

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

: MOTION FOR DELAYED APPEAL

PLAINTIFF/APELLEE,

: ON APPEAL FROM THE EIGHTH APPELLATE

-vs-

: DISTRICT COURT OF APPEALS FOR CUYAHOGA

RICARDO SPATES

: COUNTY CASE NUMBER 88058

DEFENDANT/APELLANT,

: SUPREME COURT CASE NO. _____

07-0977

* * * * *

Now comes the Appellant, Ricardo Spates, herein and moves this most honorable Court for leave to file a delayed Appeal pursuant to rules of practice of the Ohio Supreme Court Rule II. Section (2)(A)(1)(a) and (b), for the reason are set forth in the attached Mamorandum.

Respectfully Submitted

Ricardo Spates #502-542

Ricardo Spates #502542 Pro se
Marion Correctional Institution
Post Office Box 57
Marion Ohio 43301-0057

FILED
MAY 29 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF MOTION FOR DELAYED APPEAL

Now come Appellant Ricardo Spates to give the reason why he was unable to meet the required dead line to file his Notice of Appeal to this Most Honorable Court.

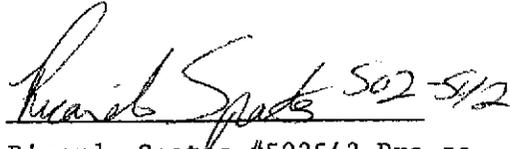
First) Appellant was trying to file an Appeal from the ruling of the Eighth Appellate District Court of Appeals for Cuyahoga County the order Entry was on March 8, 2007 and Appellate's Appeal Counsel never got this information to Appellant until March 12, 2007 and it was then that the Appeals Counsel informed Appellant that he was not going to help him with his Appeal to the Ohio Supreme Court and that Appellant needed to contact the Ohio Public Defender, so Appellant wrote the Ohio Public Defender and asked them to help him file his appeal where Appellant has no knowledge of the Law nor Rules of the Ohio Supreme Court, (See Exhibit A) Second) The Ohio Public Defender wrote Appellant on March 22, 2007 and informed him that they would not help him out but that he could proceed in Pro se, if he wanted too (SEE Exhibit B) Appellant then try to file a Appeal to the Ohio Supreme Court and on April 9, 2007 the clerk of the Supreme Court stamped a received stamped on appellant's Notice of Appeal, but sent it back to Appellant because it was not in compliance with Rule III, section 1(A) [SEE exhibit C] Appellant did not have a memorandum in support of jurisdiction, Appellant then tried to refile his notice of Appeal with a memorandum in support of jurisdiction on April 17, and once more the Clerk of the Supreme Court sent it back only this time the Clerk stated that Appellant did not have a stamp copy of the judgment entry and opinion from which he was appealing as required by rule III section 1 (D) [SEE Exhibit D] If the Clerk would of sent Appellant the rules of the Supreme Court or at least told him that he needed this also, Appellant then would have complied with the rules of the Ohio Supreme Court. Appellant could not go to the Law Library here at Marion, because it was close for a week in this time and then it was close on the same days that Appellant Block was schedule to get to be in the Library, so he could look up the rules, by the time Appellant found out everything he needed to file and he did try to get it back to the Ohio Supreme Court's Clerk of Court, it was to late for the clerk to file Appellant's notice of Appeal, but if Appellant had received the rule or information from the Clerk of Court of the Ohio Supreme Court as to what he need to get his notice of Appeal file the first time around, it would of been filed on time and Pursuant to COLEMAM -vs- THOMPSON : (1981)

501 U.S. 722, A cause is sufficient to excuse procedural default, when it is external to the Petitioner, that is not fairly attributable to the petitioner himself. Id at 735, 111 S. Ct. 2546.

By due dilligence the Appellant did try to file with the Ohio Supreme Court and not for his lack of knowledge of the rule and where he had no way to fine out just what the rule was and by the Clerk of the Ohio Suprem Court not telling/imfroming Appellant the first time that the Clerk sent Appellant's notice of Appeals back to him of everything that Appellant was missing, Appellant would of complied with the rule.

Appellant Ricardo Spates can only pray that this most honorable court will grant him leave to file his delayed Appeal.

Respectfully Submitted

 Ricardo Spates #502542

Ricardo Spates #502542 Pro se
Marion Correction Institution
Post Office Box 57
Marion, Ohio 43301-0057

VERIFICATION

STATE OF OHIO)
) SS:
MARION COUNTY)

Ricardo Spates, defendant-Appellant and movant herein, being first duly cautioned and sworn, states that the statements contained in the foregoing Motion for Delay of Appeal and the Memorandum in support thereof, are well and truly made to the best of his knowledge, belief and his memory.

Further Affiant sayeth naught;


Defendant-Appellant (Affiant)

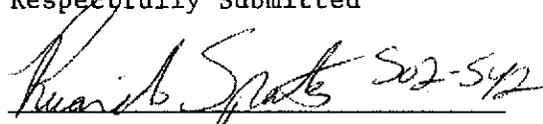
Subscribed and attested to before me and in my presence on this 15 day of May 2007.


Notary Public ROBERT L. GRAYSON JR.
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires May 5, 2010

* SEAL *

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for delayed Appeal was forwarded to the Cuyahoga Prosecutor, Office of William D. Mason at the 9th floor of the Justice Center, 1200 Ontario Street Cleveland Ohio 44113-1664, on this __ day of May 2007.

Respectfully Submitted

Ricardo Spates #502542 Pro se
M.I.C. P.O.Box 57
Marion, Ohio 43301-0057

The Supreme Court of Ohio

OFFICE OF THE CLERK

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
THOMAS J. MOYER

CLERK OF THE COURT
MARCIA J. MENGEL

JUSTICES
PAUL E. PFEIFER
EVELYN LUNDBERG STRATTON
MAUREEN O'CONNOR
TERRENCE O'DONNELL
JUDITH ANN LANZINGER
ROBERT R. CUPP

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April 9, 2007

Ricardo Spates, #502-542
Marion Correctional Institution
P. O. Box 57
Marion, OH 43302

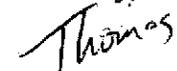
Dear Mr. Spates.

The enclosed documents were not filed and are being returned to you because they do not meet the requirements of the Rules of Practice of the Supreme Court of Ohio. The specific areas of noncompliance and relevant rules are as follows:

- You did not submit the memorandum in support of jurisdiction required by Rule III, Section 1(A). The Clerk's Office is prohibited from filing a notice of appeal that is not accompanied by a memorandum if one is required, and cannot accept requests for extension of time to file memoranda.

Please refer to the copy of the court's rules on file with your institution's library for additional information.

Sincerely,



Thomas
Deputy Clerk

Enclosures

Exhibit
A

The Supreme Court of Ohio

OFFICE OF THE CLERK

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
THOMAS J. MOYER

CLERK OF THE COURT
MARCIA J. MENGEL

JUSTICES
PAUL E. PFEIFER
EVELYN LUNDBERG STRATTON
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ROBERT R. CUPP

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April 17, 2007

Ricardo Spates, #502-542
Marion Correctional Institution
P. O. Box 57
Marion, OH 43302

Dear Mr. Spates:

The enclosed documents were not filed and are being returned because they do not meet the requirements of the Rules of Practice of the Supreme Court of Ohio. Specifically, your memorandum in support of jurisdiction does not contain a date-stamped copy of the judgment entry and opinion from which you are appealing as required by Rule III, Section 1(D).

You may resubmit your documents to be considered for filing once the above-noted deficiency is corrected. Please note that your notice of appeal, *corrected* memorandum in support of jurisdiction and affidavit of indigency must be received by the 45-day time period prescribed by Rule II, Section 2(A)(1). If you are attempting to appeal a March 18, 2007, court of appeals decision, these items necessary to perfect you appeal must be received in the Clerk's Office no later than Wednesday, May 2, 2007. Should the deadline to perfect your appeal expire, and your case involves a felony merit conviction, please see the provision for filing a delayed appeal under Rule II, Section 2(A)(4)(a).

For additional guidance, please refer to the enclosed copy of the Rules of Practice of the Supreme Court of Ohio.

Sincerely,



Nathan
Deputy Clerk

Exhibit
B

Enclosures

VALORE & CRUSE CO., L.P.A

ATTORNEYS AT LAW

23550 CENTER RIDGE ROAD, SUITE 103
WESTLAKE, OHIO 44145

JOSEPH A. VALORE
DEAN M. VALORE
BRIAN C. CRUSE

Phone: 440/333-7330
Fax: 440/333-7576
vclaw@valorecruse.com

OF COUNSEL:
THOMAS J. COLTMAN

March 12, 2007

RICARDO SPATES #A502-542
Marion Correctional Institution
PO Box 57
Marion, Ohio 43302

Dear Mr. Spates,

Enclosed please find a copy of the opinion issued by the Court of Appeals on your case. Unfortunately, the Court has ruled to affirm the trial courts decision and your appeal has been denied. If you feel you would like to pursue this matter further and appeal to a higher court, you should contact the State Public Defender's Office in Columbus who may represent you on a petition for post conviction relief or other matters as they see fit.

Yours Truly,



Dean M. Valore, Esq.

DMV/mpz

Exhibit
C



Office of the Ohio Public Defender
8 East Long Street
Columbus, Ohio 43215-2998

www.opd.ohio.gov

(614) 466-5394

Fax (614) 728-8091

DAVID H. BODIKER
State Public Defender

March 22, 2007

Ricardo Spates
#502-542
Marion Correctional Institution
P.O. Box 57
Marion, Ohio 43301

Dear Mr. Spates:

You recently contacted this office for assistance in your case. My review of your file indicates that this office previously reviewed your conviction in Trial Case No. CR-452432 and corresponding Appeal Case No. 86486. Your most recent letter seeks assistance concerning your conviction in Trial Case No. CR-460307 and corresponding Appeal Case No. 88058. DRC records indicate you are serving sentences for those convictions, as well as a sentence imposed in Trial Case no. CR05440028.

I have reviewed the court of appeals' decision in case no. 88058. *State v. Spates*, 2007 Ohio 983. You asserted on appeal that the convictions were against the manifest weight of the evidence and insufficient evidence of guilt. Rejecting both claims, the appellate court found in part:

A review of the testimony at trial indicates that Mr. Jackson identified his assailant to the police as "Rick." (Tr. 199) He then described his assailant as a black male, six feet tall, 175 pounds and having black hair. (Tr. 255) Detective Peters testified that Mr. Jackson identified Spates from a photo line-up "without hesitation." (Tr. 277) He further testified that he obtained Spates' name and address and connected the white Bonneville from the night of the attack to Spates' girlfriend, Ms. Lawson. (Tr. 283-285)

Finally, when Mr. Jackson was asked if he was certain that it was Spates who hit him with a crowbar, he responded, "[t]here is no doubt that's him." (Tr. 204) To buttress this claim, Mr. Jackson testified that he knew Spates from the neighborhood. (Tr. 200, 240)

Exhibit
1 of 2

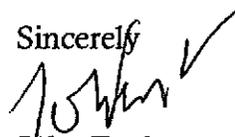
Spates maintains that Jackson presented different accounts of the incident and provided inconsistent physical descriptions of his assailant. However, Jackson's credibility is a matter for the jury to determine. Jackson's testimony, coupled with that of Officer Taylor's and Detective Peters' testimony, indicated that Jackson knew Spates from the neighborhood, and that he easily identified him from the neighborhood.

Spates at ¶13.

You wish to seek an appeal to the Ohio Supreme Court. Unlike your recent direct appeal, case you do not have an appeal of right to the Ohio Supreme Court. One must either (1) "claim an appeal of right" under subsection Supreme Court Rule II§1(A)(2); or request a "discretionary" appeal under subsection (A)(3). To obtain a discretionary appeal, the case must concern an issue of "public or great or general interest." To claim an appeal of right that case must involve a "substantial constitutional question." These are most difficult tests to meet. Thus, the Ohio Supreme Court grants very few discretionary appeals.

The Ohio Supreme Court will not review the manifest weight of the evidence except in capital cases. It will review the sufficiency of the evidence. However, I do not believe the court would grant discretionary review of your case. As detailed above, the Eighth District court found significant evidence of guilt including the victim's eyewitness testimony. Thus, this office will be unable to assist you. If you disagree, you may certainly seek pro-se relief in the Ohio Supreme Court. I have enclosed a packet to assist you.

Sincerely



John Fenlon

Assistant State Public Defender
Intake Section

#253408

Exhibit
D
1 of 2

The Supreme Court of Ohio

OFFICE OF THE CLERK

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
THOMAS J. MOYER

CLERK OF THE COURT
MARCIA J. MENGEL

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PAUL E. PFEIFER
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May 1, 2007

Ricardo Spates # 502-542
Marion Correctional Institution
P. O. Box 57
Marion, OH 43302

Dear Mr. Spates:

The enclosed documents are being returned to you because the documents necessary to perfect your appeal were not submitted within the 45-day time period prescribed by Rule II, Section 2(A)(1)(a). If you were attempting to appeal a March 8, 2007, court of appeals decision, the documents were due no later than April 23, 2007, by 5 p.m. The Clerk's Office received your documents on May 1, 2007. Pursuant to Rule XIV, Section (1)(C), the Clerk's Office is prohibited from filing documents that are not submitted on time and motions to waive this rule are prohibited and shall not be filed.

If you attempting to appeal a felony merit conviction, Rule II, Section 2(A)(4)(a), provides that in a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, *the appellant may seek to file a delayed appeal by filing a motion for delayed appeal, a notice of appeal and an affidavit of indigency.*

A motion for delayed appeal is required by Rule II, Section 2(A)(4)(a), to appeal a felony conviction after the 45-day time period for filing the notice of appeal has passed. The motion must state the date of the judgment being appealed and give adequate reasons for the delay; a copy of the decision and judgment entry being appealed must be attached. You must also submit an affidavit in support of the facts set forth in your motion. Please refer to the Rules of Practice of the Supreme Court of Ohio for further information.

Sincerely,


Abby
Deputy Clerk

Exhibit
E

Enclosures

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88058

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICARDO SPATES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-460307

BEFORE: Kilbane, J., Sweeney, P.J., and Calabrese, J.

RELEASED: March 8, 2007

JOURNALIZED:

ATTORNEY FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Matthew E. Meyer
Assistant Prosecuting Attorney
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLANT

Dean Valore
23550 Center Ridge Road
Suite 103
Westlake, Ohio 44145

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAR - 8 2007

GERALD E. FUERNST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

Ricardo Spates appeals his conviction on two counts of felonious assault following a jury trial. He contends that his conviction is against the manifest weight of the evidence and was supported by insufficient evidence. We affirm.

The record reveals that Antwain Jackson lived in the upper unit of a two-family house on Thames Avenue in Cleveland. In September 2004, Jackson's uncle was visiting the family and staying at the Thames Avenue house. Early one morning, Jackson's uncle woke him up to tell him of an altercation with another individual. Jackson went outside to investigate and encountered a white Bonneville. The car was driven by Ricardo Spates, someone Jackson apparently recognized from the neighborhood. A fight ensued and Jackson and Spates exchanged blows. Spates' girlfriend, who had been sitting in the Bonneville, exited the car and held Spates back to prevent any further fighting. Jackson left the scene and returned home.

Shortly after returning, Jackson heard rocks hitting his house. He again went outside to investigate. As he stepped out of the house, Jackson was hit with a crowbar. Jackson attempted to shield himself and was again struck with a crowbar this time on his forearm. He fell to the ground and his assailant continued the attack.

Jackson ultimately went inside his house and alerted his uncle to the situation. Jackson's uncle then drove him to Cleveland's sixth district police station where he was briefly interviewed by Patrolman Robert Taylor. Jackson described his assailant as a black male, approximately six feet tall, black hair, and who went by the name "Rick." Shortly after the interview, Jackson was taken to the Huron Road hospital where he received thirty stitches for his wounds.

Two weeks after the incident, Detective George Peters interviewed Jackson for a second time and showed Jackson a photo line-up with six photographs. Jackson positively identified Spates from the line-up as the man who attacked him.

On December 17, 2004, Spates was indicted on two counts of felonious assault, in violation of R.C. 2903.11, in connection with the attack on Jackson. A jury trial began on December 5, 2005, and Spates was found guilty on both counts. He was sentenced to four years on both counts, sentences to run concurrent. Spates appeals from this conviction in two assignments of error which state:

"1. THE VERDICTS OF GUILT ON THE CHARGES OF FELONIOUS ASSAULT WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE VERDICTS OF GUILT ON THE CHARGES OF FELONIOUS ASSAULT WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

As both assignments of error relate to the evidence presented to the jury, we address them together for purposes of appeal.

Spates maintains that the state adduced insufficient evidence to support his convictions and that the weight of the evidence fell short of establishing Spates' involvement in the attack on Jackson.

The standard of review with regard to the sufficiency of the evidence is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, as follows:

"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

Bridgeman must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, in which the Ohio Supreme Court held:

"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." (Citation omitted.)

In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror, and intrudes its judgment into proceedings which it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury which has "lost its way." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

As the Ohio Supreme Court declared:

"Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'

***** 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387. (Internal citations omitted.)**

However, this court should be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact, and a reviewing court must not reverse a verdict where the trier of fact could

reasonably conclude from substantial evidence that the State has proven the offense beyond a reasonable doubt. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraphs one and two of the syllabus. The goal of the reviewing court is to determine whether the new trial is mandated. A reviewing court should only grant the new trial in the "exceptional case in which the evidence weighs heavily against a conviction." *State v. Lindsey*, 87 Ohio St.3d 479, 483, 2000-Ohio-465, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

A review of the testimony at trial indicates that Mr. Jackson identified his assailant to the police as "Rick." (Tr. 199) He then described his assailant as a black male, six feet tall, 175 pounds and having black hair. (Tr. 255) Detective Peters testified that Mr. Jackson identified Spates from a photo line-up "without hesitation." (Tr. 277) He further testified that he obtained Spates' name and address and connected the white Bonneville from the night of the attack to Spates' girlfriend, Ms. Lawson. (Tr. 283-285)

Finally, when Mr. Jackson was asked if he was certain that it was Spates who hit him with a crowbar, he responded, "[t]here is no doubt that's him." (Tr. 204) To buttress this claim, Mr. Jackson testified that he knew Spates from the neighborhood. (Tr. 200, 240)

Spates maintains that Jackson presented different accounts of the incident and provided inconsistent physical descriptions of his assailant. However,

Jackson's credibility is a matter for the jury to determine. Jackson's testimony, coupled with that of Officer Taylor's and Detective Peters' testimony, indicated that Jackson knew Spates from the neighborhood, and that he easily identified him from the neighborhood.

Based on the testimony presented at trial, we cannot say that the jury lost its way or that the decision was against the manifest weight of the evidence or supported by insufficient evidence.

Spates' first and second assignments of error lack merit.

The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


MARY EILEEN KILBANE, JUDGE

JAMES J. SWEENEY, P.J., and
ANTHONY O. CALABRESE, JR., J., CONCUR