[Cite as *State v. Herron*, 2020-Ohio-4462.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 108775

v. :

CLIFTON HERRON, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: September 14, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-19-637091-A
Application for Reopening
Motion No. 539130

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brandon A. Piteo, Assistant Prosecuting Attorney, *for appellee.*

Clifton Herron, *pro se.*

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} On June 8, 2020, the applicant, Clifton Herron, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 6, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Herron*, 8th Dist. Cuyahoga No. 108775,

2020-Ohio-1620, in which this court affirmed his sentence for felonious assault. Herron now claims that his appellate counsel should have argued (1) that his trial counsel was ineffective for not securing his girlfriend's medical records, for not moving to reduce the charges, for not consulting with him enough, and for disparaging him and (2) that the trial court erred in ignoring his motion for a new attorney. The state filed its brief in opposition on July 21, 2020. For the following reasons, this court denies the application.

{¶ 2} As gleaned from the transcript, on February 6, 2019, Herron was living with his girlfriend. He had a long problem with drugs and alcohol. He had prematurely terminated his course of rehabilitation to return to his girlfriend's home, in the hope of helping her with the same problem. On that night, Herron was intoxicated. When he asked his girlfriend for money to buy more drugs and alcohol, she refused. Herron then grabbed a knife and threatened to kill her. The girlfriend attempted to take the knife away from him. In the ensuing struggle, Herron stabbed her in the abdomen, and cut her hands in several places, which required stitches, as well as her shoulder and neck. Eventually, the girlfriend took the knife from him, threw it behind a door, and left to contact the police and get medical attention. When the police arrested him the next morning, he seemed genuinely confused about what had happened and where his girlfriend was.

{¶ 3} The grand jury indicted him as follows: Count 1 for felonious assault under R.C. 2903.11(A)(2), causing physical harm by means of a deadly weapon, a knife; Count 2 for felonious assault under R.C. 2903.11(A)(1), causing serious

physical harm; and Count 3 for domestic violence. Herron insisted throughout the proceedings that he never wanted to hurt his girlfriend, that he remembered nothing of that night, and whatever he did, it was all caused by alcohol and drugs. He twice rejected a plea offer to plead guilty to Count 1 in exchange for nolling the other counts. He insisted that he could not plead guilty to something he could not remember.

{¶ 4} When a bench trial began and his girlfriend started her testimony, Herron pled no contest to all three charges to spare her from testifying and going through it all. For sentencing purposes, the girlfriend stated that they had a violent relationship and that he had previously injured her several times. At sentencing, the judge noted a forty-year record of legal problems, with one drug offense after another and multiple intoxication offenses. She also noted accusations of assault, weapons offenses, and domestic battery. The judge further opined that the current incident was extremely violent. Both Herron and his trial attorney said that Herron was remorseful for the incident. Herron pleaded at length that whatever happened that night was not Clifton Herron acting out of his own free will, but drugs and alcohol for which treatment, not prison, was the remedy. The judge merged all three offenses and sentenced him to six years on Count 1.

{¶ 5} Herron's appellate counsel argued that the record did not clearly and convincingly support the sentence. Appellate counsel argued that the girlfriend was not hospitalized, that the injuries were not life threatening, and that most of the previous convictions were misdemeanors. These factors, along with Herron's lack

of intent and need for treatment, meant that a six-year sentence was not the best means to protect the public. It was not the means to impose the minimum sanction so as not to impose an unnecessary burden on the state.

{¶ 6} Herron now complains that his appellate counsel was ineffective and should have argued that the trial court erred in not ruling on his motion to remove counsel and that his trial counsel was ineffective. An application for reopening must be granted "if there is a genuine issue as to whether a defendant has received ineffective assistance of appellate counsel on appeal." App.R. 26(B)(5). The Supreme Court of Ohio has held that the two-pronged analysis in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard when assessing whether an applicant has raised a "genuine issue" to reopen an appeal per App.R. 26(B). *State v. Myers*, 102 Ohio St.3d 318, 2004-Ohio-3075, 810 N.E.2d 436.

{¶ 7} Pursuant to *Strickland*, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *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} Moreover, appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898). Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. "Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. "Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel." *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶10.

{¶ 12} As shown by the transcript, Herron sent a letter directly to the judge in the form of a motion to dismiss his appointed trial counsel. The judge raised this "motion" sua sponte, but was informed by Herron's counsel that he withdrew the motion. Herron did not object and later affirmed that he was satisfied with his counsel. (Tr. 22-24, and 31.) Thus, appellate counsel properly rejected this argument as baseless.

{¶ 13} Herron also argues that his trial counsel was ineffective in multiple ways. First, he did not obtain the girlfriend's prior medical record to establish that she was hospitalized longer because of preexisting conditions, rather than the injuries of February 6, 2019. This argument is problematic because the transcript does not mention how long the girlfriend was at the hospital. Indeed, appellate counsel indicated that the girlfriend was not hospitalized at that time in an effort to show that Herron's actions were not so serious as to warrant a six-year sentence. Moreover, this argument relies on information outside the record that the girlfriend has preexisting conditions. Appellate counsel in the exercise of professional judgment properly declined an argument without record support. Moreover, even if preexisting conditions existed, such evidence does not undermine this court's confidence in the trial judge's sentence.

{¶ 14} Similarly, Herron complains that his trial counsel was ineffective for failing to move to reduce the charges. Herron insinuates that he was arrested initially on domestic violence and then the charges were unfairly increased to second-degree felonies. However, Herron does not and cannot establish prejudice. He offers no persuasive argument that the trial judge would have granted such motions if they had been presented.

{¶ 15} Finally, he complains that his trial counsel was ineffective for not consulting with him more and for making disparaging remarks about him. Again, there is little, if any, support in the record for these arguments. Without such support, appellate counsel properly rejected it.

{¶ 16} Moreover, to establish ineffective assistance of trial counsel, Herron must show that his attorney's actions were not sound trial strategy. Herron's own statements throughout the proceedings show the strategy: Drugs and alcohol, not Clifford Herron, were the culprits in this incident, and that treatment, not prison, is the appropriate remedy. The record shows that trial counsel did not deviate from that strategy.

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

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN T. GALLAGHER, A.J., and
MICHELLE J. SHEEHAN, J., CONCUR