[Cite as *State v. Harris*, 2018-Ohio-85.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104833

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case Nos. CR-15-598240-A and CR-15-599227-A
Application for Reopening
Motion No. 508774

RELEASE DATE: January 8, 2018

FOR APPELLANT

Michael Harris, pro se
Inmate No. 684798
North Central Correctional Institution
670 Marion Williamsport Road East
Marion, Ohio 43302

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Anthony Thomas Miranda
Jeffrey Schnatter
Assistant County Prosecutors
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} On July 14, 2017, the applicant, Michael Harris, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Harris*, 8th Dist. Cuyahoga No. 104833, 2017-Ohio-2985, in which this court affirmed Harris's conviction for murder in *State v. Harris,* Cuyahoga C.P. No. CR-15-599227-A.[1]

Harris now argues that his appellate counsel was ineffective because he should have made better arguments. The state of Ohio filed its brief in opposition to the application on July 21, 2017. For the following reasons, this court denies the application.

{¶2} The present case concerns the death of a two-year-old boy. Harris was in a relationship with the boy's mother. Harris had spent the night at the mother's home. In the morning, she prepared her children for the day by getting them dressed and feeding them.[2] When the mother was going into the bathroom to take a shower, the two-year-old boy was crying to come in with her. She then asked Harris to get the boy. She remembers Harris grabbing the boy, and she went to take her shower. Several minutes into the shower, she heard a knock at the bathroom door, but did not respond. When she left the bathroom, she saw the boy sitting on the couch. A few moments later, she

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[1]Harris also "appealed" his convictions for criminal trespass, domestic violence, and assault in *State v. Harris,* Cuyahoga C.P. No. CR-15-598240-A; the assault charges merged into the domestic violence charges. However, Harris did not challenge these convictions, but argued that it was error to join the two cases and consequently to permit improper "other acts" evidence.

[2]At that time, the mother had six children. Three went to school, and three, including the victim, stayed with her. The ages of the other young children were four years old and five months old. The mother testified that the four year old was not a large girl.

picked up the boy to put on his coat, but she saw that he was not breathing. Despite calling 911, trying CPR, and taking the boy to the hospital, he died.

{¶3} The coroner ruled that the boy died as a result of a blunt force impact, like a fist or a foot, to the trunk causing broken ribs, lacerated spleen and liver, and internal hemorrhaging. The coroner further opined that only an adult could have caused these injuries and that the boy would have been incapacitated within minutes of sustaining these severe injuries.

{¶4} The trial judge found Harris guilty of felony murder under R.C. 2903.02(B), as charged in the indictment, and sentenced him to 15 years to life.

{¶5} Harris's appellate counsel argued insufficient evidence, manifest weight of the evidence, improper joinder of cases, and improper "other acts" evidence. Harris now complains that his counsel improperly argued insufficient evidence, because he did not focus on the element of purposefully, and improperly argued manifest weight of the evidence by not focusing on the time line of events to show that the mother hit the boy and caused his death.

{¶6} 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.

{¶7} 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.

{¶8} 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.

{¶9} 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.

{¶10} Harris's first argument is ill-founded, because purposefully is an element of murder under R.C. 2903.02(A). It is not an element under R.C. 2903.02(B), which requires the mens rea of knowingly. Appellate counsel in the exercise of professional judgment properly rejected an argument that did not apply to Harris's indictment.

{¶11} Appellate counsel marshaled the evidence to show that the trier of fact had lost his way in finding Harris guilty. Counsel noted that there were no eyewitnesses to the events, and there was no DNA or physical evidence linking Harris to the death. Harris voluntarily cooperated with the police in the investigation and had a calm demeanor during questioning. The mother testified that Harris would play with her children, but did not discipline them. She further stated that he was fond of her children. The autopsy on the boy revealed that he had older injuries, including broken ribs and a cigarette burn on his wrist. The coroner testified that either a man or a woman could

have caused the boy's mortal injuries and that the boy had suffered some form of early child abuse. The coroner further stated that the boy's injuries would have made him cry and would have very quickly incapacitated him. Children and Family Services had investigated the mother several times before the incident and, by the time of the trial, had taken all of her children.

{¶12} Appellate counsel's inference was clear. Harris's conviction was against the manifest weight of the evidence because there was no direct evidence of Harris hitting the child, and there was evidence of the mother abusing the boy previously. Appellate counsel's decision not to tender the speculation that the mother hit the boy just before taking her shower, leaving him crying for Harris to pick up was a reasonable, professional, tactical decision that this court will not second-guess, pursuant to the admonitions of the Supreme Court.

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

SEAN C. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR