[Cite as *State v. Anderson*, 2018-Ohio-82.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104460

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHYNE ANDERSON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case Nos. CR-15-599104-A, CR-15-599105-A,
CR-15-602138-A, and CR-15-602139-A
Application for Reopening
Motion No. 507480

RELEASE DATE: January 10, 2018

FOR APPELLANT

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TIM McCORMACK, J.:

{¶1} On May 26, 2017, the applicant, Shyne Anderson, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Anderson*, 8th Dist. Cuyahoga No. 104460, 2017-Ohio-931, in which this court affirmed his convictions for felonious assault, kidnapping, aggravated burglary, criminal damaging, domestic violence, rape, grand theft, intimidation of a crime victim, assault, robbery, and abduction. Anderson now argues that his appellate counsel should have argued prosecutorial misconduct, ineffective assistance of trial counsel, improper evidence, insufficient evidence, and appellant counsel's failure to cooperate with him. The state of Ohio filed its brief in opposition on June 13, 2017, and Anderson filed a reply brief on July 12, 2017. For the following reasons, this court denies the application to reopen.

{¶2} Anderson faced charges in four different cases in which he beat up two women, the mother of his child and another woman, on five different occasions. In *State v. Anderson*, Cuyahoga C.P. No. CR-15-602138, Anderson and the mother of his child went drinking on the night of July 23, 2014. When the mother said she wanted to go home, Anderson, thinking that she was going to see another man, took her keys and drove off in her car. The mother, while walking around, picked up a brick. Eventually, Anderson returned with the car. When the mother entered the vehicle, they resumed arguing, and the mother tossed the brick into Anderson's lap. Anderson threw the brick at the mother and gashed her face. The mother asked Anderson to take her to

the hospital, but he refused. Instead, he drove her to her home, where they continued to argue. Eventually, Anderson drove off in the mother's car. On these facts, the trial court found Anderson guilty of felonious assault and kidnapping, for which the judge sentenced him to 8 years and 11 years respectively, to be served concurrently.

{¶3} In *State v. Anderson*, Cuyahoga C.P. No. CR-15-599104-A, on January 11, 2015, Anderson and the mother had gone out drinking again. After Anderson had returned the mother to her second-floor apartment residence, she saw Anderson climbing in through a window. The mother fled her apartment and ran downstairs. When Anderson caught her, he started hitting her in the face. A neighbor opened his door, and the mother fell into the neighbor's home. Anderson followed her. Eventually, the neighbor and the mother pushed Anderson out of the apartment and locked the door. The mother received injuries to her jaw, forehead, and eye. The windshield of a vehicle parked on the driveway was also shattered. On these facts, the trial court found Anderson guilty of aggravated burglary relating to the mother's residence, domestic violence, and two counts of criminal damaging. Anderson's sentence was 11 years for aggravated burglary and a fine of $250 on each count.

{¶4} In *State v. Anderson*, Cuyahoga C.P. No. CR-15-599105-A, on July 18, 2015, Anderson had a fight with the second woman. After the fight, the second woman went out with her friend. When she returned to her home, Anderson, who apparently had entered through a previously broken door, was waiting for her and began beating her and accusing her of having sex with somebody else. He also ripped off her shorts and inserted

his fingers into her vagina. When the woman ran to her bathroom, Anderson followed her and hit her with the shower curtain rod. Anderson then took the woman's cell phone and her car keys and drove off with her car. After the police arrested Anderson, he called the victim from jail and asked her not to appear at court proceedings. For these offenses, the court sentenced him to 11 years each on rape, kidnapping, and aggravated burglary; 17 months on grand theft; 36 months on the intimidation charge; and a $250 fine for assault, all to be served concurrently.

{¶5} In *State v. Anderson*, Cuyahoga C.P. No. CR-15-602139-A, in December 2015, Anderson and the second woman were driving in her rental car. When she refused to let Anderson borrow the rental car, they fought, during which time Anderson tried to drag her out of the car. Later, Anderson "messed up" the car. In another incident in December 2015, Anderson "bumrushed" the woman and pushed her inside her home. He punched her and poured juice and cooking oil over her. He then drove off in her car without her permission. For these offenses, the trial court sentenced Anderson to 8 years on burglary, 8 years on robbery, 36 months on abduction, and 18 months on grand theft, all to be served concurrently. Altogether, the trial court sentenced Anderson to a total of 22 years.

{¶6} Anderson's appellate counsel argued manifest weight of the evidence, improper admission of "other acts" evidence, and ineffective assistance of trial counsel for failing to challenge the joinder of the four cases. Anderson now claims that his appellate counsel was ineffective.

{¶7} 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.

{¶8} 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.

{¶9} 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 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.

{¶10} 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.

{¶11} Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898). Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. "Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. "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.

{¶12} Anderson frames his first argument in terms of prosecutorial misconduct. He claims that the state had possession of a CD recording with the second woman that if played in full would have exonerated him of the rape charge. However, it is difficult to discern to which CD or conversation Anderson is referring. At times, in reviewing his submissions, it seems like he is referring to the conversations between himself and the victim that are on exhibit No. 6. Anderson claims that the state played only a part of these conversations, and the whole conversation would have presented exonerating evidence. At other times, he seems to be referring to a conversation between the victim and the detective, which is mentioned in a discovery disclosure, but this CD was not played at trial.

{¶13} The court has reviewed all of exhibit No. 6, the jail telephone calls between Anderson and victim, and found nothing exonerating in those calls. Although the record indicates that there were conversations between the detective and the second woman, the content of the conversations are not part of the record. Anderson admits that the conversations were not played during trial. Thus, for purposes of evaluating appellate counsel's performance, those conversations are not part of the record; declining to raise claims without record support cannot constitute ineffective assistance of appellate

counsel. To the extent that Anderson refers to the conversations between himself and the second woman, his argument is unfounded.

{¶14} Anderson argues that his trial counsel was ineffective for failing to ensure that all of the telephone conversations with the victim were played. For the reasons stated above, this argument is not well taken. Anderson also argues that his trial counsel was ineffective for not consulting with him and not preparing for trial enough. Because the proof of such assertions lies outside the record, appellate counsel properly declined to raise such an argument. Anderson asserts that his trial counsel was ineffective for not arguing that the mother of their child was the aggressor in the brick incident. Appellate counsel included this point in his manifest weight argument. Appellate counsel also argued ineffective assistance of trial counsel, but focused the argument on trial counsel's failure to object to the joinder of all four cases. Following the admonition of the Supreme Court, this court will not second-guess appellate counsel's strategy and tactics.

{¶15} In his third and fourth arguments, Anderson maintains that there was no credible evidence to support the aggravated burglary conviction from his climbing through a small, second-story window. Anderson points to the testimony that there were no footprints or marks in the snow below the window, and that the investigating officer did not believe that Anderson had entered through the window. However, appellate counsel marshaled these points into the manifest weight argument. Thus, Anderson's

claim that his appellate counsel was ineffective for not raising the issue is not well founded.

{¶16} Anderson's dissatisfaction with his appellate counsel, in not communicating with him more, and not sending him a copy of the transcript, is not considered ineffective assistance of appellate counsel for purposes of App.R. 26(B). *State v. Inglesias-Rodrequez*, 8th Dist. Cuyahoga No. 76028, 2000 Ohio App. LEXIS 1007 (Mar. 16, 2000), *reopening disallowed*, 2000 Ohio App. LEXIS 4882.

{¶17} Finally, Anderson argues that there was insufficient evidence to support the convictions, especially the rape conviction, because there was no rape kit taken or presented and no effort to preserve or present physical evidence, such as the ripped shorts.

However, appellate counsel did include the rape conviction in his manifest weight argument and relied upon inconsistencies in the second victim's testimony to support that argument. Following the admonitions of the Supreme Court, this court will not second-guess counsel's professional strategic and tactical choices.

{¶18} Moreover, this court considered and rejected appellate counsel's manifest weight of the evidence argument.

> In determining that the judgment was not against the manifest weight of the evidence, this court was required to go beyond the question of law which a claim of insufficiency of the evidence would present and examine the broader issues of credibility, etc. Appellate counsel did not, therefore, violate any essential duty to applicant nor was the applicant prejudiced by the absence of an assignment of error asserting insufficiency of the evidence.

State v. Krszywkowski, 8th Dist. Cuyahoga No. 80392, 2002-Ohio-4438, *reopening disallowed*, 2003-Ohio-3209, ¶ 16.

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

TIM McCORMACK, JUDGE

EILEEN A. GALLAGHER, A.J., and
KATHLEEN ANN KEOUGH, P.J., CONCUR