[Cite as *State v. Wilson*, 2010-Ohio-2080.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91091

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC R. WILSON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 422667
Cuyahoga County Common Pleas Court
Case No. CR-502057

RELEASE DATE: May 11, 2010

ATTORNEYS FOR APPELLEE

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JAMES J. SWEENEY, J.:

{¶ 1} The applicant, Eric Wilson, pursuant to App.R. 26(B), has timely applied to reopen this court's judgment in *State v. Eric Wilson*, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133, in which this court affirmed Wilson's convictions for involuntary manslaughter and one count of felonious assault, both with firearm specifications, and having a weapon under disability; and reversed and remanded to the trial court for merging another count of felonious assault with the first felonious assault count.[1] Wilson claims that his appellate counsel

[1] On September 1, 2006, Wilson, a drug trafficker, was in his car selling drugs.

was ineffective for not arguing that the judge erred in allowing inflammatory evidence, in allowing the indictment to be amended improperly, in overruling his pro se motion to disqualify counsel, and in overruling the motion for psychological evaluation. The state filed a brief in opposition. 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; and *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.

Yhonquea walked up to Wilson's car and after putting a gun to Wilson's head, robbed Wilson of his drugs, money, and cell phone and then fled. Wilson chased Yhonquea and shot at him approximately eight times. Yhonquea shot back and mortally wounded a 12 year-old girl. Wilson caught up with Yhonqea, shot him in the back, retrieved his property, and returned to his car. Wilson had a "girlfriend" in his car who told him that a young girl had been shot. Wilson then drove the two of them to a friend's house and confirmed that the girl had been killed. The "girlfriend" stated that Wilson repeatedly forced her to have sex with him that night. Wilson then fled Cleveland. Montana police caught him ten days later. Yhonquea survived.

In 2007, the grand jury indicted Wilson for murder, attempted murder, two counts of felonious assault , two counts of aggravated robbery, kidnapping, rape, two counts of attempted rape, and having a weapon under disability. All the charges except the disability charge carried one- and three-year firearm specifications. The state dismissed the two counts of aggravated robbery before trial, and the jury returned the verdict as indicated above, specifically finding Wilson not guilty of the attempted murder, kidnapping, and rape charges. The jury found him guilty of involuntary manslaughter, a lesser included offense under the murder charge. The trial judge sentenced him to a total of 35 years.

On appeal, this court ruled that the two felonious assault charges should be merged. On remand the trial court imposed a 28-year sentence.

{¶ 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} 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 court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 6} Wilson's first argument is that the trial court denied him due process and a fair trial by allowing the "girlfriend" to refer to Wilson as "Big Will" or "Big Willie." Wilson asserts that this name is inflammatory because Cleveland's mayor made up the name to attach false allegations to it. However, Wilson does not state where in the record testimony was given that the Mayor made up this name. Furthermore, the "girlfriend" testified that when she met Wilson, he told her to call him "Big Will" (Tr. 1201) and that that was his nickname. (Tr. 1132.) Moreover, defense counsel did not object to this evidence. Rather, he attacked her credibility by trying to show disparities in how she met Wilson.[2]

[2] There was a disparity in the evidence as to whether Wilson introduced himself or whether a Christopher Bryant introduced them.

{¶ 7} The court rules that appellate counsel in the exercise of professional judgment properly declined to argue this point. The lack of objection would force appellate counsel to argue plain error, which would be very difficult to do, because the nickname is not inherently inflammatory and appears to be derived from Wilson's name.

{¶ 8} Next, Wilson argues that the trial judge erred in allowing a detective to refer to the 12-year-old girl who was killed, as "my little girl."[3] During cross-examination, defense counsel asked this detective what his theory was about what actually had happened to precipitate the shootout. After confirming that defense counsel really wanted his answer, the detective said that he believed that a drug transaction went sour and that the individuals got out of the car and exchanged gun fire. The detective then continued that if that person had not come into the neighborhood to sell drugs and that if he "didn't take it upon himself to get out of the car with a handgun and chase after somebody, we wouldn't be here, and my little girl would still be alive." (Tr. 1482-1483.) Wilson also complains that the judge allowed evidence that Yhonquea's family visited him at the hospital. Wilson argues that such testimony improperly influenced the jury's sympathies and that it allowed the detective to give an improper opinion.

[3] The detective testified that he originally came from that neighborhood and that he still went to church services there. (Tr. 1446.)

{¶ 9} In *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, 502 N.E.2d 590, paragraph one of the syllabus, the Supreme Court of Ohio ruled: "A party will not be permitted to take advantage of an error which he himself invited or induced." Because defense counsel elicited the detective's response, the error, if any, would be countered by the invited error doctrine. Appellate counsel, again, in the exercise of professional judgment properly declined to raise such an easily defeated argument.

{¶ 10} As to the detective's testimony concerning the brother's revelation that Wilson was Yhonquea's drug supplier, the detective carefully avoided hearsay testimony and just related the steps in the investigation. Defense counsel made no objections. This is a very weak argument which appellate counsel properly avoided.

{¶ 11} At the end of the trial, the state asked for and the judge gave an instruction on the lesser included offense of involuntary manslaughter. Wilson argues that this improperly amended the indictment from murder to involuntary manslaughter under Crim.R. 7(D). He claims that this changed the name of the offense and deprived him of his right to indictment from the grand jury.

{¶ 12} This argument is meritless. The court did not amend the indictment. At the end of the trial, Wilson was still facing the charge of murder, and the court instructed on that charge. Moreover, a charge of murder necessarily apprises the defendant that he must defend against lesser included offenses. If a jury

instruction on a lesser included offense is warranted under the facts, Crim.R. 7(D) permits the trial court to so instruct the jury. *State v. Carter* (Oct. 14, 1983), Miami App. No. 82CA52. Involuntary manslaughter is a lesser included offense of murder. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286; and *State v. Lazich* (Jan. 13, 1997), Mahoning App. No. 93 CA 127.

{¶ 13} For his fourth argument Wilson claims that the trial court erred in denying his pro se motion to disqualify counsel. Wilson was dissatisfied with his appointed counsel because that attorney had represented him on another criminal case, and Wilson believed that the attorney mishandled the case and made misrepresentations to him. Wilson, in his motion to disqualify, characterized this dissatisfaction as a conflict of interest. Defense counsel admitted in the hearing on the motion that Wilson did not trust him and only sought to relitigate the previous case when he met with Wilson.

{¶ 14} Wilson's argument is not well-founded. First, his dissatisfaction with trial counsel is not an authentic conflict of interest. In *State v. Manross* (1988), 40 Ohio St.3d 180, 182, 532 N.E.2d 735, the Supreme Court of Ohio stated that " '[t]he term "conflict of interest" bespeakes a situation in which regard for one duty tends to lead to disregard of another.' *** *Goitia v. United States* (C.A. 1, 1969), 409 F.2d 524, 527. A lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." Wilson does not argue that his attorney had some interest or

duty to another that conflicted with the attorney's duty to Wilson. Wilson merely vented his anger from the previous case.

{¶ 15} Moreover, Wilson does not show that his appellate counsel was deficient for not arguing that the judge erred in denying his motion to disqualify. In *State v. Stubblefield*, Cuyahoga App. No. 90687, 2008-Ohio-5348, this court stated the principles for reviewing a motion to dismiss counsel. The trial court must inquire into the reasons for the motion and determine whether there has been such a complete breakdown in the client-counsel relationship that there would be an apparently unjust result. Furthermore, substitution of counsel is within the discretion of the court.

{¶ 16} In the present case, the trial court conducted a hearing on Wilson's motion. (TR. 6-19.) The judge denied the motion because the trial counsel was a good, capable attorney; because Wilson had shown a history of not cooperating with the court; and because Wilson had filed the motion on the eve of trial. Also, Wilson seemed more interested in retrying the earlier case than with the present case; this conduct tried the judge's patience. Given these reasons and the results obtained by defense counsel, not guilty verdicts on the multiple sex offenses and a lesser included verdict on a murder charge, appellate counsel in the exercise of professional judgment could properly conclude that the trial judge had not abused his discretion in denying the motion or, at the very least, that this would make a weak appellate argument.

{¶ 17} Finally, Wilson argues that the trial judge erred in denying the motion for a psychological examination because it would have provided mitigating evidence. Wilson asserts that such a report would have produced helpful evidence about his state of mind while being held at gunpoint and being shot at. This argument is unpersuasive because it relies on speculation. There is no evidence as to what the evaluation would have stated. 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, paragraph 10.

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

JAMES J. SWEENEY, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR