

[Cite as *State v. Vicario*, 2019-Ohio-784.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106373

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIK J. VICARIO

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-597651-A
Application for Reopening
Motion No. 524799

RELEASE DATE: March 5, 2019

FOR APPELLANT

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ANITA LASTER MAYS, J.:

{¶1} Applicant, Erik J. Vicario, seeks to reopen his appeal pursuant to App.R. 26(B), claiming that appellate counsel was ineffective. He claims in two proposed assignments of error that had appellate counsel argued that trial counsel was ineffective during plea negotiations, or that there was insufficient evidence of his guilt, he would have been successful in his direct appeal in *State v. Vicario*, 8th Dist. Cuyahoga No. 106373, 2018-Ohio-4217. We deny his application.

I. Background

{¶2} As set forth in his direct appeal, Vicario was tried and found guilty of numerous offenses related to the murder of Michael Matthews, that resulted in a 31-year prison sentence. *Id.* at _ 7. Vicario appealed, arguing that his convictions were against the manifest weight of

the evidence, the trial court erred when it denied his motion for mistrial, prosecutorial misconduct deprived him of a fair trial, and trial counsel was ineffective for failing to object to highly prejudicial testimony and statements made by the prosecutor. *Id.* This court overruled the assigned errors, and affirmed Vicario’s convictions and sentences.

{¶3} Vicario timely filed an application to reopen pursuant to App.R. 26(B) on January 16, 2019. He asserts in two proposed assignments of error that appellate counsel was ineffective for not arguing that trial counsel offered ineffective assistance during plea negotiations, and the state adduced insufficient evidence to secure his convictions.

II. Ineffective Assistance of Appellate Counsel

A. Standard of Review

{¶4} App.R. 26(B) 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. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

{¶5} A timely 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 Ohio Supreme Court has affirmed that “to justify reopening [the] appeal, [the applicant] ‘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. Smith*, 95 Ohio St.3d

127, 2002-Ohio-1753, 766 N.E.2d 588, _ 7, quoting *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶6} The standard employed to review Vicario’s claim of ineffective assistance of appellate counsel is the same standard that applies to trial counsel — “a defendant 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 proceeding’s result would have been different.” *State v. Tench*, Slip Opinion No. 2018-Ohio-5205, ¶ 118, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, Vicario must show that appellate counsel was deficient for failing to raise the issues he now presents, and that had he presented those claims on appeal, there was a “reasonable probability” that he would have been successful. *Spivey* at 25.

B. Law and Analysis

1. Ineffective Assistance of Trial Counsel During Plea Negotiations

{¶7} Vicario argues that appellate counsel was ineffective for not raising and arguing that trial counsel was ineffective during the plea negotiations phase of trial. This argument is belied by the record.

{¶8} During pretrials, the trial court inquired if there had been any plea negotiations between the parties. (Tr. 41). A lengthy discussion of the potential penalties was offered by the state and the fact that Vicario did not wish to plead guilty or engage in plea negotiations was provided for the record. (Tr. 42-52). There is no indication in the record that trial counsel’s performance was deficient in the manner alleged by Vicario in his application.

{¶9} An allegation that appellate counsel provided ineffective representation must be supported by something in the record on appeal. *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, _ 10-11. “[T]he effectiveness of appellate counsel [cannot] be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by this newly added material.” *Id.* at _ 11, quoting *State v. Moore*, 93 Ohio St.3d 649, 650, 758 N.E.2d 1130 (2001).

{¶10} Here, there is nothing in the record that supports Vicario’s claim that trial counsel was ineffective during plea negotiations or leading up to trial. It appears from the record that it was Vicario’s decision not to engage in plea negotiations, which trial counsel honored. Vicario’s affidavit attached to his application for reopening even provides that he informed trial counsel that he would not accept a plea deal.

{¶11} Vicario further argues that counsel failed to adequately prepare for trial and investigate the case. However, Vicario points to conversations and items outside of the record on appeal in support of this argument. If some evidence exists outside of the record to support this contention, that is an argument that could form the basis of a postconviction relief petition but not an application for reopening. *Id.* at _ 10. Vicario’s claim that appellate counsel was ineffective for failing to argue that trial counsel was ineffective in the manner described in the application is not grounds for reopening his appeal because it is unsupported in, or even contrary to, the record.

2. Sufficiency

{¶12} Vicario also asserts that appellate counsel was ineffective for not raising and arguing a sufficiency of the evidence assignment of error. In the present case, appellate counsel was not ineffective in this manner.

{¶13} In *State v. Vicario*, Cuyahoga C.P. No. CR-15-597651-A, Vicario was found guilty of violating R.C. 2903.01(A), aggravated murder; R.C. 2903.02(B), murder; R.C. 2923.13(A)(3), having weapons while under disability; five violations under each section of R.C. 2903.11(A)(1) and (A)(2), felonious assault; and four violations of R.C. 2903.02(A), attempted murder.

{¶14} On appeal, Vicario challenged the manifest weight of the evidence without challenging the sufficiency of that evidence. In a sufficiency analysis, this court accepts the evidence adduced by the state as true, without reviewing credibility or weighing conflicting evidence. *State v. Richardson*, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, _ 13. A manifest weight analysis allows this court to take such things into consideration and determine whether the jury, or in this case the trial court, lost its way in convicting Vicario of these crimes. A sufficiency analysis “is a test of adequacy” where “we decide whether, if believed, the evidence can sustain the verdict as a matter of law. This naturally entails a review of the elements of the charged offense and a review of the state’s evidence.” (Citation omitted.) *Id.*, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997).

{¶15} Within Vicario’s argument in support of this proposition, he does not cite to any lack of evidence going to any element of an offense, but merely argues that the evidence adduced against him should not be believed for various reasons. This is a manifest weight argument, which appellate counsel made to this court.

{¶16} For instance, Vicario claims the evidence against him is “totally insufficient as it is conflicting and highly prejudiced * * *.” Application for reopening at 9. He goes on to assert that the eyewitness identifications of him as the shooter were unreliable or could not be believed for various reasons including that two of the witnesses made deals with the state in exchange for their testimony. However, appellate counsel made the same arguments to this court within the manifest weight assignment of error. *Vicario*, 8th Dist. Cuyahoga No. 106373, 2018-Ohio-4217, at _ 10.

{¶17} Even if counsel did not advance a similar argument that Vicario now makes in this proposed assignment of error, a sufficiency analysis is necessarily included in an analysis of whether the manifest weight of the evidence supported conviction:

Although sufficiency and manifest weight are different legal concepts, manifest weight subsumes sufficiency in conducting the legal analysis; that is, a finding that a conviction was supported by the manifest weight necessarily includes a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also dispose of the issue of sufficiency.

State v. Jackson, 8th Dist. Cuyahoga No. 100125, 2015-Ohio-1946, ¶ 11, citing *Thompkins*, 78 Ohio St.380, 678 N.E.2d 541. See also *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, ¶ 11; *State v. McComb*, 2017-Ohio-4010, 91 N.E.3d 255 (2d Dist.), _ 60; *State v. Williams*, 8th Dist. Cuyahoga No. 106266, 2018-Ohio-3368, _ 68.

{¶18} Therefore, there is no genuine issue of ineffective assistance of counsel.

{¶19} Application denied.

ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR