

[Cite as *State v. Kent*, 2010-Ohio-1851.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90795

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN KENT

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION GRANTED IN PART**

Application for Reopening
Motion No. 42829
Cuyahoga County Common Pleas Court
Case No. CR-485882

RELEASE DATE: April 27, 2010

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CHRISTINE T. MCMONAGLE, J.:

{¶ 1} John Kent has filed a timely application for reopening pursuant to App.R. 26(B). Kent is attempting to reopen the appellate judgment that was rendered in *State v. Kent*, Cuyahoga App. No. 90795, 2009-Ohio-3889, which affirmed his conviction for one count of aggravated murder, two counts of aggravated robbery, and one count of having weapons while under disability. For the following reasons, we grant Kent's application for reopening in part and reopen his original appeal.

{¶ 2} This court, through App.R. 26(B), is permitted to reopen an appeal based upon a demonstration of ineffective assistance of appellate counsel. In order to establish a claim of ineffective assistance of appellate counsel, Kent must demonstrate that his appellate counsel's performance was deficient and that but for the deficient performance of appellate counsel, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456. Thus, Kent must establish that there exists "a genuine issue as to whether he was deprived of the assistance of counsel on appeal." See App.R. 26(B).

{¶ 3} "In *State v. Reed* [supra, at 458] we held that the two-prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel was deficient for failing to raise the issue he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus, [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, at 25.

{¶ 4} It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987. Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones v. Barnes*, supra; *State v. Grimm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

{¶ 5} In *Strickland v. Washington*, supra, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for an appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "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.* at 689. Finally, the United States Supreme Court has upheld the appellate attorney's discretion to decide which issues are the most fruitful arguments and the importance of winnowing out weaker arguments on appeal and focusing on one central issue or at most a few key issues. *Jones v. Barnes*, supra.

{¶ 6} In support of his claim of ineffective assistance of appellate counsel, Kent raises five proposed assignments of error, which should have been raised on direct appeal.¹ The initial proposed assignment of error is that:

{¶ 7} “Appellate counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution for failure to raise ineffective assistance of trial counsel for failure to object to incomplete and inaccurate jury instructions on accomplice liability in accordance with Ohio law.”

{¶ 8} Kent, through his first proposed assignment of error, argues that trial counsel was ineffective by failing to object to the trial court’s jury instruction with regard to accomplice testimony. Specifically, Kent argues that the trial court did not properly instruct the jury with regard to

¹It must be noted that proposed assignments of error one, two, three, and four were raised before the Supreme Court of Ohio, which seems to allow Kent “two cracks at the apple” and runs counter to American jurisprudence and culminates in a waste of precious and limited judicial resources. See memorandum in support of jurisdiction, as filed in the Supreme Court of Ohio, on October 7, 2009. The court declined to accept jurisdiction, despite the fact that a violation of the holding in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 was specifically raised and argued by Kent. See *State v. Kent*, 123 Ohio St.3d 1511, 2009-Ohio-6210, 917 N.E.2d 813. This court, however, may not treat Kent’s appeal to the Supreme Court of Ohio as a bar to further review vis-a-vis the doctrine of res judicata and/or collateral estoppel. See *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608.

accomplice testimony, since the complete jury instruction as found at §405.41 of the Ohio Jury Instructions was not read to the jury.

{¶ 9} Contrary to Kent's argument, a trial court is not required to instruct the jury in the precise language requested nor is the trial court required to provide the jury with a verbatim recitation of a requested jury instruction, such as any instruction contained within the Ohio Jury Instructions. *State v. Scott* (1986), 26 Ohio St.3d 92, 497 N.E.2d 55; *State v. Brady* (1988), 48 Ohio App.3d 41, 548 N.E.2d 278. The trial court's jury instruction need only communicate to the jury, the legal principles and law pertinent to the case. *State v. Sneed* (1992), 63 Ohio St.3d 3, 584 N.E.2d 1160; *State v. Nelson* (1973), 36 Ohio St.2d 79, 303 N.E.2d 865.

{¶ 10} R.C. 2923.03(D) provides that the testimony of an accomplice may be presented at trial so long as the jury is instructed as follows:

{¶ 11} "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution. It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

{¶ 12} The trial court provided the following instruction to the jury, with regard to the testimony of an accomplice:

{¶ 13} “Testimony of an accomplice. The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity or a witness may affect his or her credibility and make that testimony subject to grave suspicions, and require that it be weighed with great caution.

{¶ 14} “ It is for you, the jurors, in light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.” Tr. 1308.

{¶ 15} The trial court’s jury instruction, with regard to the testimony of Kent’s accomplice, clearly complied with the requirements of R.C. 2923.03(D).

Thus, Kent has not demonstrated that there is a genuine issue as to whether his appellate counsel was ineffective through his first proposed assignment of error.

{¶ 16} Kent’s second proposed assignment of error is that:

{¶ 17} “Appellate counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when he failed to raise constitutional ineffectiveness on trial counsel for failure to object to improper

jury instructions concerning the charge of Aggravated Murder and the proper verdict if State failed to prove “all” the elements of Aggravated Murder.”

{¶ 18} Kent, through his second proposed assignment of error, argues that trial counsel was ineffective by failing to object to the trial court’s jury instruction with regard to the offense of aggravated murder. Specifically, Kent argues that the trial court’s use of the word “all,” instead of “each and every,” with regard to proof beyond a reasonable doubt and the elements associated with the offense of aggravated murder, constituted an erroneous jury instruction.

{¶ 19} The trial court instructed the jury, with regard to the offense of aggravated murder, as follows:

{¶ 20} “Ladies and gentlemen, if you find that the State failed to prove beyond a reasonable doubt all the essential elements of aggravated murder, then your verdict must be not guilty of that offense. In that event, or if you are unable to agree unanimously, you will continue your deliberations . . .”
Tr. 1320.

{¶ 21} As stated previously, the trial court is not required to provide the jury with a verbatim recitation of any requested jury instruction, but need only communicate to the jury the legal principles and law pertinent to a specific charged offense. *State v. Scott*, supra; *State v. Brady*, supra; *State v.*

Sneed, supra; *State v. Nelson*, supra. The trial court's use of the term "all," instead of "each and every," when instructing the jury with regard to the elements that must be proved beyond a reasonable doubt, did not circumvent the legal principles and law pertinent to the charged offense of aggravated robbery. It is clear that the trial court instructed the jury that Kent must be acquitted of the offense of aggravated murder, unless the state produced evidence, beyond a reasonable doubt, that established each element of the charged offense. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995. Kent has failed to establish that there exists a genuine issue as to whether his appellate counsel was ineffective through his second proposed assignment of error.

{¶ 22} Kent's third proposed assignment of error is that:

{¶ 23} "Appellate counsel was constitutionally ineffective when he failed to raise the issue of defective indictment and jury instructions because the indictment and jury instructions failed to include the mens rea element necessary for Aggravated Robbery in counts one, two and three. Sixth and Fourteenth Amendments of the federal Constitution."

{¶ 24} Kent through his third assignment of error, argues that counts one, two, and three of the indictment, which include or deal with the offense of aggravated robbery, failed to contain the element of mens rea of

recklessness. Specifically, Kent argues that the trial court should have instructed the jury with regard to the mens rea of recklessness as mandated by the decision rendered by the Supreme Court of Ohio in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

{¶ 25} In *Colon*, the court established that a defendant's due process rights are violated in a prosecution for robbery, when the indictment omits the mens rea of recklessness and the jury is not instructed with regard to the State's burden that the defendant had been reckless in committing the offense of robbery. *Colon* is not applicable to count one of the indictment, since the offense of aggravated robbery was but a predicate offense and an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162. In addition, *Colon* is not applicable to count two of the indictment, since Kent was charged with the offense of aggravated robbery under R.C. 2911.01(A)(1), which imposes strict liability for the element of recklessness. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038.

{¶ 26} We, however, find that there exists a genuine issue as whether Kent was deprived of effective assistance of counsel on appeal, as a result of

his conviction for the offense of aggravated robbery under R.C. 2911.02(A)(3). Kent has demonstrated that there exists a genuine issue as to whether an error in the indictment and the court's jury instruction, as to the mens rea of recklessness that is associated with the offense of aggravated robbery brought pursuant to R.C. 2911.01(A)(3), permeated the trial from beginning to end and placed into question the reliability of the trial court in serving its function as the mechanism for the determination of guilt or innocence. This issue was not raised on appeal by appellate counsel, and if raised, could have resulted in a different outcome on appeal. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

{¶ 27} Kent's fourth proposed assignment of error is that:

{¶ 28} "Appellate counsel was constitutionally ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when he failed to raise the cumulative effect of the errors contained in propositions of law I, II and III and their cumulative effect on the fundamental fairness of the trial received by the appellant."

{¶ 29} Kent, through his fourth proposed assignment of error, argues that he was prejudiced by cumulative error that resulted from multiple defective jury instructions and a defective indictment. Based upon our review of first, second and third proposed assignments of error, we find no

cumulative effect that improperly effected the fundamental fairness of the trial received by Kent. Our finding of a potential error, as associated with proposed assignment of error three, constitutes a solitary error at best. Cf. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858; *State v. Garner*, 74 Ohio St.3d 46, 1995-Ohio-168, 656 N.E.2d 623; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256.

{¶ 30} Kent's fifth proposed assignment of error is that:

{¶ 31} "The trial court abused its discretion in failing to waive or suspend court costs even though trial counsel moved for such waiver and when the trial court suspended court costs for the co-defendant and appellate counsel was ineffective for failing to raise such issue on appeal."

{¶ 32} Kent, through his fifth proposed assignment of error, argues that appellate counsel was ineffective by failing to argue on appeal that the trial court erred by failing to grant his motion to waive court costs. Court costs may be collected from an indigent defendant. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164. In addition, appellate review of a trial court's denial of a motion to waive court costs is based upon an abuse-of-discretion standard. *Id.* Herein, Kent has failed to demonstrate that the trial court abused its discretion in denying his motion to waive court costs. *State v. Luna*, Cuyahoga App. No. 91271, 2009-Ohio-2712; *State v.*

Nicholson, Cuyahoga App. No. 88889, 2007-Ohio-5429. Kent has failed to establish that there exists a genuine issue as to whether his appellate counsel was ineffective through his fifth proposed assignment of error.

{¶ 33} Based upon our disposition of Kent's third proposed assignment of error, we grant Kent's application for reopening in part and reopen Kent's original appeal as filed in Cuyahoga App. No. 90795. See App.R. 26(B)(5). Pursuant to App.R. 26(B)(6)(a), attorney John P. Parker, Registration No. 0041243, is appointed to represent Kent. The reopened appeal, however, is limited to one assignment of error that deals with the issue of whether Kent's conviction for the offense of aggravated robbery, pursuant to R.C. 2911.01(A)(3), violated *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. See App.R. 26(B)(7). No other assignments of error or issues shall be addressed by this court. Appellant's assignment of error and brief is due within twenty days of the date of this entry. Appellee's answer brief is due twenty days after the filing of the appellant's brief. Appellant is permitted to file an answer brief, if necessary, within ten days of the filing of the appellee's answer brief.

{¶ 34} Application for reopening granted in part.

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR