[Cite as *State v. Hale*, 2020-Ohio-1598.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107646
v.	:	
ISIAH B. HALE,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: April 21, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-16-607517-A
Application for Reopening
Motion No. 533599

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, *for appellee.*

Patituce & Associates and Kimberly Kendall Corral, *for appellant.*

EILEEN A. GALLAGHER, J.:

{¶ 1} On November 13, 2019, the applicant, Isiah Hale, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Hale*, 8th Dist. Cuyahoga

No. 107646, 2019-Ohio-3276, in which this court affirmed his convictions and sentences for murder, involuntary manslaughter, aggravated robbery, having a weapon while under disability and perjury, but remanded the case to the trial court to issue a nunc pro tunc order reflecting the consecutive sentence findings made at the sentencing hearing. Hale now asserts that his appellate counsel should have argued (1) that the trial court erred in allowing Hale's prior counsel to testify outside the scope necessary to respond to Hale's accusations and (2) that Hale's trial counsel was ineffective for not trying to sever the perjury count. The state of Ohio filed its brief in opposition on January 15, 2020. For the following reasons, this court denies the application.

Factual and Procedural Background

{¶ 2} On September 11, 2009, Hale entered a car driven by Montrell Stonewall; Louis Santiago, Stonewall's half-brother, was in the front passenger seat. It is undisputed that the car pulled away and then went stop-and-go for a short distance. When the car stopped, Hale emerged from the car and shot and mortally wounded Stonewall.

{¶ 3} In 2009 in *State v. Hale*, Cuyahoga C.P. No. CR-09-529253-A, ("Case I") the grand jury indicted Hale for murder, kidnapping, aggravated robbery and having a weapon while under disability. The grand jury in the same case also indicted Jermael Burton for conspiracy to murder, kidnapping, robbery and having a weapon while under disability. Hale has maintained that he acted in self-defense. Nevertheless, he and his attorneys arranged a plea agreement in which Hale pled

guilty to involuntary manslaughter and the other charges were nolled. In May 2010, after accepting the guilty plea, the trial judge sentenced Hale to eight years.

{¶ 4} As part of this process, Hale with counsel present submitted to a video-recorded interview with East Cleveland police to determine Burton's involvement. Hale stated that Burton called and told him that Burton needed Hale's help in mediating a drug transaction, which was going badly. When Hale arrived at Burton's location, Burton explained two men (Stonewall and Santiago) were "trying to negotiate a better price." Burton asked Hale to help resolve the issue. Hale continued that after he entered the car, Stonewall "pulled off" and told Hale "I got you, m***** f*****." Hale asked Stonewall repeatedly to stop the car; he thought they were trying to rob him. Hale then said he pulled out his own gun and demanded that they stop the car. Stonewall stopped the car "a little bit, then goes, stops and goes" until finally he stopped the car. Hale said that as he was getting out of the car, he saw Stonewall point a gun at him. At that, Hale fired his gun and ran away. He said that at that time he did not know that he had shot Stonewall. No gun was ever found.

{¶ 5} At Burton's trial in 2011, the state disclosed that a gunshot residue test of Stonewall's hands revealed gunshot primer residue on his right hand.[1] Although Hale's attorneys had asked for those test results, the state had not disclosed them. Accordingly, Hale moved to withdraw his guilty plea in Case I based

[1] Burton was acquitted of the charges against him relating to Stonewall's death.

on the state's failure to disclose this potentially exculpatory evidence. Hale also hired the attorney who had represented Burton.

{¶ 6} At the May 2011 hearing on Hale's motion to withdraw the guilty plea, Hale's sworn testimony differed from his account to East Cleveland police. He said that he responded to Burton's call, but did not talk to Burton once he got there. Rather, he talked to a third person who directed him to Stonewall's car to talk about some marijuana. When he entered Stonewall's car, Stonewall pulled off, and Santiago pulled a gun on Hale. As Hale wrestled the gun from Santiago, Stonewall stopped and started the car. Hale continued that when the car stopped and as Hale exited the car with Santiago's gun, Stonewall fired a gun at him, and Hale fired in self-defense. Hale then ran off through a wooded area and dropped the gun. Hale further testified that although his attorneys, whom his brother had hired, were initially optimistic about winning an acquittal on Hale's version of the events, when the money was running out, they advised him to take the plea. Hale further testified that they advised him to lie and change his version to make the story more believable for a plea bargain.

{¶ 7} In August 2013, the trial court granted Hale's motion to withdraw the guilty plea. After the state appealed that decision in *State v. Hale*, 8th Dist. Cuyahoga No. 100447, 2014-Ohio-3322, the state nolled the charges in Case I. On July 28, 2016, the grand jury indicted Hale for two counts of murder, aggravated robbery, kidnapping, all with one- and three-year firearm specifications, having a weapon while under disability and perjury for the alleged "false testimony" at the

hearing on his motion to withdraw his guilty plea. *State v. Hale*, Cuyahoga C.P. No. CR-16-607517-A ("Case II"). Hale's attorney never moved to sever the perjury count.

{¶ 8} During the trial in the summer of 2018, one of Hale's former attorneys testified that they did not tell Hale to lie or change his story to make the plea bargain more acceptable. (Tr. 551 – 552, 564-565.) On cross-examination, defense counsel elicited: "Well, it had always been our position that this was self-defense." (Tr. 555.) Cross-examination further elicited that taking the plea was not so much a repudiation of the self-defense position, but was rather the necessary response to the difficulty of proving self-defense without a gun, without gun residue and without other corroborating evidence. On redirect, the prosecutor asked Hale's former attorney about access to the medical examiner's office, whether he has contacted that office without prosecutors there and whether the failure to disclose the gun residue evidence was intentional. Hale's former attorney answered that he could and often did directly contact the medical examiner's office, that he takes the prosecutor's word on whether results exist and that he thought the nondisclosure was a clerical mistake. The prosecutor also asked him about the elements of self-defense and confirmed that the former lawyers did not tell Hale to lie.[2] To further

[2] Before the court allowed Hale's former attorney to testify, the court reviewed the issue of client-counsel privilege with the attorneys. After that review, the prosecutor, Hale's then current defense attorney, Hale's former attorney and the judge all agreed that Hale had waived the client-counsel privilege by putting privileged communications directly at issue in his plea withdrawal by claiming that the attorneys had him fabricate a story. (Tr. 538.)

prove the elements of perjury, the state, inter alia, presented the transcripts of the hearing on the motion to withdraw guilty plea and the recording he made for the police.

{¶ 9} Santiago testified that when Hale entered the car in the backseat, Hale pulled out his gun and told them to "give it up." At that point, Stonewall sped off. As Stonewall tussled with Hale for the gun, he drove stop-and-go. When Stonewall finally stopped the car, Hale got out of the car, shot Stonewall and ran off. Santiago further testified that neither he nor Stonewall had a gun. Indeed, no gun was ever found.

{¶ 10} Hale testified that when he entered the car, Stonewall sped off and Santiago pulled a gun on him. He was able to wrestle the gun from Santiago and Stonewall stopped the car. When Hale got out of the car, Stonewall fired at him. Hale then fired back at Stonewall and ran away.

{¶ 11} A jury found Hale guilty of one count of murder, involuntary manslaughter, a lesser included offense of the other count of murder, aggravated robbery, having a weapon while under disability and perjury. It found him not guilty of kidnapping. The judge sentenced him to an aggregate term of 21 years to life.

{¶ 12} Hale's appellate counsel argued the following: (1) There was insufficient evidence to support the verdict, (2) The verdict was against the manifest weight of the evidence, (3) Hale's rights against double jeopardy were violated when he was tried a second time for the same charges after the prosecutor failed to disclose exculpatory evidence, (4) The trial court erred by allowing Hale's former attorney to

testify against him in violation of the attorney-client privilege, (5) Hale's trial counsel was ineffective and (6) The trial court erred in imposing consecutive sentences without making the required findings.

Discussion of Law

{¶ 13} Now Hale argues that his appellate counsel was ineffective for not arguing (1) that the trial court erred in allowing Hale's former attorney to testify beyond the scope reasonably necessary to respond to Hale's obligations and (2) that trial counsel was ineffective for not moving to sever the perjury count.

{¶ 14} 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.

{¶ 15} 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.

{¶ 16} 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.

{¶ 17} 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.

{¶ 18} Hale's first proposed assignment of error is "Appellate Counsel was ineffective for failing to raise that the trial court erred in permitting appellant's prior counsel to offer testimony outside the scope reasonably necessary to respond to appellant's obligations." This argument is difficult to discern. Hale concedes that he waived the client-counsel privilege by testifying that his lawyers told him to lie. However, he proposes that the waiver is limited to the extent the lawyer reasonably believes necessary to respond to the client's allegations. Hale then submits that his former lawyer testified way beyond that limitation on such matters as whether he could independently contact the medical examiner's office, whether he could do so without the prosecutor, what the elements of self-defense are, whether other witnesses were believable and some hypotheticals, such as is it odd to try to rob someone in the backseat of a car. The former attorney also disagreed with the prosecutor's characterization of the gun residue testimony, that it could not have been as simple as the prosecutor was saying. The attorney also opined that the "concealment" "was a screw-up by one of the clerks in their office." (Tr. 567.)

{¶ 19} Hale also argues that the former attorney could not and should not have testified about Hale's accusations, because he did not know the exact accusations against him. He had not read the transcript of the hearing on the motion to withdraw the guilty plea. Therefore, he could not know the proper limits of his testimony.

{¶ 20} Many of these statements, such as working with the medical examiner's office, do not reveal Hale's secrets or confidences. Thus, they could not be beyond the waiver. Furthermore, defense counsel never objected to any of these statements, and thus, appellate counsel would not have a firm foundation upon which to base an argument. The court has examined the former attorney's testimony and finds that the attorney did not testify to Hale's secrets and confidences beyond Hale's waiver of the privilege. It is difficult to conceive how an attorney's personal opinions of a third party's actions disclose the secrets and confidences of a client. Following the admonition of the United States Supreme Court, this court will not second-guess appellate counsel's decision not to argue a nebulous distinction of the attorney-client privilege.

{¶ 21} Hale's other argument is that trial counsel was ineffective for not trying to sever the perjury count from the counts concerning the September 11, 2009 homicide. Generally, the law and public policy favor the joinder of charges that involved the same acts, transactions, or course of criminal conduct. Joinder conserves time and expense, diminishes the inconvenience to witnesses and minimizes incongruous results of successive trials. Crim.R. 8; *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981). However, Crim.R. 14 provides for severance upon a showing of prejudice by the defendant. The state can counter such a showing by establishing that the evidence for each crime is simple and direct or that the evidence could be introduced as other acts evidence under Evid.R. 404(B). The issue is reviewed on an abuse of discretion standard. *State v. Harris-Powers*,

8th Dist. Cuyahoga No. 87921, 2007-Ohio-389; and *State v. Ford*, 8th Dist. Cuyahoga No. 106394, 2018-Ohio-5169.

{¶ 22} Hale argues that in order to prove perjury, that state had to present Hale giving multiple and conflicting accounts of the incident as well as Hale's former attorney testifying that he never told Hale to lie. Such evidence is not simple and direct. Rather, the evidence of the different crimes committed years apart overlap and conflate with the main charges involving the September 11, 2009 incident. Hale argues that a jury could easily and improperly consider the various accounts Hale gave of the incident as incriminating Hale in the homicide of Stonewall. The inconsistencies in Hale's accounts show he is not trustworthy and is a murderer. Because of the danger that posed, trial counsel was ineffective for not trying to sever the perjury count.

{¶ 23} The court notes that Hale's trial counsel used his cross-examination of the former counsel to show that Hale always insisted he acted in self-defense and that the guilty plea was a result of lack of evidence and the corresponding difficulty of proving self-defense, not a denial of self-defense. Therefore, to establish ineffective assistance of trial counsel, appellate counsel would have to overcome the deference given to trial counsel's strategic decisions.

{¶ 24} Moreover, the federal courts have ruled that there is nothing inherently prejudicial in the joinder of perjury charges when the false declarations concern the substantive offenses. *United States v. Potamitis*, 739 F.2d 784 (2d Cir.1984) and *Garcia v. United States*, 15 F.Supp. 367 (S.D. N.Y. 1998). Again,

following the admonition of the Supreme Court, this court will not second-guess the professional judgment of the appellate attorney in rejecting this argument.

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

EILEEN A. GALLAGHER, JUDGE

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