

IN THE SUPREME COURT OF OHIO
2010

ORIGINAL

STATE OF OHIO,

Case No. 2010-1674

Plaintiff-Appellee,

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

-vs-

CHRISTOPHER KENNEY,

Court of Appeals
Case No. 09AP-231

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/462-3555

And

BARBARA A. FARNBACHER 0036862
(Counsel of Record)
Assistant Prosecuting Attorney
bafarnba@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

TIMOTHY YOUNG 0059200
Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614-466-5394

and

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

COUNSEL FOR DEFENDANT-APPELLANT

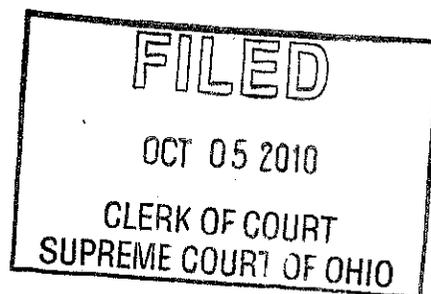


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

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. This case comes before this Court on an appeal from the Tenth District Court of Appeals' decision denying the defendant's application for reopening, filed under App.R. 26(B), alleging ineffective assistance of appellate counsel, but the defendant does not present any claim challenging his appellate attorney's performance. Instead, he seeks to raise new issues he has not previously raised, in his first, second, and third propositions of law. But this Court does not review issues that were not raised in the lower courts, *State v. Cornely* (1978), 56 Ohio St.2d 1, 4, particularly when those issues are first raised in an appeal from a denial of relief in a collateral post conviction proceeding. See *Morgan v. Eads*, 104 Ohio st.3d 142, 2004-Ohio-6110.

More importantly, the Tenth District Court of Appeals thoroughly reviewed each of the defendant's claims challenging his appellate attorney's performance, and properly rejected each of his claims, finding that he had not demonstrated that his appellate attorney rendered constitutionally ineffective assistance. *State v. Kenney*, 10th Dist. No. 09AP-231, 2010-Ohio-3740, ¶27. Contrary to the defendant's claims, the appellate court's decision was not misguided, illogical, untenable, or wrong, nor did the appellate court lose its way. This Court should decline to review the defendant's claims.

Also, the issues the defendant now seeks to frame for review by this Court are actually fact-laden issues, grounded in assertions that the trial court abused its discretion in admitting and excluding evidence during this child-rape prosecution. This Court should decline to expend its scarce judicial resources to review the court of appeals' decision in this case, in which the appellate court found that appellate counsel was not constitutionally ineffective in failing to raise specific challenges to the trial court's evidentiary rulings, particularly when appellate counsel

had presented multiple challenges to the trial court's proceedings. Indeed, the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray* (1986), 477 U.S. 527, 536, quoting *Jones v. Barnes*, 463 U.S. at 751-752. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues." *Id.*

It is therefore respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

On July 10, 2007, the Franklin County Grand Jury issued a fifteen-count indictment charging the defendant with nine counts of rape, three counts of gross sexual imposition, and three counts of disseminating matter harmful to juveniles. All fifteen counts were committed against the same child victim, who was four years old in 2004 when the offenses began and was 6½ years old when she reported the abuse in January 2007. At the time of the defendant's trial in November 2008, the victim was eight years old and testified against the defendant. In addition to the victim's testimony, the State presented testimony from Kristie Bass, a case worker from Franklin County Children's Services, Detective Monte Nommay from the Columbus Police Department, Dr. Jonathan David Thackery, the clinical director at Nationwide Children's Hospital, and Kerri Marshall, a social worker employed at Children's hospital. The State also presented numerous exhibits.

The eight-year old victim testified and repeatedly identified the defendant as the perpetrator of the sexual assaults committed against her. The child victim testified that the defendant touched her in the wrong places almost every night, beginning when she was four years old, when she and her brother first started living in the defendant's house. The victim

testified that the defendant sexually assaulted her for years. She reported the sexual abuse and was examined at Children's Hospital when she was 6½ years old. The victim specifically testified to instances of fellatio, anal intercourse, gross sexual imposition, and disseminating matter harmful to a juvenile. In her statement to Kerri Marshall, which was also admitted into evidence, the victim stated that the defendant also committed acts of cunnilingus and vaginal intercourse, multiple times, and she stated that when the defendant raped her vaginally and anally, it hurt her, and that she sometimes saw blood.

Detective Nommay established that there was no DNA or physical evidence available because the offenses occurred in the defendant's home, where the defendant's DNA would be found. The victim's medical records from Children's hospital were admitted, and Dr. Thackery testified that the child victim came to the hospital in considerable pain, notwithstanding a normal genital examination.

The defendant conceded at trial that the child victim had been sexually abused, but claimed that he was not responsible for the assaults. The jury evaluated the defendant's credibility and rejected his claims, finding him guilty of all of the offenses occurring when the victim was five and six years old, and not guilty of the offenses occurring when the victim was just four years old. The trial court imposed an aggregate prison term of fifty-six and one-half years to life in prison, and the defendant timely appealed.

On direct appeal, the defendant raised five assignments of error, including a claim challenging his trial attorney's cross-examination of the victim, three claims challenging the constitutionality of Senate Bill 10, and a claim challenging the weight and sufficiency of the evidence. *State v. Kenney*, 10th Dist. No. 09AP-231, 2009-Ohio-5584, ¶7 (*Kenney I*). On October 22, 2009, the Tenth District Court of Appeals issued its decision rejecting the

defendant's claims and affirming his convictions. *Id.* The defendant then filed a timely appeal, with new counsel to this Court, raising issues challenging his classification as a Tier III sex offender, in addition to issues that had not been raised in the defendant's direct appeal. This Court accepted jurisdiction over the defendant's case and stayed the briefing schedule, pending decisions in several other cases. *State v. Kenney*, No. 2009-2200. That case remains pending before this Court.

The defendant also filed an application seeking to reopen his appeal, under App.R. 26(B), alleging ineffective assistance of appellate counsel. He presented four assignments of error which he claimed should have been raised by his appellate attorney, and which he claimed demonstrated appellate ineffectiveness. *State v. Kenney*, 10th Dist. No. 09AP-231, 2010-Ohio-3740, ¶4 (*Kenney II*). Specifically, the defendant claimed plain error occurred during the trial court's competency determination; plain error occurred during the prosecutor's closing argument; error in the exclusion of evidence under Ohio's rape shield law; and ineffective assistance of trial counsel for not objecting to the competency determination and to the prosecutor's closing argument. *Id.* The court of appeals thoroughly reviewed each of the defendant's claims, and rejected them, concluding that defendant's appellate attorney did not render constitutionally ineffective assistance. *Id.* at ¶27. The defendant now seeks to have this Court exercise its discretionary jurisdiction and review new claims he has not previously raised. This Court should decline to review the defendant's case.

RESPONSE TO PROPOSITION OF LAW NO. ONE:

NO PLAIN ERROR OCCURRED IN THE ADMISSION OF EVIDENCE.

The defendant claimed that his appellate attorney was ineffective for failing to raise a claim challenging the competency of the 8½-year old child victim. The court of appeals found

that the competency hearing conducted by the trial court was inadequate, but that there was overwhelming other evidence establishing the defendant's guilt, rendering harmless any purported error in the competency determination. *Kenney II*, at ¶8. Accordingly, the defendant had not demonstrated plain error in the competency proceedings or constitutionally ineffective assistance of appellate counsel. Further, while the appellate court stated that there were inconsistencies between the victim's prior statement and her testimony, the appellate court also concluded that the victim's prior statement, which was admissible, notwithstanding the competency issue, *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, "unequivocally implicated appellant in the sex offenses, and, in fact, * * * 'bolstered her sex abuse claims.'" *Kenney II*, at ¶8. This "compelling incriminating evidence" rendered purported deficiencies in the trial court's competency hearing harmless. *Id.* Accordingly, no error occurred in the admission of the victim's prior statement, and no plain error was demonstrated from the admission of her testimony. *Id.* This Court need not review the issues the defendant now presents, which arise out of these evidentiary rulings.

It cannot seriously be disputed that regardless of whether the victim was correctly found to be competent to testify, her prior statement was admissible evidence. *State v. Muttart* 116 Ohio St.3d 5, syllabus. In addition to the victim's prior statement, the State presented overwhelming other evidence establishing the defendant's guilt, including numerous exhibits, as well as testimony from numerous witnesses, including Kristie Bass, a case worker from Franklin County Children's Services, Detective Monte Nommay from the Columbus Police Department, Dr. Jonathan David Thackery, the clinical director at Nationwide Children's Hospital, and Kerri Marshall, a social worker employed at Children's hospital. Accordingly, the appellate court's

determination that any purported error in the trial court's competency determination was harmless error was correct and should be affirmed.

Error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt. *State v. Kidder* (1987), 32 Ohio St. 3d 279, 284. "Where there is no reasonable possibility that unlawful testimony contributed to conviction, the error is harmless and therefore will not be grounds for reversal." *State v. Brown* (1992), 65 Ohio St. 3d 483, citing *State v. Lytle* (1976), 48 Ohio St. 2d 391, paragraph three of the syllabus. Under this standard, no prejudicial error occurred, and this Court should decline to review this claim. See, also, *State v. Williams* (1988), 38 Ohio St.3d 346, 349-350.

RESPONSE TO PROPOSITION OF LAW NO. TWO:

NO ERROR OCCURRED IN THE ADMISSION OF EVIDENCE.

At the outset, the defendant never raised this issue in the prior litigation of his case, and has therefore waived his right to review of this claim. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶23. Also, this Court should decline to review an issue that was not raised below. *State v. Cornely* (1978), 56 Ohio St.2d 1, 4. Finally, the trial court properly admitted the victim's prior statement. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267. Accordingly, no error occurred in the admission of evidence.

RESPONSE TO PROPOSITIONS OF LAW NOS. THREE AND FOUR:

NO ABUSE OF DISCRETION OCCURRED IN THE TRIAL COURT'S APPLICATION OF OHIO'S RAPE SHIELD LAW.

Again, the defendant challenged his appellate attorney's performance for not raising a challenge to the trial court's exclusion of evidence under Ohio R.C. 2907.02(D) and 2907.05(E), but the appellate court fully reviewed the defendant's claim, and correctly found that no abuse of

the trial court's discretion in excluding evidence had been demonstrated. *Kenney II*, at ¶¶18-24. Appellate counsel's performance was therefore not constitutionally ineffective. *Id.* at ¶27.

In particular, the defendant raised three instances of purported error in the exclusion of evidence by the trial court, but the court of appeals correctly found that, with respect to the first instance, the evidence was admitted; with respect to the second instance, the trial court correctly found the evidence was irrelevant; and with respect to the third instance, no abuse of discretion was demonstrated in the trial court's analysis and decision. *Kenney II*, at ¶¶21-23. "[A]buse of discretion means a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence. * * * The term has been defined as a view or action 'that no conscientious judge, acting intelligently, could honestly have taken.'" *State v. Leide*, 12th Dist. No. CA2005-08-363, 2006-Ohio-2716, ¶14 (citations omitted). Again, the court of appeals correctly found that the defendant failed to demonstrate that the trial court abused its discretion, or that appellate counsel provided constitutionally ineffective assistance. *Kenney II*, at ¶27. Again, that decision should be affirmed.

Also, in reviewing the defendant's claim challenging his appellate attorney's performance, the court of appeals correctly applied Ohio law to the facts presented and found that the defendant failed to prove his appellate ineffectiveness claim. Indeed, the court of appeals cited inter alia this Court's decision in *State v. Gardner* (1979), 59 Ohio St.2d 14, 16-17, as well as its own decisions in *State v. N.D.C.*, 10th Dist. No. 06AP-790, 2007-Ohio-5088, and *State v. N.D.C.*, 10th Dist. No. 08AP-217, 2008-Ohio-6120, when it rejected the defendant's claim that error occurred in the exclusion of evidence. *Kenney II*, at ¶¶18-20. The defendant's assertion that the appellate court refused to follow Ohio law is devoid of any merit and must be

rejected; the appellate court's decision rejecting the defendant's claim that appellate counsel's performance was constitutionally deficient was correct and should be affirmed.

RESPONSE TO PROPOSITION OF LAW NO. FIVE:

THE DEFENDANT WAS REPRESENTED BY COMPETENT TRIAL COUNSEL.

The court of appeals correctly rejected the defendant's claim that his trial attorney rendered ineffective assistance of counsel, because the defendant cannot demonstrate prejudice. *Kenney I*, at ¶¶8-10; *Kenney II*, at ¶¶25-26. Indeed, because appellate counsel raised ineffective assistance of trial counsel on direct appeal, review of his trial counsel ineffectiveness claim in his App.R. 26(B) application was barred by application of the doctrine of res judicata and law of the case. The doctrine of res judicata bars review of any claim that a defendant could have raised in the trial court before conviction or on appeal after conviction. *State v. Perry* (1967), 10 Ohio St.2d 175. In addition, the "law of the case" doctrine provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3 (citations omitted). The rule is necessary to "ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Id.* (citation omitted). "Under the pertinent portion of the law-of-the-case doctrine, 'the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, ¶28 (citations omitted). Because the defendant raised ineffective assistance of trial counsel on direct appeal, further review of his claim was barred.

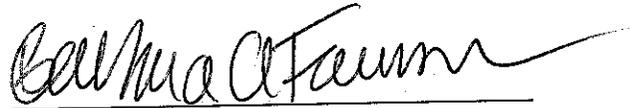
Also, the defendant's claim challenging the trial court's competency determination was not prejudicial, as the appellate court correctly concluded, *Kenney II*, at ¶8, so trial counsel's failure to object could not possibly amount to ineffective assistance. *Id.* at ¶26. "[S]trategic choices made after thorough investigation of law and facts are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington* (1984), 466 U.S. 668, 690-691. Courts must apply "a heavy measure of deference to counsel's judgments." *Id.* at 691. "[A] lawyer must have 'full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.'" *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, ¶24, quoting *Taylor v. Illinois* (1988), 484 U.S. 400, 418. The defendant failed to demonstrate prejudice from trial counsel's failure to object to the competency determination. *Kenney II*, at ¶26, citing *Strickland*, at 687. Because the appellate court correctly concluded that trial counsel rendered adequate and effective assistance to the defendant, *Kenney I*, at ¶¶8-10; *Kenney II*, at ¶¶25-26, the defendant failed to demonstrate that his appellate attorney rendered constitutionally deficient and prejudicial performance by failing to raise a different argument challenging defendant's trial attorney's performance, and the defendant was not entitled to relief under App.R. 26(B).

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 should be declined.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



BARBARA A. FARNBACHER 0036862
Assistant Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/462-3555
bafamba@franklincountyohio.gov

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day, October 5th, 2010, to CLAIRE R. CAHOON, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Counsel for Defendant-Appellant.



BARBARA A. FARNBACHER 0036862
Assistant Prosecuting Attorney