[Cite as *State v. Dumas*, 2016-Ohio-4799.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 12 MA 0031
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION AND
	)	JUDGMENT ENTRY
	)	
NATHANIEL DUMAS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Appellant's Application for Reopening Case No. 11 CR 429

JUDGMENT: Overruled.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
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. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 29, 2016

[Cite as *State v. Dumas*, 2016-Ohio-4799.]
WAITE, J.

{¶1} Appellant Nathaniel Dumas has filed an Application for Reopening his appeal pursuant to App.R. 26(B). A criminal defendant may apply for reopening of the appeal from the judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). The application for reopening cannot merely allege that appellate counsel rendered ineffective assistance for failing to brief certain issues. Rather, the application must demonstrate that 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).

{¶2} The test for ineffective assistance of appellate counsel has two parts: establishing that the counsel's performance was deficient, and that this resulted in prejudice. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); App.R. 26(B)(9). Appellant must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness and, but for this substandard representation, the outcome of the case would have been different. *Strickland* at 687. Establishing ineffective assistance of appellate counsel means that the applicant must prove that counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10-11.

{¶3} Appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. *Tenace* at ¶ 7, citing *Jones v. Barnes*, 463 U.S.

745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Counsel is expected to focus on the stronger arguments and leave out the weaker ones, as this strategy is generally accepted as the most effective means of presenting a case on appeal. *State v. Adams*, 7th Dist. No. 08MA246, 2012-Ohio-2719, ¶ 8-12.

{¶4} The application for reopening pursuant to App.R. 26(B) must contain: "One 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); *State v. Ludt*, 7th Dist. No. 07 MA 107, 2009-Ohio-2214. Appellant alleges that appellate counsel failed to raise eight issues, and also alleges cumulative error resulting from the ineffective assistance.

{¶5} In our Opinion in this matter we affirmed Appellant's conviction on counts of felony murder (with an accompanying firearm specification) and aggravated robbery (also with an accompanying firearm specification). Appellant's counsel raised three assignments of error in the direct appeal, and Appellant raised additional assignments of error *pro se*.

{¶6} Appellant's first three assignments of error allege that appellate counsel should have argued that the trial court erred by failing to sua sponte hold the prosecutor and defense counsel in direct contempt of court for failure to abide by various court orders. Appellant does not allege how he was prejudiced by counsel's failure to raise these issues on appeal. Since a trial court's decision to hold a person in contempt is only reviewed for abuse of discretion, however, it is highly unlikely that

such an argument would be successful on appeal. *State v. Kilbane*, 61 Ohio St.2d 201, 204, 400 N.E.2d 386 (1980).

{¶7} Appellant next argues that appellate counsel should have argued that the trial court abused its discretion by forcing Appellant to go to trial without *Brady* materials. Under *Brady v. Maryland*, the United States Supreme Court determined that the prosecution must provide a defendant with any evidence that is material to guilt or punishment, and held that withholding such evidence can result in a due process violation. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L .Ed.2d 215 (1963). A *Brady* violation may occur when the evidence that was not disclosed "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 24, quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995). In order to establish a *Brady* violation, appellant must demonstrate three elements: (1) the state failed to disclose evidence upon request; (2) the evidence was favorable to the defense; and (3) the evidence was material. *See Moore v. Illinois*, 408 U.S. 786, 794, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972). Appellant refers to his failure to receive a bill of particulars, but this does not amount to a *Brady* violation since a bill of particulars is not, in and of itself, evidence. *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). He also states that he did not receive a "notice of intent to use evidence," but that notice was given on December 7, 2011. He finally mentions "due process materials" with no other

details. Appellant has fallen woefully short of the standard required and his arguments fail.

{¶8} Appellant's fifth argument is that appellate counsel should have raised an error related to Appellant's conflicts with his trial counsel, his lack of choice of trial counsel, and the fact that he was given only 24 hours to seek new retained counsel as a possible replacement for his appointed counsel. The facts surrounding Appellant's request for new counsel were reviewed in the direct appeal. It is clear from the record that Appellant did not ask to represent himself, and he indicated to the trial judge that it would not take very long to find new counsel, which resulted in the 24-hour continuance. We also note that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Since there is little if any support for this alleged error in the record, there is no error in appellate counsel's choice not to raise this as an issue.

{¶9} Appellant's sixth argument is that appellate counsel should have raised an issue of a conflict of interest, but it is not clear from the single sentence in Appellant's brief devoted to this issue what Appellant alleges as error or its resulting prejudice.

{¶10} Appellant's seventh argument is that appellate counsel should have raised ineffectiveness of trial counsel regarding the investigation into the identity of certain witnesses who might be able to testify as to whether Appellant was at the crime scene. Appellant cannot explain how further investigation would have led to a

different result at trial since the evidence on which Appellant seeks to rely on is not in the record. Since appellate counsel could not rely on evidence found outside of the record in order to establish error on direct appeal, there is also no error in appellate counsel's failure to raise this issue. *State v. Wolff*, 7th Dist. No. 07 MA 166, 2009-Ohio-7085. In addition, appellate counsel raised the issue of Appellant's presence at the crime scene as an error on appeal. Appellant merely disagrees with counsel's tactics in presenting this argument. Debatable trial tactics (or in this case, debatable tactics in presenting an appeal) rarely form the basis for a finding of ineffective assistance, and counsel's strategic choices among a range of plausible options are "virtually unchallengeable" on appeal. *State v. Leonard*, 104 Ohio St.3d 54, 82, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 149.

{¶11} Appellant's eighth argument is that the trial court abused its discretion in allowing the prosecutor to approach witnesses. Appellant does not describe this as an error involving ineffective assistance of counsel, nor does he allege this prejudiced his appeal. In fact, there is no indication what forms the legal basis for this argument.

{¶12} Appellant's ninth and final error is that there was cumulative error in appellate counsel's failure to raise errors one through eight. Because there was no error in appellate counsel's representation, there is no reason to examine the record for cumulative error. "[W]here no errors exist, harmless or otherwise, the cumulative error doctrine is not applicable." *State v. Sloane*, 7th Dist. No. 06 MA 144, 2010-Ohio-612, ¶ 23.

{¶13} Having determined that there is no basis for Appellant's claim of ineffective assistance of appellate counsel, the application for reopening pursuant to App.R. 26(B) is hereby overruled.

Waite, J., concurs.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.