[Cite as *State v. Ellis*, 2009-Ohio-4359.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90844

STATE OF OHIO

APPELLEE

vs.

WILLIAM W. ELLIS

APPELLANT

JUDGMENT:
APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 419321
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-495646

RELEASE DATE: August 25, 2009

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SEAN C. GALLAGHER, P.J. :

{¶ 1} On March 5, 2009, the applicant, William W. Ellis, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State of Ohio v. William Ellis*, Cuyahoga App. No. 90844, 2008-Ohio-6283, in which this court affirmed his convictions for gross sexual imposition, felonious assault, and kidnaping, as well as his classification as a sexual offender. Ellis argues that his appellate counsel was ineffective because counsel (1) did not move to dismiss on double jeopardy grounds, (2) did not argue that trial counsel deprived Ellis of his right to testify on his own behalf, (3) did not argue speedy trial rights, and (4) did not argue that the indictments

for kidnaping were defective because they did not allege a mens rea. The State of Ohio filed a brief in opposition on April 6, 2009. For the following reasons, this court denies the application.

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 ; *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 ruled that judicial scrutiny of an attorney's work must be highly deferential. The Court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "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} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most

promising arguments out of all possible contentions. The court noted, "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, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987. Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the Court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638 and *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987.

{¶ 5} Furthermore, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 6} Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 50 N.E. 97; *Carran v. Soline Co.* (1928), 7 Ohio Law Abs. 5 and *Republic Steel Corp. v. Sontag* (1935), 21 Ohio Law Abs. 358. Thus, "a reviewing court cannot add matter to the record that was not part

of the trial court's proeceedings and then decide the appeal on the basis of the new matter. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500. Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke,* 97 Ohio St.3d 55, 2002-Ohio-5310, ¶10, 776 N.E.2d 79.

{¶ 7} Moreover, appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue. *State v. Williams* (1991), 74 Ohio App.3d 686, 600 N.E.2d 298; *State v. Columbo* (Oct. 7, 1987), Cuyahoga App. No. 52715, reopening disallowed (Feb. 14, 1995), Motion No. 55657; *State v. Munici* (Nov. 30, 1987), Cuyahoga App. No 52579, reopening disallowed (Aug. 21, 1996), Motion No. 71268, at 11-12: "appellate counsel is not responsible for accurately predicting the development of the law in an area marked by conflicting holdings." *State v. Harey* (Nov. 10, 1997), Cuyahoga App. No. 71774, reopening disallowed (July 7, 1998), Motion No. 90859; *State v. Sanders* (Oct. 20, 1997), Cuyahoga App. No. 71382, reopening disallowed, (Aug. 25, 1998), Motion No. 90861; *State v. Bates* (Nov. 20, 1997), Cuyahoga App. No. 71920, reopening disallowed (Aug. 19, 1998), Motion No. 91111; and *State v. Whittaker* (Dec. 22,

1997), Cuyahoga App. No. 71975, reopening disallowed, (July 28, 1998), Motion No. 92795.

{¶ 8} Ellis originally faced these charges in *State of Ohio v. William Ellis*, Cuyahoga County Common Pleas Court Case No. CR-484041 (hereinafter the "First Case").[1] On Monday, April 2, 2007, in this First Case, the trial judge made the following journal entry: "Defendant in court with retained counsel Marcus Poole. Prosecutor(s) Blaise Thomas, Brent Kirvel present. Jury panel sworn; jury selection is complete. Jury to be sworn in Tues, 4/1/07 at 9:45AM." The next day the prosecutors dismissed the case first thing in the morning, and the Grand Jury reindicted Ellis on the identical charges on June 18, 2007, in *State of Ohio v. William Ellis*, Cuyahoga County Common Pleas Court Case No. CR- 495646 (hereinafter "the Second Case").

{¶ 9} Ellis' first argument is that because jeopardy attaches when the jury is sworn, jeopardy attached to him on April 2, 2007, as proven by the journal entry. Thus, when the prosecutors dismissed the case, they actually finished it. Double Jeopardy barred the Second Case and now requires vacating those convictions.

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[1] On July 2, 2006, Ellis went to the home of his cousin, where the victim was residing. When the victim refused his sexual advances, he grabbed her, choked her, and had her remove her clothing. He then fondled her breasts and vagina. They struggled some more, and the victim testified that Ellis vaginally raped her. She was then able to escape. For this conduct the Grand Jury on November 14, 2006, indicted Ellis for one count of rape, two counts of gross sexual imposition, two counts of felonious assault, and two counts of kidnaping with sexual motivation specifications.

{¶ 10} However, a review of the transcript shows that the jury was never sworn, despite the language in the journal entry. (Tr. 11-19.) Appellate counsel in the exercise of professional judgment properly declined this argument which the transcript contradicted.

{¶ 11} Ellis' second argument is that trial counsel denied him his right to testify on his own behalf. He further submits that he informed his appellate counsel that he had expressed a desire to testify to his trial attorney. He endeavors to show prejudice by arguing that because the case would have turned upon his word against the victim's word, and the jury could not have discerned who was telling the truth, a reasonable doubt would have necessarily been created.

{¶ 12} However, again the transcript contradicts this argument. On the afternoon of October 25, 2007, at the close of the state's case, the trial judge asked Ellis whether he wanted to testify, and he said, "I guess not." (Tr. 826.) Ellis did express reservations about his attorney, and again the trial judge asked him, without divulging client-counsel communications, to state whether he wanted to testify. He replied, "No, I don't want to testify." (Tr. 827.) The judge explained that there was still two hours of trial time left and that she did not want to waste those two hours only to have him say he wanted to testify in the morning. Ellis confirmed thrice more that he was not testifying. (Tr. 828.) On the morning of October 26, the trial judge asked him, "And one more time, Mr. Ellis, is it your desire to testify in this case or

not?" Ellis answered, "No, I don't want to testify." (Tr. 834.) Again, appellate counsel properly rejected an argument not supported by the record.

{¶ 13} Next, Ellis argues that he was not brought to trial within 270 days as required by R.C. 2945.71. Thus, his convictions should be vacated because his right to a speedy trial was violated. Ellis argues that he was arrested on July 11, 2006, for these charges and that his trial did not begin until October 23, 2007. Moreover, he was in jail from July 11 until August 3, 2006, during which the triple-count provisions of Ohio's speedy trial statutes, would expend 69 days of those 270 days. At the time of the dismissal of the First Case, the court and the state had calculated that only 24 days remained unexpired. (Tr. 33.) Thus, Ellis argues these remaining days must have elapsed by the time of trial on October 23, 2007.[2] Trial and appellate counsel were deficient in not arguing this critical issue.[3]

{¶ 14} However, the calculation resulting in an apparent short time to bring Ellis to trial assumed that there were charges pending against him from July 11

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[2] It seems that Ellis argues that the time must have continued to expire between April 2 and June 18, 2007. However, during this time there was no pending charge against Ellis. R.C. 2945.71 requires that there be a pending charge in order for the speedy trial statute to apply.

[3] An examination of the docket in the Second Case shows that 8 days elapsed from June 18 to June 26, 2007. From June 26 to October 15, 2007, the parties entered into a series of pretrials which were continued at the defendant's request. So no speedy trial time elapsed during that period. The trial court had originally scheduled the trial for October 15, but the court was engaged in another trial that day, so it continued Ellis' trial to October 23. Even assuming that this last continuance did not come within the tolling time of R.C. 2945.72(H), - "the period of any reasonable continuance granted other than upon the accused's own motion" - it appears only 16 days elapsed during the Second Case, which is

through November 14, 2007, the day the initial indictments were issued. However, Ellis was held on municipal court charges for these offenses only until early August. At that time the municipal court charges were dismissed. Thus, from August 3 to November 14, 2007, there were no charges pending against Ellis, and this time did not count for purposes of speedy trial. (Tr. 43-45.) Appellate counsel properly declined to argue an issue not supported by the record.

{¶ 15} Ellis' final argument is that the indictments for kidnaping were defective because they did not include a mens rea element. The indictments provided in pertinent part that Ellis "unlawfully and by force, threat or deception removed Jane Doe from the place where she was found or restrained her of her liberty for the purpose of (1) facilitating the commission of a felony or the flight thereafter or (2) engaging in sexual activity." Ellis asserts that as in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, there is no mens rea for the elements of force, threat or deception. Thus, the indictments are defective.

{¶ 16} However, Ohio appellate courts have rejected the argument that the statute does not set forth a means rea and have ruled that the mens rea of the statute is purposefully. *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631; *State v. Riddle*, Cuyahoga App. No. 90999, 2009-Ohio-348; and *State v. Parker*, Cuyahoga App. No. 90256, 2008-Ohio-3681. This court also notes that the trial court included the definition of purposefully in the instructions for kidnaping.

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within the 24 days originally calculated.

Appellate counsel is not responsible for arguing changes in the law or for raising issues in an area marked by conflicting opinions. Thus, appellate counsel was not deficient for not raising this issue.

{¶ 17} Accordingly, this court denies the application to reopen.

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCURS