[Cite as *State v. Sloane*, 2010-Ohio-612.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 06 MA 144
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION AND
	)	JUDGMENT ENTRY
	)	
ALFIE T. SLOANE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Application for Reopening

JUDGMENT: Application Denied.

APPEARANCES:

For Plaintiff-Appellee:

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Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: February 18, 2010

WAITE, J.

{¶1} Appellant, Alfie T. Sloane, pro se, filed an application on October 1, 2009 pursuant to App.R. 26(B) to reopen his direct appeal following our March 10, 2009, decision affirming his convictions for rape, attempted rape, complicity to commit rape, and gross sexual imposition in *State v. Sloane*, 7th Dist. No. 06 MA 144, 2009-Ohio-1175.

{¶2} Appellant concedes that the application is untimely under the rule, but argues that he can demonstrate good cause for the delay. App.R. 26(B)(1) reads, in pertinent part, "[a]n application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

{¶3} Appellant attached a number of letters to his application that establish that he requested the trial transcript from his appellate counsel in a letter dated March 10, 2009, but did not receive it until some time after August 17, 2009. Appellate counsel explained in a letter dated March 17, 2009 that he could not send the transcript to Appellant until the appeal, which was pending before the Ohio Supreme Court, was complete. In the letter, appellate counsel did not inform Appellant that he could request the official transcript from this Court.

{¶4} The Supreme Court declined Appellant's request for review on July 1, 2009. *07/01/2009 Case Announcements*, 2009-Ohio-3131. According to a letter dated August 17, 2009, appellate counsel forwarded the transcript to Appellant on that date. Appellant also attached a package room/legal mail form from Lebanon

Correctional Institute indicating that the prison received the package on August 25, 2009.

{¶5} The Eighth District Court of Appeals has adopted a per se rule that applicants may not rely on their inability to acquire trial transcripts from their appellate counsel to establish good cause under App.R. 26(B)(1). *State v. Tomlinson*, 8th Dist. No. 83411, 2005-Ohio-5844, ¶3 ("This court has repeatedly held that difficulty in obtaining the transcript does not constitute good cause.") We have likewise refused applications for reopening on timeliness grounds in a number of cases where appellants relied upon their failed efforts to timely acquire their trial transcript from appellate counsel. *State v. Baker*, 7th Dist. No. 03 CO 24, 2005-Ohio-565; *State v. Thompson*, 7th Dist. No. 97JE40, 2003-Ohio-1607. However, in both of our cases, the applicants engaged in additional delay in filing their applications after receiving the transcripts.

{¶6} For instance, Baker received the trial transcript on March 15, 2003 (three months after this Court filed its opinion affirming Baker's conviction), but did not file his application until August 30, 2004. Baker established that he had retained new appellate counsel who undertook an investigation of his case during the time between March and August. However, we concluded that Baker engaged in undue delay in pursuing his application. Although we chastised Baker for failing to request the official transcript available from the clerks' office for review, we grounded our decision on the additional five month delay occasioned by Baker's retention of new counsel and the investigation of the case that followed. Id. at ¶12.

{¶7} The same is true in *Thompson*, supra. In that case, Thompson requested the trial transcript from the trial court, and was informed by the trial court that this Court had the case file. Although we criticized Thompson's failure to request the trial transcript from our clerks' office, we relied upon Thompson's admission that he decided to seek reopening in April, 2002, but waited ten additional months to file his application, to conclude that he engaged in undue delay. Id. at ¶9.

{¶8} Appellant appears to have received his trial transcript at the end of August and he filed his application on October 1, 2009. Consequently, we allow that Appellant has shown good cause for his delay in filing the application. However, because Appellant essentially presents the same claims argued in the underlying appeal, his application for reopening is denied.

{¶9} Pursuant to App.R. 26(B)(1), a criminal defendant may seek reopening based upon a claim of ineffective assistance of counsel. The defendant must set forth any assignments of error not considered on the merits or considered on an incomplete record due to 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 defendant was deprived of the effective assistance of counsel. App.R. 26(B)(5).

{¶10} The traditional two-pronged analysis for assessing ineffective assistance of counsel is the appropriate standard to assess whether an applicant has raised a genuine issue as to the ineffectiveness of appellate counsel. See *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Thus, the applicant

must prove that his counsel was deficient for failing to raise the issues that he now presents and that there was a reasonable probability of success had counsel presented those claims on appeal. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶5.

{¶11} Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, 687 N.E.2d 1358. The defendant must produce evidence that counsel acted unreasonably by substantially violating essential duties owed to the client. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674, 693 N.E.2d 267. Because attorneys are presumed competent, reviewing courts strongly assume that counsel's performance falls within a wide range of reasonable legal assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965.

{¶12} Upon demonstrating counsel's deficient performance, the applicant then has the burden to establish prejudice to the defense as a result of counsel's deficiency. *Reynolds* at 674. The reviewing court must look at the totality of the evidence and decide if there exists a reasonable probability that, were it not for serious errors made, the outcome of the trial would have been different. *Strickland* at 695-696. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

{¶13} It should be noted that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. *Tenace* at ¶7, citing *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 761 N.E.2d 18. "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* (1983), 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987.

{¶14} Turning to the facts in this case, Appellant argued in his original appeal that he was deprived of his constitutional and statutory rights to a speedy trial. He challenged the trial court's decision to permit the state to prosecute him by way of a superseding indictment that included new charges based upon the same facts and evidence giving rise to the original charges.

{¶15} The original indictment, which essentially tracked the language of the rape and gross sexual imposition statutes, omitted the language, "not the spouse of the offender," from those counts of the indictment. Unaware of the defect in the indictment, Appellant waived his speedy trial rights. When the state discovered the defect, Appellant was indicted a second time, in order to include the required language in the superseding indictment. Appellant argued that the original indictment was void, and, therefore, his speedy trial waiver could not be applied to the superseding indictment. He further argued that the charges in the superseding indictment were separate and distinct from the charges in the original indictment.

{¶16} In addressing the speedy trial claim, we charted the development of the law involving the amendment of charges against a criminal defendant. Based on the Ohio Supreme Court's most recent interpretation of Crim.R. 7(D), we concluded that

Ohio courts had abandoned the notion of void indictments in favor of a notice and prejudice test.

{¶17} In this case, Appellant knew from the date of the original indictment that he was being charged with rape and gross sexual imposition, and that the element of those charges that was omitted, that is, that he was not the spouse of the victims, did not change the name or the identity of the crime charged. Furthermore, we found that Appellant had not been misled or prejudiced by the defect for which the amendment was made, because he was aware from the outset of the case that he was being charged with rape and gross sexual imposition. As such, we concluded that his waiver of his speedy trial rights, given prior to the amendment of the charges against him, applied with equal force to the superseding indictment.

{¶18} Rather than raise any new assignments of error in an effort to demonstrate that his appellate counsel provided ineffective assistance, Appellant merely refashions or again simply raises his appellate counsel's argument. In his first proposed assignment of error, Appellant contends that he was denied equal protection of laws when his trial counsel instructed him to sign the speedy trial waiver. In his third proposed assignment of error, Appellant argues that his original indictment was void for lack of subject matter jurisdiction.

{¶19} Appellant misunderstands that the state could amend the charges against him at any time pursuant to Crim.R. 7(D), as long as the amendment did not change the name or identity of the crime charged, or the omission did not mislead or prejudice him. *State v. O'Brien* (1987), 30 Ohio St.3d 122, 127-128, 508 N.E.2d 144.

{¶20} Furthermore, despite the fact that Appellant contends that he believed that he was being charged with importuning, not rape, based upon the language of the first indictment, the record belies his claim. In fact, Appellant entered a guilty plea on several of the rape charges prior to the issuance of the superseding indictment, but later withdrew his plea. Appellant cannot contend that he was unaware that he was being charged with rape when he pleaded guilty to several of the rape charges prior to the issuance of the superseding indictment.

{¶21} In his second proposed assignment of error, Appellant contends that his due process rights were violated when he was not brought to trial within the 270-day limit provided by R.C. 2945.71. Appellant relies on a passage in our Opinion where he contends that we wrote that four trial continuances were granted by the trial court without explanation. However, Appellant misreads our Opinion.

{¶22} We noted that the trial was continued three times, twice based on joint requests of the parties and once on a motion filed by Appellant. We then stated that, on April 5, 2006, the trial court granted Appellant's motion to discharge the jury and rescheduled the trial for June 12, 2006. We wrote that the trial court memorialized the foregoing events (the discharge and new trial date) in a judgment entry and specifically referred to the record in the judgment entry. We then explained that, because Appellant did not include a copy of the transcript of the proceedings, the reason for the fourth continuance was not made a part of the record on appeal. We further explained that absent a transcript, we must presume regularity in the proceedings in the trial court. *Knapp v. Edwards Laboratory* (1980), 61 Ohio St.2d

197, 400 N.E.2d 384. Contrary to Appellant's argument, we did not find that four continuances were granted without explanation.

{¶23} In Appellant's fourth proposed assignment of error he asserts cumulative error. However, where no errors exist, harmless or otherwise, the cumulative error doctrine is not applicable. *State v. Cornwell*, 7th Dist. No. 00-CA217, 2002-Ohio-5177, ¶88, citing *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623.

{¶24} Because Appellant has reasserted claims made by his appellate counsel in the underlying appeal and raised claims that would not have been meritorious had they been raised in his original appeal, Appellant has failed to establish that his appellate counsel was ineffective. Accordingly, Appellant's application to reopen his appeal is denied.

Waite, J., concurs.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.