[Cite as *State v. Alexander*, 2017-Ohio-9011.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104281

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES ALEXANDER

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-598675-B
Application for Reopening
Motion No. 508845

RELEASE DATE: December 12, 2017

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ANITA LASTER MAYS, J.:

{¶1} James Alexander has filed a timely application for reopening pursuant to App.R. 26(B). Alexander is attempting to reopen the appellate judgment, rendered in *State v. Alexander*, 8th Dist. Cuyahoga No. 104281, 2017-Ohio-1445, that affirmed his conviction and sentence for the offenses of aggravated murder, murder, attempted murder, aggravated burglary, kidnapping, and felonious assault. We decline to reopen Alexander's original appeal.

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

> The trial court violated Mr. Alexander's right to due process and a fair trial by permitting the State to introduce cell phone record data analysis that he claimed showed Mr. Alexander's phone was in the vicinity of the shooting at the time that it occurred.

{¶5} Alexander, through his proposed assignment of error, argues that the trial court erred by allowing the testimony of an FBI agent to be adduced at trial, because the testimony with regard to the cellular phone analysis was not reliable and should have been barred under Evid.R. 702.

{¶6} This court has established that testimony concerning the location of cellular towers and cell phone records does not require specialized knowledge, skill, experience, training, or education and thus constitutes lay opinion testimony. *State v. Wilson*, 8th Dist. Cuyahoga No. 104333, 2017-Ohio-2980; *State v. Daniel*, 8th Dist. Cuyahoga No. 103258, 2016-Ohio-5231; *State v. Dunn*, 8th Dist. Cuyahoga No. 101648, 2015-Ohio-3138.

{¶7} In addition, the trial court conducted a *Daubert* hearing, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), with regard to the proffered testimony of the FBI agent. During the course of the *Daubert* hearing, it was clearly demonstrated that the testimony of the FBI agent was reliable and met the *Daubert* test. *See* tr.
143 - 247. Alexander has failed to establish any prejudice through his first proposed assignment of error.

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

> The trial court violated James Alexander's rights to due process and a fair trial by allowing the prosecution to taint the jury by injecting irrelevant but extremely damning testimony about street gangs and gang affiliation through witnesses including a "so-called" street gang expert.

{¶9} Alexander, through his second proposed assignment of error, argues that he was prejudiced by testimony adduced at trial with regard to gang activity. A review of the transcript, however, demonstrates that any testimony offered at trial was limited to factual statements regarding the names and locations of two gangs that had been referenced during the course of trial. We further find any possible error associated with the gang testimony was harmless beyond a reasonable doubt pursuant to Crim.R. 52(A). *State v. Bell*, 8th Dist. Cuyahoga No. 97123, 2012-Ohio-2624. Alexander has failed to establish any prejudice through his second proposed assignment of error.

{¶10} Alexander's third proposed assignment of error is that:

> The mandatory sentencing provision under R.C. 2929.02(A) is unconstitutional as applied in the instant matter where it requires the trial court to impose a life sentence notwithstanding the defendant's juvenile status and his at worst secondary role in the underlying misconduct.

{¶11} Alexander, through his third proposed assignment of error, argues that the imposition of a life sentence without the possibility of parole, under R.C. 2929.02(A), is unconstitutional. Specifically, Alexander argues that the sentence imposed by the trial court violated the holdings established in *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890; *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183

L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

{¶12} Alexander, however, was not sentenced to a life sentence of incarceration without the possibility of parole. In fact, the trial court stated that "mandatory parole is part of sentence" in the sentencing journal entry. Thus, the case law cited by Alexander is not applicable to his sentence of incarceration.

{¶13} In addition, this court addressed a similar argument in *State v. Terrell*, 8th Dist. Cuyahoga No. 103428, 2016-Ohio-4563, and held that:

> Terrell argues the mandatory 15 years to life sentence he received is unlawful based on this precedent. However, Terrell's sentence is different from the sentences at issue in *Miller*, *Graham*, and *Long* because he was not sentenced to life without the possibility of parole. Terrell is entitled to parole hearings after 21 years to determine if he has been rehabilitated to such an extent that he may re-enter society. Indeed, rehabilitation is a legitimate goal of penal sanctions. *Graham*, 560 U.S. at 71, 130 S.Ct. 2011, 176 L.Ed.2d 825.
>
> Furthermore, this court has refused to extend the rationale in *Miller*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407, *Graham*, *Roper*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, and *Long* to sentences where parole is afforded. *See, e.g.*, *State v. Hammond*, 8th Dist. Cuyahoga No. 100656, 2014-Ohio-4673; *see also State v. Zimmerman*, 2d Dist. Clark No. 2015-CA-62 and 2015-CA-63, 2016-Ohio-1475.
>
> Terrell nevertheless argues the United States Supreme Court's recent decision in *Montgomery*, 577 U.S. , 136 S.Ct. 718, 193 L.Ed.2d 599, expanded the court's holding in *Miller* to include discretionary sentences. He claims the *Montgomery* court held that even discretionary sentences for juveniles convicted of murder are unconstitutional "unless the sentencing court explicitly concludes that the juvenile is 'irreparably corrupt' or 'permanently incorrigible.'" (Appellant's Brief p.4, quoting *Montgomery* at 735.)

> However, like *Miller*, the *Montgomery* court was discussing the imposition of mandatory life sentences without parole. The decision had nothing to do with mandatory indefinite life sentences, such as the one at issue here. *Montgomery* clarified the court's holding in *Miller* by explaining that life imprisonment without parole may be justified in rare cases if the court finds the juvenile offender exhibits such depravity that rehabilitation is impossible. *Id*. at 733. Indeed, *Miller* held that before a sentencing court can impose a life sentence without parole, the juvenile defendant "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id*. at 736-737.
>
> Despite Terrell's argument to the contrary, *Montgomery* did not expand the court's holding in *Miller*. Nor did *Miller* categorically ban life sentences without the possibility of parole for juvenile offenders. Rather the court in *Miller* concluded that based on the unique circumstances of juveniles, the Eighth Amendment requires juvenile offenders be given a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 567 U.S. 460, 132 S.Ct. at 2469, 183 L.Ed.2d 407, quoting *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825.
>
> Terrell's 21 years to life prison sentence affords him the opportunity to regain his freedom once he has matured and demonstrated rehabilitation. Moreover, as previously explained, we refused to extend the rationale in *Miller* to juvenile cases where the offender is afforded the possibility of parole as in *Hammond*, 8th Dist. Cuyahoga No. 100656, 2014-Ohio-4673, and we decline to do so now.

Id., at ¶ No. 17 - 22.

{¶14} Based upon the fact that Alexander was not sentenced to life in prison without parole and the inapplicability of the case law cited, we find that Alexander has failed to establish any prejudice through his third proposed assignment of error.

{¶15} Alexander's fourth proposed assignment of error is that:

> The trial court's imposition of consecutive sentences after it found that Mr. Alexander's juvenile criminal history reflects that they were necessary to protect the public is not justified on this record.

{¶16} Alexander, through his fourth proposed assignment of error, argues that the trial court erred by imposing consecutive sentences. Specifically, Alexander argues that his juvenile criminal history, as cited by the trial court, did not justify the imposition of consecutive sentences of incarceration.

{¶17} Contrary to Alexander's argument, the trial court's imposition of consecutive sentences was not solely based upon Alexander's juvenile record. During the sentencing hearing, the trial court stated that:

> COURT: All right. The court has considered all this information, the principles and purposes of felony sentencing, the appropriate recidivism and seriousness factors. Pursuant to statutory requirements, there is mandatory consecutive sentencing with respect to the firearm specifications. And then the court is left with some discretion with respect to consecutive prison terms.
>
> The court has considered all these facts. I sat through the trial. I considered everything. I am going to find that consecutive sentences are appropriate, that they're necessary to protect the public and to punish these defendants, that it would not be disproportionate to the acts in this matter. That crimes were committed — I believe Mr. Alexander was on probation in juvenile court at the time. And that's another factor. The harm is so great or unusual that a single term would not adequately reflect the seriousness of the conduct. And that juvenile criminal history shows consecutive sentences are necessary to protect the public.

(Tr. 3021-3022.)

{¶18} The trial court fully complied with R.C. 2929.14, prior to imposing consecutive sentences of incarceration, and we further find that the trial court did not abuse its discretion in imposing consecutive sentences of incarceration. The trial court made the appropriate consecutive sentence findings and the record clearly demonstrates that the trial court engaged in the analysis as mandated by R.C. 2929.14(C)(4). *State v.*

Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659; *State v. Allison*, 8th Dist. Cuyahoga No. 105212, 2017-Ohio-7720; *State v. Ladson*, 8th Dist. Cuyahoga No. 104642, 2017-Ohio-7715. Alexander has failed to establish that he was prejudiced through his fourth proposed assignment of error.

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

ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR