

[Cite as *State v. Winters*, 2016-Ohio-5921.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102871

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TROY WINTERS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-583833-B
Application for Reopening
Motion No. 497067

RELEASE DATE: September 19, 2016

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶1} Troy Winters has filed a timely application for reopening pursuant to App.R. 26(B). Winters is attempting to reopen the appellate judgment that was rendered in *State v. Winters*, 8th Dist. Cuyahoga No. 102871, 2016-Ohio-928, that affirmed his convictions for felonious assault and discharging a firearm on or near a prohibited premises, with firearm specifications. The state has opposed reopening and for the reasons that follow, the application is denied.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, the applicant 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).

{¶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} Winters raises two related proposed assignments of error in support of his App.R. 26(B) application for reopening. He has failed to establish ineffective assistance of appellate counsel through his two proposed assignments of error._

{¶5} Winters alleges that his appellate counsel should have alleged that trial counsel was ineffective for not moving to bifurcate his trial from his codefendant's trial, and the trial court's alleged error for not sua sponte granting a bifurcation.

{¶6} As the state points out, Winters is alleging that his charges should have been severed from the codefendant's charges and then proceeded to separate trials. Therefore, Winters is really arguing that error occurred because his trial was not severed from codefendant David Capp's trial.

{¶7} To demonstrate that a trial court erred by denying a motion to sever, a defendant

“must affirmatively demonstrate (1) that his rights were prejudiced, (2) that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial.”

State v. Schaim, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992), citing *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981).

{¶8} Winters bases his arguments upon affidavits created after this court already affirmed his convictions on appeal. Therein, Winters and Capp aver that Capp would have testified that Winters “was not present at the crime scene at any time during the shooting, nor at any time that day.” This evidence is nowhere in the appellate record.

Further, there was no motion to sever ever filed in the trial court, and Winters has failed to demonstrate that this issue was raised at any time in the trial court proceedings. The motion to bifurcate that Winters filed pro se sought to exclude any reference at trial to any notice of prior conviction specifications and did not mention codefendant Capp or his proposed testimony. Similarly, the notice of alibi that was filed on February 27, 2015, simply indicated that Winters was at the Justice Center at the time of the crime. Winters's witness list was filed on March 19, 2015, and did not identify codefendant Capp as a potential witness. Finally, Capp did not testify at trial.

{¶9} Winters has not satisfied the standard for reopening.

{¶10} Crim.R. 8 permits joinder of defendants where they are alleged to have participated in the same act or series of acts constituting an offense or in the same course of criminal conduct. Crim.R. 14 provides for a court to order separate trials if the state or defendant are prejudiced by the joinder. The defendant must show "clear, manifest and undue prejudice and violation of a substantive right resulting from failure to sever" and the decision to deny a motion to sever will not be reversed absent a clear showing of an abuse of discretion. *State v. Byrd*, 8th Dist. Cuyahoga No. 71789, 1998 Ohio App. Lexis 1726 (Apr. 23, 1998).

{¶11} He cannot establish that his appellate counsel was ineffective for not raising the issue. First, there was no motion filed for separate trials and there is no evidence in the record regarding Capp's proposed testimony. The trial court did not have any evidence, let alone sufficient evidence from which it could have concluded that the

joinder was prejudicial based on Capp's testimony. Secondly, the evidence Winters relies upon is outside the appellate record. 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 *The 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). "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.

{¶12} Winters has also failed to demonstrate any prejudice.

{¶13} Winters's claim that he was prejudiced because he was denied the opportunity to call his codefendant to testify as a result of the joinder is without merit. *Accord State v. McCrary*, 2d Dist. Montgomery No. 23360, 2010-Ohio-2011, ¶ 24. There is no indication that Capp's alleged testimony would have had any exculpatory effect nor can we presume he would have testified at a separate trial. As was the situation in *McCrary*, Winters's contention presupposes that had the cases been severed, Capp would not have asserted his Fifth Amendment rights. This court has previously observed that "co-defendants could not be forced to testify because they could still assert their Fifth Amendment right against self-incrimination." *Byrd, supra*. Where the

codefendant chose not to testify at the joint trial, there was a likely possibility that he or she would have exercised their Fifth Amendment rights if called upon to testify at a separate trial.

{¶14} The jury and this court already addressed Winters’s defense at trial, which “centered on him not committing the act and the state prosecuting the wrong person.” *Winters*, 8th Dist. Cuyahoga No. 102871, 2016-Ohio-928, ¶ 40. We noted that his alibi witness did not establish his whereabouts at the time of the shooting. *Id.* at ¶ 21. Further, the trial included the eyewitnesses testimony of Hayne who was familiar with Winters and identified him as the shooter. *Id.* at ¶ 19, 29.

{¶15} Winters has not met the standard for reopening pursuant to App.R. 26(B).
Accordingly, his application for reopening is denied.

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
SEAN C. GALLAGHER, J., CONCUR