[Cite as *State v. Woodson*, 2010-Ohio-5230.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93476

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AARON WOODSON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-513779
Application for Reopening
Motion No. 435378

RELEASE DATE: October 28, 2010

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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ANN DYKE, J.:

{¶ 1} On July 1, 2010, the applicant, Aaron Woodson, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Woodson,* Cuyahoga App. No. 93476, 2010-Ohio-1671, in which this court affirmed Woodson's conviction for aggravated murder; he did not contest his conviction for carrying a concealed weapon. Woodson maintains that his appellate counsel should have argued ineffectiveness of trial counsel for not trying to sever the aggravated murder count from the concealed weapon count. Woodson also complains that his appellate counsel was deficient for not sending him the transcript of his case.

On August 2, 2010, the state of Ohio filed its brief in opposition. For the following reasons, this court denies Woodson's 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, 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 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, 751-752, 103 S.Ct. 3308, 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, 849 N.E.2d 1.

{¶ 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} In the present case, Woodson's arguments on ineffective assistance of appellate counsel are not well taken. First, App.R. 26(B)(2)(c) requires that assignments of error provide the basis of the application. Woodson's argument

that his appellate counsel did not provide him with the transcript is not an authentic assignment of error. Moreover, the client-counsel relationship between appellate counsel and the defendant-appellant generally does not establish ineffective assistance of counsel. *State v. Inglesias-Rodriquez* (March 16, 2000), Cuyahoga App. No. 76028, reopening disallowed (Oct. 12, 2000), Motion No. 17738; and *State v. Trembly* (Mar. 16, 2000), Cuyahoga App. No. 75996, reopening disallowed (Oct. 30, 2000), Motion No. 16908. Furthermore, Woodson does not establish how having the transcript would have resulted in a reversal of his convictions.

{¶ 7} Woodson's other argument is that his trial counsel was ineffective for not trying to sever the aggravated murder charge from the carrying-a-concealed weapon charge. The evidence at trial showed that during the early morning hours of July 12, 2008, there was a small gathering of people on the back porch of an apartment in the Garden Valley Estates. The victim was killed by a gunshot at close range to the side of his head. Although no one saw the shooting, three individuals testified that Woodson was next to the victim just before the shooting. One witness testified that right after the shooting, he saw Woodson walking away with a gun in his hand. Woodson's cousin testified that just before the shooting, Woodson was the only person next to the victim. The police never retrieved the bullet, but they did discover a .22 caliber casing in the

general vicinity of the apartment several days later.[1] When the police arrested Woodson several days after the shooting, he had a .25 caliber handgun in his back pocket. This was the basis for the concealed weapon charge.

{¶ 8} Woodson argues that trying the two counts together was prejudicial to him, because the evidence of the gun, which was not definitively linked to the murder, would inflame the minds of the jury that he was a bad man who would be inclined to murder people.

{¶ 9} The Supreme Court of Ohio in *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, stated the governing principles for joinder of charges. Under Crim.R. 8(A), two or more offenses may be charged together if the offenses "are of the same or similar character, * * * or are based on two or more acts or transactions connected together * * * or are part of a course of criminal conduct." Indeed, the law favors joining multiple offenses in a single trial if the requisites of Crim.R. 8(A) are fulfilled. Nevertheless, under Crim.R. 14, a trial court may grant a severance, if it appears that the defendant would be prejudiced by the joinder. The defendant bears the burden of proving prejudice and that the trial court abused its discretion in denying severance. The state may rebut the claim of prejudice by showing, inter alia, that the evidence of each crime joined at trial is simple and direct.

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[1]This court further notes that in its original opinion, it did not consider the finding of a .22 caliber casing in the vicinity of the apartment several days later to be determinative of the gun used in the murder.

{¶ 10} In the instant case, defense counsel, in the exercise of professional judgment, could reasonably conclude that the evidence of each crime was simple and direct and, thus, the trial court would not abuse its discretion by allowing joinder. The evidence for the concealed weapon charge was very simple and direct; the police found the firearm in Woodson's back pocket when they arrested him. For the murder charge, the victim was shot at close range, and three people testified that Woodson was the person next to the victim just before the shooting. One of the witnesses saw Woodson walking away with a gun.

{¶ 11} Moreover, one of the cases Woodson cites in support, *State v. Robinson* (C.A. 2, 1977), 560 F.2d 507, undermines his position. In that case, a witness testified that Robinson carried a .38 caliber revolver or a gun that looked like a .38 caliber revolver during the subject robbery. When Robinson was arrested ten weeks later, he possessed a .38 caliber revolver. The circuit court of appeals ruled that his possession of the firearm ten weeks later was admissible evidence.

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

ANN DYKE, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
COLLEEN CONWAY COONEY, J., CONCUR