[Cite as *State v. Crim* , 2009-Ohio-2701.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90222

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ELLIS CRIM

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 414632
LOWER COURT NO. CR-417152
COMMON PLEAS COURT

RELEASE DATE: June 10, 2009

ATTORNEYS FOR PLAINTIFF-APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Diane Smilanick
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR DEFENDANT-APPELLANT

Ellis Crim, pro se
Inmate Number: 441-222
Marion Correctional Inst.
P.O. Box 57
Marion, Ohio 43301

ANN DYKE, P.J.:

{¶ 1} On October 23, 2008, the applicant, Ellis Crim, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Ellis Crim,* Cuyahoga App. No. 90222, 2008-Ohio-3805, in which this court affirmed Crim's sentences for two counts of felonious assault with firearm specifications.[1] Crim asserts that his

[1] In 2002, a jury found Crim guilty of two counts of felonious assault with firearm specifications. The trial court sentenced him to three years on the firearm specifications, three years on the first count of felonious assault, and four years on the second count, all to run consecutively for a total of ten years. In his first appeal, *State v. Crim*, Cuyahoga App. No. 82347, 2004-Ohio-2553, this court affirmed the convictions, but remanded for resentencing for proper findings of fact. The judge reimposed the same sentence. Upon appeal, *State v. Crim*, Cuyahoga App. No. 85290, 2005-Ohio-4129, this court affirmed the sentences. However, the Supreme Court of Ohio accepted Crim's appeal and reversed and remanded for resentencing in accordance with *Foster*. *In re: Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2190, 847 N.E.2d 1174. After hearing argument that imposing any sentence other than minimum, concurrent sentences would result in an unconstitutional use of *Foster*, the trial court reimposed the original sentence.

appellate counsel improperly argued that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, violates the Ex Post Facto and Due Process Clauses of the United States Constitution. On December 15, 2008, the State of Ohio 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} In the present case, appellate counsel was arguing to change the law. This court, in *State v. Mallette,* Cuyahoga App. No. 87984, 2007-Ohio-715, discretionary appeal not allowed, 115 Ohio St.3d 1439, 2007-Ohio-5567, had already rejected the contention that *Foster* violated the Ex Post Facto Clause. The other Ohio appellate districts had rejected the argument too. Nevertheless, appellate counsel argued that a proper understanding of ex post facto principles would establish that the clause forbids application of any retrospective law which disadvantages the offender affected by it. *Foster*'s retroactive application would disadvantage Crim because he would no longer be entitled to a presumption of minimum and concurrent sentences. In this argument, appellate counsel primarily relied upon *Miller v. Florida* (1987), 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351.

{¶ 7} Crim now maintains that his appellate counsel should have relied upon other federal cases, most importantly *Lynce v. Mathias* (1997), 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63. However, *Lynce* is easily distinguished; it concerned a legislative revocation of prison time credits, not a judicial application of the Sixth Amendment to sentencing. Furthermore, the Sixth Appellate District examined *Lynce* in upholding *Foster* against Ex Post Facto and Due Process challenges. *State v. Coleman*, Sandusky App. No. S-06-023, 2007-Ohio-448, and *State v. Friess*, Lucas App. No. L-05-1307, 2007-Ohio-2030. Thus, this court is not convinced that citing to *Lynce* rather than *Miller* would have made a difference.

{¶ 8} Moreover, following the admonition of the Supreme Court, this court in this case will not second-guess appellate counsel's strategy and tactics in deciding upon what United State Supreme Court and federal cases to cite when endeavoring to make a "cutting-edge of the law" argument, especially one that seeks to modify, if not overturn, a recent state supreme court decision.

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

ANN DYKE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR