[Cite as *State v. Brown*, 2011-Ohio-65.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92814

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STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID J. BROWN, SR.

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-509535
Application for Reopening
Motion No. 434095

RELEASE DATE: January 11, 2011

FOR APPELLANT

David J. Brown, Sr., pro se
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ATTORNEYS FOR APPELLEE

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Cuyahoga County Prosecutor

By: Kristen L. Sobieski
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MARY EILEEN KILBANE, A.J.:

{¶ 1} On May 20, 2010, the applicant, David J. Brown, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. David J. Brown, Sr.*, Cuyahoga App. No. 92814, 2010-Ohio-661, in which this court affirmed Brown's convictions for attempted murder with one- and three-year firearm specifications, two counts of felonious assault with one- and three-year firearm specifications, and having a weapon under disability. Brown maintains that his appellate counsel was ineffective for not arguing 17 assignments of error. On June 17, 2010, the State of Ohio filed its brief in opposition, and on July 1, 2010, Brown

filed a reply brief. For the following reasons, this court denies the application to reopen.

{¶ 2} First, Brown's application exceeds the ten-page limitation established by App.R. 26(B)(4). This defect provides sufficient reason for dismissing the application. *State v. Murawski*, Cuyahoga App. No. 70854, 2002-Ohio-3631; *State v. Caldwell*, Cuyahoga App. No. 44360, 2002-Ohio-2751; *State v. Graham* (June 1, 1975), Cuyahoga App. No. 33350, reopening disallowed (July 21, 1994), Motion No. 252743; *State v. Schmidt* (Dec. 5, 1991), Cuyahoga App. No. 57738, reopening disallowed (Aug. 10, 1994), Motion No. 142174; and *State v. Peeples* (Dec. 22, 1988), Cuyahoga App. No. 54708, reopening disallowed (Aug. 24, 1994), Motion No. 254080, affirmed (1994), 71 Ohio St.3d 349, 643 N.E.2d 1112.

{¶ 3} Next, 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; and *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.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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. "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, paragraph 10.

{¶ 8} In the present case, the strategy has always been self-defense. There is no doubt that Brown fired his gun multiple times at Doss, hitting Doss once in the stomach and once in each leg. Brown testified that Doss came at him, after Brown made a remark about Doss's relationship with his girlfriend. Brown stated that Doss drew a gun and fired a shot at him, at which time Brown returned fire. Doss testified that Brown made the remark and that he (Doss) started toward Brown, removed his cell phone from his belt and put it in a pocket and started to remove his coat, at which time Brown fired at him. The other

witnesses generally bolstered Doss's account. Throughout trial Brown and his counsel made self-defense the strategy.

{¶ 9} Appellate counsel continued this strategy by arguing sufficiency of the evidence and manifest weight of the evidence.[1] Pursuant to the admonitions of the United States Supreme Court and the Supreme Court of Ohio, this court will not second-guess appellate counsel strategic and professional decision to pursue the natural strategy of this case. Accordingly, this court rules that appellate counsel's performance was not deficient.

{¶ 10} Moreover, this court has reviewed the record and Brown's proposed assignments of error. His arguments, inter alia, on speedy trial, additional jury instructions, prosecutorial misconduct, police misconduct, discovery, witness competency, witness credibility, racial bias, amendment of the indictment, tampering with the evidence, and deprivation of civil rights under Title 42, United State Code, Section 1983, are not supported by the record or the law, or otherwise fail to establish prejudice.

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

MARY EILEEN KILBANE, Administrative Judge

LARRY A. JONES, J., and

[1] Appellate counsel also argued that the disability charge should have been bifurcated.

SEAN C. GALLAGHER, J., CONCUR