[Cite as *State v. Hoskin*, 2023-Ohio-3052.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Nos. 111119, 111120, and 111121
v.	:	
SEAN T. HOSKIN,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 28, 2023

Cuyahoga County Court of Common Pleas
Case Nos. CR-19-642961-A, CR-19-644629-A, and CR-20-652363-A
Application for Reopening
Motion No. 561449

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecutor, and Sarah E. Hutnik, Assistant Prosecutor, *for appellee.*

Sean Hoskin, *pro se.*

LISA B. FORBES, J.:

{¶ 1} The applicant, Sean Hoskin, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Hoskin,* 2022-Ohio-3917, 199 N.E.3d 1114 (8th Dist.). The judgment affirmed Hoskin's convictions in three criminal cases,

State v. Hoskin, Cuyahoga C.P. Nos. CR-20-652363-A, CR-19-642961-A, and CR-19-644629-A, for one count of murder; one count of felonious assault; two counts of having weapons while under disability; seven counts of drug trafficking, including cocaine, fentanyl, heroin, and morphine; one count of drug possession; one count of possessing criminal tools; and one count of failure to comply with order of a police officer. In the murder case, the trial court ruled that the murder charge and felonious assault charges merged but that the accompanying 54-month firearm specification on each was to be served consecutively. However, this court vacated the sentence for the 54-month firearm specification for felonious assault because the two charges merged. It remanded the case to the trial court to correct the sentencing journal entry to reflect this court's decision.

{¶ 2} Hoskin now argues that his appellate counsel was ineffective for not arguing the following assignments of error: (1) there was insufficient evidence to convict on murder because he had presented evidence of self-defense, (2) the trial court erred in imposing costs, (3) the trial court erred in imposing a $20,000 fine, (4) trial counsel was ineffective for not moving to dismiss the murder indictment for failing to list all of the elements, and (5) the trial court erred in imposing an improper sentence. On February 2, 2023, the state of Ohio filed its brief in opposition. For the following reasons, this court denies the application to reopen.

I. Factual and Procedural Background

{¶ 3} In the first of the three consolidated cases, *State v. Hoskin*, Cuyahoga C.P. No. CR-20-652363-A, the murder case, the jury convicted him of murder and

felonious assault with the one- and three-year firearm specifications. The trial court found him guilty of two counts of having weapons while under disability and the two 54-month firearm specifications for murder and felonious assault. The trial court merged the murder and felonious assault counts and merged the two disability counts. The state elected to sentence on the murder count. The two 54-month firearm specifications were ordered to be served consecutively to the 15-years-to-life sentence for murder. The trial judge sentenced Hoskin to 36 months concurrent on the weapons charge for an aggregate sentence of 24 years to life.

{¶ 4} The following facts were established during the murder trial. Sean Hoskin was the ex-boyfriend of Toya Johnson. He had helped raise her children, including giving her money for expenses. The father of Johnson's youngest child was Vernon Norman. On May 23, 2020, Johnson had just moved into her new home. She was sleeping upstairs, and Norman was sleeping with their child downstairs. Hoskin entered the house through an upstairs window. A fight broke out between Hoskin and Johnson. When Johnson yelled for help, Norman came upstairs and saw Hoskin and Johnson fighting. According to Hoskin, Johnson told Norman to run and get his "shit." Norman went downstairs, and Hoskin chased after him. Johnson heard three gunshots. When she got downstairs, Norman had been fatally shot and Hoskin was yelling that he had been shot. Hoskin fled the scene.

{¶ 5} In *State v. Hoskin,* Cuyahoga C.P. No. CR-19-642961-A, Hoskins pled guilty to three fourth-degree drug-trafficking offenses, three fifth-degree drug-

trafficking offenses, and one count of failure to comply with the order of a police officer. The trial court sentenced him to 18 months on each of the three fourth-degree offenses, 12 months on each of the three fifth-degree offenses, and six months on the failure-to-comply offense. The trial court ordered these sentences to be served concurrently with each other but consecutive to the sentences in his other two cases.

{¶ 6} In *State v. Hoskin,* Cuyahoga C.P. No. CR-19-644629-A, Hoskins pled guilty to a first-degree drug-trafficking offense with a major-drug-offender specification, first-degree drug possession offense with a major-drug-offender specification, and possession of criminal tools. The trial court merged the two drug offenses, and the state elected to sentence him on the trafficking offense. The court imposed a mandatory 11-year prison term and a $20,000 fine for the drug-trafficking offense and 12 months for possession of criminal tools to run concurrent to the drug-trafficking sentence. This sentence is consecutive to the sentences in the other cases for an aggregate sentence of 36.5 years to life.

{¶ 7} On direct appeal, Hoskin's attorney argued the following: (1) because the evidence of self-defense was not negated, there was insufficient evidence to convict Hoskin of murder; (2) the trial court erred in permitting the state to question him on his post-arrest silence; (3) the trial court erred by failing to merge the firearm specifications; and (4) the trial court erred in imposing consecutive sentences. This court ruled that the trial court erred in the murder case in imposing the 54-month firearm specification for the felonious-assault charge after it had been merged with

the murder charge. Thus, this court affirmed the convictions, but remanded the case to the trial court to vacate the one 54-month firearm specification, reducing his sentence to 32 years to life. Hoskin now argues that his appellate counsel was ineffective.

II. Standard of review applicable to App.R. 26(B) application to reopen

{¶ 8} App.R. 26(B) allows a criminal defendant to apply to reopen his appeal based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(5) provides that an application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal."

{¶ 9} 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).

{¶ 10} 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. *Strickland* at 689. 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.'" *Id.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

{¶ 11} 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).

{¶ 12} 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. *Strickland*, *supra*, at 694. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies. *Id*. at 697.

III. Legal Analysis

{¶ 13} Hoskin's first proposed assignment of error that his counsel failed to argue that "[t]here was insufficient evidence to sustain a conviction for murder in violation of R.C. 2903.02(B), and the state failed to disprove self-defense" is ill-founded. Appellate counsel made this identical argument. This court examined the evidence and concluded that the state presented sufficient evidence to disprove Hoskin's theory of self-defense.

{¶ 14} Hoskin maintains in his second proposed assignment of error that his appellate counsel should have argued that because Hoskin is indigent, the trial court erred in imposing costs. Pursuant to R.C. 2947.23(A), in all criminal cases, the judge or magistrate shall include in the sentence the costs of prosecution. The statute requires this even if the defendant is indigent. *State v. White,* 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, and *State v. Clevenger,* 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589. However, R.C. 2947.23(C) provides as follows: "the court retains jurisdiction to waive, suspend, or modify the payment of costs of prosecution * * * at the time of sentencing, or at any time thereafter." Thus, appellate counsel would be hard-pressed to argue prejudicial reversible error because Hoskin may move the trial court at any time to waive the payment of costs. *State v. Beasley,* 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028. In *State v.*

Copeland, 8th Dist. Cuyahoga No. 107187, 2019-Ohio-987, ¶ 10, this court ruled: "Because appellant could pursue a waiver of the payment of court costs after sentencing, he was not prejudiced by counsel's performance."

{¶ 15} Moreover, the decision to waive or suspend payment of costs is reviewed on an abuse-of-discretion standard. *State v. Threatt,* 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164. This court has held that a trial court did not abuse its discretion in imposing court costs, even if the defendant is indigent. *State v. Dawson,* 2017-Ohio-965, 86 N.E.3d 672 (8th Dist.); *State v. Minifee,* 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146; *State v. Johnson,* 8th Dist. Cuyahoga No. 109152, 2020-Ohio-4997; and *State v. Graves,* 8th Dist. Cuyahoga No. 103984, 2016-Ohio-7303. Therefore, in light of the lack of prejudice and the difficulty in overcoming an abuse-of-discretion argument, there is no genuine issue regarding appellate counsel's effectiveness based on the failure to raise the imposition of costs on appeal.

{¶ 16} Hoskin's third proposed assignment of error is that the trial court erred in imposing fines. Hoskin pled guilty to a first-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 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.[1] If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to

[1] (A)(3) provides a fine of not more than $20,000 for a first-degree felony.

> 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.

{¶ 17} The offender has the burden to demonstrate that he is indigent and is unable to pay the mandatory fine. *State v. Gipson,* 80 Ohio St.3d 626, 635, 687 N.E.2d 750 (1998). This includes the future ability to pay the fine. Moreover, a finding of indigence for purposes of appointed counsel does not necessarily shield a defendant from paying a fine. A reviewing court uses an abuse-of-discretion standard in determining whether the trial court erred in imposing a fine. *State v. Brammer,* 2d Dist. Greene No. 2017-CA-56, 2018-Ohio-3067.

{¶ 18} By the day of the sentencing hearing, Hoskin had not submitted an indigency affidavit. However, his trial counsel said that he would be submitting such an affidavit.[2] At the sentencing hearing, trial counsel argued Hoskin's indigency. Hoskin had been in jail for 17 months,[3] did not have funds or assets and was sentenced to a 36-and-one-half years to life prison sentence. Thus, trial counsel argued Hoskin is indigent and will have no way of paying the fine.

{¶ 19} Notwithstanding the lack of the required indigency affidavit, the trial court examined whether Hoskin could pay the mandatory fine. The court noted that Hoskin had a long and violent criminal history, that he never had any trouble

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[2] The dockets of the cases do not indicate that the indigency affidavit was filed. Nevertheless, the trial judge appointed appellate counsel and ordered the transcript at the state's expense.

[3] The trial court granted Hoskin 487 days of jail-time credit.

earning money, that he possessed $3,000 when he was arrested, that he had retained counsel, and that he had provided money to Johnson and family members. The court concluded that it did not see evidence of Hoskin's indigency as he had the means and resources to pay for those things. The court did not vacate the fine.

{¶ 20} Given the status of the record, the lack of the required indigency affidavit, and the trial court's recitation of Hoskin's history, appellate counsel could conclude in the exercise of professional judgment that he could not successfully argue this assignment of error. Hoskin has not presented a genuine issue as to appellate counsel's effectiveness for failing to raise this proposed assignment of error.

{¶ 21} Hoskin's fourth assignment of error is that his trial counsel should have moved to dismiss the murder indictment because it failed to state the predicate offense by its statute number.[4] The murder charge under R.C. 2903.02(B) clearly states the predicate offenses as felonious assault and aggravated burglary. In *State v. Dubose,* 1st Dist. Hamilton No. C-070397, 2008-Ohio-4983, the First District Court of Appeals held that naming the predicate offense provides sufficient notice. In the indictment, Count 2, aggravated burglary, identified the statute number, and Count 4, felonious assault, also set forth the statute number for that offense. The Supreme Court of Ohio has held that reading the indictment in pari materia in which other counts of the indictment state the statute number provides ample notification.

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[4] In his brief, Hoskin identifies the murder count as Count 5. However, Count 3 was the murder charge; Count 5 was attempted felonious assault.

State v. Wesson, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, and *State v. Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836. The indictment gave Hoskin full notice of the charges against him. This argument elevates form over substance and fails to present a genuine issue regarding the effectiveness of appellate counsel.

{¶ 22} Hoskin's final proposed assignment of error is that "the trial court erred in imposing an ambiguous sentence and/or a sentence contrary to law, and in violation of R.C. 2929.02(B)(1)." On Count 3, murder in violation of R.C. 2929.02(B), the trial court sentenced Hoskin to "54 month(s) on the firearm specification(s) to be served prior to and consecutive with life imprisonment on the base charge [ ] with parole eligibility after 15 years." Hoskin contrasts that language with the language of R.C. 2929.02(B)(1): "whoever is convicted of * * * murder * * * shall be imprisoned for an indefinite term of fifteen years to life." Hoskin argues that the life sentence imposed with later parole eligibility is so substantively different than an indefinite sentence of fifteen years to life, that the sentence must be vacated and resentenced. However, the Supreme Court of Ohio recently rejected this argument in *State v. Leegrand,* Slip Opinion No. 2022-Ohio-3623. In that case, the court considered a sentence of "life in prison with eligibility of parole after 15 years" and held that the sentencing entry was consistent with R.C. 2929.02(B)(1), such that it "conveys the exact same meaning as the statutory language." *Id.* at ¶ 8. Thus, Hoskin's argument is not well founded and does not present a genuine issue on the effectiveness of appellate counsel.

{¶ 23} Accordingly, this court denies the application to reopen.

LISA B. FORBES, JUDGE

EILEEN A. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR