[Cite as *State v. Lumbus*, 2016-Ohio-5920.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102273

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRIAN LUMBUS, JR.

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-11-556112-A
Application for Reopening
Motion No. 495681

RELEASE DATE: September 19, 2016

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Brian Lumbus has filed an application pursuant to App.R. 26(B) to reopen his direct appeal in *State v. Lumbus*, 8th Dist. Cuyahoga No. 102273, 2016-Ohio-380. The state has opposed the application and Lumbus has filed a reply. For the reasons that follow, the application to reopen is denied.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Lumbus 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. 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), *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 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} Lumbus contends that his appellate counsel was ineffective for failing to seek the dismissal of his appeal for lack of a final, appealable order because the record did not contain the original jury verdict forms. Lumbus cites App.R. 26(B)(2)(c), which provides:

> (2) An application for reopening shall contain all of the following:
>
> (c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation.

Lumbus asserts that his appeal was decided on an incomplete record.

{¶5} The state responds that this court did have jurisdiction to decide the appeal because the sentencing journal entry satisfied the requirements of a final, appealable order. "[A] final appealable order exists when the judgment entry contains (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time-stamp indicating the entry upon the journal by the clerk." *State v. Braddy*, 8th Dist. Cuyahoga No. 101774, 2015-Ohio-1154, ¶ 8; *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus. In *Braddy*, this court held that a final, appealable order existed despite Braddy's claims that the clerk failed to file and journalize the jury verdict forms.

{¶6} The trial court's November 10, 2014 entry, coupled with the nunc pro tunc orders issued in October 2015 during the limited remand, satisfied the requirements of a final, appealable order.

{¶7} Lumbus relies on a 1987 unreported decision from the First District in *State v. Cosby*, 1st Dist. Hamilton No. C-860508, 1987 Ohio App. LEXIS 7761 (July 1, 1987). However, *Cosby* predates the precedential Ohio Supreme Court authority in *Lester*, amendments to Crim.R. 32, and is distinguishable from his case. The state points out, by citation to the trial transcript, that the jury verdict forms were reviewed by the trial court on the record, found to be in order, filled out and contained the signature of all 12 jurors, and each verdict was read aloud. The jury was polled on the record and confirmed that the verdicts, as recited for the record, were correct. In analogous circumstances, this court, and others, have found that where the verdict, conviction, and sentence are properly journalized, the failure to file the jury verdict forms with the clerk does not create reversible error. *State v. Wright*, 8th Dist. Cuyahoga No. 93068, 2011-Ohio-3575, ¶ 64, citing *State v. Clark*, 2d Dist. Montgomery No. CA 9722, 1987 Ohio App. LEXIS 5485 (Jan. 6, 1987). ("The filing of such forms is a ministerial act and, however important, it does not affect a substantial right when the otherwise perfect record of the proceedings at trial and the final judgment fully disclose the delivery and acceptance without objection of valid verdicts by the jury.")

{¶8} While the jury verdict forms were not filed with the clerk in this case, they are a part of the record. Further, we note that Lumbus filed a mandamus action with the Ohio Supreme Court seeking to compel the clerk or the trial judge to produce copies of the completed jury verdict forms. *State ex rel. Lumbus v. Jackson*, 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318. The respondent parties moved for dismissal of the

mandamus action indicating that the judge, and not the clerk, was in possession of the original jury verdict forms. *Id*. The clerk argued she had no duty to produce documents that are not in her possession, and the trial judge argued that he had no duty to produce copies of the verdict forms without a request being made pursuant to R.C. 149.43(B)(8). The Ohio Supreme Court granted the motion to dismiss. *Id.*

{¶9} There is no indication that appellate counsel did not review the jury verdict forms. Further, even though the verdict forms were not filed pursuant to Crim.R. 55, the record of the proceedings fully disclose the delivery and acceptance of the jury's verdict and the final judgment. Lumbus has failed to identify or allege any invalidity in the verdicts as reflected by the proceedings.

{¶10} Accordingly, he has not satisfied either prong of the *Strickland* test and, therefore, the application to reopen is denied.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, J., CONCURS;
MARY EILEEN KILBANE, P.J., CONCURS
(SEE ATTACHED CONCURRING OPINION)

MARY EILEEN KILBANE, P.J., CONCURRING:

{¶11} I concur with the judgment of the majority, but I write separately to express my concern regarding the failure to file the jury verdict forms with the clerk of courts. The filing of the jury verdict forms is a ministerial act, but an important one. *State v. Wright*, 8th Dist. Cuyahoga No. 93068, 2011-Ohio-3575. In order to ensure a full and

complete record, the jury verdict forms should, at the very least, be filed with the clerk of the courts, especially if they are being maintained separately from the file by the judge.