

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 106111
 v. :
 :
 DONNELL D. LINDSEY, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 20, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-16-602687-B
Application for Reopening
Motion No. 529126

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee*.

Donnell D. Lindsey, *pro se*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Applicant, Donnell D. Lindsey, timely seeks to reopen his appeal in *State v. Lindsey*, 8th Dist. Cuyahoga No. 106111, 2019-Ohio-782. He claims that appellate counsel was ineffective for not arguing that the trial court erred in

overruling certain of his motions for mistrial. He also claims that appellate counsel should have argued that trial counsel was ineffective because counsel did not seek a psychological evaluation or properly object to certain testimony. Finding no merit to his application for reopening, it is denied.

{¶ 2} Lindsey was tried and convicted of several charges resulting from the murder of a three-year-old, Major Howard. He received a prison sentence of 37 years to life. *Id.* at ¶ 20. In his direct appeal, Lindsey raised nine assignments of error, three of which are germane to the issues raised in his application:

Assignment of error I: The trial court erred when it denied Mr. Lindsey's and the State's motion for a psychological evaluation in violation of his rights.

Assignment of error II: The trial court erred when it denied Mr. Lindsey his Constitutional right to his retained counsel.

Assignment of error III: The trial court erred when it denied Mr. Lindsey's motions for mistrials thereby denying him his right to a fair trial.

Appellant's brief at v.

{¶ 3} This court overruled each of the nine assignments of error and affirmed Lindsey's convictions in our decision issued March 7, 2019. *Lindsey* at ¶ 112.

{¶ 4} On June 5, 2019, Lindsey filed the instant application asserting two proposed assignments of error: (1) The trial court erred when it denied appellant's motion for mistrials thereby denying him his right to a fair trial, and (2) ineffective assistance of trial counsel. The state timely opposed the application.

I. Ineffective Assistance of Appellate Counsel

{¶ 5} App.R. 26(B) provides a limited means of asserting a claim of ineffective assistance of appellate counsel that occurred during a criminal appeal. It states, “[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel.” App.R. 26(B)(1). The rule goes on to provide that “[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” A claim of ineffective assistance of appellate counsel is analyzed under the same rubric as a claim of ineffective assistance of trial counsel announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10. That is, the applicant must establish that appellate counsel was deficient for failing to raise an issue and there is a reasonable probability of success had it been raised in the appeal. Further, the applicant “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).

A. Mistrial

{¶ 6} Lindsey claims that appellate counsel was ineffective for not arguing that the trial court committed reversible error in denying motions for mistrial that were made during trial.

{¶ 7} As this court previously stated, “the granting or denying of a motion for mistrial under Crim.R. 33 rests within the sound discretion of the trial court. *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001). A trial court should only declare a mistrial when ‘the ends of justice so require and a fair trial is no longer possible.’” *Lindsey*, 8th Dist. Cuyahoga No. 106111, 2019-Ohio-782, at ¶ 41, quoting *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶ 8} Appellate counsel did, in fact, raise an assignment of error in relation to the trial court’s denial of motions for mistrial. In the direct appeal, we addressed whether the trial court erred in overruling two motions for mistrial. The first came after the state was alleged to have breached an agreement regarding the testimony of Detective Johnson, who was not included on the state’s witness list. *Id.* at ¶ 40. The second motion for mistrial came after the state’s closing arguments and alleged that comments made by the prosecution were unfairly prejudicial and denied Lindsey of a fair trial. *Id.* Those arguments were rejected and the assignment of error was overruled. *Id.* at ¶ 63.

{¶ 9} The principles of res judicata apply to applications for reopening. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Where an argument is raised by appellate counsel in a direct appeal, the same issue may not constitute grounds for reopening based on these principles. *State v. Ahmed*, 8th Dist. Cuyahoga No. 84220, 2008-Ohio-217, ¶ 6. App.R. 26(B)(2)(c) makes this clear when it specifically requires an applicant to assert “[o]ne or more assignments of error or arguments in support of assignments of error *that previously were not*

considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[.]” (Emphasis added.) Lindsey's attempt to reargue issues that were previously raised on appeal may not form the basis of a successful claim for ineffective assistance of appellate counsel.

{¶ 10} However, appellate counsel did not argue that the trial court erred in denying a motion for mistrial made in relation to events that occurred during a jury view. Therefore, this aspect of Lindsey's claim on reopening will be addressed.

{¶ 11} After the jury was taken to view the scene of the crime, a discussion was had on the record about what had transpired during this jury view. It was alleged that a resident of the street where the jury view took place leaned out her door and shouted something. Trial counsel moved for a mistrial. The court denied the motion, but conducted a thorough voir dire of each juror, one at a time and outside the presence of the others, to determine what they may have heard and whether it had any effect on them. Many of the jurors stated that they did not hear any comment. One juror heard the neighbor say something that ended in “Howard,” but nothing else. Another heard the neighbor yell something with the word “Major” in it, but could not make out the rest of what was said. A third juror thought he heard a man yell “justice for Major.” (Tr. 1131.) Another juror heard a neighbor yell something about a child, but the juror did not understand what was said. Finally, a juror heard a woman come out of her house and say, “Justice for little Major.”

(Tr. 1146.) Jurors also talked about a different incident where a woman standing in a driveway commented on the racial makeup of the jury as the jury passed by.

{¶ 12} The trial court conducted a thorough voir dire of the jury to determine what occurred and to gauge the impact of the comments on the jury. Each juror that heard any of the comments indicated that those comments would have no impact on their handling of the case.

{¶ 13} The trial court took appropriate actions to ensure the fairness and impartiality of the jury. Lindsey has not demonstrated that the comments made by third parties during the jury view created an atmosphere where a fair trial was no longer possible. *See State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 173, citing *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). Therefore, Lindsey has not demonstrated a colorable claim of ineffective assistance of appellate counsel regarding this proposed assignment of error.

B. Ineffective Assistance of Trial Counsel

{¶ 14} Lindsey also argues appellate counsel was ineffective because no assignment of error was raised arguing that trial counsel was ineffective in a number of ways.

{¶ 15} As stated above, the applicable standard for ineffective assistance of counsel is the two-pronged analysis set forth in *Strickland*. A successful claim must show that trial counsel's performance fell below an objective standard of reasonableness, and this deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice may be

established by a showing that but for trial counsel's errors, there is a reasonable probability that the result of trial would have been different. *Id.* at 694.

{¶ 16} First, Lindsey argues that during the lower court proceedings, he indicated that his relationship with his attorneys had broken down. He explained one of the reasons was that trial counsel did not request a psychological evaluation. He went on to orally request such an evaluation, and his trial attorneys indicated that they did not believe it was necessary.

{¶ 17} However, this court has already determined that the trial court did not err in overruling Lindsey's oral motion for a psychological evaluation. In his first assignment of error in the direct appeal, appellate counsel asserted that the trial court erred in overruling Lindsey's oral motion for a psychological evaluation. *Lindsey*, 8th Dist. Cuyahoga No. 106111, 2019-Ohio-782, at ¶ 25. This court rejected the argument. *Id.* at ¶ 30. Therefore, the issue has already been addressed.

{¶ 18} Next, Lindsey claims that trial counsel failed to properly object to the testimony of Detective Johnson or properly notify the trial court of an agreement with the state about the scope of this testimony. This issue was raised by appellate counsel in the direct appeal in the context of the denial of the motion for mistrial that was filed. *Id.* at ¶ 43-50. Again, this court rejected the argument. *Id.* at ¶ 51. This issue has already been addressed.

{¶ 19} "App.R. 26(B)(2)(c) and (d) should make it obvious that the rule is also not an invitation to raise old issues previously adjudicated." *State v. Lechner*, 72 Ohio St.3d 374, 375, 650 N.E.2d 449 (1995). These issues were previously

analyzed by this court and the arguments rejected. There is no reasonable probability of a different outcome had appellate counsel raised them in the context of ineffective assistance of trial counsel rather than the context argued in the direct appeal.

{¶ 20} Lindsey also claims trial counsel was ineffective for not filing a motion for change of venue.

Changes in venue help to protect fair trial rights. A trial court can change venue “when it appears that a fair and impartial trial cannot be held” in that court. Crim.R. 18; R.C. 2901.12(K). However, “[a] change of venue rests largely in the discretion of the trial court, and * * * appellate courts should not disturb the trial court’s [venue] ruling * * * unless it is clearly shown that the trial court has abused its discretion.” *State v. Maurer* (1984), 15 Ohio St.3d 239, 250, 473 N.E.2d 768, 780, quoting *State v. Fairbanks* (1972), 32 Ohio St.2d 34, 37, 289 N.E.2d 352, 355.

State v. Lundgren, 73 Ohio St.3d 474, 479, 653 N.E.2d 304 (1995).

{¶ 21} The issue of a change of venue was tangentially addressed in the direct appeal in Lindsey’s second assignment of error regarding the denial of his right to retained counsel. *Lindsey*, 8th Dist. Cuyahoga No. 106111, 2019-Ohio-782, at ¶ 36. The allegation was that counsel failed to move for a change in venue prior to trial because of the significant media attention that the case garnered. The instant allegation asserts that trial counsel was ineffective for failing to move for a change of venue after an allegation that the testimony of a witness was recorded and streamed live over the internet.

{¶ 22} During trial, it came to the court’s attention that someone present in the courtroom, possibly a member of the news media, had live-streamed the

testimony of a witness. The trial court prohibited future use of mobile phones in the courtroom, but recognized that it was an open courtroom. (Tr. 133-134.) Indeed, “[t]he right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution and by Section 10, Article I of the Ohio Constitution.” *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 81. There is no indication from the record that a motion for a change of venue made at this juncture would have been granted or that a fair trial was not possible given the prophylactic actions the trial court took. Lindsey has not established a colorable claim of ineffective assistance of counsel regarding this aspect of the proposed assignment of error.

{¶ 23} Lindsey has not demonstrated a colorable claim of ineffective assistance of appellate counsel. Accordingly, his application to reopen his appeal is denied.

{¶ 24} Application denied.

KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR