

[Cite as *State v. Hill*, 2018-Ohio-3564.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106017

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER HILL

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION GRANTED

Cuyahoga County Court of Common Pleas
Case No. CR-17-614706-A
Application for Reopening
Motion No. 519209

RELEASE DATE: August 31, 2018

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SEAN C. GALLAGHER, J.:

{¶1} Christopher Hill, pursuant to App.R. 26(B), timely seeks to reopen his appeal, *State v. Hill*, 8th Dist. Cuyahoga No. 106017, 2018-Ohio-1401, claiming that appellate counsel was ineffective for failing to address the key issues surrounding his involuntary manslaughter conviction. We grant the application for reopening.

{¶2} App.R. 26(B) provides a means to assert an ineffective assistance of appellate counsel claim. In order to be successful, the application for reopening must demonstrate “a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” App.R. 26(B)(5). This condition can be satisfied by demonstrating a claim of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5. Therefore, Hill must show that appellate counsel was deficient for failing to raise an issue and there was a reasonable probability of success had the issue been asserted in the direct appeal. *Id.*

{¶3} In his direct appeal, Hill’s attorney alleged that his involuntary manslaughter conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. Within these assignments of error, appellate counsel argued that Hill was acquitted of aggravated robbery, so the involuntary manslaughter conviction could not stand. Counsel further argued that the jury was improperly instructed on the offense that underpinned the involuntary manslaughter conviction: drug trafficking. Appellate counsel contended that aggravated robbery was the proper predicate offense even though

the indictment and jury instructions identified the unindicted felony of drug trafficking as the predicate offense.

{¶4} We affirmed Hill’s conviction for involuntary manslaughter based, in part, on a lack of argument going to the essential issue in the case. “The issue is whether Hill knowingly sold or offered to sell controlled substances, an issue that has not been addressed in the appellate briefing by either party, and whether Hill’s conduct in trafficking drugs created the foreseeable risk of the victim’s death.” *Hill*, 8th Dist. Cuyahoga No. 106017, 2018-Ohio-1401, at _ 11, citing App.R. 16(A)(7).

{¶5} Having already determined that Hill’s appellate counsel failed to argue the determinative issue in the assignments of error that were raised, we must turn to prejudice and determine whether Hill presents a colorable claim of ineffective assistance of appellate counsel. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, _ 28. *See also Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (whether there is a reasonable probability of a different result).

{¶6} Involuntary manslaughter, as set forth in R.C. 2903.04(A), provides that no person shall cause the death of another “as a proximate result of the offender’s committing or attempting to commit a felony.” A “proximate result” is akin to “proximate cause.” *State v. Muntaser*, 8th Dist. Cuyahoga No. 81915, 2003-Ohio-5809, ¶ 38. A proximate result of criminal conduct is an action that “(1) caused the result, in that but for the conduct the result would not have occurred, and (2) the result must have

been foreseeable.” *Id.*, citing *State v. Lovelace*, 137 Ohio App.3d 206, 738 N.E.2d 418 (1st Dist.1999).

{¶7} This court has previously set forth the parameters of foreseeability in this context of involuntary manslaughter:

A defendant cannot be held responsible for consequences no reasonable person could expect to follow from his conduct, but he will be held responsible for consequences which are direct, normal, and reasonably inevitable when viewed in the light of ordinary experience. *State v. Losey* (1985), 23 Ohio App. 3d 93, 95, 491 N.E.2d 379. It is not necessary that the defendant “be in a position to foresee the precise consequence of his conduct; only that the consequence be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct.” *Id.* at 96.

State v. Wilson, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133, ¶ 24-26 (8th Dist.).

{¶8} The state argues there is no probability of a different result because sufficient evidence of drug trafficking existed, along with evidence that Hill could reasonably foresee that his drug trafficking activity could result in death. The state points to the fact that Deon Bulger, the individual who actually caused the victim’s death, was a known member of the Heartless Felons gang. Hill knew of Bulger’s gang affiliation and should have foreseen that arranging a drug transaction between an individual associated with such a violent gang could result in death. Further the state points to testimony adduced at trial that indicates that drug transactions often result in violence.

{¶9} Prior opinions of this court have supported this reasoning: “As courts have acknowledged, drug transactions are dangerous endeavors that can often lead to robbery

or deadly violence.” *Id.* at ¶ 29, citing *State v. Marshall*, 175 Ohio App.3d 488, 2008-Ohio-955, 887 N.E.2d 1227 (1st Dist.).

{¶10} Hill counters that our opinion affirming his conviction recognized that evidence exists in the record that establishes that Jonathan Mentor, the drug dealer with whom Bulger was to transact business, did not carry a firearm. *Hill*, 8th Dist. Cuyahoga No. 106017, 2018-Ohio-1401, at _ 12; tr. 446, 452-453. Therefore, Hill asserts, he could not reasonably foresee that death would result from this drug transaction. This contrasts with the drug-dealer defendant in *Wilson* who was armed. *Wilson* at _ 29. This may not sufficiently distinguish the cases to justify a different result, but the failure to at least argue these issues on appeal does constitute a genuine issue of whether Hill was deprived of effective assistance of counsel. Hill is not required to demonstrate that he would be successful had these arguments been advanced, but only that there is a reasonable probability. There exists a genuine issue as to whether Hill was deprived of the effective assistance of counsel. As a result, his application is well taken.

{¶11} Hill has failed to set forth a proposed assignment of error for review on reopening. The closest Hill gets is the previously quoted passage from our opinion setting forth the key issue in the case. Therefore, the appeal will be limited to a determination of “whether Hill knowingly sold or offered to sell controlled substances * * * and whether Hill’s conduct in trafficking drugs created the foreseeable risk of the victim’s death.” *Hill*, 8th Dist. Cuyahoga No. 106017, 2018-Ohio-1401, at _ 11.

{¶12} The court appoints Erika Cunliffe, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio, 44113, telephone 216-443-6911, to represent Hill. Counsel is instructed to apply for compensation within 30 days after journalization of this court's final decision in the reopened appeal. Loc.App.R. 46(C).

{¶13} The clerk of the court of appeals is instructed to reassemble the record in 8th Dist. Cuyahoga No. 106017 as it existed during this court's original review of the judgment in *State v. Hill*, Cuyahoga C.P. No. CR-17-614706-A.

{¶14} Hill's brief on the merits is due 20 days from the date of this entry. Appellee's brief is due within 20 days of the filing of Hill's brief. Hill's reply brief, if any, is due within 10 days of the filing of appellee's brief. All briefs shall conform to the appellate rules, including the local rules.

{¶15} Application for reopening is granted.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, A.J., and
TIM MCCORMACK, J., CONCUR