

IN THE SUPREME COURT OF OHIO
2009

ORIGINAL

STATE OF OHIO,

Case No. 2009-1340

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

JOSHUA HUSBAND,

Court of Appeals
Case No. 08AP-917

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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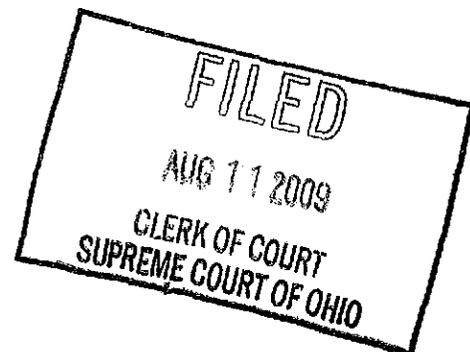


TABLE OF CONTENTS

EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION..... 1

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS 2

ARGUMENT..... 3

RESPONSE TO PROPOSITIONS OF LAW NOS. ONE, TWO, AND THREE:..... 3

 WHEN A WITNESS FAILS TO APPEAR PURSUANT TO A
 SUBPOENA, THE TRIAL COURT'S ISSUANCE OF A WARRANT
 SATISFIES ALL FEDERAL AND STATE CONSTITUTIONAL
 GUARANTEES..... 3

RESPONSE TO PROPOSITION OF LAW NO. FOUR: 5

 A DEFENDANT CLAIMING INEFFECTIVE ASSISTANCE OF
 COUNSEL MUST DEMONSTRATE BOTH DEFICIENT
 PERFORMANCE AND PREJUDICE TO BE ENTITLED TO RELIEF..... 5

CONCLUSION..... 6

CERTIFICATE OF SERVICE 7

EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is therefore respectfully submitted that jurisdiction should be declined. In an attempt to convince this Court to exercise its discretion and fully review his case, the defendant both re-packages and supplements the issues he raised on direct appeal to the Tenth District Court of Appeals, which issues the state appellate court thoroughly analyzed and properly rejected. The State of Ohio respectfully submits that this case was both simple and straight-forward, and was correctly decided by the court of appeals. Thus, this Court need not expend its scarce judicial resources to review the defendant's claims, and jurisdiction should therefore be declined.

STATEMENT OF THE CASE

On September 1, 2006, the Franklin County Grand Jury indicted the defendant, Joshua Husband, in a seven-count indictment. The indictment charged Husband as follows: count one, trafficking in cocaine with firearm specification; count two, possession of cocaine with firearm specification; count three, tampering with evidence; and counts four through seven, endangering children. Count one was alleged to have occurred on December 26, 2005, and all other counts were alleged to have occurred on January 3, 2006. *State v. Husband*, 10th Dist No. 08AP-917, 2009-Ohio-2900, at ¶5.

The case proceeded to trial before a jury, and the defendant was found guilty of the trafficking charge, with a firearm specification, and sentenced to serve an aggregate four-year prison term. The trial court granted the defendant's request for an appeal bond, and the defendant filed a timely appeal, raising three assignments of error. On June 22, 2009, the Tenth District Court of Appeals issued its decision, rejecting the defendant's claims and affirming his

conviction. *State v. Husband*, 10th Dist No. 08AP-917, 2009-Ohio-2900. The defendant then filed this appeal, seeking a granting of jurisdiction and review of his claims.

STATEMENT OF THE FACTS

On December 29, 2005, at about 9:35 p.m., narcotics detective David Barrick of the Franklin County Sheriff's Office and a confidential informant ("CI") went to the defendant's home. An unknown man let the men into the defendant's home. The CI introduced the defendant to Detective Barrick, who had never previously spoken to the defendant; the CI set up the contact on the detective's cell phone. The defendant was on a couch, and Detective Barrick sat on another couch. There were two or three people in the room that Detective Barrick never identified, and there was a digital scale on the coffee table.

The defendant asked Barrick if he was a police officer, and then took a handgun out of the coffee table. The defendant told Barrick that he was all about business as he pulled a baggie from his pocket and put it on the scale. The defendant wanted Barrick to sample the cocaine, but Detective Barrick said that he, too, was all about business. The defendant asked Barrick if the baggie looked alright, and Barrick said that it did. Detective Barrick put seven-hundred and fifty dollars on the coffee table, and received an ounce of cocaine, nearly thirty grams.

While the drug transaction was going on, a small child ran into the room, and the defendant's wife retrieved the child. The drug transaction took about five minutes. Other deputies were conducting surveillance outside the defendant's home, and were monitoring the body wire that Detective Barrick was wearing.

On January 3, 2006, Corporal Daniel Johnson, also of the Franklin County Sheriff's office, did pre-surveillance at the defendant's address. Deputy Johnson and sheriff's detective Jeffrey Edwards observed the defendant get into a blue Impala with another person and go to a

nearby address on Blue Lake Circle. The defendant was there for about thirteen minutes, and then returned to his home on Abbott Cove.

Detective Barrick was unable to consummate another transaction with the defendant on January 3, 2006. The defendant apparently learned that there was a valid arrest warrant for his December 29, 2005 actions; Detective Barrick was ultimately able to recover the weapon. The digital scale was also recovered in a consent search at the Blue Lake address, and a small safe was found in the hallway closet with a baggie containing forty-two grams of cocaine, a Palm Pilot, and a small amount of marijuana. The defendant's brother-in-law Adam Whaley was the resident at the Blue Lake address, and he admitted that the defendant had been there, although he could not speak to whether the defendant brought anything with him or opened the closet. Whaley testified on behalf of the defense, stating he had no idea how the cocaine got into his closet, and that he had never seen the Palm Pilot before.

The defendant testified on his own behalf, claiming that he was entrapped and denying that he displayed a firearm during the drug transaction.

ARGUMENT

RESPONSE TO PROPOSITIONS OF LAW NOS. ONE, TWO, AND THREE:

WHEN A WITNESS FAILS TO APPEAR PURSUANT TO A
SUBPOENA, THE TRIAL COURT'S ISSUANCE OF A
WARRANT SATISFIES ALL FEDERAL AND STATE
CONSTITUTIONAL GUARANTEES.

In his first three propositions of law, the defendant claims that plain, uninvited error occurred, and that the State of Ohio and the Franklin County Common Pleas Court deprived the defendant of his state and federal constitutional compulsory process rights when, after issuing a warrant for the arrest of a defense witness in the middle of the defendant's trial, the State and the trial court did not physically acquire "the body of the witness." Joshua Husband's Memorandum

in Support of Jurisdiction, at p. 11. Acknowledging that defense “counsel did not act to preserve his client’s rights on this issue,” the defendant nonetheless claims that the State of Ohio’s and the trial court’s failures to physically arrest the defendant’s witness, along with the State’s and the trial court’s failures to physically procure the body of this “indisputably critical defense witness,” *id.*, mandates that this Court accept jurisdiction over this case, and further mandates a reversal the Tenth District Court of Appeals’ decision affirming the defendant’s conviction for trafficking in cocaine with a firearm specification. *Id.* at pp. 5, 9-13, 16. The defendant’s claims at this juncture, like those which he raised and which were rejected below, are without any merit. See *State v. Husband*, 2009-Ohio-2900, at ¶6, 25.

First, “it is clear” from the record that the defendant’s “counsel agreed that if [the witness] did not appear prior to the start of closing arguments, [the defendant] would rest his case.” *State v. Husband*, 2009-Ohio-2900, at ¶9. The defendant and his witness had testified; the trial court had admitted all of the defendant’s exhibits, and the defense had rested. *Id.* at ¶8. The witness never appeared to testify. In rejecting the defendant’s constitutional claim below, the court of appeals stated:

Appellant's counsel explicitly conceded to the trial court that the case could not be indefinitely delayed while waiting for [the witness] to be located and/or arrested. It is also clear that the trial court did everything appellant's counsel requested in order to secure [the witness]'s appearance. Appellant's counsel requested that the trial court sign a subpoena for [the witness]'s attendance, which it did, and appellant's counsel then requested that the trial court issue an arrest warrant for [the witness], which it also did. Appellant failed to request that the trial court or state do anything further, and then agreed to rest his case if [the witness] was not apprehended prior to closing arguments. Any error in the trial court's failure to further attempt to secure the attendance of [the witness] was invited by appellant.

Husband, 2009-Ohio-2900, at ¶9. The court of appeals thoroughly and correctly analyzed the pertinent facts and the applicable law in the defendant’s case. The State therefore respectfully requests that this Court decline to exercise jurisdiction over this case.

RESPONSE TO PROPOSITION OF LAW NO. FOUR:

A DEFENDANT CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL MUST DEMONSTRATE BOTH DEFICIENT PERFORMANCE AND PREJUDICE TO BE ENTITLED TO RELIEF.

The court of appeals correctly concluded that the defendant failed to demonstrate either deficient performance or prejudice, under *Strickland v. Washington* (1984), 466 U.S. 668. *Husband* 2009-Ohio-2900, at ¶20. The defendant “has not shown that his counsel’s performance was deficient. [He] fails to cite any support for the proposition that a competent attorney would have moved for a longer continuance under these circumstances. * * * [A]s a practical matter, the case could not be continued indefinitely while waiting for [the witness] to be arrested which may well have never happened.” *Id.* The defendant also failed to demonstrate prejudice under *Strickland*, *supra*. “[E]ven if * * * counsel should have requested a longer continuance, [the defendant] has failed to demonstrate that, were it not for counsel’s errors, the result of the trial probably would have been different,” *Husband*, at ¶20, because there simply was no evidence that [the witness] would have testified consistently with the defendant’s version of the events. *Id.* at ¶17. The defendant failed to demonstrate that he was entitled to any relief *under Strickland v. Washington*; the court of appeals’ decision affirming his conviction was correct and thus must be affirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is therefore respectfully submitted that jurisdiction be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, August 11th, 2009, to DENNIS PUSATERI, 492 City Park Avenue, Columbus, Ohio, 43215; Counsel for Defendant-Appellant.



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