[Cite as *State v. Young*, 2004-Ohio-7366.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 78058

STATE OF OHIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellee	:	OPINION
	:	
-vs-	:	
	:	
JERRY YOUNG	:	
	:	
Defendant-appellant	:	

DATE OF JOURNALIZATION: APRIL 6, 2004

CHARACTER OF PROCEEDING: Application for Reopening,
Motion No. 352099
Lower Court No. CR-329277
Common Pleas Court

JUDGMENT: Application Denied

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON, ESQ.
CUYAHOGA COUNTY PROSECUTOR
BY: LISA REITZ WILLIAMSON, ESQ.
ASST. COUNTY PROSECUTOR
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant:

KEVIN SCHAD, ESQ.
SCHAD & COOK
8240 Beckett Park Drive
Indian Springs, Ohio 45011

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ANN DYKE, P.J.:

{¶ 1} On September 2, 2003, the applicant, Jerry Young, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State of Ohio v. Jerry Young* (Apr. 12, 2001), Cuyahoga App. No. 78058, in which this court affirmed his convictions for murder and having a weapon while under a disability. He argues ineffective assistance of appellate counsel, because of the failure to argue such issues as judicial bias and prosecutorial misconduct. On September 5, 2003, the State of Ohio filed its brief in opposition. For the following reasons, this court denies the application.

{¶ 2} App.R. 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within ninety days from journalization of the decision unless the applicant shows good cause for filing at a later time. The September 2, 2003 application was filed over two years after this court's decision. Thus, it is untimely on its face. Young argues that his lack of legal knowledge prevented him from timely filing his application. However, the courts have consistently ruled that lack of knowledge or ignorance of the law does not provide sufficient cause for untimely filing. *State v. Klein* (Apr. 8, 1991), Cuyahoga App. No. 58389, reopening disallowed (Mar. 15, 1994), Motion No. 49260, affirmed (1994), 69 Ohio St.3d 1481; *State v. Trammell* (July 24, 1995), Cuyahoga App. No. 67834, reopening disallowed (Apr. 22, 1996), Motion No. 70493; *State v. Cummings* (Oct. 17, 1996), Cuyahoga App. No. 69966, reopening disallowed (Mar. 26, 1998), Motion No. 92134; and *State v. Young* (Oct. 13,

1994), Cuyahoga App. Nos. 66768 and 66769, reopening disallowed (Dec. 5, 1995), Motion No. 66164. Ignorance of the law is no excuse.

{¶ 3} Young in his supporting affidavit also states that his appellate counsel never informed him of the ability to file an application to reopen. Thus, he implies that his lack of communication with his counsel and his unfortunate reliance on appellate counsel excuses his untimely filing. However, in *State v. Lamar* (Oct. 15, 1985), Cuyahoga App. No. 49551, reopening disallowed (Nov. 15, 1995), Motion No.63398, this court held that lack of communication with appellate counsel did not constitute good cause. Similarly, in *State v. White* (Jan. 31, 1991), Cuyahoga App. No. 57944, reopening disallowed (Oct. 19, 1994), Motion No.49174 and *State v. Allen* (Nov. 3, 1994), Cuyahoga App. No. 65806, reopening disallowed (July 8, 1996), Motion No. 67054, this court rejected reliance on counsel as showing good cause. In *State v. Rios* (1991), 75 Ohio App.3d 288, 599 N.E.2d 374, reopening disallowed (Sept. 18, 1995), Motion No. 66129, Rios maintained that the untimely filing of his application for reopening was primarily caused by the ineffective assistance of appellate counsel; again, this court rejected that excuse. Cf. *State v. Moss* (May 13, 1993), Cuyahoga App. Nos. 62318 and 62322, reopening disallowed (Jan. 16, 1997), Motion No. 75838; *State v. McClain* (Aug. 3, 1995), Cuyahoga App. No. 67785, reopening disallowed (Apr. 15, 1997), Motion No.

76811; and *State v. Russell* (May 9, 1996), Cuyahoga App. No. 69311, reopening disallowed (June 16, 1997), Motion No. 82351. Accordingly, he has not shown good cause for untimely filing. This defect alone is sufficient to dismiss the application.

{¶ 4} Additionally, the application exceeds the ten-page limitation established by App.R. 26(B)(4). This defect provides another independent reason for dismissing the application. *State v. Graham* (June 1, 1975), Cuyahoga App. No. 33350, reopening disallowed (July 21, 1994), Motion No. 52742; *State v. Schmidt* (Dec. 5, 1991), Cuyahoga App. No. 57738, reopening disallowed (Aug. 10, 1994), Motion No. 42174; *State v. Peeples* (Dec. 22, 1988), Cuyahoga App. No. 54708, reopening disallowed (Aug. 24, 1994), Motion No. 54080, affirmed (1994), 71 Ohio St.2d 349, 643 N.E.2d 1112, and *State v. Caldwell*, Cuyahoga App. No. 44360, 2002-Ohio-2751.

{¶ 5} Moreover, a substantive review of his arguments reveals that he has not established a genuine issue as to whether he was deprived of the effective assistance of appellate counsel. In order to establish such a claim, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶ 6} 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*, 104 S.Ct. at 2065.

{¶ 7} 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* (1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308, 3313. 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.

{¶ 8} 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.

{¶ 9} The first argument that Young asserts should have been made is that the trial judge's actions in questioning witnesses and commenting about the law violated his right to a fair and impartial trial. Young further submits that his conviction must be vacated because the judge gave the jury the appearance of partiality towards the State's case. He then lists instances in which the court questioned witnesses and elicited testimony unfavorable to Young or in which the trial judge supplied exceptions to the hearsay rule to allow testimony against Young.

{¶ 10} This argument is not well founded. First, the extent of any possible prejudice is minimized because this was not a jury trial, but a trial to the bench. Furthermore, Evid.R. 614(B), governing interrogation by the court, explicitly permits the court to interrogate witnesses in an impartial manner. This court has reviewed the record and concludes that the judge was generally asking clarification questions: Who said what, when. Such questioning does not indicate the judge's partiality. Significantly, trial counsel objected only twice to the judge's questioning; both involved the alibi witnesses. Appellate counsel, in the exercise of professional judgment, could easily dismiss the questioning of the second alibi witness because of lack of prejudice; that witness established Young's location approximately five hours after the murder. The judge's questioning of the first alibi witness, who tried to establish Young's location at the time of the murder, was more probing and pointed. However, the ambiguities in the witness's testimony could easily call for such questioning, and again appellate counsel in the exercise of professional judgment could conclude that this argument was not strong enough to include.

{¶ 11} Furthermore, the judge's interjections on the hearsay rule did not show partiality. The record clearly reveals that counsel and the court knew that the hearsay issues were critical to the case and that they continually considered the relevant hearsay rules before and during the trial.[1] In reviewing the record, appellate counsel could conclude, in the exercise of professional judgment, that this dialogue between the judge

[1] Although a neighborhood boy placed Young on the victim's street and heard a loud bang from the direction of the victim's house on the day of murder, there were no eyewitnesses. The state relied upon hearsay statements to show that the victim, who was Mr. Young's longstanding girlfriend, was afraid of him and his dominating behavior and was afraid of what he might do to her as she was trying to terminate their relationship.

and the lawyers did not show judicial bias but an effort to apply the hearsay rules fairly and consistently. Because there were multiple, critical hearsay issues in this case, appellate counsel cannot be faulted for directly attacking those issues, as he did in three of his five assignments of error, and excluding the judicial bias argument.

{¶ 12} Young's next argument is that the trial court erred in allowing an eleven-year-old boy to testify without holding a competency hearing. This boy, who lived a few houses away from the victim, was nine years old at the time of the murder and testified that he saw Young driving his car on the street the morning of the murder. Young argues that because a child's competency to testify is always questionable, the trial judge committed reversible error in not holding a competency hearing. However, in *State v. Clark*, 71 Ohio St.3d 466, 1994-Ohio-43, 664 N.E.2d 331, the Supreme Court of Ohio ruled that pursuant to Evid.R. 601(A), a child witness who is at least ten years old at the time of trial, but who was under ten years old at the time of the incident, is presumed competent to testify about the event. Additionally, a trial judge in the exercise of discretion may conduct a competency hearing of such a minor witness. But if there is no reason to question the child's competency, then the failure to conduct a voir dire examination of such a child does not constitute reversible error. A review of the boy's testimony shows that he was capable of receiving just impressions of the relevant facts, reflecting on them, and relating them accurately. The court further notes that appellate counsel did argue that the boy's identification was impermissible because of irregularities by the police in showing the boy photographs of Young and his car. In doing so, appellate counsel continued and relied on the strategy and

tactics of trial counsel. Appellate counsel was not deficient for excluding this competency argument.

{¶ 13} Finally, Young submits that prosecutorial misconduct should have been argued because the prosecutor failed to disclose the boy's identify until the day of trial.[2] However, appellate counsel did include this argument in his fourth assignment of error, arguing that the court erred when it failed to exclude the asserted identification testimony provided by the boy. (Page 35 of appellant's brief.) Following the admonition of the supreme court in *Barnes*, this court will not second-guess the strategy and tactics of appellate counsel.

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

COLLEEN CONWAY COONEY, J., AND

SEAN C. GALLAGHER, J., CONCUR.

ANN DYKE
PRESIDING JUDGE

[2] This court notes that the trial judge minimized any prejudice to Young by allowing the defense attorney to interview the boy immediately before his testimony and by apparently allowing the defense to call a recently identified alibi witness.