[Cite as *State v. Rasul*, 2016-Ohio-200.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101625

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTIQ S. RASUL

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-579154-A
Application for Reopening
Motion No. 486633

RELEASE DATE: January 15, 2016

FOR APPELLANT

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TIM McCORMACK, J.:

{¶1} Applicant Antiq Rasul has filed a timely application to reopen his direct appeal in *State v. Rasul*, 8th Dist. Cuyahoga No. 101625, 2015-Ohio-1151. In *Rasul*, this court affirmed the trial court's imposition of consecutive sentences. *Id*. at ¶ 17. The state has opposed the application for reopening of the appeal. The application is denied for the reasons that follow.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Rasul is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, 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*.

{¶4} Rasul identifies five proposed assignments of error that are summarized as follows:

1) his convictions were based on insufficient evidence;

2) the trial court erred by admitting hearsay testimony;

3) the trial court abused its discretion by allowing "misleading testimony of SANE nurse & DNA expert for the prosecution";

4) appellate counsel rendered ineffective assistance because he failed to raise the foregoing assignments of error; and

5) the trial court erred by failing to comply with R.C. 2929.19(B)(2)(a) & (b).

{¶5} The fourth assignment of error broadly alleges that appellate counsel was ineffective for failing to raise the other proposed assignments of error that are presented in the petition. We note that Rasul has failed to develop any substantive argument regarding his claim of ineffective assistance of counsel in connection with any of the proposed assignments of error. In other words, he has not presented any argument that appellate counsel's failure to raise each proposed assignment of error resulted in deficient performance or that the alleged deficiency resulted in any prejudice to him. As set forth below, Rasul has failed to establish the elements necessary for sustaining an ineffective assistance of appellate counsel regarding any of his proposed assignments of error.

I. Sufficiency of Evidence

{¶6} The court, after a bench trial, found Rasul guilty of three counts of rape, one count of kidnapping, and aggravated burglary.

{¶7} In reviewing for sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The record contains sufficient evidence to support all of the convictions.

{¶8} First, Rasul claims there was insufficient evidence to prove he compelled the victim to submit by force or threat of force to three distinct acts of intercourse (fellatio, anal, and vaginal). The victim testified that he forced her to engage in these distinct acts multiple times.

She testified that she felt forced to do so and believed that he had a gun located outside her home. The victim's testimony alone provides sufficient evidence, that if believed, would support the three rape convictions as well as the kidnapping conviction. Next, he believes the state presented insufficient evidence that he trespassed in the victim's home to cause physical harm to her. The victim testified that he entered her home without her permission, slapped her in the face, and raped her multiple times. The record contains evidence that, if believed, supports the aggravated burglary conviction.

{¶9} While Rasul challenges the credibility of the victim's testimony and believes the DNA evidence contradicts her allegations, that is not the proper standard of review to apply when examining the sufficiency of the evidence. When reviewing the sufficiency of the evidence, the appellate court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶10} Appellate counsel was not ineffective for declining to challenge the sufficiency of the evidence in the appeal. Rasul's first proposed assignment of error fails to present grounds for reopening the appeal.

II. Alleged Hearsay Testimony

{¶11} Rasul contends that the trial court erred by improperly allowing hearsay testimony. He cites to pages 133-135 of the trial transcript. However, the trial court sustained the defense counsel's objections to the testimony referenced in that portion of the transcript. Appellate counsel could not reasonably be expected to raise an assignment of error based on the trial court's ruling that sustained the defense's objection. Further, this case involved a bench trial.

The court's ruling reflects the court's opinion that the subject testimony was inadmissible and, therefore, the court would not have considered or relied upon it to reach its verdict.

{¶12} Rasul does not present any evidence to support his broad contention that the court relied on any inadmissible hearsay to reach the verdict. In *State v. Kelly*, 8th Dist. Cuyahoga No. 74912, 2000 Ohio App. LEXIS 2907 (June 21, 2000), this court established that the mere recitation of assignments of error is not sufficient to meet the burden to prove that the applicant's appellate counsel was deficient for failing to raise the issues he now presents, or that there was a reasonable probability that the applicant would have been successful if the presented issues had been considered in the original appeal. *See also State v. Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-4467; *State v. Hawkins*, 8th Dist. Cuyahoga No. 90704, 2009-Ohio-2246. The failure to present any cognizable argument with regard to the proposed assignments of error results in the failure to demonstrate that his appellate counsel was deficient and that he was prejudiced by the alleged deficiency. *State v. Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-5151.

{¶13} The second proposed assignment of error does not provide a basis for reopening the appeal.

III. Alleged Misleading Testimony

{¶14} Rasul cites to various portions of the sexual assault nurse examiner's testimony and the testimony of the DNA forensic analyst. He then cites to three cases without any elaboration, explanation, or argument as to how these cases support his contentions that any of the subject testimony was admitted in error.

{¶15} For example, Rasul cites *In re J.P.*, 5th Dist. Licking No. 08-CA-148, 2009-Ohio-4730, which addressed an appeal by the state after the trial court had excluded certain

DNA evidence and statements of a child victim that were made to a nurse practitioner. The Fifth District affirmed in part, reversed in part, and remanded. We cannot speculate as to how Rasul believes *In re J.P.* supports his contention that the trial court erred by allowing allegedly misleading statements of the sexual assault nurse examiner or the DNA expert in his trial. Similarly, the basis for Rasul's reliance on *State v. Lee*, 9th Dist. Summit No. 22262, 2005-Ohio-996, is unclear. In *Lee*, the Ninth District sustained the state's assignment of error and reversed the trial court's decision that had excluded statements made to a sexual assault nurse practitioner. The court found the statements made to the nurse were nontestimonial and that the trial court erred by excluding them based upon a perceived confrontation clause violation. Finally, Rasul references *State v. Brewster*, 8th Dist. Cuyahoga No. 87701, 2007-Ohio-3407, and *State v. Durdin*, 10th Dist. Franklin No. 14AP-249, 2014-Ohio-5759. *Brewster* involved the admission of a social worker's hearsay testimony and an analysis of the sufficiency of the evidence upon remand from the Ohio Supreme Court. In the case cited by Rasul, our court found that the evidence was sufficient to support the conviction. In *Durdin*, the Tenth District analyzed the admission of a nurse's testimony for purposes of a determining whether its admission violated the defendant's confrontation clause rights.

{¶16} None of the cases that Rasul has cited involve any arguments challenging the admission of allegedly misleading testimony or evidence. Rasul has not alleged that the admission of the identified testimony violated his confrontation clause rights. He asserts that some of the SANE nurse's findings were contrary to the findings of the doctors who had examined the victim. This discrepancy was fully developed during cross-examination and was within the province of the trier of fact to resolve. Rasul has failed to present any law or argument

that would support a finding that the admission of this testimony was improper or that the failure to raise an assignment of error on this ground resulted in ineffective assistance of counsel.

{¶17} The third proposed assignment of error does not satisfy the standard for reopening the appeal. Because the first, second, and third assignments of error fail to provide any basis for reopening the appeal, the fourth proposed assignment of error also fails.

IV. Non-compliance with R.C. 2929.19(B)(2)(a) and (B)(2)(b)

{¶18} In his final proposed assignment of error, Rasul contends that the trial court did not comply with R.C. 2929.19(B)(2)(a) and (b), which provide:

> (2)__Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:
>
> > (a)__Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;
> >
> > (b)__In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications * * * .

{¶19} Rasul cannot establish an ineffective assistance of appellate counsel claim based on this alleged error. He has not argued or explained how counsel's failure to raise this as an

assignment of error resulted in any prejudice to him. Courts that have addressed this error have determined that the proper remedy is limited by R.C. 2929.19(B)(7), which provides:

> The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(2)(a) of this section or to include in the sentencing entry any information required by division (B)(2)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.

See also State v. McFarland, 7th Dist. Mahoning No. 15 MA 17, 2015-Ohio-4839, ¶ 22-23, citing *State v. Benitez-Maranon*, 9th Dist. Summit Nos. 26461 and 26659, 2014-Ohio-3575, and *State v. Ware*, 141 Ohio St.3d 160, 2014-Ohio-5201, 22 N.E.3d 1082, ¶ 10 (the proper remedy is to remand the matter to the trial_court to provide the notification set out in R.C. 2929.19(B)(2)(a)).

{¶20} Even if this proposed assigned error has merit, Rasul cannot establish prejudice for the failure to raise it in the direct appeal because the remedy is limited to providing a corrected entry and does not affect the validity of the sentence or sentences that were already imposed. Appellate counsel has wide latitude and discretion in deciding which assignments of error to pursue in an appeal. *State v. Lowe*, 8th Dist. Cuyahoga No. 82997, 2005-Ohio-5986, ¶ 17. Counsel is not required to argue every conceivable assignment of error. *Id*.

{¶21} The fifth proposed assignment of error fails.

{¶22} For all of the foregoing reasons, appellant has not met the standard for reopening his appeal. The application to reopen is denied.

TIM McCORMACK, JUDGE

LARRY A. JONES, SR., A.J., and
EILEEN A. GALLAGHER, J., CONCUR