[Cite as *State v. Ramos*, 2017-Ohio-7712.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103596

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HUGO RAMOS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-589368-A
Application for Reopening
Motion No. 504334

RELEASE DATE: September 18, 2017

ATTORNEYS FOR APPELLANT

Mark A. Stanton
Cuyahoga County Public Defender
By: Paul Kuzmins
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Anthony T. Miranda
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MELODY J. STEWART, J.:

{¶1} Hugo Ramos has filed a timely application for reopening pursuant to App.R. 26(B). Ramos is attempting to reopen the appellate judgment, rendered in *State v. Ramos*, 8th Dist. Cuyahoga No. 103596, 2016-Ohio-7685, that affirmed his conviction and the sentence imposed with regard to the offenses of aggravated murder, murder, felonious assault, domestic violence, and endangering children. We decline to reopen Ramos's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Ramos 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, Ramos has raised two proposed assignments of error in support of his application for reopening. Ramos's initial proposed assignment of error is that:

> Mr. Ramos' conviction for felony-murder based on kidnapping was based on insufficient evidence where the state failed to present any evidence that the alleged kidnapping was the proximate cause of death.

{¶5} Ramos, through his initial proposed assignment of error, argues that appellate counsel "could have and should have demonstrated that even if the Court accepted the state's position that Mr. Ramos's fight with his wife constituted a kidnapping, the State could not [have] shown that the act of kidnapping was the proximate cause of his wife's death." Specifically, Ramos argues that his conviction for the offense of aggravated murder, pursuant to R.C. 2903.01(B), required the predicate underlying offense of kidnapping to have proximately caused the death of the victim.

{¶6} Contrary to Ramos's argument, a conviction pursuant to R.C. 2903.01(B) does not require proof that Ramos purposely caused the death of another "while" committing or attempting to commit the predicate offense of kidnapping. The Supreme Court of Ohio, in *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, examined R.C. 2903.01(B), with regard to purposely causing the death of another while committing a predicate offense, and established that:

> However, "the term 'while' does not indicate * * * that the killing must occur at the same instant as the [* * *1159]_ [predicate felony], or that the killing must have been caused by the [felony]." *State v. Cooper* (1977), 52 Ohio St.2d 163, 179-180, 6 O.O.3d 377, 370 N.E.2d 725. Nor does it mean that the felony must have been the motive for the killing. *State v. Williams* (1996), 74 Ohio St.3d 569, 577, 1996 Ohio 91, 660 N.E.2d 724; *State v. McNeill* (1998), 83 Ohio St.3d 438, 441, 1998 Ohio 293, 700 N.E.2d 596.

> Rather, "while" means that "the killing must be directly associated with the [felony] as part of one continuous occurrence * * *." *Cooper*, 52 Ohio St.2d at 179-180, 6 O.O.3d 377, 370 N.E.2d 725. See, also, *State v. Cooey* (1989), 46 Ohio St.3d 20, 23, 544 N.E.2d 895. "[T]he term 'while' means that the death must occur as part of acts leading up to, or occurring during, or immediately subsequent to the [relevant felony]." *Williams*, 74 Ohio St.3d at 577, 660 N.E.2d 724. "The sequence_of events" may be "examined in light of time, place, and causal connection" to determine whether it "amounts to 'one continuous occurrence.'" *McNeill*, 83 Ohio St.3d at 441, 700 N.E.2d 596, quoting *Cooey*, 46 Ohio St.3d at 23, 544 N.E.2d 895. (Emphasis added.)

State v. Johnson, *supra*, at ¶ 55-56.

{¶7} The state was not required to prove that the offense of kidnapping was the proximate cause of the death of the victim in order to obtain a conviction for the offense of aggravated murder pursuant to R.C. 2903.01(B). Ramos, 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.

{¶8} Ramos's second proposed assignment of error is that:

> Appellate counsel was ineffective when it failed to file for reconsideration
>
> effectively abandoning the client.

{¶9} Ramos, through his second proposed assignment of error, argues that appellate counsel should have filed an App.R. 26(A) application for reconsideration after this court granted the state's motion for reconsideration, vacated its prior appellate opinion ("*Ramos I*"), and issued a subsequent opinion ("*Ramos II*") that revised the original appellate opinion and affirmed the conviction and sentence of the trial court.

{¶10} This court, when reviewing an application for reconsideration, must determine whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or not fully considered by the court. *Cleveland Clinic Found. v. Bd. of Zoning Appeals*, 8th Dist Cuyahoga No. 98115, 2012-Ohio-6008; *State v. Dunbar*, 8th Dist. Cuyahoga No. 87317, 2007-Ohio-3261. In addition, an application for reconsideration is not intended to simply allow a party to challenge an opinion because of a disagreement with the conclusion reached and the logic employed by the appellate court. *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. Erie No. E-10-006, 2011-Ohio-2959; *In re Richardson*, 7th Dist. Mahoning No. 01-CA-78, 2002-Ohio-6709. Finally, an application for reconsideration must point to an obvious error in the appellate decision or raise for consideration issues that were not considered at all or not fully considered. *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (10th Dist.1987); *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (10th Dist.1981).

{¶11} Ramos's argument, that appellate counsel should have filed an application for reconsideration in *Ramos II*, is based upon four claims: 1) this court failed to fully address his sufficiency claim because Count 2 was predicated on the kidnapping conviction and this court declined to address the sufficiency of the kidnapping conviction; 2) this court improperly applied the holding in *State v. Powell*, 49 Ohio St.3d 255, 552 N.E.2d 191 (1990); 3) this court improperly sua sponte reconsidered its judgment after

journalization of the opinion in *Ramos I*; and 4) this court erred when it reconsidered *Ramos I* on grounds not raised pursuant to App.R. 26(A) or briefed by the parties.

{¶12} The filing and consideration on an application for reconsideration, by Ramos's appellate counsel in *Ramos II*, would not have resulted in any revision to the opinion rendered in *Ramos II.* The claims of failure to fully address the issue of sufficiency, the predicate offense of kidnapping, and the application of *Powell*, simply constitute disagreement with the conclusions and logic used by this court in *Ramos II*, and thus, could not form a viable basis for an application for reopening.

{¶13} In addition, by virtue of the jurisdiction conferred by Section 3(B), Article IV of the Ohio Constitution, a court of appeals possesses the inherent authority to sua sponte reconsider its judgment. *State ex rel. LTV Steel Co. v. Gwin,* 64 Ohio St.3d 245, 594 N.E.2d 616 (1992); *Tuck v. Chapple*, 114 Ohio St. 155, 151 N.E.2d 48 (1926).

{¶14} Finally, Ramos's appellate counsel, in *Ramos I*, filed a brief in opposition to the application for reconsideration that specifically addressed the argument of whether this court sua sponte pursued an argument and also addressed the claims of sufficiency and predicate offense. Attempting to reargue the aforesaid claim, through an application for reconsideration, would have constituted a vain act and would not have resulted in a different outcome on appeal. Ramos, 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.

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

MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR