

Court Copy

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-0317

STATE OF OHIO,
APPELLEE

SUPREME NO: -----

VS.

DEREK WARNER,
APPELLANT.

ON APPEAL FROM THE CUYAHOGA COUNTY
COURT OF APPEALS, EIGHTH APPELLATE
DISTRICT COURT OF APPEALS.

CASE NO: 95750

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DEREK WARNER

DEREK WARNER #592-912
P.O. BOX 8107
MANSFIELD, OHIO 44901
COUNSEL IN PRO-SE.

WILLIAM MASON
CUYAHGOA COUNTY
1200 ONTARIO STREET
CLEVELAND, OHIO 44113
COUNSEL FOR APPELLEE.

RECEIVED
FEB 22 2012
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
FEB 22 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGES:

STATEMENT OF CASE, AND STANDARD OF REVIEW:----- ii.

EXPLANATION OF WHY THIS CASE RAISED A SUBSTANTIAL CONSTITUTIONAL QUESTION AND INVOLVES AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST:----- 1,2.

~~STATE~~ LAW AND ARGUMENT:----- 2

PROPOSITION OF LAW NO:1: Appellant Counsel, Michael Maloney was ineffective for failure to bring up key point which occurred at trial which could have further supported Appellant Derek Warner Defense.-----2,3,4.

PROPOSITION OF LAW NO: 2: Trial Counsel, Ms.Dobroshi was ineffective for failure to fully prepare for trial, and for failure to bring up key evidence during the trial which could have further supported Defendant,s Derek Warner innocence and Defense, which cause the trial counsel to be ineffective during the trial.--5,6

CONCLUSION:----- 7

PROOF OF SERVICE-----10

AFFIDAVIT OF SWORN STATEMENT OF WARNER: ===== 8,9

JOURNAL ENTRY AND OPINION

Decision, EIGHTH DISTRICT COURT OF APPEALS
STATE OF OHIO VS. DEREK WARNER (JAN.24,2012), CUYAHOGA COUNTY,
APP. NO. 95750, MOTION FOR RE-OPEN, PER TO APP.R.26(B).----A1.

STATEMENT OF CASE

Appellant, Derek Warner had respectfully moved the Eighth District Court to reopen his direct appeal, pursuant to APP.R.26(B), of the OHIO RULES of Appellate procedure, and STATE VS. MURNAHAN, (1992), 63 OHIO. ST 3d 60.

As described herein, past appellate counsel,s ineffective inadequate ~~performance~~ performance compromised Appellant,s appeal.

Whereas the appellant suffered severe prejudice because of counsel substandard performance, the Appellate Ohio Supreme Court should reversed the Decision of the Appellate District decision to denied Appellant,s Derek Warner MOTION TO REOPEN HIS DIRECT APPEAL PURSUANT TO APP.R.26(B).

APPLICABLE STANDARD OF REVIEW

On review of an application for reopening an appeal filed by a convicted criminal defendant, the appellate Court must determined whether the applicant was deprived of the effective assistance of counsel on appeal, and shall be granted the requested relief when a genuine issue is present. SEE APP.R.26(B), and see MURNAHAN, supra, 63 OHIO ST. 3d at 66.

**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL
AND PUBLIC INTEREST:**

The United States Supreme Court determined that nominal representation on an appeal of right, like nominal representation at trial- does not suffice to render the proceeding constitutionally adequate. EVITTS VS. LUCEY, 469 U.S. 387,396 (1985). Proper Appellate review must be had to ensure that a criminal conviction has been obtained through a reliable process. Id. at 399-400.

Appeal Rule 26(B) provides a remedies to the defendant,s who have been deprived of the effective assistance of appellate counsel. To succeed on a claim of ineffective assistance of appellate counsel, a criminal defendant must prove that counsel,s performance prejudiced him. See STRICKLAND VS. WASHINGTON, 466 U.S. 668,687, (1984). In direct appeal, appellant,s counsel failed to raise certain winning issues. See DELGADO VS. LEWIS, 181 F.3d 1087 (9th cir. 1999). BUT FOR THE Appellate Counsel,s unreasonable and unjustifiable errors, the appeal would have resulted in a different outcome. Because there is a reasonable probability that but for these errors the outcome of the Appellant,s Warner appeal would have been different, and Appellant was prejudiced by the Appellate Counsel deficient representation. See WILLIAMS VS. LOCKHART, 849 F.2d 1134 (8th cir. 1988). "Counsel,s failure to perfect appeal is prejudicial under the STRICKLAND standard and constitutes ineffective assistance of appellant counsel. See WEEKLY VS. JONES, 56 F.3d 899 (8th cir. 1995). "The Court found a defendant need not establish that the attorney deficient performance more likely than not altered the outcome in order to establish prejudice under STRICKLAND, and that the reasonable probability standard is not a sufficiency test, citing KYLES VS. WHITLEY, 115 S.CT. 1555,1566,(1995). Id at. 56 F.3d 897; and See BOUCHILON VS. COLLINS,907 F.2d 589, (5th cir. 1990).

The BOUCHILON Court found the standard prejudice prong of ineffective assistance of counsel was a reasonable probability that he was incompetent" sufficient to undermine confidence in the outcome. SEE STRICKLAND, at 694. This is a lower burden of proof

than the preponderance standard. The Court also held in MURNAHAN, supra, that the defendant must "put forth a colorable claim of ineffective assistance of Appellate Counsel".

OHIO SUPREME COURT HAS ACCEPT JURISDICTION TO HEAR APPELLANT APPEAL UNDER CASE NO: 11-1677, on DECEMBER 21, 2011:

I: LAW AND ARGUMENT:

PROPOSITION OF LAW NO: 1: Appellate Counsel, Michael Maloney was ineffective for failure to bring up key points which occurred at trial which could have further supported Appellant Derek Warner Defense:

Appellant, Derek Warner feels that the error of his Appellate Counsel Maloney so prejudice Appellant in his appeal to the Eighth District Appellate Court that they rise to the level of ineffective Assistance of Appellate Counsel.

STATE VS. MENDOZA, 2011 WL 3654534 "In order to prove ineffective assistance of (Appellate Counsel), a defendant must show (1) that defense counsel,s representation fell below an objective standard of reasonableness and (2) that counsel,s deficient representation was prejudicial to defendant,s case. STATE VS. BRADLEY, (1989), 538 N.E.2d 373, paragraph two of the syllabus, citing STRICKLAND VS. WASHINGTON, (1984), 466 U.S. 668. In Ohio, a properly license attorney is presumed competent and the burden is on the Appellant to show counsel,s ineffectiveness. STATE VS. LYTLE, (1976), 358 N.E. 2d 623; STATE VS. HAMBLIN, (1988), 524 NB N.E. 2d 476.

There were several issues which Appellant Derek Warner had asked his Appellate Counsl Mr. Maloney to raise in the Appellant Brief which Appellate Counsel failed to do so. Any reasonable person could have plainly seen that these issues were directly related to and relevant to arguments raised in the Appellate Brief, and their inclusion thereof would have substantially raised Appellant chances of winning his appeal. These issues are as follows listed below;

CONTINUE OF PROPOSITION OF LAW NO: 1:

(A). Appellant, Warner was arrested and interrogated soon after the time of his alleged participation in the burglary, and yet he was released that same day.

(B). Neither Tahjay King or Shaneice Ball ever stated whether it was April or May when Appellant Warner allegedly admitted to the burglary-Appellant was in jail at the time he was supposedly making this confession.

(C). The jury found Appellant Warner not guilty of charges of bribery due to discrepancy in the testimonies of Tahjay King and Shaneice Ball.

(D). Calvin Cook, A.K.A. Mookie, Appellant,s Warner,s Co-Defendant, plead guilty to the burglary in juvenile court, receiving probation and house arrest at his sentence, and he never implicated Appellant Warner as being an accomplice.

(E). On a recording played at trial, Shaneice Ball tells Detective Legg and Prosecutor Brockler the following; "My sister (Shanay Ball, the states star and only eyewitness who was actually physically present when the burglary was committed) didn,t know anything when i got home, i told her everything. I planned it".

(F). Shanay Ball and Vanetta Ware (garage owner) alleged that Appellant Warner was wearing black or dark clothes during the commission of the burglary. However, when Appellant was arrested a short time after his alleged participation in the burglary, he was wearing a white shirt. An arrest picture was taken, and this was the same picture in which Shanay Ball picked Appellant Warner out of a photo line-up.

Appellant Warner further feels that there were a number of errors made by his TRIAL COUNSEL MS. DOBROSHI which, when combined, would have well supported an assignment of error for ineffective assistance of trial counsel. Appellant,s Warner Appellate Counsel for this reason, was further ineffective for not raising such an assignment of error in the Appellate Brief. The following is a list of the errors made by Appellant,s Warner TRIAL COUNSEL MS. DOBROSHI.

(1).Although there was a photo in the photo records depicting Appellant,s Warner cell phone displaying a text, by Appellant to Appellant,s Co-Defendant, made at the time Appellant was allegedly participating in the burglary, stating: "I,m over at Don,s house", this photo was never presented at trial by Appellant,s trial counsel MS. DOBROSHI.Also, even though Appellant requested his trial lawyer to subpoena DONALD MYNATT to testify

CONTINUE OF PROPOSITION OF LAW NO: 1

on Appellant,s Warner behalf, this was never done. Appellant,s Warner Appellate lawyer also never raised this issue in the Appellate Brief, although he was requested to do so by Appellant Warner. If MYNATT was called to testify on Appellant,s behalf, this would have solidified Appellant,s Warner alibi as to where he actually was at the time of the burglary.

(2). MS. DOBROSHI, Trial Counsel, after Appellant Warner was sentenced, she moved the court to be taken off Appellant,s Warner pending case because she had a CONFLICT OF INTEREST with Appellant though she never actually stated to the court what that conflict was, she confided to Appellant Warner that she was representing an individual in a homicide case of which Appellant was a person of interest. Appellant believe that this conflict did exist the entire time she was representing me at TRIAL and that it had affected her performance as Appellant,s trial counsel.

(3).Ms. DOBROSHI, TRIAL COUNSEL did not subpoena Appellant,s CO-DEFENDANT to testify on Appellant,s Warden behalf, despite the fact that Appellant requested his trial counsel to do so several times.

(4). Although asked by Appellant Warner for a continuance because Appellant did not feel that his DEFENSER was fully prepared for Trial, in which the trial counsel refused to ask for a continuance and instead proceeded to trial not fully prepared.

These are key points to Appellant,s Warner case which were not brought to light by appellate Counsel. Any one of them could have changed the tide for Appellant Warner on appeal. Appellant will further detail these issues in his Appellate Brief to this Honorable Court. Appellant Warner feels that any reasonable lawyer who was really trying to be successful in litigating this case would have certainly felt that these issues would be a substantial part of and a key element to the litigation of this case. This fact that these issues were not raised certainly prejudiced Appellants Warner chances at winning, both on Appeal and at trial. Therefore Appellant feels he meets both of the standards set forth by the above cited case law to rise to sufficiently satisfy his burden of showing counsel,s ineffectiveness.

For the foregoing reasons, Defendant-Appellant DEREK WARNER respectfully asks this court to accept jurisdiction over this matter as it raised a substantial constitutional issues.

CONTINUE OF LAW AND ARGUMENT

PROPOSITION OF LAW NO: 2: Trial Counsel, MS. DOBROSHI was Ineffective for failure to fully prepare for trial, and for failure to bring up key evidence during the trial which could have further supported Defendant,s Derek Warner innocence and Defense, which cause the trial counsel to be ineffective during the trial:

Appellant Warner feels that there were a number of errors made by the trial counsel Ms. Dobroshi which when combined, would have well supported an assignment of error for ineffective assistance of trial counsel. The following is a list of the errors that were made by trial counsel Ms. Dobroshi, which support her as being in ineffectiveness.

1).Although there was a photo in the photo records depicting Appellant,s Warner cell phone displaying a text, by Appellant to Appellant,s Co-Defendant, made at the time Appellant was allegedly participating in the burglary, stating: I,m over at Don,s house, this photo was never presented at trial by Appellant,s trial counsel. Also, even though Appellant requested his trial counsel to SUBPOENA DONALD MYNATT to testify on Appellant,s behalf, this was never done. Appellant,s Warner Appellate Counsel also never raised this issue in the Appellate Brief, although he was request ed to do so by Appellant Warner. If MYNATT was called to testify on Appellant,s behalf, this would have solidified Appellant,s Warner ALIBI as to where he actually was at the time of the burglary.

2).Ms. Dobroshi, trial counsel, after Appellant Warner was sentenced, she had moved the trial court to taken her off Appellant, pending case because she had a CONFLICT OF INTEREST with Appellant, though she never actually stated to the court what the CONFLICT was, she confided to Appellant Warner that she was representing an individual in a homicide case of which Appellant was a person of interest. Appellant believe that this CONFLICT did exist the entire time, and that it affected her performance as Appellant,s trial counsel.

3). Ms. Dobroshi, trial counsel did not SUBPOENA Appellant,s CO-DEFENDANT to testify on Appellant,s Warner behalf, despite the that Appellant requested his trial counsel to do so several time.

4). Although asked by Appellant Warner for a continuance because Appellant did not feel that his DEFENSE wasn,t fully prepared for trial, in which the trial counsel refused to ask for a continuance and instead proceeded to trial not fully prepared.

CONTINUE OF PROPOSITION OF LAW NO: 2:

These are key points to Appellant,s case which were not brought to light by Appellate Counsel. Any one of them could have changed the tide for Appellant on Appeal or at Trial. Appellant will further detail these issues in his Appellate Brief on the merits to this honorable Court.

Appellant feels that any reasonable counsel who was really trying to be successful in litigating this case would have certainly felt that these issues would be a substantial part of and a key element to the litigation of this case. The fact that these issue were not raised certainly prejudiced Appellant,s chances at winning, both on appeal and at trial. Therefore, Appellant feels he me meets both of the standards set forth by the above cited case law to rise to sufficiently satisfy his burden of showing counsel,s were ineffectiveness on both counsel,s (APPELLATE) AND (TRIAL COUNSEL).

FOR THE FOREGOING REASONS, DEFENDANT-APPELLANT DEREK WARNER respectfully askedf this court to accept jurisdiction over this matter as it raised a substantial constitutional issues..

RESPECTFULLY SUBMITTED,

Derek Warner

DEREK WARNER #592-912

P.O. BOX 8107

MANSFIELD, OHIO 44901

CONCLUSION

For the foregoing reasons demonstrate that Appellate Counsel,s decision not to raise these issues in direct appeal was unreasonable and that counsel,s representation of the Appellant was deficient with respect to the argument and errors raised in direct appeal, which subsequently prejudiced the outcome of Appellant,s Warner appeal.

Appellant has demonstrated that a sufficiently colorable claim of genuine issue exist and that his appellate counsel was deficient in the performance of his professional duties to the Appellant. Appellant Counsel on appeal failed to assign errors that were potentially reversible errors. Failure to raise these issues demonstrates that there was a reasonable probability that he was incompetent. The absence of these newly raised errors clearly demonstrates in their selves a colorable clam as to the ineffective assistance of appellate counsel, thus prejudicing Appellant meeting the criteria set in MURNAHAN, see also STATE VS, BRADLET, (1089), 42 OHIO ST.3d 136.

Appellant Warner respectfully request that this honorable court would accept jurisdiction on this matter, as this honorable court has already accepted jurisdiction on part on of this case, as witness in OHIO SUPREME COURT CSAE NO:#11-1677, which were accept by this court on DECEMBER 21,2011.

RESPECTFULLY SUBMITTED,



DEREK WARNER #592-912

P.O. BOX 8107

MANSFIELD, OHIO 44901

AFFIDAVIT OF SWORN STATEMENT OF DEREK WARNER

STATE OF OHIO:

COUNTY OF RICHLAND:

RE: AFFIDAVIT OF SWORN STATEMENT OF DEREK WARNER:

I, Derek Warner, swear that the following is true;

1).I have received the record. For the reasons explained in my motion to reopen, my Appellate and Trial Counsel,s deficient performance prejudiced me the Appallant.

2).THE ASSIGNMENT OF ERRORS THAT SHOULD HAVE BEEN RAISED.

ASSIGNMENT OF ERROR ONE: Appellate Counsel were ineffectiveness for failing to bring up key points which occurred at trial, which could have further supported Appellant Derek Warner defense because these key points to Appellant,s case which were not brought to light by Appellate counsel.

ERROR NUMBER TWO: TRIAL COUNSEL was ineffective for failure to fully prepare for trial, and for failure to bring up key evidence during the trial which could have further supported Defendant,s innocence and defense, which cause the trial counsel to be ineffective during the trial:

3). Appellate Counsel was ineffective because he failed to raise winning issues. I was prejudiced because my conviction would have been reversed by this Honorable Court if appellate counsel had raised the issues, SEE STRICKLAND VS. WASHINGTON (1984), 466 U.S. at 687.

Derek Warner

DEREK WARNER #592-918

NOTARY PUBLIC 

CONTINUE AFFIDAVIT OF SWORN STATEMENT

Derek Warner

DEREK WARNER #592-912
P.O. BOX 8107
MANSFIELD, OHIO 44901

NOTARY PUBLIC 

Sworn to or subscribed in my present this tenth day of
October, 2011.

Rebecca Williams


NOTARY PUBLIC 

Rebecca Williams
Notary Public
State Of Ohio
My Commission Expires
4 Mar 2013


PAGE (9)

PROOF OF SERVICE

I, Derek Warner hereby certify that a true copy of the foregoing Appellant,s MEMORANDUM IN SUPPORT OF JURISDICTION was served upon Prosecutor William Mason , at 1200 ONTARIO STREET, CLEVELAND OHIO 44113, via U.S. MAIL THIS 15th day of FEB. 2012.

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script that reads "Derek Warner". The signature is written in black ink and is positioned above the typed name and address.

DEREK WARNER #592-912

P.O. BOX 8107

MANSFIELD, OHIO 44901

JOURNAL ENTRY AND OPINION

A1

JOURNAL ENTRY AND OPINION

A1

JOURNAL ENTRY AND OPINION

A1

(A1)

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
95750

LOWER COURT NO.
CP CR-539458

COMMON PLEAS COURT

-vs-

DEREK WARNER

Appellant

MOTION NO. 448587

Date 01/24/12

Journal Entry

Motion by Appellant, pro se, to reopen direct appeal pursuant to App.R. 26(B) and for appointment of appellate counsel is denied.

FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 24 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES - COURT CLERK

Adm. Judge, PATRICIA A. BLACKMON,
Concurs

Judge FRANK D. CELEBREZZE, JR., Concurs

Mary Eileen Kilbane
Judge MARY EILEEN KILBANE

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95750

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEREK WARNER

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Cuyahoga County Common Pleas Court
Case No. CR-539458
Application for Reopening
Motion No. 448587

RELEASE DATE: January 24, 2012

FOR APPELLANT

Derek Warner
Mansfield Correctional Inst.
Inmate #952-912
P. O. Box 8107
Mansfield, OH 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Katherine Mullin
Justice Center, 8th Fl.
1200 Ontario Street
Cleveland, OH 44113

COPIES MAILED TO COUNSEL FOR
ALL PARTIES - COURT ORDER

**FILED AND JOURNALIZED
PER APP.R. 22(C)**

JAN 24 2012


**GERALD B. BOERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.**

MARY EILEEN KILBANE, P.J.:

Derek Warner has filed a timely application for reopening pursuant to App.R. 26(B). Warner is attempting to reopen the appellate judgment, as rendered in *State v. Warner*, Cuyahoga App. No. 95750, 2011-Ohio-4096, which affirmed his conviction for the offenses of burglary (R.C. 2911.12(A)(2)), theft (R.C. 2913.02(A)(1)), vandalism (R.C. 2909.05), and criminal damaging (R.C. 2909.06). We decline to reopen Warner's original appeal.

In order to establish a claim of ineffective assistance of appellate counsel, Warner must demonstrate that appellate counsel's performance was deficient and that, but for the deficient performance, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456. Specifically, Warner must establish that "there is a genuine issue as to whether he was deprived of the assistance of counsel on appeal." App.R. 26(B)(5).

"In *State v. Reed* [supra, at 458] we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel was deficient for failing to raise the issue he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus, [applicant] bears the burden of establishing that there

was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes*, 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308 (1983). Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Id.*, *State v. Grimm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

In *Strickland*, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for a defendant/appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. Finally, the United States Supreme Court has upheld the appellate attorney's discretion to decide which issues he or she believes are the

most fruitful arguments and the importance of winnowing out weaker arguments on appeal and focusing on one central issue or at most a few key issues. *Barnes*, supra.

In the case sub judice, Warner raises two proposed assignments of error in support of his claim of ineffective assistance of appellate counsel:

(1) "Appellate counsel, Michael Maloney was ineffective for failing to bring up key points which occurred at trial which could have further supported appellant Derek Warner defense."; and

(2) "Trial counsel, Ms. Dobroshi was ineffective for failure to fully prepare for trial, and for failure to bring up key evidence during the trial which could have further supported defendant's Derek Warner innocence and defense, which caused the trial counsel to be ineffective during the trial."

Warner, however, has failed to present any substantive argument, with regard to his two proposed assignments of error, that demonstrates how appellate counsel's performance was deficient and that he was prejudiced by appellate counsel's claimed deficiency.

In *State v. Kelly*, 8th Dist. No. 74912, 1999 WL 1044494 (Nov. 18, 1999), reopening disallowed (June 21, 2000), this court established that the mere recitation of assignments of error, without substantive argument, is not sufficient to meet the burden to prove that applicant's appellate counsel was

deficient for failing to raise the issues he now presents or that there was a reasonable probability that he would have been successful if the present issues were considered in the original appeal. *State v. Gaughan*, 8th Dist. No. 90523, 2009-Ohio-955, reopening disallowed, 2009-Ohio-2702. See, also, *State v. Mosely*, 8th Dist. No. 79463, 2002-Ohio-1101, reopening disallowed, 2005-Ohio-4137; *State v. Dial*, 8th Dist. No. 83847, 2004-Ohio-5860, reopening disallowed 2007-Ohio-2781; *State v. Ogletree*, 8th Dist. No. 86500, 2006-Ohio-2320, reopening disallowed, 2006-Ohio-5592; *State v. Huber*, 8th Dist. No. 80616, 2002-Ohio-5839, reopening disallowed, 2004-Ohio-3951. The failure of Warner to present any substantive argument with regard to his two proposed assignments of error results in the inability to demonstrate that his counsel was deficient and that he was prejudiced by the alleged deficiencies.

It must also be noted that Warner's claims of ineffective assistance of both appellate counsel and trial counsel, as predicated upon the failure to introduce evidence during the course of trial, failure to subpoena witnesses, and a request for continuance of trial, involved strategic choices of counsel that fell within the realm of trial strategy and tactics that will not ordinarily be disturbed on appeal. *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270; *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263. Warner has failed to demonstrate the prejudice that resulted from the strategic decisions as

made by trial counsel during the course of trial or that the outcome of his appeal would have been different had the issues been raised on appeal. *State v. Spivey*, supra, 701 N.E.2d 696; *State v. Reed*, supra, 660 N.E.2d 456. Thus, we find that Warner has failed to establish that appellate counsel was ineffective on appeal through his two proposed assignments of error.

Accordingly, the application for reopening is denied.



MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, A.J., AND
FRANK D. CELEBREZZE, JR., J., CONCUR