

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : No. 106584
 :
 v. :
 :
 KIECHAUN NEWELL, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 19, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-16-609565-A
Application for Reopening
Motion No. 529397

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Callista Plemel, Assistant Prosecuting
Attorney, *for appellee*.

Kiechaun Newell, *pro se*.

LARRY A. JONES, SR., J.:

{¶ 1} Applicant, Kiechaun Newell, timely seeks to reopen his appeal in
State v. Newell, 8th Dist. Cuyahoga No. 106584, 2019-Ohio-976. He alleges that his
appeal should be reopened because appellate counsel was ineffective for not filing a

postconviction relief petition and for failing to allege that trial counsel was ineffective for not introducing a video that purportedly exonerates Newell. Newell's application fails to assert a colorable claim of ineffective assistance of appellate counsel, and is denied.

{¶ 2} Newell was part of a bank robbery that took place in Northfield, Ohio. After the robbery, one of Newell's coconspirators told Newell to kill a third coconspirator, which he did. Newell was convicted of aggravated murder, kidnapping, felonious assault, discharge of a firearm on or near prohibited premises, tampering with evidence, aggravated theft, and having weapons while under disability. He received an aggregate sentence of life in prison with the possibility of parole after 49 years.

{¶ 3} Newell appealed, raising eight assignments of error. This court affirmed Newell's convictions, overruling the assigned errors. *Newell* at ¶ 1.

{¶ 4} On June 14, 2019, Newell filed a timely application for reopening pursuant to App.R. 26(B). He asserted two proposed assignments of error.

Proposed Assignments of Error

I. Appellant received ineffective assistance of appellate counsel in violation of the Sixth Amendment.

II. Appellant received ineffective assistance of trial counsel in violation [of] the Sixth Amendment.

Standard for Application for Reopening

{¶ 5} App.R. 26(B) provides a limited means of asserting a claim that appellate counsel was ineffective on appeal. The rule provides, "[a] defendant in a

criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel.” App.R. 26(B)(1). The application shall be granted if “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). The standard for ineffective assistance of appellate counsel is judged using the same standard that applies to ineffective assistance of trial counsel announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to show ineffective assistance, appellant “must prove that his counsel were [(1)] deficient for failing to raise the issues he now presents and [(2)] that there was a reasonable probability of success had he presented those claims on appeal.” [*State v.*] *Sheppard*, 91 Ohio St.3d [329] at 330, 744 N.E.2d 770 [(2001)], citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. Moreover, to justify reopening his appeal, appellant “bears the burden of establishing 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] at 25, 701 N.E.2d 696 [(1998)].

State v. Were, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 11.

Ineffective Assistance of Appellate Counsel in Postconviction Proceedings

{¶ 6} First, Newell argues that appellate counsel was ineffective because counsel failed to file a postconviction relief petition on Newell’s behalf. Newell is not entitled to appointed counsel in postconviction proceedings. *State v. Crowder*, 60 Ohio St.3d 151, 152, 573 N.E.2d 652 (1991); *State v. Glover*, 8th Dist. Cuyahoga Nos. 100330 and 100331, 2014-Ohio-3228, ¶ 20, citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). An attorney appointed to

represent Newell in a direct appeal cannot be ineffective for failing to undertake representation outside of that appointment. Further, such an allegation is not based on the record on appeal. Review of a claim of ineffective assistance of appellate counsel is limited to the appellate record. *State v. Moon*, 8th Dist. Cuyahoga No. 93673, 2014-Ohio-108, ¶ 12. Appellate counsel's failure to fulfill an alleged ethical obligation to file a postconviction relief petition is not evidenced in the appellate record. Therefore, such a claim cannot be addressed in an application for reopening.

Ineffective Assistance of Trial Counsel

{¶ 7} Newell claims that appellate counsel was ineffective for not arguing two issues of ineffective assistance of trial counsel. Newell raised a claim of ineffective assistance of counsel in his direct appeal. However, Newell raised arguments about ineffective assistance of counsel in the application that are different from the arguments raised in the direct appeal. Therefore, these will be addressed.

{¶ 8} A claim of ineffective assistance of trial counsel is analyzed by using the two-prong standard set forth in *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To establish ineffective assistance of counsel, an appellant must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different.

State v. Sowell, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, ¶ 138, citing *Strickland*.

{¶ 9} Newell argues that trial counsel should have removed himself from the case because of an alleged conflict of interest. Newell asserts that trial counsel had previously represented the city of Garfield Heights in a criminal case against Newell before the Garfield Heights Municipal Court.

{¶ 10} Newell does not point to anything in the record that supports this claim. Newell apparently failed to raise the issue before the trial court. As such, any argument in support of this proposed assignment of error must rely on matters outside the appellate record. Arguments in support of an assignment of error on appeal must be supported by the record under App.R. 9. App.R. 12(A)(1); *State v. Davis*, 4th Dist. Highland No. 09CA19, 2009-Ohio-7083, ¶ 12. The same is true of any proposed assignment of error in an application for reopening. *Moon*, 8th Dist. Cuyahoga No. 93673, 2014-Ohio-108, at ¶ 12. The arguments Newell raises in support of this claim of ineffective assistance of trial counsel are not supported by the record on appeal. Therefore, those arguments do not assert a colorable claim of ineffective assistance of appellate counsel.

{¶ 11} Newell also claims that a video existed that could have exonerated him, but it was withheld by the police. Newell admits in his application that there is no mention of this video contained within the appellate record. The video Newell alleges constitutes exculpatory evidence and the basis for this ineffective assistance of trial counsel claim is not contained in the record before this court. Such a claim may be asserted in a postconviction relief petition, but is not a proper subject for an

application for reopening because it relies on information de hors the record. *Moon* at ¶ 13, citing *State v. Cooperrider*, 4 Ohio St.3d 226, 228-229, 448 N.E.2d 452 (1983); *State v. Curtis*, 8th Dist. Cuyahoga No. 89412, 2008-Ohio-916, ¶ 8.

{¶ 12} Application denied.

LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANITA LASTER MAYS, J., CONCUR