

[Cite as *State v. Rolfes*, 2016-Ohio-2933.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102521

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEREMY ROLFES

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-04-458493-A
Application for Reopening
Motion No. 491376

RELEASE DATE: May 10, 2016

FOR APPELLANT

Jeremy Rolfes
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FRANK D. CELEBREZZE, JR., J.:

{¶1} Jeremy Rolfes has filed a timely application for reopening pursuant to App.R. 26(B). Rolfes is attempting to reopen the appellate judgment that was rendered in *State v. Rolfes*, 8th Dist. Cuyahoga No. 102521, 2015-Ohio-4696, that affirmed his plea of guilty and sentence for the offense of aggravated murder with a one-year firearm specification. We decline to reopen Rolfes's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Rolfes 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 in 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} Rolfes raises three proposed assignments of error in support of his application for reopening. Rolfes's first proposed assignment of error is that:

The failure to advise a defendant during a plea colloquy of the true nature of the charge, the maximum penalty and the requirements for parole constitutes a violation of due process of law and, thus, are not subject to harmless error analysis.

{¶5} Rolfes argues that his plea of guilty was defective because the trial court failed to inform him of the nature of the charged offense of aggravated murder, the maximum penalties that could be imposed upon entering a plea of guilty to the offense of aggravated murder, and the possibility of parole.

{¶6} Rolfes's first proposed assignment of error was previously addressed upon appeal and found to be without error.

Appellant claims the court failed to advise him of the maximum penalties involved, the statutory code sections of the charged crimes, the potential for fines, that he was not subject to early or judicial release, and he would be subject to parole and postrelease control. These alleged failings all fall under Crim.R. 11(C)(2)(a) and are nonconstitutional rights. *Clark* at ¶ 31.

* * *

Here, the trial court did mention the maximum penalties, the nature of the charges, and any early release. Therefore, this court must engage in a prejudice analysis to determine whether the trial court's failure to properly inform appellant of these things rendered his pleas unknowing, unintelligent, or involuntary. The test for prejudice is "whether the plea would have otherwise been made." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

When the state was explaining the plea agreement on the record, the prosecutor indicated that for the charge of aggravated murder, the penalty agreed to between the parties was a sentence of 20 years to life in prison without the possibility of early parole. (Tr. 11.) There would also be a consecutive one year sentence for the firearm specification. The trial court stated the same terms. It advised appellant that by pleading guilty to aggravated murder, he would be subject to possible incarceration for 20 years to life, and there would be no possibility of early parole. The court similarly advised appellant of the sentence for the firearm specification. The court failed to advise appellant of the actual sentencing range for aggravated murder, which included life imprisonment without parole or parole eligibility after 20, 25, 30 years. Former R.C. 2929.03. The sentence also carried with it the possibility of a fine up to \$25,000. Former R.C. 2929.02(A).

It is clear from the record that the trial court failed to inform appellant of the maximum penalties he faced prior to accepting his guilty plea to aggravated murder. However, appellant was not prejudiced by this failure. Appellant received a 21-year-to-life prison sentence, no fines were imposed, and appellant was informed that he would not be eligible for early release. The trial court imposed the sentence of which appellant was informed at the plea hearing. As the sentencing transcript indicates, there was an agreed sentence as part of the plea deal, which the court imposed. Appellant was not prejudiced by the failure to advise him of the possible range of penalties because the court informed him of all aspects of the sentence that was actually imposed.

Appellant was also properly informed of the charges against him. Appellant argues that the court failed to comply with Crim.R. 11 because it failed to state the statutory code section under which he was charged. However, appellant was informed of the type and nature of that charge. For instance, the prosecutor explained that appellant was charged and would plead guilty to aggravated murder, an unclassified felony and further included the statutory definition of that charge (purposefully causing the death of Gregory Brown “while committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated robbery.”) (Tr. 11.) Therefore, appellant was not prejudiced by the alleged failure even if the court was required to state the revised code section for aggravated murder.

Appellant was not prejudiced by the advisement relating to the

above arguments before the court accepted his guilty plea to aggravated murder. Therefore, this assigned error is overruled.

State v. Rolfes, supra, ¶ 9.

{¶7} Rolfes's claims that his plea of guilty was defective because the trial court failed to inform him of the nature of the charged offense of aggravated murder, the maximum penalties that could be imposed upon entering a plea of guilty to the offense of aggravated murder, and the possibility of parole, are barred from further review by the doctrine of res judicata. The issues presently raised in support of his first proposed assignment of error were previously determined to be without merit in *State v. Rolfes, supra*. Rolfes is not permitted to relitigate those issues previously addressed and found to be without merit. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469, (1970); *State v. Cargo*, 93 Ohio App.3d 621, 639 N.E.2d 801 (1994); *State v. Williamson*, 8th Dist. Cuyahoga No. 102320, 2015-Ohio-4482; *State v. Day*, 8th Dist. Cuyahoga No. 67767, 1996 Ohio App. LEXIS 44847 (Nov. 2, 1995). Rolfes has failed to establish any prejudice through his first proposed assignment of error.

{¶8} Rolfes's second proposed assignment of error is that:

The trial court violated due process and committed reversible error when it failed to advise appellant that he could or would be subjected to thousands of dollars in restitution.

{¶9} Rolfes, through his second proposed assignment of error, argues that he was prejudiced by the failure of the trial court to inform him that he was subject to a fine or restitution. A review of the trial court's sentence, however, fails to establish that Rolfes was subjected to a fine or restitution. *See* sentencing journal entry journalized on June

14, 2005. Thus, Rolfes has failed to establish how he was prejudiced and that the outcome of his appeal would have been different had this court considered his second proposed assignment of error. 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, supra*; *State v. Gumm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

{¶10} Rolfes's third proposed assignment of error is that:

The failure to accept the plea of guilty on the part of the trial court, on the record, divests the trial court of subject matter jurisdiction to impose sentence, rendering the sentence and all subsequent proceedings void ab initio.

{¶11} Rolfes, through his third proposed assignment of error, argues that the trial court did not accept his plea of guilty to the offense of aggravated murder, which rendered the sentence of the trial court void. A review of the transcript of the change of plea hearing demonstrates that Rolfes did enter a plea of guilty and that the trial court, on the record, accepted the plea of guilty.

COURT: Now, in Case No. CR-458493, I'm going to ask how do you plead to the first count of that indictment charging you with aggravated murder? How do you plead to that?

DEFENDANT: Guilty.

COURT: And are you, in fact, guilty of between

October 24, 2004 and October 25, 2004, in the County of Cuyahoga, unlawfully purposely causing the death of another, to-wit: Gregory Brown, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated robbery? Are you guilty of that?

DEFENDANT: Guilty.

COURT: And are you further guilty of the one-year firearm specification? Are you guilty of that?

DEFENDANT: Guilty.

COURT: And are you, in fact, guilty of on October 24 to October 25, 2005, in Cuyahoga County, of having a firearm on or about your person or under your control while committing the offense of aggravated murder? Are you guilty of that?

DEFENDANT: Guilty.

COURT: All right, let the record reflect that the defendant in court with counsel freely and voluntarily waived his constitutional rights and entered a plea of guilty to Count 1 of the indictment, aggravated murder, and to the amended firearm specification of one year.

Further that on the recommendation of the prosecuting attorney and for good cause shown all of the remaining counts and specifications contained in the indictment are hereby nolle.

* * *

COURT: The Court has agreed to accept the plea arrangement in this case and, * * *.

{¶12} The record of the change of plea hearing clearly demonstrates that the trial court accepted Rolfes’s plea of guilty to the offense of aggravated robbery and the one-year firearm specification. In addition, the record clearly demonstrates that the trial court strictly complied with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. We further find that under the totality of the circumstances, Rolfes subjectively understood the implications of his plea of guilty and the rights waived. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621; *State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990); *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981). Rolfes, through his third proposed assignment of error, has failed to establish that he was prejudiced in any fashion through his plea of guilty.

{¶13} Application denied.

FRANK D. CELEBREZZE, JR., JUDGE _____

LARRY A. JONES, SR., A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR