[Cite as *State v. Anderson*, 2010-Ohio-3863.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92568

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ORIE ANDERSON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 432870
Cuyahoga County Common Pleas Court
Case No. CR-504304

RELEASE DATE: August 16, 2010

FOR APPELLANT

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ANN DYKE, J.:

{¶ 1} Orie Anderson has filed a timely application for reopening pursuant to App.R. 26(B). Anderson is attempting to reopen the appellate judgment that was rendered in *State v. Anderson*, Cuyahoga App. No. 92568, 2010-Ohio-66, which affirmed his conviction for the offenses of murder and having weapons while under disability. For the following reasons, we decline to reopen Anderson's original appeal.

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, Anderson must demonstrate that appellate counsel's performance was deficient and that, but for counsel's deficient performance, 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. In order for this court to grant an application for reopening, Anderson must establish that "there is a genuine issue as to whether he was deprived of the assistance of counsel on appeal." App.R. 26(B)(5).

{¶ 3} "In *State v. Reed* [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, 25, 1998-Ohio-704, 701 N.E.2d 696.

{¶ 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*; *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,* 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 a defendant-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 he or she believes 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*.

{¶ 6} In support of his claim of ineffective assistance of appellate counsel, Anderson raises One proposed assignment of error:

{¶ 7} "Appellate counsel's failure to present a claim relating to the State's failure to try him in a timely fashion resulted in appellant being denied his right to a speedy trial."

{¶ 8} As previously stated, appellate counsel is not required to raise and argue an assignment of error that is meritless. In the case sub judice, Anderson filed on July 2, 2008, two separate pro se motions in the trial court: (1) "motion for speedy trial request"; and (2) "motion to dismiss felony charges for delay of trial." Both of the aforesaid motions were premised upon the appellant's claim that he was not brought to trial within 270 days as required by R.C. 2945.71 and 2945.72. On July 14, 2008, the trial court conducted a hearing to determine whether the appellant's right to a speedy trial had been violated. At the conclusion of the hearing, the trial court determined that based upon the appellant's written speedy trial waiver, appellant's requests for the continuance of pretrials, and appellant's requests for continuance of trial, the appellant was not denied his right to a speedy trial. See Tr. 7-10. In fact, appellant's trial counsel stated on the record that the appellant was not denied the right to a speedy trial. See Tr. 8. Based upon the trial court's hearing and the admission by trial counsel that the appellant was not denied his right to a speedy trial, we cannot find that appellate counsel was required to pursue an assignment of error that dealt with the denial of the right to a speedy trial. An assignment of error that dealt with the issue of speedy trial would have been meritless. *Jones v. Barnes*;

State v. Smith (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 9} It must also be noted that our independent review of the record in this appeal demonstrates that Anderson was not denied the right to a speedy trial. Anderson was arrested on January 12, 2008, and his trial commenced on November 3, 2008. The trial court record in CR-504304 clearly demonstrates that Anderson's right to a speedy trial was tolled by the following:

{¶ 10} defendant's motion for production of favorable evidence, filed January 22, 2008; (2) defendant's motion requesting notice of state's intention to use evidence, filed January 22, 2008; (3) defendant's motion for disclosure of impeaching information, filed January 22, 2008; (4) defendant's motion for voir dire of identification witnesses, filed January 22, 2008; (5) defendant's motion for evidence in case in chief, filed January 22, 2008; (6) defendant's motion to reveal all exculpatory evidence, filed January 22, 2008; (7) defendant's demand for discovery, filed January 22, 2008; (8) defendant's motion for bill of particulars, filed January 22, 2008; (9) defendant's motion for "giglio" material, filed January 22, 2008; (10) pretrial of February 6, 2008, continued to February 20, 2008, at request of defendant; (11) pretrial of February 20, 2008, continued to March 7, 2008, at request of defendant; (12) plaintiff's demand for discovery, filed February 22, 2008; (13) defendant's waiver of speedy trial to July 1, 2008, filed April 11, 2008; (14) pretrial of April 24, 2008, continued to May 6, 2008, at defendant's

request; (15) trial date of June 23, 2008 converted to pretrial on June 25, 2008, at request of defendant; (16) defendant's motion for speedy trial, filed July 2, 2008; (17) defendant's motion to dismiss felony charges for delay of trial, filed July 2, 2008; (18) trial date of August 28, 2008, continued to October 2, 2008, at request of defendant; (19) trial date of October 2, 2008, continued to November 3, 2008, at request of defendant; and (20) trial commenced on November 3, 2008. Based upon the numerous requests for discovery, the numerous requests for continuance of pretrial, and the numerous requests for continuance of trial, we find that Anderson was not denied the right to a speedy trial. See R.C. 2945.71; R.C. 2945.72; *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159; *State v. Palmer*, 84 Ohio St.3d 103, 1998-Ohio-507, 702 N.E.2d 72; *State v. McRae* (1978), 55 Ohio St.2d 149, 378 N.E.2d 476.

{¶ 11} Accordingly, we find that Anderson has failed to establish that he was prejudiced by the conduct of appellate counsel, and we therefore deny the application for reopening.

{¶ 12} Application for reopening denied.

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR