

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO :  
 :  
 Plaintiff-Appellee, :  
 : No. 106979  
 v. :  
 :  
 PIERSON REYNOLDS, JR., :  
 :  
 Defendant-Appellant. :

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: APPLICATION DENIED**  
**RELEASED AND JOURNALIZED: October 30, 2019**

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Cuyahoga County Court of Common Pleas  
Case No. CR-16-610041-A  
Application for Reopening  
Motion No. 528659

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney, and Anthony T. Miranda, Assistant Prosecuting  
Attorney, *for appellee*.

Kimberly Kendall Corral, *for appellant*.

ANITA LASTER MAYS, P.J.:

{¶ 1} On May 22, 2019, the applicant, Pierson Reynolds, pursuant to  
App.R. 26(B), applied to reopen this court's judgment in *State v. Reynolds*, 8th Dist.  
Cuyahoga No. 106979, 2019-Ohio-630, in which this court affirmed his convictions

for two counts of burglary, and one count each of aggravated burglary, aggravated robbery, robbery, and felonious assault. Reynolds claims that his appellate counsel should have argued (1) that his trial counsel was ineffective for allowing him to withdraw his guilty plea and thus subjecting him to a greater prison sentence, (2) that his trial counsel was ineffective for not arguing that the state specifically perform its original plea agreement, and (3) that the trial court abused its discretion in sentencing him to a 15-year prison sentence. On September 5, 2019, the state of Ohio filed its brief in opposition. For the following reasons, this court denies the application to reopen.

{¶ 2} The grand jury indicted Reynolds on two counts of aggravated burglary, two counts of burglary, one count of aggravated robbery, four counts of robbery, three counts of theft, one count of attempted theft, one count of kidnapping, and one count of felonious assault for crimes committed against six individuals, ages 76 to 94. These crimes occurred between July 29, 2016, and September 16, 2016.

{¶ 3} By May 22, 2017, the state and Reynolds had reached a plea bargain under which Reynolds would plead guilty to two counts of burglary and one count each of aggravated burglary, aggravated robbery, robbery, and felonious assault. In return, the state would nolle the other charges and would recommend an agreed sentence of 13 years. The court accepted the plea on that date and set sentencing for June 29, 2017. As part of the presentence investigation report, defense counsel asked for and received a mitigatory psychological evaluation.

**{¶ 4}** At the sentencing hearing, defense counsel stated that the psychological evaluation raised serious issues about Reynolds's competency to enter a plea and proceed with the sentencing. Consequently, the court ordered a competency evaluation for Reynolds. In July 2017, that evaluation found Reynolds incompetent to stand trial but opined that he could be restored to competency. Thus, the trial court ordered Reynolds to inpatient treatment for competency restoration and transferred the case to the mental health docket.

**{¶ 5}** By October, Reynolds had been restored to competency. At a hearing on November 8, 2017, defense counsel moved to withdraw the guilty plea because Reynolds was not competent at that time to do so. The state said that it had no objection to the withdrawal, but that the agreement of a 13-year sentence would be off the table. The mental health docket judge granted the motion to withdraw but opined that the state was being mean and acting in bad faith in revoking the 13-year agreement.

**{¶ 6}** By January 17, 2018, Reynolds and the state had again reached a plea bargain. Reynolds pled guilty to the same two counts of burglary, and one count each of aggravated burglary, aggravated robbery, robbery, and felonious assault. The state nolle the other charges, but would not recommend an agreed sentence of 13 years. Instead, in its sentencing memorandum, it asked for maximum penalties. However, at the sentencing hearing on March 1, 2018, the state asked that the court sentence Reynolds commiserate with the acts he committed and provide the community an opportunity to be safe from his actions. The mental health docket

judge held an extensive sentencing hearing. She listened to victims of the crime, the defense counsel, the prosecutor, Reynolds, and members of his family. She read letters to the court, reviewed his extensive criminal history as a juvenile, and noted the injuries to one of his victims. The judge then sentenced him to a total of 15 years.

{¶ 7} Appellate counsel raised one assignment of error:

Mr. Reynolds' right to due process and a fair sentence were violated where the prosecution abandoned its sentence recommendation for no justifiable reason and encouraged the court to impose the maximum and where the trial court, again, for no justifiable reason, imposed a sentence beyond that which had been originally agreed upon.

Pursuant to this argument, appellate counsel proposed that the prosecutor sought to punish Reynolds for exercising his constitutional right to move to withdraw his plea and for his mental illness. There were no intervening circumstances, such as additional crimes, that would justify a harsher sentence. Therefore, "the harsher sentence creates a presumption of vindictiveness, and nothing in the record or in what the trial court said overcomes it." (Appellant's brief, pg. 6.) Appellate counsel concluded that the harsher sentence was vindictive and punished him for his mental disabilities. Reynolds asked that this court vacate his sentence and remand the matter for a new sentence.

{¶ 8} In overruling this assignment of error, this court reasoned that because Reynolds was incompetent at the time of the guilty plea, he did not knowingly, intelligently, and voluntarily plead guilty to an offense. Thus, the plea was void, and the state was not bound by the terms of the initial plea agreement. Moreover, the trial court was not bound by the terms of the initial plea agreement

and could determine the appropriate sentence for the charges to which Reynolds had pled guilty. This court concluded that the mental health court did not err when it imposed a sentence greater than the original plea agreement.

{¶ 9} Now Reynolds argues that his appellate counsel was ineffective and should have argued the following: (1) Reynolds was denied effective assistance of counsel when his counsel withdrew his plea, resulting in denying Reynolds the benefit of the plea bargain that was negotiated and agreed to; (2) Reynolds was denied effective assistance of trial counsel when trial counsel failed to argue for specific performance; and (3) the trial court abused its discretion in failing to give proper weight to mitigating circumstances of Reynolds[’s] mental health, rather considering them as an aggravating factor.

{¶ 10} 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.

{¶ 11} 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.

{¶ 12} 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 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.

{¶ 13} 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.

{¶ 14} Appellate counsel chose to address the loss of the agreed-upon 13-year sentence directly by arguing that the state and the judge acted vindictively by abandoning that recommendation, rather than indirectly through the lens of ineffective assistance of trial counsel. Such an approach avoids the additional analysis of examining whether trial counsel's decisions came within the ambit of reasonable strategy and tactics. This is especially true when a review of the record shows that trial counsel's sentencing strategy was to present a very sympathetic view of Reynolds, through family support and remorse. Thus, following the admonition of the Supreme Court this court will not second-guess appellate counsel's decision to attack an issue directly. *State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2015-Ohio-516; *State v. Hilliard*, 8th Dist. Cuyahoga No. 102214, 2016-Ohio-2828. By arguing that the state and the judge acted vindictively, appellate counsel argued in essence that the trial court abused its discretion in imposing the longer sentence.

{¶ 15} Moreover, Reynolds cannot show prejudice. This court found that because of Reynolds's incompetency, the initial plea bargain was void and the state was not bound by it. Thus, defense trial counsel could not insist upon specific performance or argue that because Reynolds was competent in November 2017, the earlier plea bargain made when he was incompetent should still remain.

{¶ 16} During the sentencing hearing, the mental health court judge reviewed each of the factors in R.C. 2929.12. The judge said that Reynolds's mental condition made him more dangerous to the public. Reynolds now argues that the trial court abused its discretion by so stating because his mental health had to be viewed as a mitigatory factor. The judge's review of his criminal records showed that he was a danger to society. This court after reviewing the entire record concluded that the judge did not err imposing the 15-year sentence. Prejudice is not shown.

{¶ 17} Accordingly, the application to reopen is denied.

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ANITA LASTER MAYS, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and  
MICHELLE J. SHEEHAN, J., CONCUR