[Cite as *State v. Hilliard*, 2016-Ohio-2828.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102214

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RUDOLPH HILLIARD

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-10-535768-A
Application for Reopening
Motion No. 490582

RELEASE DATE: May 3, 2016

FOR APPELLANT

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EILEEN A. GALLAGHER, P.J.:

{¶1} On November 2, 2015, the applicant, Rudolph Hilliard, pursuant to App.R. 26(B) and *State v. Murnahan*, 62 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Hilliard*, 8th Dist. Cuyahoga No. 102214, 2015-Ohio-3142, in which this court affirmed Hilliard's convictions and sentences for aggravated murder and kidnapping. Hilliard argues that his appellate counsel should have argued ineffective assistance of trial counsel for (1) failing to investigate and argue mitigating factors that the moment and his rage precluded prior calculation and design, and (2) failing to argue that aggravated murder and kidnapping were allied offenses. The state of Ohio filed its brief in opposition on November 6, 2015, and Hilliard filed a reply on November 30, 2015. For the following reasons, this court denies the application to reopen.

{¶2} As gleaned from the facts presented at the guilty plea and sentencing hearings, Hilliard had been in a romantic but abusive relationship with a 22-year-old woman, and she had moved to a new residence to get away from him. Enraged by her decision to leave him Hilliard, on March 22, 2010, claimed that his mother had been killed in a car accident so that he could leave work early. He then drove to his former girlfriend's new residence and waited for her. When she arrived, he ambushed her, stabbing her so many times that it was necessary for the undertaker to wrap her body in plastic in order to keep the embalming fluid in her body. Hilliard was caught in the act.

{¶3} The Grand Jury indicted Hilliard on charges of aggravated murder and kidnapping. He pled guilty to both counts. At the sentencing hearing, his attorney acknowledged the seriousness of the crime and referred to some psychiatric testing, Hilliard's youth, lack of criminal record and his remorse to mitigate sentencing. Hilliard expressed remorse, asked for forgiveness and said that it was not the real Rudolph Hilliard who committed that crime. There was no discussion of allied offenses. The trial judge imposed a sentence of 25 years to life for aggravated murder and seven years for kidnapping to be served concurrently.

{¶4} This court granted Hilliard a delayed appeal, and his appellate counsel argued (1) the trial court erred by not merging the kidnapping count into the aggravated murder count as allied offenses, and (2) the record and the law did not support the sentence. Hilliard now argues that his appellate counsel should have framed the allied offense argument as ineffective assistance of trial counsel in failing to raise the issue as well as trial counsel's failure to investigate mitigating factors.

{¶5} 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.

{¶6} 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.

{¶7} 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. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. 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.

{¶8} 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.

{¶9} Also, appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898); *Carran v. Soline Co.*, 7 Ohio Law Abs. 5 (1928), and *Republic Steel Corp. v. Sontag*, 21 Ohio Law Abs. 358 (1935). "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.

{¶10} In the present case, appellate counsel chose to address the issue of allied offenses directly rather than indirectly through the lense of ineffective assistance of trial counsel. Following the admonitions of the Supreme Court, this court has not second guessed appellate counsel's decision to attack an issue directly rather than indirectly. *State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, *reopening disallowed,* 2015-Ohio-51; *State v. Jones,*
8th Dist. Cuyahoga No. 80737, 2002-Ohio-6045; *reopening disallowed,* 2003-Ohio-4397. Such an approach eliminates the necessity of challenging counsel's strategy and tactics.

In the present case, a review of the record indicates that the strategy in light of the overwhelming and horrific evidence was to present Hilliard as accepting responsibility for his actions and showing as contrite a heart as possible in order to avoid the harsher penalties of 30 years to life or life imprisonment without parole. Thus, the record was not developed enough to sustain an allied offense argument; a second-by-second recounting of the incident to show there was not an independent kidnapping would have been inconsistent with the strategy.

{¶11} The court further notes that the Supreme Court of Ohio clarified the standard of reviewing allied offenses after the parties had finished briefing; the court ruled that the trial court did not have a duty to inquire about the allied offense issue if the parties did not raise it. *State v. Rogers,* 143 Ohio St.3d 385, 2015-Ohio-2459, 39 N.E.3d 860. Appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue. *State v. Williams*, 74 Ohio App.3d 686, 600 N.E.2d 298 (8th Dist.1991); *State v. Munici,* 8th Dist Cuyahoga No. 52579, 1987 Ohio App. LEXIS 9683 (Nov. 30, 1987), *reopening disallowed* (Aug. 21, 1996), Motion No. 271268, at 11-12: "appellate counsel is not responsible for accurately predicting the development of the law in an area marked by conflicting holdings." Accordingly, appellate counsel was not deficient in his presentation of the allied offense argument.

{¶12} Hilliard also argues that his trial counsel was ineffective for failing to investigate and present mitigating evidence. To the extent that this argument relies upon material outside the record, it is ill-founded. Appellate counsel and appellate review is

limited to the record. Moreover, appellate counsel marshaled whatever was in the record as part of his argument that the sentence was not supported by the record and contrary to law. This court will not second guess counsel's professional decisions regarding strategy and tactics.

{¶13} Accordingly, this court denies the application to reopen.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
EILEEN T. GALLAGHER, J., CONCUR