

IN THE OHIO SUPREME COURT

STATE OF OHIO,
Plaintiff-Appellee,
-vs-
JASON HERRON,
defendant-Appellant.

: SUPREME COURT NO. 08-2276
: [By Clerk]
: APPEALS NO. CA-22451
: Montgomery C.P. # 02-CR-3261
: CLAIMED APPEAL AS OF RIGHT FROM
: THE JUDGMENT OF THE MONTGOMERY
: COUNTY COURT OF APPEALS
:

Defendant-Appellant's Memorandum In Support of Claimed
Jurisdiction

FOR PLAINTIFF-APPELLEE
STATE OF OHIO

MATHIS H. HECK JR.

AND
R. LYNN NOTHSTINE(0061560)
Assistant Prosecuting Attorney
Montgomery County
301 West Third Street
P.O. Box 972
Dayton, Ohio 45422
[937] 225-5757

COUNSEL FOR APPELLEE

FOR DEFENDANT-APPELLANT
JASON HERRON

JASON HERRON
Reg. # 446-705
Lebanon Correctional Inst.
P.O. Box 56
Lebanon, Ohio 45036

IN PRO PER

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SUPREME COURT OF OHIO

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JURISDICTIONAL STATEMENT

WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL
QUESTIONS OF LAW AND IN A FELONY CASE IS OF GENERAL
OR GREAT PUBLIC INTEREST

This case involves substantial constitutional questions of law because it questions whether a State Legislature is subject to the Supremacy Clause of Article VI, Clause 2, United States Constitution and is of general or great public interest because the public has an interest in observing that procedural due process is being followed.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant, appeals from an order of the Montgomery County Court of Appeals affirming the denial of leave to file and motion for new trial filed in the montgomery county court of Common Pleas.

Appellant was convicted in 2003, following a jury trial, of felonious assault with a firearm specification, improperly discharging a firearm at or into a habitation, having weapons under a disability, and murder, with a firearm specification. Appellant was sentenced to serve terms of incarceration totaling thirty-eight [38] years to life. The Montgomery County Court of Appeals affirmed the conviction and sentence on direct appeal. State v. Herron, Montgomery App. No. 19884, 2002-Ohio-773.

On July 30, 2007, Appellant filed a pro se application captioned "Motion For Leave To File Motion For New Trial."

Appellant argued in the trial court and again on appeal to the Montgomery County court of Appeals inasmuch as a prior motion for new trial filed on his behalf by his appointed counsel was denied because it had not been filed timely, Appellant was denied the effective assistance of appellate counsel under Strickland v. Washington, [1984], 466 U.S. 668, 104 S.Ct. 2052. Appellant further argued that he was factually innocent of the crime of murder because the murder statute he was tried under, i.e. O.R.C. § 2903.02[B] could only have charged Involuntary Manslaughter per O.R.C. § 2903.04 consistent with his Equal Protection rights under Article II, Section 26, Ohio constitution as well as the Due Process Clause, United States Constitution.

The State of Ohio filed its opposition motion and on September 20, 2007, the trial court overruled the request for leave to file motion for new trial .

Appellant timely appealed the trial court's judgment to the Montgomery County Court of Appeals, for the Second District of Ohio and on October 10, 2008, the Court of Appeals affirmed the summary dismissal by the trial court. State v. Herron, 2008 WL 4599609 (Ohio App. 2 Dist.), 2008-Ohio-5362.

This timely appeal to the Supreme Court of Ohio ensues.

PROPOSITION OF LAW NO. 1.

DEFENDANT-APPELLANT'S CONVICTION FOR MURDER UNDER OHIO REVISED CODE SECTION 2903.02[B] IS VOID BECAUSE AS APPLIED THE STATUTE VIOLATES HIS EQUAL PROTECTION RIGHTS AS GUARANTEED UNDER ARTICLE II, § 26, OHIO CONSTITUTION AS WELL AS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

LAW & ARGUMENT

Appellant was indicted, tried, convicted and sentenced for a violation of Ohio Revised Code § 2903.02[B]-Murder.

This section of the Revised Code provides:

[B] No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a crime of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code. [emphasis supplied.]

Ohio Revised Code § 2903.04 provides:

[A] No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony. [emphasis supplied.]

Both of these statutes prohibit causing the death of another as a proximate result of the Appellant committing or attempting

to commit a felony. The only difference between the two statutes is that a conviction under § 2903.02[B] requires the offender to have committed a felony of the first or second degree, when a conviction under O.R.C. § 2903.04 requires the commission of any felony whether a 1st, 2nd, 3rd, 4th, or 5th degree.

In essence, then, both statutes prohibit identical activity, require identical proof to warrant a conviction under either, yet O.R.C. § 2903.04 warrants a penalty as a first degree felony of 3, 4, 5, 6, 7, 8, 9, or 10 years, while a violation of the identical statute per O.R.C. § 2903.02[B] carries a Life term.

In *State v. Wilson*, [1979], 58 Ohio St. 2d 52, 388 N.E. 2d 745 and *State v. Wilson*, [1978], 60 Ohio App. 2d 377, 397 N.E. 2d 1206, both the Court of Appeals of Ohio and the Ohio Supreme court determined that: "if two statutes operate to prohibit identical activity, require identical proof, and yet impose different penalties, we would conclude that to sentence a defendant under the statute with the higher penalty violates the Equal Protection of the law." *Id.*

Although there is a well-established principle of law that "courts will refrain from declaring legislation unconstitutional unless the posture of the cause leaves no logical alternative thereto." *Washington Courthouse v. McStowe*, [1976], 45 Ohio St. 2d 228, 230, 343 N.E. 2d 109, 110.

It is important to note that prosecutorial discretion in and of itself is not unconstitutional. See 16A CTS Constitutional Law § 563, fn. 16.10. Only when that discretion is unfettered, when it is the prosecutor, not the Legislature, enacting the laws, is

the Constitution offended. Thus, technically, the question is whether the above quoted statutes each prosecute the same acts. [emphasis added.]

Although Appellee, State of Ohio will argue the virtues of the United States Supreme Court's ruling in United States v. Batchelder, [1979], 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed. 2d 755, decided nine months after this Court's holding in State v. Wilson, [1979], 58 Ohio St. 2d 52, 388 N.E. 2d 745, this argument is of no moment, because Batchelder was decided upon the basis of the United States Constitution, while this court decided Wilson based upon the Equal Protection Clause of the Ohio Constitution.

And it is black-letter law that a federal court may not re-interpret the 'meaning' of State law, Cf. Reed v. Farley, 512 U.S. 339, 353 [1994]; Hill v. United States, 368 U.S. 424, 428 [1962].

Accordingly, where Ohio Revised Code § 2903.02[B] and § 2903.04[A] prohibit identical activity, require identical proof, yet O.R.C. § 2903.02[B] provides a higher penalty of Life viz-a-viz ten [10] years, convicting and sentencing under O.R.C. § 2903.02[B], is violative of Appellant's Equal Protection rights under Article II, §26, Ohio Constitution rendering the statute void as applied. State v. Wilson, supra.

Reversal and discharge is warranted.

PROPOSITION OF LAW NO. 2.

DEFENDANT-APPELLANT HAS BEEN DEPRIVED OF HIS ABSOLUTE RIGHT TO PROCEDURAL DUE PROCESS OF LAW WHERE THE TRIAL AND APPELLATE COURTS DENIED HIM RELIEF.

LAW & ARGUMENT

Appellant in both the trial and appellate courts alleged the ineffective assistance of trial counsel as 'cause' of him not filing his motion for new trial timely. The United States Supreme Court has made it clear that a claim of ineffective assistance of counsel will serve as 'cause' for a State procedural default. See: *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2539 [1986].

Accordingly, it was both prejudicial error and an abuse of discretion for both the trial and appellate courts to refuse to entertain the motion for leave and motion for new trial in this case where 'cause' was shown.

In *Carey v. Piphus*, [1978], 435 U.S. 247, 98 S.Ct. 1042 the U.S. Supreme Court held that:

"Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, see *Boddie v. Connecticut*, 401 U.S. 371, 375, 91 S.Ct. 780, 28 L.Ed. 2d 113 [1971]; *Anti-Fascist Committee v. McGrath*, 341 U.S. at 171-172, 71 S.Ct. at 648-649 (Frankfurter, J. concurring) [1951], we believe that the denial of procedural due process should be actionable*** without proof of actual injury." [emphasis supplied.]

Accordingly; once Appellant demonstrated that the ineffective assistance of trial counsel was 'cause' for his default of the untimely filing of the motion for leave and motion for new trial, it was both prejudicial error and an abuse of discretion for both the trial and appellate courts to fail to entertain his applications in violation of his 'absolute' right to procedural due process of law as guaranteed under the Ohio and U.S. Constitution.

Reversal and remand is warranted.

PROPOSITION OF LAW NO. 3.

DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THIS CASE WHERE HE FAILED TO RECOGNIZE, ARGUE AND BRIEF THE FACT THAT OHIO REVISED CODE SECTION 2903.02[B], AS APPLIED IN THIS CASE IS UNCONSTITUTIONAL IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF ARTICLE II, SECTION 4, OHIO CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION.

LAW & ARGUMENT

Trial counsel here was a properly licensed attorney of the State of Ohio and therefore was presumed competent. Cf. State v. Jackson, [1980], 64 Ohio St. 2d 107, 413 N.E. 2d 819.

As such, then, although not required to argue all non-frivolous issues, he had a constitutional duty to raise the strongest revealed by the record. Smith v. Murray, 477 U.S. 527, 536 [1986] (quoting: Jones v. Barnes, 463 U.S. 751-752 [1983]).

In the instant case, such attorney failed to recognize, argue and brief the fact that Ohio Revised Code § 2903.02[B] as applied in this case violated the Equal Protection Clause of the Ohio Constitution and therefore the Due Process Clause of the Fourteenth Amendment, U.S. Constitution.

If true, then such attorney was not acting as counsel contemplated by the Sixth Amendment, Cf. Stickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 [1984]. He therefore would not have performed as well as the average lawyer with ordinary skill and training in the criminal law. United States v. Beasley, 381 F. 2d 896 [6th Cir., 1974]. And this failure if viewed under the trial strategy & tactic, must be considered unsound. Martin v. Rose, 744 F. 2d 1245 [6th Cir., 1984].

This must be true, because if O.R.C. § is unconstitutional as applied to Appellant, then such counsel failed to recognize, argue and brief a "dead bang winner".

A dead bang winner has been defined as those errors that are obvious upon the record; tend to leap out even upon a casual reading of the the trial transcript and would have resulted in reversal on appeal if preserved. *Bond v. U.S.*, 1 F. 2d 631, 634 [7th Cir., 1993]; *Page v. U.S.*, 884 F. 2d 300, 302 [7th Cir., 1989]; *U.S. v. Cook*, 45 F. 3d 388 [10th Cir., 1995].

It is obvious upon the record that trying, convicting and sentencing Appellant under O.R.C. § 2903.02[B] violates the Equal Protection Clause of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment, U.S. Constitution, because in *Apprendi v. New Jersey*, [2000], 120 S.Ct. 2348, the U.S. Supreme Court in the year 2000, held that "it is unconstitutional for a Legislature to remove from a jury's consideration a fact that increases the penalty beyond that set by the Legislature for the elements of the offense. And that such distinction must be established by proof beyond a reasonable doubt." *Id.*

In the case sub judice, the Legislature by enacting O.R.C. § 2903.02[B] has removed the 'intent' or 'wilfulness' element from the traditional murder offense without requiring the government to prove the difference between Revised Code § 2903.02[B] and § 2903.04 beyond a reasonable doubt.

Therefore, by convicting and sentencing Appellant in the manner under the statute is contrary to clearly established federal law as determined by the United States Supreme Court or an unreasonable application thereof in violation of the Due Process Clause of the Fourteenth Amendment. Cf. Williams v. Taylor, 529 U.S. 420 [2000]; Harris v. Stovall, 212 F. 3d 940, 942 [6th Cir., 2000].

Wherefore, in not recognizing, arguing and briefing this dead bang winner trial counsel must be held to have been objectively unreasonable and Appellant was severely prejudiced where he was meted a Life sentence for Involuntary Manslaughter per O.R.C. § 2903.02[B], when as a matter of law his conviction and sentence could not have constitutionally exceeded a judgment of from 3, 4, 5, 6, 7, 8, 9, or 10 years pursuant to Ohio Revised Code § 2929.14[A].

The disparity between the sentence imposed and the sentence rendered manifests an obvious miscarriage of justice. Strickland v. Washington, 466 U.S. 668. 104 S.Ct. 2052 [1984].

And for all the foregoing reasons, this Court should invoke its appellate jurisdiction and reverse this case.

CONCLUSION

As it is manifest that neither due process and or equal protection of the law has been administered in this case and since this Court is one of last resort, the Court has a constitutional duty to make it right.

IT IS SO PRAYED FOR

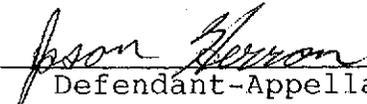
Respectfully submitted,



Jason Herron-Appellant
Reg. # 446-705
Lebanon Correctional Inst.
P.O. Box 56
Lebanon, Ohio 45036

Certificate of Service

This is to certify that a copy of the foregoing Memorandum In Support of Claimed Jurisdiction was served by regular mail service upon Mathias Heck Jr., Montgomery County Prosecutor at 301 West Third Street, P.O. Box 972, Dayton, Ohio 45422 this 10th day of November, 2008.



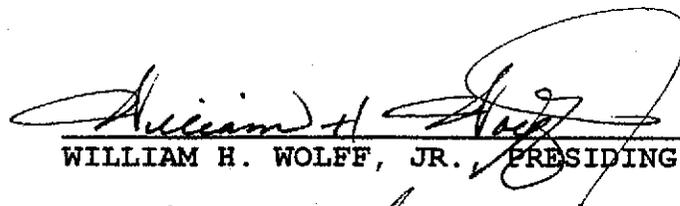
Defendant-Appellant

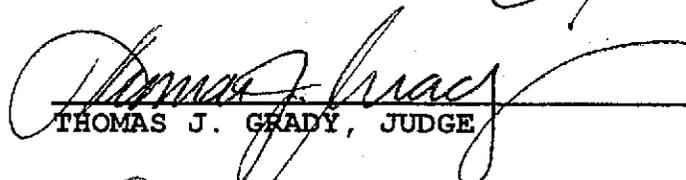
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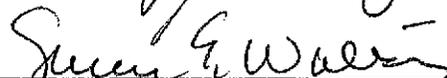
IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 22451
vs. : T.C. CASE NO. 02CR3261
JASON MARK HERRON : FINAL ENTRY
Defendant-Appellant :

Pursuant to the opinion of this court rendered on the
10th day of October, 2008, the judgment of the trial
court is Affirmed. Costs are to be paid as provided in App.R.
24.


WILLIAM H. WOLFF, JR., PRESIDING JUDGE


THOMAS J. GRADY, JUDGE


SUMNER E. WALTERS, JUDGE (BY ASSIGNMENT)

(Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

R. Lynn Nothstine
Asst. Pros. Attorney
P.O. Box 972
Dayton, OH 45422

Jason Mark Herron
Inmate No. 446-705
Lebanon Corr. Inst.
P.O. Box 56
Lebanon, OH 45036

Hon. Mary L. Wiseman

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 22451
vs. : T.C. CASE NO. 02CR3261
JASON MARK HERRON : (Criminal Appeal from
Common Pleas Court)
Defendant-Appellant :

O P I N I O N

Rendered on the 10th day of October, 2008.

Mathias H. Heck, Jr., Pros. Attorney; R. Lynn Nothstine, Asst.
Pros. Attorney, Atty. Reg. No.0061560, P.O. Box 972, Dayton,
OH 45422

Attorneys for Plaintiff-Appellee

Jason Mark Herron, Inmate No. 446-705, Lebanon Correctional
Institution, P.O. Box 56, Lebanon, OH 45036

Defendant-Appellant, pro se

GRADY, J.:

Defendant, Jason Mark Herron, appeals from an order of
the court of common pleas that denied Herron's motion for
leave to file a delayed motion for a new trial.

Herron was convicted in 2003, following a jury trial, of
felonious assault, with a firearm specification, improperly

discharging a firearm at or into a habitation, having weapons while under a disability, and murder, with a firearm specification. Herron was sentenced to serve terms of incarceration totaling thirty-eight years to life. We affirmed Defendant's conviction and sentence on direct appeal. *State v. Herron*, Montgomery App. No. 19894, 2004-Ohio-773.

On July 30, 2007, Defendant filed a pro se application captioned "Motion For Leave To File Motion For New Trial." Defendant argued that inasmuch as a prior motion for new trial filed on his behalf by his appointed counsel was denied because it had not been timely filed, Defendant was denied the effective assistance of counsel. Defendant further argued that he was factually innocent of the crime of murder because he should instead have been convicted of involuntary manslaughter.

The State filed a motion opposing Defendant's application. On September 20, 2007, Defendant's request for leave to file a motion for a new trial was denied by the trial court. Defendant filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN VIOLATION OF APPELLANT'S ABSOLUTE RIGHT TO PROCEDURAL DUE PROCESS OF LAW AS GUARANTEED BY THE OHIO AND U.S. CONSTITUTION

IN SUMMARILY OVERRULING THE MOTION FOR LEAVE AND MOTION FOR NEW TRIAL."

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT DETERMINING THAT THE COURT HAD INHERENT JURISDICTION TO VACATE A JUDGMENT OF CONVICTION WHICH IS VOID AS BEING IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE OHIO AND UNITED STATES CONSTITUTION."

Crim.R. 33(B) provides, in pertinent part:

"Motion for new trial; form, time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein."

Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable

representation and, in addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136. Further, the threshold inquiry should be whether a defendant was prejudiced, not whether counsel's performance was deficient. *Strickland*.

Defendant might have been prejudiced by his counsel's failure to timely file the prior motion for new trial, if some basis in law to allow the court to order a new trial could have been found. Defendant's current motion for leave (Dkt 6) did not identify what that basis could be, except to make a broad and unsupported assertion of "factual innocence." That assertion failed to satisfy the showing of prejudice that *Strickland* and *Bradley* require. Therefore, on the record before it, the trial court did not err when it denied Defendant's motion for leave.

Defendant reveals the basis in law on which his motion for new trial would rely in his brief on appeal. Defendant

argues that his constitutional rights to due process and equal protection of the law were denied because the crime of felony murder of which he was convicted, R.C. 2903.02(B), prohibits the same conduct and requires the same proof as the crime of involuntary manslaughter, R.C. 2903.04(A), yet a conviction for felony murder permits imposition of a more severe punishment.

Defendant's argument suffers from two flaws, both fatal. The first is that Defendant failed to present this contention in the trial court proceedings, which forfeits his right to argue the deprivations of his constitutional rights he presents on appeal. *State v. Payne*, 114 Ohio St.3d 502. 2007-Ohio-4642. The second flaw is that the argument fails unless Defendant shows that in charging and convicting him, the State discriminated against a class of defendants to which he belongs based upon some unjustifiable standard such as race or religion. *United States v. Batchelder* (1979), 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755; *State v. Dixon*, Montgomery App. No. 18582, 2002-Ohio-541. Defendant offers no basis to make such a finding, and his argument therefore fails.

The assignments of error are overruled. The judgment of the trial court will be affirmed.

WOLFF, P.J. And WALTERS, J., concur.

(Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

R. Lynn Nothstine, Esq.
Jason Mark Herron
Hon. Mary L. Wiseman