[Cite as *State v. Richardson,* 2024-Ohio-1995.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff- Appellee,

v.

GREGORY DELMAR RICHARDSON II,

Defendant- Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0136

Application for Reopening

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Mark A. Hanni, Judges.

JUDGMENT:
Denied.

Atty. Gina DeGenova, Mahoning County Prosecutor*, Atty. Edward A. Czopur,* Assistant Mahoning County Prosecutor, Mahoning County Prosecutor's Office for Plaintiff-Appellee and

Gregory Delmar Richardson II, pro se*.*

Dated: May 16, 2024

PER CURIAM.

{¶1} Gregory Delmar Richardson II seeks to reopen his direct criminal appeal under App.R. 26(B). Richardson claims his appellate counsel was ineffective based on counsel's failure to argue that he was denied the effective assistance of trial counsel.

{¶2} The state of Ohio asserts the application to reopen is untimely and lacks merit. For the following reasons, Richardson's application is denied.

{¶3} Richardson plead guilty and was convicted of robbery in violation of R.C. 2911.02(A)(1) with a firearm specification and having weapons while under a disability in violation of R.C. 2923.13(A)(2).

{¶4} In his appeal, Richardson raised two assignments of error. He challenged the voluntariness of his plea. Richardson also claimed he was denied the effective assistance of trial counsel since his attorney did not advise him that by pleading guilty, he waived the right to appeal the decision overruling his suppression motion. We concluded each of his arguments lacked merit and affirmed his convictions. *State v. Richardson*, 7th Dist. Mahoning No. 22 MA 0136, 2023-Ohio-4718.

{¶5} As for the state's timeliness argument, we disagree. An application to reopen an appeal must be filed in the court of appeals within 90 days after journalization of the appellate court's judgment. App.R. 26(B)(1).

{¶6} We issued our decision on December 18, 2023. Richardson filed his application for reopening March 18, 2024, which is 91 days after our decision. However, because March 17, 2024 was a Sunday, his application was timely. App.R. 14(A).

Ineffective Assistance of Appellate Counsel

{¶7} Richardson claims his appellate counsel was ineffective for failing to raise two arguments showing he was denied the effective assistance of trial counsel.

{¶8} A criminal defendant may apply for reopening of his direct appeal based on a claim of ineffective assistance of appellate counsel by raising an assignment of error (or an argument in support of an assignment of error) that previously was not considered on the merits (or that was considered on an incomplete record) because of appellate counsel's allegedly deficient representation. App.R. 26(B)(1), (B)(2)(c).

{¶9} "An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶10} Appellant's burden per App.R. 26(B) is to show there is a genuine issue as to whether he was deprived of the effective assistance of appellate counsel; an appellant is not required to conclusively establish ineffective assistance of appellate counsel. *State v. Leyh*, 166 Ohio St.3d 365, 2022-Ohio-292, 185 N.E.3d 1075. Thus, when addressing an application to reopen, we consider the two-part test for ineffective assistance of counsel upon considering whether there is a genuine issue as to whether counsel's performance was deficient and resulting prejudice. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5, applying *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). If there is no genuine issue regarding whether counsel's performance was deficient, then there is no need to review for prejudice and vice versa. *Id.*

{¶11} In evaluating whether appellate counsel was deficient, our review is highly deferential to counsel's decisions because there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2d 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Courts should not second-guess an attorney's strategic decisions. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶12} Regarding the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Id.* A finding of prejudice from defective representation justifies reversal only if the results were unreliable or the proceeding was fundamentally unfair due to counsel's performance. *Id.* citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838 (1993).

{¶13} Moreover, in this context, we must be cognizant that appellate counsel has wide discretion to choose the errors to be raised on appeal and focus on the arguments counsel perceived as the strongest. *Tenace*, 109 Ohio St.3d 451, 849 N.E.2d 1, ¶ 7. "Experienced advocates since time beyond memory have emphasized the importance of

winnowing out weaker arguments on appeal" to avoid diluting the force of stronger arguments. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308 (1983).

Proposed Assignment of Error

{¶14} Richardson's sole proposed assignment of error asserts:

"Appellant was denied the effective assistance of trial counsel."

{¶15} Richardson claims his appellate counsel was ineffective for failing to raise two reasons his trial counsel was ineffective. As a result of his trial counsel's alleged failures, Richardson contends he was given a 54-month sentence enhancement when he should have received a 12-month penalty.

{¶16} First, Richardson claims his attorney was deficient for failing to realize the penalty enhancement is not applicable to a robbery offense, such as his. Richardson contends R.C. 2911.02 does not authorize the R.C. 2941.145 enhancement. We detailed Richardson's plea agreement in our opinion:

> The court issued an entry October 6, 2022 indicating it was amending count three from aggravated robbery, a first-degree felony, to robbery, a second-degree felony under R.C. 2911.02(A)(1) based on the parties' Rule 11 negotiations. (October 6, 2022 Judgment.) Appellant entered a guilty plea the same date. He plead guilty to counts three and five. The written guilty plea indicates amended count three charged Appellant with one count of robbery in violation of R.C. 2911.02(A)(1), a second-degree felony with a "F/A SPEC – 54 month, R.C. 2941.145(D)." It also states he plead guilty to count five, "W.U.D. R.C. 2923.13(A)(2)" a third-degree felony. (October 6, 2022 Plea of Guilty Pursuant to Crim.R. 11(F).)
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> At the plea hearing, the prosecutor detailed the parties' plea agreement. He explained that on the two severed counts, counts three and five, Appellant agreed to plead guilty to an amended robbery count with a firearm specification and the weapons under disability charge. And "in exchange" the state agreed to recommended the agreed upon sentence of a total of eight to nine years. The state moved to amend the aggravated robbery charge to robbery, which the court granted. Count three was a first-

> degree felony before it was reduced to a second-degree charge. (September 29, 2022 Plea Hearing Tr. 2-7.)
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> * * *
>
> In its written decision, the trial court stated it was adopting the agreed upon sentence of the parties. For count three, it sentenced Appellant to the minimum sentence of two years in prison with a maximum of three years. On the attendant firearm specification, the court sentenced him to the mandatory four and a half years, which was to be served before and consecutive to count three. As for count five, the court imposed an eighteen-month prison sentence to run consecutive to the time for count three, for a total sentence of eight to nine years in prison. (October 6, 2022 Judgment.)

State v. Richardson, *supra*, at ¶ 7-8, 12.

{¶17} Richardson directs our attention to *State v. Holmes*, 181 Ohio App.3d 397, 2009-Ohio-1241, 909 N.E.2d 163 (8th Dist.), in support of his argument. However, *Holmes* deals with a lack of sufficient evidence supporting the three-year firearm specification for aggravated robbery, as opposed to the lesser offense of robbery. *Id*. at ¶ 21-25. It does not address whether a court is authorized to impose the penalty enhancement for a violation of R.C. 2911.02(A). *Id.*

{¶18} A violation of R.C. 2911.02(A)(1) is robbery, a second-degree felony. R.C. 2911.02(B). Richardson was sentenced to a minimum two years in prison and maximum of three years.

{¶19} R.C. 2941.145(D) states in part:

> Imposition of a mandatory prison term of fifty-four months upon an offender * * * is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed a firearm, or used the firearm to facilitate the offense and that the offender previously has been convicted of or pleaded guilty to a firearm specification of the type described in section

> 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code.

{¶20} Here, count three of the indictment charged Richardson with theft and a firearm specification. The specification states in part that Richardson "had a firearm on or about his person or under his control while committing the offense and displayed the firearm, brandished the firearm, indicated he possessed the firearm, or used the firearm to facilitate the offense and he previously has been convicted of or pleaded guilty to a firearm specification * * *." (March 11, 2021 Indictment.) Consequently, despite the fact that his robbery offense was reduced from a first-degree felony to a second-degree felony, the enhancement was nevertheless applicable. The essential language was specified in the indictment.

{¶21} Because Richardson fails to demonstrate that the R.C. 2941.145 enhancement was inapplicable, this aspect of his proposed assignment of error fails to show there is a genuine issue regarding whether his trial counsel's performance was deficient.

{¶22} Second, Richardson claims his trial attorney should have sought dismissal of the penalty enhancement because it was unconstitutionally applied in his case since the state relied on his prior conviction from 2015. Richardson claims this violates the ex-post facto clause since his prior conviction predates the statute amendments. We disagree.

> '[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.'*

Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715 (1990), quoting *Beazell v. Ohio,* 269 U.S. 167, 46 S.Ct. 68 (1925).

{¶23} Further, this court has held:

> [C]onstitutional prohibitions are not implicated where a new statute criminalizes future conduct of a person whose status is determined by a prior crime. * * * [For example,] the crime of having a weapon while under

> disability entails a present crime but relies on past conduct to determine status. * * * In dicta, the Supreme Court has stated that prosecuting these felons is not a violation of the *ex post facto* or retroactivity clauses. *State v. Cook* (1998), 83 Ohio St.3d 404, 412.

State v. Bell, 7th Dist. Belmont No. 00BA25, 2001 WL 1005890, *4; *Accord State v. Vermillion*, 7th Dist. Belmont No. 98-BA-16, 1999 WL 436737, *5; *State v. Sargent*, 126 Ohio App.3d 557, 566, 710 N.E.2d 1170 (12th Dist.1998).

{¶24} Because Richardson's charged offense occurred after the amendment, there is no ex-post facto violation. Richardson's pre-existing disability does not violate the law or trigger its application. Instead, the increased penalty was applicable because Richardson's criminal offense occurred after the revision. The fact that the disability predated the amendment does not constitute a violation of the ex-post facto clause. *Id.*

{¶25} Accordingly, Richardson's proposed assignment of error does not show there is a "genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

Conclusion

{¶26} For the foregoing reasons, Appellant's proposed assigned error fails to demonstrate that reopening is warranted.

JUDGE CAROL ANN ROBB

JUDGE CHERYL L. WAITE

JUDGE MARK A. HANNI

NOTICE TO COUNSEL

This document constitutes a final judgment entry.