

[Cite as *State v. Calvin*, 2016-Ohio-805.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100296

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MANDELL D. CALVIN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-09-523916
Application for Reopening
Motion No. 487464

RELEASE DATE: March 1, 2016

FOR APPELLANT

Mandell Calvin
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ATTORNEYS FOR APPELLEE

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Cuyahoga County Prosecutor
By: James D. May
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KATHLEEN ANN KEOUGH, J.:

{¶1} Applicant Mandell Calvin seeks to reopen his appeal in *State v. Calvin*, 8th Dist. Cuyahoga No. 100296, 2015-Ohio-2759, where this court affirmed his plea but remanded for resentencing. The state opposes the application. The application to reopen is denied for the reasons that follow.

{¶2} Calvin argues that appellate counsel was ineffective for failing to challenge the validity of his plea because the trial court allegedly accepted his guilty plea without determining allied offenses pursuant to R.C. 2941.25. He contends the identity fraud and theft counts are allied offenses because the court did not properly amend the counts to identify the different victims.

{¶3} The state opposes the motion to reopen. Calvin later moved to supplement his application to raise additional issues concerning restitution, which is denied as beyond the page limitations of App.R. 26(B), as well as being untimely without good cause.

{¶4} In order to establish a claim of ineffective assistance of appellate counsel, Calvin 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 768 (1990).

{¶5} 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* at 688.

{¶6} Calvin's arguments that the trial court did not grant the state's motion to amend the indictment to reflect the various victims is without merit. The record clearly demonstrates that the plea agreement involved amendments to Counts 5, 9, 13, 15, 16, and 26 to identify separate victims. The state expressed its appreciation to the court for allowing the amendments in order to present the plea. Calvin's trial counsel stated, "it's [Calvin's] desire at this time to withdraw his formerly-entered plea of not guilty and enter pleas of guilty to the plea deal *as articulated by the State of Ohio*." (Emphasis added.) Calvin acknowledged that it was his intention to plead guilty to the amended indictment. Notably, Calvin is not disputing other amendments that were part of the plea agreement that reduced Counts 2 and 9 to crimes of lesser degrees. The sentencing journal entry reflects that the various counts were amended to include the individual victim's names.

{¶7} The court specifically advised Calvin that the multiple counts would not merge and that he could receive consecutive sentences for each count. Because Calvin's plea agreement involved counts that involved separate victims, they do not constitute allied offenses.

{¶8} "Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph two of the syllabus. Further, where the defendant fails to raise an objection regarding the nonmerger of alleged allied offenses of similar import, he waives all but plain error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860,

¶ 4. Based on the record, Calvin has not established any error with regard to allied offenses, let alone plain error.

{¶9} Calvin has not met the standard necessary for reopening the direct appeal with regard to the alleged invalidity of the plea based on an allied offense argument. His appellate counsel was not ineffective for raising this as an additional challenge to the validity of the plea because the indictment was amended to identify different victims in each count. We additionally note that even if Calvin had timely asserted his arguments regarding restitution, they are equally unavailing. Defense counsel specifically stated that Calvin had no objection to the amount of restitution calculated by the state. Where the defendant enters into a negotiated plea and does not challenge the amount of restitution, there is no error, plain or otherwise, to the imposition of the restitution amount. *E.g., State v. St. Martin*, 8th Dist. Cuyahoga No. 96834, 2012-Ohio-1633, ¶ 10 (affirming the imposition of restitution that was beyond the statutory amount where defendant entered a negotiated plea and did not object to the amount).

{¶10} The application to reopen is denied.

KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., A.J., and
ANITA LASTER MAYS, J., CONCUR