

[Cite as *State v. Stewart*, 2011-Ohio-1667.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93428**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ROBERT STEWART**

DEFENDANT-APPELLANT

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**JUDGMENT:  
APPLICATION DENIED**

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Cuyahoga County Common Pleas Court  
Case No. CR-515489  
Application for Reopening  
Motion No. 439406

**RELEASE DATE:** April 1, 2011

## **FOR APPELLANT**

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## **ATTORNEYS FOR APPELLEE**

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**LARRY A. JONES, J.:**

{¶ 1} Robert Stewart has filed a timely application for reopening pursuant to App.R. 26(B). Stewart is attempting to reopen the appellate judgment that was rendered in *State v. Stewart*, Cuyahoga App. No. 93428, 2010-Ohio-3869, which affirmed his conviction for four counts of aggravated robbery with one and three year firearm specifications. For the following reasons, we decline to reopen Stewart's original appeal.

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, Stewart must demonstrate that appellate counsel's performance was deficient and that, but for his 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. Specifically, Stewart must 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, 77 L.Ed.2d 987, 103 S.Ct. 3308. 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 a defendant/appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight.

{¶ 6} 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 he or she believes 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.

{¶ 7} Herein, Stewart has raised two proposed assignments of error in support of his claim of ineffective assistance of appellate counsel. A review of Stewart's two proposed assignments of error, however, fails to support the claim of ineffective assistance of appellate counsel.

{¶ 8} Stewart's first proposed assignment of error is that:

{¶ 9} “Appeal counsel failed to federalize the sole claim raised on appeal.”

{¶ 10} Stewart, through his initial proposed assignment of error, argues that appellate counsel was ineffective by failing to “protect [his] right to obtain federal relief in a federal habeas corpus proceeding.” Specifically, Stewart states that the failure of his appellate counsel to raise a sufficiency argument on appeal prevents federal review of his conviction.

{¶ 11} In order for this court to grant the application for reopening, Stewart must demonstrate that appellate counsel was deficient for failing to raise the issue of sufficiency on appeal and that, if raised, there exists a “reasonable probability” that the outcome of his appeal would have been different. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. Consideration of Stewart’s initial proposed assignment of error would not have resulted in a reversal of the conviction for the offenses of aggravated robbery with firearm specifications. The issue of manifest weight was previously raised on direct appeal and found to be without merit. In finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. Peterson*, Cuyahoga App. No. 88248, 2007-Ohio-1837. See, also, *State v. Logan*, Cuyahoga App. No. 88472, 2007-Ohio-2636, reopening disallowed, 2008-Ohio-1934, Motion No. 400716; *State v. Krzywkowski*, Cuyahoga App. No. 80392,

2002-Ohio-4438, reopening disallowed, 2003-Ohio-3209, Motion No. 343757, appeal dismissed, 100 Ohio St.3d 1425, 2003-Ohio-5232, 797 N.E.2d 92.

{¶ 12} It must also be noted that the issue of lack of “federalization” of the original appeal, in order to allow for federal habeas corpus proceedings, does not constitute ineffective assistance of appellate counsel under App.R. 26(B). An application for reopening is premised upon one or more assignments of error that were not previously considered on the merits in the original appeal. See App.R. 26(B)(2)(C). The issue of failing to “federalize” Stewart’s original appeal, to allow for habeas corpus proceedings within the federal court system, could have been raised on direct appeal and thus cannot form the basis for reopening under App.R. 26(B). *State v. Pratt*, Cuyahoga App. No. 93123, 2010-Ohio-1426, reopening disallowed, 2010-Ohio-4998, Motion No. 434932.

{¶ 13} Stewart’s second proposed assignment of error, in support of his claim of ineffective assistance of appellate counsel, is that:

{¶ 14} “Appeal counsel failed to raise several ineffective assistance of trial counsel claims as follows: [1] trial counsel was ineffective for failing to raise the issue at trial that my right to confront witnesses were violated when key witnesses did not show up at trial; [2] trial counsel was ineffective for failing to raise the issue that the weapon in question was never fingerprinted; that it was found in a heater vent in a house the defendant did not live in;

and, the gun that was recovered is not the type of gun the witness identified at trial; and [3] trial counsel was ineffective for failing to ask the court to exclude identification testimony that resulted from unnecessarily suggestive procedures that led to an irreparably mistaken identification.”

{¶ 15} Stewart, through his second proposed assignment of error in support of his claim of ineffective assistance of appellate counsel, argues that the following three issues should have been raised on appeal: (1) failure to confront witnesses; (2) failure to fingerprint the recovered firearm; and (3) improper eyewitness identification procedure. Stewart, however, has failed to present any argument in support of his second proposed assignment of error. Specifically, he does not explain any basis for concluding that counsel was deficient or that he was prejudiced by appellate not raising the issues of failure to confront witnesses, fingerprinting of the firearm, and eyewitness identification on appeal. The mere recitation of a proposed assignment of error is not sufficient to meet an applicant’s burden of proving that his appellate counsel was deficient and that there is a reasonable probability that he would been successful if counsel presented those claims. *State v. Harris*, Cuyahoga App. No. 90699, 2008-Ohio-5873, reopening disallowed, 2009-Ohio-5962, Motion No. 418801; *State v. Hawkins*, Cuyahoga App. No. 90704, 2008-Ohio-6475, reopening disallowed, 2009-Ohio-2246, Motion No. 417851. It must also be noted that the critical issue of eyewitness

identification was previously addressed on direct appeal and is thus barred from further review by the doctrine of res judicata. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204; *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104; *State v. Williams* (Mar. 4, 1991), Cuyahoga App. No. 57988, reopening disallowed (Aug. 15, 1994), Motion No. 52164.

{¶ 16} Stewart has not meet the standard for reopening. Accordingly, we decline to reopen Stewart's original appeal.

{¶ 17} Application for reopening is denied.

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LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and  
JAMES J. SWEENEY, J., CONCUR