

ORIGINAL

IN THE SUPREME COURT OF OHIO  
2012

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ELDAR VELIEV,

Defendant-Appellant.

Case No. 12-372

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

Court of Appeals  
Case Nos. 09AP-1059 & -1060

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION**

RON O'BRIEN 0017245  
Franklin County Prosecuting Attorney  
373 South High Street-13<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614/525-3555

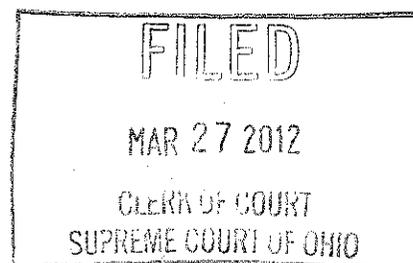
and

STEVEN L. TAYLOR 0043876  
(Counsel of Record)  
Assistant Prosecuting Attorney  
sltaylor@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

KEITH A. YEAZEL 0041274  
Attorney at Law  
5354 North High Street  
Columbus, Ohio 43214  
614/885-2900

COUNSEL FOR DEFENDANT-APPELLANT



**TABLE OF CONTENTS**

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

STATEMENT OF THE CASE AND FACTS ..... 1

ARGUMENT ..... 2

RESPONSE TO PROPOSITION OF LAW NO. ONE:..... 2

    DEFENDANT’S CLAIMS OF INEFFECTIVE APPELLATE COUNSEL  
    LACK MERIT AND THE APPELLATE COURT PROPERLY DENIED  
    THE APPLICATION FOR REOPENING. .... 2

CONCLUSION..... 7

CERTIFICATE OF SERVICE ..... 8

## **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. Defendant presents a run-of-the-mill proposition of law regarding appellate-counsel-ineffectiveness claims that would not be helpful to the bench and bar, as it merely restates the standard for such claims that this Court has repeatedly addressed. Moreover, the Tenth District applied the proper standards in denying defendant's application for reopening. It is respectfully submitted that jurisdiction should be declined.

Notably, the co-defendant Ambartsoumov pursued the same proposition of law in his appeal here from the denial of his application for reopening, which raised identical claims. This Court unanimously declined review of Ambartsoumov's reopening appeal on March 21, 2012.

## **STATEMENT OF THE CASE AND FACTS**

For purposes of this memorandum, the State hereby incorporates the discussion of facts found in the Tenth District's opinions in *State v. Veliev*, 10th Dist. Nos. 09AP-1059 & -1060, 2010-Ohio-6348, ¶¶ 1-20 and *State v. Ambartsoumov*, 10th Dist. No. 09AP-1054, 2010-Ohio-6293, ¶¶ 1-28. This Court declined review of Veliev's appeal from the Tenth District's affirming of his conviction. *State v. Veliev*, 128 Ohio St.3d 1461, 2011-Ohio-1829.

The Tenth District denied defendant's application for reopening on January 24, 2012, and defendant is now pursuing this appeal.

## ARGUMENT

### RESPONSE TO PROPOSITION OF LAW NO. ONE:

DEFENDANT'S CLAIMS OF INEFFECTIVE APPELLATE COUNSEL LACK MERIT AND THE APPELLATE COURT PROPERLY DENIED THE APPLICATION FOR REOPENING.

#### A. Standards for Reopening

An application to reopen an appeal shall be granted only if the defendant shows that there is a genuine issue as to whether appellate counsel rendered ineffective assistance. See App.R. 26(B)(5). Under *Strickland*, a court must apply “a heavy measure of deference to counsel’s judgments,” *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984), and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. This deference extends to cases involving claims of ineffective assistance of appellate counsel, for “appellate counsel need not raise every possible issue in order to render constitutionally effective assistance.” See *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). A competent appellate attorney can discount the chances of success on some issues and spend time on other issues instead. *State v. Allen*, 77 Ohio St.3d 172, 173, 672 N.E.2d 638 (1996).

Indeed, the United States Supreme Court has recognized the importance of appellate counsel’s role of prioritizing potential arguments:

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.

*Jones*, 463 U.S. at 751-52. Thus, appellate counsel need not present every non-frivolous issue. See *id.* Indeed, presenting numerous issues may be counterproductive, as “[t]he effect of adding weak arguments will be to dilute the force of the stronger ones.” *Id.* at 752, quoting R. Stern,

Appellate Practice in the United States 266 (1981). Generally, “only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002), quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

The Tenth District properly found that no genuine issue of ineffective assistance of appellate counsel existed.

#### B. Ineffective Assistance of Counsel Standards

To succeed on a claim of ineffective assistance, a defendant must demonstrate two things: (1) trial counsel acted incompetently; and (2) but for counsel’s incompetence, there is a reasonable probability the result of the proceeding would have been otherwise. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). The same test is applied in evaluating alleged instances of appellate counsel ineffectiveness. Appellate counsel is not required to argue assignments of error that are meritless. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983); *State v. Campbell*, 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (1994). As discussed below, defendant failed to establish that his appellate counsel was ineffective, and he failed to show prejudice.

#### C. Defendant’s Proposed Assignments of Error

Defendant’s first and fifth claims allege that counsel should have objected to the admission of character evidence allegedly put on by the prosecution. Defendant raised a similar challenge in his first assignment of error in his direct appeal which was rejected by the Tenth District. *State v. Veliev* at ¶ 24. The Tenth District noted that the State did not extensively question Safaryan about his business and put on character evidence. *Id.* With respect to Koulian, the State did not put on character evidence in its case in chief and only provided some

background testimony. Further, the admission of evidence lies within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Renfro v. Black*, 52 Ohio St.3d 27, 556 N.E.2d 150 (1990).

In his sixth proposed assignment of error, defendant claims that counsel was remiss in failing to cross-examine Safaryan about inconsistent statements to medical personnel. Defendant points to nothing inconsistent but highlights a statement about some yelling at girls before the incident. First, the statement written in the medical records is hearsay. Second, there is nothing to show it is inconsistent. Third, no prejudice can be shown by this statement not being before the jury. Defendant cannot show that this statement somehow was relevant to the events. Introduction of this statement would not have changed the outcome of the case.

In his ninth and tenth proposed assignments of error, defendant argues that counsel was ineffective for failing to cross-examine the detective about his interview with Ambartsoumov and for failing to introduce the statement into evidence. First, counsel was aware of Ambartsoumov's statement to the detective and had a tape of the same. A video clip was played for the jury to show what Ambartsoumov looked like that night. (Vol. IV, T. 56, 76) Just because Ambartsoumov testified that he felt he answered all of the detective's questions does not mean that Detective Siniff would have agreed. Defense counsel knew the contents of the interview and would not have wanted to open the door to expose negative information. Moreover, the jury was aware that Ambartsoumov claimed to have offered an explanation about his cut to the detective via his testimony so no prejudice can be shown. The evidence (and transcript pages provided by defendant) showed that Ambartsoumov did discuss his cut but did not offer a reasonable or clear explanation about his injury to Officers Graber and Ewing. Defendant is now arguing about Ambartsoumov's explanation to Detective Siniff and grouping

those statements with statements Ambartsoumov made to officers to suggest that the statement to Detective Siniff somehow would have been a prior consistent statement. The State never suggested that Ambartsoumov testified differently in his interview with the detective. Ambartsoumov could not say how he was cut. Therefore, there was no insinuation of recent fabrication pursuant to Evid.R. 801(D)(1)(b) and the statement would not have been admissible anyway. The jury heard Ambartsoumov's testimony about his explanation to Siniff, therefore allowing testimony that potentially was consistent would not have changed the outcome of the case.

In his second and third proposed assignments of error, defendant argues that the trial court erred in allowing evidence that Safaryan was "cautious" of Ambartsoumov. The objections defendant refers to as "repeated" were based on other statements defense counsel felt were hearsay. While there was an objection to Safaryan stating that he was cautious of Ambartsoumov, the testimony was admissible to show the tension that existed between Ambartsoumov and Safaryan and to show his motive for wanting to injure or kill Safaryan.

Shvets was permitted to testify about her prior contact with Ambartsoumov to show his ill will toward Safaryan and motive for the assault. Shvets testified about Ambartsoumov's belief that he was "king of the city" and his hatred of Safaryan. (Vol. III, T. 81-82) The testimony provided background information about the strained relationship between the two and Evid.R. 404(B) allows testimony of other acts to show motive. Pursuant to Evid.R. 404(B), prior threats to commit a criminal act are admissible where they are directly related to proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, and are close in time to the criminal act in question. *State v. Sargent*, 126 Ohio App.3d 557, 568, 710 N.E.1170 (1998).

In his fourth proposed assignment of error, defendant claims that the court erred in excluding materials and used the wrong standard in determining admissibility. The Tenth District already rejected similar arguments in defendant's direct appeal. *Veliev*, ¶¶ 25-27

In his seventh proposed assignment of error, defendant alleges the trial court erred in overruling a defense motion for a continuance to subpoena Safaryan to question him about his statement to hospital personnel. The judge noted that Safaryan had already testified in the case. (Vol. IV T. 19) The defense had not issued a subpoena and, when told Safaryan was out of state, did not request a continuance or take issue with the court's decision to continue on with the case rather than suspending it to locate Safaryan. (Id. at T. 20) The defense had an opportunity to question Safaryan and chose not to. Defense counsel never stated what information they sought that would be helpful to their case and no plain error could be shown here had the issue been raised on direct appeal.

In his eighth proposed assignment of error, defendant complains that the court did not allow the defense to play Ambartsoumov's statement to Detective Siniff before Ambartsoumov testified. As the trial court noted, the statement offered by the defense was hearsay. Defendant claims that it would be a prior consistent statement, however, the defense wanted to play it before there was any testimony from Ambartsoumov. (Vol. IV, T. 56-57)

The claim that the tape was needed to show that Ambartsoumov was forthcoming about his injuries is also unpersuasive. The defense could have played portions of the tape if needed when the detective testified if they felt the detective was not candid about Ambartsoumov's interview. Defendant cites *People v. Carroll*, 95 N.Y.2d 375, 740 N.E.2d 1084 (2000), in support of his claims. In *Carroll*, the Court held that the defense was entitled to use a taped statement of defendant to impeach officers who claimed that the defendant never denied the

crime. *Id.* at 386. Here, defendant never sought to use the tape to impeach the detective and *Carroll* is distinguishable. In the case at bar, defendant tried to play his taped statement in lieu of testifying.

Defendant's counsel was not required to pursue the meritless arguments that defendant wished to advance. *Jones v. Barnes*, *supra*. Also, defendant cannot establish prejudice resulting from the claimed deficiencies in appellate counsel's performance such that the result of his appeal would have been different. See *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996). Therefore, the application for reopening was properly denied.

Defendant's proposition of law does not justify the granting of review.

#### 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 respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

RON O'BRIEN 0017245  
Prosecuting Attorney



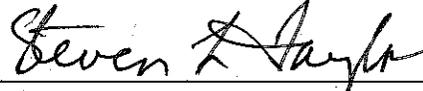
---

STEVEN L. TAYLOR 0043876  
Assistant Prosecuting Attorney

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 27<sup>th</sup>  
day of Mar., 2012, to KEITH A. YEAZEL, 5354 North High Street, Columbus,  
Ohio 43214; Counsel for Defendant-Appellant.



STEVEN L. TAYLOR 0043876  
Assistant Prosecuting Attorney