ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	**NO. 2007-2021**
Plaintiff-Appellee	:	On Appeal From The Hamilton County Court of Common Pleas, Case No. B-0600596
vs.	:	
LAMONT HUNTER	:	This Is A Capital Case.
Defendant-Appellant	:	

RESPONSE TO APPELLATE RULE 26(B) APPLICATION TO REOPEN

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STATEMENT OF THE CASE AND FACTS

A three-judge panel convicted defendant-appellant, Lamont Hunter, of aggravated murder, rape and child endangerment in the death of three-year-old Trustin Blue, and sentenced him to death. This Court affirmed Hunter's convictions and death sentence on December 20, 2011. *State v. Hunter*, 131 Ohio St.3d 67, 960 N.E.2d 955, 2011-Ohio-6524. Hunter applies to this Court to reopen his appeal pursuant to App. R. 26(B), raising several claims of ineffective assistance of appellate counsel.

MEMORANDUM

Appellate Rule 26(B) allows a defendant to reopen his direct appeal when he has fallen victim to ineffective assistance of appellate counsel. In *State v. Murnahan* and its progeny, this Court ruled that a defendant moving to reopen his direct appeal must (1) set forth a colorable claim of ineffective assistance of appellate counsel; (2) show that, when res judicata would bar these claims, applying the doctrine would be unjust; and (3) show that there was a reasonable probability that the new assignments of error would have been successful if they had been raised in the direct appeal. *State v. Murnahan* (1992), 63 Ohio St. 3d 60, 66, 584 N.E.2d 1204; *State v. Dillon*, 74 Ohio St. 3d 166, 171, 1995-Ohio-169, 657 N.E.2d 273; *State v. Spivey*, 84 Ohio St. 3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

In order to demonstrate ineffective assistance of counsel, the defendant must show that counsel made errors so serious that he "was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Johnson* (1986), 24 Ohio St.3d 87, 494 N.E. 2d 1061. Furthermore, appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308.

In *Strickland v. Washington*, the United States Supreme Court stated:

> "Judicial scrutiny of counsel's performance must be highly deferential...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.'"

A finding that prejudice is lacking precludes inquiries as to whether an essential duty was breached.

Under App. R. 26(B)(2)(c), an appellate court shall consider only those "assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court." Thus, an issue that has already been dealt with below may not be revisited simply due to the filing of an Application to Reopen.

In his application, Hunter claims appellate counsel was ineffective for failing to raise several issues in his direct appeal as of right to this Court. Appellee will address each in turn.

First, appellate counsel is faulted for not assailing trial counsel for relying on cross-examination and not hiring experts to refute the testimony of Dr. Makoroff and Dr. Stephens, who both testified as expert witnesses for the State, and rendered opinions that Trustin was the victim of child abuse and not an accidental fall down the stairs. This claim was raised by appellate counsel on direct appeal and rejected by this Court. *State v. Hunter,* 2011-Ohio-6524, ¶ 66. Under the explicit language of Appellate Rule 26(B)(2)(c), Hunter can not raise this claim again in an application to reopen.

Recognizing this Hunter approaches this issue a bit differently in his application. Hunter cites to portions of trial counsel's (Clyde Bennett) opening statements where he said the evidence will prove that Trustin's biological mother was a horrible mother who could have harmed Trustin. Bennett also indicated that his injuries could have been inflicted by a different person at

a different time and that Trustin could have died from rebleeding. (T.p. 121-126) Hunter claims that Bennett never put forward any evidence to substantiate these opening statement claims.

The failure to raise this issue falls far short of ineffective appellate counsel. First, in nearly every trial, counsels opening statements do not align perfectly with the evidence. If counsel is ineffective every time this occurred few criminal convictions could stand. That is certainly why a jury is given a standard instruction that opening statements are not evidence.

Second, Bennett used cross-examination to support the points he made in opening statements. Bennett vigorously challenged the timing of Trustin's injuries. (T.p. 352-355) And, contrary to Hunter's assertions, Bennett did imply that Trustin's mother was the possible abuser. Bennett elicited information that she was depressed and previously threatened to kill her children. (T.p. 528-529, 563-564) Bennett also questioned why Job and Family Services removed Trustin from his mother's care, insinuating that she did not provide proper care to Trustin. (T.p.487) This claim fails to meet the standard of ineffective counsel.

Hunter also argues that appellate counsel should have attacked Bennett's mitigation strategy. But appellate counsel did attack Bennett's mitigation strategy on many fronts. This Court rejected all of these alternative mitigation theories and wrote:

> "Trial counsel presented extensive mitigation evidence during the penalty phase. Five family members and two others testified about Hunter's background and family life. Leevell Hunter, the defendant's father, indicated that Hunter had an alcohol abuse problem and had been involved in drugs. The witnesses also expressed their hope that Hunter would receive a life sentence and explained that a death sentence would have a horrible impact on the family. In addition, Hunter presented a detailed sworn statement. ***Finally, trial counsel's final argument raised residual doubt as an issue and set forth all the mitigating factors favoring a life sentence.***" *State v. Hunter,* 2011-Ohio-6524, at ¶ 70. (Emphasis added)

Despite Bennett's more than adequate mitigation investigation and presentation, Hunter claims that Bennett's reliance on residual doubt, which is no longer a specifically designated

mitigating factor under Ohio law, showed his lack of knowledge and competence in death penalty cases. But under R.C. 2929.04(B)(7), mitigating factors include "[a]ny factors that are relevant to the issue of whether the offender should be sentenced to death." Residual doubt falls under this catchall category.

Hunter next claims that Bennett misstated the weighing process of mitigating and aggravating evidence in both opening statement and in closing argument. This is a nonissue. The panel and this Court conducted the proper weighing process, curing any possible error. Hunter can not demonstrate prejudice.

Hunter also repeats a claim that was raised on direct appeal that Bennett opened the door to prior acts testimony. Again, this Court already rejected this ineffective assistance claim, which was raised by appellate counsel. *State v. Hunter*, 2011-Ohio-6524, at ¶'s 76-94. Having already been raised and rejected, it is improper to raise it again in an application to reopen. App. R. 26(B)(2)(c).

Hunter next claims that appellate counsel should have argued on direct appeal that Dr. Makoroff, a pediatrician, was not qualified to testify as an ophthalmologist, neurosurgeon, or neurologist. Specifically, Hunter claims that she was not qualified to give "expert" testimony regarding injuries to Trustin's eyes or brain.

This claim is frivolous. Dr. Makoroff is an Assistant Professor of Pediatrics at Cincinnati Children's Hospital and attending physician at the Mayerson Center, a child advocacy group that specializes in diagnosing sexual and physical child abuse. (T.p. 288-289) Dr. Makoroff was eminently qualified to testify about Trustin's brain and eye injuries, which were the result of child abuse, her particular area of expertise.

Next, Hunter claims that appellate counsel should have challenged the trial court's (panel's) sentencing opinion because it did not comply with R.C. 2929.03(F) in that it considered uncharged and non-statutory aggravating circumstances. Even if this were correct, this error was cured during this Court's independent weighing process of the mitigating and aggravating circumstances. *State v. Hunter,* 2011-Ohio-6524, at ¶ 206. Appellate counsel likely did not raise this claim because counsel was aware of this Court's responsibility to also weigh the mitigating and aggravating evidence.

Next, Hunter claims that appellate counsel should have raised the issue that the panel was biased in favor of imposing the death penalty against Hunter. This is a serious allegation that challenges the ethics of the three judges on the panel and, if true, would call into question whether they should continue to serve on the bench. Such serious allegations should be supported with at least some prima facie evidence. That is not the case here. Hunter relies on the remarks made by the judges on the panel ***after*** the trial was concluded. These remarks, registering discuss about Hunter's actions, were based on the facts of the case and accurately depicted a person just convicted of torturing and murdering a three-year-old child. There is no evidence that any of the three trial judges predetermined Hunter's fate.

Finally, Hunter claims that appellate counsel should have raised claims of prosecutorial misconduct. In order to successfully appeal a prosecutorial misconduct claim, appellate counsel must demonstrate prejudice. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394, 400. Moreover, failure to object to claims of prosecutorial misconduct waives all but plain error. *State v. Jones* (2001), 91 Ohio St.3d 335, 352, 744 N.E.2d 54. In order to prevail on a claim of plain error, the accused must demonstrate that the outcome of the trial would have been different absent the error. *State v. Coben,* 2nd Dist. No. 2001 CA 8, 2002-Ohio-914.

Here, Hunter makes several claims of prosecutorial misconduct. First, he argues that the prosecutor improperly introduced a picture of one of the State's witnesses kissing Trustin, and that the photograph amounts to improper victim impact evidence. There was no objection and no plain error occurred. This case was tried before a panel of judges precisely because a panel of judges, opposed to a jury, is not likely to decide a case based on emotion. It is presumed that the panel based its decision only on "the relevant, material and competent evidence in arriving at its judgment." *State v. Hunter*, 2011-Ohio-6524, at ¶ 91, citing *State v. White* (1968), 15 Ohio St.2d 146, 151, 44 O.O.2d 132, 239 N.E.2d 65. No error occurred.

Next, Hunter argues that the prosecutor elicited prejudicial testimony from Criminalist Barbara Mirlinbrink when she testified that she recovered two Tiki torches and a tire gauge from Trustin's home. Hunter said the admission of this evidence was to insinuate that these were the objects Hunter used in the rape of Trustin. But as this Court pointed out in its opinion, the prosecution also presented evidence that "[s]ubsequent forensic testing of these items disclosed nothing of evidentiary value." *State v. Hunter*, 2011-Ohio-6524, at ¶ 25. Contrary to Hunter's claim, the prosecution did not commit any type of misconduct. It accurately informed the panel that these items had no evidentiary value.

Next, Hunter claims the prosecutor elicited improper hearsay testimony of Wilma Forte, one of Trustin's caregivers when he was removed from the care of his mother. Hunter also claims the prosecutor continuously requested expert witnesses to provide speculative testimony. Hunter does not cite to any case law, and makes no attempt to argue the merits of these claims. Again, it is presumed that the panel based its decision only on "the relevant, material and competent evidence in arriving at its judgment." *State v. Hunter*, 2011-Ohio-6524, at ¶ 91, citing

State v. White (1968), 15 Ohio St.2d 146, 151, 44 O.O.2d 132, 239 N.E.2d 65. Hunter has failed to demonstrate prosecutorial misconduct in these allegations.

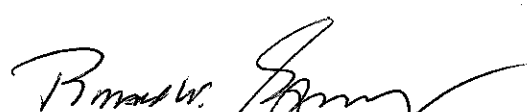
Finally, Hunter claims that the prosecutor made inflammatory and prejudicial comments in closing argument that were not based on the evidence. Trial counsel did not object so all but plain error is waived. (T.p. 715) Once again, because this case was not tried to a jury, "it is presumed that the panel based its decision only on "the relevant, material and competent evidence in arriving at its judgment." *Id.* This claim would not succeed on appeal.

CONCLUSION

Hunter falls far short of meeting the standards for a reopening of his appeal. Appellee submits that Hunter's application must be denied.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney



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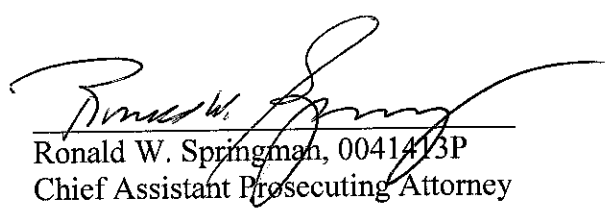
PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Kimberly S. Rigby (0078245), Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Cincinnati, Ohio 45202, counsel of record, this 25th day of April, 2012.



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