[Cite as *State v. Williams*, 2021-Ohio-718.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff- Appellee,

v.

RUBIN L. WILLIAMS,

Defendant- Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0010

Motion to Reopen

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Denied.

Atty. Vito Abruzzino, Prosecutor, *Atty. John E. Gamble*, Chief Assistant Prosecutor, *Atty. Tammie Riley Jones,* Assistant Prosecutor, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Rubin Williams, pro se, A704-728, Belmont Correctional Institution, 68518 Bannock Road, St. Clairsville, Ohio 43950-9736 for Defendant- Appellant.

Dated: February 5, 2021

PER CURIAM.

{¶1} Defendant-Appellant Rubin L. Williams has filed an application to reopen his direct criminal appeal under App.R. 26(B). For the following reasons, the application for reopening is denied.

{¶2} Appellant was convicted of involuntary manslaughter and drug trafficking in the Columbiana County Common Pleas Court. The evidence showed Appellant supplied the victim with fentanyl instead of heroin. On appeal, he set forth arguments on the sufficiency of the evidence and the manifest weight of the evidence, focusing on the element of causation due to the mix of drugs in the victim's system.

{¶3} On August 21, 2020, we affirmed his convictions, concluding the state sufficiently showed and the jury properly found Appellant's drug trafficking was both the actual cause and the legal cause of the victim's overdose death. *State v. Williams*, 7th Dist. Columbiana No. 19 CO 0010, 2020-Ohio-4430.[1] We thereafter denied Appellant's motion to certify a conflict. *Williams*, 7th Dist. No. 19 CO 0010, 2020-Ohio-5045.

{¶4} On November 16, 2020, Appellant filed his timely application for reopening. A criminal defendant may apply for reopening of his direct appeal based on a claim of ineffective assistance of appellate counsel by raising an assignment of error (or an argument in support of an assignment of error) that previously was not considered on the merits (or that was considered on an incomplete record) because of appellate counsel's deficient representation. App.R. 26(B)(1), (B)(2)(c). To warrant reopening, the application to reopen must demonstrate 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).

{¶5} This reopening inquiry utilizes the standard two-part test for ineffective assistance of counsel which requires a showing of both deficient performance and resulting prejudice. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5, applying *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the performance was not deficient, then there is no need to review for

[1] The Ohio Supreme Court thereafter issued a decision interpreting cases on causation in the same manner as this court. *See State v. Price*, __ Ohio St.3d __, 2020-Ohio-4926, __ N.E.3d __.

prejudice and vice versa. *See also State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶6} In evaluating the deficiency prong of the test, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *State* v. *Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2D 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689. A court should not second-guess the strategic decisions of counsel. *State v*. *Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶7} On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Id*. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶8} In applying the test to a reopening request, we emphasize that appellate counsel has wide discretion to choose the errors to be assigned on appeal and to focus on the arguments perceived as the strongest. *See Tenace*, 109 Ohio St.3d 451 at ¶ 7, 9. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal" to avoid diluting the force of stronger arguments. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). We are guided by these principles in determining whether there "is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal" under App.R. 26(B)(5).

{¶9} However, the genuine issue must first be supported in the manner required by the rule. Pursuant to App.R. 26(B)(2)(d), an application shall contain a sworn statement. The sworn statement must address the alleged deficiency and the manner in which the deficiency prejudicially affected the appeal. App.R. 26(B)(2)(d). *See also State v. Henderson*, 7th Dist. Mahoning No. 16 MA 0057, 2019-Ohio-1760, ¶ 18 (if a sworn

statement only addresses one issue, then it fails to raise a genuine issue of ineffective appellate counsel on other issues raised in the application).

{¶10} "[T]he sworn statement required by App.R. 26(B)(2)(d) is mandatory." *State v. Lechner*, 72 Ohio St.3d 374, 375, 650 N.E.2d 449 (1995). Accordingly, "[a]n applicant's failure to submit a sworn statement as required by App.R. 26(B)(2)(d) is sufficient reason to deny an application to reopen an appeal." *State v. McKinnon*, 7th Dist. Columbiana No. 16 CO 0011, 2018-Ohio-1818, ¶ 5, quoting *State v. Davis*, 7th Dist. Mahoning No. 05 MA 3, 2007-Ohio-7213, ¶ 9.

{¶11} Appellant has failed to submit a sworn statement. Consequently, his application for reopening fails on this basis.

{¶12} Moreover, his discussion of the three proposed assignments of error does not demonstrate the existence of a genuine issue as to appellate counsel's ineffectiveness. All three proposed assignments allege appellate counsel was ineffective for failing to raise ineffective assistance of counsel as to his trial attorney. Appellant was represented by a different attorney on appeal than at trial.

{¶13} Appellant's first proposed assignment of error claims: "Appellate counsel was ineffective for Failing to Raise the Issue that Trial counsel was ineffective for failing to Challeng[e] there were no African-Americans or other minority groups represented in the Jury pool or on the panel of jurors in violation of his Sixth and Fourteenth Amendment Rights." Appellant raises his right to have a jury drawn from a fair cross-section of the community as encompassed in the Sixth Amendment's jury trial right. *See Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Appellant recognizes that in order to demonstrate a violation of the right to a fair cross-section:

> a defendant must prove: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the representation is due to systematic exclusion of the group in the jury-selection process.

State v. Fulton, 57 Ohio St.3d 120, 566 N.E.2d 1195 (1991), paragraph two of the syllabus, citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

{¶14} Appellant says he is an African-American who was convicted by an all-white jury. To show the jury pool and the final jury panel contained no minorities, Appellant points to a statement made by his trial attorney during voir dire stating, Appellant was "the only person of color in this room. That has to make him feel quite nervous." (Tr. 75). Appellant claims he asked his trial attorney to ask for a new jury pool or a change of venue due to the composition of the panel, but his attorney refused to do so; he also says his appellate attorney refused to raise the issue after his request to do so. Appellant suggests the disclosure of prior community connections between jurors may assist in establishing the second and third elements of the fair cross-section test. He also says African-Americans constitute 2.2% of the "jury-eligible population" in Columbiana County. He then provides statistics on other minorities as well (stating the percentages are based on the entire population of the county).

{¶15} It has been observed that the second element requires a showing with regards to the minority group's representation in venires in general in relation to their number in the community, not just the group's representation on the particular venire and panel in the defendant's specific case. *State v. Jones*, 91 Ohio St.3d 335, 340, 744 N.E.2d 1163 (2001). Moreover, the third element of systematic exclusion requires more than underrepresentation of the defendant's particular venire and jury; it requires evidence on the drawing of the pool and an explanation on why the method is suspect. *Id.* There was no such evidence on these elements.

{¶16} Furthermore, a direct appeal of a criminal conviction cannot rely on facts outside of the record to prove facts or to show a deficiency in representation or a resulting prejudicial impact. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001) (if a claim of ineffective assistance of counsel requires proof from outside of the record, then such claim is not appropriately considered on direct appeal). The appellate court is limited to what transpired as reflected by the record on direct appeal. *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978)

{¶17} Appellant's second proposed assignment of error states: "Appellate counsel was ineffective for Failing to Raise the Issue that Trial counsel was ineffective for failing to raise that his indictment was constructively amended in violation of his Fifth, Sixth, and Fourteenth Amendment Rights." Appellant asserts an indictment is unconstitutionally and constructively amended if the trial evidence essentially altered the

indictment by broadening the possible grounds for conviction beyond the grounds set forth in the indictment, citing *United States v. Miller*, 471 U.S. 130, 138, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985).

{¶18} Appellant was indicted for involuntary manslaughter in violation of R.C. 2903.04(A) for causing the death of Jennifer Bettis as a proximate result of committing or attempting to commit a felony (drug trafficking). Appellant was also indicted for knowingly selling or offering to sell a controlled substance, specified as fentanyl, a Schedule II controlled substance, in violation of R.C. 2925.03(A)(1).

{¶19} Appellant states that he was not charged with causing the victim's death by a mixed drug overdose, resorting to his argument that the actual cause of the victim's death was not fentanyl but was a mixed drug overdose. However, we explained our position on causation in our opinion issued in Appellant's direct appeal (and in the opinion denying Appellant's motion to certify a conflict). We concluded fentanyl was an independent cause of the victim's death and was also the but-for cause under the standard test. *Williams*, 7th Dist. Columbiana No. 19 CO 0010, 2020-Ohio-4430, ¶ 42-43 (then finding it was the legal cause as well).

{¶20} Finally, Appellant's third proposed assignment of error contends: "Appellate counsel was ineffective for Failing to Raise the Issue that Trial counsel was ineffective for failing to raise Prosecutorial misconduct for using misleading Evidence [in] violation of [the] Fifth, Sixth, and Fourteenth amendments." He suggests the prosecutor engaged in misconduct by relying on misleading evidence presented by the coroner. He also says this court relied on the misleading evidence in finding sufficient evidence as to causation.

{¶21} Appellant claims it is a well-known scientific fact that 9 nanograms of fentanyl on a toxicology report would be considered toxic but not fatal. He also claims the victim's fentanyl level artificially increased after her death, contrary to the coroner's testimony indicating the victim's level was likely higher before it was converted into norfentanyl (which is metabolized by the liver instantaneously and not measured by the test).

{¶22} In support, Appellant cites from a recitation of testimony in a Tenth District medical malpractice case and other cases. However, the recitation of a witness's opinion

in setting forth the facts of a case was not a legal holding.[2] And again, evidence outside the record cannot be used in a direct appeal (or the reopening of a direct appeal). *See Hartman*, 93 Ohio St.3d at 299. Moreover, there is no indication any alleged error in the coroner's testimony was a result of prosecutorial misconduct. Had the matter been raised to the trial court, there is not a reasonable probability the trial court would have taken judicial notice of the scientific opinions herein alleged by Appellant.

{¶23} Appellant does not argue counsel was ineffective in failing to call an expert to interpret the toxicology results. In any event, this would be considered tactical. *See State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 97 (decision to refrain from seeking a defense expert can be tactical as there may be a concern an additional expert might further incriminate the defendant). *See also State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993).

{¶24} Regardless, as set forth supra, Appellant failed to submit a sworn statement. This sworn statement is a mandatory aspect of an application to reopen as stated in App.R. 26(B)(2)(d). *Lechner*, 72 Ohio St.3d at 375. The lack of a sworn statement in support of an application to reopen is a sufficient basis to deny the application. *McKinnon*, 7th Dist. No. 16 CO 0011 at ¶ 5. Accordingly, the application to reopen is denied.

JUDGE CAROL ANN ROBB

JUDGE CHERYL L. WAITE

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[2] While citing to a paragraph containing a witness's testimony that 10-15 nanograms is considered a toxic to fatal level, Appellant ignores the paragraph in that case which sets forth other testimony that fentanyl overdoses have occurred at levels as low as 3 nanograms; he also cites testimony on the risks of testing heart blood, while recognizing the blood here was taken from a subclavian artery. *See Wildenthaler v. Galion Community Hosp.*, 2019-Ohio-4951, 137 N.E.3d 161 (10th Dist.).