

[Cite as *State v. Winfrey*, 2010-Ohio-276.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23174
v.	:	T.C. NO. 08 CRB 6942
ARTHUR N. WINFREY	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	

OPINION

Rendered on the 29th day of January, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Arthur N. Winfrey, filed December 16, 2008. On May 15, 2008, Winfrey was charged by way of complaint in Dayton Municipal Court with one count of assault, in violation of R.C. 2903.13(A), and one count of aggravated menacing, in violation of R.C. 2903.21, both misdemeanors of the first

degree. Following a bench trial, Winfrey was convicted of both offenses, and he received a sentence of 180 days in the Montgomery County Jail for each offense, to be served consecutively, with credit for 66 days.

{¶ 2} The victim herein is Brenda Davis, Winfrey's former girlfriend. Davis testified that Winfrey came to her apartment on May 10th and that an argument ensued regarding Davis' new boyfriend. According to Davis, Winfrey hit her "about the face by the neck," and after leaving the apartment, he repeatedly made threatening telephone calls to her. The following day, Davis called the police. Officer Edmund Trick of the Dayton Police Department testified regarding his response to Davis' residence and the injuries which he observed on Davis' face.

{¶ 3} Winfrey asserts one assignment of error as follows:

{¶ 4} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND BY SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶ 5} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * * . Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an

objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel’s perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel.” (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 6} According to Winfrey, his counsel was ineffective for failing to submit a notice of alibi and present alibi witnesses at trial. Winfrey relies upon his affidavit, attached to his brief, that provides:

{¶ 7} “1. That the undersigned had an alibi in defense of the criminal charges against him * * *

{¶ 8} “2. That the undersigned presented information regarding this alibi to his trial attorney, * * * including names of alibi witnesses.

{¶ 9} “3. That the trial attorney did not contact the alibi witnesses or conduct any other investigation regarding the alibi.

{¶ 10} “4. That, in fact, no alibi was pled, and no alibi witnesses were presented at trial in defense of the criminal charges against the undersigned.

{¶ 11} “5. That the undersigned was prejudiced by the trial attorney’s failure to present the alibi to the trial court.”

{¶ 12} While R.C. 2953.21(A) allows a trial court to consider “a supporting affidavit and other documentary evidence” in ruling on a petition for post-conviction relief, which Winfrey did not file, Appellate Rules 9(A) and 12(A)(1)(b) limit our consideration to the

“original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court.” Winfrey cannot supplement the record on appeal by means of his affidavit; the scant facts it alleges regarding defense counsel’s failure to pursue an alibi defense are not contained in the trial court record, and the affidavit is not properly before us. See *State v. Carter* (June 16, 1998), Washington App. No. 97CA13. Since Winfrey has failed to demonstrate in the record that his counsel’s performance was deficient and that, but for the deficiency, the outcome of his trial would have been different, his assigned error is overruled. Judgment affirmed.

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BROGAN, J. and FROELICH, J., concur.

Copies mailed to:

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