

IN THE SUPREME COURT OF OHIO

09-0391

RAYNELL ROBINSON,	:	Case No.
	:	
Defendant-Appellant,	:	On Appeal from the Union
	:	County Court of Appeals,
-vs-	:	Third Appellate District
	:	
STATE OF OHIO,	:	
	:	Court of Appeals
Plaintiff-Appellee.	:	Case No. <u>14-07-20</u>

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT RAYNELL ROBINSON

Raynell Robinson
Inst. No. A-547-643
North Central Correctional Institution
P.O. Box 1812
Marion, Ohio 43301-1812

COUNSEL FOR APPELLANT, Raynell Robinson, In Pro Se

David Phillips
Prosecutor of Union County
221 West 5th Street
3rd Floor, Room 333
Marysville, Ohio 43040

COUNSEL FOR APPELLEE,
Prosecutor's Office of Union County

FILED

FEB 24 2009

CLERK OF COURT
SUPREME COURT OF OHIO

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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 case presents substantial constitutional questions which involves ineffective assistance of appellate counsel for counsel's failure to raise ineffective assistance of trial counsel on Appellant's direct appeal of right.

The Third Appellate District Court of Appeals denied the Appellant' application for reopening of direct appeal pursuant to App.R.26(B). The court of appeals found that the issues raised in Appellant's application failed to show any genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5). . . Accordingly, the application was not well taken.

Defendant-Appellant in this case was charged with misdemeanor offenses stemming from an incident that he was involved in on September 2, 2006 in Marysville, Ohio. The Marysville Police Department served a citation on the Defendant-Appellant alleging that he did unlawfully, and recklessly cause, inconvenience, annoyance, or alarm to another by engaging in fighting, threatening harm to others, or the property of others, or in violent or turbulent behavior in front of 714 Meadows Drive in violation of Ohio Revised Code § 2917.11(A)(1).

On September 19, 2006, Defendant-Appellant appeared in Marysville Municipal Court. He entered a plea of guilty to the above offenses, and paid his fines and court costs on the morning of September 19, 2006.

Thereafter, on or about December 26, 2006, Defendant-Appellant was served with a three (3) count indictment stemming from the same incident and conduct of September 2, 2006. Defendant-Appellant was

charged with:

COUNT I: On or about September 2, 2006 in Union County State of Ohio, Raynell Robinson did knowingly cause serious physical harm to another. This constitutes the offense of Felonious Assault in violation of Ohio Revised Code Section 2903.11(A)(1), a felony of the second degree.

COUNT II: On or about September 2, 2006 in Union County, State of Ohio Raynell Robinson did knowingly by damaging or tampering with any property, substantially impair the ability of law enforcement officers, fire-fighters, rescue personnel, emergency medical services personnel, or emergency facility personnel to respond to an emergency or to protect and preserve any person or property from serious physical harm. This constitutes the offense of Disrupting Public Services in violation of Ohio Revised Code Section 2909.04(A)(3), a felony of the fourth degree.

COUNT III: On or about September 2, 2006 in Union County, State of Ohio, Raynell Robinson did knowingly and by force or by unlawful threat of harm to any person or property, did attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges. This constitutes the offense of Intimidation of Attorney, Victim or Witness in a Criminal Case in violation of Ohio Revised Code Section 2921.04(B), a felony of the third degree.

The Ohio Appellate Courts and this Court has long held that the Double Jeopardy Clause prohibits multiple prosecution for the same offense. As stated in State v. Best (1975), 42 Ohio St.2d 530, 71 O.O.2d 517, 330 N.E.2d 421, at paragraph two of the syllabus.

The Double Jeopardy Clause of the State and the Federal Constitutions prohibit a second prosecution for the same offense, and, or multiple punishments for the same offense. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that *no person* shall be subjected for the same offense, to be twice put in jeopardy of life or limb.

The Double Jeopradly Clause is applicable to the States through

the Fourteenth Amendment, and Article I, Section 10, of the Ohio Constitution, which provides that no person shall be twice put in jeopardy for the same offense.

It is also submitted that because of the Double Jeopardy issues in this case, that these issues or errors are structural in nature, and that they cannot be waived by the Defendant-Appellant's failure to object. See State v. Woullard (2004), 813 N.E.2d 964, 971.

Defendant-Appellant presented "good cause" for the filing of his application for reopening of his appeal. Defendant-Appellant was clearly prejudiced by appellate counsel's failure to raise the issue of ineffective assistance of trial counsel on his direct appeal of right, and the court of appeals decision in this case.

For all of the above reasons, Defendant-Appellant was deprived of his constitutional rights to the effective assistance of appellate counsel in this case; And, this Court must intervene to correct this injustice that has been imposed upon the Defendant-Appellant.

STATEMENT OF CASE AND FACTS

This case evolved from the charges of misdemeanor offenses stemming from an incident that Defendant-Appellant was involved in on September 2, 2006 in Marysville, Ohio.

The Marysville Police Department served a citation on the Defendant-Appellant alleging that he did unlawfully, and recklessly cause, inconvenience, annoyance, or alarm to another by engaging in fighting, threatening harm to others, or the property of others, or in violent or turbulent behavior in front of 714 Meadows Drive in violation of Ohio Revised Code § 2917.11(A)(1).

On September 19, 2006, Defendant-Appellant appeared in Marysville Municipal Court, and entered a plea of guilty to the above offenses, and paid his fines and court costs on the morning of September 19, 2006.

Thereafter, on or about December 26, 2006, Defendant-Appellant was served with a three (3) count indictment stemming from the same incident and conduct of September 2, 2006. Defendant-Appellant was charged in Count I with Felonious Assault in violation of Ohio Revised Code § 2903.11(A)(1), a felony of the 2nd degree; Count II with Disrupting Public Service in violation of Ohio Revised Code § 2909.04 (A)(3), a felony of the 4th degree; Count III with Intimidation of Attorney, Victim, or Witness in a Criminal Case, in violation of Ohio Revised Code § 2921.04(B), a felony of the 3rd degree.

On February 21, 2007, pursuant to Criminal Rule 48(A), the State gave notice to the Defendant-Appellant of its intent to Nolle Prosequi Count I, Felonious Assault, of the Indictment filed against the Defendant, Raynell Robinson, without prejudice, for the reason that the victim in this case has moved to the State of Arizona. Absent the victim, the State admitted, that there was insufficient evidence to proceed to trial on Count I.

On February 26, 2007, Defendant-Appellant's case proceeded to a jury trial. Thereafter, on February 27, 2007, Defendant-Appellant was found guilty and convicted of Count II and Count III of the indictment, Disrupting Public Services and Intimidation of an Attorney Victim, or Witness in a Criminal Case. Defendant-Appellant was sentenced to serve a term of (15) months on Count II, and to serve a sentence of (2) years on Count III. Both sentences were ordered to be served concurrently.

On August 18, 2008, the Third Appellate District Court entered judgment, and Affirmed in Part, Reversed in Part, and the case was Remanded to the Court of Common Pleas. The court of appeals held that the Defendant-Appellant's conviction for disrupting public services was not supported by sufficient evidence. The court of appeals sustained Defendant-Appellant's assignment of error as it pertained to his disruption of public services argument, and remand this cause for further proceedings consistent with its opinion. As of today's date the Defendant-Appellant has not been taken back to the Court of Common Pleas on the remand of the Court of Appeals.

On or about April 22, 2008, Defendant-Appellant filed a Petition To Vacate Or Set Aside Judgment Of Conviction And Sentence in The Court of Common Pleas of Union County, Ohio. On September 15, 2008, the Court of Common Pleas dismissed the Defendant's petition. The court held that the Defendant's petition was untimely, and a petition for post-conviction relief is properly denied by the application of the doctrine of res judicata, where petitioner seeks relief on the basis of issues which were or could have been raised on appeal. There was no appeal taken on the denial of the Petition To Vacate Or Set Aside Judgment Of Conviction And Sentence.

On October 27, 2008, Defendant-Appellant filed a Application For Reopening of his Direct Appeal, pursuant to App.R. 26(B). On January 20, 2009, the Third Appellate District Court of Appeals denied the Appellant's application for reopening. The court held that the Appellant's application fail to show any genuine issue as to whether he was deprived of the effective assistance of counsel on appeal.

The Court of Appeals erred when it failed to hear Appellant's application for reopening of his direct appeal, because appellate counsel failed to raise the issue of ineffective assistance of trial counsel. Especially, when the Defendant-Appellant had informed trial counsel that he had already been to trial in Marysville Municipal Court on the same conduct and offenses. Trial counsel failed to inform the trial court that the charges and offenses that the Defendant was on trial for arose out of the same incident that the Defendant had entered a plea of guilty to in Marysville Municipal Court. Trial counsel failed to object and/or investigate anything that the Defendant-Appellant told him about the offenses that he was on trial for; And, in relation to these issues, appellate counsel failed to raise the issue of ineffective assistance of trial counsel on Appellant's direct appeal of right.

Now the Defendant-Appellant is properly before this Court on appeal from the denial of his Application For Reopening of his Direct Appeal pursuant to App.R. 26(B). Hereinafter, the Defendant-Appellant will be referred to as the "Appellant."

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The court of appeals erroneously denied the Appellant's application for reopening of his direct appeal for all of the following reasons:

Appellate Rule 26(B) allows for the reopening of a direct appeal where the applicant can demonstrate that appellate counsel was ineffective for failing to raise significant and obvious issues of a constitutional magnitude which, if raised, hold a reasonable probability of a different outcome on appeal. See, Evitts v. Lucey (1985), 469 U.S. 387. The standard for the evaluation of counsel's claimed ineffectiveness is the same on direct appeal as it is at all other stages of the proceedings, as enumerated in Strickland v. Washington (1984), 466 U.S. 648. If counsel made errors in failing to raise the issues, and the underlying issues could reasonably have affected the outcome of the appeal, then reopening is required. In this case, the failure to raise the below issues constituted ineffective assistance of appellate counsel, requiring reopening of the appeal.

Proposition of Law No. II: Appellant submits that his felony charges, conviction, and sentence were illegally obtained in violation of his rights pursuant to the double jeopardy provisions of the Fifth and Fourteenth Amendments to the United States Constitution; And, Article I, Section 10 of the Ohio Constitution.

This case evolved from the charges of misdemeanor offenses stemming from an incident that Appellant was involved in on September 2, 2006 in Marysville, Ohio.

The Marysville Police Department served a citation on the Appellant alleging that he did unlawfully, and recklessly cause, inconvenience, annoyance, or alarm to another by engaging in fighting,

threatening harm to others, or the property of others, or in violent or turbulent behavior in front of 714 Meadows Drive in violation of Ohio Revised Code, § 2917.11(A)(1). (See Exhibit B).

On September 19, 2006, Appellant appeared in Marysville Municipal Court, and entered a plea of guilty to the above offenses. The Appellant was adjudicated as guilty. The Court imposed a fine of One Hundred Dollars (\$100.00), and charged Fifty-Two Dollars (\$52.00) for court costs. Thereafter, Appellant paid his fine and court costs on September 19, 2006. (See Exhibit C).

Three months later, on December 26, 2006, Appellant was served with a three (3) count Indictment stemming from the same incident and conduct of September 2, 2006. Appellant was charged in Count I with Felonious Assault, in violation of Ohio Revised Code, § 2903.11(A)(1), a felony of the 2nd degree; Count II with Disrupting Public Service, in violation of Ohio Revised Code, § 2909.04(A)(3), a felony of the 4th degree; Count III with Intimidation of Attorney, Victim, or Witness in a Criminal Case, in violation of Ohio Revised Code, § 2921.04(B), a felony of the 3rd degree. (See Exhibit D).

On February 21, 2007, pursuant to Criminal Rule 48(A), the State gave notice to Appellant of its intent to Nolle Prosequi Count I, Felonious Assault, of the Indictment filed against the Defendant, Raynell Robinson, without prejudice, for the reason that the victim in this case has moved to the State of Arizona. Absent the victim, the State admitted, that there was insufficient evidence to proceed to trial on Count I. The trial court granted the State's motion.

On February 26, 2007, Appellant's case proceeded to a jury trial. Thereafter, on February 27, 2007, Appellant was found guilty and convicted of Count II and Count III of the indictment, Disrupting

Public Services and Intimidation of an Attorney, Victim, or Witness in a Criminal Case. Appellant was sentenced to serve a term of (15) months on Count II, and to serve a sentence of (2) years on Count III. Both sentences were ordered to be served concurrently.

Appellant submits that his misdemeanor and felony charges, are charges for the same offense and conduct of September 2, 2006. His prosecution for the instant felony charges stemmed from the same conduct and behavior. Further, the trial court relied upon the same evidence and information at trial, that the charging officers relied upon on the night of the altercation. It seems to be clear that the charging officers intended to serve a misdemeanor citation, rather than arrest the Defendant-Appellant, and charge him with three (3) felony offenses.

The Double Jeopardy Clauses of the State and Federal Constitutions prohibit a second prosecution for the same offense, and, or multiple punishments for the same offense.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "*no person* shall be subject for the same offense, to be twice put in jeopardy of life or limb."

The double jeopardy provision of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. Benson v. Maryland (1969), 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. See also, Article I, Section 10 of the Ohio Constitution, which provides that "no person shall be twice put in jeopardy for the same offense.

Appellant submits that by admitting his guilt, paying his fine, and court costs in Marysville Municipal Court bars any subsequent felony prosecution that is based upon the same conduct and behavior as the misdemeanor conviction.

In Brown v. Ohio (1977), 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187. The Court set aside a felony conviction on the charge of auto theft following a prior misdemeanor conviction of joy riding, where the separate charges grew out of the same conduct. The United States Supreme Court held that double jeopardy clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, bars prosecution and punishment for the lesser included offense of operating the same vehicle without owner consent.

The United States Court has also held in Blockburger v. U.S. (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, recognized that the double Jeopardy Clause of the Fifth Amendment prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes where one "requires proof of a fact which the others does not."

Further, in Brown, supra, the Supreme Court held that the double jeopardy clause prohibits prosecution of a defendant for a greater offense when he or she has already been acquitted or convicted on the lesser included offense.

In Waller v. Florida (1970), 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435, it was held that the judicial power to try an accused in Municipal Court springs from the same organic law that created the state court with general jurisdiction to try an accused. Thus, the state and the city are parts of a single sovereignty, and double jeopardy stands as a bar to a prosecution by one, after an accused has been in jeopardy for the same offense in a prosecution by the other. See also, Article XVIII, Section 3, of the Ohio Constitution.

Appellant answered to the citation in Marysville Municipal Court. Appellant paid his fines and court costs on the morning of September 19, 2006; And, thereafter, three (3) months later, on December 26, 2006,

Appellant was served with an indictment stemming from his same conduct and behavior of September 2, 2006. Appellant's conduct pertaining to both the citation and the indictment, are all one incident.

The issue to be decided in this appeal is whether Appellant's conviction for a misdemeanor bars any subsequent felony prosecution that is based upon the same conduct and behavior as was the misdemeanor conviction. The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that "no person shall be put in jeopardy twice for the same offense."

In the interest of justice, Appellant respectfully request this Court to accept jurisdiction of this case, and to enter an order remanding this case, and to grant any other appropriate relief.

Proposition of Law No. III: Appellant received ineffective assistance of trial counsel for his failure to file a motion to inform the court that Appellant had appeared in Municipal Court and answered a citation in relation to the case that he was on trial for, in violation of his rights to the effective assistance of counsel under the Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

Appellant informed trial counsel before trial, and on the day of trial, of his court appearances in the Marysville Municipal Court, and of the payment of fines and court costs after a court appearance on September 19, 2006, for his conduct and behavior the night of September 2, 2006. Trial counsel's response was, "No matter what, the prosecutor is going ahead with your trial today."

In order to successfully assert ineffective assistance of counsel under the Sixth Amendment, there is a two-prong test set forth in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. The Appellant must show that counsel's performance was

deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the Appellant by the Sixth Amendment. Second, the Appellant must show that the deficient performance was so serious as to deprive the Appellant of a fair trial, a trial whose result is reliable.

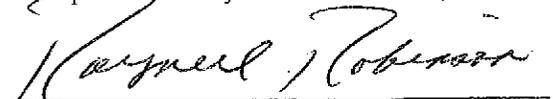
In State v. Hester (1976), 45 Ohio St.2d 71, 79, the application of this test in deciding an allegation of ineffective assistance of counsel involves two steps. First, it must be determined whether there has been a substantial violation of an essential duty owed by the defense counsel to the Appellant. If such a violation is found, there must next be a determination as to whether the Appellant was prejudiced by such a violation.

Counsel's failure to at least make an oral tenuous motion at any time during the Appellant's trial in Union County Court of Common Pleas, pertaining to the citation, and the answering of that citation in Marysville Municipal Court, rendered counsel's performance ineffective; And, his ineffective performance is the cause of Appellant's lost of freedom, pain, and suffering caused by his conviction and detention in the Ohio Department of Rehabilitation and Correction.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest, and raises a substantial constitutional question. The Appellant requests that this Court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

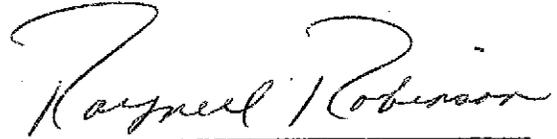
Respectfully submitted,



Raynell Robinson
Inst. No. A-547-643

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum In Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for appellee, David Phillips, Prosecutor of Union County, 221 West 5th Street, 3rd Floor, Room 333, Marysville, Ohio 43040 on February 23, 2009.



Raynell Robinson
Inst. No. A-547-643
North Central Correctional Inst.
P.O. Box 1812
Marion, Ohio 43301-1812

Defendant-Appellant In Pro Se

APPENDIX

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

COURT OF APPEALS
UNION COUNTY

2009 JAN 20 PM 1:40

Sharon K. Mickle
CLERK

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 14-07-

v.

RAYNELL ROBINSON,

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

This cause comes before the court on Appellant's application for reopening of direct appeal pursuant to App.R. 26(B).

Upon consideration the court finds that the additional issues raised in Appellant's application fail to show any genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5). *State v. Reed* (1996), 74 Ohio St.3d 534, applying the analysis of *Strickland v. Washington* (1984), 466 U.S. 668. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136. Accordingly, the application is not well taken.

It is therefore **ORDERED** that Appellant's application for reopening of direct appeal be, and the same hereby is, **DENIED** at the costs of the Appellant for which judgment is hereby rendered.



John B. Williams
JUDGES

DATED: January 15, 2009
/jnc

J16 P00054

47

13

2417

- Summons and Complaint—Crim. R. 3 & 4
- Minor Misdemeanor Citation—Crim. R. 4.1

Marysville (County) (Municipal) Court
Marysville Union County, Ohio
(City) (Name of County)

THE STATE OF OHIO
City of Marysville
Raynell Robinson
(Name of Defendant)
714 Meadows Dr
(Street Address)
Marysville OH 43040
(City, State, Zip Code)

CASE NO. 02088901
 DOC. _____ PAGE _____
 D.O.B. 06/23/1972 AGE _____
 SEX M HT. 5'11" WT. 190
 HAIR Blk EYES BRN
 S.S.N. _____

Employed by _____
 Phone No. _____

SUMMONS

You are ordered to appear at 8:00 ^(a.m.) on Sept. 19 2006
(Month-Day-Year)
 in the Marysville (County) (Municipal)
 Court, located at 125 E. 6th St. Marysville
(City) (City)
 Ohio. If you fail to appear at this time and place a warrant may be issued for your arrest.
 This summons served personally on the defendant on Sept 2 2006
Year

COMPLAINT

On or about Sept 2 2006 at 0333 ^(a.m.)
(a.m.)
 in Marysville Union County, Ohio
(City/Township) (Year)
 you did unlawfully DID RECKLESSLY CAUSE
(describe the offense charged)
INCONVENIENCE, ANNOYANCE, OR ALARM TO
ANOTHER BY ENGAGING IN FIGHTING, IN
THREATENING HARM TO OTHERS, OR THE
PROPERTY OF OTHERS, OR IN VIOLENT OR
TURBULENT BEHAVIOR, TO WIT ENGAGING
IN A FIGHT IN FRONT OF 714
MEADOWS DRIVE.
 in violation of Section 2917.11 A1 and/or _____
(O.R.C.) (Rule)

Signature of Issuing-Charging Officer: [Signature]
 Being duly sworn the issuing-charging law enforcement officer states that he has read the above complaint and that it is true.

Sworn to and subscribed before me by Robert Bartholomew
(Issuing-Charging Officer)
 on Sept. 4 2006
[Signature]
(Notary Public/Deputy Clerk)
Marysville (County) (Municipal) Court

MM

Notary Public _____
 My Commission Expires _____

NOTICE TO DEFENDANT: The officer is not required to swear to the complaint upon your copy of the summons and complaint. He swears to the complaint on the copy he files with the court. You may obtain a copy of the sworn complaint before hearing time. You will be given a copy of the sworn complaint before or at the hearing. For information regarding your duty to appear call _____

MARYSVILLE MUNICIPAL COURT

CRB 0600901

125 East Sixth St. P.O. Box 322
Marysville, Ohio 43040-0322

Date: 09/19/2006

Receipt No: 9390945

Criminal Case No: CRB 0600901
State Of Ohio (Mar)
VS
Robinson, Raynell
714 MEADOWS DRIVE
MARYSVILLE OH 43040

Viol: 2917.11A1 DISORD CONDUCT MM

Received of Robinson, Raynell
payment in the above entitled case in
the amount and items indicated herein.

Clerk - Deputy of Court LP

* * Fine and Costs Amounts * *

Fine Amount: 100.00
Court Costs: 52.00
Misc Costs : .00
Bond Amount:

Total Rec'd: 152.00 CA

Total Due : 152.00
Total Paid : 152.00
Balance Due: .00



