[Cite as *State v. Brown*, 2023-Ohio-2174.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 111462
v.	:	
EARNEST BROWN,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: June 23, 2023

Cuyahoga County Court of Common Pleas
Case No. CR-20-653549-A
Application for Reopening
Motion No. 562266

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Owen W. Knapp, Assistant Prosecuting Attorney, *for appellee*.

Earnest Brown, *pro se*

MARY EILEEN KILBANE, J.:

{¶ 1} On February 22, 2023, the applicant, Earnest Brown, pursuant to App.R. 26(B) and *State v. Murnahan,* 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Brown,* 8th Dist. Cuyahoga No.

111462, 2022-Ohio-4640, in which this court affirmed his convictions and sentences for drug trafficking, drug possession, possession of criminal tools, and endangering children. He now argues that his appellate counsel should have argued that (1) his trial counsel was ineffective for failing to move for an independent analysis of the drugs, (2) the trial court erred in imposing a fine and costs without determining Brown's ability to pay, and (3) the trial court erred in failing to merge the drug tracking offense with the drug possession offense. On March 22, 2023, the state of Ohio filed its brief in opposition. For the following reasons, this court denies the application.

{¶ 2} In July 2020, the Lakewood Police Department began a narcotics investigation on Brown. They arranged several controlled buys before arresting him in his car and conducting a search of his home pursuant to a search warrant. (Tr. 28-29.) The grand jury in September 2020 indicted Brown on the following charges: (1) trafficking in a fentanyl-related compound with a juvenile specification, a first-degree felony; (2) drug possession of a fentanyl-related compound, a second-degree felony; (3) drug possession of 4-ANPP, a schedule II drug, a second-degree felony; (4) drug possession of cocaine, a fifth-degree felony; (5) possession of criminal tools, a fifth-degree felony; (6) child endangerment; and (7) child endangerment, both first-degree misdemeanors.[1]

[1] When the police executed the search warrant, Brown's girlfriend and two children were in the home.

{¶ 3} The state released its narcotics lab report pursuant to discovery in October 2020. After multiple continuances, the trial judge conducted the final pretrial on October 19, 2021. The judge explained that Brown could take the plea agreement that day or the case would proceed to trial on November 1, 2020. At the beginning of the pretrial, Brown's retained attorney stated that Brown still wanted to have the drugs independently analyzed; Brown maintained that he thought he was only dealing in cocaine, and not fentanyl. When the trial judge clarified that there would be no more continuances, Brown accepted the plea agreement.

{¶ 4} The state nolled the juvenile specification for Count 1, which reduced the crime to a second-degree felony. Brown pleaded guilty to Counts 1, 3, 5 and 6. The state nolled the other counts. Both the state and the defense proposed an agreed three-year sentence. During his statement, Brown reiterated his desire to have the independent analysis of the drugs. The trial judge sentenced Brown to three years on Count 1, which under the Reagan Tokes Law became a three year to a four and a half year sentence, 12 months on Count 3, 12 months on Count 5, and six months on Count 6; all counts to run concurrently. The judge also imposed a mandatory $7500 fine on Count 1.

{¶ 5} Brown's appellate counsel argued that the trial court abused its discretion in failing to grant a continuance and that it erred by imposing an unconstitutional sentence pursuant to the Reagan Tokes Law. Counsel argued that for most of the previous 12 months, Brown had been in prison for violating postrelease control and could not have arranged for the independent testing. Given

this lack of time, counsel argued, it was unreasonable for the judge to issue an ultimatum and not grant a continuance for the analysis. This court affirmed the decisions of the trial court. Brown now argues that his appellate counsel was ineffective.

{¶ 6} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996).

{¶ 7} In *Strickland,* the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge 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* at 689.

{¶ 8} Specifically, in regard 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 what he thinks are the most

promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 672 N.E.2d 638 (1996).

{¶ 9} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 10} Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E.97 (1898). Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter." *State v.*

Ishmail, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. "Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 758 N.E.2d 1130 (2001). "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke,* 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶10.

{¶ 11} Brown first argues that his appellate counsel should have framed the first assignment of error as a matter of the ineffective assistance of trial counsel. Trial counsel knew that Brown wanted an independent analysis, because Brown thought he was only dealing in cocaine. Moreover, Brown continues, trial counsel had a year to move for an independent analysis but did not. The failure to pursue a reasonable investigatory step that could lead to a viable defense constitutes ineffective assistance of counsel.

{¶ 12} Appellate counsel chose to address the issue of continuing the trial for drug testing directly through an abuse-of-discretion argument rather than through the lens of ineffective assistance of counsel. Such an approach avoided the additional analysis of examining whether trial counsel's decisions came within the ambit of reasonable strategy and tactics. Following the admonition of the Supreme Court this court will not second-guess appellate counsel's decision to attack an issue directly. *State v. Reynolds,* 8th Dist. Cuyahoga No. 106979, 2019-Ohio-4456; *State*

v. Hilliard, 8th Dist. Cuyahoga No. 102214, 2016-Ohio-2828; and *State v. Schwarzman,* 8th Dist. Cuyahoga No. 100337, 2015-Ohio-516.

{¶ 13} Furthermore, Brown has not shown prejudice. Other than Brown's assertions that he dealt only in cocaine, there is no evidence of what the drug analysis would have shown. The results of those tests are purely speculative, and not the sound foundation of an appellate argument. *State v. Hartman*, 93 Ohio St. 3d 274, 754 N.E.2d 1150 (2001). Brown's assertions do not undermine this court's confidence in the result.

{¶ 14} Brown's second argument is that the trial court erred in imposing fines and costs on him, when the trial judge did not hold a hearing on his present and future ability to pay the costs.

{¶ 15} Brown pled guilty to a second-degree drug trafficking offense under R.C. 2925.03(A)(2). R.C. 2929.18(B)(1) provides in pertinent part as follows:

> For a first, second, or third degree felony violation of any provision of Chapter 2925, * * *, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section.[2] If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

Moreover, the burden is upon the offender to affirmatively demonstrate that he is indigent and is unable to pay the mandatory fine. This includes the future ability to

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[2] (A)(3) provides that for a second-degree felony, a fine of not more than $15,000.

pay the fine. A reviewing court uses an abuse-of-discretion standard in determining whether the trial court erred in imposing a fine. *State v. Gipson,* 80 Ohio St.3d 626, 687 N.E.2d 750 (1998); *State v. Brammer,* 2d Dist. Greene No. 2017-CA-56, 2018-Ohio-3067.

{¶ 16} By the day of the final pretrial, which also was the sentencing day, Brown had not submitted an indigency affidavit. He had retained counsel. Additionally, three times during the sentencing hearing, Brown represented that he had employment: "I just be trying to do the right thing. I'm working a job now." Tr. 39. In discussing his children, he said, "I can send money, stuff like that * * *." Tr. 40. "I got people giving me jobs. Like I'm doing everything I can to not sell drugs." Tr. 45. Given this record, it is understandable that appellate counsel in the exercise of professional judgment declined to argue that the judge abused her discretion in imposing the minimum mandatory fine.

{¶ 17} Moreover, to the extent that Brown's argument includes costs, there is no prejudice. R.C. 2947.23(C) provides that the trial "court retains jurisdiction to waive, suspend or modify the payment of the costs of prosecution * * * at the time of sentencing or at any time thereafter." Brown can move to vacate the costs at any time.

{¶ 18} Brown's final argument is that Counts 1 and 3 should have merged as allied offenses of similar import. He argues that both offenses occurred on the same date, at the same time, with the same drug, and with the same animus. Thus, the crimes should have merged. This argument is ill founded because different drugs

were involved. Count 1 charged trafficking with a fentanyl compound, and Count 3 charged possession of 4-ANPP. Title 21 Code of Federal Regulations Section 1308.12(b) lists fentanyl and 4-ANPP as distinct substances. Beyond that the record is devoid of the scientific information necessary to argue that they are so closely related as to be the same drug. Therefore, appellate counsel was not deficient for failing to raise this argument.

{¶ 19} Accordingly, this court denies the application.

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MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR