

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellee, : No. 19AP-711
v. : (C.P.C. No. 18CR-5181)
Mark A. Hill, : (REGULAR CALENDAR)
Defendant-Appellant. :

MEMORANDUM DECISION

Rendered on September 2, 2021

[*G. Gary Tyack*], Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Mark A. Hill, pro se.

ON APPLICATION FOR REOPENING

BEATTY BLUNT, J.

{¶ 1} On April 8, 2021, defendant-appellant, Mark A. Hill, 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. Hill*, 10th Dist. No. 19AP-711, 2021-Ohio-132, claiming ineffective assistance of appellate counsel. On May 4, 2021, plaintiff-appellee, State of Ohio, filed a memorandum in opposition to Hill's application. On June 4, 2021, Hill filed a motion to strike the memorandum in opposition filed by the state, which we hereby deny. Because Hill has failed to demonstrate a genuine issue that he has a colorable claim that his appellate counsel's performance was deficient and that he was prejudiced by the deficient performance, we deny his application to reopen.

I. Factual and Procedural Background

{¶ 2} We incorporate the recitation of the facts giving rise to Hill's indictment and his trial from the direct appeal:

On October 18, 2018, appellant was indicted on one count of aggravated burglary, in violation of R.C. 2911.11, a first-degree felony, and one count of felonious assault, in violation of R.C. 2903.11, a second-degree felony. Each count included a repeat-violent-offender ("RVO") specification pursuant to R.C. 2941.149(A). The indictment alleged that each of the foregoing offenses occurred on or about August 25, 2018. Appellant entered a not guilty plea to the charges and requested a jury trial.

On August 20, 2019, a jury trial commenced. At trial, the following evidence was adduced. In 2016, appellant Mark A. Hill began dating Brittany Hamm ("Ms. Hamm"), a woman who had been struggling with heroin addiction since 2013. (Aug. 20, 2019 Tr. Vol. I at 41, 57.) Ms. Hamm's grandmother, Rita Hamm ("Mrs. Hamm"), knew appellant through his association with Ms. Hamm and, for a brief period of time, Mrs. Hamm allowed appellant to live in her home. (Tr. Vol. I at 57, 59.)

In August 2016, after appellant had moved out, Mrs. Hamm permitted Martie Jacobs ("Jacobs"), a long-time family friend and the victim in this case, to move into her home. (Tr. Vol. I at 35-37; Aug. 21, 2019 Vol. II at 7, 11.) Jacobs lived in the front bedroom of the home. (Tr. Vol. I at 40; Tr. Vol. II at 13-14.) Jacobs suffered from severe arthritis and degenerative disc disease stemming from a back injury he had sustained when he was younger. (Tr. Vol. II at 5, 9.) Due to his physical impairments, Jacobs had stopped working in 2011 or 2012. (Tr. Vol. II at 9.) At trial, Mrs. Hamm testified that Jacobs, then 53 years old, was frail due to his physical disabilities. (Tr. Vol. I at 51.) Mrs. Hamm and Jacobs both testified that Jacobs did odd jobs for Mrs. Hamm and he contributed to buying groceries by using his food stamps. (Tr. Vol. I at 38; Tr. Vol. II at 12.)

Mrs. Hamm permitted Ms. Hamm to come to her home despite that Ms. Hamm would lie to her and had stolen her property. (Tr. Vol. I at 42-43.) On August 25, 2018, Ms. Hamm went to Mrs. Hamm's home to shower and get something to eat. (Tr. Vol. I at 44.) While Ms. Hamm was in the garage smoking a cigarette and talking on her phone, Mrs. Hamm heard her yell

that Jacobs had hit her in the face. (Tr. Vol. I at 46.) Ms. Hamm was crying. *Id.* Neither Mrs. Hamm nor Ms. Hamm called the police, and Mrs. Hamm testified that Ms. Hamm did not have any noticeable injuries. (Tr. Vol. I at 46-47, 48, 52.)

Earlier that afternoon, Jacobs had been at a neighbor's house drinking and watching pre-season football, and he testified that he had been drinking and was drunk. (Tr. Vol. II at 21, 37-38.) Mrs. Hamm testified, however, that when he returned to the home, he was not slurring his words or otherwise out of control. (Tr. Vol. I at 86.) Both Mrs. Hamm and Jacobs testified that while Ms. Hamm was in the garage, Jacobs was outside on the front porch smoking a cigarette. (Tr. Vol. I at 46; Tr. Vol. II at 22.) Mrs. Hamm further testified that Jacobs denied hitting Ms. Hamm, and she did not see Jacobs hit her. (Tr. Vol. I at 47.)

Jacobs testified that after he had finished his cigarette, he came inside, saw Ms. Hamm, who was in the kitchen, and confronted her about her behavior from two days earlier involving her bringing a man into the home. (Tr. Vol. II at 22-23.) He told her that if she did not stop this type of behavior, he was going to call the police. (Tr. Vol. II at 23.) In response, Ms. Hamm picked up a knife that had been laying on the table and threatened to kill or stab him. *Id.* Jacobs grabbed her hand, took the knife from her, "threw her into the living room on the floor," and "fell down on top of her." (Tr. Vol. II at 23-24.)

Both Mrs. Hamm and Jacobs testified that at this point, Mrs. Hamm intervened in the altercation and pushed Jacobs off Ms. Hamm. (Tr. Vol. I at 49; Tr. Vol. II at 24.) Mrs. Hamm testified that although she did not see a knife during the altercation, she saw a knife on the living room floor. (Tr. Vol. I at 49-50.) It was a knife she kept in her kitchen. (Tr. Vol. I at 82-83; State's Ex. 22.) Jacobs testified the altercation between Ms. Hamm and himself took place in the early evening around 6:00 p.m. (Tr. Vol. II at 24.) Mrs. Hamm testified the altercation occurred around 9:00 p.m. (Tr. Vol. I at 52.) Both Mrs. Hamm and Jacobs testified that after the incident, Jacobs went to his room, shut his door, took his medications and went to bed. (Tr. Vol. I at 51; Tr. Vol. II at 24-25.)

Mrs. Hamm testified that sometime between 10:30 and 11:00 p.m., appellant arrived at the residence. (Tr. Vol. I at 57, 60.) Appellant entered the home from the garage door leading into the kitchen and proceeded straight to Jacobs' bedroom. (Tr.

Vol. I at 60-61.) Appellant had been in Jacobs' bedroom for five to seven minutes when Ms. Hamm came into the kitchen from the garage and entered Jacobs' bedroom. (Tr. Vol. I at 61-62.) A few minutes later, both appellant and Ms. Hamm exited Jacobs' bedroom and went out the front door of the home. (Tr. Vol. I at 62.) Mrs. Hamm did not hear anyone yelling while appellant and Ms. Hamm were in Jacobs' bedroom. *Id.*

Jacobs testified he was in a light sleep when he heard his bedroom door open. (Tr. Vol. II at 26-27.) Turning to look over his shoulder, he saw appellant standing in his room. (Tr. Vol. II at 27.) Jacobs then saw appellant pull a sledgehammer from his pants. (Tr. Vol. II at 29.) Appellant hit Jacobs in the face near his left eye. (Tr. Vol. II at 29-30.) Jacobs fell to his knees on the floor, and appellant hit him again on the other side of his face. (Tr. Vol. II at 30.) After the assault, Jacobs passed out and went in and out of consciousness and did not fully wake up until one day or so later. (Tr. Vol. II at 30-31.)

Mrs. Hamm testified that after appellant and Ms. Hamm had left the house, she saw Jacobs go into the bathroom and soon heard Jacobs yelling for her. (Tr. Vol. I at 65.) She found him lying in a fetal position in the bathroom, with blood all over his face and arms and blood spatter on his pants. (Tr. Vol. I at 65-66.) She also saw blood in the bathroom, in the hallway, and in Jacob's bedroom on the runner carpet. (Tr. Vol. I at 67.) Mrs. Hamm further testified the runner was covered in blood and that she put it in the trash can. (Tr. Vol. I at 68.) She called 911 and Jacobs was transported to the hospital. (Tr. Vol. I at 66.)

At the hospital, Jacobs underwent a 12-hour surgery to reconstruct one eye socket and his jaw. (Tr. Vol. II at 32.) He had to undergo rehabilitation to learn to walk and swallow again, and he still had problems walking which he might never recover from. (Tr. Vol. II at 33.) Jacobs also had to undergo 4 follow-up surgeries to address problems with his tear ducts and pain from one of the steel plates used in the reconstruction surgery. (Tr. Vol. II at 34.) He also had to see an eye specialist and a plastic surgeon. *Id.* As a result of the assault, a portion of the left side of Jacobs' face is permanently concave. (Tr. Vol. II at 35.)

Appellant testified at trial. According to appellant, at about 10:00 p.m. on August 25, 2018, Ms. Hamm called him to ask him to pick her up at Mrs. Hamm's home. (Tr. Vol. II at 90.) While he was driving to the residence, Ms. Hamm contacted

him again via a video call. (Tr. Vol. II at 91-92.) Ms. Hamm was crying and hysterical and she told appellant that Jacobs had punched her in the eye. (Tr. Vol. II at 92.) Appellant testified he "could tell where she had been punched." *Id.*

According to appellant, when he arrived at the residence, Ms. Hamm was in the garage smoking a cigarette and still crying. (Tr. Vol. II at 93.) After speaking with Ms. Hamm about what had happened, he decided to go inside and talk to Jacobs, telling Ms. Hamm, "[c]ome on, let's go talk to him," (Tr. Vol. II at 94.) Ms. Hamm told appellant Jacobs was in the bedroom, and they both walked to the bedroom. (Tr. Vol. II at 95.) Appellant knocked once on the bedroom door and entered the room. *Id.* Appellant testified that he wanted to let Jacobs know "to keep his damn hands off my girl" and asked him why Jacobs had put his hands on her. *Id.*

In contrast to Jacobs' testimony describing the assault, appellant testified that it was Jacobs who first took a swing at appellant, but appellant dodged the blow. (Tr. Vol. II at 95-96.) Appellant testified that he was shocked by Jacobs' actions and "wasn't expecting to get into no physical confrontation with him, you know." (Tr. Vol. II at 95.) Appellant further testified that in response, he hit Jacobs about four times using only his fist and that Jacobs fell back on the bed. (Tr. Vol. II at 96.) Appellant denied having a sledgehammer or any other kind of hammer with him during the incident. (Tr. Vol. II at 90-91.) He further testified that he did not see any blood or pay any attention to Jacobs' face. (Tr. Vol. II at 96-97.) After reiterating his warning to "[k]eep your fucking hands off my girl," appellant and Ms. Hamm left. (Tr. Vol. II at 97.) Later that night, appellant took photographs of Ms. Hamm's black eye using his phone. (Tr. Vol. II at 98.)

When Columbus Police subsequently investigated the incident, appellant waived his Miranda rights and voluntarily spoke with Detective Kathy Zimmer. (Tr. Vol. I at 119-20.) Appellant showed the police the photographs of Ms. Hamm's face he had taken, copies of which were admitted into evidence at trial. (Tr. Vol. I at 121; Tr. Vol. II at 98; Def. Exs. A1-A5.) Appellant also showed the police text messages between himself and Ms. Hamm. (Tr. Vol. II at 98.)

At the close of the state's case, outside of the presence of the jury, defense counsel moved for acquittal pursuant to Crim.R. 29. (Tr. Vol. II at 138.) After listening to arguments from

defense counsel and the prosecutor, the trial court denied the motion. (Tr. Vol. II at 138-39.) Subsequently, at the close of the defense's case, and again outside of the presence of the jury, defense counsel renewed his motion for acquittal based on Crim.R. 29. (Tr. Vol. II at 149.) The trial court again denied the motion. *Id.*

At the conclusion of the trial, the jury returned a verdict acquitting appellant of aggravated burglary and finding him guilty of felonious assault, a second-degree felony. The court convicted appellant for the RVO specification on the felonious assault charge. On September 20, 2019, the trial court issued a judgment entry which reflected the verdicts of the jury and the court and imposed an aggregate 12-year term of incarceration.

Hill, 2021-Ohio-132, ¶ 2-18.

{¶ 3} In affirming the judgment of the trial court during Hill's direct appeal, we determined that the evidence "was sufficient to allow the jury to infer that appellant knowingly caused physical harm to [the victim] and/or that appellant knowingly caused or attempted to cause serious physical harm to the victim by means of a deadly weapon as required by R.C. 2903.11(A)(1) and (2). Therefore, the trial court properly overruled appellant's motion for acquittal made pursuant to Crim.R. 29." *Hill* at ¶ 32. We also found that the manifest weight of the evidence supports Hill's conviction for felonious assault. *Id.* at ¶ 33. Finally, we found the trial court did not abuse its discretion in permitting the state to introduce evidence of Hill's prior conviction of felonious assault for purposes of impeachment of Hill's credibility and, that even if there was any error, it was harmless in light of the overwhelming evidence of Hill's guilt. *Id.* at ¶ 48-49.

{¶ 4} On April 27, 2021, the Supreme Court of Ohio declined jurisdiction over Hill's discretionary appeal. *State v. Hill*, 162 Ohio St.3d 1440, 2021-Ohio-1399. Subsequently, Hill filed an application for reconsideration and an application for en banc consideration, which we denied. *State v. Hill*, 10th Dist. No. 19AP-711 (May 13, 2021) (memorandum decision).

{¶ 5} Before us now is Hill's motion to reopen the appeal under App.R. 26(B), filed on the grounds that he received ineffective assistance of counsel during his direct appeal.

II. Analysis

{¶ 6} Under App.R. 26(B), "[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." To present the claim, the applicant must state "[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 addition, the applicant must present "[a] sworn statement of the basis for the claim * * * [describing] the manner in which the deficiency prejudicially affected the outcome of the appeal." App.R. 26(B)(2)(d).

{¶ 7} A reviewing court must grant the application "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). When reviewing an applicant's claim of ineffective assistance of counsel, a court applies the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Reed*, 74 Ohio St.3d 534, 535 (1996). That is, that (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the defense because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 687, 694. "A defendant does not state a claim for ineffective assistance of counsel unless his attorney acted unreasonably given the facts of the case, and the unreasonable conduct was prejudicial to the defense." *State v. Mills*, 62 Ohio St.3d 357, 370 (1992).

{¶ 8} In the context of an application under App.R. 26(B)(5), the *Strickland* standard requires that the applicant "show that counsel was deficient for failing to raise the issue he now presents and that there was a reasonable probability of success had that issue been presented on appeal." *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 2. "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." *State v. Davis*, 10th Dist. No. 09AP-689, 2011-Ohio-1023, ¶ 8, citing *Lee* at ¶ 3. A court of appeals "should grant an application for reopening if the defendant shows a genuine issue that he has a colorable

claim that his appellate counsel's performance was deficient and that he was prejudiced by the deficient performance." *State v. Simpson*, ___ Ohio St.3d ___, 2020-Ohio-6719, ¶ 22.

{¶ 9} Hill presents four assignments of error in support of his claim that appellate counsel provided ineffective assistance on direct appeal, which we address as follows.

A. First Assignment of Error

Defense counsel provided ineffective assistance in not objecting to the failure of the trial court to provide a limiting instruction with respect to testimony allowed regarding use of a sledgehammer in commission of the felonious assault offense.

{¶ 10} In his proposed first assignment of error, Hill asserts that his appellate counsel was ineffective for failing to raise a claim of trial counsel ineffectiveness on the basis that trial counsel failed to object to the victim's testimony that Hill hit him with a sledgehammer and failed to object to the trial court's failure to provide a limiting instruction pertaining to the victim's testimony on this point. We find no merit in this proposed assignment of error.

{¶ 11} Hill appears to suggest that the amendment to the indictment should have barred the state from presenting the victim's testimony as to how his serious injuries occurred, or at least required the trial court to provide a limiting instruction to the jury that they were "not to consider the use of a sledgehammer, nor any other weapon, in order to reach a verdict on either offense charged." (App. for Reopening at 5.) This is not so.

{¶ 12} When the case was indicted, both Counts 1 and 2 alleged that Hill committed the offenses with a sledgehammer. (Oct. 18, 2018 Indictment.) The indictment was amended to eliminate the specific reference to the use of a sledgehammer, and the jury charge included no reference to a dangerous weapon or ordnance. (Final Jury Charge at 6.) Thus, because the state indicted Hill in the alternative—i.e., the indictment still alleged that a felonious assault was committed by causing serious physical harm to the victim—the amendment simplified the case by removing one way the state might have tried to prove guilt: committing felonious assault through the use of a deadly weapon—specifically in this case, a sledgehammer. See R.C. 2903.11(A)(1) and (2). Furthermore, because Hill's primary defense was premised on a claim of self-defense, removing the reference to the sledgehammer from the indictment and removing the alternative means for the state to

prove guilt also helped the defense as it permitted counsel to have the jury hone in on whether striking the victim with fists was done knowingly under the circumstances.

{¶ 13} The victim's testimony that he believed he was struck with a sledgehammer was properly presented to the jury, leaving the defense to challenge that testimony as an issue of credibility. Defense counsel thoroughly did so on cross-examination. (Tr. Vol. II at 74.) When Hill testified, he denied having used a sledgehammer. *Id.* at 90-91. As we stated in our decision resolving the direct appeal, "the jury was not obligated to accept Hill's testimony as truthful, and instead was entirely free to resolve the inconsistent testimony concerning the details of the assault in favor of believing the victim." (Citations omitted.) *Hill* at ¶ 34. Whether Hill used a sledgehammer or his fists, the jury was free to reject Hill's claim of self-defense and instead find that Hill knowingly caused the victim serious physical harm. Hill's continued complaints that the jury chose to believe the victim rather than appellant is simply a rehashing of the argument made on direct appeal and does not provide a basis for a claim of ineffective assistance of appellate counsel for failing to object to the actions or inactions of trial counsel on this point.

{¶ 14} In short, Hill's appellate counsel was not ineffective for failing to bring this meritless argument, and the proposed first assignment of error is overruled.

B. Second Assignment of Error

The trial court plainly erred, to the prejudice of appellant, by failing to instruct on the lesser included offense of reckless assault.

{¶ 15} In his proposed second assignment of error, Hill asserts that his appellate counsel was ineffective for failing to argue that the trial court committed plain error by failing to provide a jury instruction on the lesser-included offense of reckless assault. Specifically, Hill argues that in this case, viewing the facts and evidence in the light most favorable to him, the jury should have been given the option to determine whether Hill acted "recklessly" versus "knowingly" in causing serious physical harm to the victim. This claim is utterly without merit.

{¶ 16} As noted previously, and in our prior decision resolving the direct appeal, Hill's primary claim was that he acted in self-defense: he testified that the victim threw the first punch, that he was shocked by this, and he had no choice except to respond by using

his fist to punch the victim four times in the face. (Tr. Vol II at 95-96.) Thus, defense counsel argued to the jury that Hill's conduct in striking the victim was intentional but justified. (Tr. Vol. II at 178.)

{¶ 17} The defense also argued that his conduct did not result in serious physical injury to the victim. Instead, the defense suggested the victim's injuries resulted from a fall in the bathroom. (Tr. Vol. II at 177.) Under the foregoing facts and evidence presented by the defense, an instruction on reckless assault would not only be unsupported but would be entirely inconsistent with Hill's claim of self-defense.

{¶ 18} Hill's appellate counsel was not ineffective for failing to argue a non-existent error. The second proposed assignment of error is overruled.

C. Third Assignment of Error

Defense counsel provided ineffective assistance of counsel by representing conflicting interests when stipulating to the serious physical harm element of R.C. 2903.11(A)(1).

{¶ 19} In his proposed third assignment of error, Hill contends that his appellate counsel was ineffective for failing to argue that he had received ineffective assistance of trial counsel by trial counsel's stipulation to the serious harm element of the felonious assault charge. We do not agree with this contention.

{¶ 20} "It is a well-established principle that decisions regarding stipulations are matters of trial strategy and tactics." *State v. Roy*, 10th Dist. No. 14AP-986, 2015-Ohio-4959, ¶ 22, citing *State v. Rippy*, 10th Dist. No. 08AP-248, 2008-Ohio-6680, ¶ 16, citing *State v. Edwards*, 119 Ohio App.3d 106 (10th Dist.1997), citing *United States v. Teague*, 953 F.2d 1525 (11th Cir.1992). *Strickland* instructs us that "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, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). Thus, to succeed on his claim for ineffective assistance of counsel premised on the stipulation to serious physical harm, Hill must overcome the presumption set forth in *Strickland*.

{¶ 21} In this case, we cannot say that trial council's decision to stipulate that the victim suffered serious physical harm was not within the rubric of reasonable trial strategy.

As discussed previously, the record indicates that Hill's trial attorney pursued a strategy of self-defense. Hill admitted to hitting the victim but testified it was only with his fists, and only four times. Without the stipulation to serious physical harm to the victim and admission of the victim's medical records, the state would have presented a medical expert or experts whose testimony would have provided detailed explanations and analyses of the victim's injuries and potential causes. Such medical expert testimony would only have drawn more attention to the serious nature of the victim's injuries and added weight to the victim's version of how those injuries were specifically caused. By stipulating to the serious physical harm element, the prosecution did not present such testimony. Hill does not explain why his trial attorney's decision to stipulate to the serious harm element of the felonious assault charge and focus on the strategy presented was objectively unreasonable, and he has failed to demonstrate that the outcome of the trial would have been different had the stipulation not been entered; i.e., that the state could not have proven serious physical harm without the stipulation.

{¶ 22} In short, Hill has failed to demonstrate that actions of trial counsel were not part of a sound trial strategy and that the outcome of the trial would have been different otherwise. Because there was no reasonable probability of success had this issue been presented on appeal, Hill's appellate counsel was not deficient for failing to raise it. Accordingly, the third proposed assignment of error is overruled.

D. Fourth Assignment of Error

The trial court plainly erred and prejudiced appellant by failing to provide the jury with the legal definition of "non-deadly force" self-defense.

{¶ 23} In his proposed fourth assignment of error, Hill asserts that his appellate counsel was ineffective for failing to argue that the trial court committed plain error by providing a jury instruction on both deadly and non-deadly force and for failing to argue that trial counsel was ineffective for failing to object to the instruction on deadly force. There is no merit to this contention.

{¶ 24} Hill does not explain why the facts of this case do not support the trial court's jury instruction, and the instruction on self-defense given by the trial court was an accurate statement of the law. Furthermore, the trial court properly concluded that in this case the

type of force used by Hill was a factual issue for the jury to resolve. (Tr. Vol. II at 148.) This court has previously observed that "[t]he court must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Mankin*, 10th Dist. No. 19AP-650, 2020-Ohio-5317, ¶ 34. *State v. Joy*, 74 Ohio St.3d 178, 181 (1995), citing *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus.

{¶ 25} Moreover, Hill has failed to demonstrate that the outcome of the trial would have been different had the instruction on non-deadly force solely been given. In other words, that otherwise the jury would have believed Hill's claim that he acted in self-defense and used only the force reasonably necessary to respond to the victim's alleged first punch.

{¶ 26} Because there was no reasonable probability of success had this issue been presented on appeal, Hill's appellate counsel was not ineffective for failing to raise this argument. Accordingly, the fourth proposed assignment of error is overruled.

III. Conclusion

{¶ 27} Because there is no "reasonable probability of success" had any of the four proposed issues raised by Hill been asserted on appeal, Hill has failed to show a genuine issue that he has a colorable claim that his appellate counsel's performance was deficient and that he was prejudiced by the deficient performance. Accordingly, all proposed assignments of error are overruled and his application to reopen the appeal under App.R. 26(B) is denied.

Application to reopen denied.

DORRIAN, P.J., and SADLER, J., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v.

No. 19AP-711
(C.P.C. No. 18CR-5181)

Mark A. Hill,

(REGULAR CALENDAR)

Defendant-Appellant.

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on September 2, 2021, it is the order of this court that the application for reopening, filed April 8, 2021, is denied

BEATTY BLUNT, J., DORRIAN, P.J., &
SADLER, J. concur.

/S/ JUDGE
Judge Laurel Beatty Blunt

The Supreme Court of Ohio

FILED

DEC 14 2021

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

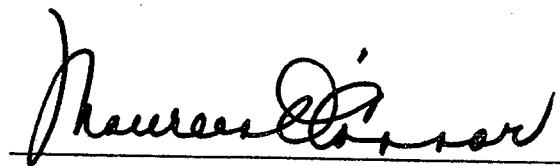
Mark A. Hill

Case No. 2021-1300

E N T R Y

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. 19AP-711)



Maureen O'Connor
Chief Justice