[Cite as *State v. Sowell*, 2009-Ohio-5685.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90732

STATE OF OHIO

APPELLEE

vs.

MARIOUS SOWELL

APPELLANT

JUDGMENT:
APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 418908
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-485862

RELEASE DATE: October 28, 2009

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: T. Allan Regas
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLANT

Orville E. Stifel, II
5310 Franklin Blvd.
P.O. Box 602780
Cleveland, Ohio 44102

JAMES J. SWEENEY, J.:

{¶ 1} In *State v. Sowell*, Cuyahoga County Court of Common Pleas Case No. CR-485862, applicant, Marious Sowell, was convicted of: aggravated burglary with one-year and three-year firearm as well as repeat violent offender specifications; tampering with evidence; one count of having a weapon while under disability with one-year and three-year firearm specifications; and one count of having a weapon while under disability. This court affirmed that judgment in *State v. Sowell*, Cuyahoga App. No. 90732, 2008-Ohio-5875. The Supreme Court of Ohio denied Sowell's motion for leave to appeal and dismissed the appeal as not involving any substantial constitutional question. *State v. Sowell*, 121 Ohio St.3d 1450, 2009-Ohio-1820, 904 N.E.2d 900. Sowell has filed with the clerk of this court a timely[1] application for reopening. He asserts

[1]

Days	Month
6	November
31	December
31	January
23	February
91	TOTAL

This court's journal entry and opinion on direct appeal was journalized on November 24, 2008. Sunday, February 22, 2009, was the ninetieth day. App.R. 26(B)(1). Sowell filed his application on Monday, February 23, 2009, the last day on which a timely application could have been filed because the ninetieth day was a Sunday. App.R. 14(A). Contrast *State v. Ellis*, Cuyahoga App. No. 91116, 2009-Ohio-852, reopening disallowed, 2009-Ohio-2875, at n.5 and accompanying text (application untimely because applicant filed on Tuesday, 92 days after journalization, when applicant was required to file on Monday, 91 days after journalization).

that he was denied the effective assistance of appellate counsel and sets forth three proposed assignments of error.

{¶ 2} Having reviewed the arguments in the application for reopening in light of the record, we hold that Sowell 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. Sowell cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 3} Sowell and codefendant Nathaniel Harris were among the people outside a nightclub when a fight broke out. Harris and Sowell: left the area in a Range Rover; initially pulled over when police signaled to pull over; left suddenly with police in pursuit; abandoned the Range Rover; proceeded on foot down the loading dock of the Hyatt Regency Hotel; entered the hotel; encountered a security officer who told them to leave and to whom Harris offered $1,000 to help them leave the building; and were later apprehended by police outside the hotel. 2008-Ohio-5875, at ¶4-12.

{¶ 4} In his first proposed assignment of error, Sowell argues that his appellate counsel was ineffective for failing to argue that the indictment for aggravated burglary was defective because it did not include a mens rea element. In support of this proposed assignment of error, Sowell relies on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. In *State v. Davis*, Cuyahoga App. No. 90050, 2008-Ohio-3453, however, this court observed that the indictment mirrored the aggravated burglary statute and held that the aggravated burglary count was not affected by *Colon*. Appellate counsel was not, therefore, deficient and Sowell was not prejudiced by the absence of an assignment of error asserting that the indictment for aggravated burglary was defective under *Colon*. As a consequence, Sowell's first proposed assignment of error does not provide a basis for reopening.

{¶ 5} In his second proposed assignment of error, Sowell argues that his appellate counsel was ineffective for failing to argue that he was denied his rights to indictment by a grand jury, to be informed of the charge against him and due process. That is, he contends that the count in the indictment for aggravated burglary, the bill of particulars and the jury instruction were defective because they did not specify the predicate offense. See R.C. 2911.11(A), aggravated burglary, which prohibits "trespass in an occupied structure *** to commit *** any criminal offense ***."

{¶ 6} In *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, Foust contended that the aggravated burglary count in his indictment was defective because it did not specify the offense that he intended to commit inside the house. Id. at ¶26. "The wording of the indictment tracked the language for aggravated burglary in R.C. 2911.11 and did not need to allege the particular felony that Foust had intended to commit." Id. at ¶31 (citations deleted). In light of the Supreme Court's holding in *Foust*, Sowell was not prejudiced by the absence from the aggravated burglary count of the indictment of a specific offense which he intended to commit in the hotel.

{¶ 7} Additionally, Sowell has not provided this court with any controlling authority requiring a different conclusion with respect to the absence of a specific offense in the bill of particulars and the jury instructions. Although Sowell relies on *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, in

Wamsley the Supreme Court considered the question of whether the trial court's failure to instruct the jury on the culpable mental state of trespass was structural error or plain error. *Wamsley*, at ¶14. Although the Supreme Court observed that the trial court did not instruct the jury on the culpable mental state of the underlying offenses of trespass and assault, *Wamsley*, at ¶17, the holding in *Wamsley* was that the court of appeals should have used plain error analysis rather than structural error analysis. In reaching this conclusion, the Supreme Court expressly did not wish to encourage defendants to remain silent at trial and only raise potential errors on appeal. *Wamsley*, at ¶28.

{¶ 8} In this case, the trial court did instruct the jury on the elements of trespass. Tr. at 978. In light of *Foust*, we cannot conclude that Sowell's appellate counsel was deficient or that Sowell was prejudiced by the failure of appellate counsel to argue that the trial court erred by failing to specify the predicate offense. As a consequence, Sowell's second proposed assignment of error does not provide a basis for reopening.

{¶ 9} In his third proposed assignment of error, Sowell argues that his appellate counsel was ineffective for failing to argue that Sowell was denied the effective assistance of trial counsel because counsel: a) did not move to strike results of gunshot residue tests and cartridge casing comparisons; b) did not object to instances of prosecutorial misconduct; c) did not object to the indictment and jury instruction which did not charge mens rea or specify the predicate

offense; and d) failed to timely discover the state's pretrial destruction of exculpatory evidence and to conduct an appropriate investigation.

{¶ 10} Sowell argues that the testimony from the state's gunshot residue and ballistics experts was not sufficiently reliable. As a consequence, Sowell argues that trial counsel was ineffective for failing to move to strike the experts' testimony. Sowell also observes that his trial counsel acknowledged that he should have moved to strike this evidence while arguing his Crim.R. 29 motion.

{¶ 11} On direct appeal, this court observed: "One particle of gunshot residue consisting of lead, barium and antimony was recovered from one of defendant's hands. The state's witness, forensic scientist Martin Lewis, admitted that more than one particle is needed to make a positive finding in some laboratories. Other particles consisting of barium with antimony, lead with antimony, or individual particles of lead, antimony or barium were also recovered. The findings are consistent with defendant being in the vicinity of a gun, which was discharged within the previous four to six hours." 2008-Ohio-5875, at ¶13.

{¶ 12} Also on direct appeal, this court rejected Sowell's claim that the jury's verdict finding him guilty of aggravated burglary was against the manifest weight of the evidence. After Sowell and Harris fled from police, "[a] handgun was later recovered from the grease vat, and shells recovered from the scene of the shooting matched shells test-fired from this weapon and a particle of gunshot residue was detected on defendant's hand. From the foregoing, a jury could

properly determine, consistent with the weight of the evidence, that defendants, by force, stealth or deception, trespassed in an occupied structure, or in a separately secured or separately occupied portion of the hotel, when others were present, with the purpose of committing another crime and while having a gun." Id. at ¶37.

{¶ 13} Sowell has not provided this court with any controlling authority which would have required the trial court to grant a motion to strike the expert testimony if trial counsel had moved to strike. Sowell has not, therefore, demonstrated that his appellate counsel was deficient or that he was prejudiced by the absence of an assignment of error challenging the expert testimony.

{¶ 14} He also contends that trial counsel did not object to instances of prosecutorial misconduct. Sowell does not, however, identify where in the record the purportedly objectionable conduct occurred. Compare *State v. McGrath* (Sept. 6, 2001), Cuyahoga App. No. 77896, reopening disallowed, 2002-Ohio-2386, at ¶36. Additionally, as mentioned above, this court on direct appeal rejected Sowell's argument that his conviction for aggravated burglary was against the manifest weight of the evidence. Similarly, this court on direct appeal rejected his contention that his convictions for tampering with evidence and having a weapon under disability as well as being a repeat violent offender were not supported by sufficient evidence. In light of the evidence presented in the trial court, we cannot conclude that the failure of trial counsel to object to the

instances of what Sowell asserts are prosecutorial misconduct deprived him of a fair trial. See *State v. Townsend*, Cuyahoga App. No. 88065, 2007-Ohio-2370, reopening disallowed, 2007-Ohio-6638, at ¶10.

{¶ 15} Sowell also argues that trial counsel was ineffective because counsel did not object to the indictment and jury instruction which did not charge mens rea or specify the predicate offense. In light of our discussion above of Sowell's first and second proposed assignments of error, this argument obviously is without merit.

{¶ 16} Finally, the hotel had a video surveillance system which showed Sowell and Harris in the hotel. The security guard and police viewed the tapes. Ultimately, hotel staff recorded over the tapes. Sowell contends that trial counsel failed to timely discover the state's pretrial destruction of exculpatory evidence and to conduct an appropriate investigation. Sowell acknowledges, however, that appellate counsel did indeed raise the issue of the destruction of the security tapes. This court determined that "[t]here was absolutely no evidence that the tape was lost due to the bad faith of the police." 2008-Ohio-5875, at ¶29.

{¶ 17} Yet, Sowell argues that the cumulative impact of trial counsel's failure to pursue the videotapes in conjunction with the other assertions of ineffective assistance of trial counsel did prejudice him. The discussion above, however, demonstrates that none of Sowell's complaints about trial counsel is sufficient to demonstrate that appellate counsel was deficient or that he was

prejudiced by appellate counsel's failure to assign errors regarding the testimony of the expert witnesses, prosecutorial misconduct or the content of the indictment and the jury instructions.

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

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR