

[Cite as *State v. Scott*, 2011-Ohio-587.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91890

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

JOSEPH SCOTT

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Cuyahoga County Common Pleas Court
Case No. CR-505742
Application for Reopening
Motion No. 437262

RELEASE DATE: February 8, 2011

FOR APPELLANT

Joseph Scott, pro se
Inmate No. 551-565
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Diane Smilanick
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MELODY J. STEWART, J.:

{¶ 1} In *State v. Scott*, Cuyahoga County Court of Common Pleas Case No. CR-505742, a jury found applicant, Joseph Scott, guilty of gross sexual imposition and attempted rape. This court affirmed that judgment in *State v. Scott*, Cuyahoga App. No. 91890, 2010-Ohio-3057. The Supreme Court of

Ohio accepted Scott’s appeal on propositions of law VII (“Gross sexual imposition against a child under 13 is not a strict liability offense. The act of sexual contact must be recklessly performed.”) and IX (“The Adam Walsh Act does not apply to persons whose offenses were committed prior to the AWA’s effective date.”) The Supreme Court is holding the case pending decisions in two other appeals before it and has stayed briefing. *State v. Scott*, 127 Ohio St.3d 1444, 2010-Ohio-5762, 937 N.E.2d 1035.

{¶ 2} We recognize that Scott’s appeal remains pending before the Supreme Court. Nevertheless, the Supreme Court’s determination does not affect our ability to dispose of Scott’s application. See S.Ct.Prac.R. 2.2(D)(1).

It is well-established that appellate counsel is not required to anticipate changes in the law. See, e.g., *State v. Lucic*, Cuyahoga App. No. 91069, 2009-Ohio-616, reopening disallowed, 2009-Ohio-5686, ¶9.

{¶ 3} Scott has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel because his appellate counsel did not raise various errors on direct appeal. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 4} In his application, Scott states six proposed assignments of error. He does not, however, make any argument in support of any of those

proposed assignments of error. “The mere recitation of an assignment of error is not sufficient to meet an applicant's burden of proving that his counsel were deficient and that there is a reasonable probability that he would have been successful if counsel had presented those claims. *State v. Hawkins*, Cuyahoga App. No. 90704, 2008-Ohio-6475, reopening disallowed, 2009-Ohio-2246, at ¶2-3.” *State v. Harris*, Cuyahoga App. No. 90699, 2008-Ohio-5873, reopening disallowed, 2009-Ohio-5962, ¶20.

{¶ 5} In light of *Harris*, this court could deny the application because Scott did not support the application with argument. Likewise, the affidavit accompanying Scott’s application does not set forth the basis for his claim of ineffective assistance of appellate counsel or “the manner in which the deficiency prejudicially affected the outcome of the appeal * * *.” App.R. 26(B)(2)(d). We could, therefore, deny the application on either ground.

{¶ 6} Almost four months after filing his application, Scott did file a memorandum in support of his application and a sufficient affidavit. The memorandum repeats the six assignments of error in Scott’s application and presents argument in support of each. Nevertheless, Scott made these filings without leave of court. Although we could strike these filings as untimely, in the interest of justice as well as judicial economy, we will consider the merits.

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

{¶ 8} Scott was indicted on 17 counts involving two victims. The charges involving the first victim ("Victim I") were alleged to have occurred more than two decades before the charges relating to the second victim ("Victim II"). After the jury was unable to reach a verdict on several counts

involving both victims, the state nolleed all the charges relating to Victim I and some regarding Victim II.

{¶ 9} In his first proposed assignment of error, Scott argues that the identically worded charges and duplicate counts for each victim, respectively, “lacked differentiation among the criminal charges.” Application, unnumbered page 2. We note, however, that Scott was convicted on only two of those counts which involved Victim II.

{¶ 10} On direct appeal, appellate counsel’s fifth assignment of error stated, in part, “the indictment failed to adequately advise the defendant of the pending charges * * * .” 2010-Ohio-3057, ¶35. Counsel argued that the overlapping time frames in the indictment made it impossible to determine what evidence led to the guilty verdicts. This court rejected that argument and observed that “Scott was convicted on the same essential facts on which he was indicted.” 2010-Ohio-3057, ¶38. This court has, therefore, already determined that the indictment was sufficient.

{¶ 11} “The principles of *res judicata* may be applied to bar the further litigation in a criminal case of issues which were raised previously or could have been raised previously in an appeal. See generally *State v. Perry* (1967), 10 Ohio St.2d 175, 22 N.E.2d 104, paragraph nine of the syllabus. Claims of ineffective assistance of appellate counsel in an application for reopening may

be barred by *res judicata* unless circumstances render the application of the doctrine unjust. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 66, 584 N.E.2d 1204." *State v. Williams* (Mar. 4, 1991), Cuyahoga App. No. 57988, reopening disallowed (Aug. 15, 1994), Motion No. 52164, quoted with approval in *State v. Logan*, Cuyahoga App. No. 88472, 2008-Ohio-1934, at ¶4.

{¶ 12} This court has already determined the sufficiency of the indictment. As a consequence, *res judicata* bars Scott's first proposed assignment of error.

{¶ 13} In his second proposed assignment of error, Scott argues that the times mentioned in the indictment do not coincide with Victim II's testimony.

As mentioned above, on direct appeal, this court considered the issue of the time of the events leading to Scott's conviction. "Insofar as Scott complains of vague and overlapping time frames set forth in the indictment, we find no merit to this argument. This court has recognized that 'temporal deviations in an indictment, based on information eventually elicited in discovery, need not necessarily deprive a defendant of the right to indictment by grand jury * *.' *State v. Shafer*, Cuyahoga App. No. 79758, 2002-Ohio-6632. This is particularly so in cases involving sexual abuse of a victim under the age of 13 over a period of time." 2010-Ohio-3057, ¶39. As a consequence, *res judicata* bars Scott's second proposed assignment of error.

{¶ 14} In his third proposed assignment of error, Scott argues that gross sexual imposition and rape are allied offenses of similar import. On direct appeal, this court overruled appellate counsel’s eleventh assignment of error: “The convictions are allied offenses and must be merged.” As a consequence, *res judicata* bars Scott’s third proposed assignment of error.

{¶ 15} In his fourth proposed assignment of error, Scott contends that trial counsel was ineffective. In part, Scott argues that trial counsel failed to consult with him as well as to investigate and to secure witnesses. Scott does not, however, identify anywhere in the record that provides a factual basis for these assertions. “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.

To the extent that Scott relies on materials which are outside the record, his second proposed assignment of error does not provide a basis for reopening.

{¶ 16} Scott also complains that trial counsel did not object “when no evidence was presented to support counts in the indictment and prosecutor

used same evidence for all counts.” Application, unnumbered page 7. Yet, on direct appeal, this court overruled appellate counsel’s third assignment of error, asserting that the evidence was insufficient to sustain Scott’s convictions, and the fourth assignment of error, asserting that Scott’s conviction was against the manifest weight of the evidence.

{¶ 17} As a consequence, his fourth proposed assignment of error does not provide a basis for reopening.

{¶ 18} In his fifth proposed assignment of error, Scott contends that the trial court erred when it denied his Crim.R. 29 motion because “no evidence was presented to support counts in the indictment.” Application, unnumbered page 8. He argues that the evidence was not sufficient to establish gross sexual imposition and attempted rape. Yet, as we noted above, on direct appeal, this court overruled appellate counsel’s assignment of error asserting that the evidence was insufficient to support Scott’s convictions. As a consequence, res judicata bars Scott’s fifth proposed assignment of error.

{¶ 19} In his sixth proposed assignment of error, Scott contends that the trial court erred “when it failed to amend the indictment to charged offenses alleged by [Victim II] during trial.” Scott repeats his contention that the evidence was not directly matched to specific counts in the indictment. With

regard to Scott’s first proposed assignment of error, however, we already observed that this court concluded on direct appeal that “Scott was convicted on the same essential facts on which he was indicted.” 2010-Ohio-3057, ¶38.

Having already determined on direct appeal that the indictment and the evidence did indeed match, *res judicata* bars Scott’s sixth proposed assignment of error.

{¶ 20} Scott cannot satisfy either prong of the *Strickland* test and has not met the standard for reopening. Accordingly, the application for reopening is denied.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, A.J., and
JAMES J. SWEENEY, J., CONCUR