[Cite as *State v. McDuffie*, 2015-Ohio-3223.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100826

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAURICE McDUFFIE

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-12-567263-A
Application for Reopening
Motion No. 482305

RELEASE DATE: August 12, 2015

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Maurice McDuffie has filed a timely application for reopening pursuant to App.R. 26(B). McDuffie is attempting to reopen the appellate judgment that was rendered by this court in *State v. McDuffie*, 8th Dist. Cuyahoga No. 100826, 2014-Ohio-4924, which affirmed his conviction and sentence for the offense of felonious assault. We decline to reopen McDuffie's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, McDuffie 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.

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

> 1) Appellant Maurice McDuffie was denied the effective assistance of appellate counsel in violation of his sixth, and fourteenth amendment rights under the United States Constitution and Article I Section 10 of the Ohio Constitution for counsel's failure to raise the issue that the trial court committed prejudicial error and abused its discretion for failure to consider appellant's PSI report based upon an oral motion submitted by trial counsel before sentencing appellant to a maximum prison term of eight years. Absent within the statutory range R.C. 2929.11 and 2929.12 [*State v. Edmonson* (1999), 86 Ohio St.3d 324, 329, 1999 Ohio 110, 715 N.E.2d 131.]
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> 2) Appellant Maurice McDuffie was denied the effective assistance of appellate counsel in violation of his sixth and fourteenth amendment rights under the United States Constitution and Article I Section 10 of the Ohio Constitution for counsel's failure to raise the issue that the trial court committed prejudicial error and abused its discretion for failure to grant his Crim.R. 29(C) motion for acquittal on his felonious assault charge and allow his motion to amend the indictment to a reduced lesser included offense of aggravated assault after it was offered by the state in a plea offer that both the state and the trial court reference from the record but later denied its offer was ever made to appellant.
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> 3) Appellant Maurice McDuffie was denied the effective assistance of appellate counsel in violation of his sixth amendment rights under the United States Constitution and Article 1 Section 10 of the Ohio Constitution for counsel's failure to raise the issue that the trial court erred to the prejudice of defendant-appellant and abused its discretion in having allowed defendant-appellant's counsel to not withdraw after showing cause and then refusing to allow defendant a reasonable continuance to an evidentiary hearing in determining if whether new counsel should be appointed, forcing defendant-appellant to proceed with sentencing.

{¶5} A substantive review of McDuffie's three proposed assignments of error fails to establish a claim of ineffective assistance of counsel. McDuffie, through his

initial proposed assignment of error, argues that the trial court erred by imposing a maximum sentence of eight years without considering a "PSI report" and providing a reason for the imposition of the maximum sentence of eight years. Crim.R. 32.2 and R.C. 2951.03(A)(1) places a duty upon the trial court to obtain a presentence investigation report in every felony case in which a prison sentence is not imposed. Thus, the duty to obtain a presentence investigation report exists only when a trial court imposes a sentence of community control. *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d 528; *State v. Kinser*, 8th Dist. Cuyahoga No. 101409, 2015-Ohio-684. In addition, trial courts possess full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing a maximum or more than a minimum sentence. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. McDuffie has failed to establish any prejudice through his first proposed assignment of error.

{¶6} Through his second proposed assignment of error, McDuffie argues that the trial court erred by failing to grant his Crim.R. 29(A) motion for judgment of acquittal. McDuffie also argues that the trial court erred by failing to amend the indictment from felonious assault to the lesser offense of aggravated assault.

{¶7} A judgment of acquittal, pursuant to Crim.R. 29(A), is proper if the evidence is insufficient to sustain a defendant's conviction. The necessary inquiry on appeal 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 charged offense

proven beyond a reasonable doubt. *State v. Gooden*, 8th Dist. Cuyahoga No. 82621, 2004-Ohio-2699. Thus, the standard for review for the denial of a Crim.R. 29(A) motion for acquittal is the same as the standard of review for sufficiency of the evidence. *State v. Widder*, 9th Dist. Summit No. 21383, 2003-Ohio-3925. Herein, our review of the record clearly demonstrates that sufficient evidence was adduced at trial with regard to each and every element of the offense of felonious assault, a violation of R.C. 2903.11(A)(1), caused serious physical harm to another. Thus, the trial court properly denied McDuffie's Crim.R. 29(A) motion for judgment of acquittal.

{¶8} In addition, McDuffie has failed to demonstrate that the trial court judge was required to amend the indictment from felonious assault to aggravated assault vis-a-vis plea negotiations. In fact, the record demonstrates that McDuffie rejected the plea negotiations, to lesser offenses, as offered by the state. *See* tr. 8 wherein the following occurred:

BAILIFF WALLACE:	The State of Ohio versus Maurice McDuffie.
THE COURT:	Mr. Prosecutor.
MR. MARTIN:	Thank you, Judge. Your Honor, it is my understanding that — well, we were set for trial in this case yesterday. I recognize that you were at that time engaged in trial. You are no longer engaged in trial, and we're prepared to proceed today to trial.
THE COURT:	Okay.
MR. MARTIN:	Judge, there has been a plea offer made. It is a one-count indictment, Felony 2, felonious assault. The State offered to reduce the charge by adding the

attempt statute. That would render this a felony of the third degree, attempted felonious assault.

Alternatively, we would reduce the charge down to a felony of the fourth degree, aggravated assault, with an agreed one-year prison sentence. It is my understanding — that would be an option obviously for the defendant to choose between those two plea offers. It is my understanding that the defendant has been made aware of those plea offers and is not interested in pleading guilty to either of those two options.

I say that because I believe that it is prudent for the prosecutor to put on the record what sort of plea negotiations have taken place prior to engaging in trial.

THE COURT: Counselor.

MS. HRICKO: Thank you. The prosecutor has correctly stated my understanding. I have gone over both of those plea offers with my client in full detail. I do believe that he understands those. He does not wish to accept those at this time. He wishes to have a trial. We are prepared to go forward.

THE COURT: Okay. * * *

{¶9} McDuffie has failed to demonstrate that the trial court was required to amend the indictment. We further find that the record fails to demonstrate any bias on the part of the trial court toward McDuffie or that the trial court abused its discretion. Without demonstrating the claimed error, McDuffie 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); *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶10} Through his third proposed assignment of error, McDuffie argues that he was prejudiced by the failure of the trial court to grant defense counsel's motion to withdraw, which was made after trial and conviction of the offense of felonious assault, but prior to sentencing. McDuffie has failed to indicate how he was prejudiced by the trial court's denial of the motion to withdraw as defense counsel. A simple claim of prejudice, without explanation of the actual prejudice incurred, will not allow for the reopening of an appeal. *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996). It must also be noted that appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995); *State v. Campbell*, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994). Therefore, we find no prejudice as claimed by McDuffie in his third proposed assignment of error.

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

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FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MARY J. BOYLE, P.J., and
TIM McCORMACK, J., CONCUR