[Cite as *State v. Allen*, 2016-Ohio-5400.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103148

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES D. ALLEN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-12-558112-A
Application for Reopening
Motion No. 494605

RELEASE DATE: August 17, 2016

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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SEAN C. GALLAGHER, J.:

{¶1} James D. Allen ("applicant" or "Allen") has applied to reopen this court's judgment in *State v. Allen*, 8th Dist. Cuyahoga No. 103148, 2016-Ohio-706 ("Allen II"), pursuant to App.R. 26(B). In Allen II, this court affirmed the sentence the trial court imposed during the resentencing hearing held on May 29, 2015, pursuant to the remand ordered by *State v. Allen*, 8th Dist. Cuyahoga No. 101342, 2015-Ohio-1448 ("Allen I"). Allen argues that his appellate counsel was ineffective for not arguing that his federal and state constitutional rights to due process were violated when appellant was denied his right to allocution without giving a waiver of this right on the record. For the reasons that follow, the application to reopen is denied.

{¶2} In Allen II, appellate counsel argued that the 11-year sentence that the court reimposed at the resentencing hearing was contrary to law. In resolving this assignment of error, we specifically noted that appellant was not present at the resentencing hearing. We further observed that

> the court stated on the record and in its journal entry that appellant refused to leave his holding cell. Crim.R. 43(A) mandates that "the defendant must be physically present at every stage of the criminal proceedings and trial, including * * * the imposition of sentence," except when the rules provide otherwise or the defendant waives his right to be present. Although Crim.R. 43 instructs that in felony cases a defendant may waive his right to be physically present "in writing or on the record," the lack of an express waiver in this case amounted to an invited error by appellant's refusal to leave his holding cell.

Allen II at ¶4, fn.1.

{¶3} 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. 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._

{¶4} Because this court already determined that Crim.R. 43 was not violated on the grounds of invited error, Allen cannot establish that he was prejudiced by counsel's failure to specifically raise it. *See also In re Jason R.*, 77 Ohio Misc.2d 37, 666 N.E.2d (C.P. 1995), citing *Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.E.2d 174 (1974) (holding that accused parties waive their right to be present by not returning to court or refusing to attend hearings.); *see also State v. Logan*, 10th Dist. Franklin No. 87AP-633, 1988 Ohio App. LEXIS 1533 (Apr. 28, 1988) (holding Crim.R. 43 was not violated when the defendant refused to leave his holding cell and voluntarily chose not to

attend the remainder of his trial.) In *Logan*, the court held that the defendant need not exhibit aggressive behavior and that passively refusing to leave the holding cell constitutes disruptive behavior.

{¶5} While Allen disputes the accuracy of the trial court's statements on the record and the court's journal entry that documented his refusal to leave the holding cell, his allegations are outside the appellate record and could not have been considered in resolving an assignment of error on the direct appeal. It is well settled that "appellate review is strictly limited to the record." *State v. Ellis*, 8th Dist. Cuyahoga No. 90844, 2009-Ohio-4359, ¶ 6, citing *Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898) (other citations omitted); *State v. Corbin*, 8th Dist. Cuyahoga No. 82266, 2005-Ohio-4119, ¶ 7. A reviewing court cannot add material to the appellate record and then decide the appeal on the basis of the new material. *Id*., citing *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978); *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 62; *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶ 50. "Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130.

{¶6} Even if appellate counsel had specifically presented the proposed assignment of error for review, the outcome of this court's decision would not have changed based on

the record and the foregoing applicable legal authority. Accordingly, this court denies the application to reopen.

SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR