

[Cite as *State v. Schwarzman*, 2015-Ohio-516.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100337

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARK SCHWARZMAN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-12-567998
Application for Reopening
Motion No. 476914

RELEASE DATE: February 6, 2015

FOR APPELLANT

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MELODY J. STEWART, J.:

{¶1} On July 21, 2014, the applicant, Mark Schwarzman, 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. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, in which this court affirmed Schwarzman's convictions and sentences for three counts of rape, one count of attempted rape, and four counts of kidnapping. Schwarzman asserts that his appellate counsel should have argued that his trial counsel was ineffective for not investigating and proffering more witnesses, especially medical experts who could have tendered exculpatory evidence. On September 4, 2014, the state of Ohio filed its brief in opposition to the application, and Schwarzman filed a rebuttal brief on September 15, 2014. For the following reasons, this court denies the application.

{¶2} In March 2013, the grand jury indicted Schwarzman for 18 counts of rape, kidnapping, and gross sexual imposition of one of his stepdaughters occurring between 1999 and 2007. On June 18, 2013, appointed trial counsel moved for a continuance of the trial set for June 24, 2013. Trial counsel argued that he needed additional time to interview prospective witnesses and receive records from subpoenas issued to Children and Family Services and the stepdaughter's school. At the proceedings just before trial, counsel also noted that he had hospital records that showed that Schwarzman had been diagnosed with genital herpes in 1997. Counsel indicated that he should retain a medical expert regarding this condition. He also stated that he wished to contact more of the stepdaughter's relatives who lived in the Schwarzman house during the relevant time. The trial court denied the motion.

{¶3} At trial, the stepdaughter testified to three specific incidents of rape and one incident in which they were spotted while Schwarzman was undressing her. She also testified that the

touching and rapes were regular occurrences during the relevant time. Defense counsel put on six witnesses who were essentially character witnesses and/or testified to the apparent good relationship between Schwarzman and the stepdaughter. The trial court granted a directed verdict for Schwarzman on four counts. The jury found him guilty on eight counts and not guilty on the others. The trial court merged the kidnapping counts with their corresponding rape counts and sentenced Schwarzman to a total of 16 years in prison.

{¶4} Appellate counsel argued eight assignments of error: (1) the trial court abused its discretion in denying the motion for continuance, (2) the indictments lacked sufficient specificity to allow a proper defense, (3) the evidence was insufficient to support the convictions, (4) the convictions were against the manifest weight of the evidence, (5) the trial court allowed inadmissible hearsay concerning the stepdaughter's diary over the defendant's objection, (6) the trial court improperly allowed the state to cross-examine its own witness, (7) the trial court improperly limited defense counsel's examination of a defense witness, and (8) the sentence was improper because the evidence did not support consecutive sentences and because the trial court did not effect the policy of punishing the offender by using minimum sanctions.

{¶5} Schwarzman now submits that appellate counsel should have argued ineffective assistance of trial counsel for (1) not moving for a continuance earlier, and (2) failing to investigate more witnesses and evidence. Schwarzman specifically argues that the failure to investigate medical witnesses prejudiced his case. He claims that he has had genital herpes since 1997. He further asserts that this disease is highly contagious and that if he had had intercourse with his stepdaughter, he would necessarily have infected her.¹ Nevertheless, trial

¹ The stepdaughter testified that for the three rapes for which Schwarzman was convicted, he wore a condom. However, she also testified that he did not always wear a condom. Schwarzman also asserts that a condom offers only limited protection from the transmittal of genital herpes.

counsel did not explore this possibility, ask whether the stepdaughter had genital herpes, or call medical experts. Schwarzman implies that producing this evidence would have exonerated him. He also complains that the failure to investigate the stepdaughter's school records precluded another possibility to impeach her. Finally, he assigns as error that the trial court erred when it denied his motion for a medical technician to determine the transmittal of an infectious disease.

{¶6} 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.

{¶7} 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.

{¶8} 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. 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.

{¶9} 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.

{¶10} Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898). Thus, “a reviewing court cannot add matter to the record that was not part of the trial court’s proceedings and then decide the appeal on the basis of the new matter.” *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978). “Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material.” *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. “Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel.” *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶ 10.

{¶11} In the present case, Schwarzman’s arguments are unpersuasive. They rely on speculation. The record does not contain evidence on Schwarzman’s condition, the treatments

rendered, its transmittal properties, the stepdaughter's susceptibility to the disease, and most importantly, whether she has the disease or not. Without that evidence in the record, appellate counsel and this court could only speculate as to what the evidence might be and whether it would establish prejudice. This is insufficient for making an appellate argument. *State v. Addison*, 8th Dist. Cuyahoga No. 90642, 2009-Ohio-221, *reopening disallowed*, 2009-Ohio-2704.

{¶12} Moreover, appellate counsel incorporated Schwarzman's medical condition as part of the foundation for arguing that the trial court abused its discretion in denying the motion for a continuance. In both the statement of case and the statement of facts, appellate counsel noted that defense counsel had indicated that Schwarzman had a medical condition since 1997 that could prove useful to the defense. Following the admonitions of the Supreme Court, this court will not second-guess counsel's strategy and tactics in presenting an argument. Furthermore, this court concluded that there was no prejudice from the trial court's refusal to continue trial.

{¶13} Schwarzman also argues that the school records were necessary and would have impeached the stepdaughter. However, there is no sworn evidence concerning the school records. A friend of the stepdaughter (her boyfriend's mother) says that the stepdaughter did tell her middle-school guidance counselor about the rapes, but Schwarzman was able to convince the counselor that nothing happened. Schwarzman now argues that such "testimony" is incredible and that the records would have shown those statements to be unfounded. However, those references were not evidence as to guilt and innocence, but remarks made at the sentencing hearing. Appellate counsel in the exercise of professional judgment could properly reject an argument based on unsworn statements.

{¶14} Similarly, this court will not second guess appellate counsel’s decision to attack the denial of the motion for continuance directly through an abuse of discretion argument, rather than through the lens of ineffective assistance of trial counsel. Additionally, Schwarzman cannot establish prejudice. This court concluded that there was “no prejudice from the court’s refusal to continue trial.” *Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, ¶ 4.

{¶15} Finally, Schwarzman argues that the trial court erred in denying his motion for a medical technician to determine the transmittal of an infectious disease. However, the docket does not show that such a written motion was made. Defense counsel did include the genital herpes as part of his oral argument to grant the motion for continuance, and appellate counsel also included that in his foundation for the argument that the trial court abused its discretion in denying the motion. Thus, this matter is not well founded.

{¶16} Application denied.

MELODY J. STEWART, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
SEAN C. GALLAGHER, J., CONCUR