

[Cite as *State v. Jackson*, 2015-Ohio-1946.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100125

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLIFFORD D. JACKSON, III

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-11-551409
Application for Reopening
Motion No. 483612

RELEASE DATE: May 19, 2015

APPELLANT

Clifford D. Jackson, III, pro se
No. 642-548
P.O. Box 788
Mansfield Correctional Institution
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Eric L. Foster
Assistant County Prosecutor
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

KATHLEEN ANN KEOUGH, J.:

{¶1} Clifford D. Jackson has filed a timely application for reopening pursuant to App.R. 26(B). Jackson is attempting to reopen the appellate judgment that was rendered by this court in *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, that affirmed his conviction and sentence for the offenses of aggravated murder, attempted aggravated murder, murder, aggravated burglary, kidnaping, and having weapons while under disability. We decline to reopen Jackson's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Jackson 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 (1990).

{¶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, Jackson raises 13 proposed assignments of error in support of his App.R. 26(B) application for reopening:

- 1) denied right to speedy trial;
- 2) trial counsel failed to file motion to dismiss for lack of speedy trial;
- 3) insufficient evidence adduced at trial to support convictions for offenses of aggravated burglary;
- 4) defective indictment with regard to offenses of aggravated burglary;
- 5) insufficient evidence adduced at trial to support convictions for offenses of aggravated burglary;
- 6) improper convictions for the lesser included offenses of murder;
- 7) sufficiency of the evidence vis-a-vis DNA evidence;
- 8) void judgment vis-a-vis improper conduct of prosecutor;
- 9) failure of appellate counsel to provide appellant with copy of transcript;
- 10) *Brady* violation vis-a-vis failure of prosecutor to disclose evidence favorable to the appellant;
- 11) insufficient evidence adduced at trial to support conviction for offense of aggravated murder;
- 12) trial court was biased toward the appellant; and
- 13) criminal prosecution, in its entirety, violated the appellant's constitutional rights.

{¶5} Jackson, however, has failed to present any cognizable argument with regard to his 13 assignments of error. Thus, Jackson has failed to demonstrate how

appellate counsel's performance was deficient and that he was prejudiced by appellate counsel's claimed deficiencies.

{¶6} 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 presented 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 Jackson to present any cognizable argument with regard to his 13 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.

{¶7} Notwithstanding the failure to present any argument, a substantive review of Jackson's 13 proposed assignments of error fails to establish a claim of ineffective assistance of counsel. Through his first and second proposed assignments of error, Jackson argues that he was denied the right to a speedy trial per R.C. 2945.71. R.C. 2945.71(C)(2) and (E) require that a defendant charged with a felony offense be brought to trial within 270 days of arrest or within 90 days if the accused is held in jail in lieu of bail. The days that the defendant is incarcerated are subject to the triple-count provision

of R.C. 2945.71(E). However, the time period for bringing a defendant to trial may be extended pursuant to R.C. 2945.72. Reasons for an extension of the period for a timely trial include delay necessitated by defendant's motion, continuances granted as a result of defendant's motion, and the period of any continuance granted other than upon the defendant's own motion. See R.C. 2945.72(A)-(I).

{¶8} Herein, a review of the docket in *State v. Jackson*, Cuyahoga C.P. No. CR-11-551409, demonstrates that Jackson was arrested on June 10, 2011, and that trial commenced on May 7, 2013. Thus, a period of 697 days elapsed between the date of arrest and trial. Because Jackson was incarcerated in lieu of bail, the triple count provision must be applied to determine whether he was timely brought to trial within 270 days of arrest. In addition, we must determine whether any of the 697 days were tolled pursuant to R.C. 2945.72.

{¶9} Further review of the docket in *State v. Jackson*, Cuyahoga C.P. No. CR-11-551409, demonstrates that a total of 677 days were tolled as a result of Jackson's 91 pro se motions, 75 pretrial motions as filed by Jackson's legal counsel, and 27 continuances of trial as granted at the request of Jackson's legal counsel. A total of 20 days were not tolled. Jackson was brought to trial within 270 days as required by R.C. 2945.71. *State v. Bickerstaff*, 10 Ohio St.3d 62, 461 N.E.2d 892 (1984). Thus, the first and second proposed assignments of error are without merit and fail to establish ineffective assistance of appellate counsel.

{¶10} Through his third, fifth, and eleventh proposed assignments of error, Jackson argues that the evidence adduced at trial was insufficient as a matter of law to support his conviction for the offenses of aggravated murder and aggravated burglary.

{¶11} Although sufficiency and manifest weight are different legal concepts, manifest weight subsumes sufficiency in conducting the legal analysis; that is, a finding that a conviction was supported by the manifest weight necessarily includes a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also dispose of the issue of sufficiency. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶12} Jackson argued on direct appeal that his convictions for aggravated murder and aggravated burglary were against the manifest weight of the evidence. *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, *supra*, at ¶ 31. This court determined that the convictions for aggravated murder and aggravated burglary were not against the manifest weight of the evidence, thus necessarily finding sufficiency. *Thompkins, supra*. See, *State v. Lee*, 158 Ohio App.3d 129, 2004-Ohio-3946, 814 N.E.2d 112 (9th Dist.2004). Our previous determination that Jackson's convictions for the offenses of aggravated murder and aggravated burglary were supported by the weight of the evidence is dispositive of the issue of sufficiency. Thus, the third, fifth, and eleventh proposed assignments of error are without merit and fail to establish ineffective assistance of appellate counsel.

{¶13} Through his fourth proposed assignment of error, Jackson argues that the indictment was defective with regard to the offenses of aggravated burglary. However, Jackson has failed to provide this court with any evidence that the counts of aggravated burglary, as contained within the indictment, were defective. An indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number is not defective and sufficiently provides a defendant with adequate notice of the charge against him. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162. Herein, both Counts 3 and 4 tracked the language contained within R.C. 2911.11(A)(1) and correctly identified the predicate offense of aggravated murder per R.C. 2903.01. Counts 3 and 4 were sufficiently worded to provide Jackson with notice of the charges of aggravated burglary. Thus, the fourth proposed assignment of error is without merit and fails to establish ineffective assistance of appellate counsel.

{¶14} Through his sixth proposed assignment of error, Jackson argues that he was improperly convicted of the “lesser included” offense of murder. Murder, however, is a lesser included offense of aggravated murder. *State v. Solomon*, 66 Ohio St.2d 214, 421 N.E.2d 139 (1981); *State v. Johnson-Millender*, 5th Dist. Stark No. 2004-CA-288, 2005-Ohio-4407. Thus, the sixth proposed assignment of error is without merit and fails to establish ineffective assistance of appellate counsel.

{¶15} Through his seventh proposed assignment of error, Jackson argues that a lack of DNA evidence resulted in convictions that were against the manifest weight of the

evidence because there was no physical evidence linking him to the charged offenses vis-a-vis a knife or soda bottle. The issue of a lack of DNA on the knife used to stab the victim or on the soda bottle that Jackson allegedly drank from, was raised on direct appeal and is thus barred from further review through the doctrine of res judicata. *See State v. Jackson*, 8th Dist. Cuyahoga No. 100125, *supra*, at ¶ 33. Thus, the seventh proposed assignment of error is without merit and fails to establish ineffective assistance of appellate counsel.

{¶16} Through his eighth proposed assignment of error, Jackson argues that he was prejudiced “when a state officer [acted] under state law in a manner violative of the federal constitution.” Jackson has failed to identify the “state officer” that improperly acted under state law and has further failed to establish what provisions of the U.S. Constitution were violated. Jackson has failed to establish any prejudice. *State v. Durr, supra; State v. Johnson, supra*. Thus, the eighth proposed assignment of error is without merit and fails to establish ineffective assistance of appellate counsel.

{¶17} Through his ninth proposed assignment of error, Jackson argues that he was prejudiced by the failure of appellate counsel to provide him with a copy of the trial transcript. Once again, Jackson has failed to establish the exact prejudice that resulted from his inability to obtain and review a copy of the trial court transcript. Thus, the ninth proposed assignment of error is without merit and fails to establish ineffective assistance of appellate counsel.

{¶18} Through his tenth proposed assignment of error, Jackson argues that the prosecutor violated the holding rendered in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose exculpatory evidence and by the introduction of perjured testimony during trial. Jackson has failed to demonstrate the existence of any exculpatory evidence that was withheld by the prosecutor. In addition, we find no evidence of perjured testimony after a review of the trial court transcript. Jackson has failed to establish the existence of any *Brady* violations. Thus, the tenth proposed assignment of error is without merit and fails to establish ineffective assistance of appellate counsel.

{¶19} Through his twelfth proposed assignment of error, Jackson argues that the trial court was biased during the course of trial as a result of the denial of the right to a speedy trial. We have already determined that Jackson was not denied the right to a speedy trial. In addition, Jackson has failed to establish any other biased conduct on the part of the trial court judge. Thus, the twelfth proposed assignment of error is without merit and fails to establish ineffective assistance of appellate counsel.

{¶20} Through his thirteenth proposed assignment of error, Jackson argues that he was: (1) improperly subjected to the jurisdiction of the court; (2) improperly apprehended and seized; (3) slandered; (4) subjected to involuntary servitude; (5) subjected to collusion and conspiracy; (6) subjected to false incarceration and ignorance of the law; and that (7) the grand jury foreperson violated due process of law.

{¶21} The arguments, as contained within Jackson’s thirteenth proposed assignment of error, constitute a “stream of consciousness” at best and fail to demonstrate any cognizable claim of ineffective assistance of appellate counsel. Upon appeal to this court, Jackson’s appellate counsel was not required to raise and argue assignments of error that were 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. *Id.* *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. In addition, Jackson has failed to establish the prejudice that resulted from the alleged deficient performance of appellate counsel. Finally, Jackson has failed to show that but for the alleged deficient performance of appellate counsel, 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. Thus, the thirteenth proposed assignment of error is without merit and fails to establish ineffective assistance of appellate counsel.

{¶22} Not one of Jackson’s proposed thirteen assignments of error provides a basis to support the allegation that appellate counsel was deficient on appeal, or that Jackson was prejudiced by the performance of appellate counsel. Accordingly, Jackson has failed to meet the standard for reopening an appeal pursuant to App.R. 26(B).

{¶23} Application for reopening is denied.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR