

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 106668
 v. :
 :
 CHARLES E. HOPPER, JR., :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 20, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-17-619109-A
Application for Reopening
Motion No. 525154

Appearances:

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

Charles E. Hopper, Jr., *pro se*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} On January 29, 2019, the applicant, Charles E. Hopper, Jr., pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Hopper*, 8th Dist. Cuyahoga No.

106668, 2018-Ohio-4520, in which this court affirmed his conviction for felonious assault. Hopper maintains that his appellate counsel should have argued (1) that his trial counsel failed to argue that a witness was biased against Hopper, (2) that his trial counsel was ineffective for not investigating a possible witness, and (3) that the trial judge deprived him of his constitutional right to be heard. The state of Ohio filed its brief in opposition on March 8, and Hopper filed his reply brief on March 20, 2019. For the following reasons, this court denies the application to reopen.

{¶ 2} On July 4, 2017, five friends held a party: Stephen Little and Renee Savage, who were in a romantic relationship; Jimmie Slaubaugh, who was residing and sleeping with Danielle Gerard who was also at the party; and Charles Hopper, a longtime friend of Danielle Gerard who was residing in her apartment and soon became her fiancé. After watching fireworks, all five friends went to Danielle Gerard's apartment. Stephen Little and Renee Savage began arguing about their relationship. Little was facing Savage and Jimmie Slaubaugh; Charles Hopper was in the bathroom. When Hopper emerged from the bathroom, he retrieved a baseball bat which was by the front door and hit Little twice in the back of the head with it. Danielle Gerard called 911 and tried to keep Hopper in the apartment. Nevertheless, Hopper ran from the apartment followed by the others. The police arrived, questioned everyone, took Little to the hospital and arrested Hopper.

{¶ 3} In Gerard's statement to police, she mentioned that her brother, Marc, was also there and tried to keep Hopper in the apartment's kitchen. Pursuant

to the police report attached to Hopper's application, the police were unsuccessful in locating Marc.

{¶ 4} The grand jury indicted Hopper for attempted murder and two counts of felonious assault. During discussions in open court but out of the presence of the jury, the judge addressed Hopper: "I'm sorry, Mr. Hopper, you need to speak through counsel for purposes of the trial and all proceedings associated therewith." (Tr. 366.) However, the record is silent on what prompted the judge to make those comments.

{¶ 5} The jury found Hopper not guilty of attempted murder but guilty of the two counts of felonious assault. At the sentencing hearing, Hopper said that he would have liked some things brought up during trial and tried to reach out to the judge but that the judge told him he could only speak through his attorney. The judge merged the two counts of felonious assault as allied offenses and sentenced Hopper to seven years in prison.

{¶ 6} Hopper's appellate counsel argued that the trial court erred in allowing the state to impeach Gerard with a 12-year-old misdemeanor forgery conviction. Hopper now argues that his appellate counsel was ineffective for choosing such a weak argument and should have raised the three aforementioned issues.

{¶ 7} 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.

{¶ 8} 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.

{¶ 9} 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 (s)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.

{¶ 10} 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.

{¶ 11} Appellate review, however, is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898). Thus, “a reviewing court cannot add matter to the record that was not part of the trial court’s proceedings and then decide the appeal on the basis of the new matter.” *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. “Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material.” *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. “Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel.” *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶ 10.

{¶ 12} Hopper submits that his trial counsel should have argued that Jimmie Slaubaugh was a biased witness because he had threatened Hopper with the same baseball bat and was making love to Hopper's fiancée. These facts had been presented to the jury. With those facts in the background, Hopper's trial counsel endeavored to create a reasonable doubt by implying that Slaubaugh was the perpetrator because he had better access to the baseball bat, because he had threatened to use it against Hopper, because he had known Renee Savage longer, because he had been smoking marijuana all day, because no one was really watching him and because Hopper could not have known what was happening when he was in the bathroom. He also asked the jury to consider whether there was sufficient evidence of purpose to convict on the charge of attempted murder, and the jury found Hopper not guilty of that charge. Given the deference that must be afforded to an attorney's choice of strategy and tactics, appellate counsel in the exercise of professional judgment could properly choose not to argue trial counsel's closing argument. Hopper's reliance on Evid.R. 616(A) is misplaced. It provides the means of impeaching a witness, not a means of labeling a witness.

{¶ 13} Hopper further complains that his trial counsel did not try to use Marc to create a reasonable doubt. However, Marc was mentioned only once during trial when Danielle Gerard read her police statement. Trying to base any argument or line of questioning upon that one reference would necessarily rely on pure speculation. Similarly, arguing that trial counsel was deficient for failing to investigate Marc is unpersuasive because any efforts to locate Marc would be outside

the record. Hopper also argues that the trial court deprived him of his constitutional right to be heard because the judge told him that he had to speak through his attorney. Again, the court is left to speculate as to what Hopper wanted to say and whether it would have made a difference in the trial. Speculation on what could have been said is not the basis for an appellate argument. *State v. Addison*, 8th Dist. Cuyahoga No. 90642, 2009-Ohio-2704; *State v. Spencer*, 8th Dist. Cuyahoga No. 69490, 2003-Ohio-5064; and *State v. Piggee*, 8th Dist. Cuyahoga No. 101331, 2015-Ohio-596.

{¶ 14} Accordingly, the court denies the application to reopen.

EILEEN A. GALLAGHER, PRESIDING JUDGE

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