

[Cite as *State v. Bridges*, 2015-Ohio-1447.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100805

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDREY BRIDGES

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-574201-A
Application for Reopening
Motion No. 479829

RELEASE DATE: April 14, 2015

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶1} Andrey Bridges has filed a timely application for reopening pursuant to App.R. 26(B) relating to *State v. Bridges*, 8th Dist. Cuyahoga No. 100805, 2014-Ohio-4570, which affirmed his convictions for murder, felonious assault, tampering with evidence, and abuse of a corpse.¹ The state has opposed the application for reopening, and Bridges has filed a reply brief. For the following reasons, we deny the application for reopening.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Bridges must demonstrate that appellate counsel's performance was deficient and that, but for the deficient performance, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456. Specifically, Bridges must establish that "there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶3} In *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, the Supreme Court of Ohio held that:

Moreover, to justify reopening his appeal, [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." *State v. Spivey*, 84 Ohio St.3d at 25, 1998-Ohio-704, 701 N.E.2d 696.

Smith, supra, at 7.

¹The convictions for murder and felonious assault were merged as being allied offenses of similar import.

{¶4} In addition, the Supreme Court of Ohio, in *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, held that:

In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 1996 Ohio 21, 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. 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.

{¶5} It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones, supra*, at 752; *State v. Gumm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

{¶6} In *Strickland*, the United States Supreme Court also stated that a court’s scrutiny of an attorney’s work must be deferential. The court further stated that it is too tempting for a defendant-appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, “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.” *Id.* at 689. Finally, the United States Supreme Court has firmly established that appellate counsel possesses the sound discretion to decide which issues are the most fruitful arguments on appeal. Appellate counsel possesses the sound discretion to winnow out weaker arguments on appeal and to focus on one central issue or at most a few key issues. *Jones, supra*, at 752.

{¶7} Bridges’s application sets forth four assigned errors in which he alleges that his appellate counsel was ineffective. Under the first assigned error in his application, Bridges simply summarizes the three assigned errors that follow it, which does not satisfy the burden for reopening. *See State v. Reeves*, 8th Dist. Cuyahoga No. 100560, 2015-Ohio-299, ¶ 6 (the failure to present any argument in support of an assigned error is insufficient to meet the burden of proving that appellate counsel was ineffective). In his reply brief, Bridges similarly sets forth numerous generalized ways in which he believes his appellate counsel was ineffective in connection with his first assigned error; however, he does not develop any arguments as to how he was prejudiced by these alleged deficiencies. For example, he contends his appellate counsel should have highlighted inconsistencies in the statements Quinones made to police compared to his trial testimony. Yet, appellate counsel expressly argued that the convictions were against the manifest weight of the evidence because Quinones’s testimony was not credible. This court reviewed the entire record, including the credibility of Quinones’s testimony, and

found that the circumstantial evidence against Bridges was overwhelming. Bridges did not point to any specific inconsistencies that he believes should have been highlighted, and he has not explained how the outcome of the decision could have been different where the entire record was already considered by this court. *Bridges*, 8th Dist. Cuyahoga No. 100805, 2014-Ohio-4570, ¶ 83.

{¶8} Bridges claims his appellate counsel should have also raised the following arguments on appeal: that there was an actual conflict between himself and his trial counsel, that trial counsel failed to secure needed experts, that trial counsel failed to object to improper and prejudicial prosecutorial remarks, that trial counsel failed to subpoena his son to testify and that counsel should have moved the court to issue a gag order “to prevent the newspaper from reporting the proceedings and/or criminal background of Bridges to the public.” Bridges has not cited to any specific prosecutorial remarks he believes were improper or prejudicial. Further, many of the foregoing arguments require reference to material that is outside the trial court record and would be improper for appellate counsel to raise in the direct appeal.

{¶9} It is well settled that “appellate review is strictly limited to the record.” *State v. Ellis*, 8th Dist. Cuyahoga No. 90844, 2009-Ohio-4359, ¶ 6, citing *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898) (other citations omitted); *State v. Corbin*, 8th Dist. Cuyahoga No. 82266, 2005-Ohio-4119, ¶ 7. A reviewing court cannot add material to the appellate record and then decide the appeal on the basis of the new material. *Id.*, citing *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d

500 (1978). “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-189, 758 N.E.2d 1130.

{¶10} Bridges has also failed to demonstrate any prejudice stemming from the alleged deficiencies. The first assigned error does not provide grounds for reopening the appeal pursuant to App.R. 26(B).

{¶11} In his second assignment of error, Bridges maintains that his appellate counsel should have asserted that the trial court erred by allowing media coverage of his case or his counsel should have moved for a change in venue. Bridges generally asserts that the publicity deprived him of an impartial jury but he has not identified any factual basis in the record that would support this claim. It is within the court’s discretion whether to grant or deny a motion for change of venue. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 91. Bridges cannot establish that the trial court would have granted a motion for change of venue even if trial counsel had filed one. In order “to prove that a trial court erred by denying a change of venue, a defendant must show that at least one prospective juror was actually biased.” *Id.* at ¶ 95. Bridges has not identified any specific juror that he claims was actually biased. “[I]n certain rare cases, pretrial publicity is so damaging that courts must presume prejudice even without a showing of actual bias.” *Id.* at ¶ 100. A claim of presumed prejudice requires Bridges to make a clear and manifest showing of pervasive and prejudicial pretrial publicity. *Id.* at

¶ 101. There is no reasonable probability that appellate counsel would have prevailed on a claim of presumed prejudice based on this record. During voir dire, some jurors indicated that they had been exposed to some media coverage of the case. Each juror was separately questioned about their media exposure. In most instances, the juror's knowledge was very limited and consisted only of hearing that the body of a transgender individual had been found in a pond in Olmsted Township. None of the jurors reported having any knowledge of Bridges or his criminal history. None of the jurors had formed any opinion regarding Bridges's culpability. All of the jurors indicated that they could be fair and impartial and that they could set aside anything that they had learned from the pretrial publicity.

{¶12} There is no indication that Bridges received an unfair trial based on publicity. The second assigned error does not provide grounds for reopening the appeal.

{¶13} In his third assigned error, Bridges maintains that appellate counsel should have argued that trial counsel was ineffective in the following ways: failure to investigate the case, failure to consult with the client to prepare the case, failure to file a suppression motion and a "motion for in camera inspection," failure to move for a private investigator prior to trial, and failure to file a notice of alibi. In his reply brief, Bridges contends that his trial counsel's alleged failure to timely investigate the case and to present relevant evidence affected a substantial right and prejudiced him. Appellate counsel could not have successfully raised any of these arguments in the direct appeal because they would require speculation or consideration of evidence that is outside of the record. *Ishmail*,

54 Ohio St.2d 402, 377 N.E.2d 500; *State v. Bays*, 87 Ohio St.3d 15, 28, 1999-Ohio-216, 716 N.E.2d 1126 (prejudice from counsel’s failure to employ investigative services is speculative where the record does not disclose what investigations trial counsel had performed or what information an investigator might have “turned up or that defense counsel in fact failed to obtain”). Accordingly, the third assigned error does not establish a colorable claim of ineffective assistance of appellate counsel for purposes of reopening the appeal.

{¶14} In his application, Bridges appears to be arguing under his fourth assigned error that his appellate counsel should have presented an ineffective assistance of trial counsel argument based on the failure to file a motion to suppress. Bridges failed in his application to identify the specific testimony or evidence that he believes was improperly admitted. In his reply brief, Bridges refers to “the admission of the alleged statements of Jason Quinones through the testimony of an investigating officer violated his right to confront witnesses against him * * *.” However, Quinones was subject to cross-examination at trial. In any case, Bridges has failed to direct this court to any portion of the record or trial where he contends his trial counsel should have objected to the admission of evidence or where any specific testimony or evidence was improperly introduced to his prejudice. Accordingly, he has failed to demonstrate any genuine issue of ineffective assistance of appellate counsel based on the fourth assigned error.

{¶15} Bridges has not met the standard for reopening pursuant to App.R. 26(B).

{¶16} Accordingly, his application for reopening is denied.

MARY J. BOYLE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
LARRY A. JONES, SR., J., CONCUR