

[Cite as *State v. Vaughn*, 2017-Ohio-1356.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103330

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KAIN K. VAUGHN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-593122-B
Application for Reopening
Motion No. 498765

RELEASE DATE: April 12, 2017

FOR APPELLANT

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PATRICIA ANN BLACKMON, J.:

{¶1} On August 2, 2016, the applicant, Kain Vaughn, pursuant App.R. 26(B), applied to reopen this court's judgment in *State v. Vaughn*, 8th Dist. Cuyahoga No. 103330, 2016-Ohio-3320, in which this court affirmed Vaughn's convictions for two counts of aggravated robbery with three-year firearm specifications, two counts of aggravated robbery with one-year firearm specifications, and one count each of kidnapping, vandalism, having a weapon while under disability, attempted having weapons while under disability, receiving stolen property, and intimidation of a witness with a one-year firearm specification. This court, however, remanded for correction of the sentence.¹ Vaughn now claims that his appellate counsel improperly argued that the trial court erred in imposing consecutive sentences because the trial judge misread Vaughn's juvenile record. The state of Ohio filed its brief in opposition. For the following reasons, this court denies the application.

{¶2} 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

¹At the sentencing hearing, the trial judge imposed a 26-year sentence as follows: 11 years for the robbery convictions plus three years for the accompanying three-year firearm specification, consecutive to 11 years for kidnapping plus one year for the one-year firearm specification for intimidation; all other sentences were concurrent. However, the sentencing entry imposed a 45.5-year sentence. Thus, this court upheld the first assignment of error that the sentencing entry differed from the sentence imposed in the sentencing hearing and remanded to issue a nunc pro tunc journal entry imposing the hearing sentence. This court also noted that R.C. 2929.14(B)(1)(g) required that the two 3-year firearm specifications had to be served consecutively.

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.

{¶3} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "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 689.

{¶4} Specifically, in regard 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 what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional

judgments and impose on appellate counsel the duty to raise every “colorable” issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶5} To establish prejudice the applicant must show that 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.

{¶6} On October 19, 2014, Vaughn and a codefendant robbed two food marts, during which they tried to destroy the security cameras at both stores. After one of the robberies, they kidnapped one of the victims to be the getaway driver. Vaughn pleaded guilty to the above-listed offenses. At the sentencing hearing, the state was able to display some of the footage from the security camera from one of the food marts. Although the audio was poor, the prosecutor proffered that the footage revealed Vaughn and his codefendant discussing whether they should kill the victims and that a gunshot could be heard.

{¶7} During the sentencing, the trial judge reviewed Vaughn’s presentence investigation report (“PSI”) and his juvenile delinquency adjudications. First, she mentioned that he had an aggravated robbery with a burglary in January 2012. The report shows robbery (F-2)/burglary w/ct theft under two different case numbers:

DL12100409 and DL12118433. The judge stressed that these were two different cases.

She then mentioned that he also had a delinquency adjudication for domestic violence (Case No. DL12119350, arrested

December 24, 2013) and put on probation. The judge then stated that he had another robbery with kidnapping and an aggravated robbery with menacing, kidnapping, carrying a concealed weapon, receiving stolen property, and having weapons while under disability. The PSI shows that Vaughn was arrested for these latter offenses on October 22, 2014. A review of the case numbers for October 2014 delinquency charges are the same numbers for which Vaughn is bound over for the instant matter. The judge further noted that while on probation, Vaughn violated three times, tested positive for drugs, and fought at a treatment facility in Toledo. (Tr. 56.)

{¶8} The judge then showed Vaughn the PSI and declared that “these are not the ones you’re charged with now.” (Tr. 57.) Furthermore, when the judge imposed sentence in making the necessary findings for consecutive sentences, she found

that consecutive sentences are necessary to protect the public from future crimes. The court does find that he has three prior adjudications of delinquency in the Cuyahoga County Juvenile Court. Each is different, and they have not deterred him. The court finds consecutive sentences are necessary to punish the offender. The court finds that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct.

(Tr. 64.)

{¶9} Vaughn complains that the trial court improperly weighed the notations in the PSI concerning his juvenile delinquency charges for October 2014. By mentioning the

charges and indicating that he had committed armed robbery more than once, the trial judge must have relied, in part, upon the October 2014 juvenile charges for imposing consecutive sentences. In essence, Vaughn argues that the current charges were counted double against him.

{¶10} Vaughn's appellate counsel in the second assignment of error did argue that the trial court erred in imposing consecutive sentences, but he did not include the "double counting." Instead, appellate counsel generally argued that the record did not support the imposition of consecutive sentences, and specifically, he argued that Vaughn's codefendant was the main perpetrator, that no one was injured, and that none of the victims appeared at trial to describe the harm done to them. Thus, Vaughn argues that his appellate counsel was ineffective for omitting a well-taken and unfair point against him in arguing that the consecutive sentences were improper.

{¶11} However, the judge in making the actual findings while imposing sentence, did not rely on the October 2014 charges. She mentions only the three prior adjudications of delinquency, DL12100409 and DL12118433, robbery with burglary and theft, and DL12119350, domestic violence. If she had relied on the October 2014 charges, she would have stated at least four prior adjudications. This precise use of the prior charges shows that no double counting was used to fashion the consecutive sentences. Following the admonition of the United States Supreme Court, this court will not second guess appellate counsel's tactical decision not to include "double counting" in his argument, when the trial judge did not do that in imposing sentence.

{¶12} Moreover, Vaughn has not established prejudice. Vaughn was on probation for robbery, burglary, theft, and domestic violence when he committed the subject crimes. He committed two separate armed robberies of food marts on the same day. In those, he participated in damaging the stores' cameras to conceal his criminal activity. He further kidnapped one of the victims to be the getaway driver, after discussing whether to kill him. These factors alone provide more than sufficient reason to impose consecutive sentences, and Vaughn's argument does not undermine this court's confidence in the outcome of the case.

{¶13} Accordingly, this court denies the application to reopen.

PATRICIA ANN BLACKMON, JUDGE _____

TIM McCORMACK, P.J., and
SEAN C. GALLAGHER, J., CONCUR