

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-274
	:	(C.P.C. No. 08CR-02-1099)
LaRue A. Monford,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 13, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

LaRue A. Monford, pro se.

ON MOTIONS

CONNOR, J.

{¶ 1} Defendant-appellant, LaRue A. Monford ("defendant" or "appellant"), has filed a pro se application pursuant to App.R. 26(B) seeking to reopen his appeal resolved in this court's decision in *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732 (10th Dist.), claiming ineffective assistance of appellate counsel. Plaintiff-appellee, the State of Ohio ("the State"), filed a memorandum in opposition to defendant's application. Because defendant's application fails to present a genuine issue that he was deprived of the effective assistance of counsel, we deny his application to reopen.

{¶ 2} As a preliminary matter, we shall first address defendant's March 15, 2011 "motion contra" filed in response to this court's March 1, 2011 entry granting the State's February 25, 2011 request for leave to file memorandum contra defendant's application for reopening *instanter*. Defendant objects to this court granting the State leave to file its

memorandum contra to the application for reopening, claiming it is a conspiracy and a sham to allow the State to file an untimely memorandum contra. However, upon review, we find there was no proof of service regarding defendant's application for reopening. Furthermore, the State submits it never received a copy of defendant's application and was unaware of said filing until notified by this court's administrator. Under these circumstances, there is nothing improper or "conspiratorial" about the court administrator advising one of the parties of a pending proceeding and permitting leave to file *instanter*. See *generally* Loc.R. 7; App.R. 14(B); App.R. 15. Consequently, defendant's "motion contra" is denied and we shall return our focus to addressing the merits of defendant's application for reopening.

{¶ 3} On February 15, 2008, defendant was indicted on charges of murder, attempted murder, felonious assault, and carrying concealed weapon arising out of a shooting that occurred on the afternoon of February 7, 2008, at a bar known as D#1 Happy Family. As a result of the shooting, one victim, Eugene Brown, died and a second victim, Alicia Brown, was injured. On April 24, 2008, the trial court granted leave for defendant to enter written pleas of not guilty by reason of insanity. On that same date, the trial court also appointed Kristen E. Haskins, Psy.D., to interview and evaluate defendant with respect to said pleas.

{¶ 4} The matter eventually proceeded to jury trial. On December 17, 2008, the jury found defendant guilty of murder, attempted murder, and felonious assault, and further found him guilty of the three-year firearm specifications. Additionally, the jury also found defendant guilty of one count of carrying a concealed weapon.

{¶ 5} A sentencing hearing was held on January 15, 2009. The trial court imposed an aggregate sentence of 28 years to life in prison. Specifically, defendant received 15 years to life on the murder, 10 years on the attempted murder, 8 years on the felonious assault, and 12 months on the carrying concealed weapon offense. The attempted murder, felonious assault, and carrying concealed weapon offenses were run concurrently to one another, but consecutively to the murder. The court imposed an additional 3 years for the firearm specification.

{¶ 6} In his direct appeal, defendant, through counsel, raised eight assignments of error. He argued: (1) the trial court erroneously overruled his pretrial motion to suppress

identification; (2) the prosecutor engaged in misconduct by using the motion to suppress identification as a one-on-one show-up and to obtain an in-court identification; (3) counsel's failure to engage in meaningful inquiry during voir dire and his failure to excuse an objectionable juror constituted a denial of effective assistance of counsel; (4) the trial court's failure to address the plea of not guilty by reason of insanity or to instruct the jury on insanity constituted structural error and resulted in a denial of due process; (5) the convictions were not supported by sufficient evidence identifying him as the shooter; (6) the trial court erred in imposing consecutive sentences on two allied offenses of similar import—attempted murder and felonious assault—and violated the constitutional ban against double jeopardy; (7) the cumulative effect of trial counsel's unprofessional omissions resulted in a denial of the effective assistance of counsel; and (8) the convictions were against the manifest weight of the evidence.

{¶ 7} App.R. 26(B) allows applications to reopen an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1) provides that an application for reopening shall be filed within 90 days from the journalization of the appellate judgment. Here, defendant has filed a timely application.

{¶ 8} An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶ 9} To prevail on an application to reopen, defendant must make "a colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 2, citing *State v. Sanders*, 75 Ohio St.3d 607 (1996). Under *Strickland*, defendant must demonstrate the following: (1) counsel was deficient in failing to raise the issues defendant now presents; and (2) defendant had a reasonable probability of success if the issue had been presented on appeal. *Lee* at ¶ 2, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

{¶ 10} An appellate attorney has wide latitude and the discretion to decide which issues and arguments will prove most useful on appeal. Furthermore, appellate counsel is not required to argue assignments of error that are meritless. *Lee* at ¶ 3, citing *State v. Lowe*, 8th Dist. No. 82997, 2005-Ohio-5986, ¶ 17.

{¶ 11} Defendant's application alleging his appellate counsel was ineffective lacks clear assignments of error or arguments and is sometimes difficult to decipher. Nevertheless, the application lists the following as "Assignment of Errors/Arguments:"

[I.] Lead, veteran detective, Steven Glasure and witness, and owner of Williams Electronics, Ron Williams falsified material evidences, committed perjury[] and tainted witnesses and jury. This caused appellant irreparable harm.

[II.] Tainted video, still photos and public hearsay were the poisonous impetus and foundation of sham case against appellant. This caused appellant irreparable damage.

[III.] Rules of Discovery were repeatedly violated by prosecutor.

[IV.] Prosecutor made false statement regarding material fact and repeatedly and maliciously presented perjured testimony.

[V.] The court repeatedly manifest[ed] a pattern of prejudice causing appellant irreparable harm.

[VI.] Trial and appell[ate] counsel were adversarial and did not offer any competent defense against issues manifested herein. This caused appellant irreparable damages.

{¶ 12} Based upon our overall reading of defendant's application, he appears to assert appellate counsel was ineffective in failing to raise the following general arguments in his direct appeal: (1) the jury verdicts were against the manifest weight of the evidence because they were based upon: perjury, false testimony, the testimony of witnesses who were not credible, inadmissible hearsay evidence, evidence (videos and photographs) that had been tampered with or tainted, and identification procedures which were highly suggestive; (2) defendant was denied a fair trial due to discovery violations committed by the prosecutor and due to prosecutorial misconduct, including the presentation of perjured testimony; (3) defendant was denied a fair trial due to the trial judge's prejudice against him, resulting in a denial of the right to confront his accusers; and (4) trial counsel

failed to offer a competent defense by failing to impeach the State's witnesses and by leading the State's primary witness to inculcate defendant.

{¶ 13} With respect to defendant's manifest weight argument, we note that a manifest weight challenge was previously raised on direct appeal. In considering that argument on direct appeal, we found that the jury's determination as to the credibility of the witnesses and the reliability of their identifications should be given great deference. Even in light of the defense expert's identification testimony questioning the reliability of eyewitness identification, the jury could have found defendant guilty by reasonably concluding the witnesses had an adequate opportunity to view the defendant and that any media exposure did not affect their identifications, especially since several witnesses knew defendant from previous encounters and identified him without hesitation. Thus, having previously considered these same (or similar) arguments in the direct appeal, we find these arguments fail to establish a genuine issue that defendant was deprived of the effective assistance of counsel, and they do not warrant further consideration.

{¶ 14} As for defendant's additional arguments challenging the manifest weight of the evidence (*e.g.*, numerous pieces of evidence, such as videos and photographs, have been tampered with; reliance upon inadmissible hearsay evidence; the jury relied upon perjured testimony), many of these allegations are based upon pure speculation or evidence that may be (or may not be) contained outside the record, neither of which we can rely upon to find that counsel was ineffective. Defendant has failed to produce anything we can consider to backup these assertions.

{¶ 15} Defendant also asserts he was denied a fair trial due to the prejudice of the trial judge, who denied him the right to confront his accusers. Yet, defendant provides no specific examples of how the trial court repeatedly displayed prejudice against him by disregarding or violating his Sixth Amendment rights. Without additional detail, it is impossible for us to determine if appellate counsel was deficient in failing to raise this as an issue or if defendant had a reasonable probability of success if it had been presented on appeal. Therefore, we find this proposed assignment of error to be meritless.

{¶ 16} In addition, defendant purports he was denied a fair trial as a result of prosecutorial misconduct, including the presentation of perjured testimony and various discovery violations. Like his assertions regarding the purported violation of his right to

confrontation, defendant's contentions regarding the discovery violations are unclear. Defendant has failed to provide any details as to the alleged discovery violations. Again, without additional detail, it is impossible for us to determine if appellate counsel was deficient in failing to raise this as an issue or if defendant had a reasonable probability of success if it had been presented on appeal.

{¶ 17} As to defendant's claim regarding the prosecution's presentation of perjured testimony, defendant has failed to meet its burden. "The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Columbus v. Joyce*, 10th Dist. No. 00AP-1486, 2001 WL 1511967, *8, 2001 Ohio App. LEXIS 5274, *21 (Nov. 29, 2001), quoting *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir.1989). To meet the test for prosecutorial misconduct, the defendant must show: "(1) the statement was false; (2) the statement was material; and (3) the prosecutor knew it was false." *Id.*, 2001 WL 1511967, at *8, 2001 Ohio App. LEXIS 5274, at *22, quoting *United States v. O'Dell*, 805 F.2d 637, 641 (6th Cir.1986). The defendant has the burden of demonstrating the testimony was perjured. *Id.*, citing *United States v. Griley*, 814 F.2d 967, 971 (4th Cir.1987). Defendant has not done so here.

{¶ 18} Finally, defendant proposes an argument for ineffective assistance of trial counsel. This argument appears to be premised upon the assertion that trial counsel was ineffective in presenting its defense, particularly the examination of certain witnesses. Notably, on direct appeal, appellate counsel argued the cumulative effect of trial counsel's omissions denied defendant the effective assistance of counsel. We considered and rejected that challenge, although we realize the direct appeal did not contain a specific challenge regarding trial counsel's cross-examination of certain witnesses. Nevertheless, "[t]he scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101, citing *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶ 45. Therefore, we see no merit in this proposed argument.

{¶ 19} We conclude by noting that defendant was previously represented by appellate counsel who filed a 41 page merit brief on defendant's behalf (which required a

motion for leave to exceed the 35 page limitation) advancing eight assignments of error.¹ We believe it likely that counsel anticipated the arguments he raised in the merit brief had a better chance of success than any of the arguments defendant is currently proposing, and because page limitations often force advocates " 'to winnow out weaker arguments and focus on key issues.' " *State v. White*, 9th Dist. No. 19040, 1999 WL 394938, *4, 1999 Ohio App. LEXIS 2721, *10 (June 16, 1999), quoting *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St.3d 10, 22 (1993), counsel reasonably did not raise the issues defendant now seeks to raise.

{¶ 20} We find defendant has failed to establish a genuine issue demonstrating that he was deprived of the effective assistance of counsel and that he suffered prejudice as a result of appellate counsel's performance. Consequently, we find all of defendant's proposed assignments of error to be without merit.

{¶ 21} In conclusion, defendant's "motion contra" opposing this court's decision granting the State leave to file a memorandum contra defendant's application for reopening *instanter* is denied. In addition, because defendant has failed to prove that counsel was deficient in failing to raise the issues referenced above in the direct appeal, particularly given that some of these issues were previously raised, and because defendant has failed to show there was a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different, we find defendant's arguments fail to establish a colorable claim of ineffective assistance of counsel. Therefore, we deny defendant's application for reopening.

*Application for reopening denied;
"motion" contra denied.*

BROWN, P.J., and DORRIAN, J., concur.

¹ We also note that following our decision in the direct appeal, appellate counsel filed a motion to certify a conflict, which we denied. *See State v. Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-5624. Appellate counsel then filed a discretionary appeal with the Supreme Court of Ohio, which was accepted but subsequently dismissed as improvidently accepted. *See State v. Monford*, 131 Ohio St.3d 40, 2011-Ohio-6398.