[Cite as *State v. Brown*, 2017-Ohio-4061.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103748

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARYL W. BROWN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-595913-A
Application for Reopening
Motion No. 500042

RELEASE DATE: May 31, 2017

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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FRANK D. CELEBREZZE, JR., J.:

{¶1} On September 13, 2016, the applicant, Daryl Brown, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Brown*, 8th Dist. Cuyahoga No. 103748, 2016-Ohio-5244, in which this court affirmed his convictions for aggravated vehicular homicide and failure to stop. Brown asserts that his appellate counsel should have argued the impropriety of amending the failure to stop indictment and trial counsel's failure to protect Brown's "due process at the grand jury and at sentencing with accurate information." The state of Ohio filed its brief in opposition on October 12, 2016. For the following reasons, this court denies the application.

{¶2} On May 9, 2015, Brown was driving a truck westbound on Miles Avenue in Cleveland, Ohio. Brown swerved the truck into the eastbound lanes and then made a left-hand turn onto East 114th Street. In doing so, Brown failed to yield the right of way to a motorcycle traveling eastbound on Miles Avenue. The truck collided with the motorcycle and mortally injured the driver. Brown stopped and walked to the rear of the vehicle. He paused momentarily, ran back to the truck, and drove away. He abandoned the truck in the driveway of a vacant home.

{¶3} The grand jury indicted Brown for aggravated vehicular homicide and failure to stop after an accident, pursuant to R.C. 4549.02(A). The latter indictment included the specification: "FURTHERMORE, and the violation resulted in the death of a person." (Emphasis sic.) R.C. 4549.02(B)(3)(a) provides : "If the accident or collision results in the death of a person, failure to stop after an accident is * * * a felony of the

third degree." Thus, the specification raised the level of the crime from a first-degree misdemeanor to a third-degree felony. Indeed, the indictment stated that this charge was a "F3."

{¶4} At the close of the state's case the prosecutor moved to amend the indictment by substituting "accident or collision" for "violation" to track the wording of the statute. Brown's counsel objected, arguing that the wording was an essential component of the greater offense and allowing the amendment would change the nature and identity of the charge. (Tr. 199-200.) The trial judge allowed the amendment relying on Crim.R. 7(D), which allows the judge to amend the indictment at any time during trial in respect to any defect, imperfection, or omission in form or substance provided no change is made in the name or identity of the crime charged.

{¶5} The trial judge found Brown guilty as charged of the two offenses. After reviewing Brown's lengthy criminal history, which included convictions for involuntary manslaughter, aggravated robbery, aggravated assault, and domestic violence, the judge sentenced him to eight years for aggravated vehicular homicide and 36 months for failure to stop after an accident to run concurrently.

{¶6} Now Brown argues that his appellate counsel was ineffective for not raising the following: (I) appellant's counsel failed to object when the state moved to amend the language in Count 2 (Failure to stop) to fall in line with the statute pursuant to Crim.R. 7(D), and (II) appellant was denied effective assistance of counsel where his appellate

counsel failed to raise the issue that trial counsel failed to protect the appellant's due process at the grand jury and at sentencing with accurate information.

{¶7} 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.

{¶8} 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.

{¶9} 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.

{¶10} 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.

{¶11} In the present case, Brown's arguments on ineffective assistance of appellate counsel are not well taken. As to his first assignment of error, to the extent that Brown argues that Crim.R. 7(D) was violated by amending Count 2 from "Failure to stop after accident" to "Stopping after Accident," the argument is meritless because it elevates form over substance and does not address the actual amendment made. To the extent that Brown argues that his trial counsel was ineffective for failing to object to the

amendment that was made, the argument is not well-founded, because trial counsel did object to the amendment and raised the issue again at sentencing. (Tr. 273.) Moreover, the language of the indictment and the specification provided sufficient notice to Brown as to the true nature of the offense. Thus, neither the failure to include the statute's entire language nor the amendment from "violation" to "accident or collision" prejudiced Brown. He knew the charge he was facing. The courts have repeatedly allowed amendments to charges to correct the statutory number among R.C. 4549.021, 4549.02, and 4549.03, when the true nature of the offense has been stated. *State v. Cooper*, 4th Dist. Ross No. 97CA2326, 1998 Ohio App. LEXIS 2958 (June 25, 1998); *State v. Muchmore*, 1st Dist. Hamilton No. C-140056, 2014-Ohio-5096; *State v. Gishnock*, 11th Dist. Lake No. 90-L-14-063, 1990 Ohio App. LEXIS 4888 (Nov. 9, 1990); and *State v. Shelton*, 12th Dist. Brown No. CA89-11-020, 1990 Ohio App. LEXIS 4062 (Sept. 17, 1990). Accordingly, appellate counsel was not deficient in declining to argue this point.

{¶12} The gravamen of Brown's second assignment of error is that the state presented fraudulent information before the grand jury and the trial court for purposes of enhancing the degree of the offense and the sentence. However, Brown never explicitly states what that fraudulent information was. He seems to argue that it was improper to use his conviction for involuntary manslaughter in *State v. Brown*, Cuyahoga C.P. No. CR-80-055252-A, because it is over thirty years old, but a review of the dockets shows that he pled guilty to that offense and the other offenses, including multiple convictions

for domestic violence. Nor does he dispute that he did not have a valid driver's license at the time of the subject accident. Thus, this argument is meritless.

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

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR