

IN THE SUPREME COURT OF OHIO

07-0395

STATE OF OHIO, :
Appellee, :
-VS- :
MICHAEL L. CLEAVER, :
Appellant. :

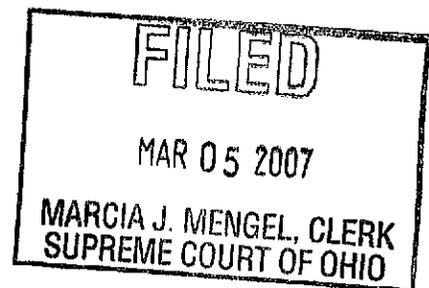
On Appeal from the Montgomery
County Court of Appeals, Second
Appellate District

Court of Appeals
Case No. 21387

NOTICE OF APPEAL OF APPELLANT MICHAEL L. CLEAVER

Michael Cleaver, Inmate #508-808
London Correctional Inst.
P.O. Box 69
London, Ohio 43140
Appellant, Pro Se

Carley Ingram
Assistant Prosecuting Attorney
Montgomery County Prosecuting's Office
301 W. Third St., Suite 500
Dayton, Ohio 45422
Counsel for Appellee



NOTICE OF APPEAL OF APPELLANT MICHAEL L. CLEAVER

Now comes the Appellant, Michael L. Cleaver, who hereby gives notice of appeal to the Supreme Court of Ohio from the decision and entry of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 21387 on February 8, 2007.

This case raises a substantial constitutional question and is one of public or great general interest on appeal.

Respectfully Submitted,


Michael L. Cleaver
Appellant, Pro Se

CERTIFICATE OF SERVICE

I hereby certify a copy of the forgoing Notice of Appeals was sent by ordinary U.S. Mail service, postage prepaid, to Appellee's counsel, Carley Ingram, Assistant Prosecuting Attorney, at 301 W. Third St., Suite 500, Dayton, Ohio 45422 on this 28th day of February 2007.


Michael L. Cleaver

FILED
COURT OF APPEALS
2007 FEB -8 PM 2:19

BAN FOLEY
CLERK OF COURTS
MONTGOMERY CO., OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

:

Plaintiff- Appellee

:

C.A. Case No. 21387

vs.

:

T.C. Case No. 05-CR-2928

MICHAEL L. CLEAVER

:

Defendant-Appellant

:

.....
DECISION AND ENTRY

Rendered on the 8th, day of February, 2007.
.....

PER CURIAM:

Michael Cleaver appeals from the trial court's denial of his application to reopen his appeal pursuant to App.R. 26(B). We affirmed Cleaver's convictions for felonious assault with a firearm specification and having a weapon while under a disability on November 9, 2006.

Cleaver contends his appellate counsel was constitutionally ineffective for failing to argue that the trial court erred in denying his Crim.R. 29 motion, made at the conclusion of the State's case. The State argues that counsel was not ineffective because this court held that Cleaver's convictions were not against the manifest weight

of the evidence, and that finding necessarily includes a finding that the convictions were based on sufficient evidence. We agree. The fact that a judgment is based on sufficient evidence does not preclude this court from finding that a defendant's convictions were against the manifest weight of the evidence. *State v. Thompkins* (1997), 78 Ohio St.3d 380. It is more difficult to prevail upon a Crim.R. 29 motion than a manifest weight assignment in an appeal. There was certainly evidence from which a reasonable juror could conclude that Appellant shot Herman Hicks with a loaded weapon.

Cleaver contends his appellate counsel was ineffective for not arguing that the trial court erred in ruling that Detective Martinez could not testify that Haershel Drussell told her that he had seen the fight and indicated that there was no gun involved in the fight, and that the victim's ear had been bitten off. We agree with the State that Drussell's alleged statement to Detective Martinez was hearsay and was properly ruled inadmissible, therefore appellate counsel was not ineffective in making a contrary argument.

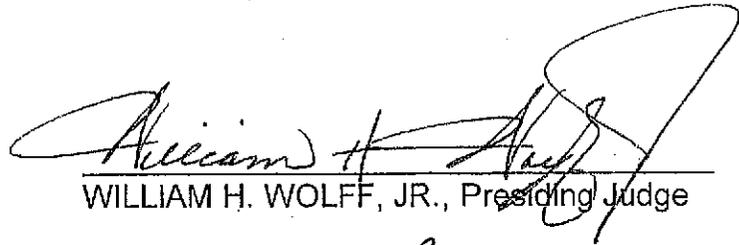
He also contends appellate counsel was ineffective for not arguing that trial counsel was ineffective for not subpoenaing Hearshel Drussell to testify in his defense. In support of this argument, he attached a copy of the police investigation report where Drussell told Officer John Riezel of the Dayton Police Department that he saw the fight and there was no gun involved.

This argument has no merit in a claim of ineffective assistance of appellate counsel because trial counsel may have interviewed Drussell and concluded his testimony was not credible or helpful. However, Cleaver's argument may have merit

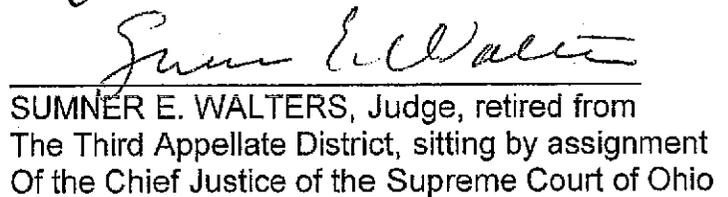
in a post-conviction proceeding where the reason for trial counsel's not calling Drussell as a defense witness could be pursued. See R.E. 2953.21(A)(1).

Cleaver's application for reopening his direct appeal pursuant to App.R. 26(B) is Denied.

SO ORDERED.


WILLIAM H. WOLFF, JR., Presiding Judge


JAMES A. BROGAN, Judge


SUMNER E. WALTERS, Judge, retired from
The Third Appellate District, sitting by assignment
Of the Chief Justice of the Supreme Court of Ohio

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