

No. _____

In the

07-0325

Supreme Court of Ohio

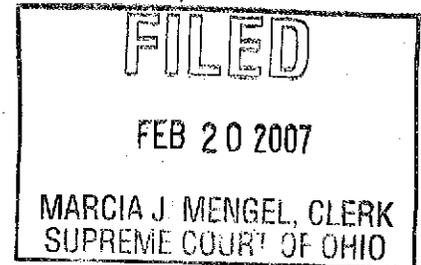
THE STATE OF OHIO,

Plaintiff-Appellee

vs.

ANDRE DAVIS,

Defendant-Appellant



Appeal from the Court of Appeals, Hamilton County, First Appellate District,
Case No. C 040665

MEMORANDUM IN SUPPORT OF JURISDICTION FOR APPELLANT,
ANDRE DAVIS

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**EXPLANATION OF THE REASONS WHY THIS CASE
IS ONE OF PUBLIC OR GREAT GENERAL INTEREST,
RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND WHY THE COURT SHOULD REVIEW THIS FELONY APPEAL**

The constitutional rights of which Appellant was deprived by the courts of Hamilton County are his right to the effective assistance of counsel (for trial and appeal), secured to him by the Sixth Amendment, and to the due process of law, under the Due Process Clause of the Fourteenth Amendment, both to the U.S. Constitution.

Appellant was convicted after a trial rife with egregious prosecutorial misconduct committed by a master of that craft; no objection was lodged during trial, raising the issues of prosecutorial misconduct, and the ineffective assistance of trial counsel for failing to object, move for mistrial, or otherwise bring the misconduct to the trial court's attention. However, those issues were not raised on Appellant's appeal. After the conviction was affirmed, Appellant hired present counsel, and timely filed an appeal to this Court (No. 06-1487) and an Application to Reopen Appeal under App. R. 26(B). Both filings claimed ineffective assistance of appellate and trial counsel, and also a due process denial by virtue of the prosecutorial misconduct. This Court refused to hear the direct appeal, and the Court of Appeals denied the 26 (B) application because Appellant's issues were held to be res judicata since Appellant could have raised them in an appeal to this Court.

Of course, the Court of Appeals is simply flat-out wrong with respect to its holding that this court's refusal to accept jurisdiction constitutes res judicata. The refusal by this Court to hear a discretionary appeal means nothing other than the Court found the issues did

not constitute issues of public or great general interest, nor presented a substantial constitutional issue. By promulgating App. R. 26(B), the Court solved a procedural dilemma which had vexed the criminal justice system for years: which court should address in the first instance claims of ineffective assistance of counsel on appeal, and by what vehicle should an aggrieved appellant present his claims to the courts.

Unfortunately, this Court did not delete, amend or otherwise alter its decision in *State v. Murnahan*, interpreted by some to require raising ineffective assistance of appellate counsel at the very first opportunity. After the initial appeal to the Court of Appeals is over, the next opportunity is in an appeal to this Court, even though App.R. 26(B) provides a different mechanism, an application to reopen appeal in the Court of Appeals.

The Court of Appeals is also wrong when it asserts that Appellant was barred from res judicata from consideration of his 26(B) application. Appellant filed that application, and the appeal to this Court, both within the time provided by law, and raised the issues in question here in both proceedings. Thus, the issue of his deprivation of effective appellate counsel was pending in two separate courts at the same time.

Another issue involved here is that the Court of Appeals held that, since appellate counsel are not expected to raise ineffective assistance of trial counsel, where the appellate counsel also was trial counsel, then the appellate court is powerless to do anything. The appellant might as well go pound salt. The old axiom that where the law provides a right, it furnishes a remedy, is no longer true, at least not in the First Appellate District.

The Districts are divided as to whether a ruling by this Court not on the merits, dismissing an appeal without full plenary consideration, is sufficiently on the merits to support a conclusion that that dismissal, and all of the issues in the appeal, or which ought to be in the appeal, are res judicata, beyond the reach of the courts to remedy. The Eighth District has held similarly to the court below, *State v. Keith*, Eighth District # 83686, 2004-Ohio-5731. The Sixth District and the Twelfth Districts do not consider the refusal to review a discretionary appeal by this Court to have any binding or final effect so as to bar other proceedings, *State v. Comer*, 6th Dist. L-99-1296; 99 Ohio St. 3d 463, 2003-Ohio-4165, 793 N.E.2d 473; *State v. Prom*, 12th Dist. CA 2002-01-008, 2003-Ohio-6543, at ¶ 30

Under this interpretation of the law by the First District, the possibility that an unsuccessful appellant can appeal to the Supreme Court of Ohio renders all issues of ineffectiveness of appellate counsel under the Sixth Amendment res judicata, and thus ineligible for review by the court of appeals under an Application to Reopen brought pursuant to App. R. 26(B). In the First District (And the Eighth District, which has similarly held), App. R. 26(B) functionally no longer exists.

The Court is respectfully urged to accept this case for review, to enforce its own Rules, and thus to reassert its supremacy and provide justice to Appellant and those similarly situated.

STATEMENT OF THE CASE AND FACTS

Andre Davis, Appellant, was convicted of voluntary manslaughter with a firearm specification, and his conviction was affirmed on appeal, in which he was represented by one of the lawyers who had represented him at his trial. *State v. Davis*, 1st Dist. C 040665, 2006-Ohio-3171. Davis then hired his present appellate counsel, who prepared and filed a direct appeal to this Court, Case No. 06-1487, and also an Application to Reopen Appeal under App. R. 26(B). For a period of time, both actions were simultaneously pending.

In both proceedings, Davis, pursuant to language from *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204, raised three issues which had not been raised in the direct appeal in the Court of Appeals by his counsel, who was also one of his trial counsel. The issues involved egregious prosecutorial misconduct at trial, the ineffective assistance of trial counsel, who did not object to the misconduct and ineffective assistance of appellate counsel, who did not raise in Appellant's direct appeal the issue of either the prosecutorial misconduct or the issue of the ineffectiveness of trial counsel for failing to object to the prosecutorial misconduct. Appellant did raise those issues in his appeal to this Court from the affirmance by the Court of Appeals on direct appeal, and also in his Application to Reopen the direct appeal, pursuant to App. 26(B).

On October 18, 2006, this Court refused to hear Davis' appeal. His Application to Reopen Appeal remained pending until January 8, 2007, when the Court of Appeals rejected it in a two page entry purporting to give its reasons for its decision. The Court refused to

address the merits of Appellant's 26B claims, stating that all of his issues were res judicata because "[t]he appellant could have raised these matters in his appeal to the Ohio Supreme Court. And he does not now offer any reason why applying the doctrine of res judicata to bar his claims would be unjust."

And, with respect to the claim of ineffective trial and appellate counsel, the Court of Appeals held that, since "the same counsel represented the appellant at trial and in his direct appeal, [appellate] counsel cannot realistically be expected to argue [on appeal] his own incompetence [at trial], [and therefore] this Court cannot say that appellate counsel was deficient in failing to assign as error her own ineffectiveness' at trial." (Entry, p.2), citing *State v. Cole* (1982), 2 Ohio St. 3d 112, 114, 443 N.E.2d 169, fn 1.

Appellant filed an application to reconsider the denial of the 26B application, pointing out, inter alia, that he actually did raise the issues in his appeal to this Court, filed August 7, 2006 (which one supposes the Court of Appeals ought to have known at the time it denied the 26B on res judicata grounds on January 8, 2007). He also pointed out to the Court of Appeals that the decision of the First District meant that Appellant would never get a ruling on the merits of his claims of prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel in *any* Ohio court, and asserting that the handling of the matter by the Court of Appeals worked a denial of Appellant's right to due process of law under the Fourteenth Amendment to the U.S. Constitution, as well as the Sixth Amendment and separate Fourteenth Amendment due process violations set forth in

his original 26B Application to Reopen. The Court of Appeals was unimpressed, and overruled the Application for Reconsideration. This appeal ensued.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1:

AN APPELLATE COURT HAS A DUTY TO DECIDE CASES ON THEIR MERITS, AND MAY NOT AVOID THAT DUTY IN RELIANCE UPON PROCEDURAL NICETIES, ESPECIALLY WHERE THERE ARE NO PROCEDURAL IMPEDIMENTS TO A MERIT DECISION BY THE APPELLATE COURT.

PROPOSITION OF LAW NO. 2:

THE OPPORTUNITY TO FILE A DISCRETIONARY APPEAL IN THE SUPREME COURT OF OHIO DOES NOT CREATE A BAR TO A MERIT RULING ON A TIMELY FILED APPLICATION TO REOPEN APPEAL UNDER APP. R. 26B).

This Court has held on many occasions that appellate courts should not merely get rid of cases on the basis of technicalities not related to the merits. It is "a basic tenet of Ohio jurisprudence that cases should be decided on their merits and not on mere procedural technicalities," *Barksdale v. Van's Auto Sales, Inc.* (1988), 38 Ohio St. 3d 127, 128, 527 N.E.2d 284. See, also *Maritime Mfrs. Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 436 N.E.2d 1034, *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644.

Avoiding a decision on the merits is precisely what the Court of Appeals did in this case. Rather than rule on the merits of the 26B application, the appellate court evaded its responsibility to decide all of those issues by conjuring up an unfounded res judicata argument, holding that since Appellant could have raised the issues in his direct appeal to

this Court, the issues were res judicata to the Court of Appeals justifying its dismissal of the application to reopen on that spurious ground. But, of course, Appellant *did* raise the issues in his direct appeal to this Court, and in the 26(B) Application in the Court of Appeals.

Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant . . . “from raising and litigating in any proceeding, *except an appeal from that judgment*, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, *or on an appeal from that judgment*. *State v. Szefcyk* 77 Ohio St.3d 93, 96. [1996-Ohio-337].” *State v. Spillan*, 10th Dist. 06AP-50, et al., 2006-Ohio-4788, ¶ 9 (Emphasis added).

Appellant’s appellate counsel should have recognized the misconduct and ineffective assistance issues and should have raised them in the Court of Appeals. Appellant here recognized the omission from his appeal of the prosecutor’s misconduct, and his trial and appellate counsel’s ineffectiveness in failing to object at trial and raise the issue on appeal, within time to raise the issues in the two proceedings available to him through Ohio law: a direct appeal to this Court, and an appellate postconviction proceeding [an Application to Reopen Appeal under App. R. 26(B)]. And he did so; in both proceedings, and in timely fashion. He also recognized the fact that one of his trial counsel represented him in his direct appeal in the Court of Appeals, and raised that issue as well in both courts.

The issues cannot be subject to the effect of res judicata because the issues had not been finally determined on their merits, and were still pending in the appellate courts. *State*

v. *Szefcyk, supra*. However, the Court of Appeals ruled that the issues involving misconduct of the prosecutor and his trial counsel were res judicata although when Appellant filed the 26 (B) application, this Court had yet to rule on whether it would hear the case, much less decide its merits.

The purpose of a jurisdictional memorandum in this Court is to present the legal issues in the case to the Court, and to argue that the Court should accept jurisdiction so that it can render a full and fair adjudication of the Appellant's claims. There simply is not enough in a jurisdictional memorandum to permit the Court to fully, fairly, and finally adjudicate the issues raised therein.¹ Consequently, res judicata cannot be applied to bar merit consideration of a 26(B) application without violating the right to due process of law under the Fourteenth Amendment.

Courts which employ res judicata to avoid deciding issues which have not -- and have never -- been fully and fairly determined on their merits deny the litigants due process of law under the Fourteenth Amendment, *South Central Bell Telephone Co. v. Alabama*

¹There are other differences between a 26B application and an appeal to the Supreme Court which contradict the Court of Appeals' assumption that an appeal to the Supreme Court relieves it of the obligation to fully and fairly consider a 26B application even where an appeal has (or could have) been filed from the decision in the Court of Appeals to the Supreme Court. A 26B application is required by the Rule to have appended to it portions of the record, a "sworn statement" of the basis for the claim that appellate counsel's representation was deficient, and other supplemental affidavits, App. R. 26(B)(2). These documents are not only not required, they may not be filed in support of a jurisdictional memorandum in an appeal to the Supreme Court. S.Ct. Prac. R. III (1)(D). None of the trial record is to be sent to the Supreme Court unless and until it assumes jurisdiction and accepts the case for merit review, S.Ct. Prac. R. V (3)(A).

(1999), 526 U.S. 160, 168. And that is what occurred here.

It is respectfully submitted that the opportunity to file a discretionary appeal in the Supreme Court of Ohio does not create a res judicata bar to an application to reopen appeal under App. R. 26(B). And this is because the Supreme Court of Ohio is a court of *discretionary* review. The refusal of the Court to accept a case for review is obviously not, and cannot be, a ruling on the merits. It is only a determination by the Supreme Court that the case presented is not one of public or great general interest. *Kern v. Contract Cartage Co.* (1936), 55 Ohio App. 481, 485, 9 N.E.2d 869. The unsuccessful Appellant has not had the opportunity to brief and argue the unraised issues in his appeal.

Because a timely-filed application pursuant to App. R. 26(B) gives him the right to raise the issues, he has a due process right to do so, pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution, a right denied by the Court of Appeals order overruling his 26(B) application without even considering the merits of the Assignments of Error which he raised therein, *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830.

PROPOSITION OF LAW NO. 3:

WHILE A CRIMINAL TRIAL ATTORNEY REPRESENTING A CLIENT AT TRIAL, AND ON DIRECT APPEAL FROM A CONVICTION, IS NOT EXPECTED TO RAISE ON APPEAL HIS OWN EFFECTIVENESS AT TRIAL, WHERE THERE IS APPARENT IN THE RECORD GROUNDS SUPPORTING AN ARGUABLE CLAIM THAT HE RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, THE COURT OF APPEALS IS OBLIGATED *AT LEAST* TO CONSIDER THE MERITS OF A LATER CLAIM THAT TRIAL COUNSEL'S REPRESENTATION VIOLATED THE CLIENT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, WHERE RAISED UNDER APP. R. 26(B) BY DIFFERENT COUNSEL. *AT MOST*, THE APPELLATE COURT SHOULD REMOVE APPELLATE COUNSEL AND SECURE OTHER COUNSEL FOR THE DEFENDANT-APPELLANT.

It should be noted that this Court has held that "claims of ineffective assistance of appellate counsel should be considered and disposed of in the appellate court where the alleged error occurred. . . ." *Morgan v. Eads*, 104 Ohio St. 3d 142, 2004-Ohio-6110, 818 N.E.2d 1157. The overruling of Appellant's 26(B) application by the Court of Appeals also violated this principle. In fact, the *only* permissible basis of an App. R. 26(B) application *is* the ineffectiveness of appellate counsel in a criminal case before an intermediate appellate court. App.R. 26(B) does not apply to cases in the trial courts; it does not apply to cases in this Court. It applies *ONLY* to cases in the Court of Appeals. Obviously App. R. 26 (B) – and *ONLY* App. R. 26(B) – can be the vehicle for raising and deciding the issues presented by a claim of ineffective assistance of appellate counsel. To the extent that *Murnahan*, and *Cole*, differ from App. R. 26(B), they are bad law and must be modified.

The *Murnahan* decision, which spawned App. R. 26(B), is being misused. *Murnahan* itself limits the filing of an application to reopen an appeal only in situations

where the time for reconsideration and an appeal to the Supreme Court has expired, *Murnahan*, 63 Ohio St. 3d at 66. That is not the case here, and Appellant ought not to be held bound by the dicta in *Murnahan* that he can raise the issues in his appeal to this Court.

App. R. 26(B), however, permits the filing of the application to reopen both before and after the filing of an appeal in the Supreme Court. This means that the issues raised in the 26B application are different than those raised in a jurisdictional memorandum with the Court. See *Eads*, 2004-Ohio-6110, at ¶ 14. And here, it must be noted, Appellant did not sit on his rights, but filed both the Application to Reopen in the Court of Appeals, and his direct appeal to this Court, within the time provided by law.

A defendant cannot in the first instance raise ineffective assistance of appellate counsel in the initial appeal in the court of appeals, because it is the counsel who was allegedly ineffective who is representing the Appellant at that stage of the proceedings. Logic and *State v. Eads, supra*, dictate that the effectiveness of appellate counsel can be determined only after the appeal is over and the court of appeals has rendered its written decision (how else can one argue or demonstrate prejudice without considering the decision of the Court of Appeals before which the case was pending?). The only proceeding available to permit the adjudication of ineffectiveness of appellate counsel is, therefore, App. R. 26(B).

It is axiomatic that where the law provides a right, it will provide a remedy for the breach of that right. Appellant has the right under the Sixth Amendment to the effective

assistance of both trial and appellate counsel. He also has the right to fair and impartial enforcement of the rights granted him under the Due Process Clause of the Fourteenth Amendment. Since the promulgation of App. R. 26(B), the right to effective assistance of appellate counsel is secured to him by that Rule. But, since the law will not presume that appellate counsel will raise his or her own ineffectiveness, the poor defendant is out of luck, according to the decision of the court of appeals.

The law has granted Appellant the right to review by the Court of Appeals of his claims under App. R. 26(B). The Court of Appeals has tossed that remedy aside, treating the appeal to the Supreme Court as apparently providing an alternate remedy. It has been demonstrated previously that a dismissal of a discretionary appeal to the Supreme Court is not a ruling on the merits, *Kern v. Contract Cartage Co.*, *supra*, and hence cannot finally determine whether or not Appellant received effective counsel on his appeal.

As the Court of Appeals indicated, no appellate counsel will allege his or her ineffectiveness, at trial or on appeal. In cases such as this, if appellate counsel is to be subjected to the burden of raising his or her own ineffectiveness, perhaps the only solution would be for the Court of Appeals to appoint counsel for the criminal appellant to examine the record and briefs of the "regular" appellate counsel, and to file a supplemental brief, if necessary, to demonstrate the ineffectiveness of the "regular" appellate counsel to the Court of Appeals. It is obvious that this is an unworkable solution to a problem that would not exist if the appellate courts simply follow the law, realize that the discretionary appeal to the

Supreme Court cannot furnish a proper vehicle for raising res judicata, and just decide the issues raised in a properly-brought Application to Reopen the Appeal, as Appellant has filed here.

There has been considerable prejudice visited upon Appellant Andre Davis here. He was victimized by egregious prosecutorial misconduct, primarily (but not exclusively) in final argument by a prosecutor whose tactics have been frequently criticized by the Court of Appeals, necessitating reversal in some cases. His attorneys ought to have objected; they did not. His appellate counsel ought to have raised the misconduct on his direct appeal; she did not. Appellant followed the law to the letter in filing in a timely manner his direct appeal to this Court and the Application to Reopen Appeal in the Court of Appeals, only to be rebuffed by both courts. Through no fault of his, he is serving a long prison term with his principal claim to a new trial never having been addressed by a Court with the power, and in the case of the Court of Appeals, the duty, to do so.

What the Court of Appeals has done is write App. R. 26(B) completely out of Ohio law, at the whim of any appellate court that chooses to hold that the possibility of raising ineffectiveness of appellate counsel on direct appeal to this Court makes that issue res judicata as to any court lower than the Supreme Court, including the Court of Appeals. It can then ignore the issue of ineffective appellate counsel with impunity, as it has done here. And it thereby denies to the appellant that which he is due under Ohio law - a decision by the Court of Appeals as to whether he has received his Sixth Amendment right to the

effective assistance of counsel. And the elimination of that right by the denial to appellants by courts of remedies -- the 26(B) review -- specifically provided by state law for their benefit.

If this Court will accept this case for review, and rule that App. R. 26(B) provides the *sole* vehicle for raising issues on appeal which were not raised by appellate counsel, and emphasizing that those issues, and the issue of ineffectiveness of appellate counsel, is not made res judicata merely because of the possibility of raising such issues in a direct appeal to this Court, the issue will be resolved.

This Court should accept this case for review. It should hold as follows:

1. That App. R. 26(B) provides the *sole* vehicle for raising issues on appeal which were not raised by appellate counsel.
2. That the fact that an unsuccessful appellant has an option to appeal to this Court does *not* render the issue of ineffectiveness of appellate counsel res judicata.
3. That the issue of ineffectiveness of appellate counsel may be raised on an Application to Reopen under App. R. 26(B).
4. That the issues allegedly omitted from the initial appeal by the initial appellate counsel are not res judicata, and may be raised on an Application to Reopen under App. R. 26(B).

CONCLUSION

For the reasons stated, the Court is respectfully urged to accept this case for review, reverse the decision of the Court of Appeals, and remand it to that Court with instructions to give Appellant's Application to Reopen Appeal full and fair consideration, and a full and fair decision on the merits of his claims.

Respectfully submitted,



H. FRED HOEFLE

1717

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Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served on the 19th day of February, 2007, upon opposing counsel, the office of the Hamilton County Prosecutor, by Regular U.S. Mail - ~~Office Service~~

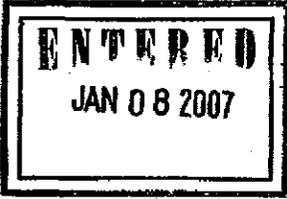


H. FRED HOEFLE

No. 1717

Attorney for Defendant - Appellant

APPENDIX



IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ANDRE DAVIS,

Defendant-Appellant.

APPEAL NO. C-040665

*ENTRY OVERRULING
APPLICATION FOR
REOPENING OF APPEAL.*



D71533688

This case is considered upon the appellant's App.R. 26(B) application to reopen this appeal and upon the state's response.

In his application, the appellant contends that he was denied the effective assistance of appellate counsel, when counsel failed to assign as error various instances of prosecutorial misconduct during closing argument and the trial court's failure to transmit to this court a complete trial record. The appellant could have raised these matters in his appeal to the Ohio Supreme Court. And he does not now offer any reason why applying the doctrine of res judicata to bar his claims would be unjust. The court, therefore, concludes that res judicata bars consideration of these claims upon the appellant's application to reopen his appeal.¹

¹ See *State v. Murnahan* (1992), 63 Ohio St.3d 60, 66, 584 N.E.2d 1204.

OHIO FIRST DISTRICT COURT OF APPEALS

The appellant also contends that he was denied the effective assistance of appellate counsel, when counsel failed to assign as error her own ineffectiveness at trial in failing to object to the alleged prosecutorial misconduct. When, as here, the same counsel represented the appellant at trial and in his direct appeal, "[appellate] counsel cannot realistically be expected to argue [on appeal] his own incompetence [at trial]."² Thus, applying the standards set forth in *Strickland v. Washington*³ and *State v. Bradley*,⁴ the court cannot say that appellate counsel was deficient in failing to assign as error her own ineffectiveness in failing to offer timely objections to the closing comments of the assistant prosecuting attorney.

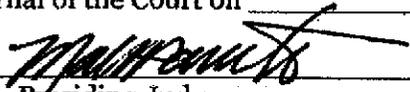
Based upon the foregoing, the court concludes that the appellant has failed to sustain his burden of demonstrating a genuine issue concerning whether he has a colorable claim of ineffective assistance of counsel on appeal.⁵ Accordingly, the court denies his application to reopen this appeal.

To the Clerk:

Enter upon the Journal of the Court on

JAN - 8 2007

per order of the Court


Presiding Judge

(COPIES SENT TO ALL PARTIES.)

² *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169, fn. 1.

³ (1984), 466 U.S. 668, 104 S.Ct. 2052.

⁴ (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

⁵ See *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696; *State v. Reed*, 74 Ohio St.3d 534, 535-536, 1996-Ohio-21, 660 N.E.2d 456.

FILED

OCT 18 2006

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio

Case No. 06-1487

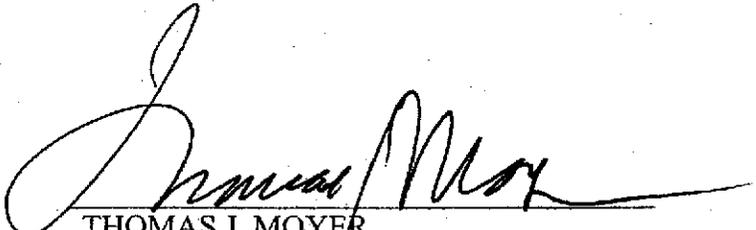
v.

ENTRY

Andre Davis

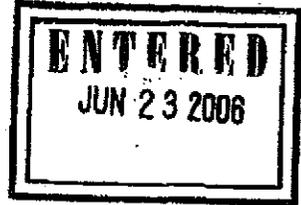
Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C040665)



THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



D68938275

STATE OF OHIO,

APPEAL NO. C-040665
TRIAL NO. B-0400414

Plaintiff-Appellee,

vs.

JUDGMENT ENTRY.

ANDRE DAVIS,

Defendant-Appellant.

This cause having been heard upon the appeal, the record and the briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the trial court is affirmed for the reasons set forth in the Decision filed herein and made a part hereof.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and Orders that costs are taxed in compliance with App. R. 24.

The Court further Orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution pursuant to App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on June 23, 2006 per Order of the Court.

By: Joseph A. Down
Acting Presiding Judge

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-040665
	:	TRIAL NO. B-0400414
Plaintiff-Appellee,	:	
	:	
vs.	:	<i>DECISION.</i>
	:	
ANDRE DAVIS,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 23, 2006

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

White, Getgey & Meyer Co., LPA, and *L. Beth Zahneis*, for Defendant-Appellant.

SUNDERMANN, Judge.

{¶1} Andre Davis appeals his conviction for voluntary manslaughter and for having a weapon under a disability. Because we conclude that Davis's assignments of error do not have merit, we affirm the judgment of the trial court.

Background

{¶2} On November 8, 2003, Davis went to Checquers nightclub in Springdale, Ohio. Edmund Scott was also at the club. That night, Davis and Scott had a confrontation outside the bar. According to witnesses, the two men began to argue. Scott then hit Davis over the head with a gun. Davis pulled a gun from his pocket and fired it twice. Scott was hit with two bullets and later died from his injuries.

{¶3} Davis was indicted for murder in violation of R.C. 2903.02(A), with a gun specification, and for having a weapon under a disability in violation of R.C. 2923.13(A)(3). The case was tried before a jury. At the conclusion of the trial, the jury found Davis not guilty of murder, but guilty of voluntary manslaughter and of having a weapon under a disability.

Expert Witness

{¶4} In his first assignment of error, Davis claims that the trial court erred when it refused to allow police officer Michael Gardner to testify as an expert on his behalf. At trial, Davis testified that there had been an ongoing dispute between a group from Evanston, where Davis lived, and a group from Madisonville, where Scott lived. He testified that he had had a previous encounter with Scott, during which Scott had shot at him while Davis was in his mother's car. According to Davis, he had purchased a gun to protect himself. Davis testified that, on November 8, he had believed that Scott was

going to kill him, and that he had fired his gun as he was running away from Scott. Davis sought to have Gardner bolster his self-defense claim by explaining that Davis had been acting in self-defense, even though Scott had been shot in the back.

{¶5} A witness who is qualified as an expert and whose testimony is based on reliable scientific, technical, or other specialized information may testify as an expert about “matters beyond the knowledge or experience possessed by lay people.”¹ We review a trial court’s decision to exclude evidence under an abuse-of-discretion standard.²

{¶6} Here, the trial court concluded that the decision about whether Davis had acted reasonably was the jury’s. We agree. During his testimony, Davis stated that Scott had had a gun on him, and that Davis had had nowhere to go to escape Scott. The jury was capable of determining whether Davis had acted reasonably without the aid of Gardner’s testimony. While the admission of Gardner’s testimony may not have risen to the level of plain error, as argued by the state, the trial court did not abuse its discretion in refusing to admit the testimony. The first assignment of error is without merit.

Voluntary Manslaughter

{¶7} Davis’s next two assignments of error relate to the voluntary-manslaughter conviction. Davis’s second assignment of error is framed in terms of the trial court’s failure to apply the law of *State v. Perdue*,³ which was decided by the Seventh Appellate District. We recast this assignment to reflect more appropriately the issues raised by Davis, that is, whether the trial court erred when it overruled his Crim.R. 29 motion, and whether the trial court erred when it refused to include a requested jury instruction. The third assignment of error is that the trial court erred when it instructed the jury on the

¹ Evid.R. 702.

² *State v. Withers* (1975), 44 Ohio St.2d 53, 55, 337 N.E.2d 780, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126.

³ 153 Ohio App.3d 213, 2003-Ohio-3481, 792 N.E.2d 747.

unindicted offense of voluntary manslaughter. We consider the assignments of error together.

{¶8} Davis argues that the trial court erred in denying his Crim.R. 29 motion because the state did not present sufficient evidence that he had acted under a sudden passion or a fit of rage. Davis contends that, at best, the evidence showed that he had acted in fear, and that, as the Seventh Appellate District held in *Perdue*, evidence of his fear alone was not sufficient to support a conviction for voluntary manslaughter.⁴

{¶9} Davis's motion was raised prior to the jury instructions. His counsel's arguments were directed to the murder charge. Because the trial court had not yet announced its decision to include voluntary manslaughter in the charge to the jury, the issue was not raised in Davis's Crim.R. 29 motion. The trial court's denial of the motion with respect to the murder charge is moot because the jury found Davis not guilty of that offense.

{¶10} Even if Davis had made a Crim.R. 29 motion with respect to voluntary manslaughter, the motion would have been properly denied by the trial court because the state had presented sufficient evidence to sustain a conviction for voluntary manslaughter.

{¶11} A person who, "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, * * * knowingly cause[s] the death of another * * *" is guilty of voluntary manslaughter.⁵ Witnesses testified that Davis and Scott had had a heated argument before Scott was shot, and that Scott had hit Davis over the head with his gun with enough force to break the

⁴ Id. at 217-218.

⁵ R.C. 2903.03(A).

gun. Scott's action constituted serious provocation that could have reasonably incited Davis into using deadly force.

{¶12} Our conclusion that the state presented sufficient evidence of voluntary manslaughter to survive a Crim.R. 29 challenge leads us to conclude also that the trial court properly instructed the jury on the offense.

{¶13} Davis argues that he could not have been convicted of an offense for which he had not been indicted. But “[p]ursuant to R.C. 2945.74 and Crim.R. 31(C), a jury may consider three groups of lesser offenses on which, when supported by the evidence at trial, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; or (3) lesser included offenses.”⁶ Voluntary manslaughter is an offense of inferior degree to murder.⁷ The court was required to give an instruction on voluntary manslaughter because the state presented sufficient evidence so that the jury could have reasonably acquitted Davis of murder and found him guilty of voluntary manslaughter.⁸

{¶14} Davis next contends that even if the trial court correctly decided to charge the jury on voluntary manslaughter, it improperly refused to include a statement of the law that he had requested.

{¶15} The trial court's voluntary-manslaughter instructions included the following language: “An act committed while under sudden passion or in a sudden fit of rage, brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite a person into using deadly force[,] is an act done in the heat of blood,

⁶ *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph one of the syllabus.

⁷ *State v. Tyler* (1990), 50 Ohio St.3d 24, 36, 553 N.E.2d 576.

⁸ *Deem*, supra, at 211.

without time to reflect or for passions to cool. In determining whether the defendant, Andre Davis, was under the influence of sudden passion or sudden fit of rage, either of which was brought on by serious provocation, you should consider any credible evidence, whether offered by the [s]tate or the defendant.” Davis requested that, at the end of this language, the trial court state that “[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or sudden fit of rage.” The trial court denied his request.

{¶16} We review a trial court’s refusal to include a requested jury instruction under an abuse-of-discretion standard.⁹ A requested jury instruction “need not be given where the general charge includes and covers the correct essential elements of the requested special instruction.”¹⁰ Davis’s counsel wanted it to be clear that the jury could not find him guilty of voluntary manslaughter merely because he had acted out of fear. The trial court’s instruction clearly defined what constituted an act done under sudden passion or fit of rage. Therefore, an additional instruction about fear was unnecessary. We conclude that the trial court did not abuse its discretion in refusing to give the requested instruction.

{¶17} The second assignment of error, as recast, and the third assignment of error are overruled.

Voir Dire

{¶18} In his final assignment of error, Davis asserts that the trial court erred when it allowed the state to use its peremptory challenges to strike three African-American jurors.

⁹ *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443.

¹⁰ *State v. Corkran* (1965), 3 Ohio St.2d 125, 209 N.E.2d 437, paragraph three of the syllabus.

{¶19} The use of peremptory challenges to discriminate based on race is prohibited by the Equal Protection Clause of the Fourteenth Amendment.¹¹ In *State v. White*, the Ohio Supreme Court discussed the three-step procedure for evaluating *Batson* challenges.¹² “First, the opponent of the strike must make a prima facie showing of discrimination. Second, the proponent must give a race-neutral explanation for the challenge. Third, the trial court must determine whether, under all the circumstances, the opponent has proven purposeful racial discrimination.”¹³ “A trial court’s finding of no discriminatory intent will not be reversed on appeal absent a determination that it was clearly erroneous.”¹⁴

{¶20} The state exercised its peremptory challenges to exclude potential jurors Napier, Griggs, and Berry. Upon defense counsel’s prima facie showing of discrimination, the prosecutor stated his reasons for exercising his challenges. With respect to Napier, he stated, “[I] think he and [defense counsel] had a very good rapport. He was vague about a lot of his answers. First he said he worked at UPS, and he had been there a very short time, I think he said a week. And then the more you got into it, he said he’d been going to college, which he never disclosed. And then he said that he quit college because he owed money. It seemed like he was not being forthcoming with his answers.” As to Griggs, the prosecutor sought to dismiss her because she had been to Checquers, which was where the incident had taken place. The prosecutor also cited the rapport that he believed that defense counsel had established with Griggs. Finally, the prosecutor exercised a peremptory

¹¹ *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712.

¹² 85 Ohio St.3d 433, 1999-Ohio-281, 709 N.E.2d 140. See, also, *State v. Jordan*, 1st Dist. No. C-040897, 2006-Ohio-2759.

¹³ *White*, supra, at 436, citing *Batson*, supra, at 96-98, *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769, and *State v. Hernandez* (1992), 63 Ohio St.3d 577, 582, 589 N.E.2d 1310.

¹⁴ *State v. Johnson*, 88 Ohio St.3d 95, 116, 2000-Ohio-276, 723 N.E.2d 1054.

challenge to exclude Berry, stating that she was very young, that he believed she was immature, and that she had a lot of ties to Evanston, where Davis and his friends lived.

{¶21} A prosecutor's reasons for exercising a peremptory challenge "need not rise to the level of justifying exercise of a challenge for cause."¹⁵ Rather, the second step in the *Batson* inquiry merely requires that the explanation be race-neutral. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."¹⁶ None of the explanations given by the prosecutor in this case revealed a discriminatory intent.

{¶22} Upon the prosecutor's race-neutral explanation of his challenges to Napier, Griggs, and Berry, the inquiry moved to the third step—the trial court's determination of whether discriminatory intent had been proved. The burden of proving discriminatory intent fell upon Davis.¹⁷ And the trial court was in the best position to evaluate the exchange between the potential jurors and defense counsel and to determine whether the prosecutor's reasons were plausible or were fabricated to hide discriminatory intent. We conclude that the trial court's determination that there was no discriminatory intent was not clearly erroneous. The fourth assignment of error is overruled.

{¶23} Because Davis's assignments of error do not have merit, we affirm the judgment of the trial court.

Judgment affirmed.

DOAN, P.J., and HENDON, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹⁵ *Batson*, supra, at 97.

¹⁶ *Hernandez v. New York* (1991), 500 U.S. 352, 360, 111 S.Ct. 1859.

¹⁷ *Purkett*, supra, at 768.

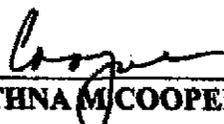
THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 09/24/2004

code: GJEI

judge: 227

Entered	9-24-04
Date:	
Image:	436


Judge: ETHNA M. COOPER

NO: B 0400414

STATE OF OHIO
VS.
ANDRE DAVIS

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

Defendant was present in open Court with Counsel L BETH HARDIN on the 24th day of September 2004 for sentence.

The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:

count 1: VOLUNTARY MANSLAUGHTER, 2903-03/ORCN, F1

count 2: HAVING WEAPONS WHILE UNDER DISABILITY,
2923-13A3/ORCN, F5

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

count 1: CONFINEMENT: 7 Yrs DEPARTMENT OF CORRECTIONS
CONFINEMENT ON SPECIFICATION: 3 Yrs DEPARTMENT OF
CORRECTIONS TO BE SERVED CONSECUTIVELY AND PRIOR TO THE
SENTENCE IMPOSED IN THE UNDERLYING OFFENSE IN COUNT #1.

count 2: CONFINEMENT: 11 Mos DEPARTMENT OF CORRECTIONS

COUNT #2 IS TO BE SERVED CONCURRENTLY WITH THE SENTENCE
IMPOSED IN COUNT #1 AND SPECIFICATION TO COUNT #1.
TOTAL INCARCERATION IS TEN (10) YEARS IN THE DEPARTMENT OF
CORRECTIONS. DEFENDANT GIVEN CREDIT FOR 192 DAYS SERVED
PLUS THE TIME OF CONVEYANCE.

THIS SENTENCE IS TO BE SERVED CONCURRENTLY WITH THE
SENTENCE IMPOSED IN CASE NUMBER B0400770.



THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 09/24/2004

code: GJEI

judge: 227

Entered	9-24-04
Date:	
Image:	437


Judge: ETHNA M COOPER

NO: B 0400414

STATE OF OHIO
VS.
ANDRE DAVIS

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT IS SUBJECT
TO THE POST RELEASE CONTROL SUPERVISION OF R.C. 2967.28.

Parent Case Id: 40624595



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