

[Cite as *State v. Bolton*, 2017-Ohio-7062.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103628

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TREVOR BOLTON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-10-537424-A
Application for Reopening
Motion No. 502299

RELEASE DATE: July 28, 2017

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶1} On November 29, 2016, the applicant, Trevor Bolton, pursuant to App.R. 26(B), applied to reopen this court’s judgment in *State v. Bolton*, 8th Dist. Cuyahoga No. 103628, 2016-Ohio-5706, in which this court affirmed his sentences for rape, kidnapping, gross sexual imposition, and having weapons while under disability. Bolton asserts that his appellate counsel was ineffective for not arguing (1) the denial of his motion to dismiss the weapons charge on statute of limitation grounds, (2) the denial of his motion for new trial based on newly discovered evidence, and (3) the failure to merge the crimes of rape and gross sexual imposition as allied offenses. After delayed service of the application and obtaining leave to file, the state of Ohio filed its brief in opposition on June 9, 2017. For the following reasons, this court denies the application to reopen.

{¶2} In May 2003, the victim lived in a two-story house. On the day of the incident, she heard noises downstairs. When she emerged from her upstairs bedroom to investigate, she saw a man coming up the stairs. She did not see him clearly, but he told her, “Put your head down, turn around.” He then grabbed her and pushed her into her bedroom. The woman testified that he pointed a firearm at her while he pulled off her pants and that he raped her with his mouth, fingers, and penis. She remembered the firearm laying near her face, but did not clearly see the man.

{¶3} When he left, she immediately called the police, and they took her to a hospital for examination, which included obtaining a rape kit. Although the woman

gave the police a statement, the police lost contact with her when she moved out of the house.

{¶4} In 2007, the police learned that a DNA match identified Bolton as the rapist.

However, the police did not locate the victim until 2010. Thus, the grand jury indicted Bolton in May 2010 on the following charges: three counts of rape and one count each of aggravated burglary, kidnapping, gross sexual imposition, and having weapons while under disability.

{¶5} In late 2010, a jury found Bolton guilty of kidnapping, gross sexual imposition, and one count of rape, and not guilty of two counts of rape and aggravated burglary. The trial judge found him guilty of having weapons while under disability and sentenced him to a total of 16 and one-half years in prison.

{¶6} In his first appeal, *State v. Bolton*, 8th Dist. Cuyahoga No. 96385, 2012-Ohio-169, this court reversed and remanded, ruling that the kidnapping and gross sexual imposition convictions should have merged for sentencing purposes. On remand, the state elected to have Bolton sentenced on the gross sexual imposition conviction, and the judge reimposed the 16 and one-half year sentence.¹ In his second appeal, *State v. Bolton*, 8th Dist. Cuyahoga No. 99137, 2013-Ohio-2467, this court ruled that the trial judge did not properly impose consecutive sentences and remanded the case again. Before the third sentencing, Bolton filed pro se motions, including a motion for DNA

¹The trial judge imposed 18 months for gross sexual imposition, ten years for rape, and five years for having weapons while under disability, all consecutive to one another.

testing, a motion for leave to file a delayed motion for new trial, the proposed motion for new trial based on new evidence, and a motion for relief from judgment based on the six-year statute of limitations for the weapons charge. The trial court orally denied the pro se motions and reimposed consecutive sentences for a total of 16 and one-half years.

{¶7} In this third and subject appeal, Bolton argued that (1) the court erred in imposing consecutive sentences, (2) the court erred in imposing a five- year sentence for the weapons charge, (3) the entire sentence should be vacated because of the delay in sentencing on remand, and (4) the court erred in denying the motion for DNA testing. This court rejected each of those arguments and affirmed.

{¶8} 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.

{¶9} 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.

{¶10} 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.

{¶11} 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.

{¶12} Bolton's first argument is that the weapons charge was barred by the statute of limitations. However, the courts have held that in order to challenge a charge on statute of limitations grounds, the defendant must file a motion to dismiss prior to trial.

The failure to file such a motion waives the statute of limitations defense. *State v. Grant*, 12th Dist. Butler No. CA2003-05-114, 2004-Ohio-2810; *State v. Jackson*, 2d Dist. Greene Nos. 2008 CA 30 and 2008 CA 31, 2009-Ohio-1773; and *State v. Shipley*, 9th Dist. Lorain No. 03CA008275, 2004-Ohio-434. This court has also ruled that the statute of limitations is waivable. *State v. Pluhar*, 8th Dist. Cuyahoga No. 102012, 2016-Ohio-1465. This court also notes that the Supreme Court of Ohio has clarified that the expiration of the statute of limitations is not a jurisdictional defect. *Daniels v. State*, 98 Ohio St.3d 467, 2003-Ohio-4780, 786 N.E.2d 891.

{¶13} Moreover, in *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), the Supreme Court of Ohio held that res judicata may bar claims of ineffective assistance of appellate counsel, if the application of the principle is not unjust. This court in *State v. Dowell*, 8th Dist. Cuyahoga No. 88864, 2008-Ohio-3447, further held that on subsequent appeals only arguments pertaining to the appealed proceedings were proper. Arguments relating back to earlier proceedings and appeals were barred by res judicata and law of the case. In the present case, the statute of limitations argument was waived and should have been raised, if at all, in the first appeal. It is now barred by res judicata.

Accordingly, counsel properly rejected this argument five years after trial and on the third appeal.

{¶14} Similarly, res judicata bars Bolton's second argument. In his first appeal, this court rejected Bolton's argument that the crimes of rape and gross sexual imposition were allied offenses. Under such circumstances, the application of res judicata is proper.

{¶15} Bolton's final argument is that his appellate counsel should have argued that the trial court erred in denying his motion for new trial based on newly discovered evidence. The gravamen of this motion is that the DNA match was incorrect because of improprieties in conducting the testing and only partial matches were confirmed. Bolton relies heavily on various scholarly articles questioning the reliability of DNA investigations.

{¶16} However, an App.R. 26(B) application to reopen applies to the appeal of the judgment of conviction and sentence. As a corollary, App.R. 26(B) does not apply to post-judgment motions such as postconviction relief petitions and motions to vacate guilty pleas. *State v. Loomer*, 76 Ohio St.3d 398, 667 N.E.2d 1209 (1996); and *State v. Gaston*, 8th Dist. Cuyahoga No. 92242, 2009-Ohio-3080, *reopening disallowed*, 2017-Ohio-4715. Thus, App.R. 26(B) does not apply to motions for new trial based on newly discovered evidence.

{¶17} This court also notes that appellate counsel chose to argue the reliability of the DNA testing through the judge's denial of the motion to grant new DNA testing.

Following the admonition of the United States Supreme Court, this court will not second-guess appellate counsel's professional judgment on which arguments to raise.

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

FRANK D. CELEBREZZE, JR., JUDGE

KATHLEEN ANN KEOUGH, A.J., and
EILEEN A. GALLAGHER, J., CONCUR