[Cite as *State v. Coleman*, 2009-Ohio-5689.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91058

STATE OF OHIO

APPELLEE

vs.

EDDIE COLEMAN

APPELLANT

JUDGMENT:
APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 424026
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-499871

RELEASE DATE: October 27, 2009

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Eddie Coleman has filed a timely application for reopening pursuant to App.R.26(B). Coleman is attempting to reopen the appellate judgment that was rendered in *State v. Coleman*, Cuyahoga App. No. 91058, 2009-Ohio-1611, which affirmed his conviction for two counts of drug possession (R.C. 2925.11), one count of drug trafficking (R.C. 2925.03), and one count of possessing criminal tools (R.C. 2923.24), but reversed the trial court's denial of a motion for the return of seized property. For the following reasons, we decline to reopen Coleman's appeal.

{¶ 2} This court may reopen an appeal based upon a claim of ineffective assistance of appellate counsel. See App.R. 26(B). In order to establish a claim of ineffective assistance of appellate counsel, Coleman must demonstrate that appellate counsel's performance was deficient and that, if it wasn't 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. Coleman is required to 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, 1998-Ohio-704, 701 N.E.2d 696, at 25.

{¶ 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 to 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, Coleman raises five proposed assignments of error. Coleman, through his initial proposed assignment of error, argues that the trial court erred by denying his Crim.R. 29(A) motion to dismiss, since sufficient evidence was not presented at trial to support his conviction for the offenses of drug possession, drug

trafficking, and possessing criminal tools. 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} In the case sub judice, the record contains sufficient facts upon which a rational trier of fact could conclude, beyond a reasonable doubt, that Coleman committed every element of the charged offenses of drug possession, drug trafficking, and possessing criminal tools. The evidence clearly demonstrates that on May 31, 2007, Coleman was arrested during the execution of a search warrant. His arrest culminated in the discovery of a kilogram of cocaine, that had slid down inside his sweat pants and was recovered by the police. In addition to the large amount of cocaine that was discovered on Coleman, the following items were recovered from a home used by Coleman: scales, United States currency; inositol power (commonly used as a cutting agent for cocaine); marijuana; and cocaine. Since there was sufficient evidence

adduced at trial to support Coleman's conviction for the offenses of drug possession, drug trafficking, and possessing criminal tools, his conviction could not be disturbed on appeal. Thus, Coleman has not demonstrated that there is a genuine issue as to whether his appellate counsel was ineffective for failing to raise the first proposed assignment of error.

{¶ 8} Coleman, through his second proposed assignment of error, argues that the cocaine that was seized during his arrest was improperly admitted into evidence at trial. The cocaine that was introduced as evidence during the course of trial was properly seized by the police during the execution of the search warrant. It must also be noted that a law enforcement officer is required to seize any contraband. See R.C. 2933.32 and R.C. 2933.42. Finally, any objects falling in the plain view of a law enforcement officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence. *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067. Coleman has not demonstrated a genuine issue as to whether appellate counsel was ineffective for failing to assign as error the admission of the cocaine as evidence.

{¶ 9} Coleman, through his third and fourth proposed assignments of error, argues that he was prejudiced by the failure of trial counsel to obtain the name of the confidential informant and to call the confidential informant as a

witness. Coleman has not demonstrated any prejudice that resulted from the non-disclosure of the confidential informant's name. In addition, Coleman has failed to demonstrate that he was prejudiced by the inability to "confront" the confidential informant during the course of trial. Coleman has once again failed to demonstrate ineffective assistance of appellate counsel. Cf. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221.

{¶ 10} Coleman, through his fifth proposed assignment of error, argues that appellate counsel "omitted obvious issues on the face of the record of appeal." Coleman, however, has not identified any cognizable issues that demonstrate ineffective assistance on the part of appellate counsel. A mere blanket statement that "appellate counsel omitted obvious issues on the face of the record" does not establish a claim of ineffective assistance of counsel and also fails to substantiate any prejudice. *State v. Spivey*, supra. See, also, *State v. Mosely*, Cuyahoga App. No. 79463, 2002-Ohio-1101, reopening disallowed, 2005-Ohio-4137, Motion No. 365082; *State v. Dial*, Cuyahoga App. No. 83847, 2004-Ohio-5860, reopening disallowed 2007-Ohio-2781, Motion No. 392410; *State v. Ogletree*, Cuyahoga App. No. 86500, 2006-Ohio-2320, reopening disallowed 2006-Ohio-5592, Motion No. 387497; *State v. Huber*, Cuyahoga App. No. 80616, 2002-Ohio-5839, reopening disallowed 2004-Ohio-3951, Motion No. 356284.

{¶ 11} Coleman has once again failed to demonstrate any prejudice through his claim of ineffective assistance of appellate counsel. Accordingly, the application for reopening is denied.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA A. BLACKMON, P.J., and
JAMES J. SWEENEY, J., CONCUR