

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM H. REDWINE, JR.

Defendant-Appellant.

Case No.

08-2015

On Appeal from the Brown
County Court of Appeals,
Twelfth Appellate District

Court of Appeals No.
CA 2006-08-011

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT WILLIAM H. REDWINE, JR.

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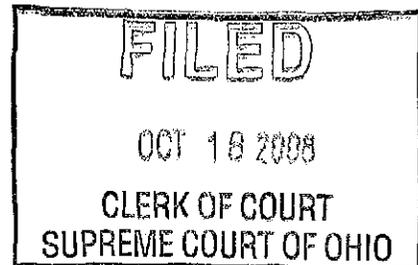


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION; OR WHY LEAVE TO APPEAL SHOULD BE GRANTED IN THIS FELONY CASE

This case involves an interesting question of constitutional significance: Where “good cause” for the untimely filing of a App.R.26(B) application for reopening of appeal is based upon a claim that appellate counsel rendered constitutionally deficient performance in failing to timely notify the applicant of the court of appeals decision, does the principals of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, require the court hearing the application to determine whether appellate counsel's deficient performance prejudiced the applicant?

The instant appeal is from the September 4, 2008 Judgment of the Twelfth District Court of Appeals, Brown County, Ohio, denying the untimely filing of Mr. Redwine's application to reopen his direct appeal pursuant to App.R. 26(B). See *State v. Redwine*, Brown App. No. CA2006-08-011 (Sept. 4, 2008). As good cause for untimely filing Mr. Redwine presented a sworn affidavit with attached exhibits establishing that: (1) his appellate counsel failed to provide him with notice of the decision rendered in his first appeal as of right before the ninety day period for filing a timely application to reopen appeal had expired; (2) Redwine had sent numerous letters to his appellate counsel requesting counsel to raise in the direct appeal the assignments of error presented in the application to reopen appeal; (3) Redwine diligently filed his untimely application to reopen direct appeal within ninety days of his discovery that a decision had been rendered in the direct appeal; and (4) the assignments of error presented in the application to reopen were meritorious sufficient to undermine confidence in the outcome of the trial proceedings.

In this case, the Court of Appeals acknowledged that “Appellant attempts to explain his late filing by claiming that his appellate counsel failed to timely advise him of [the appellate

court's] decision.” In rejecting this reason as good cause for untimely filing the Court of Appeals merely concluded: “it has been determined that, for purposes of App. R. 26(B), lack of communication with appellate counsel does not amount to good cause.” *Id.*, quoting *State v. Alexander*, Cuyahoga App. No. 81529, 2004 Ohio 3861, ¶3. (observing that defendant had been informed that the court of appeals had rendered its decision in the direct appeal, and counsel's failure to thereafter advise defendant that supreme court had dismissed appeal did not constitute good cause for late filing under App.R. 26(B). See also, *State v. Smith*, Cuyahoga App. No. 79301, 2002 Ohio 6620. (observing that an attorney's failure to communicate with the applicant does not state good cause for failure to timely file).*Id.*

Clearly, Mr. Redwine met the first prong of the *Strickland* test where he established that his appellate counsel rendered constitutionally deficient performance by failing to timely inform him that the court of appeals had rendered a decision in his direct appeal as of right. *Smith v. State of Ohio Dept. of Rehab*, 463 F.3d 426, 433-35 (6th Cir. 2006) (holding that a defendant's right to effective assistance of counsel on appeal as of right encompasses the right to timely notice of decision on that appeal; and failure of counsel to provide timely notice of decision is constitutionally deficient performance, as element of ineffective assistance of counsel). See also, *Paris v. Turner*, No. 97-4129, 1999 WL 357815 (6th Cir. 1999) (holding that counsel's delayed notice to his client of a decision of the state appellate court constituted ineffective assistance of appellate counsel).

Having established that appellate counsel rendered constitutionally deficient performance, Mr. Redwine submits that the court hearing his ineffective assistance of counsel claim had a duty to determine whether appellate counsel's deficiency prejudiced the outcome of his first appeal as of right. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373, 379,

citing *Strickland*, supra at 687-688. (establishing the two-pronged analysis standard of review for claims of ineffective assistance of counsel). Where, as here, a defendant alleges that the deficient performance of appellate counsel actually caused the forfeiture of the procedure by which to raise a his claim of ineffective assistance of appellate counsel, a reviewing court must analyze the merits of the underlying assignments of error presented in order to determine whether counsel's deficient performance resulted in prejudice to the defendant's first appeal as of right.

Mr. Redwine submits that had appellate counsel raised on direct appeal the assignments of error presented in his application to reopen, or, at least provided Redwine with notice of the appeals court decision within the time for him to timely pursue the issues in a timely pro-se application to reopen, there is a reasonable probability that the outcome of appeal would have been different. The assignments of error which establish that both trial and appellate counsel rendered constitutionally deficient and prejudicial performance are set forth in the following propositions of law.

STATEMENT OF THE CASE AND FACTS

On July 1, 2004, William Redwine, Jr., was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1) and was tried before a jury in June 2006. The state alleged that on the evening of June 1, 2004, Mark Spicer was the victim of a severe, unprovoked attack by appellant, his neighbor. At the time both men lived on Eubanks Road, in Perry Township, Brown County, Ohio. The State, and the State's witnesses all maintain that Eubanks Road runs from State Route 251 easterly through Redwine's property to it's eastern terminus at Anderson State Road. In contrast, Redwine maintained that the roadway located on his real property is a private roadway and unauthorized persons found thereon are trespassing.

At trial, it was established that Spicer and Redwine were the only eye-witnesses to the fight that had occurred between them that evening. Both parties' testimony was diametrically

opposed. Spicer testified that he was lawfully riding his recreational vehicle on the public road in front of Redwine's house when Redwine stopped him and beat him up to make good on his past threats against Spicer and other neighbors for their alleged trespassing on private property. Redwine however testified that he had lawfully confronted Spicer who was trespassing on his private property and Spicer attacked him without any reason or provocation.

While the fact that a physical altercation occurred between these two men was not contested, there were several issues presented to the jury for consideration in their deliberation. For example, because these two men were the only witnesses to the altercation and Redwine asserted self-defense, the credibility of these two men was central in determining which man was the aggressor. Furthermore, because the trial court gave the lesser offense instruction for aggravated assault and simple assault the jury was asked to consider whether Spicer provoked Redwine, whether or not there was a weapon used, whether or not there was a threat of or use of deadly force, and whether Redwine had a duty to retreat or not. Therefore, the legal status of the road located on Redwine's property was the central issue in determining the credibility of the witnesses, who was at fault in creating the altercation, and whether Redwine had a duty to retreat before defending himself against the perceived threat.

Because there had been a long history of altercations between Redwine and his neighbors over the legal status of the roadway located on his property, Redwine filed a motion in limine to exclude evidence of specific incidents of his alleged threats and aggressive conduct toward third parties. In opposition, the State argued that specific incidents of Redwine's aggressive conduct toward third parties should be admitted as character evidence for the purpose of proving that he had the propensity to commit acts of violence and acted in conformity therewith on this occasion. The trial court sustained defendant's motion. During trial however, the State elicited a great deal of testimony regarding specific incidents of defendant's aggressive conduct toward

third parties whom defendant had perceived as trespassers. The trial court failed to identify any legitimate purpose that the jury could consider the other-acts evidence.

The State also elicited a great deal of testimony regarding the undetermined legal status of the roadway where the fight between Mr. Redwine and Spicer had occurred. The prosecuting attorney vouched for these witnesses by informing the jury that according to the State, county, and township the roadway located on Mr. Redwine's property was in fact a public road. The prosecutor's improper vouching and bolstering regarding the legal status of the roadway as a public road directly undermined Redwine's credibility, characterized Redwine's other acts of protecting his property and privacy rights as illegitimate, placed fault for creating and failing to avoid the confrontation solely with Redwine, and imposed a duty on Redwine to retreat from the altercation before using non-deadly force to defend himself from the perceived danger.

After the prosecutor had informed the jury that the roadway located on Redwine's property was in fact a legally established public road, he elicited extensive testimony regarding Redwine's past conduct of posting no trespassing signs, gating the roadway, and confronting township employees and others whom he perceived as trespassers, and then asked the jury to consider this conduct as evidence of Redwine's guilt for the felonious assault on Spicer. The State used its own self-serving determination that the disputed roadway is a "public road" as the very foundation for arguing that Redwine committed an unprovoked attack on Spicer due to his unfounded belief and obsession that a public road does not exist on his property, and that Spicer was completely innocent of creating the confrontation because he was legally authorized to operate his ATV on a "public road."

Having failed to present any legally sufficient evidence to establish that a public road had ever been created on Redwine's property, the trial court failed to instruct the jury that it could not consider Redwine's constitutionally protected acts, *i.e.*, posting no trespassing signs, gating his

property, confronting trespassers, filing a civil suit against the township, and trying to protect his privacy and property rights, as evidence of guilt in his criminal trial. Moreover, the trial court erroneously instructed the jury that Redwine had a duty to retreat and had to be confronted with a perceived threat of harm sufficient to incite him into using deadly force before he could claim self-defense in this non-deadly force case.

After the trial court had granted Redwine's motion to redact the out of court statement regarding the causation of the linear bruise the doctor observed during the medical examination of Spicer, the State introduced the entire statement anyway. Redwine had never been afforded the opportunity to confront or cross examine this doctor regarding the statement used against him, and the out of court statement was material in determining whether Redwine used a weapon, committed felonious assault, aggravated assault, simple assault, or acted in self defense.

On June 16, 2006, the jury found Redwine guilty of felonious assault. The trial court sentenced him to five years in prison. Redwine, through counsel, timely appealed said judgment. On December 3, 2007, the Court of Appeals affirmed the trial court's judgment, but appellate counsel did not provide Redwine with any notice of the decision until April 29, 2008. Redwine diligently prepared and filed his application to reopen his direct appeal within ninety days of his receiving notice of the Court of Appeals decision.

The Court of Appeals denied Redwine's application to reopen his appeal without conducting any analysis as to whether appellate counsel rendered constitutionally deficient performance by his failure timely notify Redwine of the court's decision, whether such deficient performance prejudiced Mr. Redwine by depriving him of the procedure by which to raise his claim of ineffective assistance of appellate counsel, and whether appellate counsel rendered ineffective assistance of counsel by his failure to raise on direct appeal the issues presented in his application to reopen. It is from this decision that Redwine timely appeals.

Proposition of Law No. I: Where good cause for untimely filing of an application to reopen direct appeal is based on a claim that appellate counsel rendered ineffective assistance by failing to provide appellant with timely notice of the decision rendered in the direct appeal, a reviewing court is required to employ the two-pronged analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

It is well established that a defendant has a constitutional right to the effective assistance of counsel on his first appeal as of right. *Smith v. Robbins* (2000), 528 U.S. 259, 275-76, 120 S.Ct. 746. It is further established that appellate counsel's duties do not terminate the moment a court of appeals hands down its decision. Rather, an appellant's right to effective counsel on appeal encompasses the right to timely notice of the decision rendered in the appeal, and the failure of counsel to provide the client with timely notice of said decision is constitutionally deficient performance. *Smith v. State of Ohio Dept. of Rehab*, 463 F.3d 426, 433-35 (6th Cir. 2006); *Paris v. Turner*, No. 97-4129, 1999 WL 357815 (6th Cir. 1999). See also *State v. Gray* (2008), 117 Ohio St.3d 465, 884 N.E.2d 1062.

In the instant case, the Twelfth District Court of Appeals, Brown County, Ohio rendered its decision affirming appellant's conviction and sentence on December 3, 2007. Appellate counsel, however failed to provide Mr. Redwine with any notice of this decision until April 29, 2008, well after the ninety days period for timely pursuing a App.R. 26(B) application to reopen had already expired. Accordingly, Redwine filed an untimely application to reopen on July 21, 2008, within ninety days of his receiving notice of the December 3, 2007 decision. As good cause for the untimely filing, Redwine submitted a sworn affidavit and letters which establish that appellate counsel had failed to give him notice of the court's decision before the time for filing an application for reopening had expired, he had requested his counsel to raise on direct appeal the issues presented in the application to reopen, and the issues presented in the application to reopen would have changed the outcome of the appeal had they been presented for review in appellant's first appeal as of right by counsel.

In *State v. Redwine*, Brown App. No. CA2006-08-011 (Sept. 4, 2008) the Court acknowledged that “Appellant attempts to explain his late filing by claiming that his appellate counsel failed to timely advise him of [the appellate court's] decision...” In rejecting this explanation as good cause for untimely filing the Court simply concluded that “it has been determined that, for purposes of App.R.26, lack of communication with appellate counsel does not amount to good cause. Id.

Even though appellant asserted a claim that his late filing was due to the ineffective assistance of appellate counsel in failing to provide timely notice of the decision rendered in the direct appeal, the Court of Appeals decision is completely void of any analysis for an ineffective assistance of counsel claim as 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. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, the reviewing court must determine whether counsel's assistance was ineffective; *i.e.*, whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If the court finds ineffective assistance of counsel, the court must determine whether or not the client was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the proceeding is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have been different.

Having failed to apply the *Strickland* standard of review in determining whether appellate counsel rendered deficient performance and whether that deficient performance prejudiced appellant, this Court should reverse and remand the matter to the Court of Appeals with instructions that they review the merits of appellant's claims necessary in determining whether appellate counsel rendered constitutionally ineffective assistance of counsel.

Proposition of Law No. II: The cumulative introduction of character, other bad acts, and hearsay evidence for the specific purpose of proving that a defendant acted in conformity therewith in committing the crime charged deprives a defendant of a fundamentally fair trial.

In this case, Mr. Redwine filed a motion in limine to exclude evidence of specific incidents of his alleged threats and aggressive conduct toward third parties. Tr. at. pp. 7, 8. In response, the State argued that specific incidents of Redwine's aggressive conduct toward third parties should be admitted as character evidence for the purpose of proving that defendant had the propensity to commit acts of violence and acted in conformity therewith on this occasion. Tr. at. pp. 9, 11. The trial court sustained defendant's motion and instructed the State to bring similar evidence to the court's attention prior to exposing the jury with said information. Tr. at p. 14.

During trial however, the State disregarded the trial court's ruling and launched a full scale attack on Redwine's propensity for aggressive conduct toward third parties whom he had ill-perceived as trespassers due to his unfounded belief that a public road does not exist on his private property. For example, during the direct examination of Jillian Kelley the State elicited testimony regarding a completely unrelated incident where Redwine had confronted Ms. Kelley as a perceived trespasser. Tr. at. pp. 66, 67. Likewise, during the direct testimony of Bill Hopper it was revealed that this witnesses sole purpose for testifying was to inform the jury of another unrelated incident where Redwine had confronted Mr. Hopper due to his unfounded belief that he was trespassing. Tr. at. pp. 257-259. Yet again, during the direct testimony of Albert Icard, the State elicited testimony regarding a separate occasion where Redwine had confronted Mr. Icard due to his unfounded belief that Mr. Icard was trespassing. Tr. at pp. 269-272.

Not only did the State introduce this evidence as proof that Redwine had been the unprovoked aggressor toward perceived trespassers on numerous other occasions, and therefore must have been the unprovoked aggressor on this occasion, the State actually urged the jury to

consider this other-acts evidence for this forbidden purpose during its opening and closing arguments. Moreover, because the only purpose for introducing the highly prejudicial other acts evidence was clearly forbidden under the rules of evidence, the trial court failed to instruct the jury to limit its consideration of said evidence to some legitimate purpose. The record in this case establishes the most brazen example of improper use of other acts evidence, which cumulatively deprived Mr. Redwine of his right to a fair trial on the offense charged in the indictment. See *U.S. v. Parker*, 997 F.2d 219 (6th Cir. 1993); *State v. DeMarko* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus.

Proposition of Law No. III: A prosecuting attorney commits improper vouching and bolstering where he supports the credibility of a witness by indicating a personal belief in the witness' credibility, thereby placing the prestige of the state behind the witness, and implies that the witness' testimony is corroborated by evidence known to the state but not known to the jury.

The collateral issue regarding the legal status of the road located on Redwine's property went to the core of determining the credibility of the witnesses and determining who was at fault in creating the altercation. If the State could convince the jury that the roadway located on Redwine's property was in fact a public roadway, then all of Redwine's acts of posting no trespassing signs, gating his property, confronting trespassers, filing a civil suit against the township, and trying to protect his privacy and property rights would be completely unfounded and he would be at fault for causing the altercation between himself and Spicer.

Accordingly, the prosecutor himself informed the jury that the road located on Redwine's property was in fact a public road. "...Believe it or not Eubanks Road , as far as the State and township and county is concerned, goes from 251 all the way east to Anderson State Road in Highland County..." Tr. at pp. 36-44. Thereafter, the State elicited testimony from State witnesses Mark Spicer, Kathy Spicer, David Brinkman, Mike Lingrosso, Bill Hopper, and Albert Icard, who all testified that the road going through Redwine's property is in fact a public road

which they are legally entitled to access. Tr. At pp. 89, 122, 126, 131, 132, 142, 143, 173, 174, 176, 178, 218, 219, 234, 235, 244, 248, 259, 274.

In an attempt to prove the prosecutor and his witnesses position, the State called David Brinkman, a Perry Township Trustee to the stand. During Brinkman's testimony the State presented into evidence an 1876 Road Atlas for Brown County, Ohio, as proof that Eubanks Road ran through Redwine's property as early as 1876. The State further elicited from Mr. Brinkman the fact that the section of Eubanks Road located on Redwine's property appears on the township and county inventory taken in 1988. Of course, the 1876 atlas does not identify the road appearing thereon as Eubanks Road, a public road, or the same road that Redwine maintains as a private drive that he personally constructed. Moreover, the township's act in 1988 of simply driving down the roadway on Redwine's property and then adding the extended mileage to its inventory does nothing to establish that this land was ever dedicated for public use.

Thus, the prosecutor improperly vouched for the State witnesses by stating his personal belief that they were correct in contending that a public road existed on Redwine's property. The prosecutor also improperly bolstered this testimony by implying to the jury that these witnesses belief regarding the legal status of the roadway was corroborated by admissible evidence which legally established the fact.

In the end, the prosecutor had presented inadmissible and false evidence regarding the legal status of said roadway and thereby characterized Redwine as a mad man trying to claim a long existing public road as his own private property:

“...Believe it or not Eubanks Road, as far as the State and township and county is concerned, goes from 251 all the way east to Anderson State Road in Highland County...” Tr. at pp. 36-44 ... Now the defendant has taken it in his mind, and although this road – I will show you an atlas from Brown County, Ohio, that was made in 1876, it shows Eubanks Road as it goes from 251 to Anderson State Road, as an open road. He's taken it upon himself to say that there is no road. There will be evidence to show that he claims that he owns from his driveway all the way

back to the turnaround... and nobody is allowed to be there... The only thing she [Jillian Kelley] had done was ride on that road, a public road. And in spite of all the evidence that we talked about with Mr. Redwine and I, and you probably figured the both of us know a little bit about this road from the history we gave. In spite of all that evidence, the fact that it's carried on the State records, the county records, the township records, he says, 'No, there is no road there.' Even though it was there in 1876. There are legal ways to close roads and until they are, they're still open roads... He's obsessed with this road...defendant knowingly assaulted Mr. Spicer, causing him serious physical harm and he did it for no other reason than his belief that he owns that property and has the right to tell people they cannot drive on a public road. And we'll submit that you will find the defendant guilty.

Tr. at. pp. 36, 44, 215-242, 454-482, 566-582, 599-611.

While appellate counsel made a general argument challenging the introduction of the collateral evidence regarding the road dispute, counsel utterly failed to argue how the State used the collateral issues to vouch for and bolster the credibility of the State witnesses, to characterize what would be constitutionally protected acts of a land owner as bad acts, and to prejudicially sully Redwine's character and credibility.

Proposition of Law No. IV: A trial court commits plain error by failing to instruct the jury that it may not consider a defendant's constitutionally protected acts as proof of guilt on a charged offense.

The Ohio and United States constitutions guarantee to United States citizens the inalienable right to acquire, possess, and protect private property, the right to free speech, the right to bear arms for defense and security, the right not to have private property taken for public use without just compensation, and the right not to be deprived of life, liberty, or property without due process and equal protection of the law. These fundamental rights are subject to strict scrutiny, under which the ordinary presumption of constitutionality is reversed.

In this case, the prosecuting attorney clearly had an interest in the ultimate outcome of the ongoing civil suit regarding the legal status of the road located on Redwine's property. Instead of first resolving the collateral issue in a court of law the prosecutor used the criminal trial as the

forum to present his personal opinion regarding the legal status of the road as if the matter had been legally and finally determined by a court of law. By so doing, the State afforded itself with an opportunity to negatively characterize Redwine's acts of posting no trespassing signs, gating his property, confronting trespassers, and exercising what would be constitutionally protected property and privacy rights, as unfounded bad acts which eviscerated Redwine's credibility.

If the roadway is in fact Redwine's private property then his conduct of posting no trespassing signs, gating his property, confronting trespassers, filing a civil suit against the township, and exercising property and privacy rights were all constitutionally protected acts, and the State's conduct of urging the jury to consider these constitutionally protected acts as proof of guilt on the charged offense denied Redwine of a fundamentally fair trial on the charged offense. In the absence of any instructions to the contrary there is a substantial danger that the jury believed the State's unsubstantiated position regarding the legal status of the road, considered Redwine's constitutionally protected acts as other bad acts which were intertwined with the charged offense, and rested the conviction in part on constitutionally protected conduct.. See *State v. Lessin* (1993), 67 Ohio St.3d 487, 620 N.E.2d 72.

Proposition of Law No. V: A trial court commits plain error by incorporating duty to retreat and deadly force instruction into the jury instructions given in a non-deadly force case.

It is well established that a duty to retreat is not an element of self-defense where the force used by the defendant is non-deadly. *State v. Morris*, 7th Dist. No. 03 MO 12, 2004 Ohio 6810, 2004 WL 2913956, citing cases from the First, Second, Fourth, Eighth, and Tenth District Courts of Appeals. Moreover, a trial court need not use the talismanic words "duty to retreat," but also erroneously imposes a duty to retreat where it includes in self-defense instructions a requirement that the defendant prove his use of non-deadly force was the *only means of escape* from imminent danger. See *State v. Gesell*, unreported, 2006 WL 1974592 (Ohio App. 12 Dist.).

In this case, the trial court erroneously imposed a duty to retreat where it instructed the jury that defendant could not prove self-defense if he failed to retreat before using physical force: "To establish self-defense, the following elements must be shown: Number one...Number two...And that *his only means of escape from danger was the use of force*...and that his only means to protect himself was by use of force..." Tr. at pp. 625-626.

In addition, the trial court erroneously incorporated aggravated assault instructions into its self-defense instructions: "...if you find that the defendant has failed to prove...either self defense or that he acted while under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim that was reasonably sufficient to incite the defendant into using deadly force, then you must find the defendant guilty of felonious assault. Tr. at pp. 630-632.

The facts of this case establish that defendant used non-deadly force. Therefore, as a matter of law, defendant did not have a duty to retreat, nor did he need to be confronted with a perceived threat of harm sufficient to incite him into using deadly force before he could use non-deadly force to defend himself against the perceived danger. The duty to retreat instruction limited the availability of self-defense and created an evidentiary presumption that defendant actually used deadly force and could only claim self defense if the victim threatened him with death or great bodily harm.

Proposition of Law No. VI: The introduction into evidence of a material out-of-court statement against the accused violates a defendant's right to confront and cross-examine the witness against him regardless of admissibility of statement under law of evidence.

The trial court granted defendant's motion to have the examining doctor's conclusion as to the causation of the linear bruise he observed during the medical treatment of Spicer redacted from the medical report. Tr. at pp. 321-322. Nevertheless, the state introduced the redacted statement in its entirety during the cross-examination of defendant's medical expert and used the

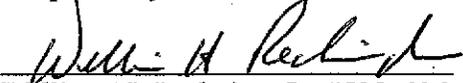
statement during closing argument. Tr. at pp. 498, 499, 580.

In this case there was a complete absence of evidence establishing that a weapon was used to assault Spicer, and the out-of-court statement of the doctor speculating that the linear bruise was consistent with some sort of linear object is material in determining whether Redwine committed felonious assault, simple assault, or acted in self defense. Because Redwine was denied the opportunity to confront or cross examine the doctor regarding this statement, the introduction thereof violated Redwine's constitutional rights to confront and cross-examine the witness against him. See *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354.

Proposition of Law No. VII: Where neither trial counsel or appellate counsel subject prejudicial errors to meaningful adversarial testing a defendant is denied his right to the effective assistance of counsel.

Where this entire case turned on the credibility of Redwine or Spicer, and trial counsel failed to take any meaningful action to enforce the trial court's favorable rulings on defendant's motion in limine, failed to oppose the admission of inadmissible other bad acts evidence, and highly prejudicial evidence, failed to object to flagrant prosecutor misconduct, and failed to ensure that the jury received correct instructions, trial counsel's performance was deficient and prejudicial. Likewise, based on the assignments of error presented herein, there can be no confidence in the outcome of Redwine's jury trial or appeal therefrom. Consequently, appellate counsel was ineffective for failing to raise the above meritorious assignments of error and for failing to inform Redwine that a decision had been rendered in the appeal within time for Redwine to pursue his 26(B) remedy by which to address appellate counsel's ineffectiveness.

Respectfully submitted,


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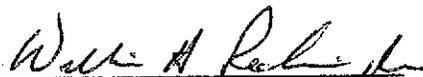
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant William H. Redwine, Jr., was sent via regular U.S. Mail, on this 14th day of October, 2008, to:

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IN THE COURT OF APPEALS FOR BROWN COUNTY, OHIO

FILED
COURT OF APPEALS

STATE OF OHIO, SEP 04 2008

Appellee, TINA M. MERANDA : CASE NO. CA2006-08-011
BROWN COUNTY CLERK OF COURTS

- vs -

WILLIAM H. REDWINE, JR., :

Appellant. :

ENTRY
DENYING APPLICATION
FOR REOPENING

This matter came on to be considered upon an application for reopening filed pro se pursuant to App.R. 26(B) by appellant, William H. Redwine, Jr., on July 21, 2008, and a memorandum in opposition filed by counsel for appellee, the state of Ohio, on August 20, 2008.

Appellant seeks to reopen his direct appeal in which this court affirmed appellant's conviction and sentence. *State v. Redwine*, Brown App. No. CA2006-08-011, 2007-Ohio-6413, appeal not accepted for review, 117 Ohio St.3d 1478, 2008-Ohio-1841.

App.R. 26(B)(1) requires that an application for reopening be filed "within ninety days from the journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." This court journalized its judgment entry on December 3, 2007. Thus, absent good cause for filing late, appellant's application was due on March 3, 2008.

Appellant attempts to explain his late filing by claiming that his appellate counsel failed to timely advise him of this court's decision and that counsel continued

to represent him in a direct appeal to the Ohio Supreme Court.

It has been determined that, for purposes of App.R. 26, lack of communication with appellate counsel does not amount to good cause. *State v. Alexander*, Cuyahoga App. No. 81529, 2004-Ohio-3861, ¶3 (counsel's failure to advise defendant that supreme court had dismissed appeal did not constitute good cause for late filing under App.R. 26[B]). See, also, *State v. Smith*, Cuyahoga App. No. 79301, 2002-Ohio-6620.

Good cause does not exist for filing an untimely application where an applicant's original appellate counsel were still representing him in collateral litigation. *State v. Keith*, Slip Opinion No. 2008-Ohio-3866, ¶6. See, also, *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755; *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976.

"The 90-day requirement in the rule is 'applicable to all appellants,' *State v. Winstead*, 74 Ohio St.3d 277, 278, [1996-Ohio-52] and [appellant] offers no sound reason why he – unlike so many other Ohio criminal defendants – should not comply with that fundamental aspect of the rule." *State v. Farrow*, 115 Ohio St.3d 205, 2007-Ohio-4792, at ¶6.

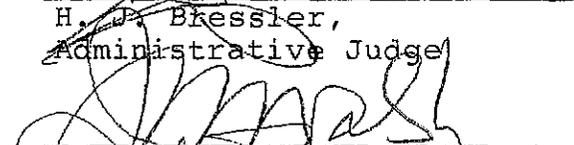
Denial of an application is appropriate absent any showing of good cause for a late filing. See *State v. Mason*, 90 Ohio St.3d 66, 2000-Ohio-14. See, also, *State v. Hancock*, 108 Ohio St.3d 194, 2006-Ohio-658. Appellant's application contains no explanation of good cause for the untimely filing.

Upon due consideration of the foregoing, and it appearing to the court that appellant has failed to show good cause as to why his application was not filed in a timely manner, appellant's application for reopening is hereby DENIED. Costs taxed to appellant.

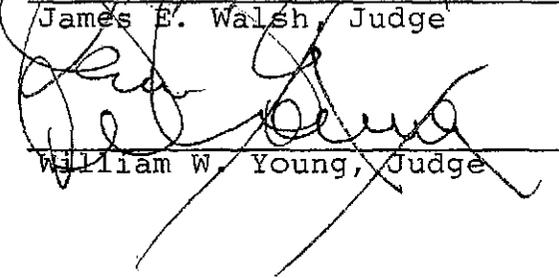
IT IS SO ORDERED.



H. P. Bressler,
Administrative Judge



James E. Walsh, Judge



William W. Young, Judge

NOTICE TO THE CLERK:

SERVE A COPY OF THIS ENTRY DIRECTLY ON APPELLANT
AT THE FOLLOWING ADDRESS:

William H. Redwine, Jr.
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