[Cite as *State v. Pruitt*, 2010-Ohio-1573.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91205

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL PRUITT

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 423483
Cuyahoga County Common Pleas Court
Case No. CR-451979

RELEASE DATE: April 2, 2010

FOR APPELLANT

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CHRISTINE T. MCMONAGLE, J.:

{¶ 1} The applicant, Michael Jarmal Pruitt, pursuant to App.R. 26(B), timely applied to reopen this court's judgment in *State v. Pruitt*, Cuyahoga App. No. 91205, 2009-Ohio-859, in which this court affirmed Pruitt's convictions and sentences for attempted murder with a three-year firearm specification and having a weapon under disability, as well as the denial of Pruitt's motion to withdraw his guilty plea.[1] Pruitt argues that his appellate counsel was ineffective for failing to

[1] In late 2004, Pruitt pleaded guilty to attempted murder with a three-year firearm specification and having a weapon while under disability; the trial court sentenced him to

raise the issue of waiver against the state's arguments, i.e., because the state did not argue subject matter jurisdiction, law of the case, and res judicata before the trial court on the motion to withdraw guilty plea, his appellate counsel should have argued that the state had waived those arguments and could not raise them in the court of appeals. The State of Ohio filed a brief in opposition to the application. For the following reasons, this court denies the application to reopen.

{¶ 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, 111 L.Ed.2d 768.

{¶ 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

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a total of 11 years. Subsequently, he moved to withdraw his guilty plea, which the trial court denied. In *State v. Pruitt*, Cuyahoga App. Nos. 86707 and 86986, 2006-Ohio-4106, this court affirmed in part, vacated in part, and remanded the matter for resentencing on the weapon charge pursuant to *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. After resentencing, Pruitt appealed again, *State v. Pruitt*, Cuyahoga App. No. 89405, 2008-Ohio-231, and this court reversed and remanded for resentencing on the weapon charge for compliance with *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. While on remand, Pruitt again moved to withdraw his guilty plea, which the trial court again denied. This led to the appeal sub judice.

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.

{¶ 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 whether there was any prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 6} In the instant case there was no prejudice. In addressing Pruitt's assignments of error on the denial of the motion to withdraw guilty plea, this court first noted that the trial court lacked jurisdiction to consider a Crim.R. 32.1 motion to withdraw guilty plea after the court of appeals had affirmed the conviction. It would not have mattered if appellate counsel had tried to raise waiver as a bar, because subject matter jurisdiction is never waived and can be raised at any time. *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.* (1998), 82 Ohio St.3d 37, 693 N.E.2d 789. Indeed, an appellate court may sua sponte consider subject matter jurisdiction even if it was not raised below. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.,* 79 Ohio St.3d 543, 1997-Ohio-366, 684 N.E.2d 72; and *Sloane v. State Bd. of Embalmers & Funeral Directors* (1995), 107 Ohio App.3d 628, 669 N.E.2d 288. An argument of waiver would not have prevented this court's review of the critical, threshold issue of subject matter jurisdiction.

{¶ 7} Moreover, appellate counsel, in his brief, did address the issues of subject matter jurisdiction, law of the case, and res judicata and endeavored to show that these principles did not prevent this court from reversing the trial court's denial of the motion to withdraw guilty plea. Following the United States Supreme Court's admonitions, this court will not second-guess appellate counsel's decisions on strategy and tactics.

{¶ 8} Accordingly, this court denies the application.

CHRISTINE T. MCMONAGLE, JUDGE

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