

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DAVID B. CONWAY,

Defendant-Appellant.

Case No. **09-0425**

On Appeal from the Clark
County Court of Appeals
Second Appellate District

C.A. Case No. 07-CA-34

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DAVID B. CONWAY**

STEPHEN A. SCHUMAKER #0014643
Clark County Prosecutor

AMY M. SMITH #0081712
Assistant Clark County Prosecutor
Counsel of Record

50 E. Columbia Street
Springfield, Ohio 45502
(937) 328-2574
(937) 328-2657 - FAX

COUNSEL FOR PLAINTIFF-APPELLEE,
STATE OF OHIO

OFFICE OF THE
OHIO PUBLIC DEFENDER

CLAIRE R. CAHOON #0082335
Assistant State Public Defender
Counsel of Record

8 East Long Street - 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - FAX
claire.cahoon@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLANT,
DAVID B. CONWAY

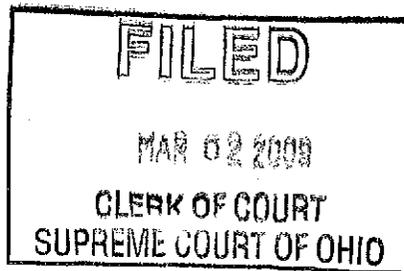


TABLE OF CONTENTS

Page Number

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF THE CASE AND FACTS.....2

ARGUMENT.....4

FIRST PROPOSITION OF LAW.....4

A criminal defendant is denied constitutionally guaranteed due process when he or she is convicted of burglary under R.C. 2911.12(A)(2) with insufficient evidence of the element of presence. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution; R.C. 2911.12(A)(2); *State v. Fowler* (1983), 4 Ohio St.3d 16; *State v. Kilby* (1977), 50 Ohio St.2d 21.....

SECOND PROPOSITION OF LAW.....6

Appellate counsel provides constitutionally ineffective assistance in failing to raise the sufficiency of the evidence to prove “present or likely to be present” for a conviction under R.C. 2911.12(A)(2) when the State failed to present sufficient evidence to support the conviction. Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution; *Strickland v. Washington* (1984), 466 U.S. 688.....

CONCLUSION.....8

CERTIFICATE OF SERVICE.....9

APPENDIX:

State v. David B. Conway, Clark County Court of Appeals Opinion and Entry, January 20, 2008 A-1

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Nothing is more fundamental to criminal prosecutions than the requirement that the State prove every element of the charged offense. It is axiomatic that a conviction based on legally insufficient evidence is violative of due process. *Tibbs v. Floria* (1982), 457 U.S. 31, 24, citing *Jackson v. Virginia* (1979), 443 U.S. 307. See, also, *In Re Winship* (1970), 397 U.S. 358; *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Determining whether evidence is legally sufficient to support a verdict is a question of law. *Thompkins*, 78 Ohio St.3d at 386, citing *State v. Robinson* (1995), 162 Ohio St. 486. When a criminal defendant is convicted in the absence of sufficient evidence, his or her right to be managed by an articulated system of laws – set forth in a specific set of elements – is wholly undermined. Equally damaging is the failure of counsel to assess and prevent such failures. Because proof of every element is central to a viable prosecution, defense counsel’s failure to object to insufficient evidence of an element is unreasonable.

In proving burglary under R.C. 2911.12(A)(2), the element of “present or likely to be present” has not been statutorily defined. However, this Court has construed the element in fact-specific situations. In *State v. Kilby* (1977), 50 Ohio St.2d 21, 25, this Court held that when the occupying family is in and out of the home during the day in question, and that home is burglarized when they are temporarily absent, there is sufficient evidence of aggravated burglary. Likewise, in *State v. Fowler* (1983), 4 Ohio St.3d 16, 19, this Court dealt with the “present or likely to be present element” in the framework of homeowners who are in and out of the house during the day. This Court held, “From these facts a permissive inference could have been drawn by the jury regarding the likelihood of [the owners’] being present in the residence at the time of the burglary.” *Id.*

The instant case presents equally nuanced facts as the definition of “present or likely to be present.” Unlike the circumstances that this Court already addressed in *Kilby* and *Fowler*, the homeowner here was out of town. The homeowner’s sons stopped in at the home on specific days and at specific times. The burglary occurred in between the times that the sons were at the home. For that reason, no reasonable inference could be made that anyone was present or likely to be present at the time of the burglary. This Court should grant jurisdiction in this case to provide clarification to Ohio’s courts of appeals as to sufficient evidence to support the “present or likely to be present” element of burglary.

STATEMENT OF THE CASE AND FACTS

In December 2006, David B. Conway was indicted by a Clark County grand jury in case no. 06-CR-1400 on one count of burglary, a violation of R.C. 2911.12(A)(2). He was also indicted in case no. 06-CR-1401 on one count of burglary, a violation of R.C. 2911.12(A)(1). The trial court ultimately joined the two cases and Mr. Conway elected to go to trial. On April 16, 2007, the jury returned a verdict of guilty in both cases, and Mr. Conway was sentenced to eight-year terms of imprisonment for each burglary conviction – an aggregate sentence of sixteen years.

At trial, the evidence proved that Jon Doughty was on vacation on September 24, 2006 when the burglary of his residence occurred. Noah Doughty, his younger son, stayed at the house from Friday, Sept. 22, 2006 through Sunday, Sept. 24, 2006. Noah testified that he left to return to college in Toledo on Sept. 24 at 1:00 or 1:30 p.m.. Alex Doughty, the older son, testified that he stopped by the house every day of his father’s vacation between 5:00 and 9:30 p.m.. Alex further testified that when he arrived on the night of Sept. 24, 2006 between 5:00 and

9:30 p.m., he found evidence of a break-in. Therefore, the burglary occurred sometime between Noah's departure at roughly 1:30 p.m. and Alex's arrival after 5:00 p.m.

Following his conviction, Mr. Conway appealed to the Second District Court of Appeals through court-appointed counsel. On direct appeal, appellate counsel raised two assignments of error. Appellate counsel argued that there was insufficient evidence of identity to support Mr. Conway's conviction for burglary and that joinder of the two cases in one trial was unfairly prejudicial. Counsel's sufficiency argument centered on the lack of a positive identification of Mr. Conway, not on any element of burglary. The court of appeals affirmed Mr. Conway's conviction. *State v. Conway*, 2nd Dist. No. 07CA34, 2008-Ohio-3001. In so doing, it pointed out that circumstantial evidence was sufficient to support a conviction, and so a positive identification was not necessary. *Id.*, citing *State v. Franklin* (1991), 62 Ohio St.3d 118.

Mr. Conway then filed a timely App.R. 26(B) application for reopening, arguing in pertinent part that appellate counsel failed to raise the sufficiency of the evidence as to the "present or likely to be present" element of R.C. 2911.12(A)(2). The Second District Court of Appeals overruled the application, stating that appellate counsel had already raised sufficiency and that "[b]y now insisting that appellate counsel should have challenged the element of presence rather than identity, Conway seeks to second guess his appellate counsel's strategy." *State v. Conway* (Jan. 16, 2008), 2nd Dist. No. 07CA34, Decision and Entry. Mr. Conway then filed a timely App.R. 26(A) application for reconsideration, which is now pending. This timely appeal follows.

ARGUMENT

PROPOSITION OF LAW I

A criminal defendant is denied constitutionally guaranteed due process when he or she is convicted of burglary under R.C. 2911.12(A)(2) with insufficient evidence of the element of presence. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution; R.C. 2911.12(A)(2); *State v. Fowler* (1983), 4 Ohio St.3d 16; *State v. Kilby* (1977), 50 Ohio St.2d 21.

“Present or likely to be present” is an essential element of burglary. Ohio Revised Code Section 2911.12(A)(2) requires:

Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender **is present or likely to be present**, with purpose to commit in the habitation any criminal offense.

(Emphasis added). This Court has held that the “present or likely to be present” element is not intended to have a completely literal interpretation. *State v. Kilby* (1977), 50 Ohio St.2d 21, 26. Rather, in pursuing the General Assembly’s intent to protect families from harm, the court should look to the type of structure and its use. *Id.* The term “likely” connotes more than “mere possibility” but something less than “a probability or reasonable certainty.” *State v. Miller*, 2nd Dist. No. 2006CA98, 2007-Ohio-2361, citing *State v. Green* (1984), 18 Ohio App.3d 69, 72.

While this Court has not addressed “present or likely to be present” in the same factual context as Mr. Conway’s case, this Court has held that the element is met when the homeowners are away at the time of the burglary but were coming and going from the home that day. *Kilby*, 50 Ohio St.3d at 25. Likewise, this Court has held that a permissive inference of presence could be made when the homeowners were home on the day in question and worked at varying

locations during varying times. *State v. Fowler* (1983), 4 Ohio St.3d 16, 19. See, also, *State v. Wilson* (1979), 58 Ohio St.2d 52, 58.

Moreover, Ohio's courts of appeals have consistently applied a fact-based analysis in assessing "present or likely to be present." *State v. McCoy*, 10th Dist. No. 07-AP-769, 2008-Ohio-3293, at ¶27 (holding that the State did not meet its burden of proof because of an absence of evidence that anyone was present or likely to be present); *State v. Pennington*, 12th Dist. No. CA2006-11-136, 2007-Ohio-6572, at ¶36 (holding that there was "sufficient activity" of caretakers' coming and going from the home at varying times to prove presence); *State v. Miller*, 2nd Dist. No. 2006CA98, 2007-Ohio-23, at ¶17 (presence not sufficiently proven when homeowner was away at work and rarely came home during her shift); *State v. Edwards*, 4th Dist. No. 06CA5, 2006-Ohio-6288, at ¶13 (holding that testimony that occupants were in and out of the home on the day of burglary was sufficient); *In re Meatchem*, 1st Dist. No. C-050291, 2006-Ohio-4128, at ¶19 (insufficient evidence of presence when caretaker stopped in briefly a few times a week); *State v. Woodruff*, 6th Dist. No. L-04-1125, 2005-Ohio-3368, at ¶8 (testimony that home was being renovated but that owners sometimes stayed there and stopped in frequently was sufficient to prove presence).

The Second District Court of Appeals failed to apply a fact-based analysis in Mr. Conway's case. Rather, the court held that Mr. Conway could not prove deficient performance by "second guessing" the issues raised by appellate counsel. *State v. Conway*, 2nd Dist. No. 2007-CA034, Decision and Entry, 3. Mr. Conway asserts that appellate counsel's failure to raise a winning appellate issue was ineffective assistance of counsel. (See Proposition of Law II). Additionally, because Mr. Conway's conviction lacks sufficient evidence of "present or likely to be present," his conviction is violative of due process.

In the instant case, Mr. Conway was convicted of burglarizing a home when the owner was away on vacation. The homeowner's sons stopped in during specific times to check on the house. One son testified that he came home and stayed through the weekend, returning to college on Sunday around 1:00 p.m.. The other son testified that he stopped at the house every day between 5:00 and 9:30 p.m.. By the time that he arrived at his father's home on Sunday night, it had already been burglarized. Because the burglary took place between 1:00 and 5:00 p.m. – time periods that the sons specifically testified that they would not be present – the State failed to present sufficient evidence that anyone was present or likely to be present at the time of the burglary. As it was never proven that anyone was present or likely to be present, Mr. Conway's conviction for burglary under R.C. 2911.12(A)(2) lacks sufficient evidence and violates his constitutional rights to due process of law. Therefore, this Court must accept Mr. Conway's case and provide Ohio's courts of appeals guidance in consistently applying the evidence to the "present or likely to be present" element of burglary under R.C. 2911.12(A)(2).

PROPOSITION OF LAW II

Appellate counsel provides constitutionally ineffective assistance in failing to raise the sufficiency of the evidence to prove "present or likely to be present" for a conviction under R.C. 2911.12(A)(2) when the State failed to present sufficient evidence to support the conviction. Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution; *Strickland v. Washington* (1984), 466 U.S. 688.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceedings would have been different. *Strickland*, at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Mr. Conway argued in a timely App.R. 26(B) application for reopening that his prior appellate counsel was ineffective in failing to argue sufficiency of the evidence to prove the element of “present or likely to be present.” Instead, his appellate attorney challenged the sufficiency of the evidence as to proof of Mr. Conway’s identity. The appellate court held, “By now insisting that appellate counsel should have challenged the element of presence rather than identity, Conway seeks to second guess his appellate counsel’s strategy.” *State v. Conway*, 2nd Dist. No. 07-CA-34, Decision and Entry, 3. The court misinterpreted the rationale behind applications for reopening, which exist under App.R. 26(B) to allow criminal defendants a vehicle for raising ineffective assistance of appellate counsel. *State v. Murnahan*, 63 Ohio St.3d 60, 65-66. Mr. Conway properly raised that ineffective assistance in a timely App.R. 26(B) application for reopening, following the rationale in *Murnahan*. The Second District Court of Appeals was mistaken in denying that application.

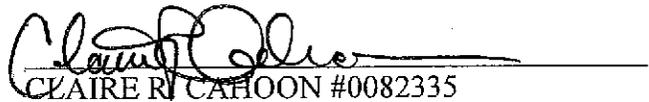
Mr. Conway’s appellate counsel unreasonably failed to raise a winning issue on appeal as to the sufficiency of the evidence to prove “present or likely to be present,” which amounted to deficient performance. Because sufficiency of the presence element would have been a determinative issue for Mr. Conway, counsel’s failure to raise it prejudiced him. As a result, Mr. Conway was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution.

CONCLUSION

This case includes substantial constitutional questions, as well as questions of public and great general interest. Therefore, this Court should grant jurisdiction in the above-captioned case.

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER



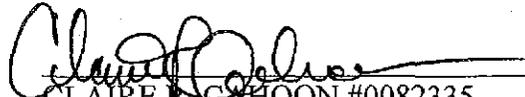
CLAIRE R. CAHOON #0082335
Assistant State Public Defender
Counsel of Record

8 East Long Street – 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – FAX
claire.cahoon@opd.ohio.gov

COUNSEL FOR DEFENDANT- APPELLANT
DAVID B. CONWAY

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant David B. Conway** was forwarded by regular U.S. Mail, postage pre-paid, to Amy M. Smith, Assistant Clark County Prosecutor, 50 E. Columbia Street, Springfield, Ohio 45502, on this 2nd day of March, 2009.



CLAIRE K. CAHOON #0082335
Assistant State Public Defender
Counsel of Record

COUNSEL FOR DEFENDANT-APPELLANT
DAVID B. CONWAY

#294949

IN THE SUPREME COURT OF OHIO

| | | |
|----------------------|---|---------------------------|
| STATE OF OHIO, | : | |
| | : | Case No. |
| Plaintiff-Appellee, | : | |
| | : | On Appeal from the Clark |
| vs. | : | County Court of Appeals |
| | : | Second Appellate District |
| DAVID B. CONWAY, | : | |
| | : | C.A. Case No. 07-CA-34 |
| Defendant-Appellant. | : | |

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DAVID B. CONWAY

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

DAVID B. CONWAY

Defendant-Appellant

Appellate Case No. 2007-CA-34

Trial Court Case No. 06-CR-1400

CLARK COUNTY
COURT OF APPEALS

JAN 26 2009

DECISION AND ENTRY
January 16, 2009

FILED
RONALD E. VINCENT, CLERK

This matter is before the Court on Defendant David Conway's September 18, 2008 application to re-open his direct appeal pursuant to App.R. 26(B). The State filed a response on October 16th, and the case is now ripe for review.

Following a jury trial, Conway was found guilty of two counts of burglary. We affirmed Conway's conviction and sentence. *State v. Conway*, Clark App. 07-CA-34, 2008-Ohio-3001.

Conway now seeks to re-open that appeal, claiming that appellate counsel was ineffective for failing to cause a transcript of the suppression hearing to be filed and for failing to offer a sufficiency of the evidence argument. Appellate Rule 26(B) allows a criminal defendant to apply to re-open his direct appeal based on a claim of ineffective

assistance of appellate counsel. "[T]o justify reopening his appeal, [Appellant] 'bears the burden of establishing that there was a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of counsel on appeal.'" *State v. Frazier*, 96 Ohio St.3d 189, 2002-Ohio-4011, ¶7, citation omitted. Conway has failed to meet this burden.

In *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, the United States Supreme Court stated that a defendant alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. *Id.* Even assuming that counsel's performance was ineffective, the defendant must also show that the error had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. Reversal is warranted only where the defendant demonstrates that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

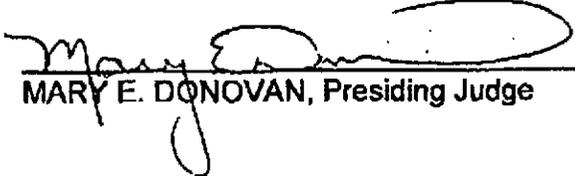
Conway first contends that appellate counsel was ineffective for failing to cause a transcript of the suppression hearing to be filed. Conway offers no insight as to precisely what appellate counsel could have been expected to argue had the transcript been filed. Instead, his argument suggests that appellate counsel is per se ineffective for failing to obtain and review suppression transcripts, and perhaps those of all trial court proceedings. The fact is that appellate attorneys often elect not to have every proceeding transcribed, including suppression hearings. In this case counsel did not make the decision to forego the transcript in a vacuum. To the contrary, counsel had the original motion to suppress, any response, and the trial court's ruling available to him for review, any of which could have alerted him to potentially meritorious issues and the need for a transcript.

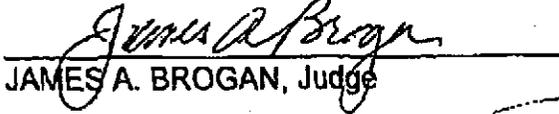
Second, Conway maintains that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence in that the State allegedly failed to prove that someone was "present or likely to be present" in the Doughty residence during the burglary. Appellate counsel did present a sufficiency of the evidence argument as the first assignment of error in the direct appeal. There, counsel challenged the element of identity, arguing that the State failed to prove that Conway was the one who committed the burglaries. By now insisting that appellate counsel should have challenged the element of presence rather than identity, Conway seeks to second guess his appellate counsel's strategy.

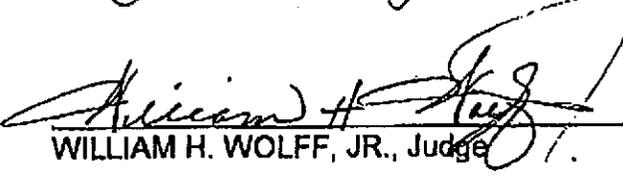
"[T]he defendant's knowledge concerning habitation is not relevant. The issue is not whether the burglar subjectively believed that persons were likely to be there, but whether it was objectively likely." *State v. Miller*, Clark App. No. 06-CA-98, 2007-Ohio-2361, ¶15, citation omitted. Although Mr. Doughty was on vacation during the burglary, the State offered evidence that one adult son had spent a weekend in the home while his father was gone, and another adult son visited the home daily to check on the house and take in the mail. This evidence is sufficient to demonstrate that someone was likely to be present in the residence, in order to support a conviction for burglary. *Id.*, at ¶16, citations omitted. Counsel chose not to challenge the sufficiency of the evidence regarding the element of presence on appeal, and in light of the State's evidence, we cannot fault or second guess counsel's strategy. See, e.g., *State v. Mason* (1998), 82 Ohio St.3d 144, 694 N.E.2d 932.

Conway cannot demonstrate deficient performance in either of these instances, and he has failed to meet his burden of proving a genuine issue of a colorable claim of ineffective assistance of counsel. Accordingly, Conway's application to re-open his appeal pursuant to App.R. 26(B) is OVERRULED.

IT IS SO ORDERED.


MARY E. DONOVAN, Presiding Judge


JAMES A. BROGAN, Judge


WILLIAM H. WOLFF, JR., Judge

Copies to:

Amy M. Smith
Attorney for Plaintiff-Appellee
50 E. Columbia Street
P.O. Box 1608
Springfield, Ohio 45501

Claire R. Cahoon
Attorney for Defendant-Appellant
Assistant State Public Defender
8 E. Long Street, 11th Floor
Columbus, Ohio 43215

CA1/JM

Brett Anthony Rinehart
Attorney for Defendant-Appellant
2 W. Columbia Street, Suite 200
Springfield, Ohio 45502

CLARK COUNTY
COURT OF APPEALS

JAN 20 2009

FILED
RONALD E. VINCENT, CLERK