

[Cite as *State v. Dunn*, 2018-Ohio-1761.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101648

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMON DUNN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-12-568849-A
Application for Reopening
Motion No. 515411

RELEASE DATE: May 2, 2018

FOR APPELLANT

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KATHLEEN ANN KEOUGH, J.:

{¶1} Applicant, Damon Dunn, seeks to reopen his appeal pursuant to App.R. 26(B), claiming that appellate counsel was ineffective. For the reasons that follow, we deny the application.

{¶2} Dunn was indicted in Cuyahoga C.P. No. CR-12-568849-A and convicted of crimes related to the murder of Kenneth Adams. He appealed, arguing three assigned errors: The denial of a motion to dismiss based on prosecutorial misconduct, the admission of testimony from a representative of a cell phone company, and the court's use of a flight jury instruction.

Dunn's convictions were affirmed on appeal. *State v. Dunn*, 8th Dist. Cuyahoga No. 101648, 2015-Ohio-3138.¹

{¶3} After the appellate decision was issued on August 6, 2015, Dunn filed a timely application for reopening on November 3, 2015. Six days later, this court journalized an erroneous denial of a motion for reconsideration. Through a series of clerical errors, the application remained pending. These errors were brought to this court's attention by Dunn's motion requesting findings of facts and conclusions of law, filed on March 5, 2018. This court vacated the earlier order denying a motion for reconsideration, and gave the state an opportunity to file a brief in opposition to Dunn's application. The state did not do so.

{¶4} In his application, Dunn asserts two proposed assignments of error. First, he contends that appellate counsel was ineffective for failing to raise and argue that the evidence was insufficient to support his convictions and the manifest weight of the evidence did not support his convictions. Second, Dunn asserts that appellate counsel was ineffective for not alleging instances where trial counsel was ineffective.

I. Ineffective Assistance of Appellate Counsel

{¶5} A criminal defendant is constitutionally entitled to representation during the appellate process. Therefore, claims of ineffective assistance of appellate counsel are cognizable. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). App.R. 26(B) provides a procedure to assert such claims. It allows for the reopening of an appeal based on a claim that appellate counsel was ineffective.

¹A more detailed recitation of the facts can be found at paragraphs 2 through 14 of this opinion.

{¶6} An application for reopening must set forth “[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). The application is required to support the alleged assignments of error with a sworn statement detailing the deficient representation and how the deficient performance prejudiced the applicant. App.R. 26(B)(2)(d). “To succeed on an App.R. 26(B) application, a petitioner must establish that counsel’s performance fell below an objective standard of reasonable representation and that he was prejudiced by the deficient performance.” *State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, 54 N.E.3d 1227, ¶ 2, citing *State v. Dillon*, 74 Ohio St.3d 166, 171, 657 N.E.2d 273 (1995); App.R. 26(B)(5). This is the standard applicable to other ineffective assistance claims announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996). Dunn must demonstrate that “there was a ‘genuine issue’ as to whether he has a ‘colorable claim’ of ineffective assistance of counsel on appeal.” *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶7} In order to show prejudice, an applicant must demonstrate that “there is a reasonable probability that, but for counsel’s errors, the factfinder would have had a reasonable doubt about his guilt.” *Strickland* at 695. In determining whether an applicant has been prejudiced, the court “must consider the totality of the evidence before the judge or jury.” *Id.*

{¶8} An appellate attorney has wide latitude and thus the discretion to decide which issues and arguments will prove most useful on appeal. *Strickland* at _ 7. Appellate counsel is also not required to raise every possible issue. *Jones v. Barnes*, 463 U.S. 745, 753-754, 103

S.Ct. 3308, 77 L.Ed.2d 987 (1983); *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995). Additionally, appellate counsel is not required to argue assignments of error that are meritless. *Id.*

A. Sufficiency and Manifest Weight of the Evidence

{¶9} Dunn argues that he was prejudiced by appellate counsel’s failure to raise sufficiency of the evidence because there was no reliable evidence that he killed Kenneth Adams.

{¶10} The question of “whether the evidence is legally sufficient to sustain a verdict is a question of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). It is “an inquiry about due process, * * * the resolution of which does not allow the court to weigh the evidence.” *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶11} When analyzing whether the evidence adduced is legally sufficient, an appellate court does not assess whether the state’s evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, _ 25, citing *Thompkins* at 387. “The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶12} Dunn was found guilty of aggravated murder (R.C. 2903.01(A)), murder (R.C. 2903.02(B)), felonious assault (R.C. 2903.11(A)(2)), and having weapons while under disability

(R.C. 2923.13(A)(3)). Dunn does not assert a challenge to any individual element as lacking, but generally asserts that the testimony adduced against him is unreliable.

{¶13} At Dunn’s trial, the state adduced eyewitness testimony that Dunn shot and killed Adams at a car wash. Reginald Longstreet testified that he saw Dunn shoot Adams several times. Corroborating evidence demonstrated that Longstreet was at the car wash at the time of the shooting and in a position to see the perpetrator. Further, cell phone records indicated that Dunn’s phone was in the area of the car wash at the time of the shooting.

{¶14} Under this appellate standard, this court does not examine the credibility of the witnesses, but simply determines whether the testimony, along with all the evidence adduced a trial, if believed, satisfies the elements of aggravated murder, murder, felonious assault, and having weapons while under disability. After examining the evidence adduced at trial, this court cannot say that appellate counsel was ineffective for choosing not to raise a sufficiency argument.

{¶15} Dunn also asserts that he was prejudiced by counsel’s failure to argue that his convictions were against the manifest weight of the evidence.

{¶16} A manifest weight inquiry looks at whether the evidence was substantial enough for a jury to reasonably conclude that all of the elements of the alleged crime have been proved beyond a reasonable doubt. The appellate court sits “as a thirteenth juror.” *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541 (1997), quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The appellate court reviews the entire record, considers the credibility of the witnesses, weighs the evidence and all reasonable inferences, and determines whether the jury clearly lost its way and created such a manifest miscarriage of justice that the

conviction must be reversed and a new trial ordered. *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717 (1st Dist.1983).

{¶17} Dunn alleges that Longstreet's testimony, the only eyewitness testimony that placed him at the car wash at the time of murder, cannot be believed because of omissions, alterations, and the presence of an ulterior motive.

{¶18} Shortly after witnessing the murder, Longstreet fled the state in an attempt to avoid federal prosecution for drug trafficking. Therefore, he did not provide a statement to police about the shooting until months later, when he was attempting to work out a reduction to the federal charges.

{¶19} Dunn highlights this ulterior motive, the fact that Longstreet testified that he was high on PCP at the time he witnessed the murder, and instances where Longstreet's testimony conflicted with his previous statements. For instance, in a pretrial statement Longstreet described the shooter as wearing all black, but a video that purported to show the perpetrator running from the scene depicted a person wearing a white shirt and dark pants. Most of the instances highlighted by Dunn were addressed at trial on cross-examination and used in an attempt to impeach Longstreet's credibility.

{¶20} After a review of the record, this court cannot say that counsel was ineffective for failing to raise a challenge to the manifest weight of the evidence. There are small inconsistencies in some aspects of the testimony adduced at trial, but nothing that casts doubt on the verdicts reached by the jury and trial court. This is not the exceptional case where the trier of fact clearly lost its way in rendering its verdict.

{¶21} There is no colorable claim of ineffective assistance of appellate counsel for failing to mount a sufficiency or manifest weight challenge.

B. Ineffective Assistance of Trial Counsel

{¶22} Dunn argues that appellate counsel should have argued trial counsel was ineffective for failing to sufficiently challenge the admission of testimony from a representative of a cell phone provider. Dunn classifies this testimony as expert testimony that did not meet the standard for reliability or comply with evidentiary rules governing expert testimony. However, on direct appeal, appellate counsel did raise this issue as an assignment of error. This court determined that the testimony of the representative from Verizon Wireless and an investigator that used cell phone records and information to create a map or data compilation did not constitute expert testimony. *Dunn*, 8th Dist. Cuyahoga No. 101648, 2015-Ohio-3138, at __ 51-54. *See also State v. Johnson*, 8th Dist. Cuyahoga No. 105612, 2018-Ohio-1389, __ 24-30 (finding that testimony of the cell phone representative did not constitute expert testimony). Appellate counsel could not be ineffective for raising the alleged error Dunn now asserts because counsel did, in fact, raise and argue the issue. *State v. Glenn*, 8th Dist. Cuyahoga No. 94425, 2012-Ohio-1530, __ 8. Res judicata bars review of the issue as outlined in *Glenn*.

{¶23} Dunn further alleges trial counsel was ineffective for failing to properly cross-examine Longstreet and sufficiently impeach him using prior inconsistent statements. The same ineffective assistance of counsel standard of review announced above applies to the review of this issue.

{¶24} An examination of the trial testimony indicates that trial counsel used Longstreet's pretrial statements to impeach his testimony and cast dispersions on his veracity and motives for testifying. Counsel used those statements to demonstrate that Longstreet's description of the shooter wearing all black was contrary to the video evidence that showed a person running away from the scene of the shooting wearing a white shirt. Counsel also used the pretrial statements

and the negotiations between federal and state prosecutors to establish that Longstreet was testifying as part of a deal. Counsel highlighted statements that Longstreet made that indicated he was “incapacitated off of the drug called PCP” at the time Adams was killed.

{¶25} Longstreet was extensively cross-examined. Counsel attempted to discredit Longstreet and attack his motives for testifying using videos, written and recorded statements made to police, letters written by Longstreet, and video evidence. Appellate counsel cannot be said to be ineffective for failing to argue that trial counsel was ineffective in this regard.

{¶26} Dunn has failed to meet his burden to 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).

{¶27} Accordingly, the application for reopening is denied.

KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and
PATRICIA ANN BLACKMON, J., CONCUR