[Cite as *State v. Landrum*, 2017-Ohio-7240.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104511

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL LANDRUM

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-601193-A
Application for Reopening
Motion No. 506736

RELEASE DATE: August 15, 2017

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MELODY J. STEWART, J.:

{¶1} Under App.R. 26(B), applicant Michael Landrum seeks to reopen this court's judgment in *State v. Landrum*, 8th Dist. Cuyahoga No. 104511, 2017-Ohio-389, in which this court affirmed Landrum's convictions and sentences for rape, three counts of gross sexual imposition, and kidnapping — all committed against a victim who was less than 13 years of age. Landrum argues that his appellate counsel should have argued ineffective assistance of Landrum's trial counsel based on trial counsel's (1) stipulating to the reports provided by the court's psychiatric clinic as to Landrum's competency; (2) failing to object to the state's motion to amend the indictment; and (3) failing to present evidence as to Landrum's sexually transmitted disease at trial, which he contends would have proven that Landrum did not rape the victim. The state opposes the application as having no merit. We agree and deny the application to reopen.

A. Standard of Review

{¶2} The appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel is the two-pronged analysis found in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10. Applicant "must prove that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal." *Id.*, quoting *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001).

Applicant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶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} With this standard in mind, we turn to the arguments raised by Landrum.

B. Arguments Not Meritorious

{¶5} Landrum raises three proposed assignments of error in support of his application to reopen his direct appeal. Having reviewed the arguments in light of the record, we hold that Landrum has failed to meet his burden to justify reopening his appeal. He cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

1. Competency Report and Independent Examination

{¶6} In his first proposed assignment of error, Landrum argues that his trial counsel was ineffective in stipulating to the report of the court psychiatric clinic, without any cross-examination, and in failing to move for an independent examination, in light of Landrum's "mental health issues." According to Landrum, "[h]ad trial counsel used either of these basic defense techniques, it is very likely that appellant would have been found incompetent, or insane at the time of the act, thereby changing the whole outcome of this case."

{¶7} But Landrum's argument is based solely on speculation and lacks merit. It is purely speculative whether a different examiner, additional information, or both, would have made any difference in the outcome of Landrum's competency evaluation. *See State v. McClurkin*, 10th Dist. Franklin No. 08AP-781, 2009-Ohio-4545, ¶ 63*; State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶ 55 ("purely speculative whether additional testing would have made any difference in the outcome of his competency evaluation"). Further, the existence of "mental health issues," which may be the impetus for an assessment in the first instance, does not provide any basis to render the court psychiatric clinic's evaluations unreliable or biased. Indeed, apart from Landrum failing to identify any grounds to object to the reports, there is absolutely no grounds to conclude that the trial court would have sustained an objection or allowed for an independent examination. *See State v. Pennington*, 8th Dist. Cuyahoga No. 100964, 2014-Ohio-5426, ¶ 31 (affirming trial court's denial of defendant's motion for an independent competency evaluation when there was no evidence that defendant was

prevented from contributing to his defense or understanding the nature and objective of the proceedings against him).

{¶8} The first proposed assignment of error is overruled.

2. Amended Indictment

{¶9} In his second proposed assignment of error, Landrum argues that his trial counsel was ineffective in failing to object to the state's motion to amend the indictment to reflect a different date for the offenses without requiring presentation to the grand jury. According to Landrum, amending the date of the offenses from "on or about October 1, 2012, to June 1-7, 2012 * * * was a significant change in the time period, which, in turn, changed the nature of the allegation and possible defenses, such as alibi." This argument, however, has no merit.

{¶10} Crim.R. 7(D) allows a trial court to amend an indictment "at any time," as long as "no change is made in the name or identity of the crime charged." A change in the name or identity of a crime charged occurs when the offense alleged in the indictment and the offense alleged in the amended indictment contain different elements that require independent proof. *State v. Buchanan*, 8th Dist. Cuyahoga No. 104500, 2017-Ohio-1361, ¶ 22, citing *State v. Mullins*, 124 Ohio App.3d 112, 114, 705 N.E.2d 709 (12th Dist.1997).

{¶11} This court has held that "'specificity as to the time and date of an offense is not required in an indictment.'" *State v. Gibson*, 8th Dist. Cuyahoga No. 103958, 2016-Ohio-7778, quoting *State v. Bogan*, 8th Dist. Cuyahoga No. 84468,

2005-Ohio-3412, ¶ 10. And when the indictment charges offenses against children, we recognize that "when dealing with the memory of a child, reasonable allowances for inexact dates and times must be made." *State v. Williams*, 8th Dist. Cuyahoga No. 94965, 2013-Ohio-4471, ¶ 13.

{¶12} The amendment to the indictment in this case did not change the name or the identity of the crimes charged. Landrum was charged with two counts of rape, three counts of gross sexual imposition, and one count of kidnapping. The amended indictment did not change that fact. The original indictment alleged that the crimes occurred "on or about May 6, 2012." The amended indictment alleged that offenses occurred "between June 1, 2012 and June 7, 2012" — changing the date of the offenses by approximately one month. Notably, the amended indictment did not change the date of birth of the victim, and under either the original or the amended indictment, the victim was still under the age of 13.

{¶13} Moreover, contrary to Landrum's assertion, he never filed a notice of alibi, nor pursued such a defense at trial. And given that the state filed its motion to amend the indictment seven weeks prior to trial, Landrum was neither surprised nor prejudiced by the amendment. *See, e.g., Buchanan*, 8th Dist. Cuyahoga No. 104500, 2017-Ohio-1361, ¶ 23 (the defendant failed to demonstrate how or why his defense was hampered by the amendment of the offense date because he did not present an alibi defense).

{¶14} Because we find that any objection to the amendment would have been futile, trial counsel's conduct in choosing not to object was a matter of sound trial strategy. *See State v. Baer*, 7th Dist. Harrison No. 07HA8, 2009-Ohio-3248, ¶ 42 ("[B]ecause the actions to which counsel failed to object were free of error, lodging objections thereto would have been unsuccessful or even perceived as frivolous."). Landrum's argument is not well taken.

3. Possible Defense Based on Sexually Transmitted Disease

{¶15} In his final proposed assignment of error, Landrum argues that his appellate counsel should have challenged his trial counsel's failure to "properly investigate and raise the defense of [his] affliction with a contagious sexually transmitted disease." The record reflects, however, that Landrum's trial counsel expressly asked Landrum whether he or his ex-girlfriend had an STD, which he responded by saying, "No." Further, upon Landrum later disclosing the truth to his trial counsel after the trial adjourned, defense counsel specifically asked the trial court to delay rendering a verdict until the "newly discovered evidence" could be considered. The trial court rejected such a request, recognizing that "it was apparently newly discovered by the defense attorney, but would have been known to the defendant well in advance of the trial of this case."

{¶16} Based on this record, trial counsel's performance fell within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 687. First, Landrum's trial counsel cannot be deemed ineffective in failing to pursue a defense that his client expressly denied. Second, upon Landrum later informing his defense attorney that he

did in fact have an STD and was apparently confused by counsel's question, Landrum's trial counsel immediately brought the information to the attention of the trial court. Such conduct amounts to a matter of strategy. Thus, aside from trial counsel's actions directly contradicting Landrum's argument in his application, this court will not second-guess a trial counsel's tactical decisions. *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001). Accordingly, the third assignment of error is not well taken.

4. Evidence Outside the Record

{¶17} Finally, we note that Landrum's first and third proposed assignments of error also fail on the separate grounds that he relies on evidence outside of the record for both. Specifically, Landrum relies on the affidavit of his father in support of his claims that his trial counsel was advised of both Landrum's "mental health issues" and his STD prior to the trial. But this evidence is not part of the record below and therefore cannot support a claim for ineffective assistance of appellate counsel. *See State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, *reopening disallowed*, 2015-Ohio-516, ¶ 10 ("Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶ 10.); *State v. Campbell*, 8th Dist. Cuyahoga No. 102788, 2016-Ohio-389, *reopening disallowed*, 2016-Ohio-5510, ¶ 5 (matters outside the record do not provide a basis for reopening under App.R. 26(B)).

{¶18} In summary, all three of Landrum's proposed assignments of error have no merit. Accordingly, Landrum cannot meet his burden under App.R. 26(B)(5) to demonstrate "a genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal."

{¶19} Application denied.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
SEAN C. GALLAGHER, J., CONCUR