[Cite as *State v. Ginley*, 2009-Ohio-4701.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90724

STATE OF OHIO

APPELLEE

vs.

DANIEL GINLEY

APPELLANT

JUDGMENT:
APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 421015
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-488806

RELEASE DATE: September 9, 2009

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MARY EILEEN KILBANE, J.:

{¶ 1} Daniel Ginley has filed a timely application for reopening pursuant to App.R. 26(B). Ginley is attempting to reopen the appellate judgment in *State v. Ginley*, Cuyahoga App. No. 90724, 2009-Ohio-30, which affirmed his conviction for three counts of aggravated robbery, three counts of felonious assault, three counts of aggravated menacing, and one count of possessing criminal tools, but reversed his conviction for two counts of aggravated robbery. For the following reasons, we decline to reopen Ginley's original appeal.

{¶ 2} This court, through App.R. 26(B), may reopen an appeal based upon a claim of ineffective assistance of appellate counsel. In order to establish a claim of ineffective assistance of appellate counsel, Ginley must demonstrate that appellate counsel's performance was deficient and that but for the deficient performance, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456. In order for this court to grant an application for reopening, Ginley must establish that "there is a genuine issue as to whether he was deprived of the assistance of counsel on appeal." App.R. 26(B)(5).

{¶ 3} "In *State v. Reed* [supra, at 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 was deficient for failing to raise the issue 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." *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

{¶ 4} It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes* (1983), 463

U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987. Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones v. Barnes*, supra; *State v. Grimm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

{¶ 5} In *Strickland v. Washington,* supra, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for an appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "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." Id. at 689. Finally, the United States Supreme Court has upheld the appellate attorney's discretion to decide which issues are the most fruitful arguments and the importance of winnowing out weaker arguments on appeal and focusing on one central issue or at most a few key issues. *Jones v. Barnes*, supra.

{¶ 6} In support of his claim of ineffective assistance of appellate counsel, Ginley raises five proposed assignments of error, which should have

been raised on direct appeal. Ginley, through his first proposed assignment of error, argues that sufficient evidence was not adduced at trial to support a conviction for the offense of aggravated robbery under count three of the indictment. An appellate court, when reviewing the sufficiency of the evidence to support a criminal conviction, must examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. The test is, after viewing the evidence adduced at trial in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560.

{¶ 7} The elements necessary to establish the offense of aggravated robbery, as charged in count three of the indictment, are contained within R.C. 2911.01(A):

{¶ 8} "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 9} "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

{¶ 10} "(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

{¶ 11} "(3) Inflict, or attempt to inflict, serious physical harm on another."

{¶ 12} In the case sub judice, the record contains sufficient facts upon which a rational trier of fact could conclude, beyond a reasonable doubt, that Ginley committed every element of the offense of aggravated robbery, as charged in count three of the indictment. The evidence clearly demonstrated that on August 22, 2006, Ginley robbed the U.S. Bank located on Lorain Avenue, in the city of Cleveland, state of Ohio, and that during the commission of the robbery, Ginley possessed a deadly weapon (box cutter), and inflicted or attempted to inflict serious physical harm upon Dwight Boiner, a security guard employed by U.S. Bank. Since there was sufficient evidence presented at trial, to support every element of the offense of aggravated robbery as charged in count three, the conviction could not be disturbed on appeal. Thus, Ginley has not demonstrated that there is a

genuine issue as to whether his appellate counsel was ineffective through his initial proposed assignment of error.

{¶ 13} Ginley, through his second proposed assignment of error, argues that the trial court erred by allowing the amendment of count eleven and twelve of the indictment to substitute the term "BB gun" for "gun." Pursuant to Crim.R. 7(D), a trial court is permitted to amend an indictment during the course of the trial, so long as no change is made in the name or identity of the charged crime. See, also, R.C. 2941.30; *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609. Herein, the amendment of count eleven and twelve, to substitute the term "BB gun," did not change the name or identity of the charged offenses of aggravated robbery. In addition, it should be noted that a BB gun may constitute a deadly weapon, and its use may support an aggravated robbery conviction. *State v. Tessanne* (Sept. 14, 1998), Stark App. No. 1997-CA-00416. Finally, the trial court did not abuse it discretion in allowing the amendment of count eleven and twelve, because Ginley was not prejudiced by the alteration. *State v. Beach*, 148 Ohio App.3d 181, 2002-Ohio-2759, 772 N.E.2d 677. Ginley has not demonstrated that there is a genuine issue as to whether his appellate counsel was ineffective for failing to assign as error the amendment of count eleven and twelve of the indictment.

{¶ 14} Ginley, through his third proposed assignment of error, argues that the trial court erred by failing to instruct the jury on the lesser included offense of robbery with regard to count eleven and twelve. A jury instruction, on the lesser included offense of robbery, required evidence that reasonably supported both an acquittal on the aggravated robbery charge and a conviction on the lesser charge of robbery. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286. The evidence presented at trial did not support an acquittal on the aggravated robbery charge. In addition, the decision to request an instruction on a lesser included offense falls squarely within the realm of trial strategy, which this court will not second-guess after conviction. *Strickland v. Washington*, supra. Ginley has once again failed to demonstrate any prejudice because of his third proposed assignment of error.

{¶ 15} Ginley, through his fourth proposed assignment of error, argues that he was improperly convicted of the offense of possessing criminal tools, as charged in count fifteen of the indictment. Specifically, Ginley argues that "count fifteen of the indictment alleged that on August 15, 2006, Mr. Ginley 'unlawfully possessed or had under his control * * * with purpose to use it criminally, to wit: box cutter and/or gun and/or phones, and such substance device, instrument, article was intended for use in the commission of a felon * * *." Precise dates and times are not essential elements of the offense of

possessing criminal tools, as charged in count fifteen of the indictment. *State v. Sellards* (1985), 17 Ohio St.3d 169, 478 N.E.2d 781. It must also be noted, that the actual date associated with count fifteen of the indictment was August 22, 2006, the day that Ginley robbed the U.S. Bank. See jury instruction at Tr. page 377. Finally, sufficient evidence was adduced at trial to support Ginley's conviction for the offense of possessing criminal tools. *State v. Jenks*, supra. Thus, Ginley has failed to establish his claim of ineffective assistance of appellate counsel through his fourth proposed assignment of error.

{¶ 16} Ginley, through his fifth proposed assignment of error, argues that appellate counsel should have raised a claim of ineffective assistance of trial counsel on appeal. Specifically, Ginley argues that trial counsel's failure to request a jury instruction on the lesser included offense of robbery and the failure to raise as error the conviction for possessing criminal tools demonstrates deficient performance, which should have been raised on appeal. The issues of failure to request a jury instruction on a lesser included offense and sufficiency of the evidence as to Ginley's conviction for the offense of possessing criminal tools, were addressed through the third and fourth proposed assignments of error, and found to be without any merit. Thus, trial counsel was not ineffective for failing to raise and argue said issues

during the course of trial. Ginley has again failed to demonstrate any prejudice through his claim of ineffective assistance of trial counsel. Cf. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221.

{¶ 17} Accordingly, the application for reopening is denied.

MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
LARRY A. JONES, J., CONCUR