

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 110982
 v. :
 :
 MARVIN HARRIS, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: July 21, 2023

Cuyahoga County Court of Common Pleas
Case No. CR-18-633664-B
Application for Reopening
Motion No. 563029

Appearances:

Michael C. O'Malley, Cuyahoga County Cuyahoga
Prosecuting Attorney, and Tasha Forchione, Assistant
Prosecuting Attorney, *for appellee*.

Marvin Harris, *pro se*.

EMANUELLA D. GROVES, J.:

{¶ 1} Marvin Harris has filed a timely application for reopening pursuant to App.R. 26(B). Harris is attempting to reopen the appellate judgment rendered in

State v. Harris, 8th Dist. Cuyahoga No. 110982, 2022-Ohio-4630, that affirmed his conviction and sentence for the offenses of murder, attempted murder, felonious assault, and improper handling of a firearm in a motor vehicle. We decline to reopen Harris’s appeal.

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

{¶ 2} An application for reopening will be granted if there exists a genuine issue as to whether an appellant was deprived of the effective assistance of appellate counsel on appeal. *See* App.R. 26(B)(5). To establish a claim of ineffective assistance of appellate counsel, Harris 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. 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), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed. 2d 768 (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. *Id.* at 689. 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.’” *Id.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

{¶ 4} Even if Harris establishes that an error by his appellate counsel was professionally unreasonable, Harris 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, regarding 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. Argument

{¶ 5} Harris, in support of his application for reopening, argues that appellate counsel’s failure to supplement the record with codefendants’ prior recorded statements prevented this court from properly reviewing the first and second assignments of error raised on appeal.¹ In essence, Harris argues that the result of his appeal would have resulted in a different outcome had the codefendants’ prior recorded statements been made part of the record.

{¶ 6} Pursuant to *Strickland*, Harris must demonstrate that (1) his appellate counsel’s performance was objectively unreasonable, and (2) there exists a

¹ Harris’s first assignment of error was “[t]he trial court committed plain error in allowing the prosecutor to impeach codefendants with their prior statements.” Harris’s second assignment of error was “[d]efense counsel rendered ineffective assistance in allowing the prosecutor to impeach codefendants’ with their prior statements, in derogation of defendant’s rights under the Sixth and Fourteenth Amendments to the United States Constitution.”

reasonable probability that, but for appellate counsel's unprofessional conduct on appeal, the results of his appeal would have been different. *Id.*, 466 U.S. at 664, 104 S.Ct. 2052, 80 L.Ed.2d 674. *See also Smith v. Robbins*, 528 U.S. 259, 285-286, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Herein, there exists no reasonable probability sufficient to undermine confidence in this court's original appellate decision. *Strickland* at 694.

{¶ 7} In the appellate opinion journalized December 22, 2022, this court opined that consideration of Harris's codefendants' prior recorded statements would not have resulted in a different outcome on appeal. Specifically, we held that ample evidence to support the findings of guilt existed in the record and consideration of the codefendants' prior recorded statements would not have resulted in a different appellate outcome. We also held that no prejudice befell Harris notwithstanding the failure to include the prior recorded video statements in the appellate record.

In the instant case, we are hampered by the absence of the video statements in the record. Nevertheless, after a thorough review of the record, we find there was ample evidence of Harris' guilt in the record, if believed by the jury. Shields identified Harris as one of the shooters. Harris' and Taylor's text messages from two days prior to the shooting confirm that they intended to commit a shooting in the area. They also exchanged texts after the shooting, praising the outcome. Although Larissa attempted to exonerate her brother, she admitted that she drove her brother, Shields, and Taylor to the Buckeye neighborhood on the date of the shooting. Pictures of her vehicle at the scene and cell phone records corroborate that testimony. In addition, the cell phone records confirm that Larissa drove to the Buckeye area. They also show Harris leaving the scene. Finally, Harris' DNA was found on the shell casing located at the crime scene. While there were problems with evidence collection, there was no testimony that the evidence was

tampered with or otherwise purposefully contaminated. Further, there was no evidence to contradict or challenge the finding of Harris' DNA on the casings.

* * *

Ineffective assistance of counsel requires a showing of both inadequate representation *and* prejudice. Prejudice, in this context, is a showing that the proceedings would have had a different outcome but for counsel's error. Consequently, there was ample evidence of Harris' guilt, notwithstanding the video statements, Harris has failed to establish prejudice.

State v. Harris, ¶¶ 37 – 52.

¶ 8} There exists no reasonable probability that, but for appellate counsel's claimed error on appeal, the results of Harris's appeal would have been different. Harris has failed to establish any prejudice through the sole assignment of error raised in support of his claim of ineffective assistance of appellate counsel. *State v. Gulley*, 8th Dist. Cuyahoga No. 109045, 2020-Ohio-4746; *State v. Lester*, 8th Dist. Cuyahoga No. 105992, 2018-Ohio-5154.

¶ 9} Application for reopening is denied.

EMANUELLA D. GROVES, JUDGE

MARY EILEEN KILBANE, P.J., and
LISA B. FORBES, J., CONCUR