ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	**SUPREME COURT CASE NO. 2014-0577**
Appellee,	)	
vs.	)	**ON APPEAL FROM THE COURT OF APPEALS, NINTH APPELLATE DISTRICT 12CA0102-M**
RICHARD M. MILES, II	)	
Appellant.	)	**MEDINA COUNTY COURT OF COMMON PLEAS CASE NO. 12-CR-0001**

MEMORANDUM IN OPPOSITION TO JURISDICTION OF THE STATE OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

LAW AND ARGUMENT 5

I. The trial court abused its discretion when it denied the appellants suppression hearing. 5

II. The prosecutor introduced new evidence in his closing arguments disclosing evidence that was favorable to the defense. Defense counsel had no opportunity to use this evidence in trial. The appellant was prejudiced by this disclosure at the end of the trial. 5

III. Trial counsel was ineffective for failing the appellant at the suppression hearing and for not being able to argue the objection to the prosecutions closing argument adequately. 5

IV. The conviction is against the standards of "sufficiency of evidence" and the "manifest weight of the evidence." 5

V. The court erred in denying the defendants motion to dismiss for failing to bring him to trial within 90 days as provided in the Ohio Revised Code § 2945.71. 5

CONCLUSION 11

PROOF OF SERVICE 11

TABLE OF AUTHORITIES

CASES

Jones v. Barnes, 463 U.S. 745 (1983) 8

Lockhart v. Fretwell, 506 U.S. 364 (1993) 7

Myers v. Garson, 66 Ohio St. 3d 610, 614 N.E.2d 742 (1993) 8

Seasons Coal Co. v. Cleveland, 10 Ohio St. 3d 77, 461 N.E.2d 1273 (1984) 8

Smith v. Murray, 477 U.S. 527 (1986) 8

Smith v. Robbins, 528 U.S. 259 (2000) 6

State v. Abuhilwa, 9th Dist. Summit No. 16787 (Mar. 29, 1995) 7

State v. Bird, 81 Ohio St.3d 582 (1998) 7

State v. Bradley, 42 Ohio St. 3d 136 (1989) 7

State v. Campbell, 69 Ohio St. 3d 38, 630 N.E.2d 339 (1994) 8

State v. Clayton, 62 Ohio St. 2d 45 (1980) 7

State v. Hamblin, 37 Ohio St. 3d 153 (1988) 7

State v. Lytle, 48 Ohio St. 2d 391 (1976) 7

State v. Miles, 9th Dist. Medina No. 12CA0102-M (Feb. 27, 2014 Journal Entry) 2, 9, 10

State v. Miles, 9th Dist. Medina No. 12CA0102-M, 2013 Ohio 4272 2

State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992) 9

State v. Phillips, 74 Ohio St. 3d 72 (1995) 7

State v. Sherman, 11th Dist. Portage No. 98-P-0009 (June 25, 1999) 7

State v. Thompson, 33 Ohio St. 3d 1 (1987) 7

State v. Were, 120 Ohio St. 3d 85, 88, 2008 Ohio 5277 ..... 9, 10

State v. Young, 5th Dist. No. 30-CA-85 (Apr. 19, 1999) 7

Strickland v. Washington, 466 U.S. 668 (1984) 7, 8

STATUTES

R.C. 2925.11(A) 1

R.C. 2925.11(C)(4)(f) 1

RULES

App. R. 26(B) 5, 6, 9, 10

App. R. 26(B)(1) 6

App. R. 26(B)(5) 10

S. Ct. Prac. R. 7.01(A)(1)(a)(i) 5

EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This Honorable Court should not accept jurisdiction for the following reasons:

1. This case does not involve a substantial constitutional question because Miles' arguments exceed the scope of appeal and he does not challenge longstanding authority – only its application in this case.

2. This case is not of great general or public interest because Miles does not ask for a new rule of procedure or substance to be created or applied, and even if the Court were to read his propositions of law as so asking, application of any such rule would only apply to him.

STATEMENT OF THE CASE

On December 19, 2011, Richard Miles II was arrested for Possession of Cocaine. The Medina County Grand Jury returned an indictment on January 6, 2012 charging Miles with Possession of Cocaine in violation of R.C. 2925.11(A) & (C)(4)(f), a felony of the first degree, and specified that the amount of cocaine was equal to or exceeded one hundred (100) grams, alleging that Miles was a major drug offender. Miles pleaded not guilty at arraignment.

On February 21, 2012, Miles filed a motion to suppress evidence. The court held a hearing on the motion on March 30, 2012. The trial court denied the motion to suppress on June 11, 2012. The case proceeded to trial, following which the jury found Miles guilty on the Possession of Cocaine charge and also found him to be a major drug offender. The trial court sentenced Miles on November 29, 2012 to a mandatory prison term of eleven (11) years, with credit for time served.

Miles filed a timely notice of appeal on December 20, 2012. The Ninth District overruled his assignment of error and affirmed his conviction on September 30, 2013. *State v.*

Miles, 9th Dist. Medina No. 12CA0102-M, 2013 Ohio 4272. Miles did not appeal that decision to the Supreme Court of Ohio.

Miles filed an application to reopen his direct appeal in the Ninth District on December 26, 2013. The State responded on January 24, 2014, and the Ninth District denied the application on February 27, 2014. *State v. Miles*, 9th Dist. Medina No. 12CA0102-M (Feb. 27, 2014 Journal Entry).

Miles filed notice of appeal and a memorandum in support of jurisdiction on April 14, 2014. The State of Ohio hereby responds in opposition, urging the Court to decline jurisdiction and dismiss the attempted appeal.

STATEMENT OF THE FACTS

On December 19, 2011, Deputy Paul Schismenos of the Medina County Sheriff's Office was monitoring traffic from the Duke and Duchess parking lot near Route 83 and Garman Road in Harrisville Township. (Tr. at 71-73.) He noticed a 1998 Chevrolet Suburban roll through the stop sign at Route 83 and Garman Road. (Tr. at 72.) Deputy Schismenos followed the Suburban, which proceeded north on Route 83 and onto the ramp to enter I-71. (Tr. at 72.) He noticed the vehicle's failure to use the turn signal while merging onto the interstate as well as the vehicle driving on the white line. (Tr. at 72.) At this point, the deputy initiated a traffic stop near mile marker 205 on I-71. (Tr. at 72-73.)

Deputy Schismenos approached the vehicle on the passenger side. (Tr. at 73.) As he approached, the sole occupant of the vehicle lowered the window. (Tr. at 74.) The deputy identified him as Richard Miles, II. (Tr. at 74.) As the window was lowered, Deputy Schismenos detected a faint odor of raw marijuana. (Tr. at 75.) He asked for driver's license and registration, which Miles provided. (Tr. at 76.) He then had Miles exit out of the driver's side of the vehicle. (Tr. at 76.) Deputy Schismenos and Miles walked to the police cruiser, and the deputy asked for consent to pat him down for weapons. (Tr. at 77.) Miles consented, and after the pat down the deputy put him in the back of his vehicle. (Tr. at 77.) Due to the marijuana odor, Deputy Schismenos requested another unit to respond. (Tr. at 78, 173.) In the meantime, he started preparing a traffic citation for Miles. (Tr. at 78.) Officer David Brantner from Lodi Police Department arrived approximately five (5) to ten (10) minutes later. (Tr. at 78.) Officer Brantner had contact with Sergeant Brian Ritchie, a K-9 handler, and asked him to respond to the scene. (Tr. at 78, 173-174.) Sergeant Ritchie arrived twenty (20) minutes later. (Tr. at 78.)

While waiting for Sergeant Ritchie to arrive, Deputy Schismenos and Miles discussed the stop sign violation citation. (Tr. at 79.) Miles disclosed that he was coming from Columbus and on his way home to Youngstown. (Tr. at 79.) He denied smoking marijuana or drinking alcohol, and Deputy Schismenos had him do field sobriety tests. (Tr. at 79.) At that point, Sergeant Ritchie arrived with his canine and brought the canine around Miles's vehicle. (Tr. at 80, 166, 174.) The canine gave a positive alert on the front passenger side, as well as on the front driver's side, near the fender and headlight assembly area. (Tr. at 80, 167-168, 174.) The officers began to conduct a search. (Tr. at 81.) Officer Brantner opened the hood of the car and noticed a brown bag near the engine compartment. (Tr. at 83, 174.) Before even opening the bag, Deputy Schismenos noticed a strong chemical smell as well as a strong odor of raw marijuana. (Tr. at 83.) When he opened up the brown bag, inside was clumped white powder and a green leafy substance appearing to be marijuana. (Tr. at 85.) The NIK test performed on the white powder indicated a positive reaction to cocaine. (Tr. at 87.) The items in the brown bag were later sent out to the Bureau of Criminal Identification and Investigation laboratory. (Tr. at 93.) The green leafy substance totaling 2.3 grams was found to contain marijuana and the white powder totaling 126.6 grams was found to contain cocaine. (Tr. at 93.) Miles was transported to the Medina County Sheriff's Office after this incident. (Tr. at 130.)

LAW AND ARGUMENT

I. The trial court abused its discretion when it denied the appellants suppression hearing.

II. The prosecutor introduced new evidence in his closing arguments disclosing evidence that was favorable to the defense. Defense counsel had no opportunity to use this evidence in trial. The appellant was prejudiced by this disclosure at the end of the trial.

III. Trial counsel was ineffective for failing the appellant at the suppression hearing and for not being able to argue the objection to the prosecutions closing argument adequately.

IV. The conviction is against the standards of "sufficiency of evidence" and the "manifest weight of the evidence."

V. The court erred in denying the defendants motion to dismiss for failing to bring him to trial within 90 days as provided in the Ohio Revised Code § 2945.71.

Scope of Appeal

As an initial matter, the State notes that each of Miles' propositions of law refer to the merits of arguments either raised on direct appeal (Proposition V) or which could have been raised on direct appeal (Propositions I-IV). This, however, is not a jurisdictional appeal from Miles' direct appeal. The instant appeal is the jurisdictional appeal from the Ninth District's denial of his application under App. R. 26(B) to reopen his direct appeal.

To the extent that Miles attached a copy of the Ninth District's September 30, 2013, decision overruling his assignment of error in his direct appeal, an appeal of that decision would be untimely under S. Ct. Prac. R. 7.01(A)(1)(a)(i). Although the Rules of Practice of the Supreme Court of Ohio contemplate delayed jurisdictional appeals, Miles has not moved for leave to file a delayed appeal. Therefore, the only decision of the court of appeals subject to review is the February 27, 2014 denial of the App. R. 26(B) application to reopen.

The scope of review under App. R. 26(B) is limited to arguments to reopen a direct appeal for claimed ineffective assistance of *appellate* counsel. App. R. 26(B)(1) ("A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, *based on a claim of ineffective assistance of appellate counsel.*") (emphasis added).

Choosing which arguments to make is part of any "strategy" on appeal. Thus, to prevail on a claim that appellate counsel was ineffective for failure to raise a specific issue, Miles must show that counsel chose obviously weaker arguments and omitted positions which were "clearly stronger." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (holding that only when ignored issues are "clearly stronger" than those presented will the presumption of effective assistance be overcome). In his memorandum in support of jurisdiction, Miles fails to even reference appellate counsel, let alone allege that their performance was deficient or prejudicial in any manner. Instead, Miles argues about the merits of several positions raised in the trial court and in his application to reopen.

As all of the arguments Miles raises exceed the scope of this jurisdictional appeal, the Court should decline jurisdiction in this case and dismiss the attempted appeal. Aside from attaching it to his memorandum in support of jurisdiction, Miles does not reference the fact that this is an attempted jurisdictional appeal from the denial of his application to reopen under App. R. 26(B). Indeed, Miles does not even argue that the appellate court's decision or even its reasoning in wrong, misplaced, inapt or flawed. These omissions mean that Miles is asserting arguments beyond the scope of this appeal and should result in this Court declining jurisdiction.

Even on their merits, however, Miles' arguments lack merit.

Ineffective Assistance of Appellate Counsel

As the Ninth District Court of Appeals below noted, the appropriate standard of review to assess claims of ineffective assistance of counsel is the two (2)-prong standard found in *Strickland v. Washington*, 466 U.S. 668 (1984). "The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any defense counsel's essential duties to appellant." *State v. Young*, 5th Dist. No. 30-CA-85 (Apr. 19, 1999), citing *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Strickland*, 466 U.S. at 687; *State v. Bradley*, 42 Ohio St. 3d 136 (1989).

"In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential." *Id.* "Because of the inherent difficulties in making the first determination, a court must indulge in a strong presumption that the challenged action might be considered sound trial strategy." *State v. Bird*, 81 Ohio St.3d 582 (1998); *Strickland*, 466 U.S. at 689; *State v. Lytle*, 48 Ohio St. 2d 391 (1976); *State v. Thompson*, 33 Ohio St. 3d 1 (1987); *State v. Hamblin*, 37 Ohio St. 3d 153 (1988); *State v. Abuhilwa*, 9th Dist. Summit No. 16787 (Mar. 29, 1995). "[D]ebatable . . . tactics . . . do not constitute a deprivation of effective counsel." *State v. Phillips*, 74 Ohio St. 3d 72 (1995); *State v. Clayton*, 62 Ohio St. 2d 45 (1980); *State v. Sherman*, 11th Dist. Portage No. 98-P-0009 (June 25, 1999).

In the second prong of a *Strickland* ineffective assistance of counsel claim, the court determines whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley*, 42 Ohio St. 3d 136; *see also Strickland*, 466 U.S. at 687 & 693. Miles does not argue, let alone show, prejudice from appellate counsel's performance.

This Court has held that "counsel need not raise all nonfrivolous issues on appeal." *State v. Campbell*, 69 Ohio St. 3d 38, 53, 630 N.E.2d 339 (1994), citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Additionally, this Court in *Campbell* noted that the "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective appellate advocacy." *Id.*, citing *Smith v. Murray*, 477 U.S. 527, 536 (1986) and *Jones*, 463 U.S. 751-752.

In this case, to reopen his appeal Miles must show that his appellate counsel rendered ineffective assistance in failing to assign as error the issues raised in his propositions of law. In essence, Miles must show that the search violated the Fourth Amendment, that appellate counsel was deficient for choosing to make other arguments (the speedy trial argument was actually made to the appellate court), and must further show that there is a reasonable probability that, but for the failure to so challenge, the Ninth District Court of Appeals would have ruled in his favor. *Strickland*, 466 U.S. at 694.

And Miles' arguments go not to legal issues alleged to have been decided erroneously but to the factual findings of the trial court below. A grant of jurisdiction in this case would therefore be inappropriate. *See Myers v. Garson*, 66 Ohio St. 3d 610, 614, 614 N.E.2d 742 (1993) (where decision in case turns on credibility of testimony and there exists competent and credible evidence supporting the findings and conclusions of the trial court, deference to such findings and conclusions must be given by the reviewing court), citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273 (1984). As the Court in *Myers* noted, the rationale underlying deference to a trial court's factual findings is the trial court's better position to view witnesses and observe their demeanor, gestures and voice inflections. *Id.* at 615, citing *s.*

Miles attempts to revive the merits of his underlying suppression challenge in the trial court in this appeal of the appellate court's denial of his App. R. 26(B) Application to Reopen. Because Applications to Reopen are limited to questions of ineffective assistance of *appellate* counsel, App. R. 26(B); *State v. Were*, 120 Ohio St. 3d 85, 88, 2008 Ohio 5277, at ¶ 11, citing *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), the State respectfully asserts that this Honorable Court may not consider directly whether the search of Miles' vehicle was proper.

Even assuming the Court would have limited jurisdiction to consider the underlying merits of the search, arguments, or sufficiency/weight of the evidence in this App. R. 26(B) context to determine whether appellate counsel was ineffective in failing to make arguments, the appellate court below did not err in refusing to grant the application to reopen as no genuine issue existed whether Miles was denied the effective assistance of counsel on appeal. The trial court had the dashcam video of the stop to review and appellate counsel chose not to challenge the decision denying the suppression motion on appeal and instead focused on the more debatable speedy trial issue. Against the fact that the deputy testified that he was able to detect the odor of raw marijuana because the car's heater was operating and the narcotics canine twice alerted on the vehicle, including on the car's front driver's side fender, these strategic calculations did not amount to deficient or prejudicial performance.

The appellate court conducted a thorough review of his claims, and in a five (5) page entry noted facts from the appellate record which contradicted his arguments or legal authorities which disproved his arguments. As the Ninth District noted, "[i]n this case, none of the arguments Mr. Miles raises had merit." *State v. Miles*, 9th Dist. Medina No. 12CA0102-M (Journal Entry of Feb. 27, 2014 denying application to reopen), at * 2. After considering the facts of Miles' case and each of his arguments, the Ninth District noted that there was no genuine

issue whether appellate counsel was ineffective. *Id.* at *5. The application was therefore denied. *See* App. R. 26(B)(5) ("An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.").

Against the appellate court's thorough and well-reasoned opinion, Miles does not take issue with the Ninth District's decision denying his application to reopen. *See* Memorandum in Support of Jurisdiction at *passim*. Instead, he merely recites the same arguments he made about the legality of the search and arrest without indicating in what manner the Ninth District erred. This is insufficient to warrant further review.

And in light of Miles' failure to indicate in what manner appellate counsel's performance was deficient or prejudicial, Miles fails to demonstrate his entitlement to relief on Sixth Amendment ineffective assistance grounds. Moreover, even outside the nature of App. R. 26(B) Applications to Reopen, the search of Miles' vehicle was not in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. As the appellate court below noted when specifically challenged, the deputy complied with existing precedent in conducting the investigation and had probable cause to conduct the search. That search recovered more than one hundred (100) grams of cocaine under the hood. Against this compliance with existing authorities, Miles does not argue for the creation or enlargement of a new right. And he does not allege that appellate counsel was ineffective for failing to so argue. Quite simply, Miles is unhappy with the result in this case and wishes it were otherwise.

Miles fails to show that counsel's performance was deficient or that he suffered prejudice. He thus failed to establish a genuine issue as to whether he was denied the effective assistance of counsel on appeal. App. R. 26(B)(5); *State v. Were*, 120 Ohio St. 3d at 88.

Accordingly, the Ninth District Court of Appeals denied his application to reopen. That decision was not erroneous and jurisdiction in this Honorable Court would be inappropriate.

CONCLUSION

For all of the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court decline jurisdiction over the instant case.

Respectfully submitted,

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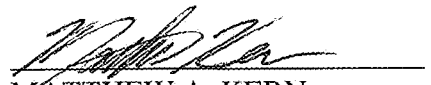
I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of the State of Ohio was forwarded to Richard M. Miles, II, Appellant *Pro Se*, Inmate # 633-763, Belmont Correctional Institution, P.O. Box 540, St. Clairsville, Ohio 43950.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