[Cite as *State v. Pinkney*, 2010-Ohio-5575.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91861

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER PINKNEY

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-504592
Application for Reopening
Motion No. 433206

RELEASE DATE: November 17, 2010

FOR APPELLANT

Christopher Pinkney
Inmate No. 544-869
Mansfield Correctional Inst.
P.O. Box 788
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Mary McGrath
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA A. BLACKMON, J.:

{¶ 1} In *State v. Pinkney*, Cuyahoga County Court of Common Pleas Case No. CR-504592, applicant, Christopher Pinkney, pled guilty to two counts of rape and one count of kidnapping. The court of common pleas sentenced him to fifteen years in prison: seven years on one rape count; eight years consecutive on the other rape count; and seven years concurrent on the kidnapping count. This court affirmed that judgment in *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237. The Supreme Court of Ohio dismissed Pinkney's appeal

because he had not filed a memorandum in support of jurisdiction. *State v. Pinkney*, ___ Ohio St.3d ___, 2010-Ohio-3268, 929 N.E.2d. 1070.

{¶ 2} Pinkney has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel because appellate counsel did not assign as error that the two rape counts were allied offenses of similar import and, therefore, the trial court should have merged the two rape counts into one conviction.

{¶ 3} We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 4} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that applicant has failed to meet his burden to demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). In *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, the Supreme Court specified the proof required of an applicant. "In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 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 were deficient for failing to raise the issues 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." Id. at 25. Applicant cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

{¶ 5} A review of the transcript of the plea hearing reflects that defense counsel acknowledged that one count of rape pertained to "vaginal activity" and the other involved "oral activity." Tr. at 6. In response to the trial court's question, defense counsel also stated that they were not allied offenses of similar import.

{¶ 6} "[R]ape by fellatio and vaginal rape are separate offenses under R.C. 2941.25(B), even when one is 'followed immediately by' the other. *State v. Barnes* (1981), 68 Ohio St.2d 13, 14, 22 O.O.3d 126, 427 N.E.2d 517. Accord *State v. Jones* (1997), 78 Ohio St. 3d 12, 676 N.E.2d 80." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶126. The Second District Court of Appeals has also observed that "commission of oral rape does not constitute commission of vaginal rape, and the converse is likewise true. Thus, vaginal rape and oral rape are not allied offenses of similar import * * * ." *State v. Burgess*, 162 Ohio App.3d 291, 2005-Ohio-3747, 833 N.E.2d 352, ¶36.

{¶ 7} In light of the fact that the record reflects that one of the two counts of rape to which Pinkney pled guilty was oral rape and the other was vaginal rape, the two charges were not allied offenses of similar import. Appellate counsel

was not, therefore, deficient and Pinkney was not prejudiced by the absence of his proposed assignment of error.

{¶ 8} Likewise, Pinkney's argument regarding consecutive sentences also fails. "'Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.' *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph 7 of the syllabus, cited in *State v. Clay*, Cuyahoga App. No. 89763, 2008-Ohio-1415, at ¶ 25." *State v. Price*, Cuyahoga App. No. 90308, 2008-Ohio-3454, reopening disallowed, 2009-Ohio-3503, ¶4. Pinkney does not challenge his sentence as being outside the statutory range.

{¶ 9} As a consequence, Pinkney has not met the standard for reopening. Accordingly, the application for reopening is denied.

PATRICIA A. BLACKMON, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS
ANN DYKE, J., NOT PARTICIPATING