[Cite as *State v. Alsip*, 2011-Ohio-303.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93105

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT ALSIP

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-504804
Application for Reopening
Motion No. 435877

RELEASE DATE: January 24, 2011

FOR APPELLANT

Robert Alsip
Inmate No. 590-294
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Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Mary McGrath
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
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JAMES J. SWEENEY, J.:

{¶ 1} In *State v. Alsip*, Cuyahoga County Court of Common Pleas Case No. CR-504804, the court found applicant, Robert Alsip, guilty of one count of gross sexual imposition. This court affirmed that judgment in *State v. Alsip*, Cuyahoga App. No. 93105, 2010-Ohio-1757.

{¶ 2} Alsip 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 meet or speak with him; and did not argue that the trial court erred by denying his motion to dismiss

based on the Interstate Agreement on Detainers ("IAD," R.C. 2963.30, et seq.).

{¶ 3} We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

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

{¶ 5} The state argues that res judicata bars Alsip's application for reopening because he could have raised the issue of the ineffective assistance of appellate counsel in a discretionary appeal to the Supreme Court of Ohio. "The filing of a motion seeking a discretionary appeal in this court does not create a bar to a merit ruling on a timely filed application to reopen an appeal claiming ineffective assistance of appellate counsel under App.R. 26(B)." *State v. Davis,* 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221. Res judicata is not, therefore, a bar to this, timely application.

{¶ 6} In his first proposed assignment of error, Alsip complains that appellate counsel's performance was deficient because he did not meet or speak with Alsip. In support of this argument, Alsip supports his application with his affidavit and the affidavit of his brother as well as a copy of a letter from Alsip to his appellate counsel. "It is well-settled that '[m]atters outside the record do not provide a basis for reopening.' *State v. Hicks*, Cuyahoga App. No. 83981, 2005-Ohio-1842, at ¶7. More properly, 'any allegations of ineffectiveness based on facts not appearing in the [trial] record should be reviewed through the postconviction remedies.' *State v. Coleman*, 85 Ohio St.3d 129, 1999-Ohio-258, 707 N.E.2d 476, 483." *State v. Carmon* (Nov. 18, 1999), Cuyahoga App. No. 75377, reopening disallowed, 2005-Ohio-5463, ¶29.

{¶ 7} Alsip relies entirely on matters dehors the record as the basis for his first proposed assignment of error. That is, the trial court record does not reflect any communication or lack of communication with his appellate counsel. As a consequence, his first proposed assignment of error does not provide a basis for reopening.

{¶ 8} In his second proposed assignment of error, Alsip contends that his appellate counsel should have argued that the trial court erred by denying his motion to dismiss based on the IAD. In part, Alsip refers to his correspondence with appellate counsel regarding the IAD. To the extent that Alsip relies on materials which are outside the record, his second proposed assignment of error does not provide a basis for reopening for the reasons discussed above.

{¶ 9} The IAD provides that a person who is imprisoned in a party state "shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, *the court having*

jurisdiction of the matter may grant any necessary or reasonable continuance."

R.C. 2963.30, Article III(a). (Emphasis added.)

{¶ 10} Alsip contends that the state failed to bring him to trial within 180 days. The state does not challenge whether the materials Alsip submitted to the prosecuting attorney and the clerk of the court of the common pleas substantially complied with the IAD. Compare *State v. Barrett*, Cuyahoga App. No. 94434, 2010-Ohio-5139, ¶11 ("[S]ubstantial compliance with R.C. 2963.30 is the appropriate prism through which to view prisoners' actions to determine whether they properly avail themselves of the 180-day period.").

{¶ 11} In the trial court, the state argued, inter alia, that Alsip had requested continuances which toll the time for bringing a detainee to trial. The docket of the underlying case reflects that Alsip requested continuances of pretrials no fewer than seven times and that he requested a continuance of the trial. Alsip has not demonstrated that the continuances were not "necessary or reasonable." Compare *State v. Denkins*, Hamilton App. No. 030518, 2004-Ohio-1696, ¶11 ("Because Denkins's trial counsel agreed to the trial dates beyond the IAD limits, Denkins waived his IAD speedy-trial rights.").

{¶ 12} The docket of the trial court reflects that several pretrial continuances and the final trial continuance were at the request of the defendant Alsip through counsel. We cannot, therefore, conclude that Alsip's right to trial within 180 days of notifying the prosecutor and the court was violated. Appellate counsel was not deficient and Alsip was not prejudiced by the absence of this assignment of error on direct appeal. As a consequence, his second proposed assignment of error does not provide a basis for reopening.

{¶ 13} Alsip has not met the standard for reopening. Accordingly, the application for reopening is denied.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, A.J., and
PATRICIA A. BLACKMON, J., CONCUR