

[Cite as *State v. Bullitt*, 2015-Ohio-3136.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100885

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEAUNTE R. BULLITT

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-12-565262-C
Application for Reopening
Motion No. 482753

RELEASE DATE: July 31, 2015

FOR APPELLANT

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ATTORNEY FOR APPELLEE

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SEAN C. GALLAGHER, J.:

{¶1} Deaunte R. Bullitt has filed a timely application for reopening pursuant to App.R. 26(B). Bullitt is attempting to reopen the appellate judgment that was rendered by this court in *State v. Bullitt*, 8th Dist. Cuyahoga No. 100885, 2014-Ohio-5138, which affirmed his conviction for drug trafficking with attendant major drug offender, juvenile, and forfeiture specifications. For the reasons that follow, the application to reopen is denied.

{¶2} App.R. 26(B)(5) requires applicant to show a “genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal.”

{¶3} The appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel is the two-pronged analysis found in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10. Applicant “must prove that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal.” *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001), citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. 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 24, 25, 701 N.E.2d 696 (1998). Appellate counsel is neither

required to raise and argue assignments of error that are meritless, nor is counsel ineffective for not raising every conceivable assignment of error. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995).

{¶4} Applicant maintains that his appellate counsel was ineffective for failing to raise a claim challenging his convictions under Counts 1 and 2 as being for allied offenses of similar import and for failing to raise a claim of ineffective assistance of trial counsel.

{¶5} His first proposed assignment of error regarding his convictions for allied offenses of similar import is without merit. As noted in the decision and admitted by Bullitt, the trial court treated his convictions for drug trafficking and drug possession under Counts 1 and 2 as allied offenses and merged them at the time of sentencing as required by law. *See Bullitt*, 2014-Ohio-5138, ¶ 2; *see also State v. Rogers*, Slip Opinion No. 2015-Ohio-2459, ¶ 18. Because the trial court complied with the law and merged the allied offenses at sentencing, there was no error to raise on appeal regarding it.

{¶6} In his remaining proposed assignments of error, Bullitt contends that appellate counsel should have challenged the alleged ineffective assistance of his trial counsel on the following grounds: (1) conflict of interest; (2) failure to examine witnesses; (3) withholding favorable evidence; (4) failure to object to damaging statements; (5) negligence; and (6) not being prepared.

{¶7} To the extent that Bullitt’s arguments rely upon matters outside the trial court record, it would have been inappropriate for appellate counsel to have assigned errors on those grounds. *State v. Budreaux*, 8th Dist. Cuyahoga No. 63698, 2003-Ohio-4335, ¶ 8, citing *State v. McNeal*, 8th Dist. Cuyahoga No. 77977, 2002-Ohio-4764, ¶ 12 (issues based on evidence outside the trial record should be raised in postconviction proceedings). The alleged instances of ineffective assistance of trial counsel set forth in items one, two, three, and five above rely on information that is outside the trial record and, therefore, could not form the basis of an error on a direct appeal. Appellate counsel was not ineffective for failing to raise those meritless claims. Additionally, cross-examination of witnesses falls within the purview of trial strategy and Bullitt has not established a claim for ineffective assistance of counsel in that regard. *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270; *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263. Bullitt has failed to demonstrate any prejudice that resulted from the cross-examination of the witnesses or that the outcome of his appeal would have been different had the issue been raised on appeal.

{¶8} Bullitt contends that his trial counsel should have objected to “damaging statements” but does not specifically identify any particular testimony or evidence. For example, Bullitt refers us to pages 38 and 74 of the transcript, which include opening statements by the state and a portion of the direct examination of Scott Vargo. Generally, he claims his attorney should have objected to statements made by the prosecutor, police officers, and codefendants who suggested that the involved drugs and

money belonged to him. Bullitt provides no law or analysis that would support this claim or on what basis the evidence should have been excluded. Further, Bullitt does not argue or present any authority that would indicate such objections, if made, would have been successful. Accordingly, he has failed to establish the burden necessary for reopening based on this ground.

{¶9} For all of the foregoing reasons, applicant has not met the standard for reopening his appeal. Accordingly, the application for reopening is denied.

SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
MELODY J. STEWART, J., CONCUR