[Cite as *State v. White*, 2017-Ohio-8056.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104224

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES C. WHITE

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-590769-A
Application for Reopening
Motion No. 503680

RELEASE DATE: September 29, 2017

FOR APPELLANT

James C. White, pro se
Inmate No. A680084
Grafton Correctional Institution
2500 S. Avon Belden Road
Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Brett S. Hammond
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN A. GALLAGHER, P.J.:

{¶1} On April 17, 2017, the applicant, James White, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. White,* 8th Dist. Cuyahoga No. 104224, 2017-Ohio-287, which affirmed White's convictions for rape and kidnapping. White now asserts that his appellate counsel should have argued the invalidity of the indictments for failing to state where the offense occurred as required by R.C. 2941.03(D) and *State v. Luna*, 96 Ohio App.3d 207, 644 N.E.2d 1056 (6th Dist.1994). The state of Ohio filed its brief in opposition on May 7, 2017. For the following reasons, this court denies the application.

{¶2} In late 2014, the grand jury indicted White for rape of a girl under the age of 13. This first page of the indictment provided that White committed the offense "in the County of Cuyahoga." The indictment included notice of a prior conviction for a rape in 1987, a repeat violent offender specification and a sexually violent predator specification. The grand jury also indicted White for two counts of gross sexual imposition, two counts of kidnapping and one count of importuning. These indictments did not include the averment of occurring in Cuyahoga County.

{¶3} Pursuant to a plea agreement, White plead guilty to an amended count of rape, which would not subject him to a sentence of life imprisonment, and an amended count of kidnapping. The judge ruled that the rape and kidnapping counts merged as

allied offenses and sentenced White to 11 years imprisonment for rape and determined him to be a Tier III sex offender.

{¶4} His appellate counsel argued that the trial judge coerced the guilty plea by telling White that in a recent case involving a similar charge of rape the defendant is facing a life sentence without parole because the defendant rejected the plea and the jury found him guilty in less than three hours. White now argues that his appellate counsel was ineffective because he should have argued the invalidity of the indictments for not stating that the offense was committed at some place within the jurisdiction of the court, as required by R.C. 2941.03(D).

{¶5} 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.

{¶6} 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.

{¶7} 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 (s)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.

{¶8} 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.

{¶9} White's argument is not well taken because the indictment, especially the rape charge, the one charge on which he was imprisoned, stated that the offense occurred "in the County of Cuyahoga." This court has ruled that this general averment satisfies the requirement of R.C. 2941.03(D). *State v. Morgan*, 8th Dist. Cuyahoga No. 70407, 1996 Ohio App. LEXIS 3855 (Sept. 5, 1996); *State v. Munici*, 8th Dist. Cuyahoga No. 70405, 1996 Ohio App. LEXIS 3544 (Aug. 22, 1996); and *State v. Vihtelic*, 8th Dist. Cuyahoga No. 105381, 2017-Ohio-5818. Furthermore, the bill of particulars specified the street address in Cleveland, Ohio at which these crimes occurred. Thus, White's appellate counsel would have been hard-pressed to show prejudicial error.

{¶10} *State v. Luna*, 96 Ohio App.3d 207, 644 N.E.2d 1056 (6th Dist.1994), is further distinguishable because the indictment in that case failed to allege the necessary element of deception, as well as failing to aver where the crime happened. Moreover, Luna plead no contest which generally allows appeals on contested issues of law. In contrast, White plead guilty in a favorable plea bargain. Guilty pleas waive any error arising from a defect in the indictment or the right to argue ineffective assistance of trial counsel except to the extent that the defect or ineffective assistance caused the plea to be less than knowing, intelligent, and voluntary, or deprived the trial court of jurisdiction. *Montpelier v. Greeno*, 25 Ohio St.3d 170, 495 N.E.2d 581 (1986); *Vihtelic* at ¶ 14. This waiver applies to defects in the indictment. *Stacy v. Van Coren*, 18 Ohio St.2d 188,

248 N.E.2d 603 (1969) — the guilty plea constituted a waiver of his constitutional right to indictment or information; *State v. Szidic*, 8th Dist. Cuyahoga No. 95644, 2011-Ohio-4093; *State v. Salter*, 8th Dist. Cuyahoga No. 82488, 2003-Ohio-5652; and *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-2766, *reopening disallowed*, 2012-Ohio-5504. Given the distinguishing factors between *Luna* and the present case and following the Supreme Court's admonitions, this court will not second-guess appellate counsel's decision not to raise the issue.

{¶11} Accordingly, this court denies the application.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, SR., J., CONCUR