

IN THE SUPREME COURT OF OHIO

12-1790

**STATE OF OHIO,
Appellee,**

vs.

**WILLIAM B. VORE,
Appellant.**

**: On Appeal From The Warren County
: Court of Appeals,
: Twelfth Appellate District.

:
: Court of Appeals No: CA2011-08-093
:
: Trial No: 10CR27091
:**

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT WILLIAM B. VORE**

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Petitioner, in pro se

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents critical issues of great general interest and involves substantial constitutional questions. The questions before this Court are whether the Ohio Appellate Court for the Twelfth District erred in denying appellant's Application to Reopen his Appeal when appellant raised substantial Constitutional grounds governed under, *Strickland v. Washington*, 466, U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

It's appellant's contention the 12th District's ruling conflicts with this Court's ruling under, *State v. Hughbanks*, (2004), 101 Ohio St.3d 52, 800 N.E.2d 1152; *State v. Sheppard*, (2001), 91 Ohio St.3d 329, 330, 744 N.E.2d 770; *State v. Reed*, (1996), 74 Ohio St.3d 534, 660 N.E.2d 456, at 458; and the United States Supreme Court decision under, *Strickland v. Washington*, supra.

It's appellant's contention his current conviction represents a miscarriage of justice because he was denied effective assistance of both trial and appellate counsel in violation of the Fifth, Sixth, and Fourteenth Amendment's to the United States Constitution, that warrants this Court to grant jurisdiction in this case.

II. STATEMENT OF THE CASE AND FACTS

On December 20, 2010, the appellant, William B. Vore, was indicted by a Warren County grand jury and charged with Robbery, **R.C. 2911.02 (A)(3)**, a felony of the Third Degree, and Grand Theft, **R.C. 2913.02(A)**, a felony of the Fourth Degree.

After a two-day trial, the appellant was convicted of robbery and grand theft, and he was sentenced to serve five years in prison, the trial court merged these charges. The appellant appealed his conviction, and on June 4, 2012, the 12th Dist., affirmed his conviction, but remanded his case for resentencing when the trial court erred in applying the PRC sanctions. *State v. William B. Vore*, 2012

Ohio 2431, 2012 Ohio App. LEXIS 2140 (Ohio App. 12th Dist. June 4, 2012). Appellant timely appealed to the Ohio Supreme Court which was denied on 9/26/2012.

On July 18, 2012, appellant was resentenced to five years in prison, however the trial court corrected the PRC sanctions. Currently appellant is on his second direct appeal. See, *State v. Vore, 12 Dist. App. No. WARCA 201207-065*.

On or about August 2, 2012, appellant filed an Application to Reopen his direct appeal pursuant to Ohio Appellate Procedure, Rule 26(B), in the 12th District Court of Appeals. On August 10, 2012, the state filed a reply. The 12th District denied appellant's Rule 26(B) motion. (See **Appendix (A)**).

No other relief has been sought by the appellant in relationship to this appeal.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

THE COURT OF APPEALS ERRED WHEN THE COURT DENIED APPELLANT'S APPLICATION TO REOPEN FILED PURSUANT TO OHIO APPELLATE RULE 26(B) AND REJECTED APPELLANT'S CLAIMS THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR COUNSEL'S FAILURE TO RAISE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON DIRECT APPEAL AND FAILED TO PROPERLY RAISE CLAIMS ON DIRECT APPEAL DENYING APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT'S TO THE UNITED STATES CONSTITUTION AND SECTIONS 5, 10, 16, ARTICLE I OF THE OHIO STATE CONSTITUTION.

Discussion: The record demonstrates appellant sought to reopen his direct appeal pursuant to Ohio Appellant Procedure, Rule 26(B). He raised several claims directed at appellate counsel's ineffectiveness when appellate counsel failed to raise the following claims on direct appeal;

1. Appellate counsel's failure to raise trial counsel's ineffective assistance when trial counsel failed to object to the state's introduction of appellant's silence at the time of his arrest and his mugshot;
2. Appellate counsel's failure to raise trial counsel's ineffectiveness when counsel failed to object to the opinions of Ryan Goodman, Alexey Bogatyrev and Detective Roger Barnes that it was

appellant depicted in the bank security footage;

3. Appellate counsel's failure to raise trial counsel's ineffectiveness when counsel failed to object to the state's introduction of the state of Kentucky evidence and failed to request a cautionary jury instruction, and counsel's elicitation of inadmissible evidence of another theft or robbery;
4. Appellate counsel's failure to raise trial counsel's ineffectiveness when counsel failed to object to the state's introduction of the defense's handwriting expert evidence;
5. Appellate counsel's failure to raise trial counsel's ineffectiveness when counsel failed to object to the trial court's refusal to submit a lesser included jury instruction and failure to adequately raise this error on direct appeal;
6. Appellate counsel's failure to raise the sufficiency of evidence on direct appeal;
7. Appellate counsel's failure to raise trial counsel's ineffectiveness when counsel failed to object and move the court for a mistrial when the state prosecutor intentionally introduced testimony and evidence before the jury that was never admitted into evidence or disclosed to the defense;
8. Appellate counsel's failure to raise trial counsel's ineffectiveness when trial counsel failed to object to the sentencing court's failure to grant appellant his jail time credit for all the time he spent in state custody;
9. Appellate counsel's failure to raise trial counsel's ineffectiveness for all the claims raised in appellant's pending postconviction appeal in *State v. Vore*, 12th Dist. No. CA2012-06-049.

Contrary to the 12th District's ruling appellant's above ineffectiveness claims presented the basis of reopening his appeal pursuant to Rule 26(B). *State v. Moore*, 93 Ohio St.3d 649, 758 N.E.2d 1130 (2001); *State v. Spivey*, 84 Ohio St.3d 24, 701 N.E.2d 696-697 (1998).

The 12th District's ruling conflicts with the United States Supreme Court decision, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Evitts v. Lucey*, 469 U.S. 387, 396, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985).

The appellant contends the 12th District's ruling failed to recognize that the cumulative effect of trial and appellate counsels' errors demonstrated prejudice under, *Strickland. Mackey v. Russell, 148 Fed. App. 355, 2005 U.S. App. LEXIS 16833 (6th Cir. 2005)*.

Based upon the above and previously stated reasons this Court should accept jurisdiction to review this appeal.

CONCLUSION

This Court should grant jurisdiction authority and review this case.

Respectfully submitted,

William B. Vore
William B. Vore-# 612-862

CERTIFICATE OF SERVICE

I, William B. Vore/Appellant, hereby certify that I sent a true and accurate copy of the Notice of Appeal and Memorandum in Support of Jurisdiction to the Warren County Prosecuting Attorney's office on this 17th, day of Oct., 2012, via U.S. Mail.

Respectfully submitted,

William B. Vore
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Petitioner, in pro se

A

COURT OF APPEALS
WARREN COUNTY
FILED

IN THE COURT OF APPEALS FOR WARREN COUNTY, OHIO ~~009~~ 11 2012

James L. Spaeth, Clerk
LEBANON OHIO

STATE OF OHIO,	:	
Appellee,	:	CASE NO. CA2011-08-093
- vs -	:	
WILLIAM BERNARD VORE,	:	<u>ENTRY</u>
Appellant.	:	<u>DENYING APPLICATION</u>
		<u>TO REOPEN APPEAL</u>

This matter concerns an application to reopen an appeal filed pursuant to App.R. 26(B) by appellant, William Bernard Vore, pro se, on Aug. 2, 2012, a memorandum in opposition filed by counsel for appellee, the state of Ohio, on Aug. 13, 2012, and appellant's response filed on Aug. 23, 2012.

Appellant was convicted of robbery in Warren County Common Pleas Court. On direct appeal, this court reversed appellant's sentence and remanded the case for a postrelease control notification only, and affirmed the conviction on all other respects.

Appellant claims he was denied the effective assistance of appellate counsel when counsel failed to allege trial counsel was ineffective for failing to: (1) object to the use of appellant's mug shot and to a police officer's testimony about appellant's "silence," i.e., that appellant made no statements to Kentucky police, (2) object to testimony from three witnesses that appellant was the person in the bank surveillance photos because they had limited contact with appellant, (3) object to admission of photos of cash and a pellet gun, which would be evidence of another crime, (4) object when defense's handwriting expert was called by the state to testify, (5) object when

trial court refused to give a lesser-included offense of theft instruction to the jury, (6) raise a sufficiency of the evidence claim in reference to the lack of evidence that appellant used force in the robbery, (7) object or move for a mistrial when the state introduced evidence that appellant took a deposit slip from a bank inside a supermarket, but the video played at trial did not show appellant taking the deposit slip, and object or move for a mistrial when the state committed a *Brady* violation by intentionally withholding part of the video showing appellant removing the deposit slip, (8) object to the amount of jail time credit awarded by the trial court at sentencing, and (9) raise "Grounds A thru O," which were argued by appellant in his petition for postconviction relief.

An application to reopen an appeal shall be granted only if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987. See also App.R. 26(B)(5). As used in this analysis, ineffective assistance of counsel is intended to comprise the two elements set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), namely, a deficiency in the representation of appellant and prejudice resulting from such deficient representation. *Tenace* at ¶ 5; *State v. Sheppard*, 91 Ohio St.3d 329, 2001-Ohio-52.

A court must apply a heavy measure of deference to counsel's judgments, and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy. *Id.* at 689; *Tenace* at ¶ 7. Tactics and strategies, even

debatable ones, do not constitute a denial of effective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45 (1980).

To show ineffective assistance of appellate counsel, appellant must prove that his counsel was deficient for failing to raise the issues that he now presents and that there was a reasonable probability of success had counsel presented those claims on appeal. *Tenace* at ¶ 5. Appellant bears the burden of demonstrating a genuine issue as to whether he was denied the effective assistance of appellate counsel. *Tenace* at ¶ 6.

However, appellate counsel need not raise every possible issue on appeal in order to render constitutionally effective assistance. *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶ 7; see *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983).

With regard to appellant's first claim regarding the mug shot and appellant's silence, we have reviewed the context in which this evidence was admitted and find no support in the record for appellant's claim as counsel's actions would be considered trial strategy, and there was no reasonable probability of success had these claims been presented by appellate counsel. See *State v. Lancaster*, 25 Ohio St.2d 83; *State v. Wayne*, 12th Dist. No. CA2006-06-128, 2007-Ohio-3351; *Clayton*.¹

Appellant's second claim that counsel was ineffective for not objecting to three witnesses identifying appellant because those witnesses had inadequate contact to identify him is not supported by the record as counsel's decision with regard to these

1. The state alleges trial counsel objected to the "silence" issue, but the bench conference was not recorded and no comments were made in relation to the nature of this conference. Therefore, we will not speculate as to the content of the conversation at the bench.

witnesses was trial strategy, and appellant was not prejudiced by the failure of appellate counsel to raise this claim.

Appellant's third claim that counsel was ineffective for failing to object to photos of cash and a pellet gun found on appellant or in his vehicle was also trial strategy as trial counsel elicited testimony to provide another explanation for appellant's conduct, and there was no reasonable probability of success had these claims been presented by appellate counsel. See *Clayton*, 62 Ohio St.2d 45; *Wayne*, 2007-Ohio-3351.

Likewise, there was no prejudice shown from appellant's fourth claim regarding the handwriting expert, as such evidence was cumulative. See *State v. Richey*, 64 Ohio St.3d 353 (1992), abrogated on other grounds by 80 Ohio St.3d 380; see *State v. Fairchild*, 2nd Dist. No. 1481, 1999 WL 942491 (Aug. 27, 1999).

With regard to appellant's fifth claim that counsel was ineffective for failing to pursue the lesser-included offense instruction, this court found in appellant's original appeal that the evidence did not warrant appellant receiving an instruction for the lesser included offense of theft, and appellant was not prejudiced by counsel's actions.

In appellant's sixth claim, appellant argues that appellate counsel was ineffective for failing to raise the sufficiency of the evidence when no force was used for the robbery. The question of whether appellant used or threatened the immediate use of force was raised by appellate counsel in the original appeal in a challenge to jury instructions and lesser-included offenses. Therefore, this issue was previously

raised and considered, and would not have been successful if raised in another context.

Appellant's seventh claim alleges that counsel was ineffective for failing to object or move for a mistrial when a witness testified that shortly before the robbery, appellant walked around a supermarket and picked up a deposit slip from a bank inside the supermarket, but the act of picking up the deposit slip was not on the video shown to the jury. Appellant claims that he was able to secure that portion of the video from the Federal Bureau of Investigation and, therefore, the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 when it intentionally withheld that portion of the video from the defense.

First, the record shows appellant's trial counsel objected to the witness' testimony. The trial court sustained the objection and instructed the jury to disregard the portion of the testimony involving the deposit slip. Further, the evidence was inculpatory, not exculpatory evidence. *See Brady*. Moving for a mistrial would not have been successful if made, and appellant was not prejudiced by counsels' conduct in this regard. *See State v. Boekhoff*, 5th Dist. No. 08CAA020004, 2008-Ohio-6663; *see also Burke*, 97 Ohio St.3d at ¶ 11.

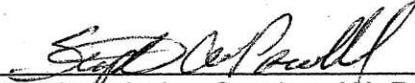
Appellant's eighth claim that counsel were ineffective for failing to challenge jail time credit because appellant was given less jail time credit than he thought he should receive is the subject of a separate, subsequent appeal now before this court in Case No. CA2012-07-065, and will not be considered here.

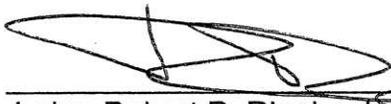
Appellant's ninth claim avers that counsel was ineffective for failing to raise "Grounds A thru O," which were raised in appellant's postconviction relief petition

(PCR). Both appellant and the state indicate that appellant appealed the trial court's decision on his PCR petition, which is now before this court on a separate, subsequent appeal in Case No. CA2012-06-049. Therefore, the ninth claim will not be considered here.

Upon due consideration of the foregoing, and it appearing to the court that there is no genuine issue as to whether appellant was deprived of the effective assistance of counsel on appeal under App.R. 26(B)(5), appellant's application for reopening is hereby DENIED. Costs to be taxed to appellant.

IT IS SO ORDERED.


Presiding Judge Stephen W. Powell


Judge Robert P. Ringland


Judge Robin N. Piper

NOTICE TO THE CLERK:

**SERVE A COPY OF THIS ENTRY DIRECTLY ON APPELLANT
AT THE FOLLOWING ADDRESS AND NOTE SERVICE ON THE DOCKET:**

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