[Cite as *State v. Doumbas*, 2016-Ohio-956.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100777

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARC DOUMBAS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-571014-C
Application for Reopening
Motion No. 490430

BEFORE: Dorrian, P.J., Klatt, J., and Sadler, J.*
(*Sitting by assignment: Judges of the Tenth District Court of Appeals)

RELEASED AND JOURNALIZED: March 7, 2016

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ON APPLICATION FOR REOPENING

JULIA L. DORRIAN, P.J.:

{¶ 1} Defendant-appellant, Marc Doumbas, has filed a timely application for reopening of his appeal based on a claim of ineffective assistance of appellate counsel. Because we conclude that appellant has failed to establish a colorable claim of ineffective assistance of appellate counsel, we deny the application for reopening.

{¶ 2} Appellant was tried on three counts of bribery and found guilty by a jury on two of the three counts. *State v. Doumbas*, 8th Dist. Cuyahoga No. 100777, 2015-Ohio-3026, ¶ 10. Appellant filed a direct appeal of the judgment, alleging that the trial court erred by admitting or excluding certain evidence and testimony, that his trial counsel was ineffective, and that the verdicts were not supported by sufficient evidence and were against the manifest weight of the evidence. *Id.* at ¶ 11. This court overruled appellant's six assignments of error and affirmed the trial court's judgment. *Id.* at ¶ 69. Appellant's codefendant, G. Timothy Marshall, was convicted at the same trial on two counts of bribery; this court affirmed the convictions on direct appeal. *State v. Marshall*, 8th Dist. Cuyahoga No. 100736, 2015-Ohio-2511, ¶ 12, 88.

{¶ 3} Appellant now seeks to reopen his appeal, pursuant to App.R. 26(B), which provides that a defendant in a criminal case may apply for reopening of an appeal based on a claim of ineffective assistance of appellate counsel within 90 days from journalization of the appellate judgment. A defendant must establish a colorable claim

of ineffective assistance of counsel in order to prevail on an application for reopening. *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, ¶ 7, citing *State v. Spivey*, 84 Ohio St.3d 24, 25 (1998). The defendant must set forth "[o]ne 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." App.R. 26(B)(2)(c).

{¶ 4} Reopening of an appeal will be granted "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel." App.R. 26(B)(5). The test for ineffective assistance of counsel requires a defendant to prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for reopening and that there was a reasonable probability of success had that issue been raised on appeal. *Spivey* at 25.

{¶ 5} Appellant sets forth two proposed assignments of error that he asserts should have been raised on direct appeal. Under the first proposed assignment of error, appellant claims that the trial court's jury instructions on the elements of bribery violated his right to due process. The statute defining the crime of bribery provides, in relevant part, that "[n]o person, with purpose to corrupt a witness or improperly to influence a witness with respect to the witness's testimony in an official proceeding, either before or

after the witness is subpoenaed or sworn, shall promise, offer, or give the witness or another person any valuable thing or valuable benefit." R.C. 2921.02(C). Appellant argues that the "with respect to the witness's testimony in an official proceeding" portion of the statute applies to both acts taken to "corrupt" a witness and acts taken to "improperly influence a witness," but that the trial court improperly instructed the jury that it only applied to the latter.

{¶ 6} With respect to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting the most promising arguments and focusing on one central issue or, at most, a few key issues. *State v. Barrow*, 8th Dist. Cuyahoga No. 101356, 2015-Ohio-4579, ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). *See also State v. Ware*, 8th Dist. Cuyahoga No. 99374, 2014-Ohio-815, ¶ 5 ("Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal."). In reviewing the issues raised in appellant's direct appeal, it seems clear that his appellate counsel elected to focus on the quantity and quality of the state's evidence. The direct appeal raised the issues of weight and sufficiency of the evidence, along with admission or exclusion of certain pieces of evidence or testimony. Even the assignment of error asserting ineffective assistance of trial counsel involved claims that appellant's trial counsel should have objected to or sought to exclude certain evidence and testimony. *Doumbas* at ¶ 63. Under these circumstances, we cannot conclude that appellant's counsel was ineffective by choosing not to expand the scope of the direct

appeal to incorporate a jury instruction issue involving statutory construction of the bribery statute.

{¶ 7} Moreover, appellant's codefendant raised this issue in his direct appeal and this court rejected the argument. *See Marshall* at ¶ 43-49. We concluded that "a requirement that all acts of bribery in violation of R.C. 2921.02(C) be 'with respect to the witness's testimony' would render the corrupting a witness form of bribery superfluous and meaningless." *Id*. at ¶ 47.

{¶ 8} Accordingly, appellate counsel was not ineffective for not asserting the first proposed assignment of error.

{¶ 9} In his second proposed assignment of error, appellant argues that he was denied effective assistance of trial counsel because his trial counsel failed to object to George Jonson's qualifications as an expert witness and failed to request proper jury instructions.

{¶ 10} The state called Jonson as a witness and the trial court admitted him as an expert in "Ohio law and specifically legal ethics." *Doumbas* at ¶ 56. On direct appeal, appellant challenged the admission of Jonson's testimony, arguing that the trial court abused its discretion by admitting the testimony because it was irrelevant. *Id*. at ¶ 57. We considered this argument under the plain error standard because, for the most part, appellant's trial counsel did not object to Jonson's testimony. *Id*. at ¶ 58. We concluded that Jonson's testimony was relevant and helpful for the jury to understand a relevant factual issue in the case — i.e., whether payments offered to alleged sexual

assault victims were ethically and legally permissible attempts to settle potential civil claims against the alleged offender. *Id*. at ¶ 59.

{¶ 11} Appellant now argues in his second proposed assignment of error that his trial counsel was ineffective by not seeking to exclude Jonson because Jonson lacked expertise in criminal law and his trial testimony necessarily required expertise in that area of the law. We addressed this argument in ruling on a motion for reopening filed by appellant's codefendant. As we explained in that decision, an expert witness is not required to be the *best* witness on a subject. Rather, the test is whether a particular witness offered as an expert will aid the trier of fact in the search for the truth. *See Marshall*. Jonson's testimony focused on the ethics of appellant's conduct under the Ohio Rules of Professional Conduct. As we explained in our prior decision, this testimony was relevant to the jury's evaluation of appellant's defense that to the extent any payments were offered to sexual assault victims, they were ethically and legally permissible attempts to settle potential civil claims against the alleged offender. *Doumbas* at ¶ 59. Because Jonson's testimony would have been relevant and helpful in determining that issue, appellant's trial counsel was not ineffective for failing to seek to exclude Jonson. "It is well settled that appellate counsel is not required to raise and argue assignments of error that are meritless." *Ware* at ¶ 5. Therefore, appellate counsel was not ineffective for failing to assign this meritless argument as error.

{¶ 12} Appellant also argues in his proposed second assignment of error that his trial counsel was ineffective by failing to request a jury instruction stating that "the law

generally permits a criminal defendant to negotiate and consummate civil assignments." (Application for Reopening, 8.) This issue was raised on direct appeal by appellant's codefendant. *See Marshall* at ¶ 50-51. Applying the plain error standard because Marshall's counsel failed to request such an instruction at trial, we concluded that Marshall failed to provide any legal support within Ohio to demonstrate that the proposed instruction was a correct statement of the law. Marshall's citations to decisions from outside Ohio were unpersuasive because the statutes in each of those states differed widely from Ohio's bribery statute. *Id*. at ¶ 50. In his application for reopening, appellant similarly fails to cite any authority from Ohio demonstrating that the proposed jury instruction is a correct statement of the law. If appellant's trial counsel had requested such a jury instruction, he likewise would have lacked authority to support the proposed instruction. Appellate counsel was not ineffective for failing to assign this meritless argument as error in the direct appeal.

{¶ 13} Appellant has not established a colorable claim of ineffective assistance of counsel and has not met the standard for reopening under App.R. 26(B). Accordingly, we deny appellant's application for reopening.

{¶ 14} Application for reopening denied.

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JULIA L. DORRIAN, PRESIDING JUDGE

WILLIAM A. KLATT, J., and
LISA L. SADLER, J., CONCUR*

*(Dorrian, Klatt and Sadler, Judges
of the Tenth Appellate District, sitting by
assignment in the Eighth Appellate District.)