

# IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

WILLIAM REDWINE, JR.

Defendant-Appellant

\* Case No.: 2008-2015  
\*  
\* On Appeal from the Twelfth District  
\* Court of Appeals for Brown County,  
\* Ohio, Case No. CA 2006-08-011  
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## MEMORANDUM IN OPPOSITION TO JURISDICTION ON BEHALF OF APPELLEE STATE OF OHIO

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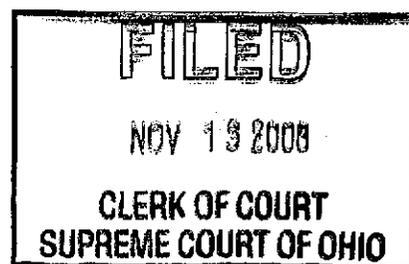
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**EXPLANATION WHY THIS CASE DOES NOT PRESENT  
A SUBSTANTIAL CONSTITUTIONAL QUESTION  
AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

This case does not present a substantial constitutional question nor does it present an issue of public or great general interest. This court previously denied jurisdiction in this case on a discretionary appeal in Case No. 2008-0071. Since that decision, the Appellant, Redwine, filed in the Twelfth District Court of Appeals, an untimely application to reopen his appeal pursuant to App.R. 26(B), ineffective assistance of appellate counsel. Redwine claimed his appellate counsel failed to give him notice of the Twelfth District's December 3, 2007 judgment entry affirming his conviction until after the 90 day period for filing an App.R. 26(B) application had expired. The Twelfth District, however, found that Redwine did not establish good cause for his untimely filing and denied the application.

Redwine did not provide any evidence, other than his self-serving affidavit, to support his claim that he did not receive notice of the December 3, 2007 judgment entry. He did, however, provide evidence contrary to his allegation. Redwine submitted to the Twelfth District a January 2, 2008, letter to his appellate counsel that contained language indicating that Redwine wished to review the appeal before it was filed. Based on the timing of the letter, it could only be referring to Redwine's Notice of Appeal and Memorandum Requesting Jurisdiction filed in this court on January 11, 2008. Thus indicating that Redwine at least knew of the Twelfth District's decision.

This court has held that the 90 day filing deadline for a App.R. 26(B) motion must be strictly enforced, even in a situation where the appellate counsel continued to represent the defendant. *State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3974; *State v.*

*Gumm*, 103 Ohio St.3d 162, 2004 -Ohio-4755.

Because this issue is not of public or great general interest and does not present a substantial constitutional question, this court should not exercise jurisdiction in this case.

### **STATEMENT OF THE CASE**

The Brown County Grand Jury indicted William Redwine for felonious assault on July 1, 2004. After a four day trial, he was convicted by a jury and sentenced to serve five years in prison. He filed an appeal with the Twelfth District Court of Appeals which was affirmed on December 3, 2007. This court denied leave to appeal on April 23, 2008.

On July 12, 2008, Redwine filed an App.R. 26(B) Motion to Reopen which was denied by the Twelfth District on September 4, 2008. This appeal followed. Redwine also filed an App.R. 26(A) Motion to Reconsider which was denied by the Twelfth District on October 17, 2008. He also filed a Motion to Certify a Conflict on September 16, 2008 which, to date, has not been decided.

### **STATEMENT OF FACTS**

This case is not about a fight between neighbors. It is the case of a vicious, unprovoked attack by the Appellant, William Redwine, on his neighbor, Mark Spicer. Redwine claimed he owned the portion of Eubanks Road that ran in front and past his home to where the paved portion ended at a turnaround. Redwine attacked Spicer because Spicer used "Redwine's road" one too many times.

Eubanks Road begins at State Route 251, in Perry Township, Brown County, and

proceeds directly through and dead ends into Anderson Road. The middle part of the road, however, is not maintained by the township and is impassible by car. Traveling from State Route 251, the chip and tar portion of the road ends at a turnaround on Elmer Eubanks property. (T.p. 217-18.) Redwine has complained at township trustee meetings that Eubanks Road, as it runs in front of his house to the turnaround is not public, but his own personal road. (T.p. 219.) Eubanks Road, however, is shown on the Atlas of Brown County for 1876 and is carried on the state registry for roads. (T.p. 224.) Further, the township has maintained the road since at least 1986. (T.p. 216, 220.)

Redwine was the first to buy property in that area and he made improvements to the Eubanks Road. But, by the time he built his home and moved in, other families had moved into the area. As more homes were built on the road, Redwine became increasing agitated regarding the traffic, especially the four-wheelers, that passed in front of his home.

Redwine's neighbors testified regarding numerous instances where they would be on the paved portion of Eubanks Road or on their own property and Redwine would threaten or harass them. (See T.p. 84-5: Redwine fired shotgun at Spicer's son and friends who were night fishing on what they believed was Spicer's property; T.p. 173, 176: Redwine approached the Spicers and Candi Icard on the turnaround and told them to get off his property; T.p. 66-7: Redwine, while holding a stick in his hand, shined a spotlight on and yelled at Jillian Kelley and friends who were riding four-wheelers on Eubanks Road; T.p. 258-59: when William Hopper parked on the turnaround to go fishing on his relatives property, Redwine pumped his shotgun and ordered Hopper off his property; T.p. 270: Redwine threatened Albert Icard, saying that something was

“gonna be f-ing hurt or shot.”)

Redwine repeatedly attempted to block access to the road by placing a tree across it, another time placing a culvert pipe across it, and also by placing a gate across it. (T.p. 220.) The township trustees also received complaints from residents regarding Redwine claiming ownership and blocking the roadway. (T.p. 229-30.)

Despite being presented with evidence of the existence of Eubanks Road since 1876, and that the road had never been vacated, Redwine refused to acknowledge that the road in front of his home was open to the public.

After years of neighborhood disputes regarding the road, Redwine finally lost control on June 1, 2004. That evening, Mark Spicer left his home on a golf cart to look for his missing dog. (T.p. 86-87.) As he turned around at the end of the paved portion of Eubanks Road, he noticed Mr. Redwine with a spotlight flickering toward him. Spicer stopped to see what Redwine wanted. As soon as Spicer stopped his golf cart, still on the roadway, Redwine got into his face and repeatedly said, “If you come back here one more time, I’m gonna kill you.” (T.p. 88.) Words were exchanged between the two men, then Redwine hit and kicked Spicer, knocking him unconscious. Spicer awoke lying face down in a ditch, bleeding and in severe pain. (T.p. 90.)

When questioned by the deputy sheriff, Redwine denied the assault and claimed that he never left the house. However, the next day, while Spicer’s neighbor, Michael Lingrosso, and his brother-in-law were inspecting the area where Spicer was attacked, Redwine approached them and after some heated words were exchanged, Redwine threatened that when his hands healed, he would do to Lingrosso what he had done to Spicer. (T.p. 245-46, 279-80.)

At trial, Redwine claimed that while he was walking on his property to smoke and feed the fish in the pond, Spicer, driving his four-wheeler, came after him in the field. Redwine claimed that Spicer tried to run him down, then got off the four-wheeler and started swinging at him. Only after Redwine blocked a few blows did he hit Spicer and retreat to his house. (T.p. at 433-41.)

## ARGUMENT

### PROPOSITION OF LAW No. 1

**WHERE THE APPELLANT FAILS TO SHOW GOOD CAUSE FOR UNTIMELY FILING OF AN APPLICATION TO REOPEN DIRECT APPEAL, THEN THE COURT IS NOT REQUIRED TO EMPLOY THE TWO-PRONGED ANALYSIS SET FORTH IN *STRICKLAND v. WASHINGTON* (1984) 466 U.S. 668.**

Before the appellate court can decide the merits of an application for reopening pursuant to App. R. 26(B), the court must determine if the appellant filed the application timely. An App.R. 26(B) application must be filed within 90 days after “journalization of the appellate judgment unless the appellant shows good cause for filing at a later time.” App.R. 26(B)(1).

The Twelfth District Court of Appeals found that Redwine failed to show good cause for his untimely filing. Because Redwine failed to show good cause, the appellate court was not required to address the merits of his claim of ineffective assistance of appellate counsel. Although Redwine claims that his appellate counsel, Fred Miller, was ineffective for failing to provide him with notice of the Twelfth District’s December 3, 2007 decision, Redwine’s own exhibits show that claim is without merit.

Redwine attached to his App.R. 26(B) application, a letter from him to Attorney

Miller, dated January 2, 2008, which states, "I realize we have a time limit and if time allows i (sic) would like to see the appeal before it is filed if possible." (Redwine Ex. C.) The appeal that is referenced in this letter is to the Ohio Supreme Court. As previously stated, the Twelfth District appeal was decided on December 3, 2007, and the Ohio Supreme Court Notice of Appeal and Memorandum Requesting Jurisdiction were filed on January 11, 2008.

**PROPOSITION OF LAW No. 2**

**EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS IS ADMISSIBLE AS PROOF OF MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, OR ABSENCE OF MISTAKE OR ACCIDENT.**

It is well-established that the decision to admit or exclude evidence lies within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶129-130. A reviewing court may not override a trial court's determination that a particular item of evidence is relevant or irrelevant simply because it disagrees with the trial court. *Id.* at ¶129. "The issue of whether testimony or evidence is relevant or irrelevant, confusing or misleading, is best decided by the trial judge, who is in a significantly better position to analyze the impact of the evidence on the jury." *Id.*

The State was permitted to present evidence of Redwine's aggressive behavior and threats against people on the roadway to show motive. See Evid.R. 404(B). Just as the court of appeals determined that the trial court did not error by allowing testimony in about Eubanks Road to provide background and motive, the trial court did not error

when allowing evidence of Redwine's aggressive behavior.

**PROPOSITION OF LAW No. 3**

**A PROSECUTING ATTORNEY IS PERMITTED TO COMMENT UPON THE EVIDENCE PRESENTED AND INDICATE THE LOGICAL AND APPROPRIATE CONCLUSIONS THAT CAN BE DRAWN FROM THE EVIDENCE.**

Redwine complains that the prosecutor improperly bolstered and vouched for the credibility of the State's witnesses regarding the road evidence. However, the portion of the transcript cited is from the State's opening statement, before any witness testified. The prosecutor is permitted in opening statements to inform the jury what evidence he expects to present during the case. That is exactly what happened here. The prosecutor informed the jury that they would be seeing an 1876 Brown County atlas. The prosecutor also informed the jury about the road evidence that they would be hearing during the trial. There is nothing improper about this.

A prosecutor is entitled to a certain degree of latitude in closing arguments. *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, 433 N.E.2d 561. It is within the sound discretion of the trial court to determine the propriety of opening statements and closing arguments. See *State v. Maurer* (1984), 15 Ohio St.3d 239, 269. A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found the defendant guilty. *State v. Benge*, 75 Ohio St.3d 136, 141, 1996-Ohio-227. Furthermore, "isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431.

A prosecutor, in closing argument "can bolster his own witnesses, and conclude by

saying, in effect, "The evidence supports the conclusion that these witnesses are telling the truth." *State v. Draughn* (1992), 76 Ohio App. 3d 664, 602 N.E.2d 790.

Besides the fact that the prosecutor did nothing improper, the Twelfth District previously ruled that the evidence regarding the legal status of Eubanks Road was not improper. Redwine's Third Proposition of law should be barred by res judicata.

#### **PROPOSITION OF LAW No. 4**

#### **EVIDENCE OF THE APPELLANT'S AGGRESSIVE BEHAVIOR AND EVIDENCE OF THE LEGAL STATUS OF EUBANKS ROAD WAS PROPERLY BEFORE THE JURY AS BACKGROUND AND MOTIVE.**

Evidence about regarding the legal status of Eubanks Road was previously held to be relevant and not improper. The evidence was proper to show background and motive for the attack. The jury was not asked to resolve any issue as to the legal status of the road. They were, however, asked to determine if Redwine was guilty of felonious assault against Mark Spicer. The State, contrary to Redwine's repeated assertions, did not ask the jury to consider the road evidence and evidence of Redwine's aggressive behavior toward people on Eubanks Road as proof of the felonious assault. Again, that evidence provided the jury with the background between the parties and motive for Redwine's assault.

#### **PROPOSITION OF LAW No. 5**

#### **A JURY INSTRUCTION ON SELF DEFENSE WHICH DOES NOT INSTRUCT ON THE DUTY TO RETREAT IS PROPER IN A NON-DEADLY FORCE FELONIOUS ASSAULT CASE.**

Redwine asserts improperly that the trial court improperly instructed the jury

that Redwine had a duty to retreat before he could avail himself of self-defense. This is not accurate. The trial court did not instruct on the duty to retreat. The court instructed:

To establish self defense, the following elements must be shown: Number one, that the defendant was not at fault in creating the situation giving rise to the public fight or incident involved in this case. And, secondly, the defendant had an honest belief that he was in imminent or immediate danger of bodily harm. And that his only means of escape from such danger was the use of such force.

T.p. 625-26. The Ohio Jury Instructions § 411.31 adds a third element to self defense when the duty to retreat is required: "he/she had not violated any duty to (retreat) (escape) (withdraw) to avoid the danger." It is clear that the court instructed the jury properly.

#### **PROPOSITION OF LAW No. 6**

#### **WHEN THE DEFENDANT BRINGS IN EVIDENCE WHICH WAS PREVIOUSLY RULED TO BE INADMISSIBLE, THE STATE IS PERMITTED TO CROSS-EXAMINE REGARDING THE EVIDENCE.**

Trial counsel for Redwine requested that a portion of the doctor's statement in admitted medical records be redacted, only as to the cause of linear bruising to the victim. The State did not object and the court ordered that the medical records be redacted. The fact that Dr. Reddy observed linear bruising was admitted, but the further statement that the linear bruising was as if it were caused by a stick or cane was redacted.

Redwine, though, presented direct evidence regarding possible causes of bruising to the victim. Dr. Wayne C. Amendt specifically testified regarding the injuries of the victim and whether an object was used to cause the injuries. (T.p. 492-94.) As such,

Redwine opened the door for the State's cross examination of Dr. Amendt. Additionally, Dr. Amendt testified that he reviewed the medical records of the victim, which included the statement of Dr. Reddy that "This bruise appears to be from an object which is linear, like a stick or cane." (T.p. 499.) There is nothing improper regarding the State's cross-examination of Dr. Amendt. Further, the statement of Dr. Reddy is nontestimonial in nature and does not violate the Appellant's right to confront his accusers.

**PROPOSITION OF LAW No. 7**

**WHERE THE APPELLANT FAILS TO SHOW THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE, THE APPELLATE COURT MAY PROPERLY DENY A MOTION TO REOPEN PURSUANT TO APP.R. 26(B).**

Redwine alleges that his appellate counsel was ineffective for failing to raise several issues on his direct appeal. Just as trial counsel is afforded discretion in choosing trial tactics, appellate counsel is afforded discretion to decide which arguments to pursue on appeal. Appellate counsel is not required to raise and argue every conceivable error. In fact, "winnowing out weaker arguments on appeal and focusing on one central issue if possible," is far from evidence of incompetence, but rather the hallmark of effective appellate advocacy. Jones v. Barnes (1983), 463 U.S. 745, 751-52.

Appellate counsel was not required to raise meritless issues. And because Redwine failed to show that his counsel was ineffective or that he was prejudiced by his counsel's deficient performance, the appellate court properly rejected Redwine's App.R. 26(B) motion.

**CONCLUSION**

Redwine failed to establish good cause for his late filing of his App.R. 26(B) motion. Additionally, he failed to show that his appellate counsel was ineffective. For these reasons, the State respectfully requests that this Court deny jurisdiction.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of November, 2008, I served a true copy of this Memorandum on William H. Redwine, Jr., Inmate #528-696, London Correctional Institution, P.O. Box 69, London, Ohio 43140, by regular U.S. mail service.

  
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