

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 107860
	:	
v.	:	
	:	
GREGORY SCRUGGS, JR.,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: February 18, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-18-628628-A
Application for Reopening
Motion No. 532993

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Christine M. Vacha, Assistant Prosecuting Attorney, *for appellee*.

Gregory Scruggs, Jr., *pro se*.

MARY EILEEN KILBANE, P.J.:

{¶ 1} Gregory Scruggs, Jr. has filed a timely App.R. 26(B) application for reopening. Scruggs is attempting to reopen the appellate judgment, rendered in *State v. Scruggs*, 8th Dist. Cuyahoga No. 107860, 2019-Ohio-3043, that affirmed

his conviction and sentence for the offenses of rape and sexual battery. We decline to reopen Scruggs's appeal for the following reasons.

I. Standard of Review Applicable to App.R. 26(B)

Application for Reopening

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, Scruggs 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 in 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} Moreover, even if Scruggs establishes that an error by his appellate counsel was professionally unreasonable, Scruggs must further establish that he was prejudiced; but for the unreasonable error there exists a reasonable probability that

the results of his appeal would have been different. Reasonable probability, with regard to an application for reopening, is defined as a probability sufficient to undermine confidence in the outcome of the appeal. *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504.

II. First Proposed Assignment of Error

{¶ 5} Scruggs's first proposed assignment of error is that:

Appellant was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution where his appellate counsel omitted a Dead Bang Winner, prejudicing appellant to receive a full review by the court.

{¶ 6} Scruggs, through his first proposed assignment of error, argues that appellate counsel failed to properly argue the claim that the conviction for the offense of rape was not supported by sufficient evidence. Specifically, Scruggs argues that appellate counsel argued the wrong standard of review applicable to a claim that the conviction for rape was not supported by sufficient evidence.

{¶ 7} Contrary to the claim of Scruggs, appellate counsel did not argue the incorrect standard of review applicable to a claim of insufficient evidence. *See* pg. 15 of the appellant's brief filed on April 23, 2019, that raised the assignment of error of insufficient evidence. In addition, this court correctly cited the standard of review applicable to a claim of insufficient evidence:

Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Williams*, 8th Dist. Cuyahoga No. 106563, 2018-Ohio-4612, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. When reviewing the sufficiency of the evidence to support a criminal

conviction, an appellate court examines the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *Id.* The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

The jury found Scruggs guilty of rape in violation of R.C. 2907.02(A)(1)(c). This statute provides in pertinent part that “[n]o person shall engage in sexual conduct with another” when “the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition,” and “the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition.”

Scruggs does not deny that sexual conduct occurred. Rather, he argues that the state failed to offer sufficient evidence either that T.M. was substantially impaired or that he knew, or had reasonable cause to believe, that she was substantially impaired and not able to consent. As a result, we need only address the element of substantial impairment.

In *State v. McCall*, 8th Dist. Cuyahoga No. 104479, 2017-Ohio-296, we stated:

As for the element of substantial impairment, this court has repeatedly held that “sleep constitutes a mental or physical condition that substantially impairs a person from resisting or consenting to sexual conduct.” *State v. Jones*, 8th Dist. Cuyahoga No. 98151, 2012-Ohio-5737, ¶ 30, citing *State v. Clark*, 8th Dist. Cuyahoga No. 90148, 2008-Ohio-3358, ¶ 21.

Id. at ¶ 7.

In the instant case, T.M. testified that she was twice awakened when someone, whom she thought was Bryant, but actually was Scruggs, had inserted his penis into her vagina. T.M. read the last text message she sent to Bryant, which stated: “That's crazy as f**k. If you wanted to f**k, you could've told me. You ain't have to do it while I was asleep but it's cool.”

The above excerpt reveals that T.M. was substantially impaired by sleep at the time of the incidents such that she was unable to resist or consent to Scruggs's sexual conduct.

In addition, T.M. testified that she had been drinking for several hours prior to being picked up by Bryant and was already drunk. T.M.II testified that T.M. was drunk when she arrived at her house, but continued to drink. T.M.II also testified that T.M.'s friend and drinking companion, Jamica, was so inebriated that she slept most of time she was at T.M.II's house. The testimony also established that Jamica was asleep most of the time spent at Scruggs's house.

The consumption of a large amount of alcohol over the course of just a few hours is sufficient evidence to find that the victim was substantially impaired. *State v. Patterson*, 8th Dist. Cuyahoga No. 104266, 2017-Ohio-1444, citing *State v. Kuck*, 2016-Ohio-8512, 79 N.E.3d 1164, ¶ 95 (2d Dist.).

Based on the foregoing, and the physical evidence linked to Scruggs, we conclude there was sufficient evidence presented which, if believed, would convince the average trier of fact that Scruggs was guilty beyond a reasonable doubt of rape.

Accordingly, the second assignment of error is overruled.

Scruggs at ¶ 18.

{¶ 8} In addition, the doctrine of res judicata prevents further review of the issue of insufficient evidence because the issue has already been addressed by this court on direct appeal, and found to be without merit. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Claims of ineffective assistance of appellate counsel in an application for reopening may be barred from further review by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Logan*, 8th Dist. Cuyahoga No. 88472, 2008-Ohio-1934; *State v. Tate*, 8th Dist. Cuyahoga No.

81682, 2004-Ohio-973. We further find that circumstances do not render the application of the doctrine of res judicata unjust. Scruggs has failed to establish any prejudice through his first proposed assignment of error.

III. Additional Proposed Assignments of Error

{¶ 9} Scruggs has also raised three additional proposed assignments of error: 1) appellate counsel's failure to fully investigate the case; 2) failure of appellate counsel to "test" the state's case; and 3) failure of appellate counsel to present "defense alibi." Scruggs, however, has failed to present any cognizable argument with regard to his three additional proposed assignments of error. Thus, Scruggs has failed to demonstrate how appellate counsel's performance was deficient and that he was prejudiced by appellate counsel's claimed deficiencies.

{¶ 10} In *State v. Kelly*, 8th Dist. Cuyahoga No. 74912, 2000 Ohio App. LEXIS 2907 (June 21, 2000), this court established that the mere recitation of assignments of error is not sufficient to meet the burden to prove that the applicant's appellate counsel was deficient for failing to raise the issues he now presents, or that there was a reasonable probability that the applicant would have been successful if the presented issues had been considered in the original appeal. *See also State v. Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-4467; *State v. Hawkins*, 8th Dist. Cuyahoga No. 90704, 2009-Ohio-2246. The failure of Scruggs to present any cognizable argument with regard to his additional three proposed assignments of error results in the failure to demonstrate that his appellate counsel was deficient

and that he was prejudiced by the alleged deficiency. *State v. Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-5151.

{¶ 11} Application denied.

MARY EILEEN KILBANE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
EILEEN A. GALLAGHER, J., CONCUR