[Cite as *State v. Williams*, 2019-Ohio-1119.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106484

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DOMINIQUE WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-17-615064-A
Application for Reopening
Motion No. 525333

RELEASE DATE: March 27, 2019

FOR APPELLANT

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LARRY A. JONES, SR., J.:

{¶1} Dominique Williams has filed a timely application for reopening pursuant to App.R. 26(B). Williams is attempting to reopen the appellate judgment, rendered in *State v. Williams*, 8th Dist. Cuyahoga No. 106484, 2018-Ohio-3792, that affirmed his conviction and sentence for the offenses of aggravated murder, murder, felonious assault, and having weapons while under disability. We decline to reopen Williams's original appeal.

I. Standard of Review Applicable to App.R. 26(B) Application for Reopening

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Williams 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, this court must indulge in 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*.

II. Improper Admission of Hearsay Evidence — Violation of Confrontation Clause

{¶4} Williams has raised one proposed assignment of error in support of his application for reopening. Williams's sole proposed assignment of error is that:

> Williams, through his only proposed assignment of error, argues that he was denied right to confront an adverse witness that his conviction is based off. A[n] off duty police officer testified he was told the Appellant was the assailant when he came to the crime scene.

{¶5} Williams, through his sole proposed assignment of error, argues his appellate counsel was ineffective for failing to argue on appeal that the testimony of off-duty police officer Richard Schilling, which involved numerous individuals identifying Williams as the person that shot the victim, constituted hearsay testimony that deprived Williams from confronting adverse witnesses during the course of trial.

{¶6} During the course of trial Schilling testified that:

Q. What else do you observe after you see the victim?

A. A number of people were indicating, saying things, he just shot that man, he just shot that man.

[COUNSEL FOR APPELLANT]: Objection.
THE COURT: Sustained.

[ASSISTANT PROSECUTOR]: Your Honor, may we approach?

THE COURT: You may.

* * *

(A discussion was had at the bench and off the record.)

* * *

[COUNSEL FOR APPELLANT]: Move to strike that answer.

THE COURT: I sustained your objection.

[COUNSEL FOR APPELLANT]: Thank you.

Q. Sergeant, I will ask some yes or no questions here.

A. I understand.

Q. When you come out of the bar, people are indicating to you certain things, correct?

A. Yes.

Q. Are they indicating to you a certain individual?

A. Yes, they are.

Q. And based on the information that was being provided to you by the people that were outside of the bar, did you look in any certain direction?

A. I did.

Q. Where did you look?

A. Directly in front of the door and slightly to the right there was an individual there with a firearm in his right hand.

Tr. 302-303.

{¶7} The trial court sustained the objection of defense counsel, and there was no further testimony from Schilling regarding any additional possible hearsay statements. In addition, during the course of trial, the trial court sustained an objection to alleged hearsay testimony offered by Detective Diaz regarding the identification of the shooter and curatively instructed the jury to disregard the alleged hearsay testimony. It must also be noted that the trial court repeatedly instructed and cautioned the jury that it must not consider any testimony that was premised upon a sustained objection. *See* tr. 250, 254, and 825. *State v. Treesh*, 90 Ohio St.3d 460, 739 N.E.2d 749 (2001).

{¶8} Also, the testimony of Schilling, with regard to the statements of various bar patrons identifying Williams as the shooter, constituted nontestimonial statements and thus did not run afoul of the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct 1143, 179 L.Ed.2d 93 (2011); *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

{¶9} Finally, all other evidence and testimony adduced at trial clearly established that Williams was guilty of the offenses of aggravated murder, murder, felonious assault, and having weapons while under disability. In fact, this court on direct appeal has already determined the there was an overwhelming amount of evidence adduced at trial of Williams's guilt, rendering any error associated with the alleged hearsay statements harmless beyond a reasonable doubt. *State v. Rahman*, 23 Ohio St.3d 146, 492 N.E.2d 401 (1986); *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976); *State v. Abrams*, 39 Ohio St.2d 53, 313 N.E.2d 823 (1974). The Supreme Court of Ohio has also held that an error in the admission of evidence is harmless if there is no reasonable possibility that the evidence may have contributed to the accused's

conviction. *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984); *State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976); *State v. Ferguson*, 5 Ohio St.3d 160, 166, 450 N.E.2d 265 (1983).

{¶10} Herein, we previously held in Williams's direct appeal that:

> In reviewing the entire record and weighing the evidence and reasonable inferences, this is not a case where the jury clearly lost its way. It is true, as Williams points out, that there was no eyewitness testimony to the actual shooting, but there was an overwhelming amount of scientific, as well as circumstantial, evidence tying Williams to the shooting. That evidence included: Williams running away from the scene of the shooting with a firearm in his hand; the murder weapon being recovered near where Williams was found; the murder weapon containing a single source of DNA, that being Williams's DNA; and the pellet recovered from [victim's] body determined to have come from that weapon found near Williams.

Williams, *supra* at ¶ 44.

{¶11} Accordingly, the sole assignment of error raised in the App.R. 26(B) application for reopening is not well taken. Williams has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced by the conduct of his appellate counsel.

{¶12} The application for reopening is denied.

LARRY A. JONES, SR., JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR