

[Cite as *State v. Gaughan*, 2009-Ohio-2702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90523

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL GAUGHAN

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 421223
LOWER COURT NO. CR-479475
COMMON PLEAS COURT

RELEASE DATE: June 8, 2009

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JUDGE MARY J. BOYLE:

{¶ 1} The Applicant, Michael Gaughan, has filed a timely application for reopening pursuant to App. R. 26(B). He is attempting to reopen the appellate judgment that was rendered by this court in *State v. Gaughan*, Cuyahoga App. No. 90523, 2009-Ohio-955. In that opinion, we affirmed defendant's convictions for aggravated murder and aggravated robbery. For the below stated reasons, we decline to reopen Gaughan's original appeal.

{¶ 2} To establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that deficiency prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 688, 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 stated that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is too tempting for a defendant to second-guess his attorney after conviction and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "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} In his application, Gaughan asserts the following: "Appeal counsel violated the appellant 6th amendment rights to effective assistance of appeal counsel by waiving oral arguments when the attorney knew that appellant prayed for counsel to argue the 'supplemental assignments of error' filed pro-se by appellant. The appeal court did not even answer the four assignments of error filed pro-se by appellant. Each error contained a valid constitutional

question of merit. Counsel collected \$3,012.10 for work he did not even argue. Therefore this appellant pray [sic] that this honorable court will re-open the appeal and allow appellant to be granted counsel so that he may have his issues presented to the court.”

{¶ 5} However, Gaughan does not present any argument with his assignment of error pertaining to how counsel’s performance was deficient and how he was prejudiced by that deficiency. In *State v. Kelly* (Nov. 18, 1999), Cuyahoga App. No. 74912, reopening disallowed (June 21, 2000), Motion No. 312367, this court held that “the mere recitation of assignments of error is not sufficient to meet applicant’s burden to ‘prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a “reasonable probability” that he would have been successful.’ *Spivey, supra.*” See also *State v. Mosely*, Cuyahoga App. No. 79463, 2002-Ohio-1101, reopening disallowed, 2005-Ohio-4137, Motion No. 365082; *State v. Dial*, Cuyahoga App. No. 83847, 2004-Ohio-5860, reopening disallowed 2007-Ohio-2781, Motion No. 392410; *State v. Ogletree*, Cuyahoga App. No. 86500, 2006-Ohio-2320, reopening disallowed 2006-Ohio-5592, Motion No. 387497; *State v. Huber*, Cuyahoga App. No. 80616, 2002-Ohio-5839, reopening disallowed 2004-Ohio-3951, Motion No. 356284.

{¶ 6} By not presenting argument pertaining to his proposed assignment of error, Gaughan has completely failed to demonstrate that his counsel was

deficient and that he was prejudiced by such deficiency. Consequently, there is no basis for this court to make any such finding. Furthermore, a review of the record indicates that this court struck Gaughan's pro-se brief because it failed to comport with the appellate rules. This court also gave Gaughan twenty-one days to file a corrected brief. Gaughan, however, never filed a corrected brief. Therefore, it would have been error for appellate counsel to argue any assignments of error presented by Gaughan.

{¶ 7} Accordingly, the application to reopen is denied.

MARY J. BOYLE, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR