

[Cite as *State v. Durham*, 2017-Ohio-954.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 103352 and 103382

STATE OF OHIO

PLAINTIFF-APPELLEE
CROSS-APPELLANT

vs.

WARREN DURHAM, JR.

DEFENDANT-APPELLANT
CROSS-APPELLEE

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-579929-A
Application for Reopening
Motion No. 501846

RELEASE DATE: March 7, 2017

FOR APPELLANT/CROSS-APPELLEE

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LARRY JONES, SR., P.J.:

{¶1} Warren Durham, Jr. has filed a timely application for reopening pursuant to App.R. 26(B). Durham is attempting to reopen the appellate judgment rendered in *State v. Durham*, 8th Dist. Cuyahoga Nos. 103352 and 103382, 2016-Ohio-7394, that affirmed his convictions for five counts of rape and five counts of kidnapping, but reversed and remanded for resentencing on a firearm specification, consideration as to whether consecutive sentences of incarceration were appropriate, and the entry of findings per R.C. 2929.15(C)(4) if consecutive sentences were imposed. We decline to reopen Durham's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Durham 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, Durham raises two proposed assignments of error in support of his claim of ineffective assistance of appellate counsel. Through his initial proposed assignment of error, Durham argues that appellate counsel was ineffective by failing to raise the issue of preindictment delay on appeal. Durham argues that “[he] was not arrested until 25 November 2013 at his Arrignment [sic], which constitutes more than 20-years of pre-indictment delay.”

{¶5} The Supreme Court of Ohio, in *State v. Jones*, Slip Opinion No. 2016-Ohio-5105, established that:

This court has stated succinctly that preindictment delay violates due process only when it is unjustifiable and causes actual prejudice: “An unjustifiable delay between the commission of an offense and a defendant’s indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law” under the United States and Ohio Constitutions. *State v. Luck*, 15 Ohio St.3d 150, 15 Ohio B. 296, 472 N.E.2d 1097 (1984), paragraph two of the syllabus.

And we have firmly established a burden-shifting framework for analyzing a due-process claim based on preindictment delay. Once a defendant presents evidence of actual prejudice, the burden shifts to the state to produce evidence of a justifiable reason_ for the delay. *State v. Whiting*, 84 Ohio St.3d 215, 217, 1998-Ohio-575, 702 N.E.2d 1199 (1998); *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 99.

Id. at ¶ 12.

{¶6} Herein, Durham has failed to establish the existence of any harm that occurred as a result of preindictment delay. Specifically, Durham has failed to identify any missing evidence or unavailable testimony, which resulted from the preindictment

delay, that would have minimized or eliminated the impact of the state's evidence and thus aided Durham's defense at trial. Durham has failed to establish that he was prejudiced by the failure of appellate counsel to argue the issue of preindictment delay on appeal.

{¶7} Through his second proposed assignment of error, Durham argues that appellate counsel was ineffective by failing to challenge the admission of testimony from a hospital emergency room registered nurse, who treated C.T., a rape victim. During the course of trial, the registered nurse testified that she reviewed the hospital records of C.T.'s treatment in the emergency room and opined that:

It says: Patient admitted ambulatory to the emergency room. No. 12 is the treatment area. States, "I was raped at 11 p.m. last night." Police here with patient on arrival. Patient is alert and oriented and cooperative. States at 10:30 or 11 p.m. was taking garbage out at home when an assault took place. States vaginal intercourse only took place. The MARKit sexual assault evidence collection kit was used per protocol. That's just the brand name of the sexual assault kit.

Tr. 893.

{¶8} The Supreme Court of Ohio has firmly established that statements made to medical personnel for the purpose of diagnosis or treatment, are admissible at trial because "they are not even remotely related to the evils that the Confrontation Clause was designed to avoid." *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 63. In addition, the Supreme Court of Ohio has held that the statements of a rape victim, made to medical personnel during examination and treatment at a hospital, are

admissible at trial even if the victim is unavailable for cross-examination. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834.

{¶9} Herein, the statements made by C.T. to the medical personnel, during the emergency room examination, were made primarily for the purpose of medical examination and treatment, and thus admissible at trial. It must also be noted that the statements of C.T., contained in the hospital medical records, were admissible pursuant to Evid.R. 803(4), because the statements were made for the purpose of medical diagnosis and treatment. *State v. Diaz*, 8th Dist. Cuyahoga No. 103878, 2016-Ohio-5523; *State v. Bowleg*, 8th Dist. Cuyahoga Nos. 100263 and 100264, 2014-Ohio-1433. Durham has failed to establish that he was prejudiced by the failure of appellate counsel to challenge the admission of testimony from a hospital emergency room registered nurse, who treated C.T., a rape victim.

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

LARRY A. JONES, SR., PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR