

[Cite as *State v. Coleman*, 2022-Ohio-3225.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 110096
 v. :
 :
 LERON COLEMAN, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: September 14, 2022

Cuyahoga County Court of Common Pleas
Case No. CR-19-640385-A
Application for Reopening
Motion No. 555484

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Callista Plemel, Assistant Prosecuting Attorney, *for appellee*.

Leron Coleman, *pro se*.

EILEEN T. GALLAGHER, J.:

{¶ 1} On June 3, 2022, the applicant, Leron Coleman, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Coleman*, 8th Dist. Cuyahoga No. 110096, 2022-Ohio-809, in which this court affirmed his sentences

for attempted murder with a three-year firearm specification, felonious assault with a one-year firearm specification, and having a weapon while under disability. Coleman now argues that his appellate counsel should have raised the following assignments of error: (1) trial counsel was ineffective for failing to present a crime-of-passion defense; (2) trial counsel failed to seek the dismissal of Count 4 for abuse of the grand jury and prosecutorial misconduct; (3) the state breached its plea bargain to recommend a five-year prison sentence; (4) trial counsel failed to properly advise him that he could not plead guilty to felonious assault and domestic violence and to attempted murder and felonious assault until the state resolved the allied offense issues; (5) trial counsel failed to argue that attempted murder and felonious assault are allied offenses; and (6) the trial court failed to merge the one- and three-year firearm specifications, but instead ordered them to be served consecutively. The state filed its brief in opposition on July 5, 2022. For the following reasons, this court denies the application.

{¶ 2} In the early morning of May 18, 2019, Coleman was arguing with his wife in a driveway on Stockbridge Ave. in Cleveland. The wife had called her boyfriend to come to that location. When the boyfriend arrived, Coleman and the boyfriend started arguing, and Coleman alleged that the argument became physical. At that point, Coleman retrieved his wife's gun from the wife's car. He chased the boyfriend and emptied the magazine by firing seven bullets at the boyfriend. Three of those hit the boyfriend, and one of those hit his spine causing him to be paralyzed

from the waist down. The wife also said that Coleman hit her in the head with the gun. Coleman then threw the gun back into the wife's car and fled.

{¶ 3} The grand jury indicted Coleman on the following charges: attempted murder of the boyfriend with one- and three-year firearm specifications, two counts of felonious assault on the boyfriend with one- and three-year firearm specifications, felonious assault on the wife with one- and three-year firearm specifications, domestic violence on the wife with one- and three-year firearm specifications, and one count of having a weapon while under disability.

{¶ 4} On October 21, 2019, Coleman pleaded guilty to Count 1, attempted murder of the boyfriend with a three-year firearm specification; Count 4, felonious assault on the wife with a one-year firearm specification, and Count 6, having a weapon while under disability. The state nolleed the one-year firearm specification on Count 1, the three-year specification on Count 4, and Counts 2, 3, and 5. In late November 2019, the trial court sentenced Coleman to a total of eight to ten years in prison: for Count 1, three years for the firearm specification consecutive to four to six years for the attempted murder of the boyfriend; for Count 4, one year for the firearm specification consecutive to four years for felonious assault on the wife, and on Count 6, 36 months for having a weapon while under disability. The two firearm specifications were consecutive to each other and to the base terms on the other sentences. The base terms were all concurrent to each other. In *State v. Coleman*, 8th Dist. Cuyahoga No. 109597, 2020-Ohio-4071, this court vacated the convictions

and remanded the case because the trial court had not fulfilled the requirements of Crim.R. 11.

{¶ 5} On October 21, 2020, Coleman accepted the same plea agreement, and the trial judge imposed the same sentence. During the hearing, Coleman specifically wanted to make sure that he would be eligible for judicial release at the same time as the first sentence. In the instant case, Coleman’s appellate attorney argued that the indefinite sentence was unconstitutional. Coleman now argues that his appellate counsel was ineffective.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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. Furthermore, appellate counsel is not required to argue assignments of error that are meritless. *State v. Leigh*, 8th Dist. Cuyahoga No. 99181, 2014-Ohio-298.

{¶ 9} 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.

{¶ 10} 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." "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.

{¶ 11} Coleman pled guilty to multiple, serious charges. A guilty plea is a complete admission of guilt. *State v. Stumpf*, 32 Ohio St.3d 95, 512 N.E.2d 598 (1987), and *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51. Moreover, "An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction, of which the subject-matter jurisdiction of the court is the familiar example." *Montpelier v. Greeno*, 25 Ohio St.3d 170, 171, 495 N.E.2d 581 (1986), quoting *United States v. Doyle*, 348 F.2d 715, 718-719, (2d Cir.1965). A guilty plea waives all appealable errors that may have occurred at trial unless those errors prevented the defendant from voluntarily entering the plea. *State ex rel. Nash v. Fuerst*, 8th Dist. Cuyahoga No. 87966, 2006-Ohio-5261.

{¶ 12} Specifically, a guilty plea generally waives a claim of ineffective assistance of counsel. *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504; *State v. Brown*, 8th Dist. Cuyahoga No. 104095, 2017-Ohio-184; *State v. Black*, 8th Dist. Cuyahoga No. 102586, 2017-Ohio-953.

{¶ 13} Coleman's first argument is that his appellate counsel was ineffective for not arguing that his trial counsel failed to present a crime-of-passion defense. He argues that because he had just found out that his wife had betrayed him by having an affair and that he was arguing with that man, his trial lawyer should have prepared and argued sufficient provocation to mitigate the conviction and sentence. The guilty plea waived this argument, because it generally waives ineffective assistance of trial counsel and matters that may have occurred during trial. Furthermore, the record offers little on what trial defense counsel's strategy and tactics would have been at trial.

{¶ 14} Coleman's second argument is that trial counsel failed to move for dismissal of Count 4, felonious assault on the wife, for abuse of the grand jury and prosecutorial misconduct. Coleman attached to his application several police reports about the incident and argues that because there are inconsistencies between what the wife said the day of the incident and among the police reports, the prosecutor relied on perjured evidence to procure the indictment for Count 4. In *State v. Dudas*, 11th Dist. Lake Nos. 2008-L-109 and 2008-L-110, 2009-Ohio-1001, the appellant made the same argument that the indictment should have been quashed due to prosecutorial misconduct because the prosecutor was aware that the

state's witnesses had committed perjury. The court of appeals rejected the argument reasoning that because the appellant had pled guilty, he waived his right to trial and thus, waived the right to challenge the indictment on the ground of prosecutorial misconduct.

{¶ 15} Coleman also framed this argument as a sufficiency of the evidence argument. However, pleading guilty waives the right to argue sufficiency of the evidence. *State v. Rice*, 8th Dist. Cuyahoga No. 106953, 2018-Ohio-5356. Accordingly, appellate counsel in the exercise of professional judgment properly rejected these arguments.

{¶ 16} Coleman next claims that appellate counsel should have argued that the state breached its plea agreement to recommend a five-year prison sentence. Coleman attached an October 2, 2019 journal entry that stated that the prosecutor recited a plea offer, but Coleman rejected offer. However, the entry does not state what the offer was, and the record otherwise does not mention an agreed five-year sentence. Instead, at the November 20, 2019 sentencing hearing, the prosecutor asked for the maximum sentence of 11 years for the attempted murder, consecutive the maximum sentences for the other counts. Appellate counsel, in the exercise of professional judgment, declined to argue an issue with so little record support.

{¶ 17} Coleman's next two proposed assignments of error concern allied offenses of similar import. He claims that the offenses of attempted murder, felonious assault, and domestic violence were all allied offenses that should have merged. However, these arguments are ill-founded. The crimes to which he pled

guilty involved different victims, and thus, different harms. The attempted murder of the boyfriend and felonious assault against the wife are not allied offenses. In *State v. Moore*, 9th Dist. Summit No. 28914, 2019-Ohio-1330, ¶9, the court of appeals ruled that “[m]ultiple offenses are of dissimilar import ‘when the defendant’s conduct constitutes offenses involving separate victims * * *.’” *State v. Johnson*, 8th Dist. Cuyahoga No. 106450, 2019-Ohio-3270.

{¶ 18} Finally, Coleman argues that the three-year firearm specification on the attempted murder count should have been merged with the one-year firearm specification on the felonious assault charge. However, R.C. 2929.14(B)(1)(g) provides that if an offender is convicted of or pleads guilty to two or more felonies, if one of those felonies, inter alia, is attempted murder and the felonies carry firearm specifications, then the sentencing court shall impose on the offender the prison terms for each of the two most serious firearm specifications of which the offender is convicted or to which he pled guilty. In *State v. Tyler*, 9th Dist. Summit No. 29225, 2019-Ohio-4661, the court ruled that because Tyler was convicted of murder and felonious assault, both of which carried firearm specifications, the trial court was required to impose consecutive prison sentences on both of the specifications.

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

EILEEN T. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR