[Cite as *State v. Clementson*, 2011-Ohio-1798.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94230

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

EMMETT CLEMENTSON, IV

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-526381
Application for Reopening
Motion No. 438414

RELEASE DATE: April 8, 2011

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SEAN C. GALLAGHER, P.J.:

{¶ 1} In *State v. Clementson*, Cuyahoga County Court of Common Pleas Case No. CR-526381, applicant, Emmett Clementson, IV, was charged in an eight-count indictment with attempted murder, two counts of aggravated burglary, three counts of felonious assault, domestic violence, and kidnapping. He pled guilty to four of the eight counts: attempted murder; aggravated burglary; felonious assault; and domestic violence. The trial court imposed a sentence of 16 and one-half years. This court affirmed that judgment in *State v.*

Clementson, Cuyahoga App. No. 94230, 2010-Ohio-3424. The Supreme Court of Ohio affirmed Clementson's conviction "on the authority of *State v. Hodge*, [128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768]." *In re Cases Held for the Decision in State v. Hodge*, ____Ohio St.3d ____, 2011-Ohio-228, 943 N.E.2d 534.

{¶ 2} Clementson 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 appellate counsel did not assign as error that the trial court failed to merge allied offenses of similar import and improperly imposed consecutive sentences. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

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

{¶ 4} Clementson and his wife had separated. He went to her residence at night and waited outside until everyone – including his wife's three children – were asleep. He believed that his wife was with another man that night. Clementson entered the home with a baseball bat and hit the male guest with the bat. The guest escaped. Clementson took a knife and stabbed his wife several times in the bedroom. She tried to escape to the kitchen where he continued to stab her, despite the effort of one son to get in between them. She presented the trial court with medical bills in excess of $40,000 for treatment of her injuries.

{¶ 5} After accepting Clementson's guilty plea, the trial court sentenced him to 16 and one-half years as follows: ten years on attempted murder and aggravated burglary, to run concurrently; five years on felonious assault and one and one-half years on domestic violence to run consecutively to each other and consecutively to attempted murder and aggravated burglary. On direct appeal, appellate counsel – the same counsel who represented Clementson in the trial court – assigned two errors challenging the propriety of the trial court's maximum sentences for three of the counts and the imposition of consecutive sentences. As mentioned above, this court's affirmance of Clementson's conviction and sentence was affirmed by the Supreme Court of Ohio in light of *Hodge*. In *Hodge*, the Supreme Court

held: "Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." Id., paragraph three of the syllabus.

{¶ 6} In his application for reopening, Clementson argued that appellate counsel failed to assign the following errors:

{¶ 7} "I. The trial court failed to determine whether the convictions were allied offenses and therefore, should have been merged for purposes of sentencing pursuant to R.C. §2941.25.

{¶ 8} "II. Trial counsel's failure to request that the convictions of domestic violence and attempted murder be merged because they are allied under R.C. §2941.25."

{¶ 9} In *State v. Antenori*, Cuyahoga App. No. 90580, 2008-Ohio-5987, Antenori was charged with murder and felonious assault and pled guilty to involuntary manslaughter (amended from murder) and felonious assault. The trial court imposed consecutive sentences. This court held that, "by voluntarily entering his guilty pleas to two separate offenses, defendant waived any argument that the same constituted allied offenses of similar import." Id., ¶ 6.

{¶ 10} In *State v. Wulff*, Cuyahoga App. No. 94087, 2011-Ohio-700, " * * * Wulff was indicted on ten counts. * * * Wulff accepted a plea agreement in which he pled guilty to three counts and the remaining counts were nolled. He pled guilty to murder, tampering with

evidence, and abuse of a corpse. The trial court sentenced him to 15 years to life in prison for murder, four years in prison for tampering with evidence, and one year in prison for abuse of a corpse. All three sentences were ordered to run consecutively, for a total of 20 years to life in prison." Id., ¶ 2.

{¶ 11} In *Wulff*, this court reaffirmed *Antenori* and distinguished *Antenori* from *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. "Underwood pled no contest to all four counts for which he was indicted. On appeal, the State in *Underwood*, conceded that the convictions were in fact allied offenses of similar import. Whereas, in *Antenori* and the instant case, a plea bargain was entered involving pleas to just some charges and no such concession by the State exists. Moreover, *Underwood* applies to an appellate review of a *jointly recommended* sentence, as opposed to sentences like those in *Antenori* and the instant case, which were imposed by the trial court after the defendant pled guilty to just some of the charges he faced.

{¶ 12} "Accordingly, by voluntarily entering two separate guilty pleas, one to tampering with evidence and one to gross abuse of a corpse, as well as allowing himself to be sentenced at the court's discretion, Wulff waived any argument that these charges constituted allied offenses of similar import." *Wulff*, ¶ 25-26 (emphasis in original).

{¶ 13} Likewise, Clementson entered separate guilty pleas to four of eight charges, the parties did *not* jointly recommend a sentence to the trial court, and the state did not concede

that the charges were allied offenses. This court decided *Antenori* in 2008, and Clementson's case was briefed, argued, and decided in 2009-2010. In light of *Antenori*, therefore, Clementson has not met his burden to demonstrate that there is a genuine issue of a colorable claim of the ineffective assistance of appellate counsel.

{¶ 14} We also note that Clementson pled guilty to a count of attempted murder in which his wife was the victim. The male guest, however, was the victim of the felonious assault count to which he pled guilty. The attempted murder count and felonious assault count would not, therefore, merge. See, e.g., *State v. Craig*, Cuyahoga App. No. 94455, 2011-Ohio-206, ¶ 70.

{¶ 15} As a consequence, Clementson's first proposed assignment of error is not well-taken.[1]

{¶ 16} In his second proposed assignment of error, Clementson argues that his trial counsel was ineffective for failing to request that the trial court merge his convictions for felonious assault and domestic violence into attempted murder. As noted above, however, Clementson was represented by the same counsel in the trial court and on direct appeal. "It

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[1] We recognize that, after this court decided *Clementson* in July 2010, the Supreme Court of Ohio decided *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, in December 2010, regarding determining whether two offenses are allied offenses of similar import requiring merger under R.C. 2941.25. "'Appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue.' *State v. Moncrief*, Cuyahoga App. No. 85479, 2006-Ohio-5571, at ¶ 1, fn. 2 (citations deleted)." *State v. Hudson*, Cuyahoga App. No. 89588, 2009-Ohio-3069, ¶ 16. For purposes of determining this application for reopening, therefore, we need not consider *Johnson*.

is well-established that appellate counsel is not expected to assign as error his or her own purported ineffectiveness as trial counsel. Fn. 16."[2] *State v. Fanin*, Cuyahoga App. No. 80014, 2008-Ohio-136, ¶ 6. Clementson cannot, therefore, demonstrate that his appellate counsel was ineffective for failing to assign his own ineffectiveness as trial counsel. As a consequence, Clementson's second proposed assignment of error is not well-taken.

{¶ 17} Clementson cannot satisfy either prong of the *Strickland* test. Accordingly, the application for reopening is denied.

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, A.J., and
LARRY A. JONES, J., CONCUR

[2] *Fanin*, fn. 16: "*State v. Nero*, Cuyahoga App. No. 47782, 2002-Ohio-656, reopening disallowed, 2003-Ohio-268, Motion No. 343053, at ¶ 19."