

[Cite as *State v. Braun*, 2008-Ohio-5980.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88336

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY BRAUN

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NOS. 403934 and 413177
LOWER COURT NO. CR-473677
COMMON PLEAS COURT

RELEASE DATE: November 19, 2008

[Cite as *State v. Braun*, 2008-Ohio-5980.]

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ANN DYKE, J. :

{¶ 1} Appellant Jeffrey Braun has filed a timely application for reopening pursuant to App. R. 26(B). He is attempting to reopen the appellate judgment that was rendered by this court in *State v. Braun*, Cuyahoga App. No. 88336, 2007-Ohio-4578. In that opinion, we affirmed defendant's convictions for aggravated burglary, aggravated robbery and attempted murder. In his application to reopen, Braun asserts sixteen assignments of error. On December 20, 2007, the State of Ohio filed a brief in opposition to the application for reopening. For the below stated reasons, we decline to reopen Braun's original appeal.

{¶ 2} To establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel’s performance was deficient and that deficiency prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 688, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶ 3} In *Strickland*, the United States Supreme Court stated that a court’s scrutiny of an attorney’s work must be highly deferential. The court further stated that it is too tempting for a defendant to second-guess his attorney after conviction 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.” *Strickland*, 104 S.Ct. at 2065.

{¶ 4} In regard to claims of ineffective assistance of appellate counsel, 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. “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues.” *Jones v. Barnes* (1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308. Additionally, appellate counsel is not required to argue assignments of error which are meritless. *Barnes*, *supra*.

{¶ 5} In his first assignment of error, Braun argues that the trial court erred by not granting his pro se motion to dismiss for violation of his speedy trial rights. After examining the lower court record and all the motions that tolled Braun's speedy trial time such as the motions to dismiss based upon speedy trial and the demand for a bill of particulars, we do not find that appellate counsel was ineffective for failing to raise this issue. See *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040; *State v. Brelo*, Cuyahoga App. No. 79580, 2001-Ohio-4245. As stated above, an appellate court must give appellate counsel discretion in deciding which arguments are the best arguments to raise. Consequently, we do not find fault with appellate counsel's decision not to raise this issue.

{¶ 6} In his second assignment of error, Braun asserts that his due process rights were violated because he was unable to attend pretrial hearings. However, Braun failed to demonstrate to this court how his presence at the pretrial hearing would have changed the result at trial. *State v. Robinson* (Sept. 22, 1994), Cuyahoga App. No. 65989. Accordingly, Braun did not demonstrate how he was prejudiced.

{¶ 7} In his third assignment of error, Braun argues that he was denied a fair chance to prepare his defense because of the vagueness of the charges. However, Braun's argument is also vague. In his argument, Braun failed to demonstrate how he lacked knowledge of the charges against him or how the charges were vague. *State v. White* (Apr. 16, 1998), Cuyahoga App. No. 72011. Consequently, we again find that Braun failed to establish how he was prejudiced.

{¶ 8} In Braun's fourth and fifth assignment of error, Braun argues that he was denied due process because the State failed to disclose statements made by the codefendant John Shears. However, even if the State did fail to disclose the statement, based upon the overwhelming evidence that Braun committed these offenses, we do not find that the result of the trial would have been any different. Accordingly, Braun again failed to establish prejudice and we overrule these assignments of error.

{¶ 9} Braun argues in his sixth assignment of error that he was denied due process when the court allowed the admission of numerous hearsay statements that indicated that Braun and the codefendant were known to rob people. We reject this argument. First, Braun failed to disclose where in the record that these statements were made. Secondly, even if these statements were made, we find that there was such overwhelming evidence of Braun's guilt that he cannot establish that the results of the trial would have been different if these statements were not admitted. *State v. Doss* (Feb. 1, 1990), Cuyahoga App. No. 56569.

{¶ 10} In his seventh assignment of error, Braun asserts that the trial court erred when it did not grant the motion for mistrial when Officer Diaz testified that he searched for Braun's name in a computer as a suspect in other offenses. Res judicata prohibits this court from entertaining this assignment of error. Errors of law that were either raised or could have been raised through a direct appeal may be barred from further review vis-a-vis the doctrine of res judicata. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 1204. In this matter, Braun raised this same issue in his direct appeal. Accordingly, res judicata prevents him from raising it again.

{¶ 11} Braun next argues that his trial counsel was ineffective because he failed to call any witnesses. A review of the trial transcript indicates that the defense chose not to call any witnesses but rested after the State's case in chief. However, Braun again failed to establish how the results of the case would have been different if witnesses were called by the defense. Based upon the overwhelming evidence produced against him at trial, we deny this assignment of error because Braun failed to establish that he was prejudiced by the decision.

{¶ 12} In his ninth assignment of error, Braun argues that his conviction was against the manifest weight of the evidence. A review of his direct appeal indicates that appellate counsel did raise this issue. Therefore, we are precluded from reviewing it based upon the principles of res judicata.

{¶ 13} In his tenth assignment of error, Braun argues that his due process rights were violated when he was charged and two elements needed to convict him, mens rea and actus rea, were unfounded under R.C. 2901.01. We disagree. The evidence overwhelmingly showed that Braun acted in concert with the codefendant when they broke into the victim's apartment after the victim refused to let them in. When the victim grabbed the gun that the codefendant was wielding, it was Braun who began to hit the victim in the back with a golf club to make the victim release his grip on the weapon. The victim also testified that after he was shot, Braun picked him up and moved him so that Braun could steal the money from the victim's pockets. Based upon the evidence, we find that the offenses were proven beyond a reasonable doubt by the State of Ohio.

{¶ 14} Braun next argues that his due process rights were violated when the trial court allowed the prosecution to dismiss jurors based upon gender and race. The United States Supreme Court, in *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, established a three-part test to determine whether a peremptory challenge is impermissibly based on race. First, the opponent of the peremptory challenge must show that the potential juror is a member of a “cognizable racial group.” *Batson*, 476 U.S. at 96. Once the opponent of the peremptory challenge makes a prima facie showing, “the burden shifts to the proponent of the peremptory challenge to come forward with a neutral explanation for challenging....” *Id.* at 97. Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination. *Id.* at 98. However, the party challenging the strike always bears the burden of persuasion to prove that the strike was motivated by a discriminatory animus. *State v. Whatley*, Cuyahoga App. No. 86267, 2006-Ohio-2465. Additionally, unless clearly erroneous, a trial court’s findings of no discriminatory intent will not be reversed on appeal. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971.

{¶ 15} In this matter, after the defense raised the issue that a peremptory challenge was used on a black, female juror, the State of Ohio argued that the purpose of the challenge was because the juror seemed to be not paying attention. Although the trial court questioned the reason, it overruled the objection. Under these facts, we cannot find that the trial court’s decision was clearly erroneous. Additionally, the record does not show that the opponent met his burden of persuasion that the strike was based upon a discriminatory animus. Moreover,

as we stated above, it is within appellate counsel’s discretion to decide which issues he or she believes are the most fruitful arguments. Based upon the above, we cannot find fault in appellate counsel’s decision not to raise this issue on direct appeal.

{¶ 16} In his twelfth assignment of error, Braun argues that his due process rights were violated when the trial court read jury instructions that were prejudicial to the defendant. Although the defendant acknowledged that the record did not contain a transcript of the jury instructions, he stated that had the transcript been included, appellate counsel would have raised this issue. Braun further adds that appellate counsel’s failure to order the transcript of the jury instructions and closing arguments are further examples of his ineffectiveness.

{¶ 17} We find this argument to be without merit. When portions of the transcript necessary for resolution of assigned errors are omitted from the record, we have nothing to pass upon and, thus we have no choice but to presume the validity of the lower court’s proceedings and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384; *Tyrrell v. Invest. Assoc., Inc.* (1984), 16 Ohio App.3d 47. 474 N.E.2d 621. Furthermore, the argument that counsel’s failure to include the transcript is evidence of ineffectiveness also fails because Braun cannot demonstrate prejudice.

{¶ 18} In his next assignment of error, Braun asserts that his due process rights were violated because counsel failed to keep him adequately informed about the pretrial conferences. We rejected a similar argument in which Braun claimed that he was denied due

process because he was not allowed to attend pretrial hearings. We reject this argument on the same basis that Braun failed to establish prejudice.

{¶ 19} In his fourteenth assignment of error, Braun argues that his sentencing violated Ohio's sentencing guidelines because he was not given concurrent sentences for allied offenses. We find this argument to be without merit because the crimes of aggravated robbery, aggravated burglary, and attempted murder are not allied offenses. See *State v. Moore*, Cuyahoga App. No. 79353, 2002-Ohio-2133; *State v. Fortson*, Cuyahoga App. No. 83895, 2004-Ohio-5220; and *State v. Lockhart* (Sept. 16, 1999), Cuyahoga App. No. 74113.

{¶ 20} For his last proposed assignment of error, Braun asserts that his due process rights were violated when the court allowed hearsay evidence from State's witnesses. Specifically, Braun argued that the court erred when it allowed Denise Smith to testify even though she admitted that she was asleep. Once again we find that Braun failed to specify in the record what statements constituted hearsay. Nevertheless, a trial court has broad discretion in the admission of evidence and, unless that discretion was abused and the defendant was materially prejudiced, an appellate court should not interfere. *State v. Tisdale*, Cuyahoga App. No. 91095, 2008-Ohio-5751.

{¶ 21} In this matter, Braun failed to demonstrate that the trial court abused its discretion. However, even if he did show that the court abused its discretion, we are hard-pressed to find that Braun was materially prejudiced considering the overwhelming evidence that he committed these crimes. Therefore, we reject this proposed assignment of error.

{¶ 22} Accordingly, we deny the application to reopen.

ANN DYKE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
PATRICIA A. BLACKMON, J., CONCUR