

[Cite as *State v. Abdul*, 2009-Ohio-6300.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90789

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMILL SHABAZZ ABDUL

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Cuyahoga County Common Pleas Court
Case No. CR-495551
Application for Reopening
Motion No. 421830

RELEASE DATE: December 1, 2009

FOR APPELLANT

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COLLEEN CONWAY COONEY, A.J.:

{¶ 1} On May 7, 2009, the applicant, Jamill Shabazz Abdul,¹ pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, applied to reopen this court's judgment in *State v. Abdul*, Cuyahoga App. No. 90789, 2009-Ohio-225, in which this court affirmed Abdul's conviction for murder with a three-year firearm specification and a repeat violent offender specification.

¹ The court notes the differences between the applicant's name in the case caption, Jamill Shabazz Abdul, and how he refers to himself in the application, Jamill Abdul Shabazz. The court will refer to the applicant as "Abdul" as in the trial court record.

The evidence at trial showed that Abdul discharged a pistol into the victim's head at point-blank range. The issue at trial was whether this was an intentional act, an accident, or the result of Abdul's mistakenly thinking that the gun contained only blanks.

Abdul asserts that his appellate counsel was ineffective because he did not argue (1) that his trial counsel were ineffective for, inter alia, not sharing discovery materials, not subpoenaing and presenting witnesses, and not cross-examining a state witness about his criminal record and (2) that the trial court erred in not granting Abdul's motion to appoint new counsel.² The state of Ohio filed its brief in opposition on August 26, 2009. Abdul filed a supplemental brief on September 10, 2009, and a response to the State's brief on September 17, 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,

² The court notes that Abdul has raised these same arguments in a postconviction relief petition in the trial court.

“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 Ohio Supreme Court reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶ 5} Moreover, 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 reasonable probability is a probability sufficient to undermine confidence in the outcome. 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} Additionally, 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. "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.

{¶ 7} Abdul first claims that his trial counsel were ineffective because they did not subpoena and present various witnesses. This argument is unpersuasive because Abdul does not establish prejudice. He does not establish with references to the record who these witnesses are and, more importantly, how their testimony would have exonerated him. Without that, this court can only speculate, and speculation does not establish prejudice. *State v. Spencer* (June 17, 1996), Cuyahoga App. No. 69490, reopening disallowed 2003-Ohio-5064 and *State v. Thompson*, Cuyahoga App. No. 79334, 2002-Ohio-5957, reopening disallowed 2003-Ohio-79334. Abdul has attached to his supplemental brief the first page of an investigator's report concerning

Randolph Thomas, who was in the building when the incident occurred. According to the report, Thomas stated: "The next day I heard [Abdul] and the [victim] were playing with the pistol and it went off." Such testimony is based on hearsay and is inadmissible.

{¶ 8} Abdul complains that his counsel did not share discovery with him. He seems particularly aggrieved because the witness statements were not provided to him. However, under Crim.R. 16, as it existed at the time of trial, the witness statements were not provided to the defense before trial. Rather, subsection (B)(1)(g) provided for the in camera inspection of the witness statement after the witness's direct examination. The record establishes this was often effectively done for the defense. Moreover, the record does not establish what discovery was or was not shared with Abdul, only that he expressed his dissatisfaction approximately two months before trial.

{¶ 9} Abdul also complains that his defense counsel did not impeach one of the State's chief witnesses, William Green, with his extensive criminal record. Instead, defense counsel impeached Green with multiple inconsistencies between his trial testimony and the statement he gave to the police. Defense counsel also showed that Green had a bias, that he wanted justice for his friend, the victim. Given the supreme court's admonitions concerning an attorney's strategy and tactics, it is understandable that appellate counsel, in the exercise of

professional judgment, would not base an argument on the tactics of cross-examination.

{¶ 10} Appellate counsel did argue that trial counsel was ineffective for failing “to inquire concerning prospective jurors bias toward members of the Muslim faith.” However, because Abdul’s arguments were not well-founded, appellate counsel in the exercise of professional judgment properly decided not to include them in his assignment of error.

{¶ 11} Abdul’s second proposed assignment of error is that the trial court erred in not granting his motion to appoint new counsel. Approximately two months before trial at a hearing to waive speedy trial rights, Abdul orally moved the trial court to change lawyers. Abdul said that he had a conflict of interest with one of his attorneys, because he thought that attorney did not have his “best interest at heart.” (Tr. 9.) When the judge asked Abdul to specify the lawyer’s deficiencies, Abdul replied that his rights under Crim.R. 16 had been violated, that he had not seen any of the evidence, and that his witnesses had not been subpoenaed. The judge noted that this attorney was “one of the most seasoned trial lawyers in this city,” that he has tried many murder cases, and that Abdul was not “going to get a more competent and qualified counsel.” (Tr. 9.) The trial judge also confirmed with the attorney that discovery was still ongoing and explained to Abdul that the discovery was not going to fall into his lap all at once. The judge also assured Abdul that the attorney would “subpoena those

witnesses he believes are in your best interest.” (Tr. 10.) The judge then denied the request.

{¶ 12} In order to obtain substitute counsel, a defendant must show good cause, such as a conflict of interest, a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant’s right to effective assistance of counsel, or an irreconcilable conflict that would lead to an unjust result. Disagreements between the attorney and the defendant over strategy and tactics do not warrant a substitution of counsel. Moreover, the trial judge should conduct a hearing on the motion. The judge’s decision is reviewed under an abuse of discretion standard. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48; *State v Jones*, 91 Ohio St.3d 335, 2001-Ohio-57, 744 N.E.2d 1163; and *State v. Blankenship* (1995), 102 Ohio App.3d 534, 657 N.E.2d 559.

{¶ 13} In the instant case, the trial judge conducted a hearing on Abdul’s motion for new counsel. Abdul expressed dissatisfaction but did not show a complete breakdown between himself and counsel. The trial judge noted counsel’s experience and competence and how Abdul’s complaints were not ripe. It is understandable why appellate counsel in the exercise of professional judgment would decline to argue an abuse of discretion regarding this issue.

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

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
MARY J. BOYLE, J., CONCUR