

IN THE SUPREME COURT OF OHIO

07-1623

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DELBERT HARRISON,

Defendant-Appellant.

CASE NO. _____

On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District

C.A. Case No. 86925

APPLICATION FOR REOPENING
MOTION NO. 390758

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DELBERT HARRISON

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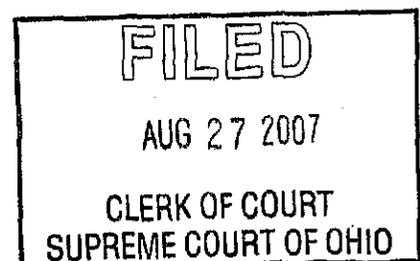


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EXPLANATION of Why This CASE is A CASE of
PUBLIC OR GREAT GENERAL INTEREST
AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This CAUSE PRESENTS FOUR (4) CRITICAL ISSUES FOR THE FUTURE OF A DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, WHEN APPELLATE COUNSEL FAILS TO RAISE AS ASSIGNMENTS OF ERROR THOSE CLAIMS WHICH HOLD MERIT, BEING, (1) WHEN A DEFENDANT IS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED AND SENTENCED AS A SEXUALLY VIOLENT PREDATOR WHEN THE SPECIFICATION FAILED TO ALLEGE THE ELEMENTS OF THAT ENHANCEMENT, THAT ENHANCEMENT CANNOT STAND, (2) THE DEFENDANT CANNOT BE CONVICTED OF A SEXUALLY VIOLENT PREDATOR SPECIFICATION WHEN THAT DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT USED THE PRESENT CONVICTION TO SO FIND, (3) A DEFENDANT'S RIGHT TO CONFRONTATION AND CROSS EXAMINATION IS DENIED WHEN STATES WITNESS LAUREN McALILEY TESTIFIED CONCERNING HER INTERVIEW OF THE ALLEGED VICTIM DESTINY BELLA, (4) A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW IS DENIED WHEN HE IS SENTENCED TO A TERM OF LIFE IMPRISONMENT IN THE ABSENCE OF FINDINGS BY THE JURY OR INDICTMENT ALLEGATIONS.

IN THIS CASE THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO IS ARBITRARILY USING THE TERM RES-JUDICATA TO ATTEMPT AN UN-JUST APPLICATION OF THAT DOCTRINE, AND AN EGREGIOUS OR MISGUIDED DECISION/OPINION HAS FOLLOWED THE APPLICATION OF THE DOCTRINE.

THE EIGHTH DISTRICT COURT OF APPEALS IS ATTEMPTING TO SET A PRECEDENT THAT STANDS ALONE AND IS NOT SUPPORTED BY THIS COURT'S HOLDINGS IN STATE V. MURNAHAN, (1992) 63 OHIO ST. 3d. 60, 584 N.E.2d. 1204, AND STATE V. HUTTON, 100 OHIO ST. 3d. 176, 797 N.E.

3d.948 (2003).

The Appellate Courts decision STRIKES AT THE HEART OF THE Ohio Supreme Courts holdings CONCERNING PROCEDURAL RULINGS AND THE LEGISLATURES INTENT BEHIND THE RATIFICATION OF App. R. 26 (B).

The Eighth Appellate District is citing RES-JUDICATA BECAUSE AN APPELLANT DOES NOT RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL TO THE Ohio Supreme COURT. THE LEGISLATURE ENACTED App. R. 26 (B) UPON THE SUPREME COURT OF OHIO'S ADVISEMENT AND PROCEDURAL RULINGS IN STATE V. MURNAHAN, SUPRA, BEING THAT AN APPELLANT SHOULD RAISE AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN THE APPELLATE COURTS OF OHIO, THUS FREEING THE Ohio Supreme COURT FROM DETERMINING ALL CASES OF ALLEGED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, AND PLACING THE FIRST CONSIDERATIONS OF THAT CLAIM TO THE APPELLATE COURTS OF THE STATE.

The decision of the Eighth Appellate District THREATENS AN UNPRECEDENTED WAVE OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BEING TAKEN TO THE Ohio Supreme COURT, AND UNDERMINES THE LEGISLATURES INTENT. MOREOVER THE COURT OF APPEALS decision IN THIS CASE, AND NUMEROUS OTHER CASES IN THAT COURT, ESTABLISHES AN ILLOGICAL AND UNTENABLE PROCEDURAL RULE IN THAT COURT. A RULE THAT THE COURT DOES NOT HAVE TO REVIEW THE MERITS OF A DEFENDANTS App. R. 26 (B) MOTION TO REOPEN APPEAL, WHEN A REOPENING OF APPEAL SHOULD BE CONSIDERED BY THE APPELLATE COURTS OF OHIO NOT BY THE SUPREME COURT OF OHIO WHICH IS AXIOMATIC.

The implications of the Court of Appeals decision, AND OVER 1000 OTHER SIMILAR DECISIONS FROM THAT COURT, AFFECT EVERY CRIMINAL DEFENDANT IN OHIO, AND THE ORDERLY DISPENSEMENT OF CRITICAL CASE THROUGH THE OHIO SUPREME COURT.

The decision of the Court of Appeals IGNORES AND VIOLATES ALL PROCEDURAL RULINGS ENACTED BY THIS COURT BY THE APPELLATE COURTS UNJUST APPLICATION OF RES-JUDICATA FOR EVERY APPELLANT CITING OR RAISING AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM UNDER APP.R. 26 (B), THUS SETTING AN INCORRECT PRECEDENT THAT THOSE APPELLANTS ARE PROCEDURALLY BARRED FOR FURTHER REVIEW OF THE CLAIMS RAISED IN AN APPLICATION FOR REOPENING OF APPEAL UNDER APP.R. 26 (B).

THE LEGISLATURE MAY AS WELL RESIND OR REVOKE APP.R. 26 (B) BECAUSE THE EIGHTH APPELLATE DISTRICTS APPLICATION OF THE DOCTRINE OF RES JUDICATA TO EVERY CLAIM BROUGHT BY AN APPELLANT UNDER APP.R. 26 (B) NULLIFIES ANY ATTEMPT TO RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL UNDER APP.R. 26 (B).

THIS CASE AND OPINION SETS THE STATE OF OHIO BACK APPROXIMATELY 10 YEARS OR MORE TO BEFORE STATE V. MURNAHAN, SUPRA, AND TEARS US UNDER OHIO'S CONSTITUTIONAL SCHEME, AND THE DUE PROCESS RIGHT TO REDRESS AND GRIEVANCE AND RIGHT TO APPEAL.

THIS COURT NEEDS THE OHIO SUPREME COURTS GUIDANCE TO ENSURE UNIFORM AND FAIR APPLICATIONS OF THE DOCTRINE OF RES-JUDICATA WHEN DEALING WITH AN APPLICATION FOR REOPENING UNDER APP.R. 26 (B).

STATEMENT OF THE CASE

Defendant was indicted in a five (5) count indictment. All counts alleged to have occurred between May 24, 2004 and June 23, 2004.

Counts one and two alleged that defendant committed rape of a child under the age of thirteen (13) in violation of §2907.02 of the Ohio Revised Code. Each of these counts included a sexually violent predator specification, a repeat violent predator specification and a notice of a prior conviction.

Counts three and four charged defendant with gross sexual imposition of a victim under the age of thirteen (13) in violation of §2907.05 of the Ohio Revised Code. These two counts also contained sexually violent predator specifications. Defendant was also charged with a count of kidnapping of a victim under the age of thirteen (13) in violation of §2905.01 of the Ohio Revised Code. This count also contained a sexual motivation specification, a sexually violent predator specification, a repeat violent offender specification and a notice of a prior conviction.

At trial defendant was found guilty on all five (5) counts. The repeat violent offender specification and notice of prior convictions specifications were withdrawn by the state. The matters of the sexually violent predator specifications were to be determined by the judge instead of a jury.

Defendant was sentenced to a prison term of life on counts one and two to be served consecutively without parole based on the court's verdicts that defendant was a sexually violent predator. Defendant, on counts three and four, was sentenced to ten (10) years to life to be served concurrently with each other and concurrent to counts one and two.

On appeal to the Court of Appeals for Cuyahoga County, this court, on August 10, 2006, affirmed the judgment and convictions but vacated the sentence and remanded for a resentencing, Case No. 86925. (August 10, 2005).

The case was then remanded to the Court of Common Pleas for Cuyahoga County for a resentencing.

On September 28, 2006, defendant was sentenced to a term of imprisonment of life on counts one and two, five (5) years to life on counts three and four and ten (10) years to life on count five. The court ordered that counts one and two were to be served consecutive to one another and concurrently with counts three, four and five. Counts three, four and five were to be served concurrent with one another but consecutive to counts one and two. In effect, defendant was sentenced to life sentences without parole.

From that judgment and sentence this appeal has been perfected.

STATEMENT OF FACTS

On September 28, 2006 the matter came on before the court for a resentencing ordered by this court. The court recounted the proceedings in this case and invited comments from the parties. (Tr.3-5). The prosecutor deferred to the court's memory of the trial and incorporated any comments that were made prior to the last sentencing. (Tr.6). Counsel for defendant likewise incorporated the mitigation that prior counsel, Donald Butler, had proffered in the record. (Tr.6).

The court addressed defendant. Defendant advised the court that he believed his rights had been violated and that he was wrongfully incarcerated. Defendant stated he wanted to file a motion for a new trial based on newly discovered evidence. Defendant asserted that he was in prison when the charges were brought against him under a

different name. (Tr.7).

At that point, defendant stated that his lawyer was sleep during his trial. Defendant requested that his appeal lawyer present this issue in his appeal but he was told that this evidence did not appear in the transcript. Counsel stated that defendant was then directed to contact the State Public Defenders' office concerning that issue. (Tr.8).

At that point the court proceeded to pronounce sentence on counts one and two. (Tr.9). Defendant inquired of the court concerning the motions that he had filed. (Tr.10). Defendant asserted that he was attempting to bring these matters before the court but none of his letters had been answered. Defendant also asserted he had not seen a transcript and that he had not been sent his appellate brief. (Tr.12-13).

After a short interruption the court addressed defendant concerning issues that did not appear on the record. The court stated it recalled the trial **"very vividly."** (Tr.13). At that point, defendant stated he was denied effective assistance of counsel because his lawyer was **"sleeping during my trial."** (Tr.13). At that point the court stated the following:

THE COURT: And on a number of occasions, this Court had to prompt Mr. Butler to appear to be awake. I can't say for sure he was sleeping, but on a number of occasions, we had to prompt Mr. Butler to appear to be awake. Do you understand what I'm doing for you? (Tr.13-24).

There were complaints by defendant that prior counsel would not present any of his alibi evidence at trial. The court advised defendant that he could raise the issue of ineffective assistance of counsel in his new appeal that the court was authorizing. (Tr.15).

The court then advised defendant as follows:

... I suggest we go forward with the resentencing. I've place some issues on

the record that will permit you to perfect a second appeal whereby you can raise an ineffective assistance of counsel, okay, and I will also after this hearing appoint an attorney to you to raise any post conviction relief motions, including your motion for newly discovered evidence. (Tr.16-17).

The court then advised defendant that he would have a hearing at the appropriate time to consider information defendant may have been in prison at the time he was charged with these crimes. (Tr.19). Defendant continued to assert that he was wrongfully incarcerated and falsely convicted. (Tr.21).

Thereafter the court imposed the sentence as follows:

THE COURT: All right. As to Counts 1 and 2, I'm sentencing this individual to life in prison to run consecutively.

As to Counts 3 and 4, I sentence this defendant to five years to life in prison, and on Count 5, ten years to life in prison.

The first two counts, Counts 1 and 2 are consecutive. Counts 3, 4 and 5 are concurrent and concurrent to the two life consecutive sentences.

So essentially, what I'm doing is I'm imposing the original sentence that I imposed way back when. Ronnie, do you care to be heard? (Tr.23-24).

The court, after hearing from the prosecutor informed defendant that the life sentences that were being imposed on counts 1 and 2 were consecutive. (Tr.25). The prosecutor responded that because defendant was found guilty of a sexually violent predator specification life sentences without parole were mandatory. (Tr.26-27). The court then stated that defendant need not be informed of post-release control because he was ineligible as he was serving a life sentence and would never leave prison. (Tr.27).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW No. 1 WHEN A DEFENDANT IS SENTENCED AS A SEXUALLY VIOLENT PREDATOR WHEN THE SPECIFICATION FAILED TO ALLEGE THE ELEMENTS OF THAT ENHANCEMENT THE DEFENDANT IS DENIED DUE PROCESS OF LAW.

The indictment in this case charged defendant with a specification alleging him to be a sexually violent predator. However that specification merely alleged that

The Grand Jury further find and specify that the offender is a sexually violent predator.

However, that specification fails to allege the elements of the offense. Section 2941.148(B) of the Ohio Revised Code states that:

(B) In determining for purposes of this section whether a person is a sexually violent predator, all of the factors set forth in divisions (H)(1) to (6) of section 2871.01 of the Revised Code that apply regarding the person may be considered as evidence tending to indicate that it is likely that the person will engage in the future in one or more sexually violent offenses.

Moreover, that term is further defined in §2971.01(H)(1)-(2)(a)-(f) as follows:

(H)(1) **"Sexually violent predator"** means a person who has been convicted of or pleaded guilty to committing, on or after January 1, 1997, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses.

(2) For purposes of division (H)(1) of this section, any of the following factors may be considered as evidence tending to indicate that there is a likelihood that the person will engage in the future in one or more sexually violent offenses:

(a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. For purposes of this division, convictions that result from or are connected with the same act or result from offenses committed at the same time are one conviction, and a conviction set aside pursuant to law is not a conviction.

(b) The person has a documented history from childhood, into the juvenile developmental years, that exhibits sexually deviant behavior.

© Available information or evidence suggests that the person chronically commits offense with a sexual motivation.

(d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.

(e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.

(f) Any other relevant evidence.

Consequently the specification fails to allege the elements of a sexually violent predator. It fails to give defendant sufficient notice which he is entitled to under the Constitution.

In **Olsen v. McFaul**, 843 F.2d 918 (6th Cir. 1988), which was a habeas corpus action, petitioner contended that he was not even given notice of the charge against him. Petitioner in that case, like the present case, was charged with a violation of law and claimed that the charge against him was insufficient to apprise him of the crime which was only alleged in language tracking the criminal statute. In **Olsen** the court ruled that an indictment which merely repeats the statutory language is not sufficient to give fair notice of the charge.

Amendment VI to the United States Constitution provides that an accused in a criminal case has the **"...to be informed of the nature and cause of the accusation; ..."** **Argersinger v. Hamlin**, 407 U.S. 25, 28 (1972).

In **Russell v. United States**, 369 U.S. 749, 763-64 (1962), the Supreme Court set forth the criteria by which the sufficiency of the indictment is to be measured:

These criteria are, first, whether the indictment **"contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what the must be prepared to meet,' "** and, secondly, **"in case any other proceedings are taken against him for a similar offenses whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."**

Thus, an indictment is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy. While the federal right to a grand jury indictment has never been found to be incorporated against the states, see Hurtado v. California, 110 U.S. 516, 534-35 (1884), courts have found that the due process rights enunciated in Russell are required not only in federal indictments but also in state criminal charges. See De Vonish v. Keane, 19 F.3d 107, 108 (2d Cir. 1994); Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992); see also Isaac v. Grider, 2000 WL 571959, at *4 (6th Cir. 2000); Parks v. Hargett, 1999 WL 157431, at *3 (10th Cir. 1999); See United States v. Hamling, 418 U.S. 87, 118 (1974); United States v. Cruikshank, 92 U.S. 542, 558 (1875).

As the Supreme Court has stated, a **"conviction upon a charge not made would be a sheer denial of due process."** DeJonge v. Oregon, 299 U.S. 353, 362 (1937).

No principle of procedural due process is more clearly established than that notice of the specific charge, and chance to be heard in trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceedings in all courts, state, or federal.... Cole v. Arkansas, 333 U.S. 196, 201 (1948).

The requirements of a charging paper in a criminal case were summarized by the Court of Appeals for Cuyahoga County in paragraphs 1 and 2 of the syllabus in State v. Burgun, 49 Ohio App.2d 112, 359 N.E.2d 1018 (1976):

1. The formal charge whether an indictment, an information, or a complaint under Criminal Rule 3, must contain the constituent elements of a criminal offense. While all specific facts relied upon to sustain the charge need not be recited, the material elements of the crime must be stated.
2. The numerical designation of the applicable criminal statute in a complaint does not cure the defect in failure to charge on all the essential elements of the crime.

In Springfield Twp. v. Quicci, 97 Ohio App.3d 664, 647 N.E.2d 248 (1994), a cryptic description of the offense was held to be insufficient to charge an offense.

The Supreme Court ruled as follows in State v. Cimpritz, 158 Ohio St.2d 490, 110 N.E.2d 416 (1953):

If any material element or ingredient of an offense, as defined by statute is omitted from an indictment, such omission is fatal to the validity of the indictment.

Consequently, defendant was convicted on a constitutionally insufficient indictment which did not contain the elements of the offense. Therefore, the judgment and conviction must be set aside and vacated.

PROPOSITION OF LAW NO. 2. DEFENDANT CANNOT BE CONVICTED OF A SEXUALLY VIOLENT PREDATORY SPECIFICATION WHEN THE DEFENDANT IS DENIED DUE PROCESS OF LAW BECAUSE THE COURT ONLY USED THE PRESENT CONVICTION TO SO FIND HIM A SEXUALLY VIOLENT PREDATOR.

At the hearing concerning whether defendant should be deemed a sexually violent predator the court convicted defendant based on the conviction in the present case. The prosecutor, in urging that defendant should be convicted alleged the following:

The first factor is that he has been convicted in separate criminal actions of sexually oriented offense. I would submit that the corruption of a minor was a sexually oriented offense and, again, by operation of law, the current case, rape, is a sexually oriented offense. (Tr.601).

The court in rendering its verdict was that the present conviction ruled that defendant was a sexually violent predator:

THE COURT: All right. So, let the court then come to its verdict. There's no question Mr. Delbert Harrison is a sexually violent predator under this statute. He's now been convicted two or more times in separate criminal offenses, sexually oriented offense. ... (Tr.607).

This was improper and unconstitutional. Thus, it can be seen that the court used the present case to enhance defendant's sentence by deeming him a sexually violent predator.

The Ohio Supreme Court has so ruled in **State v. Smith**, 104 Ohio St.3d 106, 818 N.E.2d 283 (2004):

Convictions of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined inr.C.2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment.

Accord, State v. Haven, 105 Ohio St.3d 418, 827 N.E.2d 319 (2005).

An essential element of finding one to be a sexually violent predator was that **"The person has been convicted two or more times on separate criminal actions of a sexually oriented offense or a child-victim oriented offense. ..."** Ohio Rev.Code §2971.01(H)(2)(a).

This conviction and sentencing violated due process of law. **Thompson v. City of Louisville**, 362 U.S. 199, 206 (1960) (holding that it was **"a violation of due process to convict and punish a man without evidence of his guilt"**). See **Shuttlesworth v. City of Birmingham**, 382 U.S. 87, 95 (1965).

PROPOSITION OF LAW No.3 A DEFENDANT'S RIGHT TO CROSS EXAMINE AND CONFRONTATION IS DENIED WHEN THE STATES WITNESS, LAUREN McAliley TESTIFIED CONCERNING HER INTERVIEW OF THE ALLEGED VICTIM DESTINY BELLA.

At trial the prosecution called Lauren McAliley, who was a nurse practitioner at University Hospital. Her examination revealed no physical evidence of sexual abuse. However, thereafter she proceeded to relate what she was told by Destiny Bella in her interview. (Tr.377-86). This denied defendant his right of confrontation and cross-examination. This was a basic right under the Sixth Amendment.

This court, in State v. Iverson, Case No. 85593 (Nov. 17, 2005), ruled that a police officer who related information gathered from another officer was hearsay and denied defendant his right of confrontation and cross-examination. Crawford v. Washington, 541 U.S. 36 (2004). See Davis v. Washington, 126 S.Ct.2266 (2006).

In State v. Crager, 164 Ohio App.3d 816, 844 N.E.2d 390 (2005), the trial court allowed one witness to testify concerning a report made by another witness. The court ruled that defendant's constitutional rights of confrontation and cross-examination guaranteed by the Sixth Amendment had been violated.

Amendment VI of the United States Constitution states that "**In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.**" In Crawford v. Washington, 541 U.S. 36 (2004), the court affirmed the right of confrontation where testimonial statements are offered. Thus, "**Where testimonial of statements are involved, we do not think the Framers meant to leave**

the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' 124 S.Ct. at 1370.

Defendant was denied his right of confrontation and cross-examination. This would occur even though there was not an objection. In this case there was an objection. In United States v. Cromer, 389 F.3d 662 (6th Cir.2004), the court ruled that a confrontation clause violation constituted plain error. Thus, the court reviewed it for plain error. It reversed the conviction even though there was no objection at trial. The same must be said in this case. Defendant was clearly denied his right of confrontation and cross-examination by the admission of this testimony.

PROPOSITION OF LAW No 3, A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW IS DENIED WHEN HE IS SENTENCED TO A TERM OF LIFE IMPRISONMENT IN THE ABSENCE OF FINDINGS BY THE JURY OR CONTAINED WITHIN THE INDICTMENTS ALLEGATIONS.

Defendant was sentenced to life imprisonment and five (5) years to life on various offenses. However those sentences appear to be incorrect and did not conform with the allegations of the indictment or findings by the jury. Flore v. White, 531 U.S. 225, 228-29 (2001).

The indictment in this case, with respect to the counts rape, alleged defendant has sexual conduct with Jane Doe, not his spouse **"whose age at the time of said sexual conduct was under thirteen (13) years ..."**

The indictment further alleged **"that defendant purposely compelled the victim to submit by force or threat of force."** This was a violation of §2907.02 of the Ohio Revised Code. The penalty section where force or threat of force is used and the person

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Memorandum in Support
of Jurisdiction

has been sent by regular U.S. Mail to Clerk of Supreme Court of Ohio,
65 South Front Street 9th Fl Columbus, Ohio
43215-3431, on this 20th day of August, 2007.

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 86925

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DELBERT HARRISON

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 390758
LOWER COURT NO. CR-456017
COMMON PLEAS COURT

RELEASE DATE: July 18, 2007

JUDGE PATRICIA A. BLACKMON:

On November 17, 2006, Appellant Delbert Harrison filed a timely application for reopening pursuant to App. R. 26(B). He is attempting to reopen the appellate judgment that was rendered by this court in *State v. Harrison*, Cuyahoga App. No. 86925, 2006-Ohio-4119. In that opinion, we affirmed Harrison's convictions for rape, gross sexual imposition and kidnapping, but vacated his sentence and remanded for resentencing. On February 15, 2007, the State of Ohio, through the Cuyahoga County Prosecutor's office, filed a memorandum in opposition to appellant's application for reopening of appeal pursuant to App.R. 26(B). For the following reasons, we decline to reopen Harrison's appeal:

The doctrine of res judicata prohibits this court from reopening the original appeal. Errors of law that were either raised or could have been raised through a direct appeal may be barred from further review vis-a-vis the doctrine of res judicata.¹ The Supreme Court of Ohio has further established that a claim for ineffective assistance of counsel may be barred by the doctrine of res judicata unless circumstances render the application of the doctrine unjust.²

¹ *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 1204.

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

Herein, Harrison possessed a prior opportunity to raise and argue the claim of ineffective assistance of appellate counsel through an appeal to the Supreme Court of Ohio. However, Harrison did not file an appeal with the Supreme Court of Ohio and has further failed to provide this court with any valid reason why no appeal was taken.³ We further find that applying the doctrine of res judicata to this matter would not be unjust. Accordingly, the principles of res judicata prevent further review.⁴

Notwithstanding the above, Harrison fails to establish that his appellate counsel was ineffective. "In *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 535, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel were deficient for failing to raise the issue he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus, [applicant] bears the burden of establishing that there was a

³ *State v. Hicks* (Oct. 28, 1982), Cuyahoga App. No. 44456, reopening disallowed (Apr. 19, 1994), Motion No. 50328, affirmed (Aug. 3, 1994), 70 Ohio St.3d 1408, 637 N.E.2d 6.

⁴ *State v. Borrero* (Apr. 29, 1996), Cuyahoga App. No. 68289, reopening disallowed (Jan. 22, 1997), Motion No. 72559.

'genuine issue' as to whether there was a 'colorable claim' of ineffective assistance of counsel on appeal."⁵

Additionally, Strickland charges us to "appl[y] a heavy measure of deference to counsel's judgments," and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."⁶ Moreover, we must bear in mind that counsel need not raise every possible issue in order to render constitutionally effective assistance.⁷

In regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld an appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments. "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."⁸ Additionally, appellate counsel is not required to argue assignments of error which are meritless.⁹ After reviewing

⁵ *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

⁶ *Strickland v. Washington* (1984), 466 U.S. at 697, 104 S.Ct. 2052, 80 L.Ed.2d 674.

⁷ See *Jones v. Barnes*, (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 761 N.E.2d 18.

⁸ *Jones*, supra.

⁹ *Jones*, supra.

Harrison's application, we find that he has failed to demonstrate a "genuine issue as to whether he was deprived of the effective assistance of counsel on appeal" as required by App.R. 26(B)(5).

Nevertheless, a substantive review of the application to reopen fails to demonstrate that there exists any genuine issue as to whether applicant was deprived of the effective assistance of appellate counsel on appeal. In his first assignment of error, Harrison argues that he was denied due process of law when he was convicted and sentenced as a sexually violent predator when the specification failed to allege the elements of that enhancement.

According to R.C. 2941.148, "the specification that the offender is a sexually violent predator shall be stated in substantially the following form: Specification ***. The grand jury *** further find and specify that the offender is a sexual violent predator." Since the specification that alleged that Harrison was a sexually violent predator mirrored the statutory language, we do not find that counsel was ineffective for failing to raise this issue. As stated above, counsel is not required to argue every conceivable issue to render effective assistance of counsel.¹⁰

Harrison also argues that he was denied due process of law when he was convicted of a sexually violent predator specification where the court used the

¹⁰ *Jones, supra.*

present conviction to so find. R.C. 2971.01(H)(1) defines sexually violent predator as a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future of one or more sexually violent offenses. In this matter, it was stipulated that Harrison was previously convicted of a corruption of a minor offense which is a sexually oriented offense. See R.C. 2907.04; R.C. 2950.01(D)(1)(b)(I). Since Harrison was previously convicted of a sexually violent offense, we find no error with the trial court's finding that Harrison was a sexually violent predator.

Additionally, this court addressed this same issue in Harrison's direct appeal and found no error. In so doing this court stated that, "a 'sexually violent predator' means a person who has been convicted of or pleaded guilty to committing, on or after January 1, 1997, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." R.C. 2971.01(H)(1). In determining whether an offender "is likely to engage in the future in one or more sexually violent offenses," the trier of fact may consider any of the factors listed under R.C. 2971.01(H)(2). Several of these factors were present in this case."

"In this case, Harrison had been convicted in two separate criminal actions of a sexually oriented offense or a child-victim oriented offense. See R.C. 2971.01(H)(2)(a). He was convicted in the instant case of raping a child. He also

stipulated to having been convicted of a prior corruption of a minor offense, which is also a sexually oriented offense. *R.C. 2907.04; R.C. 2950.01(D)(1)(b)(I).*”

“There was also evidence indicating that Harrison chronically commits offenses with a sexual motivation. See *R.C. 2971.01(H)(2)(c)*. The testimony in this case was that Harrison subjected the victim to sexual acts on several occasions. There was also testimony that he committed sexual acts upon a three-year-old victim as well. Harrison argues that the trial court inappropriately referenced his involvement with this second victim, against whom he was not indicted. However, there was credible testimony provided about these acts that the court could consider in making its determination.”

“Further, even without evidence relating to the three-year-old, we find sufficient evidence existed to support the trial court's determination. The trial court also considered that Harrison had a sexually oriented offense in his past.”

“The trial court also considered that Harrison had threatened to kill the victim unless she complied. The court further noted that Harrison had a lengthy criminal history that included eight prior criminal offenses, one of which was sexually oriented, and that Harrison had spent 24 of his 48 years of life in the state penal institution. In the instant case, Harrison was convicted of two counts of rape, two counts of gross sexual imposition, and one count of kidnapping. See *R.C. 2971.01(H)(2)(f)*. We find this evidence supported a determination that

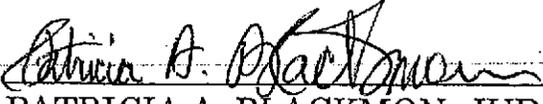
Harrison exhibited repetitive criminal behavior and was likely to engage in the future in one or more sexually violent offenses.”

In his third assignment of error, Harrison argues that he was denied his right of confrontation and cross-examination when Lauren McAliley, a nurse practitioner, testified concerning her interview of the victim. However, a review of the record demonstrates that Harrison cannot establish prejudice since the victim in this matter testified and was subject to cross-examination.

In Harrison’s last assignment of error, he argues that he was denied due process of law when he was sentenced to a term of life imprisonment in the absence of findings by the jury or indictment allegations. According to R.C. 2907.02(B), “***If the offender under division (A)(1)(b) of this section purposefully compels the victim to submit by force or threat of force, or if the victim under division (A)(1)(b) of this section is less than ten years of age, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.***”

In this matter, Harrison was charged with a violation of R.C. 2907.02(A)(1)(b) of the rape of Jane Doe, bearing a date of birth of January 30, 1997. The indictment also stated that the offense allegedly occurred sometime from May 24, 2004 to June 23, 2004. While the jury only found that the victim was under thirteen years of age, the jury also found that Harrison used force or threat of force thereby subjecting him to life imprisonment.

Accordingly, Harrison's application to reopen is denied.


PATRICIA A. BLACKMON, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MELODY J. STEWART, J., CONCUR