[Cite as *State v. Brado*, 2023-Ohio-2545.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MELANIE BRADO,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 BE 0039

Application to Reopen

BEFORE:
Cheryl L. Waite, David A. D'Apolito, Mark A. Hanni, Judges.

JUDGMENT:
Denied.

Atty. J. Kevin Flanagan, Belmont County Prosecuting Attorney and *Atty. Jacob A. Manning,* Assistant Prosecuting Attorney, 52160 National Road, St. Clairsville, Ohio 43950, for Plaintiff-Appellee

Melanie Brado, *Pro se*, Inmate No. W108057, Ohio Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040, Defendant-Appellant.

Dated: July 13, 2023

PER CURIAM

{¶1} Appellant Melanie Brado seeks to reopen her appeal, challenging whether a search warrant lacked probable cause and whether the Reagan Tokes law is unconstitutional. For the reasons provided, Appellant's application is denied.

{¶2} Pursuant to App.R. 26(B)(1), a criminal defendant "may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." An applicant must 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). If the application is granted, the appellate court must appoint counsel to represent the applicant if the applicant is indigent and unrepresented. App.R. 26(B)(6)(a).

{¶3} In order to show ineffective assistance of appellate counsel, the applicant must meet the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Pursuant to *Strickland*, the applicant must first demonstrate deficient performance of counsel and then must demonstrate resulting prejudice. *Id*. at 687. See also App.R. 26(B)(9).

{¶4} "Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for reopening and that there was a reasonable probability of success had that issue been raised on appeal." *State v. Hackett*, 7th Dist. Mahoning No. 17 MA 0106, 2019-Ohio-3726, ¶ 6, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶5} First and contrary to Appellant's assertion, appellate counsel raised several arguments contending the search warrant affidavit was not supported by probable cause

and failed to attest to the reliability and veracity of the confidential informant. *State v. Brado*, 7th Dist. Belmont No. 21 BE 0039, 2023-Ohio-1119, ¶ 18-32. We fully addressed this issue within our Opinion, and also referenced a similar analysis in the appeal of Appellant's co-defendant. *State v. Cutlip*, 7th Dist. Belmont No. 21 BE 0032, 2022-Ohio-3524. In addition, Appellant has raised this issue in her appeal to the Ohio Supreme Court which is awaiting a decision on jurisdiction (Case number 2023-0524).

{¶6} Second, we have previously held that the Reagan Tokes Act is constitutional. See *State v. Rose*, 2022-Ohio-3529, 202 N.E.3d 1 (7th Dist.). Counsel cannot be deemed ineffective for failing to raise an issue that this Court has already decided in a manner that is unfavorable to Appellant's position. We acknowledge that the constitutionality of the Reagan Tokes Act is currently pending before the Ohio Supreme Court. However, counsel's failure to raise the issue on appeal is not unreasonable considering the number of Ohio appellate districts, including this district, that have held the Act is constitutional.

{¶7} Because the argument pertaining to the search warrant was raised and fully considered and counsel was not unreasonable in not raising the constitutionality of the Reagan Tokes Act, Appellant's application for reopening is denied.

JUDGE CHERYL L. WAITE

JUDGE DAVID A. D'APOLITO

JUDGE MARK A. HANNI

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

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