[Cite as *State v. Mitchell*, 2012-Ohio-5262.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio	Court of Appeals No. E-11-039
Appellee	Trial Court No. 2006-CR-380
v.	
Chad Mitchell	**DECISION AND JUDGMENT**
Appellant	Decided: November 9, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio Public Defender, and Stephen P.
Hardwick, Assistant Public Defender, for appellant.

* * * * *

PER CURIAM.

{¶ 1} Before the court is the application of defendant-appellant, Chad Mitchell, to reopen the direct appeal of his conviction, filed August 1, 2012. On August 28, 2012, the state filed its opposition to his application. After Mitchell filed a reply brief, the state moved to strike it as noncompliant with App.R. 26(B). Both matters are now decisional.

1) Background

{¶ 2} Following a jury trial, Mitchell was convicted of complicity for various felony offenses, with firearm specifications, and received a 21 year aggregate prison term. He appealed and we reversed and remanded for resentencing on a merger issue. *State v. Mitchell*, 6th Dist. No. E-09-064, 2011-Ohio-973. Thereafter, the Erie County Court of Common Pleas resentenced him to an aggregate prison term of 20 years. Mitchell appealed again and we affirmed that sentence. *State v. Mitchell*, 6th Dist. No. E-11-039, 2012-Ohio-1992.

{¶ 3} In applying to reopen the latter direct appeal, Mitchell proposes three new assigned errors, claiming that his previous appellate counsel's failure to raise them establishes ineffectiveness. These are:

> Assignment of Error No. 1: The trial court erred by using the sentencing package doctrine to increase Mr. Mitchell's sentences for felonious assault.
>
> Assignment of Error No. 2: Res judicata barred the trial court from increasing Mr. Mitchell's sentence for his felonious assault convictions.
>
> Assignment of Error No. 3: The trial court's increased sentence for felonious assault is presumptively vindictive because the presumption of vindictiveness applies when, after a successful appeal, a trial court increases a sentence for three counts of a multiple-count case, even if the total prison term the entire sentencing package has decreased.

2) App.R. 26(B)

{¶ 4} In pertinent part, App.R. 26(B)(1) states that "[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." The defendant must provide in the application "[o]ne or more assignments of error * * * that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). Further, in a sworn statement supporting the application, the defendant must also identify "the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error * * * and the manner in which the deficiency prejudicially affected the outcome of the appeal." App.R. 26(B)(2)(d).

3) Standard of Review and Presumption of Competency

{¶ 5} To justify reopening an 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. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998); *see also State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, ¶ 7. "The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668 * * * is the appropriate standard to assess whether [appellant] has raised a 'genuine issue' as to the ineffectiveness of appellate counsel." *Id.* at ¶ 6.

{¶ 6} In order to prevail under this standard, Mitchell must demonstrate not only that the performance of his appellate counsel was deficient, but also that he was prejudiced by that deficiency. *Strickland* at 687; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107; App.R. 26(B)(2)(d). "Deficient performance" means performance falling below an objective standard of reasonable representation or assistance "under prevailing professional norms." *Strickland* at 688. "Prejudice," in this context, is defined as errors by appellate counsel that were so serious there is a reasonable probability that, but for those errors, the result of the appeal would have been different. *Id.* at 687-688, 694.

{¶ 7} Ohio law presumes the competence of a properly licensed attorney at both the trial and appellate level. *State v. Lott*, 51 Ohio St.2d 160, 555 N.E.2d 293 (1990); *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). In light of this presumption, Mitchell must specifically show how "[appellate] counsel was deficient for failing to raise the issues he now presents, and that there was a reasonable probability of success had [counsel] presented those claims on appeal." *State v. Mack*, 101 Ohio St.3d 397, 2004-Ohio-1526, 805 N.E.2d 1108, ¶ 5, citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

4) Analysis

{¶ 8} Mitchell's third proposed assignment will be addressed first. It is essentially the same argument he raised in the earlier appeal regarding the "presumption of vindictiveness" under *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969),

which we addressed and rejected. *Mitchell*, E-11-039, 2012-Ohio-1992, at ¶ 9-12. The state responds that Mitchell has identified nothing in the sentencing record to indicate "actual vindictiveness on the part of the sentencing judge," regardless of whether his resentencing resulted in an "*unexplained*" higher prison term or, as here, a lower one (citing *id.* at ¶ 9-10.) As we previously noted, there was nothing "unexplained" about Mitchell's resentencing: "The sentencing judge expressed no umbrage, frustration or animosity relating to the previous appeal or its outcome. The court provided an 'on-the-record, wholly logical, nonvindictive' explanation for the aggregate difference - one from which Mitchell unarguably benefited [i.e., a lower aggregate prison term]." *Id.* at ¶ 12. Nothing new on this point has been offered to support the application. Indeed, Mitchell can make no convincing ineffective assistance argument since his previous counsel did in fact raise and argue this issue. Repeating it here, even with some variation, does not establish ineffective assistance.

{¶ 9} Mitchell's arguments under his first and second proposed assignments also do not rebut the presumption that previous appellate counsel was effective. Mitchell first asserts that the trial court employed the "sentencing package doctrine" in resentencing him to less time cumulatively than he received in his first sentence, pointing to a one year increase on each of the felony charges, even though the merger we ordered resulted in the shorter net aggregate sentence. For this argument, Mitchell cites *State v. Saxon*, 109 Ohio St.3d 176, 179-180, 846 N.E.2d 824, 2006-Ohio-1245. In *Saxon*, the Ohio Supreme

Court barred sentencing judges from imposing "sentencing packages," as employed by federal courts, holding:

> [A] judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense. See R.C. 2929.11 through 2929.19. Only after the judge has *imposed a separate prison term for each offense* may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively. * * * Under the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses. (Emphasis added; citations omitted.)

{¶ 10} As the state notes in response, what Mitchell labels a "sentencing package" is not what occurred here. The record indicates that the sentencing judge "imposed a separate prison term for each offense," and the fact that he made some statements during his soliloquy referring to the aggregate number does not make the cumulative outcome a "sentencing package." Accordingly, *Saxon's* bar has no applicability to this resentencing. Mitchell next claims that "res judicata" barred the one-year increases here. The state responds that after a reversal and remand for resentencing, *Pearce* and its progeny fully anticipate that a greater *or* less sentence could result. *Pearce*, 395 U.S. at 723. We agree and find the res judicata contention inapposite.

{¶ 11} Finally, Mitchell claims that prior counsel was ineffective for failing to move this court to certify our decision as being in conflict with *State v. Bradley,* 2d Dist. No. 06CA31, 2008-Ohio-720, and *State v. Johnson*, 174 Ohio App.3d 130, 2007-Ohio-6512 (1st Dist.2007). *Bradley* involved a remand after which the defendant was *indicted on fourteen new counts*, which then led to negotiated pleas to four offenses for which he received harsher sentences than were originally imposed. However, in resentencing the defendant on a substantially lesser number of charges, the trial court in *Bradley* failed to provide an on-the-record explanation sufficient to rebut *Pearce's* "presumption of vindictiveness." That case is factually distinct from this one.

{¶ 12} *Johnson* actually supports the state's position. On remand after a partial reversal, the trial court in *Johnson* imposed an aggregate sentence of 19 years, which reflected an increase from three years to six years for a robbery conviction. The cumulative prison time, however, remained the same as his first sentence. *Id.* at ¶ 3-5. The First District rejected Johnson's *Pearce* claim that this increase was vindictive. Noting that the sentencing judge had made individualized sentencing choices, the court stated: "These considerations, coupled with the inescapable fact *that Johnson's total sentence did not increase*, are sufficient to establish that the sentence was not motivated by vindictiveness toward Johnson for exercising his rights." (Emphasis added.) *Id.* at ¶ 15.

5) Conclusion

{¶ 13} Mitchell has not met the standard of App.R. 26 nor his burden of rebutting the presumption of competency by establishing a "colorable claim of ineffective assistance of counsel on appeal." *Spivey,* 84 Ohio St.3d at 25. Accordingly, the application to reopen is denied. Separately, the state's "motion to strike" Mitchell's reply brief is denied as moot.

{¶ 14} It is so ordered.

Application denied.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE