[Cite as *State v. Waugh*, 2011-Ohio-589.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92896

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHAWN WAUGH

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-511174
Application for Reopening
Motion No. 436102

RELEASE DATE: February 9, 2011

FOR APPELLANT

Shawn Waugh, pro se
Inmate # 561-961
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Kristen L. Sobieski
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KATHLEEN A. KEOUGH, J.:

{¶ 1} On July 28, 2010, the applicant, Shawn Waugh, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Waugh*, Cuyahoga App. No. 92896, 2010-Ohio-1976, in which this court affirmed Waugh's convictions and sentences for aggravated robbery with a three-year firearm specification, carrying a concealed weapon and

having a weapon under disability. Waugh asserts that his appellate counsel was ineffective for failing to argue inadmissable hearsay evidence. 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.

{¶ 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 reasonable probability is a probability sufficient to undermine confidence in the outcome. 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} In the present case Waugh's argument on ineffective assistance of appellate counsel is not well taken.

{¶ 7} On April 1, 2009, Walt Williams was robbed at gunpoint outside of his Bedford apartment building, the Colony Club. Williams told the police that the assailant wore a white coat with stitching. Williams also told his friend, Joe Chapman, about the robbery. Chapman worked with Waugh, and approximately two weeks after the robbery, Chapman discussed robberies with Waugh who admitted that he had committed an armed robbery at the Colony Club in Bedford. Subsequently, when the police arrested Waugh, they discovered, pursuant to a search warrant, a white coat with stitching and a .380 pistol.

{¶ 8} Waugh argues that Chapman's testimony was inadmissable hearsay, and that his appellate counsel was ineffective for not raising the issue.[1] However, Evidence Rule 801(D)(2) provides in pertinent part as follows: "A statement is not hearsay if: * * * The statement is offered against a party and is (a) the party's own statement." Thus, Chapman's testimony was an admission against interest by a party opponent and properly admitted. Waugh's appellate counsel in the exercise of professional judgment properly declined to argue a point explicitly covered by the Rules of Evidence.

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

---

[1] Waugh's appellate counsel argued sufficiency of the evidence, manifest weight of the evidence, and abuse of discretion in imposing consecutive sentences.

KATHLEEN A. KEOUGH, JUDGE, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR