

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2007-0325
Plaintiff-Appellee : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
ANDRE DAVIS : Court of Appeals
Case Number C040665
Defendant-Appellant :

MEMORANDUM IN RESPONSE

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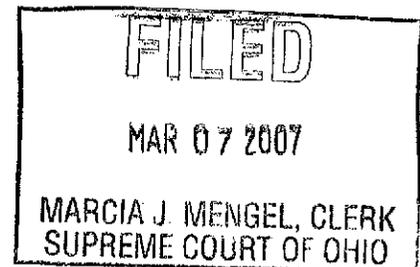


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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Defendant-Appellant Andre Davis argues that the First District Court of Appeals ignored App. R. 26(B) when it denied his application to reopen his direct appeal. But a review of the First District's entry denying the application shows that it was denied in full conformity with App. R. 26(B). The First District properly found that the Davis could have raised his claims of prosecutorial misconduct during his direct appeal. It thus found that his claims were barred under the doctrine of res judicata. But recognizing that this Court has ruled that res judicata should not be applied against a defendant that is asking to have his direct appeal reopened when doing so would be unjust, the First District went on to decide that applying the doctrine would not be unjust in this matter. Indeed, it noted that Davis never even addressed this issue in his arguments.

Under App. R. 26(B) and *State v. Murnahan*, an appellate court must look to see if a defendant has presented any colorable claim of ineffective assistance of appellate counsel. Issues may be barred by res judicata, but must circumvent the doctrine when applying it would be unjust.

The First District followed this law when it considered Davis's application. There is no reason to modify App. R. 26(B) or the law that interprets it. Therefore, this Court should decline jurisdiction over this matter.

STATEMENT OF THE CASE AND FACTS

After a jury trial, Davis was found guilty of involuntary manslaughter, having weapons under disability, and the accompanying gun specifications. The trial court sentence him to seven years for involuntary manslaughter, three years on the gun specifications, and eleven months on the having weapons under disability. The sentence for the gun specification was run consecutive to the other sentences, which were run concurrent to each other, for a total of ten years in the Ohio Department of Corrections.

The facts of the case showed that as Davis was leaving Checquers night club, Edmund Scott approached him and the two began to argue. At some point, Scott struck Davis on the head. It was believed that Scott struck Davis in the head with a gun, though others believed it was just with his fist. After this happened a gun was seen sliding across the ground away from the fight. Davis then pulled his own gun and shot Scott multiple times. While Davis was shooting Scott to death it was possible that others pulled guns and fired shots. Davis was seen walking backwards away from Scott as he repeatedly shot him. Davis fled from the scene of his crime in his car, leaving one of his friends who got was shot during Davis' shooting spree in the parking lot. One of the shots that struck Scott caused severe internal bleeding, which resulted in his death.

While there was some testimony that Davis appeared scared or nervous when he committed his crime, multiple witnesses testified that the shooting sprang forth, not from fear, but from a heated argument. Davis, of course, testified that each of the witnesses that testified to him being anything other than scared had to be mistaken.

Based off of this evidence, a jury rejected Davis' self-defense claim and found him guilty of the involuntary manslaughter.

After being found guilty, Davis appealed his conviction to the First District Court of Appeals. In his direct appeal he argued issues relate to self-defense, jury instructions, and peremptory challenges of jurors. The First District affirmed the matter in its entirety.

Up to this point, Davis had utilized the services of the same retained counsel. Only after he lost his appeal did he seek new counsel.

Davis's new counsel filed a memorandum in support of jurisdiction to this court and an application to reopen his direct appeal with the First District Court of Appeals. This court declined jurisdiction and the First District denied his application. Davis filed a motion to reconsider the denial of his application to reopen, which was also denied. He is now asking this Court to accept jurisdiction over his matter, this time in relation to his application to reopen his direct appeal.

In his application to reopen his direct appeal, Davis alleged that his originally retained counsel was ineffective for, amongst other things that he no longer is arguing, failing to object to the prosecution's closing argument at trial, for failing to attack the prosecution's closing argument in his direct appeal, and for failing to argue their own ineffective assistance in his direct appeal. Virtually identical issues were included in Davis's rejected memorandum in support of jurisdiction.

The First District considered Davis's application and denied it. It found that the issues related to prosecutorial misconduct could have been raised and was thus barred under the doctrine of res judicata. It also found that his originally retained counsel could not practically be expected to argue their own ineffectiveness and that res judicata also barred raising that claim. It further found that application of res judicata to this case was not unjust.

Though it does not directly apply to the relevant facts needed to resolve the issues that Davis has presented, it should be noted that Davis has repeatedly argued that the trial prosecutor involved

in his case has a history of committing prosecutorial misconduct. Davis has even convinced Amicus of the same thing. But Davis has never cited anything to back up this serious, disparaging allegation. His allegation of the trial prosecutor being anything other than a fair advocate for the State of Ohio is just that – his allegation. It is completely unsupported and has no place in the arguments before this Court.

**ARGUMENTS AGAINST APPELLANT'S PROPOSITIONS OF LAW AND IN
SUPPORT OF APPELLEE'S PROPOSITIONS OF LAW**

Appellee's First Proposition of Law: The doctrine of res judicata may act as a bar to claims raised in an application to reopen a direct appeal pursuant to App. R. 26(B) when applying the doctrine would not prove unjust.

Davis argues that the First District Court of Appeals erred when it denied his motion to reopen his direct appeal. He argues that the First District refused to even consider his allegation that his appellate counsel was ineffective by improperly relying on the doctrine of res judicata. Davis has misread the First District's decision.

This Court recognized that res judicata can stand as a basis for denying certain allegations on ineffective assistance of appellate counsel in *State v. Murnahan*.¹ Only when its application would prove unjust should an appellate court circumvent the doctrine of res judicata and grant a defendant's application to reopen their direct appeal under App. R. 26(B).²

In his motion to reopen, Davis argued, amongst other things, that his appellate counsel was ineffective for failing to raise prosecutorial misconduct in his direct appeal. As was detailed in the State's memorandum in response to Davis's direct appeal and in response to his application to reopen his direct appeal, the allegations of prosecutorial misconduct were baseless. They only existed when selected words were considered in a vacuum. But when those few words that Davis hand picked out of the entire closing argument were considered in light of the whole closing argument it was readily apparent that the State's closing argument was proper and that the allegations of prosecutorial misconduct were completely unfounded.

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

²*Id.*

The First District Court of Appeals considered these arguments when it denied Davis's application to reopen his direct appeal. The First District was, obviously, correct in holding that the issue of prosecutorial misconduct was something that could have been considered on direct appeal. Because of this, it was an issue that was barred by *res judicata*. But the First District did not stop there. It went on to rule that "[Davis] does not now offer any reason why applying the doctrine of *res judicata* to bar his claims would be unjust." In other words, it applied the law set forth by this Court in *State v. Murnahan*.

Just as he did when he argued that prosecutorial misconduct existed, Davis has read only those words that support his argument. He ignores the fact that the First District went on to consider whether applying the doctrine would be unjust. He ignores the fact that the First District has properly followed this Court's mandates in *Murnahan*.

Reviewing the entry denying his application in its entirety reveals that the First District applied the law set forth by this Court in *State v. Murnahan*. No where in his first or second propositions of law has Davis even mentioned *Murnahan*, let alone an argument that it was either misapplied by the First District or that its holding should be modified by this Court.

The First District properly considered Davis's application to reopen, properly applied this Court's decision of *State v. Murnahan*, and properly denied Davis's application. Davis has failed to demonstrate any error in this case, nor has he shown any reason why this Court should accept jurisdiction over this matter. Therefore, this Court should not accept jurisdiction over either the first or second propositions of law.

Appellee's Second Proposition of Law: An appellate court properly relies upon *State v. Murnahan* when considering an application to reopen pursuant to App. R. 26(B).

In his third proposition of law, Davis argues that when a defendant is represented by the same counsel at trial and on appeal that an appellate court must consider the merits of a later claim that he was the victim of ineffective assistance. He then goes so far as to argue that appellate courts should forcibly remove defendant's counsel and to appoint someone else to the appeal.

The basis of the first prong of his first proposition is that the First District refused to consider the merits of his claim of ineffective assistance. As indicated above, this simply is not true. The First District considered his arguments, found them to be barred by res judicata, and found that application of res judicata was not unjust.

This was not a rewriting of App. R. 26(B). It was a proper application of App. R. 26(B). A defendant seeking to reopen his direct appeal must show that there is a "genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal."³ Weak arguments that a defendant later feels should have been raised do not justify granting an application to reopen.⁴ When res judicata acts as a bar to a claim, a defendant must show that applying the doctrine would be unjust.⁵

Despite this long standing line of case law from this Court, Davis has failed to even begin to explain how any of his claims have any merit that would have even begun to justify granting his

³App. R. 26(B)(5). See also *State v. Davie*, 96 Ohio St. 3d 133, 772 N.E.2d 119, 2002-Ohio-3753; *State v. Jalowiec*, 92 Ohio St. 3d 421, 751 N.E.2d 467, 2001-Ohio-164.

⁴*State v. Allen* (1996), 77 Ohio St. 3d 172, 672 N.E.2d 638.

⁵*State v. Murnahan* (1992), 63 Ohio St. 3d 60, 66, 584 N.E.2d 1204.

application to reopen his appeal. And he has failed to show how denying applying res judicata was in anyway unjust.

Davis also argues that an appellate court's reliance on *Murnahan* when considering an App. R. 26(B) application is somehow wrong. This is entirely baseless. *Murnahan* is the reason that App. R. 26(B) exists. This Court has even referred to applications to reopen under App. R. 26(B) as "the *Murnahan* process."⁶ To argue that *Murnahan* and App. R. 26(B) are not related to each other defies not only logic, but the plain state of the law.

The second prong of his proposition is, to say the least, incredible. He suggests that an appellate court should forcibly remove a defendant's appellate counsel from a case when that counsel was also the trial counsel. Perhaps Davis has forgotten, but he *retained* the same counsel for both trial and appeal. He purposely picked and paid the same counsel for both trial and appeal. In his own argument on this proposition Davis recognizes that forcing a defendant to take on a different counsel not of his own choosing is "unworkable." The State readily agrees. Forcing a defendant to accept state appointed counsel in lieu of the defendant's retained counsel is plain wrong and likely unconstitutional. Appointing a second appellate counsel to review the first appellate counsel is equally wrong and would create endless havoc with the attorney-client privilege as well as the attorney-client relationship established with the defendant's retained counsel. Adopting this prong of Davis's proposition of law would be nothing more than the judiciary telling parties that they are not smart enough to pick their own counsel. That would be wrong.

⁶*State v. Brooks* (2001), 92 Ohio St. 3d 537, 751 N.E.2d 1040, reconsideration denied 93 Ohio St.3d 1453, 756 N.E.2d 116, cert. denied 122 S.Ct. 1444, 535 U.S. 974, 152 L.Ed.2d 387.

The First District Court of Appeals properly considered and properly denied Davis's application to reopen his direct appeal. It is proper for an appellate court to rely upon *State v. Murnahan* when considering an App. R. 26(B) application to reopen an appeal. Thus there is no reason at all for this Court to accept jurisdiction over this matter.

CONCLUSION

Davis has failed to raise any question of great general or public interest nor one that involves a substantial constitutional question. All he has done is raised issues of well settled law and argued that, since he does not agree with them, that they must be invalid. But *State v. Murnahan* is good law. It has been since it propagated App. R. 26(B) and the *Murnahan* process.

The First District Court of Appeals properly applied App. R. 26(B) when it found that the claims Davis wished to raise were barred by res judicata and further found that applying res judicata did not produce an unjust result. The First District did exactly what the law requires. Therefore, this Court should decline jurisdiction over this matter.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to H. Fred Hoefle, 810 Sycamore Street, Cincinnati, Ohio 45202, counsel of record, this 5th day of March, 2007.

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