

IN THE SUPREME COURT OF OHIO

STATE of Ohio : Case No.: 2004-0586
Plaintiff-Appellee
-v- : A CAPITAL CASE ON DIRECT
John DRUMMOND : APPEAL FROM THE MAHONING
 : COUNTY COURT OF COMMON
 : PLEAS, CASE NO.: 03 CR 358
Defendant-Appellant :

MEMORANDUM IN OPPOSITION TO JOHN DRUMMOND'S APPLICATION TO
REOPEN

DAVID H. BODIKER (16590)
OHIO PUBLIC DEFENDER

RUTH L. TKACZ (0061500)
ASSISTANT PUBLIC DEFENDER
Office of the Ohio Public Defender
8 E. Long St., 11th Fl.
Columbus, OH 43215
PH: (614) 466-5394
FX: (614) 644-0703

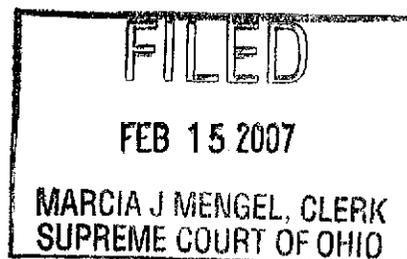
(COUNSEL OF RECORD)

COUNSEL FOR JOHN DRUMMOND

PAUL J. GAINS (0020323)
MAHONING COUNTY PROSECUTOR

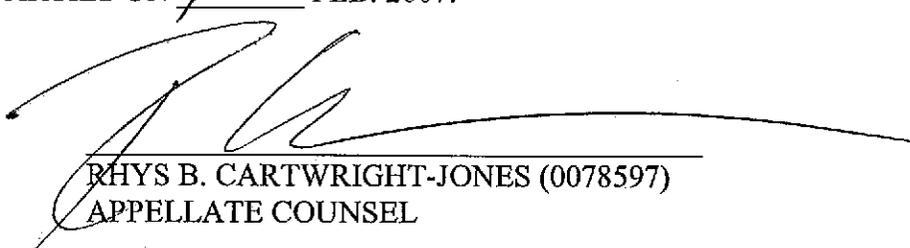
RHYS B. CARTWRIGHT-JONES (0078597)
APPELLATE COUNSEL
21 W. Boardman St., 6th Fl.
Youngstown, OH 44503-1426
PH: (330) 740-2330
FX: (330) 740-2008
rjones@mahoningcountyoh.gov

(COUNSEL OF RECORD)



CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF THIS FILING WAS SERVED BY REGULAR MAIL
UPON THE ABOVE-CAPTIONED PARTIES ON 12 FEB. 2007.



RHYS B. CARTWRIGHT-JONES (0078597)
APPELLATE COUNSEL

STATEMENT OF THE FACTS

The State now responds to Drummond's application to reopen with this memorandum of law, pursuant to Oh. Sup. Ct. Prac.R. XI, sec. 6 (C).

Drummond was a member of a street gang: the Lincoln Knolls Crips, [Tr. 2949, 3080, 3135]. Drummond carried out a gang-motivated attack on the residents of 74 Rutledge Ave. Trial testimony established that Drummond fired on the house with an assault rifle. Drummond's attack killed a baby—Jiyen Dent, Jr. A bullet fragment and a piece of the baby's toy plastic swing pierced his skull and tore into his brain, killing him instantly. [Tr. 3402-3406].

On the evening of March 24, 2003—the evening of the murder—Drummond and Wayne Gilliam ("Gilliam") left a party on a nearby street in Gilliam's car. They headed toward Rutledge Ave. Drummond carried an assault rifle. [Tr. 2664-2667, 2900-2901]. Shortly thereafter, witnesses heard a volley of gunshots. [Tr. 2667, 2901, 3267-3268]. Immediately after the gunshots, witnesses saw a car matching Gilliam's driving quickly from Rutledge Ave. with the lights off. [Tr. 3265-3270].

Beginning on the night of the baby's murder and for the next few days, the Youngstown Police Department and the Ohio Bureau of Identification and Investigation searched the area for evidence. [Tr. 2736-2746, 2757-2787, 2797-2848]. They recovered ten (10) shell casings from assault rifle rounds (specifically 7.62 x 39mm rounds) in the grass at the scene of the crime. [Tr. 2809, 2914]. On the northeast corner of the intersection of Rutledge Ave. and Duncan St. lay six (6) nine millimeter shell casings. [Tr. 2812-2814]. Officer Marzullo and BCI agents determined that five (5) of the nine millimeter shots hit 76 Rutledge Ave. [Tr. 2782-2784, 2813-2818]. The sixth nine millimeter round went through the east wall of 74 Rutledge Ave., and investigators found it intact in the pantry wall. [Tr. 2914-2915].

After interviewing Gilliam, the Youngstown Police arrested Drummond and executed a valid search warrant on his residence. [Tr. 3304, 3308-3309]. Among the items they recovered were seventy-five (75) live 7.62 x 39mm rounds and a gang book. [Tr. 3132-3142]. While awaiting trial in the Mahoning County Justice Center, Drummond discussed his case with fellow inmate, Chauncey Walker (“Walker”). [Tr. 3187-3190]. He told Walker that didn’t mean to kill the baby, but he wanted to kill someone in the house. [Tr. 3187-3190]. Nate Morris (“Morris”), another jail inmate, overheard the conversations. [Tr. 2997-2998, 3005-3006].

STATEMENT OF THE CASE

Based on the facts above, on April 3, 2003, the Mahoning County Grand Jury indicted Drummond for aggravated murder with capital specifications. Drummond’s trial began on January 12, 2004. Gang members were present. And during the proceedings, several of the jurors and witnesses reported feeling intimidated by the spectators. [Tr. 2968]. After considering contempt on one individual, the court recognized a widespread problem, and ordered closure of a narrow portion of the proceedings so that the next two witnesses could testify without fear or intimidation. [Tr. 2967-2968]. This was the full extent of the closure, and public proceedings re-opened thereafter. After all evidence was in, the jury returned guilty verdicts on all counts and specifications. [Tr. 3698-3711].

The penalty phase began on February 19, 2004. [Tr. 3723]. On February 20, 2004, the jury returned a verdict recommending that Drummond be put to death for the aggravated murder of Jiyen Dent, Jr. [Tr. 3940-3941]. After a review of the jury decision and the evidence presented, the trial court followed the recommendation of the jury and imposed the death sentence upon Drummond for the aggravated murder of Jiyen Dent, Jr. [Tr. 3950].

Drummond's immediate appeal to this Court followed. This Court requested additional briefing relative to public trial, and the parties responded. This Court overruled all Drummond's assignments of error and denied his request for relief. Contemporaneously, Drummond filed his post conviction petition, which the trial court summarily denied. Drummond appealed, the Seventh District overruled his assignments of error, denying his request for relief. An appeal from those proceedings to this Court is pending. The application at bar is for reopening pursuant to Murnahan. The State prays this Court deny the same where Drummond had effective appellate counsel.

LAW AND DISCUSSION

Under *State v. Murnahan* (1992), 63 Ohio St.3d 60 and Oh. Sup. Ct. Prac.R. XI, sec. 6, a capital defendant may petition this Court to reopen his appeal under a claim of ineffective appellate counsel. But reopening is not available as a matter of right, and to secure a reopened appeal a defendant must establish the two points of the Strickland ineffective assistance test, *infra*. Where Appellant-Drummond's proposed propositions of law establish neither point, the State prays this Court deny his application to reopen.

According to the Court, the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Lockhart v. Fretwell* (1993), 506 U.S. 364, 368, citing *Strickland v. Washington* (1984), 466 U.S. 668; *Nix v. Whiteside* (1986), 475 U.S. 157, 175, citing U.S. Const. Amend. VI; U.S. Const. Amend. XIV noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"; *United States v. Cronin* (1984), 466 U.S. 648, 653, stating "[w]ithout counsel, the right to a trial itself would be of little avail" internal quotation marks and footnote omitted; *United States v. Morrison* (1981),

449 U.S. 361, 364, stating, the right to counsel “is meant to assure fairness in the adversary criminal process.” Thus, according to the Court, “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.” *Id.*, quotations omitted, citing *Cronic*, 466 U.S. at 658.

And, according to the Court, “[t]he test formulated in *Strickland* for determining whether counsel has rendered constitutionally ineffective assistance reflects this concern.” The Court recognized that “[i]n *Strickland*, [it] identified the two components to any ineffective-assistance claim: (1) deficient performance and (2) prejudice.” *Id.* Thereby, under the *Strickland* test, “a criminal defendant alleging prejudice must show that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*, quotations omitted, citing *Strickland*, 466 U.S. at 687; *Kimmelman v. Morrison* (1986), 477 U.S. 365, noting that “[t]he essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect”; *Whiteside*, 475 U.S. at 175. Thereby, “analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.” *Id.* According to the Court, “[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel’s error may grant the defendant a windfall to which the law does not entitle him.” *Id.*, citing *Cronic*, 466 U.S. at 658.

In support of his application to reopen, Drummond presents four proposed arguments, which, the defense submits, would have secured relief had prior appellate counsel raised them.

None of the foregoing gives Drummond a toe-hold for Murnahan relief, and the State prays this Court deny the same.

Relative to its first proposed proposition of law, the defense basically argues that trial counsel for Drummond was unprepared and spent insufficient time on the matter, which resulted in a series of alleged errors. But the issue of time in preparation involves evidence de hors the record and is better suited for discussion on posture of post conviction, which is pending on a jurisdictional memorandum before this court. Moreover, the defense does not articulate clearly how Drummond's case would have turned for the better but for counsel's tactics. Further, there is no clear and convincing showing of fundamental unfairness. Nevertheless, given the foregoing, nothing in the defense's first proposed proposition of law is tantamount to ineffective assistance as to failure to raise, and the State prays this Court deny Drummond's request for Murnahan relief.

Relative to its second proposed proposition, the defense basically argues that defense counsel was defective in failing to object to several instances of, inter alia, prosecutorial or judicial misconduct. Nevertheless, the defense does not demonstrate convincingly, if at all, how this would have impacted Drummonds appeal for the better. Further, there is no clear and convincing showing of fundamental unfairness. As above, the State prays this Court deny Drummond's request for Murnahan relief.

Relative to its third proposed proposition, again the defense basically argues that defense counsel was defective in failing to object to several instances of, inter alia, prosecutorial misconduct. Nevertheless, as before, the defense does not demonstrate convincingly, if at all, how this would have impacted Drummonds appeal for the better. Further, there is no clear and

convincing showing of fundamental unfairness. As above, the State prays this Court deny Drummond's request for Murnahan relief.

Finally, relative to its fourth proposed proposition, the defense alleges cumulative error. But as before, the defense does not demonstrate convincingly, if at all, how this would have impacted Drummonds appeal for the better. Further, there is no clear and convincing showing of fundamental unfairness. And as above, the State prays this Court deny Drummond's request for Murnahan relief.

CONCLUSION

Simply stated, despite the foregoing claims, Drummond's proceedings at trial and on appeal have been thorough and fair, and nothing would have changed the outcome.

WHEREFORE, for all of the foregoing reasons, the State asks this Court to overrule Drummond's application for reopening and to deny his request for relief.

Submitted Respectfully,



RHYS B. CARTWRIGHT-JONES (0078597)
APPELLATE COUNSEL
Office of the Mahoning County Prosecutor
21 W. Boardman St., 6th Fl.
Youngstown, OH 44503-1426
PH: (330) 740-2330
FX: (330) 740-2008
rjones@mahoningcountyoh.gov

COUNSEL FOR THE STATE OF OHIO