

SUPREME COURT OF OHIO

State v. Hill

90 Ohio St. 3d 571 (Ohio 2001) · Decided January 17, 2001

SUMMARY

The Supreme Court of Ohio affirmed the denial of Genesis Hill’s application to reopen his criminal appeal under Ohio Appellate Rule 26(B). The court held that Hill failed to establish a genuine issue regarding ineffective assistance of appellate counsel under the Strickland standard, noting that counsel had raised numerous assignments of error, could not rely on facts outside the record, and was not required to raise waived or legally unsupported claims.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Per Curiam; Moyer, C.J.; Douglas, J.; Resnick, J.; F.E. Sweeney, J.; Pfeifer, J.; Cook, J.; Lundberg Stratton, J.
JURISDICTION	Ohio
DECIDED	January 17, 2001
DISPOSITION	affirmed
PROCEDURAL POSTURE	Hill appealed as of right from the denial by the Ohio Court of Appeals of his application to reopen his criminal appeal under Ohio Appellate Rule 26(B), based on alleged ineffective assistance of appellate counsel.
STANDARD OF REVIEW	The court applied the two-pronged Strickland v. Washington standard to determine whether Hill raised a genuine issue regarding ineffective assistance of appellate counsel sufficient to justify reopening under App.R. 26(B).
PRECEDENTIAL VALUE	Published Ohio Supreme Court opinion; precedential.
PARTIES	Genesis Hill v. State of Ohio

TOPICS

- ineffective assistance
- post-conviction relief
- appellate procedure
- criminal procedure
- state post-conviction relief

PRACTICE AREAS

criminal procedure

appellate procedure

post-conviction relief

ineffective assistance

QUESTIONS PRESENTED

1. What standard governs whether an applicant has established a genuine issue of ineffective assistance of appellate counsel under Ohio Appellate Rule 26(B)?
2. Whether Hill demonstrated deficient performance and a reasonable probability of success on appeal sufficient to justify reopening his appeal.
3. Whether appellate counsel was ineffective for failing to raise additional assignments of error, including claims based on matters outside the trial record, waived issues, and issues lacking sufficient merit.

HOLDINGS

1. The two-pronged analysis from *Strickland v. Washington* is the appropriate standard for determining whether an applicant has raised a genuine issue concerning the ineffectiveness of appellate counsel in an App.R. 26(B) reopening application.
2. Hill failed to establish a genuine issue that appellate counsel rendered ineffective assistance, and therefore he was not entitled to reopen his appeal under App.R. 26(B).

KEY QUOTATIONS

“The two-pronged analysis found in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess whether Hill has raised a “genuine issue,” as to the ineffectiveness of appellate counsel, in his request to reopen under App.R. 26(B)(5).” (90 Ohio St. 3d at 571)

“Accordingly, the judgment of the court of appeals is affirmed.” (90 Ohio St. 3d at 572)

FACTUAL BACKGROUND

Hill was convicted of aggravated burglary, kidnapping, and the aggravated murder of his six-month-old daughter and was sentenced to death, with additional prison sentences for kidnapping and aggravated burglary. His appellate counsel raised twenty-nine assignments of error in the initial appeal. In seeking reopening, Hill asserted that appellate counsel should have raised additional issues, some of which depended on evidence outside the trial record, involved matters waived at trial, or were precluded by settled law.

PROCEDURAL HISTORY

Hill was convicted of aggravated burglary, kidnapping, and aggravated murder and received a death sentence, and his convictions and sentence were affirmed on direct appeal. His petition for post-conviction relief was denied, and the denial was affirmed. Hill later filed an App.R. 26(B) application alleging ineffective assistance of appellate counsel; the court of appeals denied reopening because the application was untimely and Hill failed to show good cause. The Supreme Court of Ohio affirmed, but for reasons different from those relied on by the court of appeals.

DISPOSITION

affirmed

CASES CITED

- State v. Hill, 75 Ohio St. 3d 195, 661 N.E.2d 1068 (1996)
- State v. Spivey, 84 Ohio St. 3d 24, 25, 701 N.E.2d 696, 697 (1998)
- State v. Reed, 74 Ohio St. 3d 534, 535, 660 N.E.2d 456, 458 (1996)
- Walker v. Gibson, 228 F.3d 1217, 1237 (C.A.10 2000)
- United States v. Cook, 45 F.3d 388, 395 (C.A.10 1995)
- Boyd v. Ward, 179 F.3d 904, 914 (C.A.10 1999)
- State v. Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373, paragraph three of the syllabus (1989)
- State v. Campbell, 69 Ohio St. 3d 38, 53, 630 N.E.2d 339, 353 (1994)
- Jones v. Barnes, 463 U.S. 745, 753, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987, 994 (1983)
- State v. Ishmail, 54 Ohio St. 2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus (1978)
- State v. Coleman, 85 Ohio St. 3d 129, 133, 707 N.E.2d 476, 483 (1999)
- Cunningham v. Henderson, 725 F.2d 32, 36 (C.A.2 1984)
- State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992)
- Hill v. Mitchell, 30 F. Supp. 2d 997 (S.D. Ohio 1998)

OPINION

PER CURIAM.

Per Curiam. Appellant, Genesis Hill, was convicted of aggravated burglary and the kidnapping and aggravated murder of his six-month-old daughter, Domika Dudley, and sentenced to death. He was also sentenced to prison for *572kidnapping and aggravated burglary.

The court of appeals affirmed the convictions and sentence. State v. Hill (Dec. 21, 1994), Hamilton App. Nos. C-910916 and C-940487, unreported, 1994 WL 721580. On direct appeal as of right, we also affirmed. State v. Hill (1996), 75 Ohio St.3d 195, 661 N.E.2d 1068, certiorari denied, Hill v. Ohio (1996), 519 U.S. 895, 117 S.Ct. 241, 136 L.Ed.2d 170. Subsequently, the trial court denied Hill's petition for post-conviction relief, and the court of appeals affirmed that denial of relief.

State v. Hill (Nov. 21, 1997), Hamilton App. No. C-961052, unreported, 1997 WL 727587, and we declined to accept Hill's appeal. State v. Hill (1998), 81 Ohio St.3d 1468, 690 N.E.2d 1288. On April 1, 1998, we revoked a stay of execution previously granted. State v. Hill (1998), 81 Ohio St.3d 1498, 691 N.E.2d 1059. Hill also filed a petition for habeas corpus in the United States District Court, which is pending.

See *Hill v. Mitchell* (S.D.Ohio 1998), 30 F.Supp.2d 997. On October 1, 1999, Hill filed an application for reopening with the court of appeals pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, alleging ineffective assistance of appellate counsel before that court.

The court of appeals found that Hill had “failed to show good cause for filing his application more than ninety days after this Court’s judgment was journalized, as required by App.R. 26(B)(2)(b).” *State v. Hill* (June 8, 2000), Hamilton App. No. C-910916, unreported. Hence, that court denied Hill’s application to reopen his appeal.

The cause is now before this court upon an appeal as of right. We affirm the judgment of the court of appeals, albeit for different reasons. The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess whether Hill has raised a “genuine issue,” as to the ineffectiveness of appellate counsel, in his request to reopen under App.R.

26(B)(5). *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696, 697; *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458. See, also, *Walker v. Gibson* (C.A.10, 2000), 228 F.3d 1217, 1237; *United States v. Cook* (C.A.10, 1995), 45 F.3d 388, 395; *Boyd v. Ward* (C.A.10, 1999), 179 F.3d 904, 914.

To show ineffective assistance, Hill must prove that his counsel were 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. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

Moreover, to justify reopening his appeal, Hill “bears the burden of establishing that there was a ‘genuine issue’ as to whether he has a ‘colorable claim’ of ineffective assistance of counsel on appeal.” *State v. Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d at 697.

We find that Hill has failed to do so. Michael K. Allen, Hamilton County Prosecuting Attorney, and Ronald W. Springman, Jr., Assistant Prosecuting Attorney, for appellee. David H. Bodiker, Ohio. Public Defender, and Angela Miller, Assistant Public Defender, for appellant.

In his initial appeal to the court of appeals, Hill’s allegedly ineffective appellate counsel raised twenty-nine assignments of error on appeal. “Counsel could have reasonably decided they could not add * * * more issues without ‘burying good arguments * * * in a verbal mound made up of strong and weak contentions.’ ” *State v. Campbell* (1994), 69 Ohio St.3d 38, 53, 630 N.E.2d 339, 353, quoting *Jones v. Barnes* (1983), 463 U.S. 745, 753, 103 S.Ct.

3308, 3313, 77 L.Ed.2d 987, 994. Hill also relies in part upon evidence outside the trial record to support his claim of ineffective appellate assistance. Yet appellate counsel cannot properly refer to

facts outside the record. “A reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.” *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus.

Accord *State v. Coleman* (1999), 85 Ohio St.3d 129, 133, 707 N.E.2d 476, 483. Finally, many issues on Hill’s list were waived at trial, and some were precluded by settled law. Other issues “may have had arguable merit, but are ‘sufficiently problematical that the refusal to raise them cannot be assailed as an unreasonable professional judgment.’ ” *State v. Campbell*, 69 Ohio St.3d at 53, 630 N.E.2d at 353, quoting *Cunningham v. Henderson* (C.A.2, 1984), 725 F.2d 32, 36.

Accordingly, the judgment of the court of appeals is affirmed. Judgment affirmed. Moyer, C.J., Douglas, Resnick, F.E. Sweeney, Pfeifer, Cook and Lundberg Stratton, JJ., concur.