[Cite as *State v. Arios*, 2010-Ohio-1195.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91506

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE ARIOS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 429586
Cuyahoga County Common Pleas Court
Case No. CR-500492

RELEASE DATE: March 19, 2010

FOR APPELLANT

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KENNETH A. ROCCO, P.J.:

{¶ 1} In *State v. Arios*, Cuyahoga County Court of Common Pleas Case No. CR-500492, applicant, Jose Arios, was convicted of seven counts of drug trafficking; three counts of drug possession; and one count of possession of criminal tools. In *State v. Arios*, Cuyahoga App. No. 91506, 2009-Ohio-5814, this court held that three of the trafficking counts and the three possession counts were allied offenses of similar import; ordered that the allied offenses be merged; reversed the convictions on all six counts held to be allied offenses; remanded the case for an allied offense merger under R.C. 2941.25; vacated the sentence for all six counts held to be allied offenses; and otherwise

affirmed, including affirming 29 years of the trial court's original 47-year sentence (that is, reducing the sentence in accordance with this court's holding on the merger of allied offenses). *Arios*, supra, at ¶25, n.1; ¶56. The Supreme Court of Ohio denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. *State v. Arios*, 124 Ohio St.3d 1478, 2010-Ohio-354, 921 N.E.2d 248.

{¶ 2} Arios and a co-defendant, Felix Quinones, were arrested after a confidential informant ("CI") working with the Cleveland police officers purchased quantities of heroin and marijuana from them. The evidence against Arios and Quinones pertained to several locations, including an apartment on Madison Avenue ("the apartment").

{¶ 3} Prior to trial, the trial court held an extensive hearing on the defendants' motions to suppress evidence. During the hearing, the trial court ruled that the defendants did not have standing to challenge the search of the apartment. On direct appeal by Quinones, however, this court, inter alia, held that Quinones did have standing to challenge the search of the apartment; reversed the trial court's judgment on standing; and remanded the case to the trial court for a hearing on whether the search of the apartment was valid. *State v. Quinones*, Cuyahoga App. No. 91632, 2009-Ohio-2718.

{¶ 4} Arios has filed with the clerk of this court a timely application for reopening. He asserts that he was denied the effective assistance of appellate counsel because his appellate counsel failed to assign as error on appeal that the trial court erred by finding that Arios did not have standing to challenge the search of the apartment. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 5} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that Arios 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. Arios cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

{¶ 6} In *Quinones*, supra, this court considered specific facts pertinent to Quinones and concluded that he had a legitimate expectation of privacy in the apartment.

{¶ 7} "Generally, an expectation of privacy attaches to one's home or residence. *State v. Dooley*, Montgomery App. No. 22100, 2008-Ohio-1748. A person, however, may have a legitimate expectation of privacy in a place other than his or her home. *Minnesota v. Olson* (1990), 495 U.S. 91, 96-97, 110 S.Ct. 1684, 109 L.Ed.2d 85. In *Olson*, the Supreme Court held that an overnight guest may have a legitimate expectation of privacy in their host's home. *Olson*, supra.

{¶ 8} "In this case, appellant's status as an overnight guest alone may be sufficient to demonstrate that he had a legitimate expectation of privacy in the Madison apartment. Appellant testified that he spent the previous evening at the apartment. The detectives verified this assertion by testifying that they witnessed appellant enter the apartment on August 21, 2007 and not exit until the following day. Furthermore, while appellant's overnight status may be enough to establish a legitimate expectation of privacy, we find his expectation of privacy heightened when we consider the compelling fact

that the appellant's keys, retrieved from his Mercury, opened the door to the Madison apartment. We also note that appellant testified, and Det. Moran confirmed, that inside the apartment was a mattress, some of appellant's shoes and coats, and his Sam's Club identification card." *Quinones*, supra, at ¶35-36.

{¶ 9} Arios asserts that he also had standing to challenge the search of the apartment because he was an overnight guest in the apartment. He relies on a portion of this court's opinion in *Quinones* as the basis for his argument.

{¶ 10} A detective testifying during the hearing on the motions to suppress "admitted that appellant [Quinones] spent the night of August 21, 2007 [the night before police arrested Quinones and Arios] in the apartment. He explained that detectives witnessed appellant and Arios enter the front of the building on August 21, 2007, and only exit the next day prior to the second CI buy." *Quinones*, supra, at ¶13.

{¶ 11} Arios ignores, however, the following discussion during the hearing on the motions to suppress.

{¶ 12} "MS. NAIMAN [the prosecuting attorney]: Your Honor – Oscar [trial counsel for Arios], are you saying you have standing on the apartment on Madison?

{¶ 13} "MR. RODRIGUEZ [trial counsel for Arios]: No. We do not have standing for anything found in the apartment on Madison. My client has never stepped foot in the apartment. We don't have any standing to refute any of the search." Tr. 89-90.

{¶ 14} Obviously, trial counsel's strategy was to deny that Arios had ever been in much less had any interest in the apartment. Arios has not identified an objection in the record on his behalf contesting the trial court's determination that he lacked standing to challenge the search of the apartment. He has not, therefore, demonstrated that the purported error was preserved for review on direct appeal.

{¶ 15} Additionally, although Arios argues that this court should reach the same conclusion regarding standing that it did in *Quinones*, this court's opinion in *Quinones* demonstrates significant distinctions between the circumstances of each co-defendant. That is, as quoted above, Quinones had the keys to the apartment, and some of his personal property was in the apartment. He also testified that he spent the evening before his arrest in the apartment. Arios has not identified any comparable facts in the record.

{¶ 16} In light of the statement by counsel for Arios during the hearing on the motions to suppress, we cannot conclude that appellate counsel was deficient or that Arios was prejudiced by the absence of an assignment of error on direct appeal asserting that the trial court erred by holding that

Arios did not have standing to challenge the search of the apartment. As a consequence, Arios has not met the standard for reopening. Accordingly, the application for reopening is denied.

KENNETH A. ROCCO, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR