[Cite as *State v. Addison*, 2009-Ohio-2704.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90642

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AARON ADDISON

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 421098
LOWER COURT NO. CR-486979
COMMON PLEAS COURT

RELEASE DATE: June 10, 2009

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MELODY J. STEWART, J.:

{¶ 1} On April 20, 2009, the applicant, Aaron Addison, applied pursuant to App.R. 26(B), to reopen this court's judgment in *State of Ohio v. Aaron Addison,* Cuyahoga App. No. 90642, 2009-Ohio-221, in which this court affirmed his convictions and sentences for aggravated murder, two counts of attempted murder, and having a weapon under disability. Addison argues that his appellate counsel should have argued that trial counsel was ineffective for not calling an expert witness on ballistics. On May 22, 2009, 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, 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.

{¶ 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} Additionally, 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, ¶10, 776 N.E.2d 79.

{¶ 7} Addison's argument is that the state's expert witness was less than compelling. He often seemed confused and unaware of many of the facts of the incident. It also seems that the fatal projectile had an unusual trajectory. Given this uncertainty, Addison argues that a defense expert witness would necessarily have helped clear the confusion and exonerate Addison. Therefore, trial counsel must have been ineffective for not retaining and calling an expert witness.

{¶ 8} However, Addison does not show in the record what the expert witness would have said. Addison does not show a proffer and, indeed, indicates that such is not possible because trial counsel did not contact an expert. Without some scintilla of evidence in the record as to what the expert would have testified, all appellate counsel could have done was speculate on what such testimony would have been. That is insufficient for making an appellate argument, and appellate counsel properly rejected an argument without foundation in the record.

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

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
ANN DYKE, J., CONCUR