[Cite as *State v. Fayne*, 2009-Ohio-2699.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90045

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PRESTON FAYNE

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 413371
LOWER COURT NO. CR-494735
COMMON PLEAS COURT

RELEASE DATE: June 9, 2009

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COLLEEN CONWAY COONEY, A.J.:

{¶ 1} On September 17, 2008, the applicant, Preston Fayne, pursuant to App.R. 26(B) and *State v. Murnahan*, (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, applied to reopen this court's judgment in *State v. Fayne*, Cuyahoga App. No. 90045, 2008-Ohio-3036, in which we affirmed his convictions for felonious assault and having a weapon under disability, both with one- and three-year firearm specifications, notice of prior conviction, and repeat violent offender specification. Fayne alleges that his appellate counsel was ineffective for failing to make various arguments. On October 20, 2008, the State filed its brief in opposition. 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, 104 S.Ct. 2052, 80 L.Ed.2d 674; *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, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987. 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.

{¶ 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 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.

{¶ 6} Furthermore, appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 50 N.E. 97;

Carran v. Soline Co. (1928), 7 Ohio Law Abs. 5; and *Republic Steel Corp. v. Sontag* (1935), 21 Ohio Law Abs. 358. Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500. Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶10.

{¶ 7} Fayne's first contention is that his appellate counsel should have argued that the trial court abused its discretion by not waiving court costs because Fayne is indigent or, in the alternative, that his trial counsel was ineffective for not asking the court to waive court costs. The Supreme Court of Ohio has enunciated the principles governing court costs in criminal cases. R.C. 2947.23 requires the imposition of court costs as a part of the criminal sentence; the court costs must be imposed as part of the sentence, even if the defendant is indigent. Only other statutory authority may allow the suspension of costs. However, the trial judge has discretion to waive costs assessed against an

indigent defendant. An indigent defendant must move the trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then he preserves the issue for appeal, and the appellate court will review the issue on an abuse-of-discretion standard. Otherwise, the defendant waives the issue, and costs are res judicata. Once court costs are imposed on even an indigent defendant, the clerk of courts may seek to collect them. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393; *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164; and *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006.

{¶ 8} In the present case, the trial court found Fayne to be indigent and imposed court costs, which Fayne asserts exceeds $2,000, and trial counsel did not move to waive costs. Appellate counsel did not raise the issue. However, it is understandable that appellate counsel would be hesitant to raise an issue that had little foundation in the record to overcome an abuse-of-discretion standard. Moreover, this court has previously rejected the argument that trial counsel was ineffective because he failed to move for waiver of court costs due to indigence. *State v. Hunter*, Cuyahoga App. No. 89796, 2008-Ohio-3793; *State v. Melton*, Cuyahoga App. No. 87186, 2006-Ohio-5610, reopening disallowed, 2007-Ohio-849; and *State v. Walton*, Cuyahoga App. No. 88358, 2007-Ohio-5070, reopening disallowed, 2009-Ohio-1234. Finally, Fayne's reliance on *In re Carter*, Jackson

App. No. 04CA 15, 2004-Ohio-7285, is misplaced because it relies on R.C. 2152.20(D), a juvenile statute which could have no application in this case.

{¶ 9} Next, Fayne submits that his appellate counsel should have argued prosecutorial misconduct for asking questions which assumed facts not in evidence and which sought to admit hearsay testimony, i.e., that the victim asked the other two eyewitnesses to forget the identity of the perpetrator. The court has reviewed the testimony which Fayne specifies as prejudicial. This testimony is generally ambiguous, and the questions did not so much assume facts not in evidence, but attempted to elicit new evidence. At the end of the exchange, the trial judge instructed the jury to disregard the question. Moreover, the trial lawyers and the court were very conscientious throughout the trial to avoid hearsay. Therefore, appellate counsel, in the exercise of professional judgment, could properly decide not to raise this issue as an assignment of error.

{¶ 10} Fayne's next proposed assignment of error is as follows: "It was error for the Judge to cite during sentencing that the 'ENTRY OF CONVICTION' from Portage County was one of the charges that he found Appellant guilty of." Fayne was indicted on two counts of aggravated robbery, one count of felonious assault and one count of having a weapon under disability. All of the counts carried one- and three-year firearm specifications, a notice of prior conviction, and a repeat

violent offender specification. In 1978, in Portage County, Fayne was convicted of aggravated murder. In fact, the subject incident took place approximately three months after Fayne had been released on parole. Before trial, Fayne agreed to have the weapons charge, the notice of prior conviction, and the repeat violent offender specification tried to the bench. Defense counsel also stipulated to the sentencing entry from the Portage County case. After the jury trial, the court found Fayne guilty of the weapons charge, its accompanying firearm specifications, the notice of prior conviction, and the repeat violent offender specification. All of this was proper. Appellate counsel need not argue frivolous issues.

{¶ 11} Fayne then submits that the trial court's imposition of maximum and consecutive sentences was based on findings not made by a jury nor admitted by appellant and, thus, violated due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The jury found Fayne guilty of felonious assault with the firearm specifications.[1] The judge sentenced him to a total of twenty-one years in prison: three years on the firearm specifications, eight years for felonious assault, five years for the weapons charge, and five years for the repeat violent offender specification, all to run consecutively. At sentencing, the trial judge listed several factors for the harsh sentence: the careful preparation of the gun,

[1] The evidence showed that the victim was standing at a bus stop with two friends at approximately 3:30 a.m. on January 20, 2007. The perpetrator came up to the victim and said, "You know what it is." He then hit the victim on the head with a sawed-off shotgun and fled the scene.

including wrapping it with electrical tape to obscure potential evidence of fingerprints and cutting it down to conceal it; the randomness of the attack; and Fayne's prior conviction for murder. Fayne concludes from this that his sentence was a function of facts not found by the jury.

{¶ 12} However, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus, the Supreme Court of Ohio ruled that "[t]rial courts have full discretion to impose a prison sentence within the statutory range ***." This grant of discretion precludes the argument that the sentence is a function of facts not found by the jury. This court also notes that the trial court in the present case was also the finder of fact on the weapons charge and several of the specifications. Thus, this argument is not well founded, and appellate counsel need not advance weak arguments.

{¶ 13} Fayne accuses the prosecutor of withholding exculpatory evidence. He asserts the police obtained a warrant to search his brother's home, where they discovered a BB gun which Fayne asserts is nearly identical to the gun found in the snow near his brother's home.[2] Fayne claims this is exculpatory evidence because it could have been used to counter the firearm specifications and the weapons charge. However, Fayne does not establish where in the record there is any evidence or

[2] The evidence also showed that after Fayne assaulted the victim, he fled to his brother's home. The police were able to follow distinctive boot prints through new snow to the house, where they arrested Fayne and obtained clothing which the eyewitnesses identified as being the same or similar to that worn by the perpetrator.

reference to a later search pursuant to a warrant or the BB gun. Moreover, there is no such reference in the case file, or in the brother's testimony, or in the testimony of the police officers. Unless there is some evidence in the record, appellate counsel has no foundation upon which to make an argument. Thus, appellate counsel was not deficient for failing to make this argument.

{¶ 14} Finally, Fayne argues that two pieces of evidence were improperly admitted. The first is his booking photo taken three days after his arrest. The eyewitnesses testified that the perpetrator looked "dirty" and had "salt and pepper" facial hair. Fayne maintains that the three-day old photo makes him look dirtier and three days worth of growth of facial hair would prejudicially accentuate his black and gray facial hair. The second is a letter purported to be written by Fayne to his parole officer[3] in which he explained that he was looking for bricks to hold up his car while he and his brother fixed it and that explains his boot tracks in the snow. The prosecutor sought its admission to show that Fayne was fabricating a story. Trial counsel tried to exclude the letter on the grounds that its authenticity was not established. The trial judge admitted it and told the jury it could compare the letter to other examples of Fayne's writing contained in the exhibits and draw their own conclusions. Fayne now argues that these were prejudicial errors.

[3] Counsel and the trial judge omitted any reference to the fact that Fayne was on parole.

{¶ 15} "A trial court has broad discretion with respect to the admission or exclusion of evidence, and its decision in such matters will not be reversed on appeal unless the trial court has abused its discretion and material prejudice has resulted therefrom." *State v. Hawn* (2000), 138 Ohio App.3d 449,457, 741 N.E.2d 594 and *City of Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 529 N.E.2d 1382. Upon review of the record, this court concludes that appellate counsel in the exercise of professional judgment properly rejected these arguments given the standard of review, the exhibits themselves, and the strength of the arguments he did raise.

{¶ 16} Accordingly, this court denies the application.

COLLEEN CONWAY COONEY,
ADMINISTRATIVE JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR