[Cite as *State v. Friedlander*, 2009-Ohio-3370.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90084

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY FRIEDLANDER

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 412122
LOWER COURT NO. CR-487812
COMMON PLEAS COURT

RELEASE DATE: July 7, 2009

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PATRICIA A. BLACKMON, J.:

{¶ 1} A jury found applicant, Jeffrey Friedlander, guilty of attempted aggravated murder and conspiracy to commit aggravated murder.[1] This court affirmed his conviction for conspiracy to commit aggravated murder but ordered the conviction for attempted aggravated murder vacated.[2] The Supreme Court of Ohio

[1] *State v. Friedlander*, Cuyahoga County Court of Common Pleas Case No. CR-487812.

[2] *State v. Friedlander*, Cuyahoga App. No. 90084, 2008-Ohio-2812.

denied Friedlander's motion for leave to appeal and dismissed the appeal as not involving any substantial constitutional question.[3]

{¶ 2} Friedlander has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel because: he appeared at trial in prison clothes; a police officer testified regarding the reliability of a non-testifying informant; the trial court denied his request to appoint an expert to determine whether recorded conversations were altered; the trial court permitted the admission of victim impact evidence; he was denied a speedy trial. We deny the application for reopening. The reasons for our denial follow.[4]

{¶ 3} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that applicant 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."[5] The Supreme Court of Ohio has 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

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[3] *State v. Friedlander*, 120 Ohio St.3d 1418, 2008-Ohio-6166, 897 N.E.2d 653.

[4] App.R. 26(B)(6).

[5] App.R. 26(B)(5).

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."[6] Friedlander cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

{¶ 4} In his first proposed assignment of error, Friedlander argues that the trial court erred by holding his trial while he was wearing prison clothes. As part of his fifth proposed assignment of error, he argues that trial counsel was ineffective for failing to request a continuance to permit Friedlander to dress in trial clothes.

{¶ 5} Friedlander asserts that the trial court required him to stand trial in jailhouse clothing. Defense counsel acknowledged on the record, however, that -- prior to trial -- counsel had informed Friedlander that it was Friedlander's responsibility to ensure that he arrange with his family to bring clothing prior to the day of trial.[7] Friedlander's characterization of the trial court as having compelled him to stand trial in prison clothing is, therefore, inaccurate.[8] The circumstances which gave rise to Friedlander's being tried in jailhouse clothing do not present a genuine

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[6] *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

[7] Tr. at 30.

[8] Contrast the cases cited in *State v. Collins*, Cuyahoga App. No. 89808, 2008-Ohio-3016, at ¶15, as standing for the proposition "that a defendant who is *compelled* to stand trial wearing identifiable prison clothing suffers prejudice that unconstitutionally undermines the presumption of innocence." Id. (Emphasis added; citations deleted.)

issue of whether he was deprived of the effective assistance of appellate counsel. Similarly, we cannot conclude that trial counsel was ineffective for failing to request a continuance, particularly in light of the fact that the docket reflects and the trial court observed that the trial had been continued several times.[9] As a consequence, Friedlander's first and fifth proposed assignments of error do not provide a basis for reopening.

{¶ 6} In his second, third and fifth proposed assignments of error, Friedlander argues that: the trial court erred in permitting a police officer to testify about the reliability of a non-testifying informant; admission of the testimony violated his confrontation rights; and trial counsel was ineffective for failing to object to the testimony. On direct appeal, this court summarized the facts as follows:

{¶ 7} "The evidence adduced at trial demonstrated that on October 12, 2006, an informant named Eddy contacted Cleveland police sergeant Ronald Ross. Eddy had previously worked as an informant for Ross. Eddy told Ross that he was 'freaked out,' because Friedlander planned to hire a "hit man" to murder David Siss. Eddy gave Ross Friedlander's telephone number and four days later, Ross spoke with Friedlander on the telephone and pretended to be a hit man named 'Ted.' In a subsequent telephone conversation several days later, Friedlander arranged to meet Ross in the parking lot of a restaurant.

{¶ 8} "During that meeting, Friedlander gave Ross a paper which listed Siss's name and address, and stated, 'Best Time - Mon-Thurs, Evenings - Not on the

[9] Tr. 29.

Weekends.' Friedlander also showed Ross pictures of his van, which Ross was to hold as collateral until he received full payment for the job. Friedlander and Ross then drove to Siss's house so Friedlander could show Ross where Siss lived. After more discussion about the cost of the job, and Friedlander's admission that if he had not found Ross, 'I'd still be looking, I guess, or I might have done it myself,' undercover officers moved in and arrested Friedlander.

{¶ 9} "Recordings of Ross's telephone conversations and his meeting with Friedlander were played for the jury and transcripts of the recordings were made court exhibits."[10]

{¶ 10} Ross also testified that Eddy had provided reliable information in the past. Friedlander argues that the testimony regarding Eddy's reliability resulted in Ross vouching for Eddy's credibility. Friedlander also complains that, although Ross testified that Eddy was "freaked out," Friedlander testified that Eddy told Friedlander that he had to meet with "Ted" to avoid being harmed by Ted. As a result of the conflicting evidence regarding Friedlander's intentions and whether he took the initiative to arrange for the murder of Siss, Friedlander insists that his right to confront the witnesses against him was violated by the failure of the state to make Eddy available at trial.

{¶ 11} This court has already rejected this argument in an application for reopening. "In his third proposed assignment of error, [applicant] Townsend argues that appellate counsel was ineffective for failing to assign as error that Townsend's

[10] Cuyahoga App. No. 90084, 2008-Ohio-2812, at ¶2-4.

right to confront a witness was violated because a detective was permitted to testify as to statements made to the detective by a confidential informant. "'It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed. *** The testimony was properly admitted for this purpose." *State v. Thomas* (1980), 61 Ohio St.2d 223, 400 N.E.2d 401; *State v. Jenkins*, Cuyahoga App. No. 87606, 2006 Ohio 6421.' *State v. Guyton*, Cuyahoga App. No. 88423, 2007 Ohio 2513, at ¶17. Clearly, the statements of the informant were admitted to explain the steps taken by the police to investigate Townsend's activities. As a consequence, Townsend's third proposed assignment of error does not provide a basis for reopening."[11]

{¶ 12} Similarly, in this case, the state argues that the extrajudicial statements by the out-of-court declarant were admitted to explain the actions of Ross. In fact, the trial court sustained defense counsel's objection to testimony by Ross regarding what Eddy said to Ross. The trial court also instructed Ross that he could not testify as to what Eddy said to Ross.[12] Appellate counsel was not, therefore, deficient by failing to assign as error that Friedlander's right to confront the witnesses against him was violated by the testimony by Ross regarding Eddy or that trial counsel was ineffective. Likewise, Friedlander has not demonstrated any prejudice. As a

[11] *State v. Townsend*, Cuyahoga App. No. 88065, 2007-Ohio-2370, reopening disallowed, 2007-Ohio-6638, at ¶11, appeal dismissed as not involving any substantial constitutional question in 117 Ohio St.3d 1462, 2008-Ohio-1635, 884 N.E.2d 69.

[12] Tr. at 124-127.

consequence, Friedlander's second, third and fifth proposed assignments of error do not provide a basis for reopening.

{¶ 13} In his fourth proposed assignment of error, Friedlander argues that the trial court erred by denying his motion to appoint an expert to determine whether the recorded conversations were altered. Prior to trial, Friedlander requested that the court appoint an audio forensics expert to examine the three recordings which the state intended to introduce into evidence. (There were two recordings of phone calls between Friedlander and Ross and one recording of their meeting.) Friedlander contended that the transcript he had received of the recordings did not accurately represent what happened and that the recordings were "totally *** falsified."[13]

{¶ 14} In *State v. Ahmed*,[14] the appellant argued "that counsel failed to request the assistance of a 'cultural expert' and a foreign-language interpreter. However, appellant's assertions that these experts would have helped his defense are speculative at best. In *State v. Mason* (1998), 82 Ohio St.3d 144, 1998 Ohio 370, 694 N.E.2d 932, syllabus, we recognized that a trial court must provide funds for an indigent criminal defendant when the defendant has made a particularized showing of a reasonable probability that experts would aid the defense."[15]

{¶ 15} The only ground asserted by Friedlander for his request for an audio expert was his statement that he recalled the conversations differently than what was

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[13] Tr. at 19.

[14] *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637.

[15] Id. at ¶157.

represented in the transcript of the recordings which he had received. Friedlander has not provided this court with any authority requiring the conclusion that the defendant's differing recollection of a recording constitutes " a particularized showing of a reasonable probability that experts would aid the defense." Rather, this court concluded on direct appeal that "there was ample, compelling evidence that Friedlander committed a substantial overt act in furtherance of the conspiracy to murder David Siss."[16] Additionally, this court determined that "[i]n light of this evidence, the jury did not lose its way in finding Friedlander guilty of conspiracy to commit aggravated murder. Friedlander's words and actions were sufficient evidence of substantial overt acts in furtherance of the conspiracy. He spoke with an undercover police detective whom he thought was the hit man, and made arrangements for the murders. He agreed on a price and made payment arrangements. All of these acts were acts in furtherance of the conspiracy."[17] As was the case in *Ahmed*, "The record *** does not support appellant's assertions that these experts would have helped his defense."[18] As a consequence, Friedlander's fourth proposed assignment of error does not provide a basis for reopening.

{¶ 16} In his sixth proposed assignment of error, Friedlander argues that the trial court erred by permitting the state to introduce victim impact evidence. The state contends that the testimony by Siss merely demonstrates a motive for

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[16] *State v. Friedlander*, Cuyahoga App. No. 90084, 2008-Ohio-2812, at ¶13.

[17] Id. at ¶15 (citations deleted).

[18] *Ahmed*, supra, at ¶158.

Friedlander's actions because of a custody dispute in juvenile court involving a child whose deceased mother was Friedlander's niece. Siss is the child's father. The child's grandmother, Friedlander's sister, was contesting proceedings in juvenile court. The state argues that, because of the tensions in the extended families, Friedlander had a motive to hire a "hit man."

{¶ 17} The testimony introduced by the state, however, is not limited to the fact of the controversy over custody. During direct examination by the prosecuting attorney, Siss testified regarding a visit he received at his home from two police detectives who asked him if he knew Friedlander. The prosecuting attorney asked: "Has this affected you and your family since that time? Yes or no?"[19] The trial court overruled defense counsel's objection and Siss answered: "Yes."[20]

{¶ 18} Friedlander argues that this testimony amounts to victim impact evidence. Yet, he "fails to identify how he was prejudiced by the subject testimony and how, if it had been excluded, the outcome of his trial would have been different."[21] On direct appeal, this court rejected Friedlander's contentions that his conviction was based on insufficcient evidence and against the manifest weight of the evidence. "After examining the entire record, weighing the evidence, and considering the credibility of the witnesses, it is apparent the jury did not lose its way

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[19] Tr. at 231.

[20] Id. at 232.

[21] *State v. Milam*, Cuyahoga App. No. 86268, 2006-Ohio-4742, at ¶79.

in finding Friedlander guilty of conspiracy to commit aggravated murder."[22] Having failed to demonstrate prejudice, Friedlander's sixth proposed assignment of error does not provide a basis for reopening.

{¶ 19} In his seventh proposed assignment of error, Friedlander argues that he was denied his right to a speedy trial. In support of this proposition, he observes that he was in custody for 183 days prior to trial. The state observes, however, that the defense requested several continuances and filed a motion for discovery. Friedlander also filed pro se a motion to disqualify counsel. The trial court also referred Friedlander to the Court Psychiatric Clinic to determine whether he was competent to stand trial. As a consequence, Friedlander's seventh proposed assignment of error does not provide a basis for reopening.

{¶ 20} Friedlander has not met the standard for reopening. Accordingly, the application for reopening is denied.

PATRICIA A. BLACKMON, JUDGE

JAMES J. SWEENEY, P.J., and
MELODY J. STEWART, J., CONCUR

[22] *State v. Friedlander*, Cuyahoga App. No. 90084, 2008-Ohio-2812, at ¶17.