

IN THE
SUPREME COURT OF OHIO

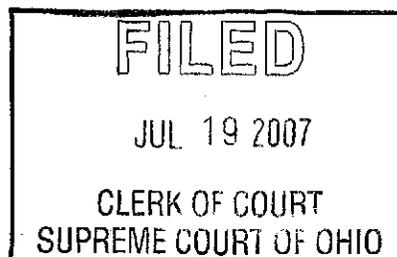
STATE OF OHIO : NO. 2007-0325
Plaintiff-Appellee : On Appeal from the Hamilton
County Court of Appeals, First
vs. : Appellate District
ANDRE DAVIS : Court of Appeals
Case Number C040665
Defendant-Appellant :

MERIT BRIEF OF PLAINTIFF-APPELLEE

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STATE OF OHIO	:	NO. 2007-0325
Plaintiff-Appellee	:	
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ANDRE DAVIS	:	<u>MERIT BRIEF OF PLAINTIFF- APPELLEE</u>
Defendant-Appellant	:	

Introduction

The issue before this Court is whether res judicata may be applied to App. R. 26(B) motions to reopen direct appeals. Andre Davis argues that the First District improperly denied his motion to reopen. One of the reasons that the First District denied his motion was because he had an earlier opportunity to argue his appellate counsel's ineffective assistance, namely in an appeal to this Court. Having found that this earlier opportunity to litigate existed, it went on to rule that applying res judicata did not produce an unjust result. This Court should affirm the First District for three reasons.

The first reason, which encompasses section I of this brief, strikes most closely to the issue this Court is reviewing. Appellate courts can and should consider res judicata when ruling on motions to reopen – so long as they continue to ensure that it does not produce an unjust result. The crucial thing here is to make sure that the appellate courts

continue to be careful of unjust results and to not deny a petition on res judicata grounds when it would create an unjust result.

The other two reasons exist only to show why this matter should be affirmed if this Court were to reject the State's position that res judicata should continue to apply to App. R. 26(B) motions when doing so is not unjust. In essence, they simply go over a defendant's burden for any motion to reopen. Section II discusses how a defendant must show that their appellate counsel was ineffective. Section III covers a defendant's duty to show a reasonable probability that their newly raised assignments of error will prove successful.

Procedural Posture

After a jury trial, Defendant-Appellant Andre Davis was found guilty of involuntary manslaughter, having weapons under disability, and the accompanying gun specifications. The trial court sentenced 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 consecutively to the other sentences, which were run concurrently to each other, for a total of ten years in the Ohio Department of Corrections.

Davis appealed his convictions, raising four assignments of error.¹ The First District affirmed.² Davis asked the First District to reopen his appeal.³ He also appealed to this Court.⁴ The First District denied the motion and this Court declined jurisdiction.⁵ He asked the First District to reconsider his motion to reopen.⁶ When that was denied, he appealed the denial of his motion to reopen to this Court.⁷ This Court accepted jurisdiction of that appeal.⁸

¹T.d. 38.

²T.d. 49.

³T.d. 52.

⁴T.d. 51.

⁵T.d. 54 and 55.

⁶T.d. 57.

⁷T.d. 59 and 61.

⁸T.d. 62.

Factual History

As Davis was leaving Checquers night club, Edmund Scott approached him and the two began to argue.⁹ At some point, Scott struck Davis on the head.¹⁰ It was believed that Scott struck Davis in the head with a gun,¹¹ though others believed it was just with his fist.¹² After this happened, a gun was seen sliding across the ground away from the fight.¹³ Davis then pulled his own gun and shot Scott multiple times.¹⁴ It was possible that others pulled guns and fired shots while Davis was shooting Scott to death.¹⁵ Davis was seen walking backwards away from Scott as he repeatedly shot him.¹⁶ Davis fled in his car, leaving one of his friends who was shot during Davis's shooting spree in the parking lot.¹⁷ One of the shots that struck Scott caused severe internal bleeding, which resulted in his death.¹⁸

While there was some testimony that Davis appeared scared or nervous when he committed his crime,¹⁹ multiple witnesses testified that the shooting sprang forth, not

⁹T.p. 453-455, 629-631.

¹⁰T.p. 630.

¹¹T.p. 1149.

¹²T.p. 631.

¹³T.p. 405-406, 456.

¹⁴T.p. 408-410, 456.

¹⁵T.p. 879.

¹⁶T.p. 458.

¹⁷T.p. 460, 1164-65.

¹⁸T.p. 573.

¹⁹T.p. 1081 & 1097.

from fear, but from a heated argument.²⁰ Davis, of course, testified that each of the witnesses that testified to him being anything other than scared had to be mistaken.²¹

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

²⁰T.p. 405, 453-455, 629-630.

²¹T.p. 1217.

State's Proposition of Law: Unless it produces an unjust result, principals of res judicata apply to App. R. 26(B) motions to reopen appeals.

Appellate Rule 26(B) allows criminal defendants to reopen their direct appeals when they have fallen victim to ineffective assistance of appellate counsel. In *State v. Murnahan* and its progeny, this Court ruled that a defendant moving to reopen their direct appeal must (1) set forth a colorable claim of ineffective assistance of appellate counsel; (2) show that, when res judicata would bar these claims, applying the doctrine would be unjust; and (3) show that there was a reasonable probability that the new assignments of error would have been successful if they had been raised in the direct appeal.²²

Davis moved to reopen his direct appeal arguing that his counsel, who also represented him at trial, was ineffective for not raising what he believes was prosecutorial misconduct on appeal and, at trial, for not objecting to the same. The First District found that the former claim was barred by res judicata and that applying the doctrine was not unjust, and that counsel could not realistically argue their own ineffectiveness. Was Davis's motion properly denied?

²²*State v. Murnahan* (1992), 63 Ohio St. 3d 60, 66, 584 N.E.2d 1204; *State v. Dillon*, 74 Ohio St. 3d 166, 171, 1995-Ohio-169, 657 N.E.2d 273; *State v. Spivey*, 84 Ohio St. 3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

I. Res judicata can bar claims of ineffective assistance of appellate counsel in App. R. 26(B) motions.

When this Court released *State v. Murnahan*, which caused App. R. 26(B) to be conceived, it knew that res judicata was something that had to be considered. It knew that it would often bar claims raised in motions to reopen appeals. It also knew that allowing res judicata to block every claim would not provide just results to some defendants. So this Court ruled that res judicata will not apply when doing so will lead to an unjust result.

Davis argues that res judicata should not be considered in App. R. 26(B) motions. He wishes for this Court to rule that appellate courts cannot use the doctrine to prevent defendants from attempting to raise issues that could have been raised in a discretionary appeal to this Court. When it is not unjust to do so, can res judicata be applied to App. R. 26(B) motions?

A. Res judicata bars subsequent actions involving the same legal theory and claims that could have been litigated. The doctrine applies when a defendant has had an opportunity to file a discretionary appeal with this Court even when this Court declines jurisdiction.

The doctrine of res judicata precludes parties from raising arguments that either have been or should have been raised in the past. This Court has explained “it has long been the law of Ohio that ‘an existing final judgment or decree between the parties to litigation is conclusive to all claims which were *or might have been* litigated in a first

lawsuit.”²³ Put another way, “[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.”²⁴

Most importantly for this matter, it applies when a defendant has had an opportunity to raise the issue before this Court in a discretionary appeal. And it applies even when this Court declines jurisdiction over a matter.²⁵

Boiled down, the primary issue before this Court is: Does the opportunity to file a discretionary appeal with this Court act as a res judicata bar for issues raised in an App. R. 26(B) motion? The answer to this question can be found in *State v. Roberts*.²⁶

In *State v. Roberts*, this Court was faced with the issue of whether res judicata barred a defendant from raising an issue in a post-conviction petition when she could have raised the issue before this Court. After she had been found guilty of a misdemeanor resisting arrest charge, Robert’s appealed. Robert’s case originally came before this Court on cross-motions to certify the record that this Court rejected. Roberts then filed a post-conviction petition and, after it had been rejected, eventually appealed to this Court.

Noting that “[n]one of the constitutional issues attempted to be raised herein on postconviction relief was asserted or even mentioned in petitioner’s earlier motion to

²³*Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 382, 1995-Ohio-331, 653 N.E.2d 226 , quoting *Rogers v. Whitehall* (1986), 25 Ohio St. 3d 67, 69, 494 N.E.2d 1387 and *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St. 3d 60, 62, 558 N.E.2d 1178 (emphasis in original.)

²⁴*Grava*, supra, 73 Ohio St. 3d at 382 quoting *Rogers*, supra, 25 Ohio St. 3d at 67.

²⁵*State v. Roberts* (1982), 1 Ohio St.3d 36, 437 N.E.2d 598, syllabus.

²⁶*Id.*

certify the record, *i.e.*, on her original appeal to this court,"²⁷ it was held that res judicata prevented her from raising unasserted constitutional issues. Relying on the 1967 case of *State v. Perry*,²⁸ this Court ruled: "The fact remains, however, petitioner *did not* include these issues, which she *could have raised in her original appeal* to this court *which appeal could have been taken as a matter of right*. Whether this omission was a conscious, tactical decision or a mere oversight is immaterial, for *Perry* unambiguously precludes this court from entertaining these issues now since they *could have been raised on appeal*."²⁹

Indeed, this Court relied on that quotation from *Roberts* in *Murnahan*.³⁰ When an issue, such as ineffective assistance of appellate counsel, could have been raised in a discretionary appeal to this Court then res judicata does act as a bar. Simply put, a defendant must raise ineffective assistance of appellate counsel at the earliest possible time. More often than naught, that will be in a discretionary appeal to this Court.

B. A defendant must raise ineffective assistance of appellate counsel at the earliest possible time.

In affirming the denial of a motion to reopen a capital case, this Court ruled that arguments relating to ineffective assistance of appellate counsel must be raised at the

²⁷*Id.* at 37.

²⁸*State v. Perry* (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104.

²⁹*Roberts*, *supra*, 1 Ohio St.3d at 39 (emphasis in original.)

³⁰*State v. Murnahan* (1992), 63 Ohio St. 3d 60, 64-65, 584 N.E.2d 1204.

earliest opportunity possible and failing to do so would preclude bringing the issue later, “unless, because of unusual circumstances, applying the doctrine of *res judicata* would be unjust.”³¹ Even though that was a capital case, where the appellant has an appeal of right to this Court, the principal remains the same. *Res judicata* can bar claims of ineffective assistance unless it is unjust to allow that to happen.

Ohio appellate courts have ruled that raising (or failing to raise) the issue of ineffective assistance of appellate counsel before this Court will act as a *res judicata* bar in App. R. 26(B) motions.³² Davis may argue that this destroys almost any opportunity for him or other defendants to raise ineffective assistance claims. But that argument ignores the fact that appellate courts cannot stop as soon as they see a *res judicata* problem. They must also check to see if applying the doctrine would be unjust.

C. Failing to raise an ineffective assistance of appellate counsel at the earliest possible time will cause *res judicata* to bar an App. R. 26(B) motion, unless it would be unjust to apply the doctrine.

The First District not only found that *res judicata* applied to Davis’s motion, it found that it was just to apply the doctrine. That is how App. R. 26(B) motions are

³¹*State v. Williams*, 74 Ohio St.3d 454, 455, 1996-Ohio-313, 659 N.E.2d 1253.

³²See, for example, *State v. Harley*, 10th Dist. Case No. 99AP-374, 2000 WL 622068; and *State v. Mosley*, 8th Dist. Case No. 79463, 2005-Ohio-4137.

handled by appellate courts.³³ After all, it's how this Court reviews App. R. 26(B) motions.³⁴

There will be times when a defendant will not be able to know of the ineffective assistance or will be unable to properly bring that claim to this Court. In those situations res judicata should not apply because it would be unjust to do so. For example, res judicata would not bar reopening a direct appeal to consider an issue that could not be reviewed because appellate counsel failed to order a transcript or failed to even file an appeal. The former situation occurred in *State v. Cook*.³⁵

Cook's appellate counsel failed to order a transcript that rendered it impossible for either the appellate court or this Court to review an alleged error. Without the transcript there was no way for either court to tell if it was a meritorious error that should have been raised. Because it was impossible for the error to be reviewed res judicata would not apply and, even if it did, its application would be unjust.³⁶

And there will be times when appellate counsel missed such a blatant error that their performance must be ineffective. In those instances, application of res judicata would be unjust. An example is *State v. Aponte*.³⁷

³³See, for example, *State v. Aponte* (2001), 145 Ohio App. 3d 607, 615, 763 N.E.2d 1205 and *State v. Smith*, 4th Dist. Case No. 05CA7, 2006-Ohio-1482, ¶ 28.

³⁴See *State v. Houston*, 73 Ohio St. 3d 346, 1995-Ohio-317, 652 N.E.2d 1018 and *State v. Bell*, 73 Ohio St. 3d 32, 1995-Ohio-314, 652 N.E.2d 191.

³⁵*State v. Cook*, 6th Dist. Case No. WD-04-029, 2005-Ohio-4174.

³⁶*Id.* at ¶ 12.

³⁷*State v. Aponte*, 145 Ohio App. 3d 607, 615, 763 N.E.2d 1205.

Aponte's plea was induced by a promise that "was beyond the power of the prosecutor to fulfill" that rendered the defendant's plea "invalid from its inception."³⁸ Because the defendant's plea was completely invalid it would have been unjust to allow res judicata to bar his App R. 26(B) motion.

Contrary to what has been suggested by Davis, appellate courts are not jumping on res judicata as a quick and easy reason to deny these motions just to reduce their workload. Appellate courts are overlooking problems to reach the merits of App. R. 26(B) motions. One example of this would be *State v. Fung*.³⁹ There, the Eighth District ruled that, despite it being filed two years late, "it would not be just if we denied Fung's application because of a procedural defect"⁴⁰ because Fung had presented a genuine issue about the effectiveness of his appellate counsel.

And despite Davis's attempt to have this Court believe otherwise, the First District is not in the practice of simply denying every App. R. 26(B) motion that comes before it. Since mid-2001 (which is as far back as the data the State was able to readily uncover goes), it has granted these motions when appellate counsel was ineffective for:

- Failing to argue that defendant had been improperly sentenced for allied offenses of similar import.⁴¹
- Failing to order trial transcripts.⁴²

³⁸*Id.* at 614-615.

³⁹*State v. Fung*, 8th Dist. Case No. 75583 & 75689, 2002-Ohio-2673 and cases cited in ¶¶ 30-31.

⁴⁰*Id.* at ¶ 31

⁴¹*State v. Buckner*, 1st Dist. Nos. C990670 & C990671.

⁴²*State v. Smith*, 1st Dist. Nos. C020336, C020337, & C020341.

- Failing to argue the improper denial of a motion to suppress.⁴³
- Failing to file a merit brief.⁴⁴
- Failing to file a notice of appeal.⁴⁵
- Failing to raise a *Blakely v. Washington* challenge to a defendant’s prison sentence.⁴⁶

In this matter, the First District ruled that Davis’s claim of ineffective assistance of appellate counsel could have been raised before this Court and that Davis did not show that “applying the doctrine of res judicata to bar his claims would be unjust.”⁴⁷ The First District is correct.

In fact, this Court has affirmed the First District’s denial of a motion to reopen where the First District used virtually the same language that it used in this case. In *State v. Fauntenberry*, the defendant tried to reopen his direct appeal after a motion to reopen his appeal in this Court had been denied. The First District denied his motion, finding “[t]he issue of ineffective assistance of counsel on direct appeal to this court could have been raised in appellant’s previous application for reopening in the Supreme Court. Appellant therefore has had at least one opportunity to challenge the effectiveness of his

⁴³*State v. Coulibaly*, 1st Dist. Case No. C010788.

⁴⁴*State v. Young*, 1st Dist. No. C030345; *State v. Green*, 1st Dist. No. C030514; *State v. Iski*, 1st Dist. No. C030437.

⁴⁵*State v. Fuller*, 1st Dist. No. C040318.

⁴⁶*State v. Brady*, 1st Dist. No. C050295; *State v. Garrett*, 1st Dist. No. C050482; *State v. French*, 1st Dist. No. C050375.

⁴⁷T.d. 59 at p.1.

appellate counsel, and he has provided no explanation as to why the application of res judicata would be unjust.”⁴⁸ This Court affirmed the denial “for the same reasons articulated by the court of appeals.”⁴⁹

Simply put, the opportunity to raise an issue in a discretionary appeal to this Court will invoke res judicata. That doctrine is to be applied to App. R. 26(B) motions unless it would prove unjust to do so.

This is not a case where the errors Davis believes should have been raised could not have been raised in his direct appeal. Nor is it a case where the errors were so egregious that no one should have missed them. To prove that this is true, let’s assume that applying res judicata would be unjust. If that were the case, did Davis present a colorable claim of ineffective assistance?

II. A defendant must present a colorable claim of ineffective assistance of appellate counsel before an appellate court will grant a motion to reopen. A defendant must prove that his counsel was deficient for failing to raise the issues he now presents. Unless he shows that his counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that counsel’s errors prejudiced him a motion to reopen should be denied.

To have a motion to reopen granted, a defendant “must prove that his counsel [was] deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a ‘reasonable probability’ that he would

⁴⁸*State v. Faunttenberry*, 1st Dist. No. C920734.

⁴⁹*State v. Faunttenberry*, 78 Ohio St. 3d 320, 1997-Ohio-291, 677 N.E.2d 1194.

have been successful.”⁵⁰ Should appellate courts deny motions that fail to meet these requirements?

This Court has ruled that the two-prong test of *Strickland v. Washington*⁵¹ is the proper way to see if appellate counsel is ineffective.⁵² First, it must be shown that counsel made errors so serious that they were not functioning as the “counsel” guaranteed by the Sixth Amendment. Next, defendants must show that this deficient performance prejudiced them by demonstrating that counsel's errors were so serious as to deprive the defendant of a fair appeal.⁵³

Appellate attorneys are often faced with a plethora of possible errors to argue on appeal. “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues.”⁵⁴ “Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal.”⁵⁵

In his direct appeal, Davis argued that the trial court should have allowed him to present an expert witness on self-defense, should have instructed the jury on self-defense

⁵⁰*State v. Spivey*, 84 Ohio St. 3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

⁵¹*Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

⁵²*State v. Dillon*, 74 Ohio St. 3d 166, 171, 1995-Ohio-169, 657 N.E.2d 273; *State v. Jones*, 91 Ohio St. 3d 376, 2001-Ohio-55, 745 N.E.2d 421.

⁵³*Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674.

⁵⁴*Jones v. Barnes* (1983), 463 U.S. 745, 753, 103 S.Ct. 3308, 77 L.Ed.2d 987.

⁵⁵*Id.*; *State v. Gumm*, 73 Ohio St. 3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St. 3d 38, 1994-Ohio-492, 630 N.E.2d 339.

and involuntary manslaughter, and should not have allowed the state to exercise peremptory challenges of certain jurors. Davis's appellate counsel thoroughly presented each argument.

In his motion to reopen, Davis argues that his counsel should have also argued that: the prosecution engaged in misconduct during closing argument; trial counsel should have objected to the closing argument and moved for a mistrial; and that an incomplete record was transmitted to the appellate court. Davis has not addressed the third reason in his appeal to this Court and has, instead, chosen to focus only on the first two grounds.

Davis's counsel presented the best assignments of error that Davis had available to him. She certainly could have raised this and likely a plethora of other potential errors. But, as appellate counsel should, she chose to raise and focus upon the strongest issues.

Davis's appellate counsel effectively raised the strongest issues that existed in his case. That is what good, experienced appellate attorneys are supposed to do. But, for the sake of argument, what would have happened if these new assignments of error had been raised in his original appeal? Has Davis shown a reasonable probability that any of his new assignments of error would succeed?

III. Even if appellate counsel should have raised a certain issue, a motion to reopen should be denied unless there is a reasonable probability that the new assignments of error would succeed on appeal.

Defendants must show a reasonable probability that the errors that were not raised would have been successful. Indeed, it is possible for this Court to dispose of this matter on this issue alone: “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of the ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”⁵⁶ Davis believes his direct appeal should be reopened to address prosecutorial misconduct and ineffective assistance of counsel.

A. Closing argument must be reviewed in its entirety. Prosecutors are entitled to make fair commentary on the evidence and to respond to the defendant’s arguments. And should prosecutorial misconduct exist, it is only when a review of the entire closing argument shows that the defendant was deprived of a fair trial that it will require reversal.

Davis argues that prosecutorial misconduct should have been raised in his direct appeal. The test for prosecutorial misconduct is whether the prosecutor’s remarks were improper, and, if so, whether they prejudicially affected the accused’s substantial rights.⁵⁷

⁵⁶*State v. Bradley* (1989), 42 Ohio St. 3d 136, 143, 538 N.E.2d 373.

⁵⁷*State v. Lott* (1990), 51 Ohio St. 3d 160, 555 N.E.2d 293.

Prosecutors are normally entitled to wide latitude in their remarks and⁵⁸ their conduct is only grounds for reversal when it deprives a defendant of a fair trial.⁵⁹

Davis did not object to the comments he now takes issue with. “The failure to object to statements made by a prosecutor during closing arguments waives all but plain error. In order to prevail on a claim governed by the plain-error standard, [the defendant] must demonstrate that the outcome of his trial would clearly have been different but for the errors he alleges. When reviewing [closing arguments, a reviewing court] must evaluate them in light of the entire closing argument. Thus, the alleged prosecutorial misconduct constitutes plain error only if it is clear that [the defendant] would not have been convicted in the absence of the improper comments.”⁶⁰

But it does not matter that there were no objections. A review of the record shows that the prosecution’s closing argument was fair commentary on the evidence and on Davis’s arguments. Reviewed for plain error or otherwise, Davis’s allegations of prosecutorial misconduct fail.

And they fail because Davis has not considered the entire closing argument. Instead, he has plucked four portions of closing that, taken alone, seem to indicate that some form of prosecutorial misconduct may have happened. A complete review of the

⁵⁸*State v. Mason* (1998), 82 Ohio St. 3d 144, 694 N.E.2d 932; *State v. Hirsch* (1st Dist., 1998), 129 Ohio App. 3d 294, 717 N.E.2d 294.

⁵⁹*State v. Keenan* (1993), 66 Ohio St. 3d 402, 613 N.E.2d 203; *Hirsch*, *supra*.

⁶⁰*State v. Kelly*, 1st Dist. Case No. C-010639, 2002-Ohio-6246, ¶ 22 (internal citations omitted).

closing arguments shows that the closing argument was a fair commentary on the evidence presented at trial.

1. The prosecution can ask the jury to consider how the evidence demonstrates a witness's lack of credibility.

The prosecution asked the jury if Davis was “open and honest” with them when he testified. This was done in a manner that asked them to consider the evidence. For example: “But he also told you that he doesn’t know that his best friends, any of them carried guns, even though two of them were in the penitentiary for possessing guns. Was he open and honest with you when he told you that?”⁶¹

If the prosecution had attempted to vouch for the credibility of its own witnesses or had expressed its personal beliefs to the jury, then there may have been some misconduct. But what was done here was fair commentary on the evidence. The evidence presented at trial showed that Davis lied during his testimony and there is nothing improper about showing the jury how the evidence showed his lack of credibility.⁶²

⁶¹T.p. 1403-1404.

⁶²See, for example, *State v. Rogers*, 5th Dist. Case No. 2005CA00055, 2005-Ohio-4958, ¶ 54; *State v. Stroud*, 2nd Dist. Case No. 18713, 2002-Ohio-940, *3.

2. The prosecution may argue how the evidence shows the defendant actively fabricated ways to minimize his guilt.

Davis next argues that the prosecution somehow attacked Davis's counsel. A complete review of the record undermines this argument. The selected comments that Davis hand-picked out of the entire closing argument were part of a larger portion of the closing argument showing how Davis, once he learned that he was going to be charged with his crimes, did everything he could to create some way out for himself.⁶³ The State explained how Davis went from claiming he knew nothing at all about what had happened to admitting that he committed the crimes, but that he did so only in self-defense.⁶⁴

At no point was it even suggested that Davis' counsel attempted to aid Davis in perpetrating a sham defense. What Davis takes as disparaging towards his counsel is actually an argument that Davis did everything he could to craft a story that looked like self-defense.

3. The prosecution may argue how circumstantial evidence suggests that a defendant said something to provoke a response from another person.

Davis argues that the prosecution argued facts that were not in evidence when the prosecution argued that the "evidence suggests that when Edmund Scott walked out of that bar, that man right there [Davis] said something to challenge him."⁶⁵ Davis then

⁶³T.p. 1176-1177, 1185-1186.

⁶⁴T.p. 1404-1405.

⁶⁵T.p. 1409.

claims that the prosecution “went on to assume the voice of the Appellant challenging Scott.”⁶⁶

The State is at a loss as to where evidence supporting the improvisation exists. But it knows where the evidence to support the prosecution’s comments is. The evidence presented at trial showed that just before Davis killed Scott that words were had between them and that Scott said “I live for this.”⁶⁷ This presented circumstantial evidence that Davis said or did something to provoke Scott. There is nothing impermissible about arguing circumstantial evidence to the jury.⁶⁸

4. The prosecution may respond to the defendant’s arguments during closing argument.

Finally, Davis argues that the prosecution’s closing argument was designed to urge the jurors to find him guilty by appealing to law and order sentiments. The State did end its closing argument by stating “we are asking you to tell him that street justice is not appropriate in Cincinnati.”⁶⁹ But during Davis’s redirect examination of Trunell Harrell, it was revealed that people wanted to “keep it street.”⁷⁰ It was Davis that raised the specter of street justice, not the State. Davis’s redirect of his own witness opened the door to this comment.

⁶⁶Appellant’s Memorandum in Support at p. 11.

⁶⁷T.p. 630, 916, 1384.

⁶⁸See *State v. Jenks* (1991), 61 Ohio St. 3d 259, 272, 574 N.E.2d 492.

⁶⁹T.p. 1411.

⁷⁰T.p. 1082-1083.

B. When appellate counsel also represented a defendant at trial then they cannot be reasonably expected to argue their own ineffectiveness. Likewise, appellate counsel cannot be found ineffective for failing to raise something they could not argue.

Davis also argues that his appellate counsel was ineffective for failing to raise their own ineffective assistance at trial. But an appellant's trial counsel cannot be realistically expected to argue their own incompetence.⁷¹

An attorney cannot be ineffective for failing to raise something that they cannot argue. Therefore, a motion to reopen, which requires a defendant to show that his appellate counsel was ineffective, cannot be granted on an allegation that appellate counsel failed to raise their own ineffectiveness.⁷²

⁷¹See *State v. Hutton*, 100 Ohio St. 3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶ 39.

⁷²See *State v. Cook*, 6th Dist. Case No. WD-04-029, 2005-Ohio-4174; *State v. Smith*, 8th Dist. Case No. 84687, 84688, and 84689, 2005-Ohio-2711; *State v. Nero*, 8th Dist. Case No. 47782, 2003-Ohio-268; and *State v. Cruz*, 8th Dist. Case No. 78475, 2002-Ohio-3238.

Conclusion

This matter should be affirmed for three reasons. First, res judicata should be applied to motions to reopen. It prevents defendants from trying to raise new arguments should their initial arguments fail. But, as this and the appellate courts have always held, it should not apply to App. R. 26(B) motions when its results would be unjust.

This leads to the second reason why this matter should be affirmed. Applying res judicata to this case does not produce an unjust result. Even if res judicata did not apply to this matter the motion to reopen still would have been denied. This is because Davis cannot show that his appellate counsel was ineffective. His counsel raised his strongest arguments on appeal. Just because those arguments did not result in a reversal does not render his appeal unfair.

And finally, this Court should affirm because even if res judicata did not apply and if his appellate counsel was ineffective, Davis has not presented any new assignments of error that have a reasonable probability of succeeding. A motion to reopen should only be granted if there is a reasonable probability that the unraised assignments of error will be sustained. Davis has not been able to show this.

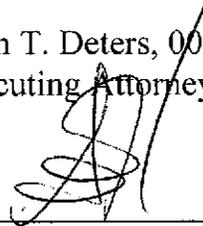
The First District properly considered Davis's motion to reopen his appeal. It correctly found that res judicata barred his arguments on ineffective assistance and that applying the doctrine did not produce an unjust result. And it rightly ruled that appellate

counsel's failure to argue their own ineffectiveness was not grounds for reopening.

Therefore, this Court should affirm.

Respectfully,

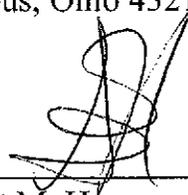
Joseph T. Deters, 0012084P
Prosecuting Attorney



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3227
Attorneys for Plaintiff-Appellee

Certificate of Service

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellee, by United States mail, addressed to H. Fred Hoefle, 810 Sycamore Street, Cincinnati, Ohio 45202, counsel of record, and Stephen P. Hardwick, Assistant Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215 this 18th day of July, 2007.



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney

Appendix

Certified copies of entries from unreported cases:

<i>State v. Brady</i> , 1 st Dist. No. C050295	A-2.
<i>State v. Buckner</i> , 1 st Dist. Nos. C990670 & C990671	A-5.
<i>State v. Coulibaly</i> , 1 st Dist. Case No. C010788	A-9.
<i>State v. Fauntenberry</i> , 1 st Dist. No. C920734	A-15.
<i>State v. French</i> , 1 st Dist. No. C050375	A-17.
<i>State v. Fuller</i> , 1 st Dist. No. C040318	A-19.
<i>State v. Garrett</i> , 1 st Dist. No. C050482	A-21.
<i>State v. Green</i> , 1 st Dist. No. C030514	A-24.
<i>State v. Iski</i> , 1 st Dist. No. C030437	A-25.
<i>State v. Smith</i> , 1 st Dist. Nos. C020336, C020337, & C020341	A-26.
<i>State v. Young</i> , 1 st Dist. No. C030345	A-28.



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



STATE OF OHIO,	:	APPEAL NO. C-050295
	:	TRIAL NO. B-0411712
Plaintiff-Appellee,	:	
	:	
vs.	:	ENTRY GRANTING
	:	APPLICATION TO REOPEN
MAC BRADY,	:	APPEAL AND EXTENDING
	:	TIME.
Defendant-Appellant.	:	

§

This cause is considered upon defendant-appellant Mac Brady's App.R. 26(B) application to reopen this appeal and the state's opposing memoranda.

In his application, Brady contends that he was denied the effective assistance of counsel, because his appellate counsel failed to present an assignment of error challenging, under the United States Supreme Court's decision in *Blakely v. Washington*,¹ the trial court's imposition of nonminimum and consecutive prison terms. In *State v. Foster*, the Ohio Supreme Court applied *Blakely* to declare unconstitutional, and to excise from the Revised Code, that portion of the state's sentencing statutes that required judicial factfinding before imposing nonminimum and consecutive prison terms.² The court held that its ruling applied to all cases then

¹ (2004), 542 U.S. 296, 124 S.Ct. 2531.
² 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶56-61, 65-67, and 97.

on direct review, and that such cases must be remanded to the trial court for resentencing.³

The supreme court decided *Foster* three months before Brady submitted this appeal. Therefore, an assignment of error challenging his nonminimum and consecutive sentences under *Foster* would have succeeded in securing for Brady a new sentencing hearing.

The state opposes reopening this appeal because Brady filed his application a week after the ninety-day period prescribed under App.R. 26(B) had expired. But an application to reopen an appeal must be granted if the applicant establishes "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal."⁴ The decision of the United States Supreme Court in *Strickland v. Washington*,⁵ provides the standard for determining whether the applicant was denied the effective assistance of appellate counsel.⁶ The applicant must prove "that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal."⁷

Applying the standard set forth in *Strickland v. Washington*, the court finds that the appellant has demonstrated a deficiency in appellate counsel's performance that prejudicially affected the outcome of his appeal. Because Brady has sustained his burden of demonstrating a genuine issue as to whether he had a colorable claim of

³ Id. at ¶104 and 106.

⁴ *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696; App.R. 26(B)(5).

⁵ (1984), 466 U.S. 668, 104 S.Ct. 2052.

⁶ See *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456.

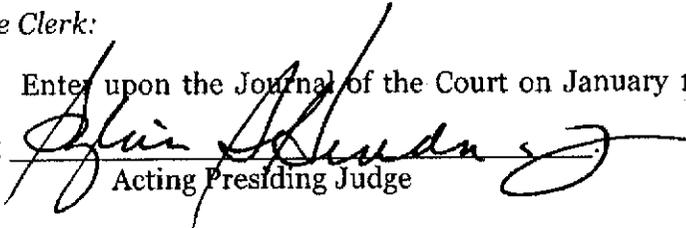
⁷ *State v. Sheppard*, 91 Ohio St.3d 329, 330, 2001-Ohio-52, 744 N.E.2d 770 (citing *State v. Bradley* [1989], 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus).

OHIO FIRST DISTRICT COURT OF APPEALS

ineffective assistance of appellate counsel, the court grants Brady's application to reopen his appeal.⁸

Further, the court extends time: Brady shall have until March 19, 2007, to file his brief; and the state shall have until April 19, 2007, to file its brief.

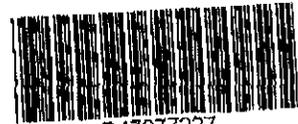
To the Clerk:

Enter upon the Journal of the Court on January 18, 2007, per order of the Court 
Acting Presiding Judge

(COPIES SENT TO ALL PARTIES.)

RECEIVED
JAN 18 2007
CLERK OF COURT
COURT OF APPEALS
FIRST DISTRICT
COLUMBUS, OHIO

⁸ See *State v. Spivey*, 84 Ohio St.3d at 25; *State v. Reed*, 74 Ohio St.3d at 535.



D47977227

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



STATE OF OHIO, : APPEAL NOS. C-990670
C-990671

Plaintiff-Appellee, :

vs. :

EARL BUCKNER, : *ENTRY GRANTING
APPLICATION FOR REOPENING
OF APPEALS, APPOINTING
COUNSEL, AND EXTENDING
TIME.*

Defendant-Appellant. :

This cause came on to be considered upon appellant's timely application to reopen these consolidated appeals pursuant to App.R. 26(B). The state has not filed a memorandum in opposition to the application.

We note preliminarily that the record does not show, as the appellant avers, that this court has granted the appellant leave to file "additional authorities" in the form of a third assignment of error that appellate counsel allegedly neglected to submit on appeal. We, therefore, overrule the appellant's motion for an extension of time to file such additional authorities. Moreover, we strike the "brief" in which the appellant presents this third assignment of error, because this additional submission would cause his application to reopen his appeals to exceed the ten-page limit prescribed by App.R. 26(B)(4).

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The appellant asserts in his application that he was denied the effective assistance of appellate counsel, when counsel failed to challenge on appeal the “duplicitous multiplicitous indictment.” Specifically, the appellant argues that counts three, four, five and six of the indictment in Trial No. B-9903995, each of which charged him with having a weapon while under a disability, “were all[] from one single transaction[] and should have merged[] for purposes of sentencing.” Thus, he contends, in essence, that the trial court could not, consistent with R.C. 2941.25, have sentenced him on each count, when the offenses were allied and of similar import and were committed neither separately nor with a separate animus as to each.

Each of counts three through six of the indictment charged the appellant with having a weapon under a disability in violation of R.C. 2923.13(A)(3). The evidentiary fundament for the four charges were the four handguns found in a bedroom during a search of the appellant’s apartment and the appellant’s 1998 conviction for marijuana trafficking. The jury returned verdicts finding the appellant guilty as charged in each of the four counts, and the trial court sentenced the appellant to one year of imprisonment on each count and ordered that the sentences be served consecutively to each other and to a five-year term of confinement for preparation of cocaine for sale, a one-year term for the accompanying firearm specification, and an eight-year term for cocaine trafficking.

R.C. 2941.25 effectuates that aspect of the state and federal constitutional guarantees against double jeopardy that protects an accused from cumulative punishments for the same offense. See *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699. The authorities are legion for the proposition that the simultaneous and undifferentiated possession of multiple



OHIO FIRST DISTRICT COURT OF APPEALS

firearms constitutes a single offense and cannot, consistent with R.C. 2941.25, provide the basis for multiple convictions for the same offense. See, e.g., *State v. Moore* (1982), 7 Ohio App.3d 187, 454 N.E.2d 980 (in which this court held that the defendant could not be sentenced on each of two counts of carrying a concealed weapon in violation of R.C. 2923.12, when the evidence showed a simultaneous purpose to conceal both weapons); *State v. Thompson* (1988), 46 Ohio App.3d 157, 546 N.E.2d 441, discretionary appeal not allowed, 38 Ohio St.3d 702, 532 N.E.2d 1317 (in which the Court of Appeals for Summit County held the defendant could not, consistent with R.C. 2941.25, be sentenced on each of two counts of having a weapon while under a disability); *State v. Woods* (1982), 8 Ohio App.3d 56, 455 N.E.2d 1289 (in which the Court of Appeals for Cuyahoga County held that the defendant could not, consistent with R.C. 2941.25, be sentenced on each of three counts of carrying a concealed weapon).

We recognize that the appellant's trial counsel failed to interpose a timely objection to the imposition of consecutive sentences on counts three through six. However, an appellate court may recognize plain error in the imposition of multiple sentences, when, as here, the error was outcome determinative. See Crim.R. 52(B); *State v. Fields* (1994), 97 Ohio App.3d 337, 343-344, 646 N.E.2d 866, 870-871.

Based upon the foregoing, the court finds that the presentation on appeal of an assignment of error challenging, under R.C. 2941.25, the imposition of a sentence of confinement on each of counts three through six would have presented a reasonable probability of success. Moreover, such a challenge, if successful, would have yielded a three-year reduction in the appellant's sentence.



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Applying the standards set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, and *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, the court finds that the appellant has demonstrated a deficiency in appellate counsel's performance that prejudicially affected the outcome of the appeals. The court, therefore, concludes that the appellant has sustained his burden of demonstrating a genuine issue as to whether he had a colorable claim of ineffective assistance of counsel on appeal. See *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696, 697; *State v. Reed* (1996), 74 Ohio St.3d 534, 535-536, 660 N.E.2d 456, 458.

Accordingly, the court grants the appellant's application to reopen his appeals, see App.R. 26(B), (and concomitantly sustains the appellant's motion for summary judgment, see Civ.R. 56[C]),¹ appoints David Wagner as counsel, and extends the time for briefing, to-wit: The appellant shall have until Nov. 1, 2001, to file his brief, and the appellee shall have until December 15, 2001, to file its brief.

To the Clerk:

Enter upon the Journal of the Court on 9/17/01

per order of the Court [Signature]
Presiding Judge



(COPIES SENT TO ALL PARTIES.)

STATE OF OHIO COUNTY OF HAMILTON
COURT OF APPEALS
DOCUMENT ON FILE IN THIS OFFICE ENTERED
IS A TRUE AND CORRECT COPY OF THE
THIS IS TO CERTIFY THAT THE FOREGOING

¹ Our determination that the appeals are to be reopened based on the R.C. 2941.25 challenge obviates the need to address the other proposed assignment of error.

BY
DEBORA HARTMAN
CLERK OF COURTS
HAMILTON COUNTY, OHIO

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



D54273242

STATE OF OHIO,

APPEAL NO. C-010788

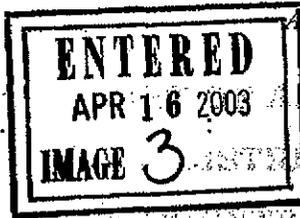
Plaintiff-Appellee,

vs.

CHEICK COULIBALY,

Defendant-Appellant.

*ENTRY GRANTING
APPLICATION FOR REOPENING
OF APPEAL, APPOINTING
COUNSEL, AND EXTENDING
TIME.*



This cause came on to be considered upon the appellant's App.R. 26(B) application to reopen this appeal and the state's memorandum in opposition.

The appellant asserts in his application that he was denied the effective assistance of appellate counsel, when counsel failed to challenge on appeal the denial of his motion for leave to file a motion to suppress evidence seized in a warrantless search of his residence. We agree.

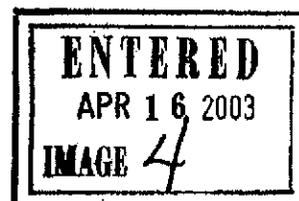
App.R. 26(B)(5) requires that an application to reopen an appeal "be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." An applicant under App.R. 26(B) "bears the burden of establishing that there [is] a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d.24, 25, 1998-Ohio-704, 701 N.E.2d 696.

OHIO FIRST DISTRICT COURT OF APPEALS

The decision of the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, provides the standard for determining whether an applicant was denied the effective assistance of appellate counsel. See *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456. The applicant thus "must prove that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal." *State v. Sheppard*, 91 Ohio St.3d 329, 330, 2001-Ohio-52, 744 N.E.2d 770 (citing *State v. Bradley* [1989], 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus).

Crim.R. 12(C) requires that a motion to suppress be filed "within thirty-five days after arraignment or seven days before trial, whichever is earlier," but grants a trial court the discretion to "extend" the time for filing, if an extension is "in the interest of justice." Thus, the decision to deny leave to file an untimely motion to suppress is committed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of some demonstration that the court abused its discretion. *State v. Karns* (1992), 80 Ohio App.3d 199, 204, 608 N.E.2d 1145.

The appellant here was arraigned on September 1, 2000, on seventeen counts charging him, variously, with complicity to theft and complicity to forgery. Prior to trial, the state disclosed to the defense an inventory of items seized from the appellant's residence during a search of the premises by law enforcement officers seeking to execute an arrest warrant. The inventory included several pagers that were determined to have been owned not by the appellant, but by a third party. The appellant did not move prior to trial to



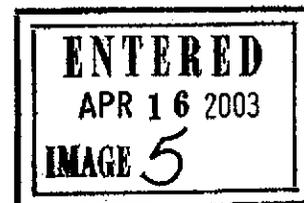
OHIO FIRST DISTRICT COURT OF APPEALS

suppress the pagers, and the state did not seek the admission of the pagers into evidence at the January 2001 trial.

Upon the evidence adduced at the trial, the jury found the appellant guilty on two counts, but failed to reach verdicts on the remaining counts. The state subsequently dismissed four of the fifteen counts on which the jury had hung and proceeded to a second trial on the eleven counts that remained.

In the months preceding the retrial, the state supplemented its responses to the defense's discovery demand, providing the defense with, among other things, "copies of e-mails between [the appellant] and [a witness]" and copies of the records of a wireless service concerning "pager information on pagers [that had been] recovered in [the] search [of the appellant's residence, and that had been] used to send e-mail messages." In August 2001, the defense, citing the state's recent supplementation of discovery and invoking the "interests of justice," moved for leave to file a motion to suppress. Following a hearing on the matter, the trial court denied leave. At the December 2001 retrial, the court admitted into evidence two pagers and three e-mail messages, and the appellant was ultimately convicted on all eleven counts.

On appeal from these convictions, appointed counsel raised two assignments of error, one challenging the weight of the evidence to support the verdicts, and the second challenging the imposition of sentences on offenses that, he contended, were allied and of similar import. This court overruled the assignments of error and affirmed the convictions.



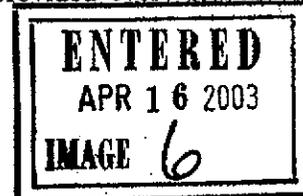
OHIO FIRST DISTRICT COURT OF APPEALS

The appellant now brings this timely application seeking to reopen the appeal on the issue of whether the trial court abused its discretion in denying leave to file a motion to suppress. We find the application to be well taken.

At the hearing on the motion for leave to file a motion to suppress, the state acknowledged that it had not sought the admission of the pagers at the first trial. The state further explained that it had not disclosed to the defense before the first trial the concededly incriminating e-mail messages that had been sent from and received on the pagers, because the e-mail messages had, unbeknownst to the prosecution, been in the custody of the Cincinnati Police Division's fraud unit. Thus, the state must be said to have effectively conceded the point that defense counsel sought to establish at the hearing, i.e., that the defense had not moved to suppress the pagers prior to the first trial, because, in the absence of the newly disclosed e-mail messages, the appellant's possession of the pagers was irrelevant to the charges against him.

Nevertheless, the trial court denied leave to file a motion to suppress upon its conclusion that the issue of suppression "should have been dealt with at a much earlier time," and upon the court's "feel[ing that] it would be prejudicial to the [prosecution] to reopen this issue." And, while the court conceded that "there may be now somewhat more significance to many of the items [seized]," it nevertheless concluded that the increased "significance" of the items sought to be suppressed provided "[no] reason for reopening this issue or to open this issue."

This court finds, to the contrary, that the increased "significance" of the pagers as evidence of the appellant's culpability in the charged offenses provided every reason to



OHIO FIRST DISTRICT COURT OF APPEALS

afford the appellant an opportunity to vindicate his Fourth Amendment rights. Moreover, the record does not demonstrate, nor can this court conceive of, any prejudice to the state in requiring it, before retrial, to justify its seizure of evidence that, coupled with newly disclosed evidence, might well have been, upon retrial, determinative of the issue of the appellant's guilt on the retried offenses.

Based upon the foregoing, this court concludes that an assignment of error challenging the denial of the appellant's motion for leave to file a motion to suppress would have presented a reasonable probability of success. Moreover, had appellate counsel mounted such a challenge and succeeded on appeal, the appellant would have been afforded a suppression hearing at which he could have sought to vindicate his Fourth Amendment rights. Thus, applying the standard set forth in *Strickland*, the court finds that the appellant has demonstrated a deficiency in appellate counsel's performance that prejudicially affected the outcome of his appeal. The court, therefore, concludes that the appellant has sustained his burden of demonstrating a genuine issue as to whether he had a colorable claim of ineffective assistance of appellate counsel. See *State v. Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d 696; *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456.

Accordingly, the court grants the appellant's application to reopen his appeals and extends the time for briefing, to-wit: The appellant shall have until May 16, 2003, to file his brief, and the appellee shall have until June 16, 2003, to file its brief.



OHIO FIRST DISTRICT COURT OF APPEALS

To the Clerk:

Enter upon the Journal of the Court on

4/16/03

per order of the Court

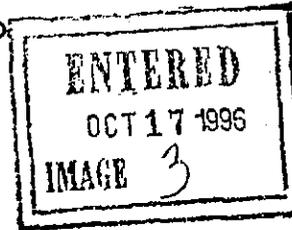
Presiding Judge

(COPIES SENT TO ALL PARTIES.)



STATE OF OHIO COUNTY OF HAMILTON
COURT OF APPEALS
THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE ORIGINAL AS FILED IN THE COURT OF APPEALS FOR THE FIRST DISTRICT OF OHIO AND THAT THE SAME IS BEING FILED IN THE COURT OF APPEALS FOR THE FIRST DISTRICT OF OHIO.
6
CLERK OF COURT

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



STATE OF OHIO, : NO. C-920734
Plaintiff-Appellee, :
vs. : ENTRY DENYING APPLICATION
JOHN FAUTENBERRY, : FOR REOPENING AND
Defendant-Appellant. : OVERRULING MOTIONS.

This cause came on to be considered upon the application of defendant-appellant John Fautenberry for reopening the appeal wherein judgment was entered by this court in *State v. Fautenberry* (Feb. 9, 1994), Hamilton App. No. C-920734, unreported, and the memoranda filed by the parties in connection therewith.

App.R. 26(B)(2)(b) requires a showing of good cause for filing an application to reopen more than ninety days after journalization of the appellate judgment. Appellant has failed to demonstrate that there is good cause for filing this application more than two years after this court's judgment was journalized. Further, the Ohio Public Defender states that it was appointed to represent appellant in January 1996; that on March 28, 1996, it filed an application for reopening in the Ohio Supreme Court "based upon ineffective assistance of appellate

counsel"; and that such application was denied in May 1996. The issue of ineffective assistance of counsel on direct appeal to this court could have been raised in appellant's previous application for reopening in the Supreme Court. Appellant therefore has had at least one opportunity to challenge the effectiveness of his appellate counsel, and he has provided no explanation as to why the application of res judicata would be unjust. See *State v. Houston* (1995), 73 Ohio St.3d 346, 652 N.E.2d 1018; *State v. Murnahan* (1992), 63 Ohio St.3d 60, 66, 584 N.E.2d 1204, 1209.

Accordingly, appellant's application for reopening is denied. All other motions are hereby overruled as being moot.

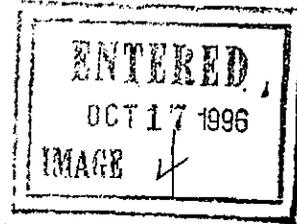
TO THE CLERK:

ENTER UPON THE JOURNAL OF
THE COURT 10/17/96

PER ORDER OF THE COURT.

BY: *M. M. ...*

Presiding Judge



(COPIES SENT TO ALL PARTIES)

STATE OF OHIO, COUNTY OF HAMILTON
COURT OF APPEALS

THIS IS TO CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE
DOCUMENT ON FILE IN THIS OFFICE ENTERED

10-17-1996
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 06-27-07

GREGORY HARTMANN, CLERK OF COURTS
BY: *J. ...*
DEPUTY CLERK

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



D73204821

STATE OF OHIO,	:	APPEAL NO. C-050375
	:	TRIAL NO. B-0404724
Plaintiff-Appellee,	:	
vs.	:	
RODNEY FRENCH,	:	<i>ENTRY GRANTING MOTION TO</i>
	:	<i>REOPEN APPEAL, APPOINTING</i>
Defendant-Appellant.	:	<i>COUNSEL, AND EXTENDING</i>
	:	<i>TIME.</i>

This cause is considered upon defendant-appellant Rodney French's App.R. 26(B) application to reopen this appeal.

French contends that he was denied the effective assistance of counsel, because his appellate counsel failed to present an assignment of error challenging, under the United States Supreme Court's decision in *Blakely v. Washington*,¹ the trial court's imposition of nonminimum and consecutive prison terms. In *State v. Foster*, the Ohio Supreme Court applied *Blakely* to declare unconstitutional, and to excise from the Revised Code, that portion of the state's sentencing statutes that required judicial factfinding before imposing nonminimum and consecutive prison terms.² The court held that its ruling applied to all cases then on direct review, and that such cases must be remanded to the trial court for resentencing.³

¹ (2004), 542 U.S. 296, 124 S.Ct. 2531.

² 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶56-61, 65-67, and 97.

³ Id. at ¶104 and 106.

OHIO FIRST DISTRICT COURT OF APPEALS

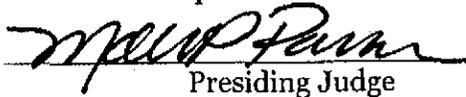
The supreme court decided *Foster* well before French submitted this appeal. Therefore, an assignment of error challenging his nonminimum and consecutive sentences under *Foster* would have succeeded in securing a new sentencing hearing.

Applying the standard set forth in *Strickland v. Washington*,⁴ the court finds that the appellant demonstrates a deficiency in appellate counsel's performance that prejudicially affected the outcome of his appeal.⁵ Because French sustains his burden of demonstrating a genuine issue as to whether he had a colorable claim of ineffective assistance of appellate counsel, the court grants French's application to reopen his appeal.⁶

Further, the court appoints Roger W. Kirk, Attorney Registration #0024219, counsel for French and extends time: French shall have until July 2, 2007, to file his brief; and the state shall have until August 6, 2007, to file its brief.

To the Clerk:

Enter upon the Journal of the Court on May 8, 2007, per order of the Court,

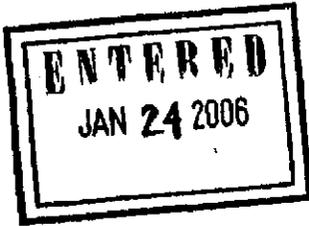

Presiding Judge

(COPIES SENT TO ALL PARTIES.)

⁴ (1984), 466 U.S. 668, 104 S.Ct. 2052; see *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456.

⁵ *State v. Sheppard*, 91 Ohio St.3d 329, 330, 2001-Ohio-52, 744 N.E.2d 770 (citing *State v. Bradley* [1989], 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus).

⁶ See App.R. 26(B)(5); *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 761 N.E.2d 696; *State v. Reed*, 74 Ohio St.3d at 535.



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



STATE OF OHIO,

APPEAL NO. C-040318

Plaintiff-Appellee,

vs

PAUL FULLER,

Defendant-Appellant

*ENTRY OVERRULING MOTION
FOR LEAVE TO FILE DELAYED
APPEAL, GRANTING MOTION
FOR REOPENING OF APPEAL,
APPOINTING COUNSEL, AND
EXTENDING TIME FOR DOCKET
STATEMENT UNTIL
FEBRUARY 14, 2006*

This cause is considered upon defendant-appellant Paul Fuller's application under App R. 26(B) to reopen his direct appeal and upon his alternative motion under App R. 5(A) for leave to file a delayed appeal

Fuller filed his application to reopen his appeal well after the ninety-day period prescribed under App R. 26(B). But App R. 26(B)(5) requires the court to reopen an appeal when the record demonstrates "a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Fuller avers in the affidavit accompanying his application that his retained trial counsel did not, as Fuller had requested, file a notice of appeal. And the record shows that the trial court did not, after Fuller had filed an affidavit of indigency, secure to Fuller his constitutional right to counsel in his first appeal as of right by appointing counsel to represent him in his appeal. See Crim R. 44(A). These circumstances conspired to compel Fuller to pursue his direct appeal pro se and thus effectively denied him the assistance of counsel on appeal. Therefore, the court holds that Fuller's application to reopen his appeal is well taken.

OHIO FIRST DISTRICT COURT OF APPEALS

Accordingly, the court grants Fuller's application to reopen this appeal, overrules his alternative motion for a delayed appeal, and orders that the July 2, 2004, entry dismissing the appeal be set aside.

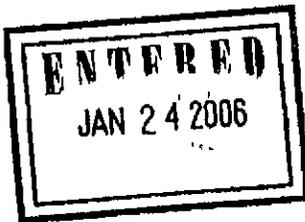
It appearing to the Court that the defendant-appellant herein is in indigent circumstances and unable to employ counsel, the court hereby appoints Joseph Rhett Baker, #0066219 in this cause.

Further, this Court *sua sponte* extends the time for filing the Docket Statement in the within cause until February 14, 2006.

To the Clerk

Enter upon the Journal of the Court on JAN 24 2006
per order of the Court *H. Hillman*
Presiding Judge

(COPIES SENT TO ALL PARTIES.)



RECEIVED BY CLERK OF COURT
JAN 24 2006
COURT OF APPEALS
FIRST DISTRICT
COLUMBUS, OHIO



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

STATE OF OHIO,

Plaintiff-Appellee,

vs.

RUBIN GARRETT,

Defendant-Appellant.



APPEAL NO. C-050482
TRIAL NO. B-0408734

ENTRY GRANTING
APPLICATION FOR
REOPENING OF APPEAL AND
EXTENDING TIME.

This cause is considered upon Garrett's App.R. 26(B) application to reopen this appeal and the state's memorandum in opposition.

An application to reopen an appeal must be granted if the applicant establishes "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal."¹ The decision of the United States Supreme Court in *Strickland v. Washington*,² provides the standard for determining whether the applicant was denied the effective assistance of appellate counsel.³ The applicant must thus prove "that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal."⁴

¹ *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696; App.R. 26(B)(5).
² (1984), 466 U.S. 668, 104 S.Ct. 2052.
³ See *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456.
⁴ *State v. Sheppard*, 91 Ohio St.3d 329, 330, 2001-Ohio-52, 744 N.E.2d 770 (citing *State v. Bradley* [1989], 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus).

In his application as supplemented, Garrett contends that he was denied the effective assistance of counsel, because his appellate counsel failed to present an assignment of error challenging his trial counsel's competence in failing to bring to the trial court's attention the Ohio Supreme Court's decision in *State v. Lozier*.⁵ In *Lozier*, the court held that the culpable mental state of "recklessness" applies to the offense of trafficking in the vicinity of a school. Garrett insists that, although he "repeatedly told" his trial counsel that he had not, and could not have, known that he had been selling drugs in the vicinity of a school, his counsel declined to pursue this line of defense.

This claim depends for its resolution upon evidence outside the record. Therefore, the appropriate vehicle for advancing it is an R.C. 2953.21 petition for postconviction relief.⁶ It follows then that this court, applying the standards set forth in *Strickland v. Washington*, cannot say that appellate counsel was ineffective in failing to present this claim in Garrett's direct appeal.

Garrett also assails his appellate counsel's competence in failing to advance an assignment of error challenging, under the United States Supreme Court's decision in *Blakely v. Washington*,⁷ the trial court's imposition of consecutive terms of imprisonment. In *State v. Foster*,⁸ the Ohio Supreme Court applied *Blakely* to declare unconstitutional, and to excise from the Revised Code, that portion of the state's sentencing statutes that required judicial factfinding before imposing consecutive

⁵ 101 Ohio St. 3d 161, 2004-Ohio-732, 803 N.E.2d 770.

⁶ See *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

⁷ (2004), 542 U.S. 296, 124 S.Ct. 2531.

⁸ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

OHIO FIRST DISTRICT COURT OF APPEALS

prison terms.⁹ The court held that its ruling applied to all cases then on direct review, and that such cases must be remanded to the trial court for resentencing.¹⁰

Garrett's appeal was pending before this court when the supreme court decided *Foster*. Therefore, an assignment of error challenging his consecutive sentences under *Foster* would have succeeded in securing for Garrett a new sentencing hearing. Thus, applying the standard set forth in *Strickland v. Washington*, the court finds that the appellant has demonstrated a deficiency in appellate counsel's performance that prejudicially affected the outcome of his appeal.

Garrett has thus sustained his burden of demonstrating a genuine issue as to whether he had a colorable claim of ineffective assistance of appellate counsel.¹¹ Accordingly, the court grants Garrett's application to reopen his appeal. Further, extends time: Garrett shall have until March 16, 2007, to file his brief; and the state shall have until April 16, 2007, to file its brief.

To the Clerk:

Enter upon the Journal of the Court on January 19, 2007

per order of the Court

Glenn A. ...
Acting Presiding Judge

(COPIES SENT TO ALL PARTIES.)

⁹ Id. at ¶65-67 and 97.

¹⁰ Id. at ¶106 and 104.

¹¹ See *State v. Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d 696; *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456.

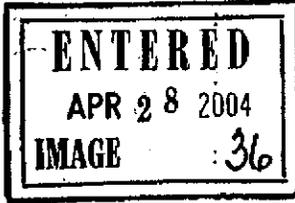
IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



STATE OF OHIO,
Plaintiff-Appellee,

vs.

CURTIS GREEN,
Defendant-Appellant.



APPEAL NO. C-030514
TRIAL NO. B-0207027

ENTRY GRANTING
APPLICATION FOR REOPENING
APPEAL, APPOINTING
COUNSEL, AND EXTENDING
TIME.

This cause came on to be considered upon the appellant's App.R. 26(B) application to reopen his direct appeal.

The court dismissed the appeal because the appellant's appointed counsel, Eric H. Kearney, neglected to file a brief. The court finds the application to be well taken, because counsel's neglect denied the appellant his right to appeal. The court, therefore, grants the appellant's application to reopen.

Accordingly, the court orders that the January 29, 2004, Entry of Dismissal be set aside. Further, the court appoints Matthew J. Donnelly as counsel and *sua sponte* extends time: The appellant shall have until June 4, 2004, to file his brief, and the appellee shall have until July 9, 2004, to file its brief.

To the Clerk:

Enter upon the Journal of the Court on 4/28/04

per order of the Court

Raymond W. Wheeler
Presiding Judge

(COPIES SENT TO ALL PARTIES.)

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



D60533202

STATE OF OHIO, : APPEAL NO. C-030437
Plaintiff-Appellee, : TRIAL NO. B-0208556
vs. : *ENTRY GRANTING MOTION TO
REOPEN APPEAL, APPOINTING
KARL ISKI, : COUNSEL, AND EXTENDING
Defendant-Appellant. : TIME.*

This cause came on to be considered upon the appellant's App.R. 26(B) application to reopen his direct appeal.

The court dismissed the appeal because the appellant's appointed counsel, Eric Kearney, neglected to file a brief. The appellant concedes that he filed his application well after the ninety-day period prescribed under App.R. 26(B). But appellate counsel's inaction effectively denied the appellant any appeal from his conviction. And App.R. 26(B)(5) requires the court to reopen an appeal when, as here, the record demonstrates "a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Thus, the court holds that the application is well taken.

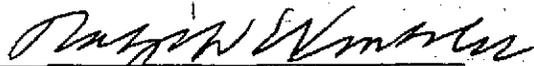
Accordingly, the court orders that the October 24, 2003, Entry of Dismissal be set aside. Further, the court appoints Michaela Stagnaro, #0059479, as counsel and extends time: The appellant shall have until October 20, 2004, to file the brief, and the appellee shall have until November 24, 2004, to file its brief.

To the Clerk:

Enter upon the Journal of the Court on

SEP - 3 2004



 (COPIES SENT TO ALL PARTIES.)
Presiding Judge

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



STATE OF OHIO,

Plaintiff-Appellee,

vs.

TROY YOUNG,

Defendant-Appellant.

APPEAL NO. C-030345
TRIAL NO. B-0202901A

*ENTRY GRANTING
APPLICATION FOR REOPENING
APPEAL, APPOINTING JAY
CLARK AS COUNSEL, AND
EXTENDING TIME FOR BRIEFS.*

This cause came on to be considered upon the appellant's App.R. 26(B) application to reopen his direct appeal.

The court dismissed the appeal because the appellant's counsel had neglected to file a brief. The court finds the application to be well taken, because counsel's neglect denied the appellant his right to appeal. The court, therefore, grants the appellant's application to reopen.

Accordingly, the court orders that the May 20, 2004, Entry of Dismissal be set aside. Further, the court appoints Jay Clark, #42027, as counsel and *sua sponte* extends time: the appellant shall have until September 30, 2004, to file his brief, and the appellee shall have until November 1, 2004, to file its brief.

To the Clerk:

Enter upon the Journal of the Court on

8/13/04

per order of the Court

Presiding Judge

(COPIES SENT TO ALL PARTIES.)

