

[Cite as *State v. Asadi-Ousley*, 2017-Ohio-7880.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104267

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ASA J. ASADI-OUSLEY

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION GRANTED

Cuyahoga County Court of Common Pleas
Case No. CR-15-597885-A
Application for Reopening
Motion No. 507171

RELEASE DATE: September 22, 2017

FOR APPELLANT

Asa J. Asadi-Ousley, pro se
Inmate No. A600-970
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, Ohio 44030

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Daniel T. Van
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} Asa J. Asadi-Ousley has filed a timely application for reopening pursuant to App.R. 26(B). Asadi-Ousley is attempting to reopen the appellate judgment, rendered in *State v. Asadi-Ousley*, 8th Dist. Cuyahoga No. 104267, 2017-Ohio-7252, that affirmed his conviction and the sentence of the trial court imposed with regard to the offenses of rape, felonious assault, kidnapping, and a sexually violent predator specification. We grant the application for reopening and order that this appeal be reopened for a limited review.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Asadi-Ousley 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. 688, 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 767 (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. Thus, 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. *Strickland*.

{¶4} Herein, Asadi-Ousley has raised four proposed assignments of error in support of his application for reopening. Asadi-Ousley's initial proposed assignment of error is that:

The Appellate Counsel had a duty to brief as an assignment of error the fact that his indictment states no crime under Ohio, as a direct result, Mr. Asadi-Ousley's right to Liberty is denied without redress.

{¶5} Asadi-Ousley, through his first proposed assignment of error, argues that the indictment was defective. Asadi-Ousley, however, has failed to present any argument with regard to his claim that the indictment was defective. The mere recitation of a proposed assignment of error is not sufficient to meet Asadi-Ousley's burden of establishing that appellate counsel was deficient and that there existed a reasonable probability that he would have been successful if appellate counsel had presented this argument on appeal. *State v. Hawkins*, 8th Dist. Cuyahoga No. 90704, 2009-Ohio-2246; *State v. Harris*, 8th Dist. Cuyahoga No. 90699, 2009-Ohio-5962.

{¶6} It must also be noted that the indictment was not defective. The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to be protected from any future prosecutions for the same incident. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, citing *Weaver v. Sacks*, 173 Ohio St. 415, 417, 183 N.E.2d 373 (1962), and *State v. Sellards*, 17 Ohio St.3d 169, 170, 478 N.E.2d 781 (1985). An indictment that tracks the language of the charged offenses,

identifies the predicate offenses by statute number and includes each element of the predicate offenses provides the accused with adequate notice of the pending charges. *Id.*; *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26.

{¶7} We find that the indictment was not defective and properly identified the statute numbers associated with the charged offenses, tracked the language of the charged offenses, and included the elements associated with the offenses of rape, aggravated robbery, felonious assault, and kidnapping. Asadi-Ousley, through his first proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced.

{¶8} Asadi-Ousley's second proposed assignment of error is that:

Further, appellate counsel provided ineffective assistance of appellate counsel by not raising the fact [that] the appellant's fundamental right to trial by jury has been denied without due process of law see record [citation omitted].

{¶9} Asadi-Ousley, through his second proposed assignment of error, argues that he was denied the right to a jury trial. However, a review of the record clearly demonstrates that Asadi-Ousley was tried by a jury of his peers. In addition, the record clearly demonstrates that on January 8, 2016, Asadi-Ousley executed a "defendant's voluntary waiver of jury trial and order" with regard to the sexually violent predator specification. Asadi-Ousley, through his second proposed assignment of error, has

failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced.

{¶10} Asadi-Ousley's third proposed assignment of error is that:

And lastly, his appellate counsel should be considered ineffective for not briefing as assignment of error [that] appellant was denied his right to trial counsel [where] the court forced him to trial [in spite] of the fact his trial counsel could not see, and should be considered legally blind. * * *

{¶11} Asadi-Ousley, through his third proposed assignment of error, argues that he was prejudiced as a result of vision issues that afflicted trial counsel during the course of trial. The doctrine of res judicata prevents this court from considering Asadi-Ousley's third proposed assignment of error. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Dial*, 8th Dist. Cuyahoga No. 83847, 2007-Ohio-2781; *State v. Ballinger*, 8th Dist. Cuyahoga No. 79974, 2003-Ohio-145. The third proposed assignment of error has already been addressed upon direct appeal and found to be without merit. *See State v. Asadi-Ousley, supra*, at ¶ 14. Asadi-Ousley, through his third proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced.

{¶12} Asadi-Ousley's fourth proposed assignment of error is that:

Mr. Asa J. Asadi-Ousley's appellate counsel provided him with ineffective assistance of appellate counsel where that attorney failed to brief the fact that the statute of limitations of six years had expired on the felonious assault charge because Asadi-Ousley was not charged with assaulting a Peace Officer * * *

{¶13} Asadi-Ousley, through his fourth proposed assignment of error, argues that he was prejudiced by appellate counsel's failure to argue on appeal that trial counsel

should have filed a motion to dismiss Count 5 of the indictment, felonious assault, because the six-year statute of limitations had expired.

{¶14} Upon review of the record, we find that there exists a genuine issue as to whether Asadi-Ousley was deprived of the effective assistance of appellate counsel.

{¶15} Based upon Asadi-Ousley's fourth proposed assignment of error, we find that reopening of the appellate judgment rendered in *State v. Asadi-Ousley*, 8th Dist. Cuyahoga No. 104267, 2017-Ohio-7252, is mandated. *See* App.R. 26(B)(5). However, the appeal shall be limited to the issue of whether Asadi-Ousley was prejudiced by the failure of appellate counsel to argue on appeal that trial counsel was deficient by not filing a motion to dismiss Count 5 of the indictment as based upon the expiration of a six-year statute of limitations.

{¶16} The record is deemed complete for purposes of this appeal. Attorney John F. Corrigan is appointed to represent Asadi-Ousley in the reopened appeal. Appellant's brief is due Oct. 13, 2017. Appellee's answer brief is due Nov. 3, 2017. A reply brief, if filed by the appellant, shall be due ten days after the appellee's answer brief is filed.

{¶17} Application for reopening is granted.

EILEEN T. GALLAGHER, JUDGE

LARRY J. JONES, SR., P.J., and
MARY EILEEN KILBANE, J., CONCUR