[Cite as *State v. Warren*, 2016-Ohio-2827.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102181

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DESMOND ERIC WARREN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-585539-A
Application for Reopening
Motion No. 491061

RELEASE DATE: May 3, 2016

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EILEEN A. GALLAGHER, J.:

{¶1} Desmond Eric Warren has filed a timely application for reopening pursuant to App.R. 26(B). Warren is attempting to reopen the appellate judgment that was rendered in *State v. Warren*, 8th Dist. Cuyahoga No. 102181, 2015-Ohio-3671, that affirmed his conviction and sentence for the offenses of trafficking in persons and compelling prostitution. We decline to reopen Warren's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Warren 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 767 (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} Herein, Warren raises two proposed assignments of error in support of his application for reopening, which we shall consider simultaneously because they involve similar issues of law and fact.

{¶5} Warren's first proposed assignment of error is that

> The trial court committed plain error in instructing the jury on human trafficking and compelling prostitution without defining the word "compel," by providing an incomplete instruction on the elements of "compelling prostitution," and then later giving a definition of "compel" that substantially and prejudicially deviated from the statutory definition.

{¶6} Warren's second proposed assignment of error is that

> Defense counsel provided ineffective assistance of counsel allowing instruction to the jury on human trafficking and compelling prostitution without defining the word "compel," by providing an incomplete instruction on the elements of "compelling prostitution," and then later giving a definition of "compel" that substantially and prejudicially deviated from the statutory definition.

{¶7} Warren, through his two proposed assignments of error, argues that "[t]he Trial Court, the State, and Defense Counsel failed to properly instruct the jury of the definition of 'compel' as statutorily defined. There is a genuine issue as to whether this failure amounted to plain error, such that it lowered the standard of proof for conviction on counts of Compelling Prostitution and Human Trafficking, of which [Warren] was found guilty."

{¶8} Crim.R. 30(A) provides that, on appeal, an appellant may not assign as error the giving or failure to give any jury instructions unless the appellant objected before the

jury retired to consider its verdict. The failure to timely object waives all but plain error. *State v. Moore*, 163 Ohio App.3d 23, 2005-Ohio-4531, 836 N.E.2d 18; *State v. Thompson*, 2nd Dist. Montgomery No. 22984, 2010-Ohio-1680. To be considered plain error, the error must be obvious on the record, palpable, and fundamental, so that the error should have been apparent to the trial court without objection. *State v. Tichon*, 102 Ohio App.3d 758, 658 N.E.2d 16 (1995). Plain error does not exist unless the appellant can establish that the outcome of his trial would have clearly been different but for the trial court's alleged improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 661 N.E.2d 1043 (1996). Notice of plain error must be taken with the utmost caution, only under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 656 N.E.2d 643 (1995).

{¶9} Warren did not object to the trial court's jury instruction thus waiving any error on appeal. In addition, Warren cannot establish that the outcome of his trial would have been different had the trial court instructed the jury as now suggested. In fact, this court upon appeal specifically found that Warren's convictions for the offenses of compelling prostitution and trafficking in persons were supported by sufficient evidence and not against the manifest weight of the evidence. This court found that each and every essential element of the offenses of compelling prostitution and trafficking in persons, including the element of "compelled," proven beyond a reasonable doubt. *Warren, supra,* at ¶ 38, 41, and 45. This court further found that Warren's convictions for the offenses of compelling prostitution and trafficking in persons were not against the

manifest weight of the evidence. *Id.* at ¶ 51 and 53. Warren cannot establish the existence of any miscarriage of justice and, thus, has failed to establish the existence of any ineffective assistance of appellate counsel. *State v. Moon*, 8th Dist. Cuyahoga No. 101972, 2015-Ohio-1550; *State v. Stewart*, 8th Dist. Cuyahoga No. 93428, 2011-Ohio-1667.

{¶10} It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones v. Barnes*, *supra*; *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995); *State v. Campbell*, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994).

{¶11} Application denied.

EILEEN A. GALLAGHER, JUDGE

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