[Cite as *State v. Barrow*, 2015-Ohio-4579.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101356

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD BARROW

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-577219-A
Application for Reopening
Motion No. 484980

RELEASE DATE: November 2, 2015

FOR APPELLANT

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SEAN C. GALLAGHER, J.:

{¶1} On April 27, 2015, the applicant, Richard Barrow, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Barrow*, 8th Dist. Cuyahoga No. 101356, 2015-Ohio-525, in which this court affirmed Barrow's convictions for attempted murder and having a weapon while under disability. Barrow argues that his appellate counsel was ineffective for not arguing (1) prosecutorial misconduct for introducing other acts evidence and (2) ineffective assistance of trial counsel for not objecting to a witness calling him a "pimp." The state of Ohio filed its brief in opposition on September 8, 2015.[1] For the following reasons, this court denies the application to reopen.

{¶2} The evidence at trial showed that Barrow was dating Cheyenne, the daughter of Brandy who lived on Fleet Avenue in Cleveland, Ohio. Barrow thought that Brandy's next-door neighbors had stolen a firearm he was keeping at Brandy's home. When he confronted the next-door neighbors about the theft, he brandished a gun from his car and told the neighbors to return the gun "or else." A few days later, Herbert, one of the next-door neighbors, learned that Barrow had "jumped" his little brother. On July 23, 2013, Herbert confronted Justin, one of Brandy's children, about the incident. The testimony was conflicting about whether Herbert was just inquiring about what happened or trying to start a fight. During this encounter on July 23, Justin was overheard calling

[1]The state submitted its brief with a motion for leave to file, which this court granted.

someone and telling them that Herbert was asking for whomever Justin was calling. Shortly thereafter, Barrow arrived and immediately confronted Herbert by aiming a handgun at his head. Herbert grabbed the gun, and Barrow shot him in the shoulder. Barrow then left, and Herbert's mother took him to the hospital.

{¶3} The grand jury indicted Barrow for attempted murder and two counts of felonious assault, all with one- and three-year firearm specifications, and having a weapon while under disability. Barrow was found guilty of all charges, and the trial judge merged the felonious assault charges with the attempted murder charge.

{¶4} On appeal, Barrow's counsel argued manifest weight and sufficiency of the evidence. Barrow now contends that his appellate counsel should have argued prosecutorial misconduct for introducing other acts evidence and ineffective assistance of trial counsel for failing to object to a witness's testimony.

{¶5} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *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); and *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

{¶6} In *Strickland*, 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 overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689.

{¶7} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶8} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability

that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶9} Barrow complains that the prosecutor improperly introduced "other acts" evidence — i.e., the threat to return the firearm "or else" while brandishing another gun and "jumping" Herbert's little brother — in violation of Evid.R. 404(B) to inflame the jury with irrelevant evidence about his bad character. Evid.R. 404(B) provides in pertinent part as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In the instant case, the evidence of the accusation of the stolen firearm, the threat to return the missing property "or else," and the "jumping" of the younger brother is evidence of motive and intent to kill. The latter is an essential element of attempted murder. Indeed, this court so ruled in its opinion. In analyzing the sufficiency of the evidence argument, this court recounted the threat, the assault on the younger brother, and pointing the gun at Herbert's head and concluded that "[t]he jury was free to infer that Barrow intended to cause the death of the victim based on Barrow's threat and subsequent actions." *Barrow*, 2015-Ohio-525, ¶ 17. Accordingly, Barrow's argument is unfounded, and appellate counsel rejected it in the exercise of professional judgment.

{¶10} Barrow's second argument is that his trial counsel was ineffective for not objecting to a witness calling him a "pimp." Cheyenne's grandmother testified for the state and during her testimony called Barrow "Cheyenne's pimp." Barrow argues that an elderly Caucasian woman calling a young black man a "pimp" would necessarily inflame the passions of the jury. However, on both direct and cross-examination she clarified her meaning that a "pimp" is a man who lets a young woman do what she should not do. Thus, she was not necessarily saying that Barrow was a purveyor of prostitution. Moreover, Barrow's trial counsel had a standing objection to all of her testimony. The grandmother admitted in a voir dire hearing that she hears voices other people cannot hear, that she has conversations with her deceased father, and that she has been prescribed medication for mental illness that she cannot afford. In light of these revelations, defense counsel objected to her being called as a witness, and the judge granted a standing objection to all of her testimony. (Tr. 108.) Furthermore, appellate counsel did incorporate this argument into his manifest weight of the evidence argument. "The introduction of [the grandmother's] testimony did nothing more than to confuse the jury and prejudice the Appellant. From the onset of her testimony she continually referred to the Appellant as a pimp; although she gave no concrete rationale for that assessment." (Appellant's brief pg. 19.) Thus, appellate counsel submitted that the grandmother's characterization contributed to the jury losing its way. Following the admonition of the United States Supreme Court, this court will not second-guess appellate counsel's professional judgment to incorporate an argument as part of a larger argument. Finally,

after reviewing the record, especially the grandmother's testimony, the failure to raise a specific objection to that testimony does not undermine this court's confidence in the verdict.

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

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SEAN C. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
TIM McCORMACK, J., CONCUR