

[Cite as *State v. George*, 2015-Ohio-514.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100113

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AARON GEORGE

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION FOR REOPENING
GRANTED; VACATED IN PART
AND REMANDED

Cuyahoga County Court of Common Pleas
Case No. CR-13-571620-A
Application for Reopening
Motion No. 477746

RELEASE DATE: February 12, 2015

FOR APPELLANT

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EILEEN A. GALLAGHER, J.:

{¶1} On August 20, 2014, the applicant, Aaron George, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. George*, 8th Dist. Cuyahoga No. 100113, 2014-Ohio-2177, in which this court affirmed George's convictions for kidnapping with one- and three-year firearm specifications, improperly discharging a firearm into a habitation,¹ having a weapon while under disability, and obstructing official business. George argues that his appellate counsel should have argued the following: (1) the court erred by not giving a cautionary jury instruction regarding the admission and identification of a 911 recording, (2) the court erred by not specifying the number of jail-time credit days, and (3) the court erred by not addressing court costs during the sentencing hearing and denying George the opportunity to seek a waiver of the payment of court costs. On September 19, 2014, the state filed its response to the application; it opposed the first assignment of error, suggested an alternative remedy for the second assignment of error, and conceded that a remand for a hearing on court costs would be proper for the third assignment of error. For the following reasons, this court grants the application in part, reinstates the appeal, and then immediately remands the case to the trial court for further proceedings.

{¶2} On the evening of February 9, 2013, George's sister visited George at his home and brought along her young daughter. After talking and drinking, the sister went shopping with her cousin and left her daughter with George. As they returned to George's home, the sister heard a gunshot. Pulling into George's driveway, she heard another gunshot and saw him standing in the window. Entering the house, she tussled with George and left without her daughter. She

¹ The jury also found George guilty of felonious assault, but the state conceded that the felonious assault charge should merge with the improper discharge count and elected to have the court sentence on the improper discharge count.

then called 911 to get her daughter back. After several hours, the police broke into George's home and found only George and the daughter. They also found a shotgun and several discharged shotgun shells. Additional investigation revealed several shotgun holes in the home across the street from George. Based upon this evidence, the jury found George guilty as indicated above, and the trial judge sentenced him to a total of nine years in prison.

{¶3} During the sister's testimony, the state introduced the 911 call. The sister stated that the voice sounded like hers, but that she did not remember making the call and that she was drunk, like the person on the 911 call. George's appellate counsel argued, inter alia, that the trial court erred in admitting the 911 call for lack of authentication. George now submits that the proper argument was that the trial court erred by not giving a cautionary jury instruction about the unreliability of eyewitness identification pursuant to *State v. Guster*, 66 Ohio St.2d 266, 421 N.E.2d 157 (1981). However, *Guster* holds that a trial court is not required in a criminal case "to give a jury instruction on eyewitness identification where the identification of the defendant is the crucial issue in the case and is uncorroborated by other evidence." *Id.* at syllabus. It is inapplicable to a witness trying to identify herself on a 911 telephone case.

{¶4} 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. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Therefore, judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638. Accordingly, this court will not second-guess appellate counsel's professional judgment to argue that the 911 call was inadmissible evidence compared

to arguing that the trial judge erred in not giving a discretionary jury instruction pursuant to an inapplicable case.

{¶5} George's other arguments, however, are well-founded. In his third assignment of error, he argues that the trial court erred in failing to address court costs during the sentencing hearing and, thus, deprived him of the opportunity to seek waiver of the payment of those costs.

The trial court imposed court costs on George, but did not mention them during the sentencing hearing. In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 1, the Supreme Court of Ohio ruled "that a court errs in imposing court costs without so informing a defendant in court * * *." The Supreme Court rejected the state's argument that the error was harmless, because the error denied the defendant "the opportunity to claim indigency and seek a waiver of the payment of court costs before the trial court." *Id.* at ¶ 23. The state concedes this error and agrees that the case should be remanded to allow George to seek a waiver of court costs.

{¶6} In his other assignment of error, George argues that the trial court did not specify the number of jail-time credit days in the sentencing entry as required by R.C. 2949.12 and Ohio Adm.Code 5120-2-04(B). George asserts that he is entitled to 121 days of credit. During the sentencing hearing, the trial court said that he would receive credit for time served (tr. 454) but omitted jail-time credit in the sentencing entry. The state does not oppose this argument but asks that this court not find counsel ineffective for failing to raise this issue. The state notes that George could achieve his objective by moving the trial court for any jail-time credit to which he might be entitled. This court rules that the trial court did err by not specifying the number of jail-time credit days in the sentencing entry, and that George's argument is well-taken.

{¶7} Accordingly, the court denies the application to reopen in part as to the convictions and the need to give a cautionary jury instruction and grants the application in part as to the imposition of court costs and the allowance of jail-time credit in *State v. George*, Cuyahoga C.P. No. CR-13-571620-A. The court reinstates this appeal to this court's active docket, vacates the imposition of court costs and remands this case for further proceedings on the imposition of court costs and the allowance of jail-time credit.

Each party to bear its own costs.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, P.J., and
PATRICIA A. BLACKMON, J., CONCUR