[Cite as *State v. White*, 2009-Ohio-4034.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90839

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JIMMY WHITE

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 418011
LOWER COURT NO. CR-500621
COMMON PLEAS COURT

RELEASE DATE: August 10, 2009

ATTORNEYS FOR PLAINTIFF-APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Katherine Mullin
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FOR DEFENDANT-APPELLANT

Robert Tobik
Chief Public Defender

BY: Robert M. Ingersoll
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶ 1} On January 30, 2009, the applicant, Jimmy White, pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, applied to reopen this court's judgment in *State of Ohio v. Jimmy White,* Cuyahoga App. No. 90839, 2008-Ohio-6152, in which this court affirmed White's convictions and sentences for two counts of having a weapon under disability with attendant firearm specifications. White asserts that his appellate counsel was ineffective for failing to argue the following: (1) the judge, who tried the weapon

under disability counts, erred by discussing the case with the jury, which tried the other counts, before reaching a decision on the disability charges and (2) the indictments for having a weapon under disability were structurally defective for failing to include a mens rea element. On April 24, 2009, the State of Ohio filed its brief in opposition. For the following reasons this court denies the application to reopen.

{¶ 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, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987. 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 and *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987.

{¶ 5} 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 court need not determine whether counsel's performance was

deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 6} Moreover, appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue. *State v. Williams* (1991), 74 Ohio App.3d 686, 600 N.E.2d 298; *State v. Columbo* (Oct. 7, 1987), Cuyahoga App. No. 52715, reopening disallowed (Feb. 14, 1995), Motion No. 55657; *State v. Munici* (Nov. 30, 1987), Cuyahoga App. No 52579, reopening disallowed (Aug. 21, 1996), Motion No. 71268, at 11-12: "appellate counsel is not responsible for accurately predicting the development of the law in an area marked by conflicting holdings." *State v. Harey* (Nov. 10, 1997), Cuyahoga App. No. 71774, reopening disallowed (July 7, 1998), Motion No. 90859; *State v. Sanders* (Oct. 20, 1997), Cuyahoga App. No. 71382, reopening disallowed, (Aug. 25, 1998), Motion No. 90861; *State v. Bates* (Nov. 20, 1997), Cuyahoga App. No. 71920, reopening disallowed (Aug. 19, 1998), Motion No. 91111; and *State v. Whittaker* (Dec. 22, 1997), Cuyahoga App. No. 71975, reopening disallowed, (July 28, 1998), Motion No. 92795.

{¶ 7} The Grand Jury indicted White on ten counts of felonious assault, two counts of improperly discharging a firearm at or into a habitation, and two counts of having a weapon under disability, all with one- and three-year firearm specifications. White chose to try the two disability counts to the court and the rest to the jury.

{¶ 8} At trial the evidence showed the following. A neighborhood fight broke out near the subject house over young men throwing trash on the ground; White participated in this fight. After the police had restored order and had left, White threatened the victims. He returned several minutes later with a gun and while standing directly in front of the victim's house said, "[w]e about to shoot this house up." After White made a cell phone call, a gold car arrived, and gunshots were fired from this car at the house. Subsequent police investigation discovered as many as fourteen entry holes in the house. The next day White returned and taunted the victims, and a witness said that he put another gunshot into the second floor. When the police went to arrest White at his house, a woman answered the door. Before the police could say anything, the woman said, "he didn't shoot nobody" and accused one of the victims of lying. When White surrendered, he was not wearing the same shirt that had been described to police; rather he was wearing a wrinkled shirt he had just put on. The police later recovered a bullet from the bedroom of the victim's house.

{¶ 9} The jury returned not guilty verdicts on all the felonious assault and improper discharge counts.[1] Immediately after reading the verdicts, the trial judge took a recess. When the judge returned, she stated: "I'm sorry, I forgot the Court was trying two of the charges. On those charges, it's going to be a finding

[1] The court granted a Crim.R. 29 Motion for Acquittal for counts 5 and 7, felonious assault.

of guilty." (Tr. 743.) Defense counsel argued that guilty verdicts for the weapon under disability charges "would be inconsistent with the logic that the jury used in reaching its conclusion." Id. The judge replied: "I had the opportunity to speak to the foreperson of the jury in a very lengthy conversation just now, and she indicated to me that they knew he did it, they just couldn't prove that he was the person actually who fired which shots. So they, for that reason, they arrived at a not guilty verdict, so I think that is consistent. *** (New paragraph) She said something else interesting to me. She said, if it had been assault, we would have found him guilty, because we couldn't tell from four people who actually did the shooting. She said, so if it had been some form of assault, we would have found him guilty, but we couldn't actually prove who did the shooting, so, therefore, we found him not guilty. (New Paragraph) So I believe my verdict is consistent." (Tr. 743-744.)

{¶ 10} The judge sentenced White to three years on the firearm specifications, two years on the first disability count, and five years on the second disability count. All sentences are to run consecutively for a total of ten years.

{¶ 11} White's initial argument is that the judge's discussion of the jury's verdict with the jury foreperson before reaching her own verdict on the disability charges was improper, presumptively prejudicial and required reversal of his convictions. First, White cites *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, for the principle that the Constitutions guarantee

defendants a fair and impartial fact finder. He then relies upon *Remmer v. United States* (1954), 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed.2d 654; *State v. Phillips*, 74 Ohio St.3d 72, 1995-Ohio-177, 656 N.E.2d 643, and *State v. Spencer* (1997), 118 Ohio App.3d 871, 694 N.E.2d 191, for the propositions that any private communication, contact or tampering with the finder of fact is presumptively prejudicial and that the state must establish that the error was harmless to the defendant.[2] White reasons that when the jury returned its not guilty verdicts, the most reasonable inference is that the jury believed the defense witnesses that the victims were trying to frame White and that an unknown person shot up the victims' house. The judge's discussion would necessarily have influenced the judge's deliberations eliminating the inference and inclining the judge toward a finding of guilty on the disability charges. At the very least there would be an unrebutted presumption of prejudice which should have resulted in a reversal.

[2] The court notes that the presumptions in *Remmer* are not universally accepted. In *United States v. Sylvester* (C.A. 5, 1998), 143 F.3d 923, the Fifth Circuit opined that the United States Supreme Court modified *Remmer* in *Smith v. Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78, and *United States v. Olano* (1993), 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508, by holding that allegations of juror impartiality are not necessarily presumed prejudicial, but do require a hearing at which the defendant has the opportunity to prove actual bias. The Sixth Circuit in *United States v. Pennell* (C.A. 6, 1984), 737 F.2d 521 read *Smith v. Phillips* as abolishing *Remmer*'s presumption of prejudice and shifting the burden of proof from the government to the defendant. In *State v. Phillips*, 1995-Ohio-177, the Supreme Court of Ohio also recognized that the Sixth Circuit has adopted that rule.

{¶ 12} However, the argument as supported is unpersuasive. All four of the cases cited concern improper influences on the jury, not the judge. Significantly, White does not cite a single case concerning improper influences on a judge. That is because a different rule governs a trial to the bench. The presumption is "that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment." *State v. Post* (1987), 32 Ohio St.3d 372, 384, 513 N.E.2d 754. *Post* is particularly instructive. In that case the Supreme Court of Ohio upheld a death sentence despite the fact that the three-judge panel erred in allowing victim impact statements into evidence. The supreme court ruled that the record did not affirmatively show that the three-judge panel relied on the victim impact statement in imposing sentence, even though the opinion noted that they had heard such evidence during the mitigation hearing. The supreme court further stated that had such evidence been submitted to a jury, it would have found prejudicial error. See, also *State v. White* (1968), 15 Ohio St.2d 146, 239 N.E.2d 65; *State v. Brewer* (1990), 48 Ohio St.3d 50, 549 N.E.2d 491; and *State v. Bays,* 87 Ohio St.3d 15, 1999-Ohio-216, 716 N.E.2d 1126 - admission of "other acts" evidence was not prejudicial because of the judicial presumption.

{¶ 13} Similarly, in the present case the transcript does not affirmatively show that the judge relied upon her conversations with the jury foreperson to

reach her decision. Rather, she referred to that conversation to answer defense counsel's objection that her verdict was inconsistent with the jury's verdict.

{¶ 14} Accordingly, the court sees multiple problems with the argument as presented. It is based on easily distinguishable cases, the differences between a jury trial and a bench trial. The argument relies on an area of law marked by conflicting decisions on the presumption of prejudice and the burden of proof in jury influence cases. Most importantly, it runs counter to the very strong presumption that in a bench trial a judge relies only on competent, material and relevant evidence to reach the verdict. In fact, it would not be unreasonable to say that this argument implicitly asks the court to change the law so that the same rules for improper influence apply to judges as well as to juries.

{¶ 15} Instead, appellate counsel chose to use the judge's remarks as the leading point for "sufficiency of the evidence" and "manifest weight" arguments. Following the admonitions of the Supreme Court, this court will not second-guess the reasonable professional judgments of counsel or require an attorney to argue for a change in the law.

{¶ 16} White's second argument is that pursuant to *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325, his indictments for having a weapon under disability under R.C. 2923.13(A)(2) were structurally defective because they did not include a mens rea element for the disability. That offense has two components. One is knowingly having a firearm or dangerous ordnance, and the other is the

disability. R.C. 2913.13 does not explicitly provide for a mens rea element for the disability portion. Furthermore, the statute defines disability to include being under indictment for an offense of violence (subsection [A][2]) or for possession or trafficking in illegal drugs (subsection [A][3]), as well as a conviction for those offenses.

{¶ 17} In *Clay* the Supreme Court of Ohio resolved an inter-district conflict on what the proper mens rea is for being under an indictment for purposes of proving the disability. A person could defend the disability charge on the ground that he did not know of the indictment and, thus, could not be convicted of having a weapon under disability. In *State v. Clay*, Cuyahoga App. No. 88823, 2007-Ohio-4295, this court ruled that the disability portion of R.C. 2923.13(A)(3) is strict liability and that the law did not require the defendant to know about the indictment. The Sixth Appellate District in *State v. Burks* (June 22, 1990), Sandusky App. No. S-89-13, had ruled that the defendant must have notice of the indictment in order to be convicted of the disability charge.

{¶ 18} In resolving this conflict the Supreme Court of Ohio first ruled that the knowingly requirement of the statute only applies to the first clause, having a firearm. Because that statute did not provide a mens rea element for the second clause, R.C. 2901.21(B), the default mens rea statute, provides the culpable mental state of recklessness.

{¶ 19} White now argues that because his indictment did not specify the mens rea element of recklessness for the disability portion of the offense, his counsel should have argued that the indictment was defective.

{¶ 20} This argument is not well founded. First, this court journalized White's decision on December 8, 2008, three days before the Supreme Court of Ohio issued *Clay.* Appellate counsel is not deficient for failing to anticipate changes in the law or to argue matters in an area marked by conflicting holdings.

{¶ 21} Moreover, White's case is distinguishable from *Clay*. The Grand Jury indicted White under R.C. 2923.13(A)(2) for having been convicted of the crime of attempted felonious assault, instead of merely being under indictment. Indeed, appellate counsel in examining *Burks* and this court's *Clay* decision would have found little inducement to raise the issue. The Sixth District limited *Burks* to those cases in which a pending indictment, rather than a conviction, provides the basis for the disability; the court reasoned that no notice is needed when the disability is a conviction because the conviction itself puts the defendant on notice. This court in *Clay* ruled that the disability portion of the statute is strict liability. Therefore, appellate counsel was not deficient for failing to argue this point.

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

MARY J. BOYLE, JUDGE

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