[Cite as *State v. Hudson*, 2009-Ohio-3069.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89588

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM HUDSON

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 409978
LOWER COURT NO. CR-478205
COMMON PLEAS COURT

RELEASE DATE: June 22, 2009

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JUDGE FRANK D. CELEBREZZE, JR.:

{¶ 1} In *State v. Hudson*, Cuyahoga County Court of Common Pleas Case No. CR-478205, applicant, William Hudson, was convicted of: two counts of attempted murder and two counts of felonious assault -- each with a notice of prior conviction and repeat violent offender specification as well as one-year and three-year firearm specifications; and one count of having a weapon while under a disability. The trial court ordered that Hudson serve the sentences on the two attempted murder counts concurrently with each other and the two felonious assault counts concurrently with each other. The trial court also ordered all counts to be served consecutively. As a consequence, Hudson is serving the terms for the attempted murder counts and the felonious assault counts consecutively.

{¶ 2} This court affirmed that judgment in *State v. Hudson*, Cuyahoga App. No. 89588, 2008-Ohio-1265. The Supreme Court of Ohio denied Hudson's motion for leave to appeal and dismissed the appeal as not involving any substantial constitutional question. *State v. Hudson*, 119 Ohio St.3d 1447, 2008-Ohio-4487, 893 N.E.2d 517.

{¶ 3} Hudson has filed with the clerk of this court a timely application for reopening. He asserts that he was denied the effective assistance of appellate counsel because appellate counsel did not assign the trial court's sentencing him to consecutive sentences for attempted murder and felonious assault as error. Rather, he argues that attempted murder and felonious assault are allied offenses of similar import.

{¶ 4} We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 5} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that Hudson has failed to meet his burden to demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). In *State v. Spivey*), 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, the Supreme Court specified the proof required of an applicant. "In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R.

26(B)(5). [Applicant] must 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. Thus [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." Id. at 25. Applicant cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

{¶ 6} Hudson argues that his appellate counsel was ineffective for failing to assert on appeal that the trial court erred by imposing consecutive sentences for attempted murder and felonious assault because those crimes are allied offenses of similar import. "Appellant was convicted of Attempted Murder, and Felonious Assault. However, Felonious Assault is incidental to the Attempted Murder; therefore, these two offense were committed with a single animus and were allied offense of similar import under R.C._2941.25. Therefore, the sentence for Counts 1 and 2 should have been merged, and the trial court erred in handing down consecutive sentences." Application, unnumbered page 2 (capitalization and spelling in original).

{¶ 7} In *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, the appellant received consecutive sentences and "moved to correct his sentence, claiming that involuntary manslaughter and aggravated robbery are allied offenses of similar import as defined in R.C. 2941.25(A)." Id. The Supreme Court held:

{¶ 8} "1. Under an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared in the abstract. (*Newark v. Vazirani* [1990], 48 Ohio St. 3d 81, 549 N.E.2d 520, overruled.) Id. at paragraph one of the syllabus.

{¶ 9} This court applied the holding and analysis in *Rance* in *State v. Nicholson*, Cuyahoga App. No. 85635, 2005-Ohio-5687. The *Nicholson* court observed that this court had "previously held that felonious assault and attempted murder are not allied offenses of similar import, since a felonious assault may occur where the elements of attempted murder would not be satisfied, and likewise, an attempted murder may be accomplished without the use of a deadly weapon or dangerous ordnance." Id. at ¶12 (citations deleted). As a consequence, the court held in *Nicholson* that "a defendant may be convicted of both offenses, and a separate sentence for each offense does not violate R.C. 2941.25 ***." Id. at ¶14.

{¶ 10} The state argues, therefore, that -- in light of *Rance* and *Nicholson*, et al. -- Hudson cannot demonstrate that he was prejudiced by the absence of an assignment of error asserting that attempted murder and felonious assault are allied offenses of similar import. Hudson, however, cites *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, in which the Supreme Court held:

{¶ 11} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the

offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, clarified.)" Id., paragraph one of the syllabus. Hudson argues, therefore, that the Supreme Court has indicated that *Rance* does not require a "strict textual comparison." Application, at unnumbered page 8.

{¶ 12} We note, however, that the trial court issued its journal entry sentencing Hudson in March 2007 and appellate counsel filed a direct appeal on his behalf in March 2007 as well. This court announced its decision and journalized judgment in this appeal in March 2008. The Supreme Court did not release its decision in *Cabrales* until April 2008. Hudson argues that *Cabrales* and other cases in which the Supreme Court or other courts found that various crimes are allied offenses requires the conclusion that his appellate counsel was deficient, he was prejudiced and he is entitled to reopening.

{¶ 13} "[A]ppellate counsel is not deficient for failing to argue developing issues in the law." *State v. Roberson*, Cuyahoga App. No. 88338, 2007-Ohio-2772, reopening disallowed, 2007-Ohio-6631, at ¶4. The determination whether various charges are allied offenses of similar import continues to be a developing issue. For example, in *State v. Jackson*, Cuyahoga App. No. 88345, 2007-Ohio-2925, this court relied on *Nicholson*, supra, to hold that Jackson's argument that attempted murder and felonious assault are allied offenses of similar import "must fail." *Jackson*, supra, at ¶36. Yet, in *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677,

this court considered the holdings in *Rance* and *Cabrales* and concluded "that all of the felonious assaults are allied offenses of similar import to the attempted murders." Id. at ¶94. *Sutton*, of course, was released after this court had decided Hudson's direct appeal.

{¶ 14} In *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286 [*Williams II*], vacating *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5149 [*Williams I*], Williams was convicted of, inter alia, two counts of attempted murder and two counts of felonious assault. The trial court ordered Williams to serve the sentence on the attempted murder counts concurrently with each other. Similarly, he was to serve the sentence on the felonious assault counts concurrently with each other. Nevertheless, the trial court ordered that Williams serve the sentence on the attempted murder counts consecutive to the sentence on the felonious assault counts.

{¶ 15} In *Williams I* (released in May 2008), this court concluded "that the convictions for one of the counts of attempted murder and one of the counts of felonious assault were allied offenses of similar import." *Williams I*, at ¶1. In *Williams II* (released and journalized in October 2008), however, the same panel vacated *Williams I* and proceeded with the two-step analysis required by *Cabrales*. The court observed that the facts were similar to those in *Sutton*, supra. "Williams fired two shots at one victim in rapid succession." *Williams II*, at ¶33. The *Williams II* court also concluded "that the separate counts of felonious assault as conceptually grouped by the state are offenses of similar import to the separate charges of

attempted murder." Id. After stating that "questions of whether a defendant has committed separate crimes with the same animus are fact dependent," Id. at ¶35, the *Williams II* court concluded that there was one animus and that Williams could be convicted of only one count of attempted murder.

{¶ 16} Clearly, at the time Hudson's appeal was pending before this court, the issue of whether -- and in what circumstances -- attempted murder and felonious assault may or may not be allied offenses of similar import was developing. "Appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue." *State v. Moncrief*, Cuyahoga App. No. 85479, 2006-Ohio-5571, at ¶1, fn. 2 (citations deleted). In light of the evolving and "fact dependent" jurisprudence exemplified by the cases discussed above, we must hold that Hudson has not met his "burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *Spivey*, supra. That is, Hudson has not demonstrated that appellate counsel was deficient for failing to assert on appeal that attempted murder and felonious assault are allied offenses of similar import and that the trial court erred by imposing consecutive sentences for those crimes.

{¶ 17} As a consequence, applicant has not met the standard for reopening. Accordingly, the application for reopening is denied.

FRANK D. CELEBREZZE, JR., JUDGE

JAMES J. SWEENEY, P.J., CONCURS

CHRISTINE T. MCMONAGLE, J., DISSENTS
(SEE ATTACHED DISSENT)

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 18} Respectfully, I dissent.

{¶ 19} In this application made under App.R. 26(B),[1] Hudson contends that he was denied effective assistance of appellate counsel because his appellate counsel did not assign as error the trial court's sentencing him to consecutive sentences for attempted murder and felonious assault.

{¶ 20} I would hold that on the face of the facts found in this court's decision on direct appeal, a meritorious issue concerning allied offenses of similar import has been raised. *State v. Hudson*, Cuyahoga App. No. 89588, 2008-Ohio-1265. Specifically, the facts, as set forth in the direct appeal, demonstrate that the victim, Genaro Claudio and Hudson attended a party. Hudson asked Claudio for a ride home. Hudson believed that Claudio had, on a previous occasion, hit him with a beer bottle. Thus, while in the car, Hudson pulled a gun on Claudio, there was a

[1]App.R. 26(B) was adopted as a result of *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, which established a procedure for addressing delayed claims of ineffective assistance of appellate counsel in criminal cases. See id. at 66.

The rule provides that "[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." App.R. 26(B)(1).

The rule further provides that "[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel." App.R. 26(B)(5).

struggle, and Claudio was shot in the stomach. The struggle continued and Claudio was shot several more times outside the car. Id. at ¶5-7. While there might be an argument that the separate shots constituted separate attempted murders, the felonious assaults were clearly allied offenses to the attempted murders.

{¶ 21} The majority states that the applicable law at the time of this appeal was *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, and indeed it was. In fact, it still is. While *Rance* has been rather consistently critiqued (the allegation being that the vocabulary of *Rance* has led people to approach the analysis of allied offenses more like the issue of lesser-and-included offenses), it however, has not been overruled,[2] and is still good law. In *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625, the Ohio Supreme Court did not overrule *Rance*, nor did it modify *Rance*; it only attempted to clarify *Rance.*

{¶ 22} The majority, citing *State v. Roberson*, Cuyahoga App. No 88338, 2007-Ohio-2772, states that appellate counsel cannot be deficient for failing "to argue developing issues in the law." But this is not a developing issue; it is a misunderstood issue, and on the facts of this case, "there is a genuine issue as to whether [Hudson] was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). *Cabrales* and its progeny[3] exist to help us understand the dictates

[2]There is a continuing argument before the Ohio Supreme Court for overruling *Rance*, the strict application of which has, according to *Cabrales* and others, led to "absurd results." But to-date, *Rance* has neither been overruled nor modified.

[3]*State v. Winn*, 2009-Ohio-1059 (slip opinion); *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.

of R.C. 2941.25(A)[4] and how to apply it to the facts of any given case. In this case, the sentencing entry, in pertinent part, reads:

{¶ 23} "**The court imposes a prison sentence at the Lorain Correctional Institution of 24 years. Defendant sentenced to 3 years on the firearm specifications (all 1 and 3 year firearm specifications in counts 1, 2, 3 and 4 merge for sentencing) to be served prior to and consecutive to 10 years on each of the base charges of counts 1 and 2, counts 1 and 2 to run concurrent with each other; 6 years on each of the base charges of counts 3 and 4, counts 3 and 4 to run concurrent with each other; 5 years on count 7; all counts to run consecutive to each other for a total of 24 years.**" (Emphasis added.)

{¶ 24} In short, the attempted murders were run concurrent with each other, while the felonious assault charges were to run concurrent with each other, but consecutive to the attempted murder counts. The court sentenced none of the charges as allied offenses of similar import.[5] The felonious assault charges are

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[4]The section provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

[5]Running counts concurrent is not the equivalent of merging them. *State v. Baker* 119 Ohio St.3d 1441, 2008-Ohio-4487, 893 N.E.2d 513; *State v. Reid*, Cuyahoga App. No. 89006, ¶8, 2007-Ohio-5858; *State v. Hines*, Cuyahoga App. No. 84218,¶20, 2005-Ohio-4421; *State v. Underwood*, Montgomery App. No. 22454, ¶27-28, 2008-Ohio-4748 ("The failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences.") Id. at ¶28, citing *State v. Coffey*, Miami App. No 2006 CA 6, 2007-Ohio-21, and *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, 877 N.E. 2d 1020. Thus, Hudson's appellate counsel could have possibly been successful even under a plain error review.

clearly allied offenses to the attempted murders; the two attempted murder charges are *arguably* allied offenses of similar import. At any rate, I believe the issue has merit, and should be both addressed by counsel and decided by this court.