

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-548
	:	(C.P.C. No. 09CR-12-7672)
Jamal H. West,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 12, 2013

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

Shaw & Miller, and *Mark J. Miller*, for appellant.

ON APPLICATION FOR REOPENING

CONNOR, J.

{¶ 1} Defendant-appellant, Jamal H. West ("appellant"), filed an application pursuant to App.R. 26(B) seeking to reopen his appeal resolved in this court's decision in *State v. West*, 10th Dist. No. 11AP-548, 2012-Ohio-2078, claiming ineffective assistance of appellate counsel. Plaintiff-appellee, the State of Ohio ("State"), filed a memorandum in opposition to appellant's application. Because appellant's application was filed untimely without good cause, and because he failed to demonstrate a genuine issue that he was deprived of effective assistance of counsel, we deny his application to reopen.

{¶ 2} On May 9, 2011, appellant entered a plea of guilty to one count of aggravated burglary, one count of aggravated robbery with a firearm specification, and one count of rape. Several days later, appellant filed a motion to withdraw his guilty plea

pursuant to Crim.R. 32.1. On May 25, 2011, the day appellant was scheduled for sentencing, the trial court conducted an oral hearing to address the motion to withdraw guilty plea. Following the hearing, the trial court overruled appellant's motion to withdraw his guilty plea and held a sentencing hearing.

{¶ 3} At the sentencing hearing, appellant's trial counsel informed the court that the three offenses were not allied offenses of similar import. The trial court specifically found the offenses were committed with a separate animus as to each count, and based upon the facts presented, the offenses were not allied offenses of similar import. The trial court sentenced appellant to ten years as to each of the three counts and ordered the counts to run consecutively to one another. The trial court also imposed a three-year sentence for the firearm specification. Appellant received a total sentence of 33 years. A sentencing entry journalizing his convictions was filed on May 27, 2011.

{¶ 4} Appellant, through counsel, filed a timely direct appeal in which he asserted a single assignment of error, claiming the trial court erred in refusing to allow him to withdraw his guilty plea. Appellant argued that the trial court failed to properly comply with Crim.R. 11, his plea was not knowingly, intelligently, and voluntarily entered, and he did not understand all of the DNA evidence involved in his case. We rejected appellant's claim on direct appeal and affirmed the trial court's denial of the motion to withdraw his guilty plea. *See West*. An entry journalizing the appellate judgment was filed on May 10, 2012.

{¶ 5} App.R. 26(B) allows applications to reopen an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1) provides that an application for reopening shall be filed within 90 days from the journalization of the appellate judgment. Additionally, App.R. 26(B)(2)(b) requires a showing of good cause for an untimely filing where the application is filed more than 90 days after the journalization of the appellate judgment.

{¶ 6} Appellant's application to reopen was filed on November 16, 2012. The 90-day deadline established under App.R. 26(B)(1) expired on or about August 8, 2012. Thus, appellant's application is untimely, in that the instant application was filed more than six months after the journalization of the appellate judgment in this action. In order to pursue his application, appellant must demonstrate good cause as to why he was

unable to make a timely filing. For the reasons that follow, we find appellant has failed to demonstrate good cause as to why he was unable to make a timely filing.

{¶ 7} In this case, appellant claims: (1) he is not familiar with the legal system, (2) he did not know there was a 90-day deadline for filing an application to reopen, and (3) upon discovering the deadline had expired (approximately one month after the deadline had passed), he took steps to file his application, which included contacting an attorney and authorizing the release of his files from his trial and appellate counsel.

{¶ 8} Although appellant claims he was ignorant of the law and that, upon learning of the expired deadline, he immediately sought counsel to assist him in filing an application, appellant offers no reasonable explanation to justify his delay in filing a timely appeal in this court. "Lack of effort or imagination, and ignorance of the law * * * do not automatically establish good cause for failure to seek timely relief." *State v. Reddick*, 72 Ohio St.3d 88, 91 (1995) (affirming denial of application to reopen appeal). Appellant cannot rely upon his alleged lack of legal training to excuse his failure to comply with the 90-day deadline. *State v. Farrow*, 115 Ohio St.3d 205, 206, 2007-Ohio-4792, ¶ 6. The 90-day requirement is " 'applicable to all appellants.' " *Id.*, quoting *State v. Winstead*, 74 Ohio St.3d 277, 278 (1996). "Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved." *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, ¶ 7.

{¶ 9} Appellant has failed to offer a sound reason as to why he (unlike other criminal defendants) could not comply with this fundamental element of the rule. In fact, the record demonstrates that appellant had previously been actively involved in his case and had sought and received the assistance of family and other outside sources to help him with the legal process. Appellant has also failed to explain how he eventually learned of the 90-day deadline or what steps he took between May 10 and mid-September 2012 towards reviewing or appealing his case.

{¶ 10} Even if we were to find that appellant's untimely application was filed with good cause, in briefly addressing the merits, we find appellant's application fails on the merits as well.

{¶ 11} An application for reopening 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). The application must also contain a sworn statement setting forth the basis of the claim alleging that appellate counsel's representation was deficient and the manner in which the deficiency prejudiced the outcome of the appeal. App.R. 26(B)(2)(d). The application "shall be granted 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).

{¶ 12} To prevail on an application to reopen, appellant must make "a colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 2, citing *State v. Sanders*, 75 Ohio St.3d 607 (1996). Under *Strickland*, appellant must demonstrate the following: (1) counsel was deficient in failing to raise the issues appellant now presents; and (2) appellant had a reasonable probability of success if the issue had been presented on appeal. *Lee* at ¶ 2, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

{¶ 13} In his application, appellant sets forth the following two arguments in support of his claim that appellate counsel was ineffective on direct appeal: (1) appellate counsel should have argued that trial counsel was ineffective for failing to argue at sentencing that the convictions should have merged, and (2) appellate counsel should have argued it was plain error for the trial court to fail to merge the offenses at issue.

{¶ 14} Appellant cites to Ohio's multiple counts statute, R.C. 2941.25, and claims the trial court was required to merge the aggravated burglary and aggravated robbery offenses. Appellant also cites to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, and argues trial counsel erred by only looking at the *types of offenses*, rather than the *conduct underlying the offenses*, as required by *Johnson*, in order to determine whether the aggravated burglary and aggravated robbery offenses were committed with the same animus. Appellant argues there was only one animus and one purpose for these crimes: to enter into a home and to steal items from inside the home.

{¶ 15} The State, on the other hand, argues that the offenses are not subject to merger because appellant invited any error that occurred and because the offenses were committed against different victims and with a separate animus.

{¶ 16} R.C. 2941.25 reads in relevant part as follows:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 17} In *Johnson*, the Supreme Court of Ohio overruled the abstract analysis it had previously established in *State v. Rance*, 85 Ohio St.3d 632 (1999), for determining whether two offenses constitute allied offenses of similar import and are subject to merger under R.C. 2941.25. Although there was no majority opinion established in *Johnson*, the plurality as well as the concurring justices stressed the importance of considering the conduct of the accused in the analysis. *See Johnson* at the syllabus, with which all justices concurred ("When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered. (*State v. Rance*, * * * overruled.)").

{¶ 18} The *Johnson* plurality opinion set forth a two-part test for determining whether or not offenses are allied and therefore required to be merged. The first question is whether it is possible to commit one offense and commit the other offense with the same conduct. *Id.* at ¶ 48. If so, then the offenses are of similar import. If the offenses can be committed by the same conduct, the test requires the court to "determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50.

{¶ 19} Recently, in *State v. Williams*, ___ Ohio St.3d ___, 2012-Ohio-5699, the Supreme Court of Ohio sought to further clarify *Johnson*. In discussing its decision in

Johnson, the court stated: "this court held that in making an allied-offenses determination, a court should not employ an abstract analysis, but instead should consider the statutory elements of each offense in the context of the defendant's conduct." *Williams* at ¶ 20.

{¶ 20} Pursuant to R.C. 2911.11, the aggravated burglary statute reads as follows:

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

- (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
- (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶ 21} R.C. 2911.01(A)(1), the provision of the aggravated robbery statute applicable here, states that "[n]o person, in attempting or committing a theft offense, * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

{¶ 22} The statutory elements of aggravated burglary and aggravated robbery as set forth in the indictment are different. For example, while aggravated robbery requires the commission (or the attempt) of a theft offense or fleeing immediately thereafter, aggravated burglary requires a trespass in an occupied structure with purpose to commit *any* criminal offense. There are similarities in that both offenses can be committed by having a deadly weapon under one's control. However, prior to *Johnson*, the Supreme Court consistently held the offenses of aggravated burglary and aggravated robbery were not allied offenses of similar import. See *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283; *State v. Williams*, 74 Ohio St.3d 569, 580; and *State v. Barnes*, 25 Ohio St.3d 203, 207 (1986).

{¶ 23} Even if we did find that the offenses are allied offenses of similar import, we still must consider the elements in the context of the appellant's conduct in this case. Here, appellant's conduct produced offenses which were committed separately or with a separate animus as to each and, therefore, they are not subject to merger pursuant to R.C. 2941.25. *See Johnson* at ¶ 51 ("if the court determines that * * * the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.")

{¶ 24} The aggravated burglary offense at issue was alleged in the indictment as against Seth Jackson ("Jackson") *and/or* A.L. and involved a trespass inside a residence on Reinhard Avenue. Once inside the residence, appellant and a co-defendant encountered Jackson and a struggle ensued over a hammer. A co-defendant put a knife to Jackson's throat while appellant put a gun to Jackson's head before tying him up and taking him to the bedroom where A.L. was sleeping. At this point, the elements of aggravated burglary had been met, as no theft element was required here (only a criminal offense).

{¶ 25} The robbery offense was alleged in the indictment only as against A.L. and appears to have involved the appellant's conduct in threatening A.L. with a handgun while ransacking her purse, finding \$228 inside the purse, and demanding additional money. A co-defendant also threatened A.L. with a knife. The men threatened to shoot both victims. A co-defendant also tied A.L.'s hands behind her back and bound her ankles. A.L. was raped and forced to perform fellatio. Upon eventually fleeing the residence, appellant and his co-defendant left in A.L.'s vehicle.

{¶ 26} Appellant also argues the infliction of harm (or the attempt therein) upon the victim was only committed in order to facilitate and further the robbery, and therefore the aggravated burglary and aggravated robbery offenses were committed with the same conduct and must be merged. Appellant further argues "there was only one animus in this case and only one purpose for these crime, i.e. enter a home and steal items from inside." (Appellant's brief, 9-10.) Yet, the rape against A.L., to which appellant also pled guilty, demonstrates otherwise.

{¶ 27} We find the offenses at issue involved different victims and were committed with a separate animus. As a result, we find appellant has not made "a colorable claim"

demonstrating that counsel was ineffective in failing to raise a merger argument. Accordingly, we also deny appellant's application for reopening on the merits.

{¶ 28} In conclusion, because appellant's application was filed untimely without good cause, and because he failed to demonstrate a genuine issue that he was deprived of the effective assistance of counsel, we deny appellant's application for reopening.

Application for reopening denied.

SADLER and DORRIAN, JJ., concur.
