[Cite as *State v. Orr*, 2010-Ohio-1657.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92005

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WYLEE ORR

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 427299
Cuyahoga County Common Pleas Court
Case No. CR-506072

RELEASE DATE: April 14, 2010
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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} On October 15, 2009, the applicant, Wylee Orr, pursuant to App.R. 26(B) applied to reopen this court's judgment in *State v. Orr*, Cuyahoga App. No. 92005, 2009-Ohio-4038, in which this court affirmed Orr's conviction and sentence for failure to comply with an order or signal of a police officer under R.C. 2921.331(B). Orr maintains that his appellate counsel should have argued that the judge's imposition of a mandatory three-year period of postrelease control resulted in a void sentence. The State of Ohio filed a brief in opposition. For the following reasons, this court denies the application.

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 ; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶ 3} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The Court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "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} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted, "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, 3313, 77 L.Ed.2d 987. Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the Court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638, and *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987.

{¶ 5} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error, there is a reasonable probability that the results of the proceeding would have been different. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 6} Additionally, appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue. *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. 255657; *State v. Munici* (Nov. 30, 1987), Cuyahoga App. No 52579, reopening

disallowed (Aug. 21, 1996), Motion No. 271268, 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.

{¶ 7} Orr pleaded guilty to a charge of R.C. 2921.331(B) as a third-degree felony. Subsection (B) provides: "No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop."[1] A violation of R.C. 2921.331(B) is a third-degree felony only if the operation of the motor vehicle by the offender caused serious physical harm to persons or property or caused the substantial risk of serious physical harm to persons or property. The trial judge sentenced Orr to two years and imposed postrelease control for three years.

{¶ 8} Orr argues that R.C. 2967.28(C) provides in pertinent part as follows: "Any sentence to a prison term for a felony of the third * * * degree that is not

[1] Under the plea agreement, Orr pleaded guilty to R.C. 2921.331(B), and the State of Ohio nolled a charge of breaking and entering.

subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section determines that a period of post-release control is necessary for the offender." Orr then implicitly assumes that his violation of R.C. 2921.331(B) must necessarily come within the scope of this subsection and that he was entitled to a discretionary period of up to three years of postrelease control; therefore, the trial judge was wrong in imposing a mandatory three-year period of postrelease control. Furthermore, under the decisions of the Supreme Court of Ohio, such as *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, the judge's disregard of the statutory requirements rendered the sentence void. If his appellate counsel had argued this point, this court would have vacated the sentence and remanded for a new sentencing hearing. Thus, Orr concludes that his appellate counsel was ineffective.

{¶ 9} However, R.C. 2967.28(B)(3) requires a mandatory period of three years of postrelease control if in the commission of the offense the offender caused or threatened physical harm to a person.[2] In *State v. Pitts,* Ottawa App. No. OT-05-036, 2006-Ohio-3182, the court of appeals considered this very issue. Pitts pleaded guilty to R.C. 2921.331(B) as a third degree felony and challenged

[2] Subsection (B)(1) provides for a mandatory five-year period of postrelease control for felony sex offenses.

the imposition of a mandatory three-year period of postrelease control. The court rejected the argument because by pleading guilty to the charge of a third-degree felony, Pitts admitted that his operation of the motor vehicle caused substantial risk of serious physical harm to persons or property, which corresponds to the language in R.C. 2967.28(B)(3). The court concluded "that R.C. 2967.28(B)(3) applies as does the language of notice of mandatory, rather than discretionary, post-release control contained in that division of the statute." ¶20.

{¶ 10} Confronted with this precedent, appellate counsel in the exercise of professional judgment could reasonably conclude that this argument was not well-founded and properly reject it. At the very least, counsel would realize that he was on the "cutting edge of the law" in an area marked by conflicting holdings. Appellate counsel was not ineffective for rejecting such arguments.

{¶ 11} Accordingly, this court denies the application to reopen.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

JAMES J. SWEENEY, J. , and
LARRY A. JONES