

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 106462
 v. :
 :
 RAVONTE CARTER, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

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

Cuyahoga County Court of Common Pleas
Case No. CR-17-613373-A
Application for Reopening
Motion No. 523722

Appearances:

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

Ravonte Carter, *pro se*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} On December 11, 2018, the applicant, Ravonte Carter, pursuant to App.R. 26(B) and *State v. Murnahan*, 62 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Carter*, 8th Dist. Cuyahoga No.

106462, 2018-Ohio-3671, in which this court affirmed his conviction for murder. Carter claims that his appellate counsel should have argued that trial counsel was ineffective for inadequate cross-examination and for failing to move to strike a witness's testimony. The state filed its brief in opposition on December 27, 2018. For the following reasons, this court denies the application.

{¶ 2} On the night of December 22, 2016, Carter confronted Donovan Alexander outside of a bar. While various individuals tried to separate the two men, Carter shot Donovan, who ran into the bar. Carter fled the scene. Several eyewitnesses, including Donovan's brother, Dominic Alexander; the bar owner; and an Alexander family friend testified that Carter shot Donovan. When Donovan ran into the bar, he made a dying declaration that Carter had shot him. The grand jury indicted Carter for aggravated murder, murder, and two counts of felonious assault, all with one- and three-year firearm specifications.

{¶ 3} During the trial an investigating police officer testified that he had seen a firearm in Dominic's car. He secured Dominic's written consent to search the car and obtained the gun. The officer also testified that Dominic had told him that the firearm was his. Dominic testified that the gun belonged to Donovan and that he had not fired the gun that night, even though he tested positive for gun residue that night. Ballistics testing showed that shell casings found by the bar that night were not fired from the gun in Dominic's car and that the morgue pellet retrieved from Donovan's body was not fired from the gun in Dominic's car.

{¶ 4} A jury found Carter guilty of murder and the two counts of felonious assault. The judge merged the three offenses; the state elected to sentence on the murder charge, and the judge sentenced Carter to 18 years to life.

{¶ 5} Carter's appellate counsel argued that (1) the trial court erred in admitting the testimony of Donovan's dying declaration; (2) the trial court erred in admitting evidence of "other acts" by Carter; (3) the trial court erred by failing to give a limiting instruction that the "other acts" evidence could not be considered as evidence of Carter's character; (4) the trial court violated Carter's constitutional rights when it found him guilty of felony murder with the felonious assault of the murder victim as the predicate offense; (5) the trial court erred by failing to give jury instructions on the lesser-included offenses of aggravated assault and involuntary manslaughter; (6) trial counsel was ineffective for failing to request the lesser-included jury instructions, for failing to object to the dying declaration, and for failing to request the limiting instruction; and (7) the verdict was against the manifest weight of the evidence.

{¶ 6} Carter now claims that his appellate counsel should have argued that his trial counsel was ineffective for failing to cross-examine Dominic and the police officers effectively. Carter continues that effective cross-examination would have revealed such inconsistencies that Dominic would have been so impeached that defense counsel could have had his testimony stricken from the record.

{¶ 7} 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*, 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); and *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

{¶ 8} 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* at 689.

{¶ 9} 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*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). 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.

{¶ 10} 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 reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel’s performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 11} Basing an ineffective assistance of trial counsel argument on cross-examination is generally ill-founded. In *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 45, the Supreme Court of Ohio stated: “The scope of cross-examination clearly falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel.” The court repeated this admonition in *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 101, and further cautioned in the words of *Strickland*, that “to fairly assess counsel’s performance, ‘a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *State v.*

Otte, 74 Ohio St.3d 555, 660 N.E.2d 711 (1996) — the decision not to cross-examine a witness is firmly within the trial counsel’s judgment.

{¶ 12} The court has re-examined Dominic’s and the police officer’s direct and cross-examinations, as well as defense counsel’s closing argument, and concludes that appellate counsel in the exercise of professional judgment properly declined to raise Carter’s proposed assignment of error. Defense counsel asked about the firearm in the car, whether Dominic shot the gun, and how gun residue got on his hands. Defense counsel then presented these irregularities to the jury in an effort to create a reasonable doubt. Any inconsistency between Dominic’s denial that he owned the gun and the officer’s testimony that Dominic said the gun was his was for the jury to weigh. What else, if anything, could have been obtained through cross-examination is just pure speculation, which is not a foundation for an appellate argument.

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

KATHLEEN ANN KEOUGH, JUDGE

EILEEN T. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR