

[Cite as *State v. Scott*, 2015-Ohio-1817.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100980

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLINTON SCOTT

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-576163-A
Application for Reopening
Motion No. 481116

RELEASE DATE: May 12, 2015

FOR APPELLANT

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TIM McCORMACK, J.:

{¶1} Clinton Scott has filed a timely application for reopening pursuant to App.R. 26(B). Scott is attempting to reopen the appellate judgment that was rendered by this court in *State v. Scott*, 8th Dist. Cuyahoga No. 100980, 2014-Ohio-4925, which affirmed his conviction and sentence for the offenses of aggravated burglary, aggravated menacing, and having weapons while under disability, but remanded solely for the trial court's calculation of jail-time credit. We decline to reopen Scott's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Scott is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767.

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, 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*.

{¶4} Herein, Scott raises four proposed assignments of error in support of his App.R. 26(B) application for reopening:

- “1) False indictment where as there are false information used to convict. Bias actions all through court proceedings from the court towards the defendant.
- “2) Failure to prove aggravated burglary. Defendant has multiply reasons to have been at 9103 Rosewood. Utility bills in defendant name along with personal belongings inside and outside of 9103 Rosewood. Defendant has been residing at 9103 Rosewood for over two years. Also had keys to 9103 Rosewood. Fact is when an owner of a freehold estate allows another person temporary exclusive possession of the property the parties have created a landlord-tenant relationship. In this case the victim had no right to change the locks without notification to the tenant/defendant. Also there was no eviction notice or any court proceedings excluding the defendant from such property.
- “3) Failure to prove menacing on two victims when one is a John Doe. The defendant six Amendment was violated by not bringing forth this victim refusing the defendant the chance to confront the witness who is accusing the defendant of a crime along with the right to ask questions.
- “4) Failure to prove weapon under disability no evidence stating defendant had a firearm in his possession, no fingerprints or DNA was obtained to prove such allegations.”

Scott, however, has failed to present any argument with regard to his four proposed assignments of error. Thus, Scott has failed to demonstrate how appellate counsel’s performance was deficient and that he was prejudiced by appellate counsel’s claimed deficiencies.

{¶5} In *State v. Kelly*, 8th Dist. Cuyahoga No. 74912, 1999 Ohio App. LEXIS (June 21, 2000), this court established that the mere recitation of assignments of error is

not sufficient to meet the burden to prove that the applicant's appellate counsel was deficient for failing to raise the issues he now presents or that there was a reasonable probability that the applicant would have been successful if the present issues had been considered in the original appeal. *See also State v. Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-4467; *State v. Hawkins*, 8th Dist. Cuyahoga No. 90704, 2009-Ohio-2246. The failure of Scott to present any argument with regard to his four proposed assignments of error results in the failure to demonstrate that his appellate counsel was deficient and that he was prejudiced by the alleged deficiency. *State v. Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-5151.

{¶6} Notwithstanding the failure to present any argument, a substantive review of Scott's four proposed assignments of error fails to establish a claim of ineffective assistance of counsel. Through his initial proposed assignment of error, Scott argues that the indictment contained false information and that the trial court was biased. However, Scott has failed to provide this court with any evidence that the information contained in the indictment was false. We further find that the record fails to demonstrate any bias on the part of the trial court toward Scott. Without demonstrating the claimed error, Scott cannot establish prejudice. *State v. Durr*, 77 Ohio St.3d 444, 674 N.E.2d 1379 (1997); *State v. Johnson*, 76 Ohio St.3d 397, 667 N.E.2d 1208 (1996).

{¶7} Through his remaining three proposed assignments of error, Scott argues that insufficient evidence was presented at trial to support the convictions for aggravated burglary, aggravated menacing, and having weapons while under disability. The issue of

sufficiency of the evidence, with regard to Scott's conviction for the offense of aggravated burglary, was addressed through his original appeal. This court held that:

In his fourth supplemental assignment of error, Scott argues his conviction of aggravated burglary is not supported by sufficient evidence.

When reviewing a challenge of the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541 (1997).

To convict Scott of aggravated burglary, the state must produce evidence to show that he, by force, stealth, or deception, trespassed in an occupied structure, with a purpose to commit a criminal offense, while having a deadly weapon. R.C. 2911.11.

The state produced evidence to show that Scott broke down Bailey's door and entered her home without permission while having a gun in his possession. The state's witnesses' testimony, that he fought with Bailey and the male in her home, causing him to run from the house, all the while having a gun in his possession, constituted evidence that he entered the dwelling with an intent to commit assault, domestic violence, or aggravated menacing. In a sufficiency review, we are not to assess whether the state's evidence is to be believed, but rather, whether, if believed, the evidence support a conviction. Having reviewed the evidence, we conclude the evidence in this case is sufficient for a conviction of aggravated robbery. The fourth supplemental assignment of error is without merit.

Scott, 8th Dist. Cuyahoga No. 100980, 2014-Ohio-4925, at ¶ 50 - 53.

{¶8} Because the issue of sufficiency of the evidence, with regard to the conviction for the offense of aggravated burglary was previously raised on appeal and

found to be without merit, we find that the doctrine of res judicata prevents any further litigation of the claimed error through Scott's application for reopening. *State v. Dehler*, 73 Ohio St.3d 307, 652 N.E.2d 987 (1995); *State v. Terrell*, 72 Ohio St.3d 307, 652 N.E.2d 987 (1995); *State v. Johnson*, 8th Dist. Cuyahoga No. 96064, 2012-Ohio-1827.

{¶9} In addition, an independent review of the trial transcript clearly demonstrates that sufficient evidence was adduced at trial with regard to the two counts of aggravated menacing. R.C. 2903.21(A) provides that:

No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family. In addition to any other basis for the other person's belief that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family, the other person's belief may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

{¶10} The evidence presented at trial demonstrates that Scott, while in possession of a firearm, kicked open the door of his ex-girlfriend's home that was located on Rosewood Avenue, Cleveland, Ohio. Scott shoved his ex-girlfriend, argued with her, and then confronted the second victim, while holding a firearm. Scott argued with the second victim after which the second victim ran from the home. Scott chased the second victim. Scott engaged in a physical struggle with the second victim. When viewed in a light most favorable to the state, the record demonstrates that Scott caused the two victims to believe that they were subject to serious physical harm to themselves or

property. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216; *Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541.

{¶11} Finally, we find that sufficient evidence was adduced at trial to support Scott's conviction for the offense of having weapons while under disability. R.C. 2929.13, in effect at the time of Scott's conviction for the offense of having weapons while under disability, provided in pertinent part that:

- A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

* * *

- (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

{¶12} The state introduced evidence of Scott's prior conviction, in *State v. Scott*, Cuyahoga C. P. No. CR-02-431092, for the offense of aggravated robbery. (Tr. 179 -181, 320.) The offense of aggravated robbery is an offense of violence as defined by R.C. 2901.01(A)(9)(a). Additionally, the testimony of Scott's ex-girlfriend established that he possessed a firearm during the commission of the offenses of aggravated burglary and aggravated menacing and that a firearm was recovered by the police. (Tr. 193 - 205, 247 - 248.) Thus, sufficient evidence was adduced at trial to support Scott's conviction for the offense of having weapons while under disability. *State v. Peters*, 10th Dist. Franklin Nos. 13AP-748 and 13AP-750, 2014-Ohio-1071; *State v. Allison*, 8th Dist. Cuyahoga No. 96895, 2012-Ohio-1046.

{¶13} Therefore, we find no prejudice as claimed by Scott vis-a-vis his four proposed assignments of error.

{¶14} Accordingly, the application for reopening is denied.

TIM McCORMACK, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MARY J. BOYLE, P.J., CONCUR