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ORIGINAL

IN THE SUPREME COURT OF OHIO

11-0506

State of Ohio,	:	CASE NO._____
Plaintiff-Appellee,	:	On Appeal from the Allen County Court of Appeals, Third Appellate District
v.	:	
Desmond J. Wilson,	:	Court of Appeals Case No. 1-09-64
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DESMOND J. WILSON

Desmond J. Wilson, #A618298
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DEFENDANT-APPELLANT, PRO SE

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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 is of public and great general interest and involves a substantial constitutional question because it involves a felony along with the principles that defendants have the right to effective assistance of trial and appellate counsel as guaranteed by the Sixth Amendment of the United States Constitution and Article I, §10 of the Ohio Constitution; the duty of trial counsel to call defense witnesses; the sentencing law governing trial courts to run allied offenses concurrently, not consecutively; and the lack of legal authority for the trial court to sentence an offender to consecutive sentences when the law calls for them to be run concurrently. In the end this case is about the integrity of the Allen County justice system and whether constitutional rights are recognized in this justice system. For all these reasons this case is of public and great general interest, involves a substantial constitutional question, and involves a felony, which is why this Honorable Court should accept subject matter jurisdiction of this appeal.

STATEMENT OF THE CASE AND FACTS

Desmond Wilson, defendant-appellant (hereinafter "Wilson"), faces the allegations at his trial that on September 2, 2009, Brenda Brown returned home at 10:00p.m., and as she was parking her car, saw a man wearing a hood on a bicycle in the alley behind her home. (Tr. p.48,51,54.) As she reached her home, she heard the gravel moving in the alley behind her and turned to see the man had come closer and was pointing and firing a gun at her. (Id. at 53.) As the man positioned himself to shoot at Ms. Brown, the hood was pulled back by his movements giving her an opportunity to see and identify Wilson (Id. at 49,51,53-55.)

Ms. Brown took cover behind 2 cars. (Id. at 53,56-58.) Wilson fired approximately 7-10 shots, striking both Ms. Brown's home and the 2 vehicles. (Id. at 60-64, 80.)

An arrest warrant was issued for Wilson the next day. (Id. at 122,124.) Officer Caldwell and another officer attempted to serve the arrest warrant. (Id. at 122,123.) Wilson fled from officers. (Id. at 123.) Wilson was apprehended by Caldwell. (Id. at 123.)

On October 15, 2009, the Allen County grand jury indicted Wilson as follows: Count 1: improperly discharging a firearm at or into a habitation, a felony of the second degree in violation of R.C. 2923.16(A)(1); Count 2: felonious assault, a felony of the second degree in violation of R.C. 2903.11(A)(2) with a firearm specification pursuant to R.C. 2941.145(A); and Count 3: possession of a weapon while under disability, a felony of the third degree in violation of R.C. 2923.13(A)(3).

A two day jury trial began November 25, 2009 on all counts and specification, which found Wilson guilty on all counts and specification. Wilson was sentenced to a prison term of six years on count one, six years on count two with three years on the specification, and five years on count three all running consecutively for a total sentence of twenty years total.

Wilson filed an appeal which was denied by the Third District Court of Appeals on May 24, 2010. After this denial Wilson filed a motion under App. R. 26(B) which was at first denied on September 16, 2010, but Wilson was not timely notified of this denial, so the appellate court refiled this decision on February 14, 2011. Wilson seeks an appeal of this latest decision.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No.I: The ineffective assistance of appellant's trial and appellate counsel violated appellant's right to assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, §10 of the Ohio Constitution.

The standard for effective assistance of counsel was outlined by the U.S. Supreme Court in Strickland v. Washington (1984), 466 US 668 at 687:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficinet. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Wilson's trial counsel was ineffective from the start. Mr. Benavidez stated on the record at (Tr. p.1) that Wilson did not wish to have him as trial counsel becuase Benavidez coerced and scared off witnesses, leaving Wilson uncomfortable

with having him as a defense attotney. This goes against the duty of defense lawyers to investigate defense witnesses in furtherence of innocence as stated in Vazquez v. Bradshaw (N.D. Ohio 2007) 522 F.Supp.2d 900 at 923:

> Finally, the Sixth Circuit's Towns[v. Smith (6th Cir. 2005) 395 F.3d 251] opinion "dispels any doubt that a lawyer's Strickland duty 'includes the obligation to investigate all witnesses who may have information concerning his or her guilt or innocence.'" Ramonez[v. Berghus (6th Cir. 2007) 490 F.3d at 487.

The ineffective assistance of counsel continued at (Tr. p.38-44) where Benavidez does not object to the testimony of Det. Scott Leland as to the conviction of Wilson's brother, Devonne. This was irrelevant to the alleged shooting on September 2, 2009 and this is clearly prosecutorial misconduct to allow in this prejudicial testimony solely for the purpose to defame Wilson and his family in the eyes of the jury.

The ineffective assistance of counsel continued at the testimony of the state's second witness, Brenda Brown (Tr. p. 44-78). Benavidez should have questioned Brown on how she could have made a postive identification of Wilson when she had previously testified at (Tr. p. 54 line 16-17): "Yea. It was just a little bit--not a whole lot. It didn't come off of his head." Benavidez should have reminded the jury at (Tr. p. 71 lines 11-18) that association does not equal causation or guilt. Just because Brown testified that she claimed the alleged bike at the scene of the crime belonged to the Wilson boys does not prove that Wilson is guilty of the crime. As a matter of fact, Benzvidez should have objected to this hearsay speculation of Brown who is not an expert witness on bike ownership in the Wilson family.

The ineffective assistance of trial counsel continued with the state's fourth witness, Rotisha Tisdale (Tr. p. 84-90). Benavidez should have objected to this surprise witness who was not on the prosecution's original Crim. R. 16 motion of discovery.

The ineffective assistance of trial counsel continued with the state's fifth witness, Patrolman Jesse Harrod (Tr. p. 91-107). Benavidez should have asked Harrod how he was sure the casings recovered at the scene were from this new shooting or from the old shooting. There is reasonable doubt here, which should have been raised.

The ineffective assitance of trial counsel continued with the state's seventh witness, Detective Timothy Clark (Tr. p. 112-121). Benavidez should have objected to the speculation of Clark as to why no shell casings were recovered from the crime scene at (Tr. p. 117). This testimony had no basis in fact, only on the speculation of Clark. Benavidez also should have followed up on Clark's testimony on (Tr. p.113 line 18-20): "...I thought it would be appropriate to take daytime photos to kind of give a better view of the overall scene." This implies there was obstruction of vision in the nighttime photos of the crime scene that could lead to obstruction of vision in identifying the suspect in this crime. Benavidez also should have objected to the speculation as to the four, six and a half, and seven foot measurements of the alleged bullet holes in the home when Clark could not make a positive identification in the photos.

The ineffective assistance of trial continued with the state's eighth witness, Patrolman George Caldwell (Tr. p. 121-126). Benavidez should have objected to the hearsay statement of Cladwell that Wilson allegedly said at (Tr. p.123 line 12-13): "I didn't shoot at nothing." There is no way to verify this hearsay of Cladwell, and it is prejudicial to Wilson in the eyes of the jury.

The ineffective assistance of trial counsel continued with the state's ninth witness, Janice Wilson at cross examination at (Tr. p.130 line 21-p.131 line 5). Benavidez reminds the jury that Wilson was convicted of 4 counts of Trafficking in Crack Cocaine, which prejudices him in the eyes of the jury. It is difficult to see how this is effective trial strategy to remind the jury of a past conviction of Wilson.

The ineffective assistance of trial counsel continued at (Tr. p. 134 line 17-21) where the only objection is to the testimony of Janice Wilson, not to the DVD of Judge Warren's Courtroom that was highly prejudicial to Wilson.

The ineffective assistance of trial counsel continues at (Tr. p. 135 line 14-16): "MR. BENAVIDEZ: I would put on a Motion for a Rule 29 Motion for Acquittal, but have no argument. Just to put it on the record, your Honor." This perfunctory Rule 29 motion was of course denied by the judge. There were many arguments Benavidez could have made at this point, but his silence guaranteed the denial of the motion.

Trial counsel was ineffective for failing to effectively arguing that the jury instruction on consciousness of guilt was unwarranted (Tr. p. 140-141). This was argued as an abuse of judicial discreion by appellate counsel, but appellate counsel was ineffective in failing to argue many other issues in this case such as the ineffective assistance of trial counsel, conviction against the manifest weight of the evidence, and conviction against the sufficiency of the evidence. In conclusion the ineffective assistance of trial and appellate counsel was against Wilson's rights to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, §16 of the Ohio Constitution.

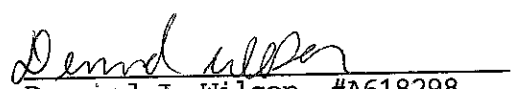
CONCLUSION

In conclusion this case raises a question of public and great general interest, raises several substantial constituional questions and involves a felony, therefore this Honerable Court should accept jurisdiction of this appeal.

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Support of Jurisdiction was sent by U.S. Mail to Juergen A. Waldick, Prosecutor for Allen County at 302 Court of Appeals Bldg. 204 N. Main St. P.O. Box 1243, Lima, OH 45802-1243 on March 28, 2011.

By Signature So Certified,



Desmond J. Wilson, #A618298
Defendant-Appellant, Pro Se

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Margie J. Miller
CLERK OF COURTS
ALLEN COUNTY, OHIO

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

STATE OF OHIO, **CASE NO. 1-09-64**

PLAINTIFF-APPELLEE,

v.

DESMOND J. WILSON, **JUDGMENT ENTRY**

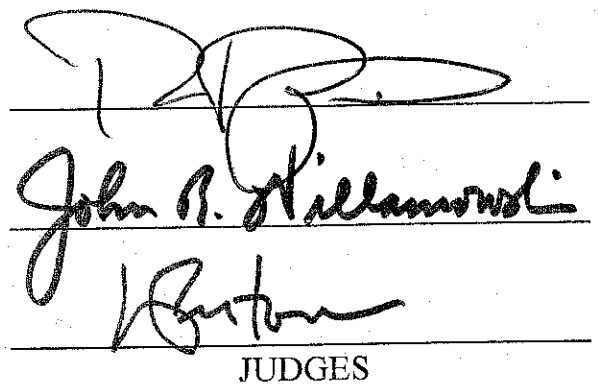
DEFENDANT-APPELLANT.

This cause comes before the Court on Appellant's application to reopen his appeal under App.R. 26(B).

Upon consideration the Court finds that the assignment of error and "additional meritorious issues" set forth in the application do not give rise to a genuine issue as to whether Appellant was deprived of the effective assistance of appellate counsel under the two-prong analysis of *Strickland v. Washington* (1984), 466 U.S. 668. See *State v. Reed* (1996), 74 Ohio St.3d. 534; and App.R. 26(B)(5). The underlying felony to which the Firearm Specification attached was not the Weapons Under Disability violation and, thus, the sentences for both did not merge and appellate counsel was not ineffective for failing to raise the separate

sentences as error. See *State v. Wright*, 10th App.No. 09AP-207, 2009-Ohio-6773. Accordingly, the application to reopen is not well taken.

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



JUDGES

DATED: September 16, 2010
/jnc