[Cite as *State v. Carrington*, 2015-Ohio-2948.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100918

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERMONE CARRINGTON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-576768-A
Application for Reopening
Motion No. 481772

RELEASE DATE: July 20, 2015

FOR APPELLANT

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TIM McCORMACK, J.:

{¶1} Defendant-appellant, Jermone Carrington, has filed a timely application for reopening pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). Carrington is attempting to reopen his appeal in *State v. Carrington*, 8th Dist. Cuyahoga No. 100918, 2014-Ohio-4575, which affirmed his guilty plea and sentence on two counts of felonious assault with firearm specifications. For the following reasons, the application to reopen is denied.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Carrington 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. 668, 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 768 (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} Carrington has presented two proposed assignments of error in support of App.R. 26(B) application for reopening.

{¶5} First, he contends that his right to effective assistance of counsel was violated because his appellate counsel did not raise an argument on appeal that the trial court failed to address or resolve inaccuracies in the presentence investigation report ("PSI") in accordance with R.C. 2951.03(B)(5) and, consequently, his 19-year prison sentence was unjustified.

{¶6} R.C. 2951.03(B)(5) provides:

> (5) If the comments of the defendant or the defendant's counsel, the testimony they introduce, or any of the other information they introduce alleges any factual inaccuracy in the presentence investigation report or the summary of the report, the court shall do either of the following with respect to each alleged factual inaccuracy:
>
> (a) Make a finding as to the allegation;
>
> (b) Make a determination that no finding is necessary with respect to the allegation, because the factual matter will not be taken into account in the sentencing of the defendant.

{¶7} At the beginning of the sentencing hearing, the court asked defense counsel if there were any inaccuracies in the PSI and defense counsel said everything was accurate. Carrington then addressed the court and he did not mention any inaccuracies in the PSI.

{¶8} Carrington now claims that the PSI was inaccurate based on the judge's statement during sentencing that he "shot the wife, the girlfriend, and then her son was in the car and he chased the son down the street shooting at him. And shot him. He chased

him down in the ground." This was not a quote from the PSI but the court's summary of it. The PSI reflects that Carrington shot at Ms. Fips and her son; therefore, the PSI correctly identified the alleged victims. Furthermore, the court made this statement in response to defense counsel's request to merge the gun specifications. Defense counsel informed the court that he believed a portion of the court's statement was inaccurate because Carrington had not chased the son down the street. Defense counsel stated his belief that the gunfire occurred while both victims were in the car thereby warranting the merger of the gun specifications. The court responded,

> Listen to this. "Ms. Fips advised that Carrington then went to the trunk of his car, pulled out what she believed was a .22 caliber hand gun, with a brown handle and silver in color. Carrington then began firing his gun in the direction of both Ms. Fips and her son. Ms. Fips stated Carrington fired numerous times at her, striking her in the head and the thigh. Ms. Fips stated that Carrington went around her auto and began firing at her son, striking him in the chest. Ms. Fips advised her son ran south on West 143rd, being chased by Carrington, who kept firing at him."

{¶9} Defense counsel agreed with this excerpt from the PSI "except for the shots continuing down the street," which the court felt "was important" to the issue concerning the merger of the gun specifications. From this record we can infer that the court did accept defense counsel's version of events because the court merged the firearm specifications. Accordingly, the court did comply with the statute when it resolved the discrepancy in Carrington's favor by merging the gun specifications.

{¶10} Carrington disputes the court's citation of his criminal history whereby he denies that he had ten convictions for either domestic violence or felonious assault including juvenile infractions. However, the record reflects that counsel confirmed the

court's statement by stating "That's correct, your Honor."[1] No one raised any dispute over Carrington's criminal history that was contained in the PSI or cited by the court. Accordingly, there was no violation of R.C. 2951.03(B)(5) regarding the criminal history.

{¶11} During sentencing, the court stated that Carrington's convictions involved felonies of the first degree. This factual inaccuracy was promptly corrected by both the prosecutor and defense counsel who informed the court that the convictions involved felonies of the second degree. In response, the court stated "this whole report is wrong," which reflects the court's understanding and finding that the convictions were for second-degree felonies. Accordingly, the court complied with the statute in resolving that factual inaccuracy. The statement that the "whole report is wrong" was clearly an expression of the court's frustration over the identified errors rather than an actual finding by the court that the entire report was inaccurate. Because we find that the trial court did not violate the provisions of R.C. 2951.03(B)(5) and because Carrington cannot establish any prejudice as a result, applicant has not established a colorable claim of ineffective assistance of appellate counsel concerning the alleged inaccuracies in the PSI. Appellant's first proposed assignment of error does not meet the standard for reopening under App.R. 26(B).

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[1]The law prohibits the addition of material to the direct appeal that is not part of the trial court record. Therefore, appellate counsel was not ineffective for failing to challenge the criminal history cited during the sentencing hearing with the "DOTS PORTAL" documents Carrington has attached to his application to reopen and that were not presented to the trial court.

{¶12} The second proposed assignment of error asserts that appellate counsel was ineffective for not challenging the validity of his plea because the trial court did not address a question that he had concerning the guilty-plea procedure.

{¶13} Appellate counsel argued that Carrington's depression prevented him from entering a valid plea. In resolving this issue, we reviewed the entire plea colloquy and determined that the trial court "fully complied with Crim.R. 11." *Carrington*, 8th Dist. Cuyahoga No. 100918, 2015-Ohio-4575, at ¶ 11. We noted that the trial court

> advised Carrington of the charges, including the maximum possible penalty of each offense to which he pleaded guilty. The court also advised Carrington that the state's position was that the offenses were not allied offenses, there is a possibility of consecutive sentences, and that if he pleaded guilty to the firearm specification, that sentence would be run consecutively to the underlying felonious assault charges. Carrington indicated that he understood the court's explanation.

Id. at ¶ 14. Based on our review of the record, we concluded that "Carrington made a knowing, intelligent, and voluntary decision to plead." *Id.* at ¶ 15.

{¶14} Carrington maintains that he indicated to the court that he had questions about the plea procedure that were not answered or addressed by the trial court. Although there is an excerpt in the record where the court asked, "Do you have any questions about these proceedings?" and Carrington responded, "Yes, ma'am, Your Honor." However, he never ultimately asked a question. Prior to that exchange, Carrington had indicated that he understood the penalties he faced by entering his plea and said he did not have any questions about the penalties he faced. To the extent that Carrington is now claiming he misunderstood the maximum potential penalty involved

with his plea, that is contrary to the court's advisement to him and to his own statements that are contained in the record. Carrington has not established a colorable claim for ineffective assistance of appellate counsel that is necessary for reopening the appeal.

{¶15} The application to reopen is denied.

TIM McCORMACK, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN T. GALLAGHER, J., CONCUR