

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 106928
	:	
v.	:	
	:	
MONTEZ COBB,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: June 12, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-17-623540-A
Application for Reopening
Motion No. 526558

Appearances:

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

Timothy Young, Ohio Public Defender, and Timothy B. Hackett, Assistant State Public Defender, *for appellant*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Applicant, Montez Cobb, timely seeks to reopen his appeal in *State v. Cobb*, 8th Dist. Cuyahoga No. 106928, 2018-Ohio-5043, claiming that appellate

counsel was ineffective because counsel failed to order and submit for review the transcript of a juvenile bindover hearing that resulted in Cobb's trial for crimes in the common pleas court. We deny the application because Cobb has not presented a colorable claim of ineffective assistance of counsel.

I. Factual and Procedural History

{¶ 2} As set forth in the appellate decision, Cobb was charged with numerous offenses related to a string of robberies, including burglaries and armed robberies. *Id.* at ¶ 2. He was bound over from juvenile court and tried in the common pleas court. *Id.* He eventually pled guilty to 8 of the counts contained in the 26-count indictment. *Id.* at ¶ 5. Cobb received an aggregate 30-year prison sentence.

{¶ 3} On appeal, Cobb raised three assignments of error dealing with the length of sentence, the consecutive nature of sentences, and ineffective assistance of trial counsel for failing to offer mitigating evidence during sentencing. *Id.* at ¶ 10. These assignments of error were overruled, and the convictions were affirmed in this court's decision released December 13, 2018. *Id.* at ¶ 22.

{¶ 4} On March 13, 2019, Cobb filed the instant application to reopen his appeal. He claims that appellate counsel was ineffective because counsel failed to include the juvenile-court transcript as part of the record on appeal. As a result, counsel failed to raise any issues or arguments pertaining to the juvenile court's probable cause and amenability determinations; and, in fact, it is unclear whether counsel even reviewed the juvenile court record to determine whether there were appealable issues.

(Citations omitted.) Application for Reopening at page 4. The state timely opposed the application pointing out that Cobb failed to include a sworn affidavit as required by App.R. 26(B)(2)(d), failed to include any proposed assignments of error as required by App.R. 26(B)(2)(c), and failed sufficiently to show ineffective assistance of appellate counsel.

II. Law and Analysis

A. Standard for Reopening

{¶ 5} App.R. 26(B) provides a limited means for a criminal defendant to reopen a direct appeal based on a claim of ineffective assistance of appellate counsel. A defendant must establish a colorable claim of ineffective assistance of counsel in order to prevail on an application for reopening. *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, ¶ 7, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998). The test for ineffective assistance of counsel requires a defendant to prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for reopening and that there was a reasonable probability of success had that issue been raised on appeal. *Spivey* at 25.

{¶ 6} The defendant must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered

on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c).

{¶ 7} The state argues that Cobb's application fails to specifically delineate an assignment of error and should be dismissed. However, the application makes clear that the alleged ineffective assistance of appellate counsel arises in appellate counsel's failure to include transcripts from the juvenile bindover hearings with the record on appeal. While the failure to include proposed assignments of error in an application is grounds for denial, Cobb's application should not be dismissed based on this where sufficient argument is made to discern the proposed issue. Cobb is arguing that "appellate counsel was ineffective because she failed to include the juvenile-court transcripts as part of the record on appeal." Application for Reopening at 4. He has sufficiently complied with App.R. 26(B)(2)(c).

{¶ 8} The application must also include "[a] sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal * * *." App.R. 26(B)(2)(d). Cobb's failure to include a sworn statement verifying the claims made in support of reopening in the application is sufficient grounds to deny it. *State v. Harris*, 8th Dist. Cuyahoga No. 90699, 2009-Ohio-5962, ¶ 22.

{¶ 9} After the state pointed out Cobb's lack of compliance with App.R. 26(B)(2)(d), Cobb belatedly filed a motion for leave to file the required affidavit. This was done after the state responded to the application and after the 90-day period to file the application had expired. For these reasons, we denied the motion to amend the application.

B. Colorable Claim of Ineffective Assistance of Counsel

{¶ 10} Cobb asserts that the failure to provide the transcript on appeal deprived this court of its ability to afford a meaningful opportunity to review the merits of the bindover proceedings. However, that is not the role of this court. This court does not scour the record to determine every possible error. *State v. Patterson*, 2017-Ohio-8318, 99 N.E.3d 970, ¶ 37 (8th Dist.), citing *Mayfair Village Condominium Owners Assn. v. Grynko*, 8th Dist. Cuyahoga No. 99264, 2013-Ohio-2100, ¶ 6.

{¶ 11} Appellate counsel is afforded deference in determining which issues to argue on appeal. *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶ 7.

With respect 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 the most promising arguments and focusing on one central issue or, at most, a few key issues. *State v. Barrow*, 8th Dist. Cuyahoga No. 101356, 2015-Ohio-4579, ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). See also *State v. Ware*, 8th Dist. Cuyahoga No. 99374, 2014-Ohio-815, ¶ 5 ("Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal.").

State v. Doumbas, 8th Dist. Cuyahoga No. 100777, 2016-Ohio-956, ¶ 6.

{¶ 12} Cobb does not assert that any error occurred, only that an error *could* have occurred. Cobb's application asserts, without support, that appellate counsel failed to review the juvenile bindover proceedings for error. The record in this case does not provide anything to indicate that appellate counsel failed to review records from the bindover proceedings and found no error sufficient to raise on appeal. The trial court entered an order on January 31, 2018, ordering the transcript from the probable cause hearing held on September 18, 2017, and September 19, 2017, to be filed with the court. There is no information properly in the record that indicates this was not done. Unsupported assertions in the application do not constitute sufficient demonstration of a colorable claim of ineffective assistance of appellate counsel where they rely on information outside of the record in this case. *See State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶ 11.

{¶ 13} Further, Cobb does not assert that any error made by appellate counsel would result in a different outcome, but merely that the alleged failure of appellate counsel to provide the transcript of the bindover hearings *could* have resulted in ineffective assistance of counsel. It is generally within the prerogative of appellate counsel to focus on certain issues while winnowing out those that are less meritorious. *Barrow* at ¶ 7. "Appellate counsel is not necessarily ineffective for failing to raise a claim of error and has no constitutional duty to raise every conceivable assignment of error on appeal." *State v. Kaszas*, 8th Dist. Cuyahoga Nos. 72546 and 72547, 1998 Ohio App. LEXIS 4227 (Sept. 10, 1998), *reopening*

disallowed, 2000 Ohio App. LEXIS 3755, 7-8 (Aug. 14, 2000), citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *State v. Gumm*, 73 Ohio St.3d 413, 428, 653 N.E.2d 253 (1995).

{¶ 14} Cobb does not argue a different outcome is likely had appellate counsel included the transcripts from the bindover hearings or demonstrate why appellate counsel's discretion to determine which issues to raise on appeal was professionally unreasonable. This is not a case where an assignment of error was raised, but due to a lack of transcript, the assigned error was overruled. *See, e.g., State v. Cook*, 6th Dist. Wood No. WD-04-029, 2005-Ohio-4174; *State v. Carpenter*, 6th Dist. Erie No. E-00-033, 2002-Ohio-4824.

{¶ 15} Cobb has not raised a colorable claim of ineffective assistance of appellate counsel. Therefore, his application to reopen is denied.

{¶ 16} Application denied.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR