[Cite as *State v. Lucic*, 2009-Ohio-5686.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91069

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VELIMIR LUCIC

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 422925
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-495692

RELEASE DATE: October 23, 2009

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SEAN C. GALLAGHER, J.:

{¶ 1} Velimir Lucic has timely filed an application for reopening pursuant to App.R. 26(B). Lucic is attempting to reopen the appellate judgment in *State v. Lucic*, Cuyahoga App. No. 91069, 2009-Ohio-616, that affirmed his conviction for the offense of carrying a concealed weapon. For the following reasons, we decline to reopen Lucic's direct original appeal.

{¶ 2} In order to establish a claim of ineffective assistance of counsel under App.R. 26(B), Lucic must demonstrate that his appellate counsel's performance was deficient and that he was also prejudiced by the deficient

performance. *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, 111 L.Ed.2d 768, 110 S.Ct 3258.

{¶ 3} In *Strickland*, the United States Supreme Court held that judicial scrutiny of an attorney's work must be highly deferential. The Court established that it is extremely tempting for a criminal defendant to second-guess his lawyer following conviction and that it would be all too easy for an appellate court, after examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Thus, "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} The United States Supreme Court, with regard to a claim of ineffective assistance of appellate counsel, has also held that appellate counsel possesses the prerogative to decide strategy and tactics by selecting and arguing those arguments that are most promising. The court noted that "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, 77 L.Ed.2d 987.

{¶ 5} Finally, appellate counsel is not deficient for failing to anticipate changes and new developments in the law. *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. 255109; *State v. Munici* (Nov. 30, 1987), Cuyahoga App. No 52579, reopening disallowed (Aug. 21, 1996), Motion No. 271267, 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. 290859; *State v. Sanders* (Oct. 20, 1997), Cuyahoga App. No. 71382, reopening disallowed, (Aug. 25, 1998), Motion No. 290861; *State v. Bates* (Nov. 20, 1997), Cuyahoga App. No. 71920, reopening disallowed (Aug. 19, 1998), Motion No. 291111; and *State v. Whittaker* (Dec. 22, 1997), Cuyahoga App. No. 71975, reopening disallowed, (July 28, 1998), Motion No. 292795.

{¶ 6} Lucic, in support of his application for reopening, argues that appellate counsel was ineffective upon appeal as a result of failing to raise the issue of ineffective assistance of trial counsel. Specifically, Lucic argues that the search of his motor vehicle and the seizure of a handgun from the motor

vehicle was unlawful and that the evidence derived from the unlawful search and seizure would have been suppressed had trial counsel filed a motion to suppress.

{¶ 7} In the case sub judice, a review of the record fails to disclose that Lucic was subjected to an unconstitutional search and that the handgun found within the motor vehicle operated by Lucic, was the result of an improper seizure. The facts pertinent to this action clearly demonstrate that on April 19, 2007, Lucic was parking a motor vehicle on West Sixth Street in the city of Cleveland, Ohio. An off-duty police officer, that was working security for a bar, observed Lucic make two illegal u-turns and then illegally park his motor vehicle, with the right tire up on the curb. The off-duty police officer asked Lucic for his driver's license. Lucic, however, was unable to produce his driver's license and was placed under arrest for driving without a license and the parking infraction. A subsequent inventory search of the motor vehicle that Lucic was operating, which occurred in connection with a tow incident to Lucic's arrest, resulted in the discovery of a fully operational Taurus nine-millimeter, semi-automatic handgun in the center console. Lucic was indicted and convicted of one count of carrying a concealed weapon (R.C. 2923.12).

{¶ 8} Herein, Lucic argues that appellate counsel should have argued on appeal the issue of trial counsel's failure to file a motion to suppress the handgun seized from the motor vehicle he was operating. Lucic's argument is premised upon the recent holding of the United States Supreme Court, in *Arizona v. Gant* (2009), 556 U.S. ____, 129 S.Ct. 1710, 173 L.Ed.2d 485, which prohibits a police officer from searching a vehicle incident to arrest.

{¶ 9} Initially, we find that *Gant* was not announced by the United States Supreme Court until after Lucic's trial and appeal. Lucic's appellate counsel cannot be required to anticipate future changes in the law and argue such changes on appeal. *Williams* (1991), 74 Ohio App.3d 686, 600 N.E.2d 298; *State v. Vlahopoulos*, Cuyahoga App. No. 82305, 2005-Ohio-4287. Lucic's appellate counsel was not ineffective for failing to argue on appeal, the issue of improper search and seizure based upon *Gant*. See, also, *Engle v. Isaac* (1982), 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783; *Alvord v. Wainwright* (C.A. 11, 1984), 725 F.2d 1282; *Brunson v. Higgins* (C.A. 8, 1983), 708 F.2d 1353.

{¶ 10} Assuming that *Gant* was announced prior to Lucic's trial and appeal, we further find that appellate counsel was not ineffective for failing to raise the issue of a motion to suppress. In *Gant*, the United States Supreme Court stated that a police officer may search a motor vehicle if he obtains a

search warrant or demonstrates another exception to the warrant requirement. An inventory search is an exception to the warrant requirement. *State v. Mesa*, 87 Ohio St.3d 105, 1999-Ohio-253, 717 N.E.2d 329. See, also, *United States v. Mullaney* (2009), E.D. Idaho 4:08CR239-E-BLW; *Arizona v. Rojers* (2007), 216 Ariz. 555, 169 P.3d 651. The inventory search of the motor vehicle, that Lucic was operating, was conducted following his arrest for not having a driver's license and a parking infraction. The inventory search was proper, since the motor vehicle was inventoried after Lucic's arrest and prior to towing. *South Dakota v. Opperman* (1976), 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000. Thus, Lucic was not prejudiced by the failure of his trial counsel to file a motion to suppress or by appellate counsel's failure to raise the issue of appeal.

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

SEAN C. GALLAGHER, JUDGE

COLLEEN CONWAY COONEY, A.J., and
KENNETH A. ROCCO, J., CONCUR