[Cite as *State v. Ledbetter*, 2017-Ohio-4291.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104077

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN C. LEDBETTER

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-594924-A
Application for Reopening
Motion No. 505092

RELEASE DATE: June 14, 2017

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶1} John C. Ledbetter has filed a timely application for reopening pursuant to App.R. 26(B). Ledbetter is attempting to reopen the appellate judgment, rendered in *State v. Ledbetter*, 8th Dist. Cuyahoga No. 104077, 2017-Ohio-89, that affirmed his plea of guilty and the sentence of the trial court imposed with regard to the offenses of drug trafficking, possession of criminal tools, and endangering children. We decline to reopen Ledbetter's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Ledbetter 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 767 (1990).

{¶3} 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*.

{¶4} Herein, Ledbetter has raised three proposed assignments of error in support of his application for reopening. Ledbetter's initial proposed assignment of error is that:

> Appellant was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution where his appellate counsel omitted a dead bang winner, prejudicing appellant to receive a full review by the court.

{¶5} Ledbetter, through his initial proposed assignment of error, has failed to raise any argument that would support his claim of ineffective assistance of appellate counsel. The simple statement that appellate counsel failed to raise a "dead bang winner" does not identify any deficient conduct on the part of appellate counsel. The mere recitation of a proposed assignment of error is not sufficient to meet an applicant's burden of establishing that his appellate counsel was deficient and that there existed a reasonable probability that he would have been successful. *State v. Mays*, 8th Dist. Cuyahoga No. 99150, 2014-Ohio-814; *State v. Harris*, 8th Dist. Cuyahoga No. 90699, 2008-Ohio-5873. Ledbetter, through his first proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced.

{¶6} Ledbetter's second proposed assignment of error is that:

> Trial court did not comply with the mandatory requirements of Criminal Rule 11 when accepting appellant's guilty pleas without making a proper finding under R.C. 2941.25.

{¶7} Ledbetter, through his second proposed assignment of error, argues that prior to accepting the pleas of guilty, the trial court was required to determine what offenses were allied offenses of similar import pursuant to R.C. 2941.25. Specifically, Ledbetter argues that "the trial court could not have properly explained the nature of the offenses and the maximum penalties involved until it resolved the issue of allied offenses of similar import."

{¶8} Contrary to Ledbetter's argument, there exists no requirement, pursuant to Crim.R. 11, to determine prior to accepting a plea of guilty what offenses will merge for sentencing. In fact, the Supreme Court of Ohio has opined that merger is a sentencing question.

> Merger is a sentencing question, not an additional burden of proof shouldered by the State at trial. * * * Nothing in Ohio's felony-sentencing statutes prohibits the litigation of merger at sentencing. To the contrary, R.C. 2929.19(B)(1) states that the trial court "shall consider * * * any information presented" by the defense or the prosecution at the sentencing hearing. Further, R.C. 2929.19(A) allows the state and the defendant to "present information relevant to the imposition of sentence in the case." On appeal from a felony sentence, the reviewing court "shall review the record," R.C. 2953.08(G)(2), which includes more than the evidence and arguments presented at trial. R.C. 2953.08(F)(3) provides that the record to be reviewed shall include "[a]ny oral or written statements made to or by the court at the sentencing hearing."

State v. Washington, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 12.

{¶9} In addition, a review of the guilty plea hearing clearly demonstrates that Ledbetter was informed of the nature of each charge and the maximum penalty involved with regard to each charge and that the issue of merger would be addressed at sentencing.

THE COURT: Do you understand that by virtue of this plea, there is mandatory imprisonment, as well as mandatory fines, forfeitures, mandatory driver's license suspension, mandatory post-release control? Have you discussed all of those things with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has she answered all of your questions?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Thank you. Ms. Billingsley.

MS. BILLINGSLEY: Thank you, Your Honor. May it please the Court. We are here in the matter of the State of Ohio versus John C. Ledbetter, Case No. 594924, a 2015 case. After full exchange of discovery and full pretrial with defense counsel, it is the understanding of the State of Ohio that the defendant will withdraw his formerly-entered plea of not guilty and enter a guilty plea to Count 1, trafficking, a felony of the fourth degree, a violation of ORC 2925.03(A)(1). The State of Ohio would ask this Court to nolle or dismiss all specifications on Count 1. The defendant also agrees to withdraw his formerly-entered plea of not guilty and enter a guilty plea to Count 2, a felony of the second degree, trafficking, a violation of ORC 2925.03(A)(2). The juvenile specification and the firearm specification will remain. The State would ask this Court to dismiss the schoolyard specification. The defendant will also change his plea to guilty to Count 4, trafficking, a felony of the fourth degree, a violation of ORC 2925.03(A)(2). The State would ask this Court to nolle or dismiss the specifications on this count. The defendant will also withdraw his formerly-entered plea of not guilty and enter a guilty plea to Count 7, a felony of the fifth degree, possessing criminal tools, in violation of ORC 2923.24(A). The defendant will also change his plea to guilty to Count 8, endangering children, a misdemeanor of the first degree, a violation of ORC 2919.22(A). The defendant further agrees to forfeit a cell phone in a drug case, money in a drug case, four guns in a drug case, as well as forfeit all property, $1,000 in U.S. currency, $354 in U.S. currency, $60 in U.S. currency and an additional cell phone, as well as the ammunition. Those items will be forfeited to the Cleveland Police Department. This is a packaged plea with co-defendant, Patricia Cianci. Your Honor, the State of Ohio would also like to place on the record that in connection with Count 2, the felony of the second degree, there is a mandatory license suspension for six months up to five years, as well as the defendant is required to serve

a mandatory prison term of one year, which will be served consecutive to the underlying offense, which for a felony of the second degree that is two to eight years incarceration.

THE COURT: Well, that's mandatory time too.

MS. BILLINGSLEY: Yes, Your Honor.

THE COURT: Because of the —

MS. JAMIESON: I believe it is — I just looked it up in the drug table. I believe it is a Schedule I or Schedule II F-3, Judge, even though the schoolyard spec makes it an F-2, but I think underneath the drug law it is in favor of.

THE COURT: Hold on.

MS. JAMIESON: The table. My phone died, but I did look that up earlier.

MS. BILLINGSLEY: I have the chart as well, Judge.

THE COURT: For a Schedule I or Schedule II drug, bulk, but less than five times —

MS. JAMIESON: Which is what he's pleading to.

THE COURT: Right; but with a juvenile spec, it is mandatory time even without the firearm spec, so it would be a mandatory minimum of three years.

MS. JAMIESON: Can I look at that chart?

MS. BILLINGSLEY: Yes.

MS. JAMIESON: I believe you, Judge, but —

THE COURT: We need to be careful.

* * *

(Thereupon, a discussion was had between the Defendant and his attorney off the record.)

* * *

THE DEFENDANT: Your Honor, can I just have one second to think about this, please?

THE COURT: Yes.

* * *

(Thereupon, a discussion was had between the Defendant and his attorney off the record.)

* * *

MS. JAMIESON: Sorry about that, Judge. I did explain everything to my client, and he does want to proceed with the plea. Sorry about that.

THE COURT: No, that's fine. Mr. Ledbetter, the whole purpose of the plea colloquy is so that I'm confident that you understand the charges, that if you make a change of plea, that you have full knowledge of the facts, the allegations, the consequences, especially when you are agreeing to mandatory time and fines and other things, all right? So if you have questions, please ask, all right?
THE DEFENDANT: I don't have any questions.

THE COURT: Okay. And after you have consulted with your attorney, you understand that for Count 2 there is one year for the mandatory firearm specification and then the time for the drug trafficking, two to eight years in one-year increments, that is mandatory as well?

THE DEFENDANT: Yes, Your Honor.

MS. BILLINGSLEY: Thank you, Your Honor. As well as the potential penalty for a felony of the fourth degree, Your Honor, I want to place on the record quickly, is 6 to 18 months, as well as the penalty for a felony of the fifth degree is 6 to 12 months and the penalty for a misdemeanor of the first degree is up to 180 days local incarceration. Additionally, I just don't remember if I stated it already, Your Honor, there is a mandatory driver's license suspension and a mandatory fine for the drug crime, which I believe is $7,500 under ORC 2929.18(B)(1). No threats or promises have been

made, other than what has been placed on the record and this mark was approved by Supervisor Andy Nichol. Thank you, Your Honor.

THE COURT: Thank you. Ms. Jamieson, is that your understanding of the proposed resolution here?

MS. JAMIESON: Thank you, Your Honor. May it please the Court. Your Honor, what Ms. Billingsley put on the record is fair and accurate. We have had full and open discovery in this case. I have gone over all of the counts that my client is going to be pleading to. I have gone over all of his constitutional rights with him, and I have gone over all of the penalties that are associated with these pleas. Your Honor, I believe that at this time he is going to withdraw his former plea of not guilty and enter a plea of guilt to the five counts as was outlined by the State of Ohio. No threats or promises have been made to induce this plea, Your Honor, and I believe it will be knowingly, intelligently and voluntarily made today. Thank you.

* * *

THE COURT: Those amendments will be granted as to Count 4. And as far as any possible merger issues, you can all address these at the time of sentencing, if there are any, okay?

MS. JAMIESON: Okay.

MS. BILLINGSLEY: Yes, Your Honor, we will discuss it further.

Tr. 4 - 13.

{¶10} Ledbetter, during his guilty plea hearing, was informed of the nature of each charge and the maximum penalty that could be imposed with regard to each charge. Ledbetter, through his second proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced.

{¶11} Ledbetter, through his third proposed assignment of error, argues that:

Trial counsel was ineffective for failing to move the court for a waiver of, and not objecting to the imposition of court costs and fines against the indigent appellant.

{¶12} Ledbetter, through this third proposed assignment of error, argues that he was prejudiced by the failure of trial counsel to file an affidavit of indigency stating his inability to pay any mandatory fines.

{¶13} The trial court is required to impose a mandatory fine unless an affidavit of indigency is filed and the trial court determines that the defendant is indigent and unable to pay the mandatory fine. *State v. Powell*, 78 Ohio App.3d 784, 605 N.E.2d 1337 (3d Dist.1992); *State v. Cravens*, 42 Ohio App.3d 69, 536 N.E.2d 686 (1st Dist.1988). Failure to file the affidavit constitutes ineffective assistance of counsel only if the record demonstrates that there exists a reasonable probability that the defendant would have been found indigent. *Powell, supra*.

{¶14} This court, in Ledbetter's original appeal, previously determined that he was not prejudiced by the failure of trial counsel to file the affidavit of indigency in order to waive the mandatory fine.

> Defendants must file an affidavit of indigency addressing their present and future ability to pay in order for the court to waive fines and costs. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 12. Appellant's failure to address these issues severely weakens his assigned error. The court heard that appellant was a high school graduate who was close to obtaining a post-secondary degree. Appellant admitted he engaged in a period of selling drugs for at least six months and was found with a large quantity of cash on hand. Appellant offered nothing to indicate he had a future inability to pay the fine and costs after being released from prison. Therefore, the trial court did not abuse its discretion in imposing mandatory fines and costs. This assignment of error is overruled.

Ledbetter, *supra*, at ¶ 19.

{¶15} Ledbetter has failed to demonstrate that there exists a reasonable probability that he would have been found indigent and that the imposition of a mandatory fine was prejudicial. Through his third proposed assignment of error, Ledbetter has failed to demonstrate that the performance of his appellate counsel was deficient.

{¶16} Accordingly, the application for reopening is denied.

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR