[Cite as *State v. Parks*, 2006-Ohio-7269.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO.: 04 CA 803
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JAMES M. PARKS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Appellant's Application for Reopening Pursuant to App.R. 26(B) Case No. 03 CR 4477

JUDGMENT: Application Denied.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Donald R. Burns, Jr.
Carroll County Prosecutor
Atty. John C. Childers
Assistant Prosecuting Attorney
11 East Main Street
Carrollton, Ohio 44615

For Defendant-Appellant:

James M. Parks, Pro-se
#463-038
P.O. Box 901
Leavittsburg, Ohio 44430

JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 23, 2006

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PER CURIAM.

{¶1} Appellant James M. Parks filed an application to reopen his direct appeal pursuant to App.R. 26(B)(5), which authorizes an application for reopening, "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Appellant previously filed direct appeals from separate convictions for rape determined in both Columbiana and Carroll Counties. His appeals were consolidated. He now seeks to reopen his direct appeal arising from only the Carroll County conviction.

{¶2} Appellant claims that his appellate counsel failed to argue on direct appeal that his right to the effective assistance of trial counsel was violated; that his indictment was improper; and that the trial court failed to confirm that his guilty pleas were knowingly and intelligently made. He argues that these errors constitute the ineffective assistance of appellate counsel. The State of Ohio has not filed a response to Appellant's application. For the following reasons, however, Appellant's application for reopening is denied.

{¶3} A criminal defendant is entitled to the effective assistance of appellate counsel on appeal as of right. *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821; *State v. Rojas* (1992), 64 Ohio St.3d 131, 592 N.E.2d 1376. The Ohio Supreme Court has adopted the two-step test pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, for assessing whether an applicant has raised a genuine issue relative to the ineffectiveness of appellate counsel in a request to reopen an appeal. *State v. Palmer,* (2001), 92 Ohio St.3d 241, 243, 749 N.E.2d 749. Appellant must establish that his appellate counsel was,

"'deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal.'" Id., quoting *State v. Sheppard* (2001), 91 Ohio St.3d 329, 330, 744 N.E.2d 770.

{¶4} Appellant asserts three areas in which his appellate counsel were deficient. In his first assignment of error he asserts:

{¶5} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS GIVEN BAD ADVICE THAT HE HAD MADE A DEAL WITH THE STATE FOR AN EIGHT-YEAR-SENTENCE TO RUN CONCURRENT WITH HIS CONVICTION IN COLUMBIANA COUNTY."

{¶6} Appellant argues that his appellate counsel was ineffective based on their failure to raise the unfulfilled promises made by trial counsel in advance of Appellant's plea agreement. Specifically, Appellant claims that his trial counsel promised him a total eight-year concurrent sentence in exchange for his six guilty pleas to rape in violation of R.C. §2907.02(A)(1)(B) in Carroll County. Appellant claims that the promised eight-year total sentence was designed to be a global plea agreement covering both his Carroll County and Columbiana County rape convictions. Appellant also states that trial counsel advised him to answer yes to the judge's questions at his plea agreement hearing and that everything would go as planned. Appellant also states that his trial counsel, Attorney Mark Colucci, has since been disbarred from the practice of law based, in part, on the mishandling of Appellant's cases.

{¶7} Appellant states in his affidavit in support of his application for reopening that he advised his appellate counsel of this issue, but they failed to address it in his direct appeal. (Affidavit of James Parks, ¶11.) Thus, Appellant claims that he was prejudiced as a result of his appellate counsel's failure to raise this issue as an assignment of error in his direct appeal.

{¶8} Contrary to Appellant's assertion, however, the trial court's record does not support his argument. In fact, Appellant's plea agreement and the sentencing transcripts depict that Appellant was fully advised of the judge's discretion to disregard any plea agreement between the prosecution and Appellant's counsel. Following this admonishment, Appellant pleaded guilty to six counts of rape after the jury was impaneled and before opening statements were made in his Carroll County jury trial. (Feb. 9, 2004, Jury Trial.)

{¶9} The record reflects that the State of Ohio and trial counsel did have a global plea agreement. The agreement discussed and recommended on the record was that Appellant be sentenced to six concurrent mandatory life sentences with parole eligibility after ten years. There was no mention of an eight year sentence. The described plea agreement also provided that Appellant's Carroll County sentences should run concurrently with his Columbiana County sentence. (Feb. 9, 2004, Tr., pp. 75-76.)

{¶10} However, after counsel described the foregoing recommended agreement to the trial court, the judge immediately explained that he was not bound to accept any plea agreement entered into between the State of Ohio and Appellant's

counsel. The judge clearly explained that he could impose any sentence he felt was appropriate regardless of the plea agreement, and Appellant responded that he understood. The trial court then went through a series of questions per Crim.R. 11(C) in open court. The judge explicitly stated that he could impose six life sentences consecutively, explaining that this meant "back to back", and Appellant still responded that he understood and that he wished to plead guilty. (Feb. 9, 2004, Tr. pp. 78-81, 86.) The Carroll County Court of Common Pleas subsequently sentenced Appellant to six life sentences with counts 1-3 to run concurrent and counts 4-6 to run concurrent for a total of two consecutive life sentences with parole eligibility in 20 years. (March 4, 2004, Sentencing.)

{¶11} Appellant did not attempt to withdraw his guilty plea at the sentencing hearing. However, Appellant subsequently filed a motion to withdraw his plea on April 2, 2004, the same day his notice of appeal was filed. The trial court never addressed this tardy motion.

{¶12} In reviewing the foregoing, we conclude that there are no genuine issues as to whether Appellant was denied the effective assistance of appellate counsel. The record reflects that Appellant's guilty pleas were made knowingly, intelligently, and voluntarily in spite of his claims to the contrary. Thus, his appellate counsel was not deficient for failing to raise this issue in his direct appeal as there was no, "reasonable probability of success[.]" *Palmer*, supra, at 243, 749 N.E.2d 749. As such, this assignment of error is overruled.

{¶13} Appellant's second assignment of error states:

{¶14} "THE TRIAL COURT PREJUDICED APPELLANT WHEN IT ALLOWED THE APPELLANT TO PLEAD TO A CARBON-COPY INDICTMENT, AND IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL NOT TO INFORM APPELLANT THAT HE WAS SUBJECT TO DOUBLE JEOPARDY, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING IT ON APPEAL."

{¶15} Appellant claims in this assignment of error that his appellate counsel was ineffective for failing to argue that his indictment subjected him to double jeopardy. He argues that the indictment was improper because each count was identical. Thus, he claims he was repeatedly convicted of the same offense.

{¶16} However, Appellant's indictment reflects that he was indicted for six separate rape offenses. Further, each offense is a violation of R.C. §2907.02(A)(1)(b). As Appellant contends, the charges were essentially identical since the offenses were violations of the same statute. However, Appellant fails to mention that each charged offense is different in that it alleges a violation of R.C. §2907.02(A)(1)(b) in a different month of the year 2003. (July 1, 2003, Indictment.)

{¶17} Further, each charged offense in Appellant's indictment closely resembles the indictment form presented in R.C. §2941.06. Appellant's charged offenses also comply with R.C. §2941.05, in that each count contains a description of the offense, "in the words of the section of the Revised Code describing the offense." R.C. §2941.05. Thus, each count gave Appellant sufficient notice of the offenses with which he was charged. R.C. §2941.05.

{¶18} Based on the foregoing, this assignment of error lacks merit as there was no reasonable probability of success had Appellant's appellate counsel presented this argument on appeal.

{¶19} In Appellant's third and final assignment of error in his application for reopening he asserts:

{¶20} "THE TRIAL COURT PREJUDICED APPELLANT BY NOT EXPLAINING THE ELEMENTS OF THE CHARGE OF RAPE CONCERNING FORCE OR THREAT OF FORCE, ALSO APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE ON APPEAL, IN VIOLATION OF CRIMINAL RULE 11."

{¶21} Appellant argues that he was denied the effective assistance of appellate counsel because his appellate counsel did not argue that the trial court failed to confirm that Appellant understood the elements of the offenses to which he was pleading guilty. Specifically, Appellant claims that he was not advised that his convictions required the state to establish that he raped the victim with force or under the threat of force. Thus, he claims prejudice since he did not make an intelligent guilty plea.

{¶22} However, no proof of force or threat of force was necessary here. Appellant fails to recognize in his argument that his convictions were violations of R.C. §2907.02(A)(1)(B), first degree felonies requiring mandatory life sentences because his victim was less than ten years of age. Because of the tender age of the victim, the state did not have to prove that Appellant used force or the threat of force in the commission of his offenses. As such, this argument is without merit.

{¶23} In conclusion, Appellant's application for reopening is entirely without merit and is hereby denied.

Donofrio, P.J., concurs.

Waite, J., concurs.

DeGenaro, J., concurs.