

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

vs.

TERRY L. LITTLE

Defendant-Appellant.

**SUPREME COURT CASE
NO. 2011-0595**

**ON APPEAL FROM THE
COURT OF APPEALS,
NINTH APPELLATE
DISTRICT 10CA009758**

**LORAIN COUNTY
COMMON PLEAS
COURT CASE NO.
07CR074162**

**MEMORANDUM OF APPELLEE IN
OPPOSITION TO JURISDICTION**

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This case does not present a case of public or great general interest and does not involve a substantial constitutional question. Appellant's arguments to the contrary are without merit.

This Honorable Court should not accept jurisdiction for the following reasons:

1. The decision of the Ninth Judicial District Court of Appeals to affirm the conviction and sentence of Appellant created no injustice as Appellant's arguments were addressed by existing case law.
2. No issue or substantial constitutional question exists in the Appellant's appeal to this Honorable Court. The attempted appeal further presents no viable question of general public interest so as to warrant the exercise of this Court's jurisdiction.

STATEMENT OF THE CASE

Terry Little, hereinafter Appellant, was convicted by a jury of the following: one (1) count of Aggravated Murder in violation of R.C. 2903.01(A) with a three (3) year firearm specification; one (1) count of felonious Assault in violation of R.C. 2903.11(A)(2) with a three (3) year firearm specification; one (1) count of Tampering with Evidence in violation of R.C. 2921.12(A)(1) with a three (3) year firearm specification; one (1) count of Having Weapons Under Disability in violation of R.C. 2923.13(A); and one (1) count of Murder in violation of R.C. 2903.02(A) with a three (3) year firearm specification. Appellant was sentenced to an aggregate prison term of thirty-three (33) years to life. Due to an error in the advisement of post-release control, the trial court amended, *nunc pro tunc*, its sentencing entry of conviction to include the correct term of post-release control.

On February 22, 2011, the Ninth District Court of Appeals affirmed Appellant's conviction and sentence. *State v. Little*, 9th Dist. No. 10CA009758, 2009 Ohio 101. On April 12, 2011, Appellant filed a motion for delayed appeal to the Ohio Supreme Court in Supreme

Court Case No. 2011-0595. This Court granted Appellant's motion for delayed appeal.

Appellant filed his memorandum in support of jurisdiction on June 15, 2011. Appellee, the State of Ohio, hereby responds.

STATEMENT OF FACTS

Around 9:30 p.m. on July 30, 2007, Lewis Turner and Thomas Bennett were seated at a table just inside the playland of the McDonald's restaurant located at the intersection of Oberlin Avenue and Meister Road in Lorain, Ohio. Appellant entered McDonald's and shot Turner in the back. The bullet entered Turner's back, nicked a rib, and cut across the muscles of the back making it nearly impossible for Turner to raise his arms. Turner and Bennett ran outside with Appellant in pursuit. Witnesses saw two (2) men fighting in the parking lot and heard two (2) more shots ring out. Turner fell to the ground and Appellant took off running.

Appellant claimed that during the struggle with Turner in the parking lot, Appellant's gun, a .380 caliber, fell out of Appellant's pocket. Appellant claimed that Turner reached into his own pocket and pulled out a .22 caliber gun. Appellant said he knocked Turner's gun out of his hand. Appellant claimed that he and Turner each went for a gun and that Turner got Appellant's gun, the .380, and Appellant got Turner's gun, the .22. Appellant testified that Turner shot at him first so he fired at Turner. Appellant claimed that he shot Turner one (1) time with the .22 caliber gun, but two (2) bullets must have come out of the gun. Turner fell to the ground and Appellant picked up both guns and ran away. Appellant was apprehended a short distance away from the shooting. Lewis Turner suffered three (3) gunshot wounds and died of blood loss due to a fatal gunshot wound to the neck.

LAW AND ARGUMENT

RESPONSE TO FIRST PROPOSITION OF LAW

I. THE NINTH DISTRICT COURT OF APPEALS CORRECTLY AFFIRMED THE DECISION OF THE TRIAL COURT DENYING THE REQUEST TO INSTRUCT THE JURY ON SELF-DEFENSE.

Appellant argues that the trial court erred in refusing to instruct the jury on self-defense.

Appellant claims that he shot Turner in self-defense because he was in fear for his life.

Appellant asserts that he presented sufficient evidence to require the trial court to instruct the jury on self-defense. This argument is without merit.

Self-defense is an affirmative defense that is established by showing that: one (1) the slayer did not create the situation giving rise to the affray; two (2), the slayer had a bona fide belief that he was in imminent danger of death or great bodily harm and the only means of escape was through the use of force; and three (3), that the slayer did not violate a duty to retreat. *State v. Palmer*, 80 Ohio St.3d 563, 1997 Ohio 312. Failure to prove each element by a preponderance of the evidence results in a failure to show that the defendant acted in self-defense. *State v. Fulmer*, 2008 Ohio 936, 117 Ohio St.3d 326. In order for a defendant who is at fault in creating the situation giving rise to the affray to regain the right to claim self-defense, the defendant must withdraw from the confrontation in good faith and clearly and fairly announce his desire for peace. *State v. Thomas*, 1997 Ohio 269, 77 Ohio St.3d 323, 326-327. Where a defendant initiates the affray and then fails to withdraw in good faith, or clearly announce his intention for peace, he loses his right to claim self-defense. *Id.*

In the present case, Appellant was clearly at fault in creating the confrontation with Lewis Turner. Appellant entered McDonald's and shot the unsuspecting Turner in the back. Appellant claims that at that point the confrontation was over but a second confrontation took

place in the parking lot where Turner fled after being shot. Appellant pursued Turner out of the restaurant and claimed that Turner, who had just suffered a debilitating gunshot wound to the back, had a gun and attacked him. Appellant did not withdraw from the confrontation or announce his desire for peace, thus he did not regain his right to claim self-defense. *Thomas supra*. The Ninth District Court of Appeals correctly overruled Appellant's claim that the jury should have been instructed on self-defense. Thus, this Court should decline to accept jurisdiction of this case.

RESPONSE TO SECOND ASSIGNMENT OF ERROR

II. THE NINTH DISTRICT COURT OF APPEALS CORRECTLY AFFIRMED THE DECISION OF THE TRIAL COURT IN DECLINING TO INSTRUCT THE JURY ON THE INFERIOR OFFENSE OF VOLUNTARY MANSLAUGHTER AND/OR THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER.

Appellant argues that he was subjectively under the influence of sudden passion, brought about by Turner, and therefore, the trial court should have instructed the jury on the inferior offense of voluntary manslaughter and/or the lesser included offense of involuntary manslaughter. Although Appellant asserts that the trial court erred in refusing to instruct on both voluntary and involuntary manslaughter, he has confined his argument solely to the trial court's refusal to instruct on voluntary manslaughter. The State of Ohio will respond accordingly.

The offense of voluntary manslaughter is not a lesser included offense to aggravated murder or murder; rather, it is an offense of inferior degree. *State v. Cheers*, 9th Dist. No. 04CA008465, 2004 Ohio 6533. A voluntary manslaughter instruction is only warranted in an aggravated murder trial where the trial court determines that evidence of reasonably sufficient provocation by the victim has been presented to warrant the instruction. *State v. Conway*, 108 Ohio St.3d 214, 2006 Ohio 791. The question of whether provocation is reasonably sufficient to

bring on a sudden fit of rage is an objective standard. *Conway* supra. If the trial court answers affirmatively, then, and only then, does the inquiry shift to whether the defendant was subjectively under the influence of sudden passion or a sudden fit of rage. *Id.* There is an immediacy requirement regarding sudden passion or sudden fit of rage for purposes of whether a trial court is required to instruct on the inferior offense of voluntary manslaughter. *State v. Huertas* (1990), 51 Ohio St.3d 22. In *Huertas*, this Court held that where there has been a sufficient cooling off period between the time of the provocation and the time of the killing a voluntary manslaughter instruction is not warranted. *Id.* This Court found that the defendant failed to prove sudden provocation due to a delay of a few hours. *Id.*

In the present case, Appellant argues that he was under a sudden fit of passion based on his claim that Turner had robbed and sexually assaulted him about one (1) year prior to the incident on July 30, 2007. A period of approximately one (1) year is certainly a sufficient cooling off period. In the case at bar, as in *Huertas*, Appellant was not entitled to a voluntary manslaughter instruction because a sufficient cooling off period had passed from the time of the alleged sexual assault to the time of the killing. *Id.*

Finally, it must be noted that Appellant failed to separately address or argue his claim that the jury should have been instructed on the lesser included offense of involuntary manslaughter. An argument that is not supported by legal authority or citations to the record may be disregarded by a reviewing court. *State v. Raber*, 9th Dist. No. 09CA0065, 2010 Ohio 4066. Appellant failed to properly support his claim that the trial court erred in refusing to instruct the jury on the lesser included offense of involuntary manslaughter, thus the Ninth District Court of Appeals properly declined to address this argument. Consequently, this Court should decline to accept jurisdiction of this case.

RESPONSE TO THIRD PROPOSITION OF LAW

III. THE NINTH DISTRICT COURT OF APPEALS CORRECTLY FOUND THAT THE VERDICTS WERE NOT AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.

Appellant claims that his convictions for Murder and Aggravated Murder are not supported by sufficient evidence and are against the manifest weight of the evidence. These arguments are without merit. It should be noted that Appellant has not challenged his conviction for Felonious Assault.

In reviewing a conviction on the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Williams*, 1996 Ohio 91, 74 Ohio St.3d 569, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, following *Jackson v. Virginia* (1979), 443 U.S. 307.

In accordance with Ohio Supreme Court precedent, the Ninth District Court of Appeals has held that when a defendant maintains that a conviction is against the manifest weight of the evidence, “an appellate court must review the entire record weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered”. *State v. Otten* (1986), 33 Ohio App. 3d 339. This power is to be invoked only in extraordinary circumstances where the evidence presented at the trial weighs heavily in favor of a defendant. *Id.* An appellate court, in reviewing a criminal case upon the weight of the evidence, owes a duty to determine whether there was some evidence tending to support the verdict. *Cooper v. Ohio* (1930), 121 Ohio St. 562. In such a situation, “if the Court of Appeals is unable to

determine from the record wherein the truth lies between conflicting evidence, it may well adopt the conclusion of *** trial court; they being in a better situation to judge of the truth by reason of their opportunity to see the witnesses and observe their conduct.” *Cooper* supra. It is the duty and function of the trier of fact to determine and assign the appropriate weight to the evidence. *State v. Tyler* (1958), 79 Ohio Law Abs. 350.

In order to prove the aggravated murder charge, the state was required to prove that Appellant purposefully killed Lewis Turner with prior calculation and design. R.C. 2901.22(A) defines the term purposefully as follows:

A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

R.C. 2901.22(A). The phrase prior calculation and design is not defined by statute, however, this Honorable Court has set out a three (3) part test for considering the existence of prior calculation and design: one (1), whether the victim and the defendant knew each other; two (2), whether there was thought or preparation in choosing the murder weapon or the murder site; and three (3), whether the murder was drawn out or almost instantaneous. *State v. Jenkins* (1991), 61 Ohio St.3d 259. Prior calculation and design must be more than just a momentary deliberation, but it can be found even when the plan to kill is quickly conceived and carried out. *Id.* This Court has further held that there is no bright line test for determining the existence of prior calculation and design. *State v. Taylor*, 78 Ohio St.3d 15, 19, 1997 Ohio 243. Prior calculation and design must be determined on a case by case basis. *Id.*

Appellant was also charged with two (2) counts of murder in violation of R.C. 2903.02(A) and (B). Appellant argues that the state failed to prove that he purposely killed Lewis Turner. Appellant admits that he intended to shoot Turner, but claims that he only

intended to shoot Turner in the shoulder. Appellant claims that he did not make a calculated decision to kill Turner in the parking lot after the initial shooting. Appellant claims that because the evidence was allegedly unclear about whether Turner had a gun, Appellant's convictions are not supported by the sufficiency or manifest weight of the evidence. These arguments are without merit.

In the case at bar, Appellant admitted that he saw Turner seated inside McDonald's. Appellant made a purchase at the drive thru and then drove across the street and parked his vehicle in front of a closed business. Appellant took out a .380 gun and returned to McDonald's on foot. Appellant was observed sitting on the curb, staring with an eerie or evil eye at a passerby. Moments later Appellant concealed his face with the hood of his sweatshirt, entered McDonald's and proceeded to the playland area where Turner was seated. Appellant ignored a closed sign and a manager telling him that playland was closed. Appellant, his hood pulled up to conceal his identity, entered playland and shot Turner in the back. Turner fled from the restaurant into the parking lot. Appellant pursued Turner into an adjacent parking lot, confronted the injured Turner and shot him twice more at close range.

Appellant claims that the state failed to prove that he made a calculated decision to kill Turner. The record clearly disproves this notion. If Appellant had merely intended to wound Turner, as he claims, Appellant would not have pursued Turner into an adjacent parking lot and shot him twice more at close range. Instead, after the wounded Turner fled the restaurant, Appellant could simply have run to his vehicle and sped away. Appellant chose not to do that. Rather, Appellant claimed to have no idea how he ended up in the parking lot with Turner. Appellant makes this claim despite the fact that he admitted at trial that he ran right past his parked vehicle before ending up in the parking lot near Turner. Not only does the evidence

demonstrate that Appellant purposely killed Turner, it demonstrates that Appellant killed Turner with prior calculation and design when he relentlessly pursued the wounded Turner to his death.

When all of the evidence is considered in a light most favorable to the state, it supports the conclusion that Appellant's convictions for aggravated murder and murder are supported by sufficient evidence. *Williams* supra. When the evidence is weighed, including all reasonable inferences, and the credibility of the witnesses is considered, it is clear that the jury did not lose its way and create a manifest miscarriage of justice such that a new trial must be ordered. *Ottens* supra. The power to overturn a conviction as against the manifest weight of the evidence is to be invoked only in extraordinary circumstances where the evidence presented at the trial weighs heavily in favor of a defendant. *Id.* The evidence in this case does not weigh heavily in Appellant's favor. Thus, the Ninth District Court of Appeals properly declined to overturn Appellant's convictions. Consequently, this Court should decline to accept jurisdiction of this case.

RESPONSE TO FOURTH PROPOSITION OF LAW

IV. APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Appellant argues that he received ineffective assistance of appellate counsel because appellate counsel failed to raise the argument that the trial court committed plain error in instructing the jury during deliberations. Appellant's contention lacks merit.

The two-part test from *Strickland v. Washington* (1984), 466 U.S. 668, is the appropriate standard to assess a claim of ineffective assistance of appellate counsel. "The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any defense counsel's essential duties to appellant." *State v. Young* (April 19, 1999), 5th Dist. No. 30-CA-85, citing, *Lockhart v. Fretwell* (1993), 506 U.S.

364; *Strickland*, 466 U.S. at 687, *State v. Bradley* (1989), 42 Ohio St.3d 136. Further, “[i]n determining whether counsel’s representation fell below an objective standard of reasonableness, judicial scrutiny of counsel’s performance must be highly deferential.” *Id.*

The United States Supreme Court held that “*** counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant.” *Jones v. Barnes* (1983), 463 U.S. 745. The Court noted that experienced advocates should weed out the weaker arguments and focus on the strongest claims for appeal. *Id.* Appellate counsel may discount the chance of success of weak issues and choose to spend time on stronger issues for appeal without being ineffective. Appellate counsel’s refusal to raise weak arguments does not create a genuine issue of ineffective assistance. *State v. Allen* (1996), 77 Ohio St.3d 172.

The second part of the *Strickland* test requires that Appellant be prejudiced by counsel’s ineffectiveness. “This requires a showing that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Bradley* (1989), 42 Ohio St.3d 136. *See also Strickland v. Washington* (1984), 466 U.S. 668.

In the instant case, appellate counsel’s representation did not fall below objective standard of reasonable representation. Appellate counsel focused on multiple assignments or error in a well written brief. The mere fact that appellate counsel did not raise every assignment of error Appellant desired is not sufficient to support an allegation of ineffective assistance of appellate counsel nor is it sufficient to support an allegation that representation fell below an objective standard of reasonable representation. Also, judicial scrutiny of counsel’s performance must be highly deferential. This deference would support the fact that no ineffective assistance of counsel exists. As such, Appellant has failed to meet the first prong of the *Strickland* test.

When a jury submits a question to the court during deliberations, it is permissible for the trial court to refer the jury to the written instructions previously provided. *State v. Lindsey*, 87 Ohio St.3d 479, 2000 Ohio 465. In the case at bar, when the trial judge indicated his proposed answer to the jury questions, Appellant's trial counsel assented to the answer and indicated that was the usual response to such a question. (Tr. 746). Trial counsel did not object and, in fact, agreed that the response proposed by the trial court was the usual response to such questions from juries. Thus, plain error is the appropriate standard to assess the correctness of the trial court's response to the jury question and whether trial counsel was ineffective in agreeing to the answer. *In Re Murphy* (July 26, 2000), 9th Dist. No. 19883.

In support of his contention that the trial court erred in answering the jury's question, Appellant provides this Court with only a portion of the trial court's answer. Appellant claims that the trial court said "you have all the evidence, you decide." (Appellant's Brief at p. 13). What the trial court actually instructed the jury was, "You have all the information needed to decide the murder charges. Please refer to the jury instructions as it pertains to these charges." The trial court did not abuse its discretion in answering the jury's question by referring them to the previously provided written instructions. *Lindsey* supra.

Appellant has failed to establish error by the trial court in answering the jury's question and he has failed to establish that, but for that alleged error, the result of trial would clearly have been different. *In Re Murphy* supra. As Appellant has failed to establish plain error, he has also failed to satisfy the two (2) part *Strickland* test for ineffective assistance of appellate counsel. Appellant has failed to establish that appellate counsel's representation fell below an objective standard of reasonableness, or that he suffered any prejudice as a result of counsel's performance. *Strickland* supra. As the United States Supreme Court noted in *Jones*, appellate

counsel does not have to raise every issue requested by the defendant and counsel is free to weed out weaker issues and focus on the strongest claims. *Jones supra*.

In the present case, appellate counsel's representation did not fall below an objective standard of reasonableness and Appellant has failed to demonstrate prejudice based on his alleged claim of error regarding the jury instructions. *Strickland supra*. Appellant's fourth proposition of law is without merit, thus this Court should decline to accept jurisdiction of this case.

RESPONSE TO FIFTH PROPOSITION OF LAW

V. APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE ALLEGED PROSECUTORIAL MISCONDUCT.

Appellant claims that the prosecutor engaged in misconduct by allegedly withholding evidence in violation of Crim. R. 16. Appellant asserts that the prosecutor withheld a receipt for the McDonald's food found on the passenger seat of his vehicle. Appellant makes the conclusory statement that the outcome of his trial would have been different had he been given a copy of this receipt in discovery. This argument is without merit.

To prevail on a claim of ineffective assistance of counsel Appellant must show that his appellate counsel's performance fell below an objective standard of reasonable representation and that he was prejudiced by counsel's performance. *Strickland supra*.

The Twelfth District Court of Appeals addressed a claim of prosecutorial misconduct based on a discovery violation and held that:

Allegations of prosecutorial misconduct related to violations of Crim.R. 16 "result in reversible error only when there is a showing that (1) the prosecution's failure to disclose was willful, (2) disclosure of the information prior to trial would have aided the accused's defense, and (3) the accused suffered prejudice." *State v. Jackson*, 107 Ohio St.3d 53, 2005 Ohio 5981, P131, 836 N.E.2d 1173, citing *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 6 Ohio B. 485, 453 N.E.2d 689.

State v. Cummings, 12th Dist. No. CA2006-09-224, 2007 Ohio 4970 ¶45.

Appellant claims that the prosecutor withheld a receipt for the McDonald's food found on the seat of Appellant's vehicle. First, it should be noted that Appellant seems to acknowledge that no receipt was ever obtained by police, either from Appellant's vehicle or from the cashier. It is axiomatic that an item can only be turned over in discovery if such item actually exists and is available to or within the possession, custody or control of the state. Crim. R. 16(B)(1)(c), (version in effect prior to July 1, 2010). Appellant has failed to demonstrate that the receipt he claims was not turned over was available to or within the possession, custody or control of the state.

In the present case, Appellant has failed to show that the prosecution willfully failed to disclose a receipt, that the disclosure would have aided his defense, or that he suffered some prejudice as a result of non-disclosure. *Cummings* supra. As such, Appellant's claim of prosecutorial misconduct based on a discovery violation is without merit. Appellant has failed to show that appellate counsel's conduct fell below an objective standard of reasonable representation or that he was prejudiced thereby. Thus, appellate counsel was not ineffective for failing to raise this baseless claim of prosecutorial misconduct. Appellant's fifth proposition of law is without merit, thus this Court should decline to accept jurisdiction of this case.

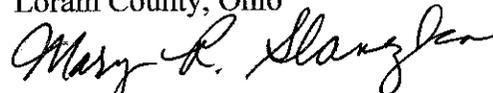
CONCLUSION

For the reasons discussed above, this case does not involve a matter of public or great general interest and does not involve a substantial constitutional question. The State of Ohio respectfully requests that this court decline to accept jurisdiction of this case.

Respectfully Submitted,

DENNIS P. WILL, #0038129
Prosecuting Attorney
Lorain County, Ohio

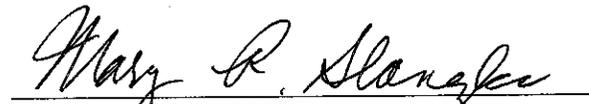
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PROOF OF SERVICE

This is to certify that a true and accurate copy of the foregoing Memorandum in Opposition to Jurisdiction was served upon Terry Little, Appellant *pro se*, Inmate No. A562207, Lebanon Correctional Institution (LeCI), P.O. Box 56, Lebanon, Ohio 45036, by regular U.S.

Mail this 1st day of July, 2011.


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