[Cite as *State v. Williams*, 2011-Ohio-64.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92714

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-512151
Application for Reopening
Motion Nos. 434901 and 433243

RELEASE DATE: January 7, 2011

FOR APPELLANT

Joseph Williams, pro se
Inmate # 561-297
Mansfield Correctional Inst.
P.O. Box 788
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Daniel T. Van
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, J.:

{¶ 1} On April 22, 2010, the applicant, Joseph Williams, pursuant to App.R. 26(B), commenced this application to reopen this court's judgment in *State v. Williams*, Cuyahoga App. No. 92714, 2010-Ohio-70, in which this court affirmed Williams' convictions for kidnapping and two counts of rape, but reversed on one count of rape. Williams argues that his appellate counsel was ineffective for the following reasons: (1) failing to argue his trial counsel's ineffectiveness for not adequately investigating the case, not calling more defense witnesses at trial, and not calling a psychiatric expert as a witness; (2) not arguing that the rape and

kidnapping counts were allied offenses, and (3) not adequately arguing the "other acts evidence" issue. On May 24, 2010, the State of Ohio filed its brief in opposition, and on June 17, 2010, Williams filed a reply brief. 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} Moreover, appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 50 N.E. 97; *Carran v. Soline Co.* (1928), 7 Ohio Law Abs. 5 and *Republic Steel Corp. v. Sontag* (1935), 21 Ohio Law Abs. 358. Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500. Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke,* 97 Ohio St.3d 55, 2002-Ohio-5310, ¶10, 776 N.E.2d 79.

{¶ 7} The jury in 2007, convicted Williams of raping his seven year-old nephew in March 1992. At the time Williams' mother was dying in a nursing home, and her extended family was staying there during the mother's last days. The nephew testified that he found Williams alone in a parlor, and over the course of approximately 30 minutes, Williams performed various sexual acts on him.

{¶ 8} Williams' first argument is that trial counsel was ineffective because he did not prepare adequately by examining the nursing home and calling

multiple witnesses who would have testified that the nursing home was so crowded with relatives and that Williams was always with them, that it would have been impossible for Williams to be alone for 30 minutes with his nephew to perform those acts. Although the record may permit the inference that such witnesses could have been called, the record does not contain what their testimony would have been. Similarly, Williams argues that in his preparation with trial counsel, he stated that they needed a psychiatric expert to explain the significance of the nephew's mental problems.[1] However, the record is devoid of what the proposed expert's testimony would have been. Appellate counsel in the exercise of professional judgment properly declined to raise an issue without support in the record.

{¶ 9} Next, Williams submits that his appellate counsel should have argued that the rape and kidnapping charges were allied offenses. However, there is no prejudice. The trial judge at sentencing merged the kidnapping charge with the rape charges. Thus, the point was moot.

{¶ 10} Finally, Williams argues that his appellate counsel did not adequately argue the third assignment of error: The admission of other acts evidence violated R.C. 2945.59, Evid.R. 404(B), and his constitutional rights to due process. In 2004, Williams in a letter admitted that he had raped a

[1] There was evidence that at the time the nephew disclosed the sexual abuse, he was suffering from various mental and emotional problems.

fifteen-year-old nephew. Williams denied, however, that he had raped the seven-year-old nephew. Nevertheless, the letter was admitted into evidence. Appellate counsel argued that the letter "was introduced only to improperly inflame the passions of the jury and to attempt to show that Appellant is of bad character." (Pg. 14 of appellant's brief.) Williams now argues that appellate counsel did not adequately argue the issue by supporting it with the sufficient legal authority. However, there is no prejudice. This court thoroughly considered the argument, and one of the panel members wrote a dissent on this issue and cited most of the legal authority that Williams now says should have been cited. It is difficult to see how the additional authority would have made a difference.

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

COLLEEN CONWAY COONEY, JUDGE

JAMES J. SWEENEY, P.J., and
KATHLEEN ANN KEOUGH, J., CONCURS