

[Cite as *State v. Patterson*, 2015-Ohio-3338.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101415

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM PATTERSON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-03-437813-A
Application for Reopening
Motion No. 484634

RELEASE DATE: August 14, 2015

FOR APPELLANT

William Patterson, pro se
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ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Frank Romeo Zeleznikar
Assistant County Prosecutor
8th Floor Justice Center
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EILEEN A. GALLAGHER, P.J.:

{¶1} On April 15, 2015, the applicant, William Patterson, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Patterson*, 8th Dist. Cuyahoga No. 101415, 2015-Ohio-873, in which this court affirmed Patterson's conviction for robbery. Patterson claims ineffective assistance of appellate counsel for the following reasons: (1) appellate counsel did not confer with him about the issues to argue; (2) appellate counsel did not argue ineffective assistance of trial counsel for not calling two alibi witnesses; (3) appellate counsel did not argue that double jeopardy barred Patterson's conviction and (4) appellate counsel did not argue that the photo line-up was improper because the victim had already seen Patterson and because there was no witness for Patterson at the initial photo line-up. For the following reasons, this court denies the application to reopen.

{¶2} On the morning of March 24, 2003, Pier Pinkney, a Cleveland Municipal Court deputy bailiff, while walking to work passed a man standing outside of a bar. That man then ran up behind her, grabbed her hair and stated he had a gun and was stealing her purse. Pinkney felt a knuckle but no gun. She turned around and tussled with the man for the purse. When its strap broke, the man ran off with the purse. Pinkney chased him briefly but he outran her. After she reported the incident to the police, she went to a men's homeless shelter where the incident occurred. There she learned that a William Patterson fit her description of the man who robbed her and she

provided the police this information. The next day, the police prepared a photo line-up that included Patterson's picture. Pinkney identified Patterson from the line-up as the man who robbed her.

{¶3} Patterson's first trial in February 2004 ended in a mistrial because a police officer testified that Patterson had a criminal record. At the second trial in April 2005, Pinkney identified Patterson as her assailant through the photo line-up and in court. Patterson presented his mother and sister as alibi witnesses who testified that he was at their home from the night of March 23 through the day of March 24, 2003. He also presented a psychologist who testified as to the factors making eyewitness identifications unreliable. The intake tech for the homeless shelter testified that Patterson did not spend the night there and Patterson's medical doctor testified that in early 2003 he suffered from per planus and degenerative arthritis that decreased his mobility. The jury convicted him of robbery. However, Patterson did not appear for the presentence investigation and was not taken into custody until November 2013.

{¶4} Res judicata bars this application. Patterson submitted his own supplemental pro se appellate brief in which he argued that the trial court erred in denying his motion to dismiss on speedy trial grounds. He argued that the 14-month delay between the mistrial and his second trial violated his constitutional right to a speedy trial.

A defendant who represents himself on direct appeal may not maintain an application for reopening. *State v. Tyler*, 71 Ohio St.3d 398, 643 N.E.2d 1150 (1994); *State v. Orr*, 8th Dist. Cuyahoga No. 100841, 2014-Ohio-4680, *reopening disallowed*,

2014-Ohio-5274. This court further notes that Patterson's appellate counsel argued the double jeopardy issue and thus res judicata also bars that issue.

{¶5} Appellate counsel's failure to contact the appellant to plan strategy and tactics is not an authentic assignment of error. Moreover, appellate counsel's failure to contact appellant is not ineffective assistance of counsel. *State v. Inglesias-Rodriguez*, 8th Dist. Cuyahoga No. 76028, 2000 Ohio App. LEXIS 1007 (Mar. 16, 2000), *reopening disallowed*, Ohio App. LEXIS 4882 (Oct. 12, 2000).

{¶6} Patterson also claims that his trial counsel was ineffective for not calling as witnesses his brother and sister-in-law who would have testified that he was with them on the morning of March 24, 2003. Generally, an attorney's decision whether to call a witness comes within trial strategy and will not be second-guessed by a reviewing court. *State v. Piggee*, 8th Dist. Cuyahoga No. 101331, 2015-Ohio-596. Moreover, a review of the record reveals that Patterson's mother and sister provided alibi testimony and their testimony did not mention that the brother or sister-in-law were present at the subject time. Trial counsel's decision not to present conflicting or inconsistent testimony should be considered sound trial strategy.¹

¹ In order to establish a claim of ineffective assistance of counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The Court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "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

{¶7} Finally, Patterson attacks the photo line-up on multiple grounds: (1) he did not have a witness there on his behalf, that he claims is a guaranteed right, (2) Pinkney as a bailiff could have accessed his photograph through court or jail resources and (3) the homeless shelter violated his constitutional rights by giving his name to Pinkney. As indicated by his lack of authority, there is no constitutional right for a suspect to have a witness or representative present during a photo line-up or preventing a private citizen from answering questions relating to a criminal offense. Speculation that Pinkney used her court resources to identify Patterson is insufficient to establish a claim of ineffective assistance of counsel. *State v. Piggee*, 8th Dist. Cuyahoga No. 101331, 2015-Ohio-596.

{¶8} Accordingly, this court denies the application to reopen.

EILEEN A. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR

overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland*, 104 S.Ct. at 2065.