

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

GARY CHARLES RIGDON,

Defendant-Appellant.

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CASE NO. 08-1526

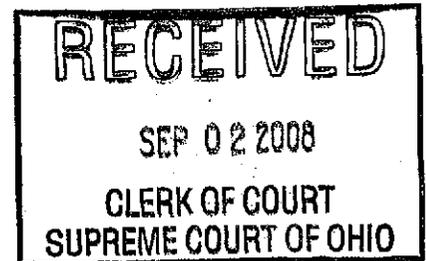
ON APPEAL FROM THE WARREN
COUNTY COURT OF APPEALS,
TWELFTH APPELLATE DISTRICT

COURT OF APPEALS CASE NO.
CA-2007-03-038

MEMORANDUM OF THE STATE OF OHIO IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

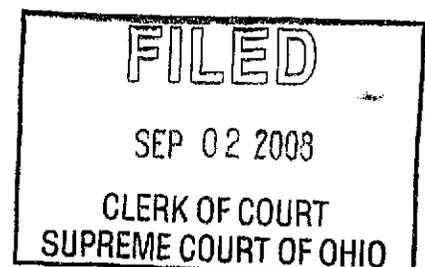
For the State of Ohio:

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

This is not a case of public or great general interest. Appellant, Gary C. Rigdon is not a public figure, nor is this case in the public eye. The Appellant's convictions and sentence were affirmed by the Court of Appeals and this Court denied to hear his appeal of the court of appeals decision. *See State v. Rigdon* (2007), Warren App. No. CA2006-05-064, 2007 Ohio 2843, appeal not accepted for review, 115 Ohio St. 3d 1474, 2007 Ohio 5735. Now, Appellant claims he was denied effective Appellate counsel and that the Twelfth District Court of Appeals misapplied the law in regards to Appellate Rule 26. The Court of Appeals properly applied the law and denied Appellant's Rule 26(B) claim. Appellant had effective Appellate counsel.

This case also does not involve a substantial constitutional question. The Appellant claims that the substantial constitutional question in this case is that his rights were violated and that this could happen to anyone that appeals to the Twelfth District. The Twelfth District Court of Appeals decision that Appellant had effective appellate counsel does not rise to the level of a substantial constitutional question.

Review in this case is unwarranted because this Court's interpretation of Appellate Rule 26 has been clear and consistent. Appellant was unable to meet the standard for ineffective assistance of appellate counsel. Appellant provides no reason to grant jurisdiction in this case. This is not a case of public or great general interest nor is there a substantial constitutional question involved.

ARGUMENT

RESPONSE TO PROPOSITIONS OF LAW¹

Appellant had effective assistance of Appellate counsel.

The Twelfth District Court of Appeals correctly applied Appellate Rule 26 and correctly found that Appellant had effective assistance of Appellate counsel.

Under Appellate Rule 26, “[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” App. R. 26(B)(5).

The standard for determining whether a defendant had effective assistance of counsel is set forth in *Strickland v. Washington* (1984), 466 U.S. 668:

[f]irst the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performances prejudiced the defense...

It is the defendant's burden to show that counsel's representation fell below the objective standard of reasonableness. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142.

Moreover, because the ways to provide effective assistance are so numerous, the court's scrutiny of counsel's performance must be highly deferential. *Id.* A properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299, 301. Any questions regarding the effectiveness of counsel must be viewed in light of evidence against the Defendant, with a “strong presumption that counsel’s conduct falls within the wide range of professional assistance.” *Strickland*, 446 U.S. at 689 and *Bradley*, 42 Ohio St.3d at 142. A reviewing court cannot use the benefit of hindsight in determining whether a Defendant received effective assistance of counsel. *Id.* A presumption exists that “under the circumstances, the challenged

¹ For economy and efficiency, Appellee, State of Ohio will address all of Appellant’s Propositions of Law in one argument.

action ‘might be considered sound trial strategy.’” *Strickland*, 446 U.S. at 689. Where trial tactics prove unsuccessful, an appellant is not allowed to later claim that such tactics were inappropriate. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

Appellant argues trial counsel was ineffective for 1.) failing to conduct basic rudimentary investigation of a witness; 2.) failing to allege prosecutorial misconduct; and 3.) failing to obtain expert testimony regarding the gun. The trial court reviewed the trial counsel’s actions in Appellant’s Motion for a New Trial and determined counsel pursued a reasonable strategy, accident, which would have been a complete defense for Appellant. Appellant cannot claim trial counsel was ineffective simply because that strategy failed.

The Affidavit of trial counsel indicates he determined Wickman’s testimony was not relevant to the defense Appellant raised. Wickman’s testimony would have added nothing to Appellant’s defense of accident. Furthermore, trial counsel did not err in failing to allege prosecutorial misconduct because there was no misconduct. Wickman’s testimony was neither favorable to Appellant nor unavailable to Appellant.

Trial Counsel did not err in failing to obtain an expert. Appellant alleges trial counsel should have hired an expert to testify that the State tampered with the shotgun following the alleged “accidental discharge.” However, the decision to call or not call a witness is made at counsel’s discretion. Trial counsel, a licensed attorney, is presumed competent. Appellant cannot now use hindsight to undermine trial tactics.

To show ineffective assistance of Appellate counsel, Appellant “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 they presented those claims on appeal.” *State v. Jalowiec* (2001), 92 Ohio St. 3d 421, 422; 2001 Ohio 164, certiorari denied, 534 U.S. 964. Appellant can

not show that trial counsel's strategies were deficient thus, he can not show that appellate counsel was deficient. Appellant's claims had they been brought up in the first appeal would not have succeeded. Since Appellant has not shown the requisite proof, the Appellant has not shown a genuine issue as to whether he was deprived of the effective assistance of counsel. The Twelfth District Court of Appeals was correct in denying Appellant's Application to Reopen his appeal.

CONCLUSION

This case is not a case of public or great general interest, nor does this case involve a substantial constitutional question. This Court should decline jurisdiction.

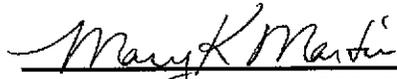
Respectfully Submitted,


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PROOF OF SERVICE

I, hereby certify that a copy of the foregoing was mailed by ordinary U.S. mail to Gary Charles Rigdon, Inmate #A525-731, Chillicothe Correctional Institute. P.O. Box 5500, Chillicothe, OH 45601, on this 29th day of August, 2008.

Respectfully submitted,



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