committed with separate animuses and should not merge. The trial court accepted this argument and rejected merger. (Tr. 1647-1653.)

² R.C. 2941.25 provides in pertinent part as follows:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment * * * may contain counts for all such offenses, but the * * * defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with separate animus as to each, the indictment * * * may contain counts for all such offenses, and the defendant may be convicted of all of them.

The Supreme Court of Ohio enunciated the practical test for determining allied offenses in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892: "the courts must ask three questions when defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered."

{¶14} To the extent that Newett is arguing that felonious assault and aggravated burglary should have merged because the offender necessarily had to commit felonious assault when committing aggravated burglary, the argument is still not persuasive, especially when viewed through the lense of *Strickland*, *Barnes*, and *Allen*. The courts have held that the crimes of aggravated burglary and felonious assault do not necessarily merge on facts similar to the instant case. *State v. Hazley*, 2d Dist. Montgomery No. 27107, 2016-Ohio-7689; *State v. Craig*, 4th Dist. Athens No. 15CA22, 2017-Ohio-4342; *State v. Taylor*, 6th Dist. Wood No. WD-11-054, 2013-Ohio-1362; and *State v. Ortiz*, 6th Dist. Lucas No. L-14-1251, 2016-Ohio-974. Moreover, although there is sufficient evidence showing that Newett committed the crimes, there is little evidence on the specifics and sequence of events. Reconstructing the events of when and how the trespass occurred, when and how the theft occurred for the robbery charge, and when and how the violence began and occurred, especially in relation to the trespass and theft, would be pure speculation. Appellate counsel tried to use this paucity of evidence to construct a persuasive sufficiency of the evidence argument, especially as to aggravated murder as charged in Count I. Following the admonitions of the Supreme Court, this court will not second-guess appellate counsel's decisions on strategy and tactics.

{¶15} Newett's second argument is that aggravated burglary and aggravated robbery should have merged. In *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.2d 414, the Supreme Court of Ohio indicated that these were crimes with

dissimilar import and committed with separate animuses. The burglary was complete upon the entering the residence with intent to commit a crime, and the robbery complete upon the theft. They did not arise from the same acts. In the present case, the uncertainty surrounding the crimes rendered making a compelling argument difficult. It is just as easy to speculate that the burglary was motivated by revenge and the robbery an afterthought, than to speculate that both were motivated by greed. Thus, it is easy to understand why counsel in the exercise of professional judgment would decline to make this argument. *State v. Jackson*, 2d Dist. Montgomery No. 24430, 2012-Ohio-2335.

{¶16} Newett's argument that aggravated robbery and felonious assault should merge is also unpersuasive. Ohio courts have held that aggravated robbery does not merge with other offenses, such as murder and felonious assault, when the force used to effect the aggravated robbery is far in excess of the force required to complete the robbery. *State v. Miller*, 8th Dist. Cuyahoga No. 100461, 2014-Ohio-3907; *State v. Sutton*, 8th Dist. Cuyahoga Nos. 102300 and 102302, 2015-Ohio-4074; *State v. Reid*, 2d Dist. Montgomery No. 25790, 2014-Ohio-1282. In the present case, the violence perpetrated on the victim far exceeded any necessary to complete the robbery.

{¶17} Newett's fourth argument is that his appellate counsel mishandled the manifest weight argument by not emphasizing the inconsistencies in the witnesses' testimony. This argument is unpersuasive because the court conducted a thorough review of the evidence and concluded "that the record contains substantial credible evidence that supports Newett's convictions for murder. As a result, Newett's

conviction for murder is not against the manifest weight of the evidence. This is not one of those rare cases where the evidence presented weighs heavily against conviction.” *Newett*, 8th Dist. Cuyahoga No. 103518, 2016-Ohio-7605, ¶ 50. Arguing additional inconsistencies would not have changed that result. Newett has not established prejudice.

{¶18} Finally, Newett argued that the trial judge deprived him of his right to testify. However, the record does not support that conclusion. The trial judge asked the defense counsel twice whether Newett would testify, and his attorney said “No.” (Tr. 1439 and 1441.) Appellate counsel was not deficient for making an argument not supported by the record.

{¶19} Accordingly, this court denies the application.

ANITA LASTER MAYS JUDGE

MARY J. BOYLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR