

[Cite as *State v. Black*, 2017-Ohio-953.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102586

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARDON J. BLACK

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-575488-A
Application for Reopening
Motion No. 496477

RELEASE DATE: March 7, 2017

FOR APPELLANT

Chardon J. Black, pro se
Inmate No. 654-329
Lake Erie Correctional Institution
Conneaut, Ohio 44030

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Jennifer Lynne O'Malley
Mary McGrath
Assistant Prosecuting Attorneys
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN A. GALLAGHER, P.J.:

{¶1} On April 27, 2016, the applicant, Chardon Black, pursuant to App.R. 26(B), applied to reopen this court’s judgment in *State v. Black*, 8th Dist. Cuyahoga No. 102586, 2016-Ohio-383, in which this court affirmed Black’s convictions and sentences for felonious assault and domestic violence.¹ He listed 16 “assignments of error” that his appellate counsel should have argued: His trial counsel was ineffective for failing to argue the Castle Doctrine, for agreeing to a consecutive sentence, for not arguing Black’s actual innocence, for not asking for a toxicology expert to show that the girlfriend had a substance abuse problem causing manic episodes, for giving him bad advice about how battered woman’s syndrome would preclude evidence of the girlfriend’s prior domestic violence, and for promising him judicial release if he pled guilty. Black further maintains that his appellate counsel was ineffective for admitting Black had a prior domestic violence conviction and for not arguing that the sentences were to be concurrent. Next, he claims that double jeopardy prevented him from being charged

¹Black’s girlfriend said that after Black had left the home following a domestic dispute, he returned and another argument ensued. He punched her in the face, and she tried to escape by going onto the roof. She reported that Black followed her, grabbed her, and threw her off the roof. She suffered fractures of her back, pelvis, wrist, and right eye socket. The police noted that the home was entirely upset and that there were blood stains leading to the window.

Black maintains that when he returned, his girlfriend restarted the fight by hitting him and pulling a gun on him. He struck her in self-defense and that after she climbed onto the roof, she fell.

The grand jury indicted Black for attempted murder, felonious assault, domestic violence, and kidnapping. Pursuant to a plea bargain, Black pled guilty to felonious assault and domestic violence. The judge imposed an agreed sentence of four years for felonious assault consecutive to ten months for domestic violence.

with multiple crimes against the same person and having two different mens rea, knowingly and recklessly. He complains that he could only have been indicted for domestic violence because the victim was a household member. He also claims that attempted murder is a noncognizable crime added to coerce his plea, that felonious assault and domestic violence are allied offenses that should have merged,² that the rule of lenity required he be given the lesser of the offenses and that his plea was void because the trial court did not review the plea pursuant to R.C. 2929.11 and 2929.12.³ Finally, he maintains that the trial court's October 26, 2015 nunc pro tunc entry is invalid and a fraud upon the court because he was not present and because the trial court added language not in the transcript.

{¶2} On May 18, 2016, the state of Ohio filed its memorandum in opposition to the application to reopen and, on June 3, 2016, Black filed his objections to the state's memorandum. Finally, on December 9, 2016, Black filed "Appellant's notice of judicial facts," in which he tried to demonstrate the fraud relating to the nunc pro tunc entry. For the following reasons, this court denies the application.

{¶3} 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,

²Black's appellate counsel argued that the convictions for felonious assault and domestic violence should have merged as allied offenses and that the sentence of four years and ten months was not authorized by law because the two convictions should have merged.

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 768 (1990); and *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996).

{¶4} 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*, 466 U.S. at 689.

{¶5} 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 dissuade 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, and *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1.

{¶6} 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 court need not determine whether counsel’s performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶7} “Merely asserting error is not sufficient for applicant to demonstrate that both counsel’s performance was deficient and that the deficient performance prejudiced him.” *State v. Jackson*, 8th Dist. Cuyahoga No. 75354, 2000 Ohio App. LEXIS 133 (Jan. 20, 2000), *reopening disallowed*, 2002-Ohio-5817, ¶15; and *State v. Ramirez*, 8th Dist. Cuyahoga No. 78364, 2001 Ohio App. LEXIS 4984 (Nov. 8, 2001), *reopening disallowed*, 2005-Ohio-378. Thus, Black’s list of “assignments of error” does not establish a genuine issue as to whether he was deprived of the effective assistance of counsel, as required by App.R. 26(B)(5).

{¶8} Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898); *Carran v. Soline Co.*, 7 Ohio

Law Abs. 5 (1928), and *Republic Steel Corp. v. Sontag*, 21 Ohio Law Abs. 358 (1935). “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. By failing to proffer arguments, including necessary references in the record, Black does not establish a genuine issue of ineffective assistance of appellate counsel. For example, without stating where in the record there is evidence that his trial counsel promised him judicial release if he pled guilty, he cannot show that his appellate counsel could even raise the issue.

{¶9} Moreover, by pleading guilty Black waived his right to challenge his convictions on almost all issues. “An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction, of which the subject-matter jurisdiction of the court is the familiar example. The claims here asserted have nothing of this quality.” *Montpelier v. Greeno*, 25 Ohio St.3d 170, 171, 495 N.E.2d 581 (1986), quoting *United States v. Doyle*, 348 F.2d 715, 718-719 (2d Cir.1965). Specifically, it waives claims of ineffective assistance of counsel. *State v. Character*, 8th Dist. Cuyahoga No. 93765, 2010-Ohio-4128. This principle precludes many of Black’s arguments, such as trial counsel’s failing to argue the Castle Doctrine, giving “bad advice” on evidence and not obtaining a toxicology expert. A guilty plea also waives the right to a direct appeal of any alleged defects in the indictment, such as “overcharging” to include charges for both

felonious assault and domestic violence, the propriety of the attempted murder charge and charges with different mens rea.

{¶10} Res judicata properly bars the claims relating to merger and allied offenses. See generally *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Res judicata prevents repeated attacks on a final judgment and applies to all issues which were or might have been litigated. In *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), the Supreme Court of Ohio ruled that res judicata may bar a claim of ineffective assistance of appellate counsel unless circumstances render the application of the doctrine unjust. In the present case, Black's appellate counsel argued that the crimes of felonious assault and domestic violence were allied offenses and should merge. Thus, to the extent that Black argues that his sentences should be concurrent or merge, this court has already considered the issues and rejected them.

{¶11} Black's claim that his appellate counsel should not have admitted that he had a prior conviction for domestic violence is also barred, because Black pled guilty to that notice in the indictment. (Tr. 63-64.)

{¶12} On September 3, 2015, this court remanded the case to the trial court to issue a sentencing order conforming with *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, and *State v. Dumas*, 8th Dist. Cuyahoga No. 95760, 2011-Ohio-2926, to specify what sentence corresponded to what charge. The trial court issued a nunc pro tunc entry on October 26, 2015, complying with this court's order. Black now argues that this entry was invalid because he was not present at the issuance of

the order and because the order clarified the justification for consecutive sentences that went beyond what was said at the sentencing hearing. The court has reviewed the transcript and the nunc pro tunc entry and concludes that there is no prejudice. *State v. Taylor*, 8th Dist. Cuyahoga No. 65711, 1995 Ohio App. LEXIS 4998 (Nov. 8, 1995) — the issuance of a nunc pro tunc entry is not a stage of the criminal proceeding requiring the defendant's presence. The judge's statement as to the justification for consecutive sentences did not exceed what was said at the sentencing hearing.

{¶13} Black's reliance on *State v. Price*, 8th Dist. Cuyahoga No. 103023, 2016-Ohio-591, is misplaced for the argument that the sentence is invalid because the trial court did not consider R.C. 2929.11 and 2929.12 in sentencing. In the instant case, the trial judge did refer to R.C. 2929.11 in the sentencing entry. Moreover, in the instant case, the sentence was an agreed sentence, but in *Price*, the trial court imposed sentence after the case had proceeded to a very peculiar procedural posture. Therefore, Black's argument is not well founded.

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

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR