

1 The State of Ohio, Appellee, v. Griffie, Appellant.

2 [Cite as *State v. Griffie* (1996), _____ Ohio St.3d _____.]

3 *Appellate procedure -- Application for reopening appeal from*
4 *judgment and conviction based on claim of ineffective*
5 *assistance of appellate counsel -- Application denied when no*
6 *genuine issue of whether applicant was deprived of effective*
7 *assistance of counsel on appeal is raised.*

8 (No. 95-897--Submitted September 12, 1995--Decided January 17,
9 1996.)

10 Appeal from the Court of Appeals for Montgomery County, No.

11 14364.

12 Following a jury trial, appellant, James Griffie was convicted of
13 felonious assault and sentenced accordingly. The court of appeals affirmed
14 the conviction except for a fine. *State v. Griffie, Jr.* (Dec. 21, 1994),
15 Montgomery App. No. 14364, unreported.

16 Appellant then filed an application to reopen his direct appeal
17 pursuant to App.R. 26(B), stating that his appellate counsel was ineffective
18 for having failed to argue that his trial counsel was ineffective for not
19 requesting an instruction on the lesser included offense of assault. The

1 court of appeals denied this application. The court stated that since requests
2 for jury instructions are notoriously part of trial strategy, the court could not
3 determine solely from the record whether appellant’s trial counsel was
4 ineffective. Appellant appeals the denial to this court.

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6 *Mathias H. Heck, Jr.*, Montgomery County Prosecuting Attorney, and
7 *Carley J. Ingram*, Assistant Prosecuting Attorney, for appellee.

8 *James Griffie, Jr.*, *pro se.*

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10 *Per Curiam.* We affirm the decision of the court of appeals.

11 In his application for reopening, appellant argued that his appellate
12 counsel was ineffective for not arguing that his trial counsel was ineffective
13 for not requesting an instruction on the lesser included offense of assault.
14 However, appellant offers no support for his argument besides the record.
15 App.R. 26(B)(2)(e) states that an application for reopening shall contain
16 “[a]ny parts of the record available to the applicant and all supplemental
17 affidavits upon which the applicant relies.” The record may reveal that trial
18 counsel did not request a certain jury instruction, but, without more, the

1 court of appeals would have to guess as to why trial counsel did not make
2 the request. Failure to request instructions on lesser-included offenses is a
3 matter of trial strategy and does not establish ineffective assistance of
4 counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 16 O.O.3d 35, 402
5 N.E.2d 1189, certiorari denied (1980), 449 U.S. 879, 101 S.Ct. 227, 66
6 L.Ed.2d 102.

7 Under App.R. 26(B)(5), an application for reopening shall be granted
8 if there is a genuine issue as to whether the applicant was deprived of the
9 effective assistance of counsel on appeal. Since appellant offered no proof
10 of appellate counsel's ineffective assistance besides the record, no genuine
11 issue was raised. Therefore, we affirm the decision of the court of appeals.

12 *Judgment affirmed.*

13 MOYER, C.J., DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER
14 and COOK, JJ., concur.

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