

[Cite as *State v. Durham*, 2016-Ohio-5618.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION  
No. 102654

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**BRYAN DURHAM**

DEFENDANT-APPELLANT

---

**JUDGMENT:**  
APPLICATION DENIED

---

Cuyahoga County Court of Common Pleas  
Case No. CR-14-585105-A  
Application for Reopening  
Motion No. 496718

**RELEASE DATE:** August 29, 2016

**FOR APPELLANT**

Bryan A. Durham, pro se  
Inmate No. 663796  
Toledo Correctional Institution  
2001 E. Central Avenue  
Toledo, Ohio 43608

**ATTORNEYS FOR APPELLEE**

Timothy J. McGinty  
Cuyahoga County Prosecutor  
By: Andrew J. Santoli  
Christopher D. Schroeder  
Assistant County Prosecutors  
8th Floor Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113

ANITA LASTER MAYS, J.:

{¶1} Bryan Durham has filed an application pursuant to App.R. 26(B) to reopen his direct appeal in *State v. Durham*, 8th Dist. Cuyahoga No. 102654, 2016-Ohio-691. In *Durham*, a majority of this court held there was insufficient evidence of the prior calculation and design element to support the aggravated murder conviction but otherwise affirmed the remainder of Durham's convictions and sentence. The matter was reversed and remanded for resentencing on the remaining counts of murder, felonious assault, and specifications. *Id.* at ¶ 183. The state has opposed the application to reopen. For the reasons that follow, the application to reopen is denied.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Durham 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. 668, 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 in 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} Durham contends that his appellate counsel was ineffective for the following reasons:

State did not prove any of the charges based on the evidence presented.  
Witnesses stated that defendant was at the location with several vehicles.  
Counsel had incorrect information due to not speaking with client to be clear on facts.

Durham has not developed any of these alleged deficiencies with any factual basis, legal support, or argument. In the sole affidavit attached to the application, Durham alleges “[c]ounsel failed to investigate, interview witnesses, failed to communicate with defendant, minimal preparation, weak trial advocacy, little to no cross examination of witnesses. Did not go over all discovery.” Affidavit at ¶ 2. These averments seem to pertain to his dissatisfaction with trial counsel's representation rather than appellate counsel. Nonetheless, Durham is required to articulate how appellate counsel was deficient for failing to raise these issues related to the alleged ineffectiveness of his trial counsel in the direct appeal and to demonstrate how he was prejudiced thereby. He has done neither. Durham has not cited to any portions of the record that would support the alleged deficiencies of trial counsel. Without support in the record, appellate counsel could not have raised these arguments. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 13, citing *State v. Ishmail*, 54 Ohio St.2d 402, 377

N.E.2d 500 (1978) (“a bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial.”) The proper vehicle for alleging constitutional errors based on evidence outside the record is through a petition for postconviction relief.

{¶5} The remainder of Durham’s arguments for reopening appear in the statement of the case and facts portion of his application. There he contends that the evidence did not support his convictions due to the presence of unknown DNA at the scene and the failure to obtain DNA samples from everyone who had been present at the scene, no other witnesses at the location, the lack of gunshot residue evidence, the failure of his trial counsel to call witnesses, that no Miranda rights were read, and there was allegedly no evidence linking him to the crime. None of these grounds provide a basis for reopening the appeal and most were already considered by this court. Appellate counsel did raise issues that challenged the convictions based on the insufficiency and weight of the evidence, which this court thoroughly addressed. This court repeatedly noted that the convictions were supported by circumstantial evidence and witness testimony. Further, appellant’s aggravated murder conviction was vacated for insufficient evidence of prior calculation and design. Appellate counsel also raised issues concerning Durham’s interview statements and the seizure of evidence from the vehicle, which were addressed by this court. The remainder of the issues identified by Durham depend on the presentation of evidence that is outside the record, such as trial counsel’s alleged failure to call witnesses despite four requests to do so. As stated, this court could not have

considered evidence from outside the record in the direct appeal. *Ishmail, supra.* Durham has not referred the court to any part of the record that substantiates his claims regarding these facts or the identity of these alleged witnesses or the substance of their proposed testimony. As such, Durham has not established the requisites for reopening on this basis.

{¶6} Durham has not satisfied either prong of the *Strickland* test and, therefore, the application to reopen is denied.

ANITA LASTER MAYS, JUDGE

---

KATHLEEN ANN KEOUGH, P.J., and  
PATRICIA ANN BLACKMON, J., CONCUR