The Supreme Court of Ohio

State of Ohio

v.

Alfred Johnson, Sr.

Case No. 2023-1543

ENTRY

Upon consideration of appellant's motion for appointment of appeal counsel due to indigency, motion for a "Franks" hearing, and motion to strike prosecutors S.Ct.Prac.R. 7.03(E), S.Ct.Prac.R. 16.07(B) violation, it is ordered by the court that the motions are denied.

It is further ordered by the court that the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Lucas County Court of Appeals; No. L-22-1084)

Sharon L. Kennedy
Chief Justice

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LUCAS COUNTY
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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

STATE OF OHIO	COURT OF APPEALS NO. {48}L-22-1084
APPELLEE	TRIAL COURT NO. CR0202101960
V.	
ALFRED JOHNSON, SR.	**DECISION AND JUDGMENT**
APPELLANT	

* * * * *

This matter is before the court on appellant Alfred A. Johnson, Sr.'s August 25, 2023 pro se filings, which superseded prior filings, entitled, "Notice of Appeal: App.R. 26(B), App.R. 9, App.R. 11.1, En Banc, Motion to Leave Appeal to Change Caption Title to Rule 26(B) from 26(A1)"; "Notice of Appeal, App.R. 26(B) & A2C En Banc"; "Sworn Statement App.R. 26(B)-D Section" filed August 25, 2023; and "Civil R. 60B(5) & (2) Motion: Relief from 6th District Judgment, App.R. 9 & 11.1." Appellee, state of Ohio,

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opposed appellant's filings. Meanwhile, the Ohio Supreme Court resolved related proceedings within its jurisdiction, and appellant's filings are now decisional.

By way of background, on March 10, 2022, a jury convicted appellant of the second-degree felony of robbery arising from theft from a retail store and assaulting a store employee in the course of fleeing the store. On April 1, 2022, the trial court sentenced appellant to an indefinite prison sentence of seven to ten and one-half years. We affirmed appellant's conviction and sentence on direct appeal. *State v. Johnson*, 6th Dist. Lucas No. L-22-1084, 2023-Ohio-2424.

From what we construe from appellant's pro se filings, appellant seeks three forms of relief: relief from the trial court's judgment pursuant to Civ.R. 60(B), en banc review of the appeal pursuant to App.R. 26(A)(2)(c), and reopening the appeal pursuant App.R. 26(B). For the following reasons, appellant's motion and two applications are denied.

First, appellant seeks reversal of this court's conviction and sentence pursuant to Civ.R. 60(B)(2) and 60(B)(5), which provide the court may relieve a party from a final judgment for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)" or "any other reason justifying relief from the judgment." Appellant argues he is entitled to relief due to ineffective assistance of his appellate counsel for failing to impress upon this court self-described "dead-bang winner" arguments, and this court's inability to understand the law as appellant does. We are not persuaded. Simply put, appellant may not now use a

Civ.R. 60(B) motion to vacate his judgment of conviction and sentencing as a substitute for a timely appeal attacking the merits of the judgment or as a device to extend the time for perfecting an appeal. *State ex rel. Durkin v. Ungaro*, 39 Ohio St.3d 191, 192, 529 N.E.2d 1268 (1988); *Doe v. Trumbull Cnty. Children Services Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus. This court has already affirmed, on appellant's direct appeal, the merits of the trial court's judgment of conviction and sentence. Nor do we find that appellant's motion demonstrates his entitlement for relief as required by Civ.R. 60(B)(2) or Civ.R. 60(B)(5), assuming, for sake of argument, the motion was properly filed in this matter. *State v. Swiger*, 125 Ohio App.3d 456, 460–61, 708 N.E.2d 1033 (9th Dist.1998).

Appellant's Civ.R. 60(B) motion is hereby denied.

Second, appellant applies for en banc consideration to reverse this court's July 14, 2023 decision pursuant to App.R. 26(A)(2). Appellant's en banc application reiterates his ineffective-assistance-of-appellate-counsel argument for failing to impress upon this court his self-described "dead-bang winner" arguments. However, appellant fails to identify any conflicts in the law within this district to be resolved en banc, which is the purpose an en banc proceeding. *State v. Forrest*, 136 Ohio St.3d 134, 2013-Ohio-2409, 991 N.E.2d 1124, ¶ 7. "If there is no conflict, then the en banc court has no need to consider the application." *Id.* at ¶ 15.

Appellant's application for en banc consideration is found not well-taken and is hereby denied.

Third, appellant seeks reversal of this court's decision pursuant to App.R. 26(B), which governs applications to reopen the appeal, and specifically not App.R. 26(A)(1), which governs applications to reconsider. App.R. 26(B)(1) provides, "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."

We review appellant's App.R. 26(B) application to reopen employing a two-prong analysis. *State v. Leyh*, 166 Ohio St.3d 365, 2022-Ohio-292, 185 N.E.3d 1075, ¶ 17, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant must prove both prongs: (1) that his appellate counsel's performance was objectively unreasonable, and (2) that, but for his appellate counsel's unprofessional errors, there is a reasonable probability he would have succeeded in overturning his convictions on appeal. *Id.*, citing *Strickland* at 687, 694. Appellant bears the burden of proof pursuant to App.R. 26(B)(5) that there is a "genuine issue" as to whether there is a "colorable claim" he received ineffective assistance of counsel on appeal. *Id.* at ¶ 21, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998). If appellant fails to meet his burden at the first stage, then we do not proceed to the second stage, involving new appellate briefs and supporting material for the claimed prejudicial errors by prior ineffective appellate counsel. *Id.* at ¶ 22.

Appellant supports his application to reopen by relying on the previously filed "Closing Arguments," which he refers to as "the motion to be heard with [the] record [and] judgment entry." In his filing captioned "Closing Arguments," appellant argues, again, his self-described "dead-bang winner" arguments of constitutional due process violations, as he understands them, but fails to directly argue ineffective assistance of his appellate counsel. Rather, his separate filing entitled, "Sworn Statement" states his appellate counsel was ineffective for omitting three "dead-bang winner" arguments, which mirror the "Closing Arguments" filing. From what we construe from appellant's pro se filings, the three "dead-bang winner" arguments are as follows:

First, appellant argues that because Toledo police detective Fisher did not appear at trial, appellant could not impeach him or the search warrant on which detective Fisher's name appears. However, we find that Toledo police sergeant Myslinksi testified at trial that he took over the investigation from detective Fisher, who was on medical leave, and it was sergeant Myslinksi who sought the search warrant for appellant's personal property while appellant was in police custody. Sergeant Myslinksi was cross-examined by appellant's attorney and was subject to impeachment.

Second, appellant argues juror bias. Appellant argues potential juror No. 2 was friendly with the Toledo police department and detective Fisher. However, we find that juror No. 2 was excused by appellant's attorney for cause and did not participate in the jury deliberations.

Next, appellant argues that one seated juror, Mr. Jackson, knew the trial judge and was not "struck for cause." However, we find that during jury selection, when the trial judge asked the potential jurors if anyone knew any people in the courtroom, including himself, Mr. Jackson replied that he and the judge had worked together previously. The trial judge specifically asked Mr. Jackson, "Does the fact that we worked together on lead issues, will that affect your weighing the evidence impartially and making your own determination? Can you do that?" Mr. Jackson replied, "No. Not at all." We find appellant fails to identify how he did not receive a fair trial because Mr. Jackson was seated as a juror. VIOLATION OF CRIM.R. 24 P9.63 TR.TRAN INQUIRE TO PROSECUTOR + ATTORNY

Third, appellant argues there is no evidence identifying him as the perpetrator of the robbery. Appellant argues the store employee he assaulted, Mr. Lahey, was an unreliable witness because he incorrectly estimated the date of the robbery as being one-year after the closing of a different store location. However, Mr. Lahey testified at trial, was cross-examined by appellant's attorney and was subject to impeachment.

Next, appellant argues the police body-camera video is of a different person, which makes it irrelevant to his conviction. However, we find that Toledo police officer Harrison, whose body-camera video was played for the jury, testified at trial, was cross-examined by appellant's attorney and was subject to impeachment.

Next, appellant claims sergeant Myslinksi and officer Harrison perjured themselves on the witness stand in order to falsely identify him as the perpetrator of the

offense. Again, both witnesses testified at trial and were subject to appellant's cross-examination and impeachment. Appellant further argues that Mr. Lahey could not identify him as the perpetrator because the perpetrator wore a face mask. Again, Mr. Lahey testified at trial and was subject to appellant's cross-examination and impeachment. Appellant further argues he was "set up" by the two witnesses, Ms. Zamora and Ms. Sherman, who testified at trial that they were familiar with him at a different retail store. However, Ms. Zamora and Ms. Sherman each testified at trial, were cross-examined by appellant's attorney and were subject to impeachment. PG. 215 TR-TRAN

Finally, appellant argues the legal elements for a robbery conviction, particularly identifying appellant as the perpetrator and the necessary mens rea, were incorrectly KNOWINGLY + PURPOSELY given to the jury due to "prosecutor misconduct" during the opening and closing statements. However, we find that opening and closing statements are not evidence at trial, and appellant fails to identify any error in the instructions on the law given to the jury by the trial court.

Upon review of appellant's application to reopen appeal, we find the doctrine of res judicata applies and bars the further litigation of issues that were raised or could have been raised on direct appeal. *State v. Dehler*, 73 Ohio St.3d 307, 307-08, 652 N.E.2d 987 (1995). Even if res judicata did not bar this application, we find appellant did not meet his burden of proof pursuant to App.R. 26(B)(5) that there is a "genuine issue" as to

whether there is a "colorable claim" he received ineffective assistance of counsel on appeal.

For the foregoing reasons, appellant's application to reopen appeal is not well-taken, and is hereby denied. App.R. 26(B)(6).

It is so ordered.

Thomas J. Osowik, J. — JUDGE

Gene A. Zmuda, J. — JUDGE

Myron C. Duhart, P.J. — JUDGE
CONCUR

Additional material from this filing is available in the Clerk's Office.