

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

v.

CORTEZ OLIVER

Appellant.

Case No. 13-06238

On Appeal From the Portage
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. 2010-P-0017

STATE OF OHIO'S RESPONSE IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION WARRANTING JURISDICTION FROM THIS COURT

Pursuant to App.R. 26(B), before an application to reopen an appeal is granted, the applicant, “[M]ust prove that his counsel w[as] deficient for failing to raise the issues he now presents and there was a reasonable probability of success had he presented those claims on appeal.” *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770, 771 (2001), citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Moreover, to justify reopening his appeal, the appellant, “[B]ears 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, 701 N.E.2d 696, 697 (1998). Under these standards, a unanimous panel of the Eleventh District Court of Appeals denied Cortez Oliver’s application to reopen his appeal pursuant to App.R. 26(B). *State v. Oliver*, 11th Dist. No. 2010-P-0017 (Mar. 8, 2013).

Rather than present this Court with an issue of public or great general interest involving a substantial constitutional question, Oliver is seeking an avenue to address issues that would otherwise be untimely under the postconviction statute in the trial court. In his application to reopen, Oliver argued that trial counsel’s deficiencies kept exculpatory evidence amounting to an independent and intervening cause of death out of his trial. Specifically, Oliver contends that Lowther’s decision to remove a ventilator severed Oliver’s responsibility for the crime but remained undiscovered at the time of his trial and should have been raised by appellate counsel on direct appeal.

The people of Portage County tried and convicted Oliver of murder for the brutal death of Richard Lowther. *State v. Oliver*, 11th Dist. No. 2010-P-0017, 2012-Ohio-122. The State's evidence established that a blunt force trauma broke the Lowther's neck and caused significant injury to his spinal cord rendering him paralyzed and unable to control basic bodily functions including breathing, eating and waste removal. (Transcript of the Jury Trial, hereinafter "T.p." 536, 542). The cause of death was complications of spinal cord injury due to the blunt force trauma to his neck. (T.p. 543, State's Exhibit 14).

Oliver's application to reopen raised issues of trial counsel's performance regarding pretrial investigation, expert witnesses not retained for trial and exculpatory material that were not contained in the record of the case. Accordingly, postconviction proceedings in the trial court were the proper place to address these issues. As Oliver failed to establish a genuine issue as to whether he had a colorable claim of ineffective assistance of counsel on appeal, the appellate court properly denied his application. This is not an issue of public or general great interest or a substantial constitutional question. A review of the record in this case demonstrates that there is no error with Eleventh District Court of Appeals' decision denying Oliver's application to reopen his appeal warranting jurisdiction from this Court.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

On August 17, 2009, the Portage County Grand Jury indicted Cortez Oliver on murder in violation of R.C. 2903.02(B), aggravated burglary in violation of R.C. 2911.11 and aggravated robbery in violation of R.C. 2911.01. (Transcript of the

docket, journal entries and original papers hereinafter "T.d." 1). Oliver entered a plea of not guilty to the charges and the matter proceeded to a jury trial on February 2, 2010. (T.d. 10, 90).

After the close of all evidence in the State's case, the Defense raised a Crim.R. 29 motion for acquittal arguing that the State had not presented sufficient evidence establishing all the elements of the charged offenses. (T.p. 1098). The trial court overruled Oliver's Crim.R. 29 motion. (T.p. 1098). The jury returned a verdict of guilty on all charges. (T.d. 90).

On February 18, 2010, the trial court sentenced Oliver to life in prison with parole eligibility after fifteen years for murder and consecutive prison terms of ten years each for aggravated burglary and aggravated robbery. (T.d. 108).

The Eleventh District Court of Appeals reviewed the matter on direct appeal. *State v. Oliver*, 11th Dist. No. 2010-P-0017, 2012-Ohio-122. The Eleventh District affirmed in part the judgment of the trial court sentencing Oliver for murder and reversed in part and remanded in part the matter to the trial court to determine whether aggravated burglary and aggravated robbery were allied offenses of similar import under *Johnson. Oliver*, 2012-Ohio-122. Oliver filed an application to reopen his direct appeal under App.R. 26(B). The appellate court overruled his application and this memorandum in support of jurisdiction followed. *State v. Oliver*, 11th Dist. No. 2010-P-0017 (Mar. 8, 2013).

STATEMENT OF THE FACTS

Richard Lowther fell asleep in his easy chair watching television on the first night of July 2009 having no idea that Oliver, Jonathan Dukes and Jodi Fetty were just

outside his back porch door. Awakened by the sound of his doorbell, Lowther found, “[A] small petite brunette at the door, [who] stated she was having car problems and needed to use the phone.” (T.p. 615-616). Lowther opened his door and directed Fetty around the corner to the kitchen phone so she could call for assistance with her flat tire. (T.p. 803). Oliver snuck in through the open porch door and he stood watch under the porch light. (T.p. 803).

As Fetty dialed a random number, Lowther headed back onto the porch to check on his dog and, “[W]as attacked from behind by a very tall, big black man.” (T.p. 616). His attacker grabbed Lowther, “[B]y his mouth, twisted and threw him to the ground.” (T.p. 616). Fetty heard a thud from the porch and ran into the house looking for a way out. (T.p. 804-805). She found a side door, fumbled with the lock and ran out the side door toward the street where Darrell Dukes was waiting in his car. (T.p. 806). Oliver followed Fetty out of the house dropping coins in the street as he ran towards Darrell’s car. (T.p. 806, 716-717).

Lowther’s neighbor saw Fetty and Oliver running from the house and saw Jon Dukes, “[W]as bent over in the doorway on the back porch” as Lowther was yelling, “[W]hat are you doing to me?” (T.p. 587). The neighbor grabbed a stick, ran out of his house startling the guy bent over Lowther who ran into the house and exited out the side door into the dark of the night. (T.p.587). The neighbor returned to help his friend and called 9-1-1. (T.p. 588, State’s Exhibit 23).

ARGUMENT OPPOSING JURISDICTION

Response to Oliver’s Three Propositions of Law: When an applicant fails to make a colorable claim of ineffective assistance of appellate counsel, denial of the application to reopen pursuant to App.R. 26(B) is proper.

In his first proposition of law, Oliver contends that the Eleventh District Court of Appeals decision denying his application to reopen was in conflict with this Court's decision in *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, requiring jurisdiction from this Court. In *Morgan*, this Court answered a certified question from the United States Northern District Court holding, "Proceedings under App.R. 26(B) are collateral postconviction proceedings and not part of the direct-appeal process." 2004-Ohio-6110, syllabus. *Morgan* explained that the provisions of App.R. 26(B) were designed specifically, "[T]o provide for a specialized type of postconviction process." *Id.*, 2004-Ohio-6110, at ¶ 8. As in a postconviction proceeding initiated in the trial court under R.C. 2953, an application process under App.R. 26(B) requires the applicant submit additional material that is not part of the record to support the claim that appellate counsel was ineffective including a sworn statement, affidavits and possibly evidence at an evidentiary hearing. App.R. 26(B)(2)(d) and (e) and (8).

Reviewing Oliver's application to reopen, the appellate court first addressed the trial court's alleged prejudicial voir dire comments. This issue was raised on direct appeal and the Eleventh District had determined that trial counsel's alleged failure regarding the comments did not result in prejudice. *Oliver*, 2012-Ohio-122, at ¶¶ 232-233. Next, the appellate court addressed Oliver's contentions that inept pretrial investigation and alleged *Brady* violations had kept the jury from hearing an intervening and independent cause of death, the victims' mental competency in deciding to remove his ventilator.

The appellate court found, “[W]ith respect to appellant’s contention that trial counsel did not conduct a pretrial investigation; * * * a determination on this issue is apparently dependant on support from evidence seemingly outside the record before us, it is not a matter that can be considered here, but instead in a post-conviction setting.” *Oliver*, 11th Dist. No. 2010-P-0017 (Mar. 8, 2013). Appellate counsel is required to raise issues of alleged trial counsel deficiencies that are contained in the record, other failings of trial counsel’s performance that do not appear in the trial record are matters to be addressed in a postconviction proceeding initiated in the trial court. Accordingly, the Eleventh District’s decision directing Oliver to a postconviction proceeding in the trial court to address alleged trial counsel deficiencies that do not appear in the record was proper and consistent with this Court’s decision in *Morgan*.

Finally, the Eleventh District addressed the alleged *Brady* violation. The appellate court reminded Oliver that App.R. 26(B) applies only to prejudicial errors made by appellate counsel and not the conduct of the state. A review of Oliver’s application revealed no reference to any portion of the record or averment in an affidavit that trial counsel requested and was denied access to exculpatory information regarding the victim’s decision to stop the ventilator or his state of mind that would give rise to such an argument on direct appeal. Furthermore, the discovery record in this case reveals that on September 4, 2009, the state provided the Victim’s 45 pages of medical records from Robinson Memorial Hospital and 837 pages of medical records from Summa Medical; on November 12, 2009, the medical examiner’s report of autopsy; and on January 15, 2010 the Victim’s certificate of death and supplemental medical certification.

Oliver's second and third propositions of law rely on Oliver's mistaken belief that the victim's decision to remove the ventilator established an independent and intervening cause of death that ended Oliver's criminal responsibility. The Ohio jury instruction regarding an independent and intervening cause of death is, "If the defendant inflicted an injury not likely to produce death, and if the sole and only cause of death was fatal injury inflicted by another person, the defendant who inflicted the original injury is not responsible for the death." 4 Ohio Jury Instructions 97 (2009), Section 417.25(3).

Oliver's responsibility was not limited to the immediate or most obvious result of his act or failure to act the night of July 2, 2009. He was also responsible for the natural and foreseeable consequences that follow in the ordinary course of events from his conduct of putting the plan in motion with Darrell, Jon and Fetty and his failure to act in any way to offer assistance to the injured Lowther. Lowther's physical harm was the C-6 and C-7 spinal fractures and the corresponding, significant spinal cord injuries between his C-6 and C-7 cerebral vertebrae's that rendered him paralyzed from his nipple line down. (T.p. 536, 542). Lowther was unable to control many bodily functions including but not limited to his breathing, eating or waste removal. (T.p. 536, 542). Dr. Dean stated the cause of Lowther's death was complications of spinal cord injury due to the blunt force trauma to his neck. (T.p. 543, State's Exhibit 14).

Even if Oliver had been able to present evidence at his trial that the immediate cause of death was the removal of Lowther's ventilator, Lowther's broken neck and serious spinal cord injury and the impact those injuries had on his body's ability to

perform vital functions would also be considered in Lowther's cause of death. No additional expert testimony would erase the circumstances of a spinal cord injury and blunt force trauma to Lowther's neck that placed him in the position of needing life saving treatment including a ventilator. "Thus, while the removal of the ventilator may have constituted an intervening cause, it did not constitute an independent, intervening cause so as to relieve the defendant of responsibility for the victim's death." *State v. Dukes*, 11th Dist. No. 2010-P-0027, 2011-Ohio-6849, ¶¶ 33-35.

Contrary to Oliver's assertions, Lowther's decision to remove the ventilator could not legally constitute an independent and intervening cause of death. Therefore, the Eleventh District properly denied the second and third assignments of error raised in Oliver's application to reopen.

CONCLUSION

Oliver has failed to demonstrate any error with the Eleventh District Court of Appeal's decision. Accordingly, Oliver's three propositions of law are without merit and do not present grounds warranting jurisdiction from this Court. For the foregoing reasons, the State of Ohio respectfully moves this Court to refuse jurisdiction to hear this discretionary appeal.

Respectfully submitted,

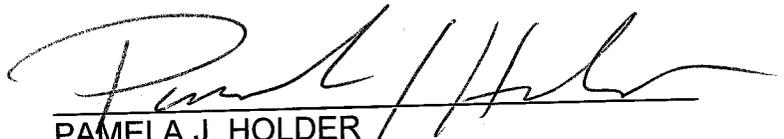
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Memorandum in Support of Jurisdiction has been sent via regular U.S. mail to Cortez Oliver, Inmate No. 581-824, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, Ohio 44430 this 14th day of May 2013.



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