

[Cite as *State v. Pagan*, 2014-Ohio-4199.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION  
No. 99935

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JOSE PAGAN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
APPLICATION DENIED

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Cuyahoga County Court of Common Pleas  
Case No. CR-11-546295-A  
Application for Reopening  
Motion No. 475731

**RELEASE DATE:** September 19, 2014

**FOR APPELLANT**

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**ATTORNEYS FOR APPELLEE**

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EILEEN T. GALLAGHER, J.:

{¶1} Jose Pagan has filed an application for reopening pursuant to App.R. 26(B). Pagan is attempting to reopen his appeal in *State v. Pagan*, 8th Dist. Cuyahoga No. 99935, 2014-Ohio-1510 (“*Pagan II*”), which dismissed his appeal as moot after the trial court issued a nunc pro tunc journal entry following a limited remand from this court for that purpose. The state has not filed any response or opposition to Pagan’s application for reopening. After review of the entire record, Pagan’s arguments and the law, the application to reopen is denied.

{¶2} Pagan is attempting to reopen an appeal from the trial court’s resentencing order that was issued following the resentencing hearing mandated by this court in Pagan’s initial appeal, *State v. Pagan*, 8th Dist. Cuyahoga No. 97268, 2012-Ohio-2197 (“*Pagan I*”). In *Pagan I*, appointed counsel asserted seven assignments of error, which were all overruled except for an error alleging the failure to merge allied offense of similar import. This court agreed that the trial court had erred by failing to merge Counts 4 and 5 for sentencing because we found they are allied offenses in his case. *Pagan I* at ¶ 47-48. Pagan further argued that his sentence was contrary to law because he received a 13-year sentence while the codefendant received six years. However, because the case was being remanded for resentencing to address merger of the allied offenses, this court found the proportionality of the sentence argument was not ripe for consideration. *Id.* at ¶ 50. In fact, following the remand in *Pagan I*, Pagan received a six-year sentence.

{¶3} Counsel, on behalf of Pagan, again appealed from the resentencing order. Thereafter, a series of nunc pro tunc entries were issued by the trial court in efforts to correct jurisdictional defects and clerical errors in the journal entry. On March 4, 2014, this court issued a limited remand and directed the trial court as follows:

Sua sponte, in reviewing the case, the court notes that the December 3, 2013 sentencing journal entry is inconsistent. The trial court noted that the obstruction of justice count merged with the tampering of evidence count, which included one- and three-year firearm specifications, and that the state elected to sentence on the tampering count. The trial court then sentenced Pagan to three years for the firearm specification and three years on the base charge of tampering for a total of six years. However, the journal entry also contains the sentence that the court imposes a prison sentence of 13 years, which had been the original sentence before this court remanded for merger of allied offenses.

Accordingly, this court remands the case to the trial court to issue a sentencing journal entry, consistent with *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, eliminating the inconsistency by March 10, 2014.

{¶4} The trial court issued a compliant sentencing journal entry and the parties agreed that this resolved the sole assignment of error presented by counsel in *Pagan II*, and the appeal was accordingly dismissed. Pagan has filed a timely application for reopening.

{¶5} Pagan alleges that *Pagan II* should be reopened for the alleged ineffectiveness of his appointed appellate counsel for failing to raise the following alleged errors (1) the trial court erred by imposing a sentence on a three-year firearm specification due to the merger of allied offenses, (2) violations of his constitutional rights resulting from the imposition of a harsher sentence than the codefendant received, and (3) that the

trial court abused its discretion by imposing a maximum sentence without making statutory findings pursuant to R.C. 2929.11 and 2929.12.

{¶6} Pagan 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).

{¶7} In *State v. Spivey*, 84 Ohio St.3d 24, 701 N.E.2d 696 (1998), the Supreme Court specified the proof required of an applicant as follows:

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} Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Gumm, supra*; *State v. Campbell*, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994). The United States Supreme Court has upheld the appellate attorney’s discretion to decide which issues he or she believes are the most fruitful arguments and the importance of winnowing out weaker arguments on appeal and focusing on one central issue or at most a few key issues. *Jones*, 463 U.S. 745.

{¶9} Pagan has not established a genuine issue as to a colorable claim on any of the errors he now proposes. A jury found Pagan guilty of obstructing justice (Count 4), tampering with evidence with the attendant three-year firearm specifications (Count 5), and carrying a concealed weapon. *Pagan I*, 2012-Ohio-2197, ¶ 13. This court found that Counts 4 and 5 were allied offenses of similar import and that the State must elect which allied offense it would pursue against Pagan. *Id.* at ¶ 49. At the resentencing hearing, the State elected to pursue sentencing on Count 5, which involved a conviction for tampering with evidence with a three-year firearm specification. Accordingly, the court properly imposed a sentence for the base offense of tampering with evidence and the firearm specification related to it. Any argument to the contrary is meritless.

{¶10} Pagan contends that counsel should have challenged his sentence on the basis that it was harsher than his codefendant's sentence. However, the record reflects that codefendant Carabello received a six-year sentence that is ultimately the same sentence that Pagan received in this case. *Compare Pagan I*, 2012-Ohio-2197, ¶ 50, with *Pagan II*, 2014-Ohio-1510, ¶ 1-2. This proposed assignment of error lacks merit. Pagan has also not established a colorable claim of ineffective assistance of appellate counsel on his third proposed assignment of error. It is well settled that while the court must consider the factors set forth in R.C. 2929.11 and 2929.12, ““there is no requirement that the court state reasons in order to demonstrate compliance with R.C. 2929.11 and 2929.12.”” *State v. Johnson*, 8th Dist. Cuyahoga No. 100719, 2014-Ohio-3722, ¶ 13,

quoting *State v. Townsend*, 8th Dist. Cuyahoga No. 99896, 2014-Ohio-924, ¶ 12. These are not “fact-finding” statutes. *Id.*

{¶11} Pagan has not met the standard for reopening under either prong of the *Strickland* test. Accordingly, the application for reopening is denied.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and  
TIM McCORMACK, J., CONCUR