

[Cite as *State v. Makin*, 2018-Ohio-1179.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104545

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HAKEEN MAKIN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-600229-A
Application for Reopening
Motion No. 513129

RELEASE DATE: March 28, 2018

FOR APPELLANT

Hakeen Makin, pro se
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ATTORNEYS FOR APPELLEE

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By: Frank Romeo Zeleznikar
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MARY EILEEN KILBANE, P.J.:

{¶1} Hakeen Makin has filed a timely application for reopening pursuant to App.R. 26(B). Makin is attempting to reopen the appellate judgment rendered in *State v. Makin*, 8th Dist. Cuyahoga No. 104545, 2017-Ohio-7882, that affirmed his convictions and sentence for the offenses of failure to comply and felonious assault of a peace officer. We decline to reopen Makin's appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Makin is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, 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*.

{¶4} Herein, Makin raises three proposed assignments of error in support of his claim of ineffective assistance of appellate counsel. Makin's first proposed assignment of error is that:

The trial court committed error and denied appellant his rights under the constitutions of the United States and Ohio when it "abused its discretion", and wrongfully denied appellant his right to disqualify his trial counsel Brian McGraw.

{¶5} Makin, through his first proposed assignment of error, argues that the trial court erred by failing to grant his request to remove appointed counsel. In *State v. Makin, supra*, this court held that:

Here, Makin requested that his appointed counsel be removed. The trial court conducted a hearing on Makin's request. A review of the hearing reveals that the court gave ample consideration to Makin's indications of his intent to self-represent. The trial court stated that it would give him a copy to read of the colloquy it must go through to determine if Makin could be his own attorney. The court stated:

"I'm not trying to talk you out of it. It's none of my business. There are some things that some people who want to represent themselves, that it sounds so good and glorious and maybe they saw a movie of where somebody represented themselves and did real well, et cetera, but there are some pitfalls. It might be good for you to read this colloquy so you'll know exactly the kind of questions the Court is going to be asking you and it gives you some time to think about it."

The court then set the matter for a hearing contingent upon Makin's indication to the court that he wished to proceed pro se. This matter, however, was not raised again by Makin, and he proceeded to trial with appointed counsel.

The foregoing record does not support Makin's assertion that the trial court denied him of his right to self-representation. Rather, it indicates that the trial court advised Makin of his options and set the matter for a hearing that was then never pursued.

Accordingly, the first assignment of error is overruled.

Makin, supra, at ¶ 14.

{¶6} The principles of res judicata may be applied to bar the further litigation of issues that were raised previously or could have been raised previously in an appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Claims of ineffective assistance of appellate counsel in an application for reopening may be barred from further review by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Logan*, 8th Dist. Cuyahoga No. 88472, 2008-Ohio-1934.

{¶7} Herein, this court has already determined that Makin was not prejudiced by the denial of the motion to remove appointed counsel. Res judicata prevents this court from once again reviewing the issue of removal of appointed counsel. *State v. Tate*, 8th Dist. Cuyahoga No. 81682, 2004-Ohio-973. We further find that circumstances do not render the application of the doctrine of res judicata unjust. Makin has failed to demonstrate that he was prejudiced through his first proposed assignment of error.

{¶8} Makin's second proposed assignment of error is that:

The trial court abused its discretion to the prejudice of the appellant when it failed to grant a continuance to secure the appearance of "expert witness Jeff White."

{¶9} Makin, through his second proposed assignment of error, argues that the trial court erred by failing to grant a continuance in order to obtain the testimony of an expert witness.

{¶10} The issue of whether the trial court prejudiced Makin by not granting a continuance to secure the appearance of an expert witness was already addressed through the second assignment of error as raised on direct appeal. This court held that:

In the second assignment of error, Makin argues the trial court abused its discretion when it denied defense counsel's request for a continuance in order to secure the appearance of Melvin Robertson ("Robertson") — a witness for the defense.

The decision to grant or deny a motion for continuance is left to the broad and sound discretion of the trial judge, and an appellate court may not disturb the trial court's ruling absent an abuse of discretion. *Cleveland v. Washington*, 8th Dist. Cuyahoga Nos. 97945 and 97946, 2013-Ohio-367, ¶ 11, citing *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981). "The term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

In the instant case, defense counsel asked for a continuance, after the state rested its case, so two witnesses — Robertson and Jeff White ("White") — could be brought into court to testify for Makin. Defense counsel noted that he had subpoenas issued for both individuals the day before, but his efforts to contact them have been unsuccessful. Robertson was the individual Makin was meeting with on Noble Road. White is an expert on auto mechanics repair and damage. With respect to Robertson, defense counsel stated:

I will say from the nature of the testimony, I don't know that Mr. Robertson being here or not for that purpose caused him any significant damage, because both from the State's side and from my client, there seems to be testimony that my client was meeting with a person in a parking lot.

We recognize "[i]t is incumbent upon a party moving for a continuance to secure the attendance of witnesses to demonstrate that substantial favorable testimony will be forthcoming and that the witnesses are willing and available as well." *In the Matter of: Timothy Reynolds*, 8th Dist. Cuyahoga No. 46585, 1983 Ohio App. LEXIS 12312 (Nov. 3, 1983), citing *U.S. v. Boyd*, 620 F.2d 129 (6th Cir.1980); *U.S. v. Medina-Arellano*, 569 F.2d 349 (5th Cir.1978).

Here, defense counsel stated that Robertson's absence did not cause Makin any prejudice because both Makin and the state essentially agreed that Makin was meeting someone in a parking lot. This testimony would have been more cumulative than substantially favorable to Makin. Because Makin has not proffered any favorable testimony of a substantial nature that would have been elicited from Robertson, we cannot say the trial court abused its discretion in denying his motion for a continuance.

State v. Makin, supra, at ¶ 18.

{¶11} Because the general issue of a continuance, based upon the request to secure the appearance of witnesses has already been addressed on appeal, we find that the doctrine of res judicata prevents its further review through this application for reopening.

In addition, we find that Makin has failed to demonstrate that any substantial favorable evidence would have been adduced at trial if Jeff White had appeared at trial and testified as an expert witness with regard to any damages sustained by Makin's motor vehicle or any other motor vehicle. Once again, we find that the trial court did not abuse its discretion in denying Makin's request for a continuance. Makin has failed to demonstrate that he was prejudiced through his second proposed assignment of error.

{¶12} Makin's third proposed assignment of error is that:

Ineffective assistance of counsel against appellate counsel for not raising prosecutorial misconduct due to the state losing or destroying and not preserving materially exculpatory evidence and that being the front end of U.S. Marshal Snack's 2008 Dodge Caravan and appellant is also going to combine ineffective assistance of trial counsel for not bringing to the trial court's attention that the state lost or destroyed exculpatory evidence and that being the front end of U.S. Marshal Snack's 2008 Dodge Caravan.

{¶13} Makin, through his third proposed assignment of error, argues that he was prejudiced through prosecutorial misconduct. Specifically, Makin argues that the failure

of the prosecutor, to preserve or introduce as exculpatory evidence the actual front bumper and grill of a vehicle operated by a United States Marshal that collided with Makin's vehicle, constituted prosecutorial misconduct that should have been argued on appeal.

{¶14} The prosecutor possesses two basic duties in a criminal trial. The prosecutor is to present the case for the state as its advocate, and the prosecutor is responsible to ensure that an accused receives a fair trial. *Berger v. U.S.*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.1314 (1935); *State v. Staten*, 14 Ohio App.3d 78, 470 N.E.2d 249 (2d Dist.1984).

{¶15} Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987); *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984). The touchstone of analysis is "the fairness of the trial, not the culpability of the prosecutor." *State v. Underwood*, 73 Ohio App.3d 834, 840- 841, 598 N.E.2d 822 (4th Dist.1991), citing *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78 (1982). An appellate court should also consider whether the misconduct was an isolated incident in an otherwise properly tried case. *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993); *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

{¶16} Herein, we find no prosecutorial misconduct based upon the failure of the prosecutor to preserve or present alleged exculpatory evidence at trial. Exhibit Nos. 4,

6-9, 11, 12, 32-44, and 46-55, and photographs of the motor vehicle operated by Makin and the motor vehicle operated by the U.S. Marshal, clearly demonstrate the damage sustained by each vehicle that resulted from a collision between the two motor vehicles. Makin has failed to demonstrate how the failure of the prosecutor to present at trial the actual grill and front bumper of the motor vehicle operated by the U.S. Marshal resulted in prejudice. In addition, Makin has failed to provide this court with any evidence to support the claim that the prosecutor destroyed or hid exculpatory evidence. Any such evidence de hors the record and could not be considered on direct appeal. *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414; *State v. Madrigal*, 87 Ohio St.3d 378, 2000-Ohio-448, 721 N.E.2d 52. Makin has failed to demonstrate that he was prejudiced through his third proposed assignment of error.

{¶17} Application denied.

MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR