[Cite as *State v. Harris*, 2009-Ohio-5962.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90699

STATE OF OHIO

APPELLEE

vs.

NATHANIEL HARRIS

APPELLANT

JUDGMENT:
APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 418801
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-485862

RELEASE DATE: November 9, 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

Dean M. Boland
18123 Sloane Avenue
Lakewood, Ohio 44107

KENNETH A. ROCCO, J.:

{¶ 1} In *State v. Harris*, Cuyahoga County Court of Common Pleas Case No. CR-485862, applicant, Nathaniel Harris, was convicted of: aggravated burglary with one-year and three-year firearm specifications; failure to comply with an order or signal of a police officer; tampering with evidence; and having a weapon while under disability. This court affirmed that judgment in *State v. Harris*, Cuyahoga App. No. 90699, 2008-Ohio-5873. The Supreme Court of Ohio denied Harris' motion for leave to appeal and dismissed the appeal as not involving any substantial constitutional question. *State v. Harris*, 121 Ohio St.3d 1450, 2009-Ohio-1820, 904 N.E.2d 900.

{¶ 2} Harris has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel and sets forth seven proposed assignments of error.

{¶ 3} Having reviewed the arguments in the application for reopening in light of the record, we hold that Harris 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. Harris 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.

{¶ 4} Harris and codefendant Marious Sowell were among the people outside a nightclub when a fight broke out. Harris and Sowell: left the area in a Range Rover with Harris driving; 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 guard 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-5873, at ¶4-9.

{¶ 5} In his first proposed assignment of error, Harris argues that his appellate counsel was ineffective for failing to argue that opening a closed but unlocked door does not satisfy the force element of the aggravated burglary statute. Harris acknowledges, however, that – since at least 1987 – the law in this district has been that opening a closed but unlocked door *does* constitute force. *State v. Wohlfeil* (Apr. 2, 1987), Cuyahoga App. No. 51983, at 2, cited with approval in *State v. Knuckles*, Cuyahoga App. No. 86053, 2005-Ohio-6345, at 24. See also *State v. Caraballo*, Cuyahoga App. No. 89775, 2008-Ohio-5248, at ¶28. Furthermore, on direct appeal, this court specifically found that entering through a closed, but unlocked door, satisfies the force element for aggravated burglary. 2008-Ohio-5873, at ¶46. In light of the consistent, controlling authority in this district, we cannot conclude that appellate counsel was deficient or that Harris was prejudiced.

{¶ 6} In his second proposed assignment of error, Harris argues that his appellate counsel was ineffective for failing to argue that the state failed to prove that he lacked a privilege to enter the Hyatt Regency. On direct appeal, appellate counsel assigned as error that the state did not present sufficient evidence of the charges and that the judgment of conviction was against the

manifest weight of the evidence. In response, this court held that Harris did not have a privilege to enter the hotel. Id. at ¶25 and 46. This court also observed that: by entering without privilege and remaining in the building Harris committed criminal trespass, Id. at ¶25; when he entered he encountered the security guard; he entered for the purpose of fleeing police; he had a gun, a deadly weapon, in his possession; he tampered with evidence when he concealed the gun but also when he contacted two women later that morning to remove the gun from a vat of grease; and he had a weapon while under disability. Id. at ¶25 and 46-47.

{¶ 7} The record in this appeal clearly demonstrates that when Harris entered the Hyatt he committed and was in the process of continuing to commit several crimes. Any privilege which Harris might have had to enter the Hyatt was, therefore, "terminated and revoked" because of Harris's criminal activity in the hotel. *Caraballo*, supra, at ¶28. We cannot conclude, therefore, that appellate counsel was deficient or that Harris was prejudiced by appellate counsel's failure to argue that the state failed to prove that he lacked a privilege to enter the Hyatt Regency.

{¶ 8} Count 13 of the indictment charged Harris with tampering with evidence. When the jury returned from its deliberation, it had found Harris guilty of tampering with evidence. At that time, however, the trial court discovered an error in the verdict form. Although the caption of the jury verdict form for count 13 stated "tampering with evidence," the body of the form stated "felonious assault." After discussing the circumstances with counsel at sidebar, the trial

court directed the jury to deliberate on count 13 again and provided them with a correct verdict form.

{¶ 9} In his third proposed assignment of error, Harris argues that his appellate counsel was ineffective for failing to argue that "[a] typographical error in a jury form as to a particular charge without polling the jury to confirm the correct verdict as to that charge is reversible error." Application, at 5. In support of this argument, Harris cites *State v. Harris* (Nov. 3, 1983), Franklin App. No. 82AP-1012. In Case No. 82AP-1012, the trial court submitted jury verdict forms for all 20 counts on which the defendant was charged despite the fact that he was being tried on merely three of the counts. "[T]he trial court apparently did not instruct or poll all of the jurors to determine whether the error influenced their verdict." Id. at 4.

{¶ 10} The Tenth District Court of Appeals did, however, distinguish this court's decision in *State v. Patterson* (July 21, 1983), Cuyahoga App. No. 45954. In *Patterson*, the trial court gave the jurors a verdict form for having a weapon while under disability charge which stated a prior conviction for a crime Patterson had not committed. "The court immediately explained this clerical error, instructed the jury that defendant had never been convicted of robbery, ordered them to re-deliberate, and instructed them to consider whether this typographical error influenced their verdict. Thereafter, the jury returned a guilty verdict with a corrected verdict form, and each juror agreed to their verdict when they were individually polled." Id. at 3.

{¶ 11} In Case No. 82AP-1012, the Tenth District reversed the conviction on two counts because the jury had not been polled. In *Patterson*, however, this court determined that the "[d]efendant was not prejudiced by the described error." *Patterson*, supra, at 3. The *Patterson* court also held that "[t]he error here was rendered harmless beyond a reasonable doubt." Id.

{¶ 12} In this case, the record reflects that the trial court discovered the clerical error in the jury verdict form when the jurors initially returned their verdict. After consultation with counsel at sidebar, the trial court explained the error in the verdict form to the jurors and directed them to continue their deliberations with a corrected verdict form. When the jury returned their verdict, the trial court read the verdicts and polled the jurors individually asking each: "Are these your verdicts?" Each replied, "Yes." T.R. 996-1003.

{¶ 13} Obviously, the record contradicts Harris's contention that the trial court did not poll the jury. Additionally, the Tenth District case upon which he relies cites a case from this district which requires us to conclude that Harris was not prejudiced by the clerical error in the jury verdict form. After receiving a corrected verdict form and having the opportunity to resume deliberations, the jurors came to a verdict, were polled and each confirmed that the verdicts were his or her own. We cannot, therefore, conclude that appellate counsel was deficient or that Harris was prejudiced by the absence of his third proposed assignment of error.

{¶ 14} In his fourth proposed assignment of error, Harris 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 ***."

{¶ 15} 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*, Harris 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. Additionally, Harris 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. As a consequence, Harris' fourth proposed assignment of error does not provide a basis for reopening.

{¶ 16} In his fifth proposed assignment of error, Harris argues that, on direct appeal, this court "re-defined the concept of reasonable doubt relating to Harris' possession of a firearm." Application, at 8-9. App.R. 26(B)(2)(c) requires that an application for reopening contain "[o]ne or more assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." Harris's critique of this court's analysis on direct appeal does not, however, reflect an assignment of error which was not considered on the merits.

{¶ 17} Rather, Harris complains about this court's analysis in response to appellate counsel's assignment of error challenging the trial court's denial of Harris's Crim.R. 29 motion for acquittal and asserting that the state failed to present sufficient evidence. As noted in this court's opinion, the appellate court reviewing a challenge to the sufficiency of evidence must determine whether the state met its burden of production. 2008-Ohio-5873, at ¶18. Necessarily, an appellate court must review the evidence.

{¶ 18} Regardless, merely criticizing the analysis of the court of appeals on direct appeal does not provide a basis for reopening. *State v. Johnson* (Aug. 20, 1992), Cuyahoga App. No. 61015, reopening disallowed (Dec. 13, 2000), Motion No. 16322, at 3. As a consequence, Harris' fifth proposed assignment of error does not provide a basis for reopening.

{¶ 19} In his sixth proposed assignment of error, Harris states that his "trial counsel and appellate counsel were ineffective for failing to object [to] or assign as error the deficiencies in the indictment including its failure to specify the predicate crime for aggravated burglary and charge complicity." Application, at 9. Our discussion of Harris's fourth assignment of error demonstrates that counsel were not deficient and Harris was not prejudiced by the absence of a challenge to the indictment based on the failure to specify the predicate crime.

{¶ 20} Additionally, Harris does not present any argument in support of this proposed assignment of error. Specifically, he does not explain any basis for concluding that counsel were deficient or that he was prejudiced because the indictment did not charge complicity. The mere recitation of an assignment of error is not sufficient to meet an applicant's burden of proving that his counsel were deficient and that there is a reasonable probability that he would have been successful if counsel had presented those claims. *State v. Hawkins*, Cuyahoga App. No. 90704, 2008-Ohio-6475, reopening disallowed, 2009-Ohio-2246, at ¶2-3. As a consequence, Harris's sixth proposed assignment of error does not provide a basis for reopening.

{¶ 21} In his seventh proposed assignment of error, Harris 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, Harris 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 Harris 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, Harris's seventh proposed assignment of error does not provide a basis for reopening.

{¶ 22} Additionally, App.R. 26(B)(2)(d) requires "a sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised * * * and the manner in which the deficiency prejudicially affected the outcome of the appeal * * *." Harris did not support his application for reopening with a sworn statement. The failure to support an application for reopening with a sworn statement as required by App.R. 26(B)(2)(d) provides a sufficient basis for denying the application. See, e.g., *State v. Perry*, Cuyahoga App. No. 90497, 2008-Ohio-5588, reopening disallowed, 2009-Ohio-2245.

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

KENNETH A. ROCCO, JUDGE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and

JAMES J. SWEENEY, J., CONCUR