[Cite as *State v. Price*, 2015-Ohio-4069.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100981

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRELL A. PRICE

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-577236-A
Application for Reopening
Motion No. 484595

RELEASE DATE: September 25, 2015

FOR APPELLANT

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Applicant Terrell A. Price has filed a timely application to reopen his direct appeal in *State v. Price*, 8th Dist. Cuyahoga No. 100981, 2015-Ohio-411. The state has not responded. In *Price*, this court affirmed his convictions but remanded for the purpose of allowing Price to seek the waiver of court costs. *Id*. at ¶ 66. The application is denied for the reasons that follow.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Price is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, 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*.

{¶4} Price contends his appellate counsel was ineffective in the following respects:

1) failure to challenge the invalidity of the affidavit for the search warrant;

2) failure to raise the alleged ineffective assistance of trial counsel for failure to obtain medical records, to challenge the lease, to challenge statements, and for failing to move for suppression of statements made in the "Incident Police Report.";

3) failure to raise an issue regarding the non-disclosure of the informant;

4) failure to raise an error concerning a witness's statement that Price was afraid to go back to prison;

5) failure to challenge the admission of evidence consisting of a picture of the leasee of the searched premises; and

6) failure to raise an issue concerning alleged misstatements made by standby counsel during trial, which applicant believes warranted a mistrial * * * .

{¶5} Price's application makes a few citations to the trial transcript, however, Price also adds much of his own commentary on what he alleges to have occurred throughout the police investigation and the trial proceedings. The application is redundant because he repeatedly maintains that several law enforcement officers and detectives lied and that the affidavit for the search warrant contained an allegedly false averment that he resided at the North Olmsted apartment. Price, however, has failed to present any cognizable argument or any relevant case law authority in support of his proposed assignments of error. Thus, he has failed to demonstrate how appellate counsel's performance was deficient and that he was prejudiced by appellate counsel's claimed deficiencies.

{¶6} In *State v. Kelly*, 8th Dist. Cuyahoga No. 74912, 2000 Ohio App. LEXIS 2907 (June 21, 2000), this court established that the mere recitation of assignments of error is not sufficient to meet the burden to prove that the applicant's appellate counsel

was deficient for failing to raise the issues he now presents, or that there was a reasonable probability that the applicant would have been successful if the presented issues had been considered in the original appeal. *See also State v. Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-4467; *State v. Hawkins*, 8th Dist. Cuyahoga No. 90704, 2009-Ohio-2246. The failure to present any cognizable argument with regard to the proposed assignments of error results in the failure to demonstrate that his appellate counsel was deficient and that he was prejudiced by the alleged deficiency. *State v. Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-5151.

{¶7} Notwithstanding the failure to articulate any legally supportable argument, a substantive review of Price's proposed assignments of error fails to establish a claim of ineffective assistance of appellate counsel.

{¶8} Appellate counsel has wide latitude and discretion in deciding which assignments of error to pursue in an appeal. *State v. Lowe*, 8th Dist. Cuyahoga No. 82997, 2005-Ohio-5986, ¶ 17. Counsel is not required to argue every conceivable assignment of error and is not required to advance arguments that are meritless. *Id.*

{¶9} Price contends that the averment in the search warrant affidavit that he resided at the North Olmsted apartment was false. He asserts his trial counsel was ineffective for not challenging the validity of the warrant on that basis and that, in turn, his appellate counsel was ineffective for not raising this argument on appeal. He argues that a motion to suppress should have been filed at the trial level based on this allegedly inaccurate information in the search warrant affidavit. His arguments that trial counsel

should have secured medical records and lease documents are interrelated to this issue, because he maintains they would prove he did not reside at the North Olmsted apartment.

{¶10} Appellate counsel presented eight assignments of error. Appellate counsel argued that there was insufficient evidence to establish that Price resided at the North Olmsted apartment. We explicitly found that there was sufficient evidence to support a finding that Price resided at the North Olmsted apartment. *Price*, 2015-Ohio-411, ¶ 35. In reaching this conclusion, we noted that Price was not the leaseholder and that the detective was aware of this information. *Id*. at ¶ 12. Nonetheless, Price had a key to the apartment, there was a utility bill that was in his name with the apartment's address, and there were clothes in the apartment that he had been seen wearing. *Id*. at ¶ 34. Even if Price's medical records and drivers license have a different address, as Price alleges, that would not compel us to reach a different conclusion. Further, Det. Guzik testified that there was nothing inside the North Olmsted apartment to indicate that any person other than Price lived there, including Carl Wiley (the leasee). *Id*. at ¶ 12. Accordingly, Price has not demonstrated how challenging the statement that he resided at the North Olmsted apartment through a motion to suppress would have led to a different conclusion.

{¶11} Price contends his appellate counsel should have challenged the nondisclosure of the informant's identity. He, however, has failed to establish any prejudice that resulted from the nondisclosure and he has not demonstrated prejudice from his inability to confront the informant. Therefore, the non-disclosure of the

informant does not establish a basis for reopening the appeal. *Accord State v. Coleman*, 8th Dist. Cuyahoga No. 9158, 2009-Ohio-5689, ¶ 9.

{¶12} The remaining arguments presented in Price's first and second assignments of error contest the credibility of the witnesses, dispute the accuracy of the police incident report, and deny that he admitted ownership of the drugs. These arguments in essence require an analysis as to whether the convictions are against the manifest weight of the evidence. Appellate counsel challenged the convictions as being against the manifest weight of the evidence and that assignment of error was overruled. Price's first and second proposed assignments of error are without merit.

{¶13} In his third proposed assignment of error, Price argues that a witness's comment that he was afraid to go back to prison improperly encouraged the jury to infer guilt from his decision not to testify. Price cites *Ben-Yisrayl v. Davis*, 431 F.3d 1043 (7th Cir. 2005), as purported support for his position. Price's argument is not supported by the record or the law he cites.

{¶14} In *Davis*, the defendant had initially confessed to murder but later recanted and exercised his right to trial as well as his right not to testify. During closing arguments the prosecutor stated to the jury "let the defendant tell you why someone would freely and voluntarily confess * * * ." Despite admonishments from the court, the prosecutor in *Davis* continued to suggest to the jury that someone would not confess to a crime if they were not guilty. The defendant maintained that these were direct and improper comments on his decision not to testify. The court concluded that the prosecutor's comments could

be construed as an invitation to the jury to draw adverse conclusions from the defendant's decision not to testify in violation of his constitutional rights. The facts addressed by the court in *Davis* have no similarity to the testimony cited by Price here.

{¶15} Although Price failed to provide any citation to the record where this testimony is located, presumably he is referring to the following excerpt from Det. Guzik's testimony:

> Q. During the search how was the defendant acting?
>
> A. Somber. You know, he -- 36 grams of cocaine is a lot of cocaine. You know. And, kind of realizing at that point in time that he's -- he's going to be going back to prison for, maybe a substantial amount of time.
>
> THE DEFENDANT: Objection.
>
> THE COURT: Sustained.
>
> Sustained.
>
> Q. He made a statement -- in fact, what was specifically his statement, if you recall?
>
> A. He said his life was over.

The trial court sustained appellant's objection to the subject testimony. Moreover Price rejected the trial court's offer to provide a limiting instruction when Price later moved for a mistrial on the basis that this testimony was an improper comment on his right to remain silent and to not testify. Price does not explain how the above testimony represents an improper comment on his decision not to testify. It would be unreasonable to construe that testimony as inviting the jury to draw an adverse conclusion on Price's decision not to testify. Appellate counsel is not required to raise meritless arguments. Price has not

established ineffective assistance of appellate counsel based on the third proposed assignment of error.

{¶16} In the fourth proposed assignment of error, Price claims he was deprived of evidence regarding "the person who lived in this apartment" which prevented him from subpoenaing and questioning the person in an "evidential hearing." Although Price fails to identify any specific person, the record demonstrates that Carl Wiley was the leasee, a fact that was known to Price. Price indicates throughout his application that Carl Wiley was his friend. Price does not explain how the alleged nondisclosure of Price's identity was a violation of the law or resulted in any prejudice to him beyond his generalized speculations. Further, although Price asserts that the court erred by admitting a picture of Carl Wiley into evidence during trial, he has not explained how this resulted in any prejudice to him or on what basis the court should have excluded it. Because Price has not presented any authority in support of his generalized claims, his fourth proposed assignment of error does not provide any basis for reopening the appeal.

{¶17} The fifth proposed assignment of error alleges that the trial court abused its discretion and deprived appellant of a fair trial when it did not declare a mistrial based on alleged comments made by standby counsel. Appellant complains that counsel informed the jury that appellant did not have the police report. He argues that this denied him his right to be his own counsel. Price does not argue or present any authority that would indicate appellate counsel's decision not to raise this as an assignment of error in the direct appeal resulted in ineffective assistance of counsel. Without any citation to the

record or law in support of his contentions, this proposed assignment of error fails to establish any grounds for reopening the appeal.

{¶18} For all of the foregoing reasons, appellant has not met the standard for reopening his appeal. The application to reopen is denied.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MARY J. BOYLE, J., CONCUR