

The Supreme Court of Ohio

FILED

SEP -3 2019

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

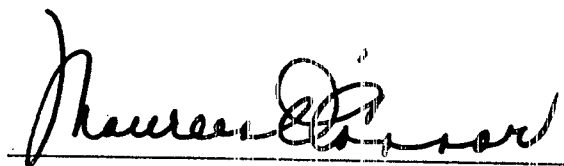
James W. Guy

Case No. 2019-0786

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Franklin County Court of Appeals; No. 17AP-322)



Maureen O'Connor
Chief Justice

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,

:

Plaintiff-Appellee,

:

v.

:

James W. Guy,

:

Defendant-Appellant.

:

No. 17AP-322
(C.P.C. No. 16CR-772)

(REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on April 30, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

On brief: *James W. Guy*, pro se.

ON APPLICATION FOR REOPENING

DORRIAN, J.

{¶ 1} Defendant-appellant, James W. Guy, has filed a pro se application for reopening of his appeal based on a claim of ineffective assistance of appellate counsel. Because we conclude Guy failed to demonstrate his appellate counsel performed deficiently by failing to assert the proposed assignments of error or a reasonable probability of success if those assignments of error had been asserted, we deny the application for reopening.

{¶ 2} Guy was convicted of 2 counts of heroin trafficking with firearm specifications, 1 count of heroin possession, and 1 count of kidnapping with a firearm specification, and sentenced to a total of 20 years imprisonment. *State v. Guy*, 10th Dist. No. 17AP-322, 2018-Ohio-4836, ¶ 15. Represented by counsel, Guy filed a direct appeal of the judgment, assigning nine errors for this court's review. *Id.* at ¶ 16. We overruled each of Guy's assignments of error and affirmed the trial court's judgment. *Id.* at ¶ 67.

{¶ 3} Guy now seeks to reopen his appeal pursuant to App.R. 26(B), which provides that a defendant in a criminal case may apply for reopening of an appeal based on a claim of ineffective assistance of appellate counsel within 90 days from journalization of the appellate judgment. A defendant must establish a colorable claim of ineffective assistance of counsel in order to prevail on an application for reopening. *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 2, citing *State v. Sanders*, 75 Ohio St.3d 607 (1996). The defendant 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). In his application, Guy sets forth two proposed assignments of error he asserts were not considered by this court due to ineffective assistance of appellate counsel.

{¶ 4} Reopening of an appeal will be granted "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel." App.R. 26(B)(5). The test for ineffective assistance of counsel requires a defendant to prove: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for reopening and that there was a reasonable probability of success had that issue been raised on appeal. *Lee* at ¶ 2.

{¶ 5} In his first proposed assignment of error, Guy asserts the trial court abused its discretion by failing to grant a continuance or impose sanctions on the prosecution due to an untimely disclosure of discovery material. On the fourth day of trial, the prosecution provided Guy with a packet of discovery that had not been previously disclosed. The prosecutors indicated they received the material earlier that morning and did not intend to introduce it into evidence. The trial court took a recess of approximately 90 minutes to provide Guy with an opportunity to review the newly provided material. Following the recess, Guy did not request a continuance or additional time to review the material, but moved to dismiss or for sanctions, arguing the material could have been used to impeach the state's witnesses. Specifically, Guy argued the material contradicted the lead police detective's testimony as to whether the police knew that a child was present at the location where Guy was arrested. The

prosecutor argued the proper remedy for any discovery violation resulting from the untimely disclosure would be to provide Guy with additional time to review the materials. The trial court denied Guy's motion for dismissal or sanctions, noting the reports included in the late disclosure, which indicated SWAT team members may have been aware there was a child in the residence, did not contradict the testimony of the lead detective, who was not part of the SWAT team that conducted the raid and testified he did not know whether there was a child in the residence.

{¶ 6} A trial court has discretion under Crim.R. 16 to determine the appropriate response to a failure to disclose discoverable material. *State v. Wiles*, 59 Ohio St.3d 71, 78 (1991). Crim.R. 16(L)(1) provides that "[i]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with [Crim.R. 16] or with an order issued pursuant to [Crim.R. 16], the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material disclosed, or it may make such other order as it deems just under the circumstances." A trial court's decision on an appropriate sanction, if any, under Crim.R. 16 is subject to review for abuse of discretion. *Wiles* at 78. "Prosecutorial violations of Crim.R. 16 require reversal only when the defendant demonstrates that: (1) the prosecution's failure to disclose was willful, (2) disclosure of the information prior to trial would have aided the defense, and (3) the defendant suffered prejudice." *State v. Bruce*, 10th Dist. No. 07AP-355, 2008-Ohio-4370, ¶ 70.

{¶ 7} Guy did not request a continuance after receiving the untimely disclosed material, instead moving for dismissal or other sanctions. Thus, he forfeited the argument on appeal that the trial court should have granted a continuance. Had the issue been raised on direct appeal, this court would have been limited to considering whether the trial court abused its discretion in denying Guy's motion to dismiss or for sanctions. In support of his first proposed assignment of error, Guy reiterates the argument he presented to the trial court—i.e., that the untimely disclosed material would have allowed him to impeach the lead detective regarding the circumstances of the raid that resulted in Guy's arrest and the detective's identification of Guy as a suspect. However, as noted in our prior decision, Guy challenged the lead detective's testimony extensively during the trial and challenged his conviction as being against the manifest weight of the evidence on appeal. *See Guy* at ¶ 46-51. Moreover,

we note the trial court's suggestion that the untimely disclosed material would have been of little use in impeaching the lead detective's testimony because it did not contradict that testimony. Given this record, Guy has failed to demonstrate that dismissal or other sanctions would have been a proper remedy for the untimely disclosure. Therefore, Guy failed to demonstrate a reasonable probability of success if the first proposed assignment of error had been asserted on appeal.

{¶ 8} In his second proposed assignment of error, Guy asserts the trial court erred by imposing three-year sentences on the firearm specifications associated with his kidnapping and heroin trafficking convictions and ordering those sentences be served consecutively. He appears to argue the underlying offenses of kidnapping and heroin trafficking were part of the same act or transaction and, therefore, the firearm specifications associated with those charges should have merged for purposes of sentencing. We note Guy's appellate counsel asserted a challenge to the imposition of consecutive sentences on direct appeal, which this court overruled. *See Guy* at ¶ 53-62. We further note the trial court considered the issue of merger in imposing sentence, finding the heroin trafficking and possession charges related to October 17, 2014 merged for purposes of sentencing. *Id.* at ¶ 15. Thus, Guy fails to demonstrate that his appellate counsel performed deficiently by failing to assert the second proposed assignment of error as part of the challenge to the sentence imposed. "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, 752 (1983). *See also State v. Campbell*, 69 Ohio St.3d 38, 53 (1994) ("Counsel need not raise all nonfrivolous issues on appeal."); *State v. Jones*, 8th Dist. No. 80737, 2003-Ohio-4397, ¶ 4 ("[I]n 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."). Moreover, "appellate counsel is not required to argue assignments of error which are meritless." *Lee* at ¶ 3.

{¶ 9} For the foregoing reasons, we deny Guy's application for reopening.

Application for reopening denied.

BROWN and SADLER, JJ., concur.
