

[Cite as *State v. Warren*, 2007-Ohio-69.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 86854

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

REGINALD WARREN

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 390487
LOWER COURT NO. CR-458468
COMMON PLEAS COURT

RELEASE DATE: January 10, 2007

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JUDGE SEAN C. GALLAGHER:

{¶ 1} On November 8, 2006, the applicant, Reginald Warren, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State of Ohio v. Reginald Warren*, Cuyahoga App. No. 86854, 2006-Ohio-4104, in which this court affirmed Warren's convictions and sentences for one count of rape, four counts of gross sexual imposition, and five counts of kidnapping, but reversed the convictions and sentences for seven counts of rape, eight other counts of gross sexual imposition, and seven counts of kidnapping. Warren maintains that his appellate counsel was ineffective because she did not argue (1) that the expansion of the criminal statute of limitations violated the United States Constitution under the Due Process Clause and the Ex Post Facto Clause, and (2) that the trial court erred by allowing improper victim impact evidence. For the following reasons, this court denies the application.

{¶ 2} 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* (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.

{¶ 3} 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.

{¶ 4} 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 and *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987.

{¶ 5} 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 court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 6} In the present case, Warren's arguments on ineffective assistance of appellate counsel are not well taken. His first argument is that the expansion of the statute of limitations from six years to twenty years in 1999 violated the Due Process and Ex Post Facto Clauses of the United States Constitution because the expansion permitted a prosecution that the passage of time had previously barred. The underlying events occurred in 1988, when Warren was fifteen years old and the victim was nine years old. Thus, Warren argues that the trial judge improperly denied his pretrial motion to dismiss on statute of limitations grounds after sixteen years and that his appellate counsel should have argued that the statute and the judge's decision directly violated the Ex Post Facto and Due Process Clauses. This argument postulates that the limitations period must have expired in 1994.

{¶ 7} However, Warren's appellate counsel contested the delay in prosecution through two assignments of error: (1) The sixteen-year delay in prosecution violated Warren's due process rights by prejudicing his defense because during that time the scene of the crime was destroyed and two key

witnesses died. (2) The twenty-year statute of limitations is unconstitutional because it fails to protect individuals from having to defend themselves against overly stale charges. Following the admonitions of the United States Supreme Court and the Supreme Court of Ohio, this court will not second-guess the reasonable professional judgment of Warren’s appellate attorney to attack the limitations issue in terms of prejudice and the inherent unfairness of a twenty-year criminal statute of limitations, instead of arguing that the limitations period had already run.

{¶ 8} Furthermore, Warren cannot establish prejudice. In its opinion, this court specifically examined the issue Warren now raises and concluded that the statute of limitations had not run. R.C. 2901.13 had provided a six-year statute of limitations. However, the amended version provided that the new limitations period “applies to an offense committed prior to the effective date of this act if prosecution for that offense was not barred under section 2901.13 of the Revised Code as it existed on the day prior to the effective date of this act.” This court then stated that the statute of limitations was tolled because the victim was a minor. Thus, the six-year period did not begin to run until 1997, when the victim was eighteen years old. Consequently, the 1999 amendments were applicable to Warren because they became effective during the limitations period. This court further noted that the courts of Ohio had held the extension of an unexpired statute of limitations is not an invalid ex post facto law. Indeed, this court relied upon *State v. Diaz*, Cuyahoga App. No. 81857, 2004-Ohio-3954 and *State v. Bentley*, Ashtabula App. No. 2005-A-

0026, 2006-Ohio-2503, in which the courts of appeals on very similar facts held that the 1999 amendment to R.C. 2913.01 was constitutional and permitted prosecution.

Furthermore, *Stogner v. California* (2003), 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, upon which Warren relies, noted that courts have upheld extensions of unexpired statutes of limitations as in the present case. Therefore, this court can understand why appellate counsel, in the exercise of professional judgment, would not argue that the statute of limitations had run but would nuance the argument so as to be distinguishable from *Diaz* and *Bentley*.

{¶ 9} Warren's other argument is that the trial court erred in allowing the prosecutor to introduce improper victim impact evidence during the adjudicatory phase of the trial, specifically that Warren's sexual misconduct scarred the victim. She hated her mother, ran away from home several times, joined a violent criminal street gang, had sexual difficulties in her first marriage, divorced and suffered nightmares. Warren submits that such testimony was irrelevant, immaterial, and prejudicial. However, Warren's appellate counsel in the fourth assignment of error argued that Warren was denied his constitutional right to due process and a fair trial when the court erred in allowing and considering hearsay and other inadmissible and unfairly prejudicial testimony. Specifically, counsel attacked the evidence which suggested that Warren had burglarized and vandalized the subject house; the trial court permitted this evidence over objection. Appellate counsel also argued that the testimony of the victim's ex-husband and a police officer to buttress the victim's

testimony was improper. The ex-husband testified, over trial counsel’s objections, that the victim would “go berserk” when he grabbed her like Warren did. In contrast, trial counsel did not object to the victim’s testimony. This court overruled this assignment of error and noted that there was no objection to the police officer’s testimony. Again, this court will not second-guess appellate counsel’s reasonable professional judgment in deciding strategy and tactics and in trying to discern weaker arguments from stronger arguments. Basing an evidentiary argument on evidence which could obtain a reversal and to which trial counsel had objected, as compared to evidence to which counsel had not objected and plain error in a bench trial would have to be established, is the exercise of professional judgment. Moreover, it is very difficult to find prejudice when this court overruled the evidentiary arguments that appellate counsel raised. Warren has not established a genuine issue as to whether he was deprived of the effective assistance of appellate counsel.

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

SEAN C. GALLAGHER, JUDGE

COLLEEN CONWAY COONEY, P.J., and
ANTHONY O. CALABRESE, JR., J., CONCUR