[Cite as *State v. Hughley*, 2009-Ohio-3274.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90323

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN HUGHLEY

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 416122
LOWER COURT NO. CR-462014, 473878, and 481899
COMMON PLEAS COURT

RELEASE DATE: June 29, 2009

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JAMES J. SWEENEY, J.:

{¶ 1} On December 8, 2008, the applicant, Kevin Hughley, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Kevin Hughley,* Cuyahoga App. No. 90323, 2008-Ohio-6146, in which this court affirmed in part, reversed in part and remanded.[1] He submits that his appellate counsel was ineffective for failing

[1] This appeal concerns three separate criminal cases. "Case One" is *State v. Kevin Hughley*, Cuyahoga County Common Pleas Court Case No. CR-462014, in which a jury found Hughley guilty of six counts of forgery, six counts of uttering and five counts of tampering with records, as shown by the indictments and verdict forms. The trial court sentenced Hughley to two years on each the tampering counts to be served concurrently but consecutive to nine months on the forgery and uttering counts, which merged. "Case Two" is *State v. Kevin Hughley*, Cuyahoga County Common Pleas Court Case No. CR-473878, in which the court found him guilty of one count each of forgery and uttering; the

to argue various issues. On the next day Hughley filed his sworn statement in support of his application. On December 29, 2008, he filed two motions for leave to file additional arguments. On February 5, 2009, the State of Ohio filed its brief in opposition, and on February 17, 2009, Hughley filed a reply to the State's brief. 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

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court merged the two offenses for sentencing and imposed a nine month sentence to be served consecutively to the sentences in the other two cases. "Case Three" is *State v. Kevin Hughley*, Cuyahoga County Common Pleas Court Case No. CR. 481899, in which the court found him guilty of committing a motor vehicle title offense under R.C. 4505.19 and sentenced him to nine months consecutive to the other two cases.

On appeal, counsel successfully argued that because the jury forms for the tampering with records counts did not specify the degree of the offense, under R.C. 2945.75(A) the counts must be considered first degree misdemeanors, rather than felonies. This court rejected the other assignments of error, including manifest weight of the evidence on each of the three cases, failing to appoint a handwriting expert, imposing consecutive sentences in Case One, and disputing the overall harshness of the sentence.

On remand the trial court sentenced Hughley to a total of eighteen months on the tampering with records counts to be served consecutively to the nine months for forgery and the nine months for uttering for a total of twenty-seven months. Still, this reduced Hughley's prison time by six months.

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} Hughley's first contention is that his appellate counsel should have argued that his sentence for Case Three is improper. R.C. 4505.19, Title Offenses, prohibits a variety of improprieties relating to the transfer and sale of motor vehicles. The trial court found Hughley guilty of unlawfully and knowingly obtaining goods, services or money by means of an invalid, fictitious, forged, counterfeit, stolen or unlawfully obtained bill of sale of a motor vehicle. The trial court sentenced him to nine months at the Lorain Correctional Institution.

{¶ 7} However, R.C. 4505.19(B) provides in pertinent part as follows: "Whoever violates this section shall be *** imprisoned in the county jail or workhouse not less than six months nor more than one year, ***, or in a state correctional institution not less than one year nor more than five years." Accordingly, Hughley submits that a nine-month sentence in a state correctional institution is contrary to

the statute and is a void, improper sentence, which this court would have reversed and remanded for resentencing, if his appellate counsel had argued it.

{¶ 8} Although the sentence does appear to be improper, this court is not convinced that appellate counsel was deficient for not raising it. It was foreseeable that if this court ruled that the sentence was void, then upon remand the trial judge could have added at least three months to the sentence to have it served in a state correctional institution. Thus, as a matter of strategy, appellate counsel in the exercise of professional judgment could have concluded that it was not worth risking additional prison time for his client by raising this argument.[2]

{¶ 9} Also in regard to Case Three, Hughley asserts that his appellate counsel should have argued that the trial court erred in sentencing him on a felony-5 when during all pre-trial discussions and during an attempted plea hearing the prosecutor "clearly spoke" that the offense was a first degree misdemeanor. Accordingly, Hughley asserts that he should be given a misdemeanor sentence.

{¶ 10} This argument is meritless. R.C. 4505.19 requires a minimum sentence of six months and allows a maximum sentence of five years. Given that range, the trial court correctly discerned that the statute concerns an unspecified felony. Moreover, it is well established that the state is not estopped when exercising governmental functions, like administering the criminal justice system. *State ex rel.*

[2] This court further notes that on November 24, 2008, during the pendency of the appeal, Hughley made this identical argument in a "Motion to remand for resentencing" which this court denied on December 2, 2008.

Barletta v. Fersch, 99 Ohio St.3d 295, 2003-Ohio-3629, 791 N.E.2d 452; *Campbell v. Campbell* (1993), 87 Ohio App.3d 48, 621 N.E.2d 853; and *State ex rel. Holcomb v. Walton* (1990), 66 Ohio App.3d 751, 586 N.E.2d 176. Therefore, a prosecutor's characterization of an offense during pre-trials does not prevent or control a trial court from administering a law as written. At the very least, appellate counsel in the exercise of professional judgment could properly reject this unfounded argument. Additionally, the court notes that appellate counsel did try to attack the overall sentence as being too harsh, but this court ruled that the trial judge upheld the statutory purpose in fashioning appellant's sentence. Again, this court will not second-guess an attorney's reasonable strategic and tactical decisions.

{¶ 11} Next, Hughley submits that his appellate counsel should have argued that court costs should have been suspended. During sentencing the trial court stated: "At this time the court costs are suspended." (July 23, 2007 Tr. Pg. 230.) However, the sentencing entries in Case One and Case Three state: "Defendant is to pay court costs." The sentencing entry in Case Two provides: "Costs waived."

{¶ 12} 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; 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.

{¶ 13} Hughley does not cite to any statutory authority which would allow the suspension of costs in his cases. Thus, the trial court seems to have been without authority to state during sentencing that costs would be suspended. Accordingly, the trial court should have imposed court costs in all three cases and then considered whether court costs should be waived.

{¶ 14} Admittedly, appellate counsel could have made a strong argument from the record that the imposition of costs was arbitrary and capricious: the trial court initially stated an intention to suspend or waive all court cost, but then in drafting the sentencing entries decided to impose costs in two of the cases and waive them in the third. Nevertheless, this court declines to rule that appellate counsel was deficient in not making this argument. Again, as a matter of strategy, appellate counsel in the exercise of professional judgment could have concluded that it was not worth risking additional costs for his client by raising this argument. It was quite foreseeable that upon remand that trial court in reviewing the Supreme Court of

Ohio's rulings on court costs would conclude that costs should be imposed in all three cases; this would result in a net loss to Hughley. Indeed, the trial court upon remand in Case One did reimpose court costs. This court will not second-guess counsel's reasonable strategic and tactical decisions.

{¶ 15} Hughley's next argument is that in Case One all of the felony forgery and uttering convictions must be reduced to misdemeanor convictions, because the verdict forms did not state the degree of the offense or the additional elements that make the offense a more serious one. R.C. 2945.75(A)(2) provides: "A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶ 16} In Case One all of the indictments for forgery and uttering are felony indictments under R.C. 2913.31(A). They all include the element "with purpose to defraud." This element distinguishes forgery and uttering from subsection (B). R.C. 2913.31(C) provides that convictions under subsection (A) are felonies and convictions under subsection (B) are first degree misdemeanors. The verdict forms for forgery specifically stated, "in violation of §2913.31(A)(2)." The verdict forms for uttering specifically stated, "in violation of §2913.31(A)(3)." Thus, there is no doubt that the indictments for forgery and uttering charged only felony offenses and the jury verdict forms explicitly referenced felony offenses. Appellate counsel in the exercise of professional judgment properly rejected this argument.

{¶ 17} Hughley then argues that the trial court erred in not following Criminal Rule 44 in granting Hughley's motion to represent himself; thus, he argues his waiver of counsel was not knowingly, intelligently, and voluntarily made. Criminal Rule 44(A) provides that in serious offenses[3] a criminal defendant may waive his right to counsel after being advised of his right to counsel and knowingly, intelligently, and voluntarily waiving that right. Subsection (C) provides that such notice and waiver must be in open court and on the record and that in serious offenses the waiver shall be in writing. Furthermore, in *State v. Martin,* 103 Ohio St.3d 385, 392, 2004-Ohio-5471, ¶39, 816 N.E.2d 227, the Supreme Court of Ohio ruled that "the trial court must demonstrate substantial compliance with Crim.R. 44(A) by making sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." The Supreme Court of Ohio further stated that to be valid the defendant must have an apprehension of the nature of the charges, the range of possible punishments, possible defenses, and all the facts necessary to an understanding of the whole matter. ¶40.

{¶ 18} Hughley charges that there was no written waiver and that the trial court did not advise him of the charges, the range of possible punishments, possible defenses, or otherwise confirm that Hughley truly understood the whole matter. Therefore, his appellate counsel should have argued this issue.

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[3] There is no dispute that Hughley faced "serious offenses" in all three cases.

{¶ 19} On December 27, 2006, Hughley, pro se, filed "Motion for waiver of counsel or to represent self / via in a hybrid representation Crim Rule 44(C)." The closing paragraph of this motion includes the following clause: "Defendant submits in writing waiver of counsel ***." Subsequently, on February 5, 2007, Hughley, again pro se, filed an objection to any trial date set by the trial court because the "matters are outside statutory time limits." He then added in the pleading caption: "(waiver of counsel has been on file.)" On February 6, 2007, Hugley, pro se, filed a request to set for prompt trial via Ohio Revised Code. Again, in the caption he included "Waiver of counsel in on file 44(C)."

{¶ 20} On February 20, 2007, the trial court conducted a hearing on Hughley's then present counsel's motion to withdraw and Hughley's motion for waiver of counsel or to represent self. The trial court noted that four attorneys had represented Hughley so far in this litigation and that Hughley had "filed at least 23 pro se motions and other papers." (February 20, 2007 Tr. Pg. 5.) The trial judge asked counsel what was the basis of his motion to withdraw. Counsel replied that after having several conversations with Hughley, he (counsel) thought that it was Hughley's desire to represent himself and that after discussing the facts of the case with Hughley, there seemed to be irreconcilable differences, especially as to culpability.

{¶ 21} Hughley said that he had no objection to counsel's withdrawing. When the trial judge asked, "Do you wish to represent yourself?," Hughley replied, "Yes."

(February 20, 2007 Tr. Pgs. 7-8.) The trial judge then noted that "obviously this is something that you have thought about and you understand the potential problems of representing yourself?" Hughley responded, "Yes." The trial judge also warned Hughley that he would be held to the same standard as a lawyer and would have to proceed in the proper form. He also advised him that counsel could be appointed for him. Finally, the trial judge asked, whether it was his desire to represent himself and whether the choice was freely and voluntarily made, and Hughley said "Yes" to all the questions. (February 20, 2007 Tr. Pgs. 8-9.)

{¶ 22} A review of the dockets and of Hughley's many pro se filings in all three cases show that Hughley was very eager to represent himself and to present, inter alia, the defense of speedy trial and to obtain a quick trial. These filings also show that Hughley was aware of Criminal Rule 44 and that he thought he had filed a written waiver of counsel as required by the rule. The court further notes that during trial, Hughley had stand-by counsel and that even in this appeal, he continued his pattern and practice of filing multiple pro se motions. Given this factual background it would seem disingenuous to argue that the trial court erred in allowing Hughley to represent himself or that Criminal Rule 44 was not fulfilled.

{¶ 23} Finally, Hughley argues that the trial court erred in not specifically stating the number of days of jail time credit in Cases Two and Three. Admittedly, the trial court failed to specify a number of days in the sentencing entries. However, the issue is now moot. In Case One the trial court issued a March 9, 2009 journal

entry which provided in pertinent part as follows: "Upon review of department of corrections sentencing procedures, the court hereby clarifies the previous sentencing journal entry. Jail time credit shall be applied first to this case, as this is the oldest case defendant has pending for sentencing. Defendant's 304 days of jail time credit shall be applied to the misdemeanor sentence in this case." This entry resolves the issue of jail time credit, and it would be futile for this court to reopen this appeal to resolve that issue.

{¶ 24} Accordingly, this court denies the application to reopen.

JAMES J. SWEENEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
PATRICIA A. BLACKMON, J., CONCUR