

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

State of Ohio

Court of Appeals No. L-10-1092

Appellee

Trial Court No. CR0200902937

v.

William Clark

DECISION AND JUDGMENT

Appellant

Decided: February 28, 2012

* * * * *

William Clark, pro se.

* * * * *

SINGER, P.J.

{¶ 1} This matter is before the court on the timely application of appellant, William Clark, to reopen his direct appeal pursuant to App.R. 26(B). Appellant was found guilty of attempted kidnapping and attempted felonious assault on a no contest plea entered in the Lucas County Court of Common Pleas. The court sentenced appellant to seven and five-year terms of incarceration on these counts respectively and ordered that the terms be served consecutively. *State v. Clark*, 6th Dist. No. L-10-1092, 2011-Ohio-4681.

{¶ 2} On appeal, appellant's appellate counsel argued only that appellant's sentence was contrary to law and that the trial court unreasonably sentenced appellant to near maximum sentences. *Id.* at ¶ 8-9. We rejected both of these propositions and affirmed appellant's conviction. *Id.* at ¶ 16.

{¶ 3} In his application for reopening, appellant suggests that he was denied effective assistance of appellate counsel because his appellate counsel failed to raise on appeal that he was denied his statutory and constitutional right to a competency hearing and failed to raise the issue of trial counsel's ineffectiveness for failure to insist on a competency hearing after an evaluation had been ordered. Appellant also faults appellate counsel for failure to question the sentence imposed as improper because the offenses were allied offenses of similar import and should have merged.

{¶ 4} The state has not responded to appellant's application for reopening.

{¶ 5} App.R. 26(B)(5) provides that an application for reopening shall be granted if there is a genuine issue as to whether appellant was deprived of effective appellate counsel. Appellant asserts that he was deprived of effective counsel because appellate counsel failed to raise issues to his prejudice.

{¶ 6} An examination of the statutes and the record available for this application suggests that appellant has raised genuine issues. R.C. 2945.37(B) provides:

In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. *If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section.* If the issue is raised after the trial has commenced, the court

shall hold a hearing on the issue only for good cause shown or on the court's own motion. (Emphasis added.)

{¶ 7} It has been held that such a hearing is constitutionally mandated if there are sufficient indicia of incompetency to call into doubt a defendant's competency to stand trial. *State v. Were*, 94 Ohio St.3d 173, 761 N.E.2d 591 (2002), paragraph two of the syllabus.

{¶ 8} The portions of the record submitted with appellant's application reveal that appellant's trial counsel requested a competency evaluation and a general psychiatric evaluation and that the state concurred. These evaluations were apparently completed, but no hearing on competency appears to have occurred.

{¶ 9} The rules provide that upon finding a genuine issue as to appellate counsel's effectiveness, the court shall grant the application. Accordingly, appellant's motion for reopening is granted. Pursuant to App.R. 26(B)(6)(a), Attorney John Peter Millon, 300 Madison Avenue, Suite 1100, Toledo, Ohio, 43604, is appointed to represent appellant.

{¶ 10} The clerk shall serve notice of this order on the parties and the clerk of the trial court.

{¶ 11} The case shall proceed as on an initial appeal on any issues not previously considered, pursuant to App.R. 26(B)(7). The record on appeal shall be filed within 30 days of the date of this decision and judgment.

{¶ 12} It is so ordered.

Application granted.

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE