[Cite as *State v. Marshall*, 2016-Ohio-100.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100736

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

G. TIMOTHY MARSHALL

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-571014-D
Application for Reopening
Motion No. 489429

BEFORE: Klatt, J., Sadler, P.J., and Dorrian, J.*
(*Sitting by assignment: Judges of the Tenth District Court of Appeals)

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ON APPLICATION FOR REOPENING

WILLIAM A. KLATT, J.:

{¶ 1} On September 22, 2015, G. Timothy Marshall filed a timely application for reopening pursuant to App.R. 26(B). He is attempting to reopen the appellate judgment this court rendered in *State v. Marshall*, 8th Dist. No. 100736, 2015-Ohio-2511. In that decision, we affirmed Marshall's two bribery convictions. The state opposes the application for reopening. For the following reasons, we decline to reopen Marshall's appeal.

I. App.R. 26(B) Application for Reopening

{¶ 2} To prevail on an application to reopen an appeal, the defendant must establish "a colorable claim" of ineffective assistance of appellate counsel. *State v. Sanders*, 75 Ohio St.3d 607 (1996). In order to establish a claim of ineffective assistance of appellate counsel, Marshall must demonstrate that appellate counsel's performance was deficient and that, but for the deficient performance, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534 (1996). Specifically, he must establish that "there is a genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5); *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753 (defendant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal."). *Id.* at ¶ 7.

{¶ 3} The Supreme Court of Ohio has applied the familiar ineffective assistance of counsel analysis found in *Strickland v. Washington*, 466 U.S. 668 (1984) to assess an

application for reopening under App.R. 26(B). *State v. Spivey*, 84 Ohio St.3d 24 (1998), citing *State v. Reed*, 74 Ohio St.3d 534, 535 (1996). Thus, Marshall must prove that his counsel was deficient for failing to raise the issues he now presents as well as showing that had he presented those claims on appeal, there was a "reasonable probability" that he would have been successful. *State v. Bridges*, 8th Dist. No. 100805, 2015-Ohio-1447, ¶ 4. In *Strickland*, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The Court stated that it is too tempting for a defendant-appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "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.'" *Id*. at 689.

{¶ 4} Finally, the United States Supreme Court has firmly established that appellate counsel possesses the sound discretion to decide which issues are the most fruitful arguments on appeal. Appellate counsel possesses the sound discretion to winnow out weaker arguments on appeal and to focus on one central issue or at most a few key issues. *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Thus, appellate counsel is not required to raise and argue assignments of error that are meritless, nor can appellate counsel be considered ineffective for failing to raise every conceivable assignment of

error on appeal. *Id.*; *State v. Gumm*, 73 Ohio St.3d 413 (1995); *State v. Campbell*, 69 Ohio St.3d 38 (1994).

II. Two Alleged Instances of Ineffective Assistance of Appellate Counsel

A. The Failure to Request Grand Jury Testimony

{¶ 5} Marshall first argues that appellate counsel was ineffective for not assigning as error that trial counsel was ineffective by not timely requesting the grand jury testimony of Harvey Bruner. We disagree.

{¶ 6} At trial, Bruner testified that he and Marshall discussed a payment of money, specifically $50,000, in exchange for favorable words from the victim at Castro's sentencing. Marshall argues that trial counsel should have requested Bruner's grand jury testimony so that counsel could have impeached him by showing that his trial testimony conflicted with his grand jury testimony.[1] Marshall alleges that based on the language in his indictment, trial counsel should have had "strong reason" to believe that Bruner's trial testimony conflicted with his grand jury testimony.

{¶ 7} As this court noted in *State v. Kelly*, 8th Dist. No. 85662, 2006-Ohio-5902, ¶ 37:

> "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of

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[1] In this court's first opinion, we rejected Marshall's argument that the trial court should have allowed him to impeach Bruner with prior inconsistent statements he made to a private investigator. *See Marshall* at ¶ 32-40 (describing Bruner's testimony and trial counsel's attempt to impeach him with prior inconsistent statements).

> justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer* (1981), 66 Ohio St.2d 139, 420 N.E.2d 982, paragraph two of the syllabus. Whether an accused has shown a particularized need for disclosure of grand jury testimony is a question of fact. *Id.*, paragraph three of the syllabus. The decision of whether to release grand jury testimony is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Id.*, paragraph one of the syllabus; *State v. Coley* (2001), 93 Ohio St.3d 253, 261, 754 N.E.2d 1129.

{¶ 8} A particularized need is established "'when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial.'" *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 66, quoting *State v. Sellards*, 17 Ohio St.3d 169, 173 (1985). However, "when a defendant 'speculates that the grand jury testimony might have contained material evidence or might have aided his cross-examination by revealing contradictions,' the trial court does not abuse its discretion by finding the defendant had not shown a particularized need." *State v. Mack*, 73 Ohio St.3d 502, 508 (1995), quoting *State v. Webb*, 70 Ohio St.3d 325, 337 (1994).

{¶ 9} Marshall's argument that Bruner's grand jury testimony would be inconsistent with his trial testimony is based on an erroneous reading of the complaint. Marshall argues that the complaint alleges that no amount of money was discussed by Bruner and Marshall and presumes that the state drafted the complaint according to Bruner's grand jury testimony. We disagree. The complaint alleged that Marshall

asked Bruner to get the victim to speak favorably at sentencing. Although the complaint did not allege that Bruner and Marshall discussed a specific monetary payment to the victim, the absence of that allegation does not demonstrate that Bruner failed to tell the grand jury that an amount of money was discussed. It is pure speculation to conclude that Bruner's trial testimony conflicted with his grand jury testimony. The mere possibility of inconsistent testimony does not rise to the level of a particularized need that would warrant the disclosure of grand jury testimony. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 44; *see also State v. Coleman*, 3d Dist. No. 9-03-23, 2003-Ohio-6440, ¶ 39 (unsubstantiated claim that grand jury transcripts might reveal inconsistent statements not sufficient to demonstrate particularized need). Accordingly, trial counsel would not have been successful had they requested Bruner's grand jury testimony and, therefore, Marshall cannot demonstrate a colorable claim of ineffective assistance of counsel. *State v. Johnson*, 6th Dist. No. WD-09-061, 2010-Ohio-3220, ¶ 48 (rejecting same ineffective assistance of counsel claim where only speculation that grand jury testimony would be inconsistent with trial testimony). Thus, appellate counsel was not ineffective for not assigning this as error. *State v. Loyed*, 8th Dist. No. 83075, 2005-Ohio-1965, ¶ 9.

B. Exclusion of the State's Expert Witness

{¶ 10} Second, Marshall contends that appellate counsel should have argued that trial counsel was ineffective by not seeking to exclude the state's expert witness, George Jonson, because he was not qualified to give such testimony. Again, we disagree.

{¶ 11} Pursuant to Evid.R 104(A), the trial court determines whether an individual qualifies as an expert, and that determination will be overturned only for an abuse of discretion. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 114, citing *State v. Williams*, 4 Ohio St.3d 53, 58 (1983). Here, however, trial counsel never challenged Jonson's qualifications to testify and thus waived all but plain error. *Id.* at ¶ 115; Crim.R. 52(B). As this court noted in the *Marshall* opinion:

> An error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Under Crim.R. 52(B), plain error requires an obvious defect in the trial court proceedings that affected "substantial rights." *State v. Posa*, 8th Dist. Cuyahoga No. 94255, 2010-Ohio-5355, ¶ 6. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *Long* at paragraph three of syllabus.

Marshall at ¶ 17.

{¶ 12} Marshall argues that Jonson was not qualified to offer expert opinions about the legal ethics of Marshall's conduct because he did not have experience in criminal law. To the extent we did not clearly address this in our first decision, we disagree.

{¶ 13} As a general rule, an expert witness is not required to be the best witness on the subject. *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 159 (1978); *Reed v. MetroHealth Med. Ctr.*, 8th Dist. No. 80044 (Apr. 11, 2002). The test is whether a particular witness offered as an expert will aid the trier of fact in the search for the truth. *Id.* Jonson did not opine regarding whether Marshall

committed any criminal offenses. His opinions focused on the ethics of Marshall's conduct under Ohio's Rules of Professional Conduct, an issue Marshall himself raised when he argued that his offers were ethical and permissible because he was simply trying to settle a potential civil claim. *Marshall* at ¶ 18-19. We determined in *Marshall* that Jonson's testimony in this regard would be relevant and helpful for the jury to understand and determine that issue. *Id.* Thus, a challenge to Jonson's qualifications would not have been successful and, accordingly, trial counsel was not ineffective for not so objecting. Appellate counsel is not ineffective for failing to assign this meritless argument as error. *State v. Smith*, 8th Dist. No. 81539, 2004-Ohio-993, ¶ 4.

III. Conclusion

{¶ 14} Because Marshall has not demonstrated a colorable claim of ineffective assistance of appellate counsel, he has not met the standard for reopening pursuant to App.R. 26(B). Accordingly, we deny his application for reopening.

{¶ 15} Application for reopening denied.

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WILLIAM A. KLATT, JUDGE

LISA L. SADLER, P.J., and
JULIA L. DORRIAN, J., CONCUR*

*(Klatt, Sadler and Dorrian, Judges,
of the Tenth Appellate District, sitting by
assignment in the Eighth Appellate District.)