[Cite as *State v. Turner*, 2017-Ohio-7881.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104490

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRETT A. TURNER

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-597060-A
Application for Reopening
Motion No. 508709

RELEASE DATE: September 27, 2017

FOR APPELLANT

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EILEEN T. GALLAGHER, J.:

{¶1} Under App.R. 26(B), applicant Brett Turner seeks to reopen this court's judgment in *State v. Turner*, 8th Dist. Cuyahoga No. 104490, 2017-Ohio-2755, in which this court affirmed Turner's convictions for aggravated robbery, felonious assault, and having a weapon while under disability. According to Turner, his appellate counsel was ineffective in failing to raise assignments of error as to (1) the lack of scientific evidence to support the conviction, and (2) the improper imposition of separate sentences for allied offenses. The state opposes the application as having no merit. We agree and deny the application to reopen.

A. Standard of Review

{¶2} "To succeed on an App.R. 26(B) application, a petitioner must establish that counsel's performance fell below an objective standard of reasonable representation and that he was prejudiced by the deficient performance." *State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, N.E.3d 1227, ¶ 52, 54, citing *State v. Dillon*, 74 Ohio St.3d 166, 171, 657 N.E.2d 273 (1995); *see also 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. Specifically, Turner "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be "highly deferential." *Id.* at 689. The court further stated that it is all too tempting for a defendant to second-guess counsel's assistance 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." *Id.*

{¶4} Moreover, it is well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Id.* at 754. Indeed, the United States Supreme Court has upheld the appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments and "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." *Id.* at 751-752.

B. Arguments Not Meritorious

{¶5} Turner raises two proposed assignments of error in support of his application to reopen his direct appeal. Having reviewed the arguments in light of the record, we hold that Turner has failed to meet his burden to justify reopening his appeal. He cannot

satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

1. Scientific Testing to Prove Identity of Shooter

{¶6} In his first proposed assignment of error, Turner contends that his appellate counsel should have argued that the lack of scientific testing on the bullet lodged into the victim precluded a finding of guilty. Specifically, he argues that "without scientific testing of the bullet shot into the leg of [the victim] there is no way of knowing what gun fired the shot." According to Turner, the existence of 9 mm shell casings as well as .380 caliber casings at the scene cast doubt as to him being the shooter. This argument, however, has no merit.

{¶7} Testimony at trial revealed that at least two and possibly five individuals approached the victim and then later began shooting within minutes of their arrival. The state's primary theory at trial was that Turner shot the victim. Indeed, the record reflects that the neighbor and victim identified Turner as the shooter, the .380 caliber casings found at the scene originated from the gun found near the fence Turner climbed while fleeing from the police, and the gun contained Turner's DNA. Additionally, the victim's white cell phone, which was reported stolen during the robbery, was recovered from Turner's pocket at the time of his arrest. But apart from this evidence, the state also requested an aiding and abetting instruction under R.C. 2923.03, which the trial court provided.

{¶8} Ohio's complicity statute provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." R.C. 2923.03(A)(2). Under R.C. 2923.03(F), a person who is guilty of complicity in the commission of an offense "shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated * * * in terms of the principal offense."

{¶9} Accordingly, even if Turner did not fire the shot that hit the victim, the evidence established at a minimum that he acted in concert with that person, thereby subjecting him to prosecution and punishment as if he was the principal offender. Thus, in this case, the fact that Turner's fired shots did not actually hit the victim is irrelevant and would not be grounds for reversal. *See, e.g., State v. Robinson*, 8th Dist. Cuyahoga No. 99290, 2013-Ohio-4375, ¶ 44-46. Accordingly, Turner's appellate counsel was not ineffective in refraining from raising an assignment of error that has no merit.

2. Allied Offenses

{¶10} In his second proposed assignment of error, Turner argues that his appellate counsel was ineffective "in failing to raise plain error when [the] trial court imposed individual sentences for allied offenses of similar import pursuant to R.C. 2941.25(A)." According to Turner, "all offenses arose out of a single incident involving a single victim" and therefore should have merged as allied offenses. We find this argument unpersuasive.

{¶11} Turner was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1), felonious assault in violation of R.C. 2903.11(A)(2), and having a weapon while under disability in violation of R.C. 2923.13(A)(3).

{¶12} Under R.C. 2941.25(A), when the same conduct by the defendant "can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." However,

> [w]here the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25(B).

{¶13} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Ohio Supreme Court announced a new test for allied offenses that asks three questions: (1) whether the offenses are dissimilar in import or significance, i.e., each offense caused a separate and identifiable harm; (2) whether the offenses were separately committed; and, (3) whether the offenses were committed with separate animus or motivation. *Id.* at ¶ 25. If the answer to any of these questions is in the affirmative, then the offenses do not merge. *Id.*

{¶14} The trial court expressly considered whether the aggravated robbery and felonious assault offenses merged in this case and found that they did not. Here, we cannot say that the trial court erred in refusing to merge the offenses because the record

contains evidence that establishes the crimes were committed with separate animus. Indeed, the victim's testimony supported the conclusion that the felonious assault was committed as a means to send a warning. This motivation was separate from Turner's decision to take the victim's cell phone.

{¶15} With respect to the having a weapon while under disability conviction, we likewise find that appellate counsel was not ineffective in failing to raise the issue of merger. Here, the record supports the conclusion that Turner came to the scene with the firearm prior to committing the other offenses and left the scene with the firearm. This offense therefore was committed separate from the others and demonstrated a separate animus. *See State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 20; *see also State v. Conner*, 8th Dist. Cuyahoga No. 99557, 2014-Ohio-601, ¶ 126. Moreover, the record further reflects that defense counsel — while advocating for merger of the aggravated robbery and felonious assault charges — acknowledged that the "having weapons under disability charge this court heard does not automatically merge for sentencing."

{¶16} Finally, we note that — where the issue of merger was raised in the trial court and rejected based on the prosecutor's proffer of different animuses — this court will not second-guess an appellate counsel's exercise of professional judgment in choosing not to raise an allied-offenses argument. *See State v. Nitsche*, 8th Dist. Cuyahoga No. 103174, 2016-Ohio-3170, *reopening disallowed*, 2017-Ohio-529, ¶ 36; *State v. Minifee*, 8th Dist. Cuyahoga No. 99202, 2014-Ohio-694, ¶ 14.

{¶17} Accordingly, because Turner failed to demonstrate a genuine issue that he was deprived effective assistance of appellate counsel, this court denies the application.

{¶18} Accordingly, the application for reopening is denied.

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR