

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,
-vs-
JERMAINE CLARDY,
Defendant-Appellant.

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:

09-1191

Case No. _____
1st Dist. No. C-060527
(on 26(B) Appeal)

MEMORANDUM IN SUPPORT OF JURISDICTION

FOR APPELLANT:

Jermaine Clardy, #525-809
Lebanon Corr. Inst.
P.O.B. 56
Lebanon, Ohio, 45036-0056
Appellant, in pro se

FOR APPELLEE:

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APPENDIX A

State v Clardy, Entry denying reopening, 5/29/09 (3 pp.)

JURISDICTIONAL STATEMENT

This case presents substantial constitutional questions regarding access to available appellant remedies.

This case also presents questions regarding ineffective assistance of appellate counsel, for failing to present assignments of error regarding the prosecutorial misconduct and erroneous jury instructions that substantially and materially affected the verdict, as well as the underlying issues omitted by appellate counsel.

This Court should accept jurisdiction over this appeal, provide a clear remedy to ensure that the jury upon hearing insufficient evidence isn't persuaded by the unconstitutional tactics by the State to reach a verdict of guilty, and ultimately reverse the lower court.

STATEMENT OF THE CASE

Appellant was indicted and charged with one count of murder with one- and three-year firearm specifications. Jury trial commenced on May 8, 2006 and, on May 12, 2006, the jury returned a verdict of guilty on all counts, failing to agree on Appellant's affirmative defense of self-defense.

On June 5, 2006, Appellant was sentenced to serve a term of eighteen years to life in prison, with both specifications merging. (Hamilton County Common Pleas No. B-0510063)

Timely direct appeal was taken to the First District Court of Appeals and on August 17, 2007, the Court sustained the assignment of error regarding erroneous imposition of post-release control, and affirmed in all other respects.

On October 2, 2007, Appellant filed a timely Application to Reopen Direct Appeal in the Court of Appeals, presenting claim of ineffective appellate counsel and three underlying proposed assignments of error. On December 31, 2007, after his initial attempt to request discretionary appeal was delayed, and leave to file a delayed appeal in this court was granted Appellant filed a Memorandum in Support of Jurisdiction from his initial direct appeal, which was denied April 23, 2008 under Case Number 07-1907.

On January 8, 2008, the Court of Appeals denied Appellant's timely 26(B) Application, citing res judicata under the theory that the issues "could have been presented" to this Court on appeal. On December 10, 2008 this cause was remanded by this Court upon reversing, on the authority of State v. Davis 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221. However, the First District denied Application to Reopen Direct Appeal on May 29, 2009. This timely appeal follows.

STATEMENT OF FACTS

During the early morning hours of June 12, 2005, Appellant, along with Michael Clay and Victor Smith, had a meeting in the Walnut Hills area of Cincinnati. They had been drinking alcohol throughout the evening and eventually went in two vehicles to an area near Woodburn and William Howard Taft Road. Smith became extremely angry, agitated and acting in a threatening and turbulent manner towards Clay and Appellant. He eventually broke out a window in Clay's vehicle and then also in Appellant's vehicle. Appellant, in fear of imminent serious bodily injury or death at the hands of aggressor Smith, got out of the vehicle with a handgun for self-protection and, upon Smith approaching him with his hand wrapped up concealing possible weapon from the rear of the vehicle, turned and fired three shots with the .25 caliber pistol, striking Smith with one of the shots. Smith turned and ran for approximately one block and fell. He eventually passed away at the hospital from the wound. Appellant was later arrested and charged with murder.

During closing arguments, the prosecutor argued facts not in the evidence to the jury, stating that Appellant had told police that he had shot Smith "in the back", and that Appellant had stated that he had gone around the vehicle to get a better shot. These comments were not supported by any evidence in the record. The prosecutor further argued that the essential element of "purpose" was not in question when, in fact, it was the only element that had not been stipulated to.

The trial court issued a supplemental instruction on purpose gleaned from an unreported case which served to shift the burden of proof, and further instructed the jury it had to find Appellant "guilty or innocence".

Appellate counsel did not present assignments of error regarding the improper comments or the erroneous jury instructions.

PROPOSITION OF LAW NO. I:

WHERE APPELLATE COUNSEL OVERLOOKS SIGNIFICANT AND OBVIOUS ISSUES OF CONSTITUTIONAL MAGNITUDE IN FAVOR OF WEAKER ARGUMENTS, SUCH COUNSEL IS CONSTITUTIONALLY INEFFECTIVE.

LAW AND ARGUMENT

It is well settled that a criminal defendant is constitutionally entitled to the effective assistance of counsel at all critical stages of the proceedings, **Gideon v Wainwright** (1963) 372 U.S. 335, including a direct appeal as of right. **Douglas v California** (1963) 372 U.S. 353.

In **Evitts v Lucney** (1985) 469 U.S. 387, the Court, in applying the two-pronged test for ineffective counsel elucidated in **Strickland v Washington** (1984) 466 U.S. 668, to claims of ineffective appellate counsel, held that where appellate counsel overlooks "significant and obvious issues of constitutional magnitude with a reasonable probability of success in favor of weaker arguments with little or no chance of success" the two-prongs of **Strickland** are met and relief is warranted.

In this case, appellate counsel successfully raised an argument regarding the imposition of post-release control, wherein Appellant will be subject to the supervision by the parole authority, anyway by virtue of his life sentence, if he is ever released which, although successful, was essentially a harmless procedural error. Appellate counsel further raised ineffective trial counsel and sufficiency of the evidence, perennial losers on appeal, while overlooking the underlying prosecutorial misconduct to which trial counsel did not object, and two separate unconstitutional and prejudicial jury instructions which, if reviewed, hold a reasonable probability of success.

Pursuant to the **Evitts** standard, Appellate counsel in this case was constitutionally ineffective and this Court should accept jurisdiction to give merit review to the extant constitutional issues.

PROPOSITION OF LAW NO. II:

WHERE A PROSECUTOR ARGUES FACTS NOT IN EVIDENCE AND MAKES MATERIAL MISSTATEMENTS OF THE LAW TO THE JURY THAT AFFECT THE FAIRNESS OF THE PROCEEDINGS, DUE PROCESS IS VIOLATED AND REVERSAL IS REQUIRED.

LAW AND ARGUMENT

A prosecutor, as an agent of the state, has a duty to seek justice and to refrain from methods calculated to produce a wrongful conviction. He may strike hard blows, but not foul ones. **Berger v U.S.** (1985) 295 78. It is reversible error for a prosecutor to argue facts not in evidence in his closing arguments to the jury. **State v Conrad** (1969) 19 Ohio App. 2d 82; **State v Cloud** (1960) 168 NE2d 761; **State v Clark** (1974) 40 Ohio App. 2d 365; **State v Lott** (1990) 51 Ohio St. 3d 160; **State v LaFreneire** (1993) 85 Ohio App. 3d 840; **State v Hart** (1994) 94 Ohio App. 3d 665.

Where improper comments of the prosecutor are raised on appeal, the test is whether the remarks are improper and whether the remarks prejudiced the substantial rights of the accused. **Hart**, supra; **Olsen v McFaul** (CA 6, 1988) 843 F2d 918. This analysis, within the entire context of the proceedings. **Darden v Wainwright** (1986) 477 U.S. 168; **Donnelly v DeChristoforo** (1974) 416 U.S. 637. Where, as here, proof of guilt is overwhelming, reversal is required. **Olsen**, supra; **U.S. v Leon** (CA 6, 1976) 534 F2d 667; **U.S. v Krebs** (CA 6, 1986) 788 F2d 1166; **State v Keenan** (1993) 66 Ohio St. 3d 411.

While counsel's failure to object is a factor weighing against relief, see, e.g. **Olsen**, supra and citations contained therein, the plain error doctrine "tempers the blows if a rigid application of the contemporaneous objection requirement". **U.S. v Young** (1985) 470 U.S. 1;

cited in **U.S. v Ebens** (CA 6; 1986) 800 F2d 1422. As Chief Justice Berger stated in **Young**, "Interruptions of arguments either by opposing counsel or by the presiding judge are matters to be approached cautiously".

In this case, the prosecutor argued facts not in the evidence to the jury, stating erroneously that Appellant had told the police that he had shot Smith in the back and that Appellant had admitted to going around his vehicle to get a "better shot". These erroneous statements, contradicted by the evidence, were designed to inflame the jury so as to overcome the evidence demonstrating Appellant's affirmative defense in this case, by focusing the jury on the missing 'purpose' element in order to secure a conviction wherein Appellant has stipulated to the remaining elements. This misconduct had a substantial and injurious effect on the verdict, and violated Appellant's substantive rights, requiring reversal.

The prosecutor went further, however, by arguing to the jury that the affirmative defense of self-defense precludes any assertion that the causing of death was not purposeful, and told the jury that the element of purpose was "not in question" despite the fact that it was, in fact, the only element that remained in question after stipulations were made to the remainder of the elements.

The effect of these material misstatements of law by the prosecutor was to confuse the jury, which is demonstrated by their request for an additional clarification of the definition of 'purpose'. (Tr. 624).

Appellant submits that this was a close case, in which such misconduct must be scrutinized more closely. **State v Draughn** (1992) 76 App. 3d 672. Reversal is required and this Court should accept jurisdiction.

PROPOSITION OF LAW NO. III:
WHERE A SUPPLEMENTAL JURY INSTRUCTION CREATES A
PERMISSIVE PRESUMPTION THAT LOWERS THE GOVERNMENT'S
BURDEN OF PROOF, DUE PROCESS IS VIOLATED.

LAW AND ARGUMENT

It is well settled that the Due Process Clause prohibits the use of even a permissive presumption in a jury instruction which relieves the state of its burden of proof on an essential element of a charged offense. **Mullaney v Wilbur** (1975) 421 U.S. 684, 702; **County Court v Allen** (1979) 442 U.S. 140. If it is "reasonably likely that the jury applied an instruction in a way that violated the Constitution by lowering the government's burden of proof", reversal is required. **Estelle v McGuire** (1991) 502 U.S. 62; **Sandstrom v Montana** (1997) 442 U.S. 510. The standard of review is whether the ailing instruction by itself, so infected the entire trial that resulting conviction violates due process. **Cupp v Naughten** (1973) 414 U.S. 140. A jury instruction error may be harmless where the defendant concedes the element of intent. **Krezemski v Perini** (CA 6, 1980) 614 F2d 121. In this case, the intent element was the only element at issue pursuant to stipulation related to the affirmative defense.

In this case, the jury requested clarification of the definition of the intent element "purpose", and the trial court issued a supplemental instruction, proffered by the prosecutor and gleaned from an unreported case decided mere days before trial in this case, **State v Levett** May 5, 2006, No. C-040537, which stated "If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life or inflict bodily harm, purpose to cause death may be inferred from the use of the weapon". This instruction is at considerable variance from statutory and O.J.I. definitions of "purpose".

Appellant submits that, in the entire context of this case the jury likely applied the instruction in a way that lessened the prosecutor's

burden of proof.

Where a case is submitted to a jury on unconstitutional theories, the conviction must be set aside. **Stromberg v California** (1931) 283 U.S. 359; **Leary v U.S.** (1969) 395 U.S. 6; **Bachellar v Maryland** (1970) 397 U.S. 564; **Evans v muncy** (1990) 111 S. Ct. 309; **Boyde v California** (1990) S. Ct. 1190.

The unreported **Levét** decision is to the instant case wherein the evidence was uncontradicted that Appellant fired only three shots with a .25 caliber pistol, striking the decendent only one time and ceased firing as soon as the decendent-aggressor moved away from Appellant. In contrast, the defendant in **Levét** chased his victim firing a total of seven shots.

The factual distinctions between these cases rendered the supplemental instruction inapplicable to this case even if it can withstand independent constitutional scrutiny.

The fact that the jury relied on the erroneous instruction is evidenced by the fact that the jury issued a question to the Court requesting clarification of the definition of the element of purpose. (Tr. 624) Notably the trial court refused to provide such clarification, despite the fact that the statutory or O.J.I. definition would have been sufficient and, unsurprisingly, the resulting guilty verdict was issued.

It is clear that the effect of the inclusion of the non-standard and erroneous jury instruction defining purpose was to negate the affirmative defense of self-defense, and to ease the prosecutor's burden of proof on the only element at issue in this case being purpose. Reversal is required and this Court should accept jurisdiction.

PROPOSITION OF LAW NO. IV:
INSTRUCTING A JURY TO FIND A DEFENDANT "GUILTY OR INNOCENT"
RATHER THAN "GUILTY OR NOT GUILTY" UNDERMINES THE GOVERNMENT'S
BURDEN OF PROOF AND VIOLATES DUE PROCESS OF LAW.

LAW AND ARGUMENT

As held in **Estelle v McGuire** (1991) 502 U.S. 62, where it is reasonably likely that a jury applied a jury instruction in a way that lowered the states burden of proof reversal is required. See also **Sandsstrom v Montana** (1979) 552 U.S. 510.

In this case, during voir dire, a juror asked the court whether "if defense counsel fails in his efforts" the jury would have any input into sentencing. The trial court responded by stating that the jury was to decide the "guilt or innocence" of the defendant. (Tr. 108-109).

As a preliminary matter, defense counsel has no burden of proof and the trial court was obligated at that time, to issue a cautionary instruction but, at instead, confused the jury.

There is a legal difference between innocence which is defined as the absence of guilt, and "not guilty" which is defined as a jury verdict resulting from the prosecution failing to prove its case beyond a reasonable doubt. (**Black's Law Dictionary**, 7th Ed. 1999). See also **People v O.J. Simpson**.

The trial court should have responded that the defense has no burden and that the jury's function was to determine whether the defendant was guilty or not guilty, by proof beyond a reasonable doubt. The phrasing "guilt or innocence" is misleading, legally incorrect and serves to undermine the government's burden of proof.

The erroneous instruction, especially in a close case such as this, with an affirmative defense which served to stipulate to all but one essential element, so infected the entire trial with unfairness as to the violate the constitution and require reversal. **Cupp**, supra.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction and ultimately, reverse, and Appellant so prays.
and, ultimately, reverse, and Appellant so prays.

Respectfully submitted.

Jermaine Clardy

Jermaine Clardy. #525-809
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Appellant, in pro se

GERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to the office of the Hamilton County Prosecutor, 230 E. 9th St., Cincinnati Ohio 45202, via regular U.S. Mail, on this 25th day of ~~July~~^{June}, 2009.

Jermaine Clardy

Jermaine Clardy
Appellant, in pro se

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-060527
	:	TRIAL NO. B-0510063
Plaintiff-Appellee,	:	
vs.	:	
JERMAINE CLARDY,	:	<i>ENTRY DENYING</i>
	:	<i>APPLICATION TO REOPEN</i>
Defendant-Appellant.	:	<i>DIRECT APPEAL AND</i>
	:	<i>OVERRULING MOTION.</i>

We consider this cause on remand by the Ohio Supreme Court upon reversing, on the authority of *State v. Davis*,¹ our entry overruling defendant-appellant Jermaine Clardy's App.R. 26(B) application to reopen this appeal.²

An application to reopen an appeal must be granted if the applicant establishes "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal."³ The United States Supreme Court's decision in *Strickland v. Washington*⁴ provides the standard for determining whether the applicant was denied the effective assistance of appellate counsel.⁵ The applicant must prove "that his counsel [was] deficient for failing to raise the issues he now

¹ 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221.

² See *State v. Clardy*, 120 Ohio St.3d 326, 2008-Ohio-6264, 898 N.E.2d 963.

³ *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696; App.R. 26(B)(5).

⁴ (1984), 466 U.S. 668, 104 S.Ct. 2052.

⁵ See *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456.

presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal.”⁶

In his application, Clardy contends that he was denied the effective assistance of counsel on appeal because his appellate counsel failed to assign as error (1) allegedly improper comments by the assistant prosecuting attorney during closing argument, (2) the trial court’s delivery of an instruction permitting the jury to infer a purpose to cause death from the manner in which the defendant used a deadly weapon, (3) the court’s response, during voir dire, to a prospective juror’s question concerning the jury’s role in sentencing.

Appellate counsel’s performance in not assigning these matters as error was not deficient. The alleged prosecutorial misconduct would not have provided a basis for overturning Clardy’s conviction because, on the record as a whole, the comments cannot be said to have denied him a fair trial.⁷ The challenged jury instruction provided an accurate statement of the law and did not, as Clardy asserts, lessen the state’s burden of proof.⁸ Nor was the state’s burden lessened by the trial court’s statement, in response to a prospective juror’s question during voir dire, that “[t]he issue of sentencing or * * * punishment * * * is not a factor for [the jury] to consider. * * * [Y]our sole responsibility is to decide guilt or innocence * * *.” The court’s statement, while imprecise, cannot be said to have misled the jury concerning the state’s burden of proof, when that burden was accurately stated in the instructions and the verdict forms provided to guide the jury’s deliberations.

⁶ *State v. Sheppard*, 91 Ohio St.3d 329, 330, 2001-Ohio-52, 744 N.E.2d 770, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

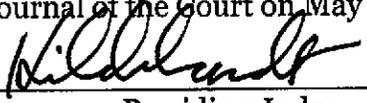
⁷ See *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

⁸ See *State v. Stallings*, 89 Ohio St.3d 280, 292, 2000-Ohio-164, 731 N.E.2d 159, citing *State v. Getsy*, 84 Ohio St.3d 180, 196, 1998-Ohio-533, 702 N.E.2d 866; *State v. Loza*, 71 Ohio St.3d 61, 81, 1994-Ohio-409, 641 N.E.2d 1082; *State v. Montgomery* (1991), 61 Ohio St.3d 410, 414, 575 N.E.2d 167.

Thus, Clardy has failed to sustain his burden of demonstrating a genuine issue as to whether he has a colorable claim of ineffective assistance of counsel on appeal. Accordingly, the court denies his application to reopen the appeal.⁹

And because App.R.26(B) affords Clardy no relief, and because neither the federal nor the state constitution afforded Clardy a right to counsel in filing his App.R. 26(B) application,¹⁰ the court overrules his motion for appointed counsel.

To the Clerk:

Enter upon the Journal of the Court on May 29, 2009
per order of the Court 
Presiding Judge

(COPIES SENT TO ALL PARTIES.)

⁹ See *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696; *State v. Reed*, 74 Ohio St.3d 534, 535-536, 1996-Ohio-21, 660 N.E.2d 456.

¹⁰ See *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, at ¶22 and 25.