[Cite as *State v. Cody*, 2017-Ohio-1543.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100797

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN DONALD CODY, A.K.A. BOBBY THOMPSON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-12-565050-A
Application for Reopening
Motion No. 491304

RELEASE DATE: April 21, 2017

FOR APPELLANT

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} In September 2015, the applicant, John Cody, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Thompson,* 2015-Ohio-2261, 34 N.E.3d 189 (8th Dist.), in which this court affirmed his convictions for engaging in a pattern of corrupt activity, complicity to commit theft, tampering with records, complicity to tamper with records, second-degree identity fraud, and seven counts of complicity to commit money laundering; vacated 11 convictions of identity fraud; and modified his sentence.[1] This was a 513-page, hand-written application to reopen claiming ineffective assistance of appellate counsel. This court struck that application and ordered him to file a ten-page application with a supporting affidavit as allowed by the appellate rules. Cody complied with that order, and the state of Ohio has filed a brief in opposition.

{¶2} Using the pseudonym Bobby Thompson, Cody organized a charity called the United States Navy Veteran's Association ("USNVA"). Using professional fund-raisers, the USNVA collected millions of dollars, including approximately $2,000,000 from Ohioans. Cody deposited the money collected for the USNVA into various bank accounts. Then he and a codefendant withdrew money from the accounts, and the money could no longer be traced. During the relevant time, Cody moved around the country, including Florida and Oregon. When he was arrested in Oregon in April 2012, he had identification papers for multiple people and over $900,000 in cash.

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[1]John Cody is the defendant's real name. Bobby Thompson was a pseudonym Cody used.

{¶3} On July 25, 2012, the grand jury indicted Cody in *State v. Thompson*, Cuyahoga C.P. No. CR-12-565050-A.[2]

{¶4} 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 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.

{¶5} 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.

{¶6} 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

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[2]However, the state of Ohio had been aware of his wrongdoing for some time and had been investigating him. The Cuyahoga County Grand Jury had indicted him on similar charges on December 27, 2010. These charges were pending when he was arrested and brought to Ohio.

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.

{¶7} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: 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.

{¶8} Cody’s first claim is that his appellate counsel failed to argue that the state suppressed exculpatory material. Cody maintains that throughout the relevant period of time he was working for the CIA and, thus, he had lawfully been assigned cover identities, including the ones for the identity fraud charges. Cody also maintains that if the

state had not suppressed the CIA information, the jury would have been convinced that he lacked the criminal intent for the theft charges. Cody further claims that the trial court improperly quashed subpoenas of witnesses on this CIA defense, that the subpoenaed witnesses would have testified as to his and the USNVA's work for the CIA and would have eliminated criminal intent. A court is not required to accept as true that which is incredible. *Black v. Berea,* 137 Ohio St.611, 32 N.E.2d 1 (1941); *State v. Mattison*, 23 Ohio App.3d 10, 490 N.E.2d 926 (8th Dist.1985); and *Schaefer v. Cincinnati S.R. Co.*, 75 Ohio App. 288, 62 N.E.2d 102 (1st Dist.1945). So too, counsel in the exercise of professional judgment need not raise arguments that are incredible.

{¶9} Cody's claim that the state suppressed the USNVA's website is countered by the state's affirmation that it provided a complete copy of the website's printout version in the course of discovery. (Pg. 5-6 state's brief in opposition to application to reopen.) Moreover, Cody's assertion that the website would have established his CIA defense is countered by the principle that a court and counsel need not accept as true the incredible.

{¶10} As a variant on this argument, Cody maintains that the lack of resources and lack of attorneys resulted in the suppression of exculpatory evidence and in the involuntary ineffectiveness of trial counsel, because he and his counsel could not get the necessary evidence to properly defend the charges. He refers to the hearing made on the record by his first appointed counsel who moved to withdraw from the case. That counsel declared that he could not represent Cody in good faith because the defense would require thousands of hours of preparation, and he could not fulfill that role while

also representing other clients, even if additional funds were paid. This argument is not persuasive, because it requires too much speculation on what could have been found, what could have been done, what could have been argued, and how that would necessarily have affected the trial. Speculation does not establish prejudice. *State v. Abdul,* 8th Dist. Cuyahoga No. 90789, 2009-Ohio-225, *reopening disallowed,* 2009-Ohio-6300; *State v. Thompson*, 8th Dist. Cuyahoga No. 79334, 2002-Ohio-5957, *reopening disallowed,* 2003-Ohio-4336; and *State v. Piggee,* 8th Dist. Cuyahoga No. 101331, 2015-Ohio-546.

{¶11} Cody's next assignment of error is that he was forced to stand trial while he was incompetent. The record in this case does not support that argument. On July 12, 2012, the trial judge referred Cody to the court psychiatric clinic to determine competency to stand trial. After the evaluation took place, defense counsel and the state stipulated to the competency report on August 21, 2012. Throughout the proceedings, Cody raised the issue of representing himself.[3] Eventually, on January 30, 2013, after repeatedly and thoroughly reviewing the matter, the judge allowed Cody to represent himself with assigned counsel, Mr. Patituce, as advisory counsel. Cody then inundated the court with motions for discovery, dismissal, in limine, suppression, grand jury transcripts, and assistance, and with reply briefs to the state's opposition briefs.[4] Cody also filed a

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[3]Evidence was presented at trial that Cody had attended law school and had practiced law for awhile.

[4]Cody filed over 120 pro se motions during the course of the proceedings. In some of these motions, he had the foresight to try to form the foundation of appellate arguments.

mandamus action and an affidavit of disqualification of the trial judge. Cody then on August 26, 2013, stopped representing himself and accepted appointed counsel for trial, which commenced on September 30, 2013. Reviewing the transcripts of the pretrial hearings while Cody represented himself shows that his comments were thoughtful, pertinent, intelligent, and articulate. At the end of the trial, the judge noted that Cody played an active role in his defense, paying close attention to the evidence, taking notes, conferring with counsel, and providing information and suggestions for cross-examination. (Tr. 4513.) These are not the actions of an incompetent person. Thus, appellate counsel in the exercise of professional judgment could decide not to raise this argument.

{¶12} Cody further argues that the trial court placed him in solitary confinement, which further drove him insane and undercut his ability to represent himself. The docket shows that on March 19, 2013, the trial judge issued an order that "[d]efendant is restricted to have no contact by phone, mail or social visits." Cody describes the horrible effect this had on him in his supporting affidavit. Nevertheless, it is understandable why appellate counsel would not raise this as an assignment of error. As explained above, the record does not support the proposition that Cody was going insane before trial, much less that his solitary confinement was causing it. Cody referred to his solitary confinement in his motions and at pretrials, but did not dwell at length on the deleterious effect it was having on his mind. Thus, this proposition was better suited to the postconviction relief petition he filed; indeed, he raised this argument there, too.

Finally, it is difficult to discern how the solitary confinement prejudiced the outcome of the trial or the appeal.

{¶13} Cody also argues that he was denied his right to testify on his own behalf. When the state rested its case, the judge asked Cody directly whether he wished to testify; the judge noted that throughout the proceedings Cody indicated he wanted to testify. However, Cody refused to answer the judge's question directly. Instead, he whispered into his counsel's ear, after which counsel said that Cody wished to answer the charges against him. Again, the judge directly asked Cody if he wanted to testify, and again he whispered into his attorney's ear and did not answer the judge directly. After taking a break to allow Cody to better his appearance[5] and to further consult with his attorney, Cody's lawyer said that it was his understanding that Cody would not be taking the stand. Cody did not object to these proceedings. (Tr. 4314-4322.) This record does not support an argument that the trial court denied Cody's right to testify, and appellate counsel in the exercise of professional judgment could decline to raise it.

{¶14} Cody's next assignment of error is difficult to discern. He argues that pursuant to *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *State v. Smith,* 8th Dist. Cuyahoga No. 98093, 2012-Ohio-5420, the trial court erred in allowing him to represent himself or in the alternative deprived him of his right to self-representation by driving him insane through the solitary confinement order. To the extent that Cody argues that the trial court erred by allowing Cody to represent himself,

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[5]The record indicates that Cody appeared disheveled that day in court.

the argument is ill-founded. The judge and Cody reviewed the risks of self-representation, and the judge finally granted Cody's motion. The record indicates that Cody received legal training at Harvard Law School and practiced criminal law outside of Ohio. The record also shows that while he represented himself, he resorted to multiple legal remedies, endeavored to reach a plea agreement, and conducted himself well during pretrials. To the extent that he argues that the trial court deprived him of his right to self-representation, the argument is not supported by the record. As discussed previously, the record does not show that Cody was going insane during the summer of 2013. Throughout the proceedings, Cody and the trial judge discussed self-representation, and on August 26, 2013, when the trial judge asked Cody if it was his intention to proceed pro se or to have Mr. Patituce resume primary representation, Cody replied: "Thank you, your honor. I wish to turn the case over to Mr. Patituce." (Tr. 493.) Accordingly, this assignment of error is ill-founded.

{¶15} Cody further argues that the trial court's failure to rule on all of the outstanding motions before trial deprived him of his right to a fair trial and due process, pursuant to *State v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002). However, *Ruiz* holds that under the United States Constitution, the federal government need not disclose impeaching information before a defendant pleads guilty, not that a trial court must rule on all pending motions before trial. Moreover, under Ohio law hybrid representation — a criminal defendant may represent himself while also being represented by counsel — is prohibited. Thus, after August 26, 2013, when Cody turned

the case over to appointed counsel, all of his pro se motions were no longer properly before the court. *State v. Martin,* 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, and *State v. Pizzaro,* 8th Dist. Cuyahoga No. 94849, 2011-Ohio-611. This court further notes that under Ohio law any pending motions upon disposition of the case are deemed denied. In *State ex rel. V Cos. v. Marshall,* 81 Ohio St.3d 467, 692 N.E.2d 198 (1998), the Supreme Court of Ohio ruled that the trial court did not commit reversible error by failing to rule on discovery motions, because, inter alia, those motions were deemed denied with the disposition of the case. Thus, appellate counsel in the exercise of professional judgment could decline to argue this point.

{¶16} Cody then argues that there was insufficient evidence and lack of jurisdiction to convict him of Count 12, identity fraud, in Ohio using the name Bobby Thompson. His reliance *Strassheim v. Daily*, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed.735 (1911), is misplaced.[6] In *Daily*, the United States Supreme Court stated that obtaining money under false pretenses warrants punishment by the aggrieved state even if the offender did not come into the state until after the fraud was complete. Furthermore, the state of Ohio showed that Bobby Thompson was not Cody's name and that he used Bobby Thompson in submitting multiple registrations and records to Ohio to allow the USNVA to collect money in Ohio. (Tr. 2951-3000.) This argument is meritless.

{¶17} Cody argues that his case should have been dismissed for lack of a speedy trial. R.C. 2945.71(C)(2) requires that the state bring a person charged with a felony to

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[6]Cody incorrectly cited *Daily* as 331 U.S. 280.

trial within 270 days after the person's arrest. Under subsection (E), each day the person is held in jail counts as three days. Cody never made bail, so each day is subject to the triple-count provision. However, the time period may be waived or extended under R.C. 2945.72. If Cody can establish that more than 90 days elapsed after allowing for all waivers and extensions, his claim may have merit. The time for speedy trial begins to run when the accused is arrested, but the actual day of the arrest is not counted. *State v. Canty*, 7th Dist. Mahoning No. 08-MA-156, 2009-Ohio-6161. The court also notes that when a defendant waives his right to a speedy trial in one case, the waiver does not apply in a subsequent case based on the same facts and circumstances as the first case. Nevertheless, when a defendant files a motion in one case that statutorily tolls the speedy trial time, such tolling will apply in a subsequent case based on the same facts and circumstances. The tolling provisions of R.C. 2945.72 apply regardless of whether the defendant also waives time. *State v. Blackburn,* 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319; and *Canty* at ¶ 77.

{¶18} The parties agree that Cody was taken into Ohio's custody on May 4, 2012, and the time began to run on May 5.[7] At that time, Cuyahoga C.P. No. CR-12-545577 ("Case II") was pending against Cody.[8] On May 8, 2012, in Case II, Cody filed a demand for discovery and a motion for a bill of particulars, both of which

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[7]R.C. 2945.72(A) provides that speedy-trial time is extended by reason of the pendency of extradition proceedings.

[8]Cody was originally indicted in Cuyahoga C.P. No. CR-10-543025-A in October 2010.

extended the time until the state had a reasonable time to respond. Given the amount of discovery necessary in this case, a reasonable time to respond would be at least July 13, 2012. The court further notes that during that time, Cody's counsel filed a motion for additional counsel on May 23, 2012, and motion for leave to withdraw as counsel on June 27, 2012. Cody also filed approximately ten pro se motions, which could have also tolled the time under R.C. 2945.72(D).

{¶19} On July 13, 2012, the court granted defense counsel's motion to withdraw holding the case in abeyance until new counsel was appointed. Moreover, the court referred Cody to the court's psychiatric clinic to determine competence to stand trial. On July 25, 2012, the grand jury indicted Cody in the current case, and the court appointed Joseph Patituce as Cody's counsel on July 31, 2012. New counsel filed a motion for a bill of particulars on August 10, 2012. On August 21, 2012, the parties stipulated to Cody's competency. The trial court subsequently clarified that the competency evaluation applied to all cases and tolled the speedy-trial time on all cases. Tolling is also consistent with the Supreme Court's rulings in *Blackburn*. Thus, because of the overlapping tollings, only four days had elapsed from May 8, 2012, to August 21, 2012, in the current case.[9]

{¶20} Also on August 21, 2012, defense counsel moved to require the state to reveal any agreements entered into between the state and any witness or defendant.

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[9]On May 10, 2012, Cody waived speedy-trial time in Case II until December 31, 2012. However, *Blackburn* holds that waiver applies only to Case II.

Counsel also moved to dismiss the indictment on August 24, 2012, and in early September several motions to strike state motions were filed. More significantly, on September 12, 2012, the court continued the trial until

March 11, 2013, at the request of the defendant and stated the reason for the continuance was to allow necessary time to prepare for trial. While that continuance was in place, on January 30, 2013, Cody waived his speedy-trial rights until June 7, 2013. While that continuance was still in place, on April 22, 2013, Cody waived his speedy-trial right to December 31, 2013. His trial began on September 30, 2013. This chronology establishes that Cody was brought to trial well within the speedy-trial time limits.

{¶21} This chronology does not even consider the time during which Cody represented himself and inundated the court with motions or moved to have the judge disqualified. Accordingly, appellate counsel properly rejected this argument.

{¶22} Cody further complains that the mental competency examination initially ordered for Case II should not have been and could not have been also used for CR-565050, because the dates and charges differed from the two cases. This is unpersuasive because the order of competency was to determine competency to stand trial, not whether Cody was competent during the commission of the offenses. Additionally, the nature and times of the charged offenses were not that different. Furthermore, as mentioned above, Cody's actions throughout the proceedings were not those of an incompetent.

{¶23} Next, Cody asserts that his appellate counsel should have argued that the trial court erred in allowing Cody's protected medical and dental records to be introduced into evidence. During trial, the state called a plastic surgeon and a dentist. Both testified that Bobby Thompson had consulted with them, and they identified checks written by Bobby Thompson to them. The state did not elicit testimony concerning treatment or condition.

{¶24} The Supreme Court of Ohio in *Jenkins v. Metro. Life Ins. Co.,* 171 Ohio St. 557, 562, 173 N.E.2d 122 (1961), held that the privilege statute, R.C. 2317.02 does not prevent testimony by a physician as to the fact that he was consulted in a professional capacity by a person on a certain day. Thus, that aspect of the doctor's testimony was not privileged. Cody's reliance on *Baker v. Indus. Comm. of Ohio,* 135 Ohio St. 491, 21 N.E.2d 593 (1939), and *In re Loewenthal,* 101 Ohio App. 355, 134 N.E.2d 158 (8th Dist.1956), are misplaced; neither hold that checks or negotiable instruments, which are issued, used, and published by and to third parties, come within the scope of the physician-patient privilege. Nor could this court find any Ohio authority for that proposition. Accordingly, appellate counsel in the exercise of professional judgment could decline to raise this issue.

{¶25} For his next assignment of error, Cody claims that the charge of Count 2, theft, should have merged with the charges of money laundering, Counts 3-9. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1601, ¶ 49, the Supreme Court of Ohio changed the law of allied offenses by requiring courts to "determine

whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind,'" quoting *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50. In the current case, using the fake USNVA charity, Cody committed theft when he obtained the money from unsuspecting donors. He committed the crimes of money laundering subsequently and in separate acts when he withdrew and dispersed the money through bank withdrawals and issuing checks. Furthermore, the crimes of theft and money laundering are not necessarily allied offenses. *State v. Dabney*, 1st Dist. Hamilton No. C-140575, 2015-Ohio-4142. This argument is ill-founded.

{¶26} Cody also claims that appellate counsel should have argued that it was improper to impose a superfine of $6,345,114.57 and the costs of prosecution of $330,778.70 against an indigent defendant. However, R.C. 2923.32(B)(2) explicitly authorized the fines and the costs, and the trial judge specifically relied on that statute in imposing them, after he noted the millions of dollars that were taken, the amount of money unaccounted for, and the damage done to the good will of charities. Appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue, such as trying to declare a statute unconstitutional. *State v. Williams*, 74 Ohio App.3d 686, 600 N.E.2d 298 (8th Dist.1991); *State v. Munici,* 8th Dist. Cuyahoga No. 52579, 1987 Ohio App. LEXIS 9683 (Nov. 30, 1987), *reopening disallowed*

(Aug. 21, 1996), Motion No. 271268.

{¶27} Finally, Cody argues that his sentence was disproportionate because his co-accomplice was given a more lenient sentence. This argument is ill-founded, because Cody was the mastermind of the entire scheme and benefitted most by it. Comparing the two sentences was not warranted.

{¶28} Accordingly, this court denies the application.

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KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

MARY J. BOYLE, P.J., and
TIM McCORMACK, J., CONCUR