[Cite as *State v. Jackson*, 2010-Ohio-1742.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91613

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERRON JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 424562
Cuyahoga County Common Pleas Court
Case No. CR-505637

RELEASE DATE: April 22, 2010

FOR APPELLANT

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ANN DYKE, J.:

{¶ 1} The applicant, Jerron Jackson, pursuant to App.R. 26(B), timely applied to reopen this court's judgment in *State v. Jackson*, Cuyahoga App. No. 91613, 2009-Ohio-2388, in which this court affirmed Jackson's convictions and sentences for aggravated robbery, kidnapping and having a weapon while under disability, but reversed and remanded another count of kidnapping to be merged with the aggravated robbery charge. Jackson asserts that his appellate counsel was ineffective because he should have argued ineffective assistance of trial

counsel differently and the lack of a mens rea element in the aggravated robbery indictment. 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, 111 L.Ed.2d 768.

{¶ 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} Moreover, appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 50 N.E. 97;

Carran v. Soline Co. (1928), 7 Ohio Law Abs. 5 and *Republic Steel Corp. v. Sontag* (1935), 21 Ohio Law Abs. 358. "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke* 97 Ohio St.3d 55, 2002-Ohio-5310, paragraph 10.

{¶ 7} Jackson first argues that his trial and appellate counsel were deficient because they did not adequately argue the lack of forensic evidence in his case. Jackson notes that the police did not obtain fingerprints from the gun or the bullet. A fingerprint was obtained from the bicycle, but it was not his. Nor did the police try to obtain DNA evidence from the "hoodie."

{¶ 8} This argument is meritless. Trial counsel did argue these points in a trial to the bench, and the judge carefully noted the lack of forensic evidence. He found Jackson guilty because of the strength of other evidence, particularly the eyewitness identifications. Furthermore, appellate counsel stressed the lack of forensic evidence as part of her manifest weight argument. This court will not second-guess counsel's professional decisions.

{¶ 9} Jackson next claims that his appellate counsel should have argued trial counsel's ineffectiveness for failing to call alibi witnesses which Jackson now claims were in the courtroom and ready to testify.[1] However, Jackson makes no reference to the record to support this argument. Significantly, at sentencing

[1] Appellate counsel did argue that trial counsel was ineffective for not moving to suppress cold-stand identifications.

Jackson did not complain that witnesses were not called; rather, he thanked his defense counsel for "good representation." (Tr. 240.) Nor were there any defense subpoenas in the record. Declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel.

{¶ 10} Jackson further claims that his trial counsel was ineffective because he had only seven days to prepare. However, the trial court appointed defense counsel for Jackson on March 19, 2008, and trial commenced on May 12, 2008. Moreover, the trial was continued several times before it began. The record does not support Jackson's claim.

{¶ 11} Finally, Jackson argues that his indictment for aggravated robbery under R.C. 2911.01(A)(1) was fatally defective because it did not include a mens rea element. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. However, in *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, the Supreme Court of Ohio considered this issue and rejected it. The court ruled that R.C. 2911.01(A)(1) imposes strict liability, and thus, a mens rea element is not required.

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

ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR