

IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,

Case No. 02-2241

Plaintiff-Appellee,

-vs-

JONATHON D. MONROE,

DEATH PENALTY CASE

Defendant-Appellant.

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING SECOND
APPLICATION FOR REOPENING**

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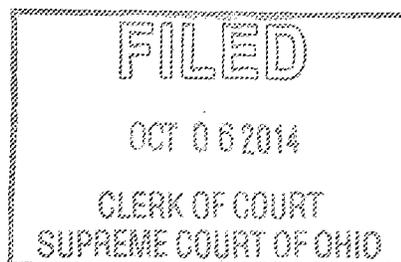
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**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING SECOND
APPLICATION FOR REOPENING**

For the reasons stated in the attached memorandum, the State opposes the untimely and successive application for reopening filed on September 10, 2014.

Respectfully submitted,



STEVEN L. TAYLOR 0043876
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MEMORANDUM IN SUPPORT

Building on the frivolous initial untimely application for reopening that was filed in 2006, defendant's latest foray into frivolity was filed on September 10, 2014 as a "second application for reopening." The current application is barred as a successive and untimely application and is just as flawed as the first application denied in 2006. The depositions do not support these claims of appellate counsel ineffectiveness.

A. Lack of Good Cause for Untimely Filing

The judgment of affirmance was filed on May 25, 2005. Pursuant to S.Ct.Prac.R. XI(6)(A) (now S.Ct.Prac.R. 11.06), defendant's application for reopening was due within 90 days thereafter, which was August 23, 2005. But defendant did not even file his first application for reopening within that time frame. The second application recently filed by defendant was over *nine years late*. Given this untimeliness, defendant is required to make "[a] showing of good cause for untimely filing * * *." S.Ct.Prac.R. 11.06(B)(2).

Defendant recognizes the delay but claims there is "good cause" because the federal habeas court allowed his habeas counsel to depose the appellate attorneys and therefore the supposed new information developed in the depositions justifies the delay. But the

depositions do not actually support what defendant is contending, and so the ability to depose really contributed nothing toward the filing the current unsupported application. And the defense provides no indication that these same theories could not have been pursued earlier through contacting trial counsel or appellate counsel.

In addition, the defense filed the federal habeas petition in March 2007, but the motion for discovery was not filed until June 2012. Waiting around five-plus years to seek discovery may have suited the defense purpose of causing delay, but it does not amount to any “good cause” for the several years of delay in the filing of the present application for reopening. The “good cause” criterion involved under S.Ct.Prac.R. 11.06 is simply a different standard and different issue than that presented to the federal habeas court on the narrow question of whether to allow discovery therein. The ruling in the habeas action is hardly preclusive of the question of whether “good cause” exists for nine years of delay.

B. Additional Lack of Good Cause for Untimely Filing

There is a lack of good cause for another reason. In the context of the reopening procedure under App.R. 26(B), this Court has recognized that “[g]ood cause can excuse the lack of a filing only while it exists, not for an indefinite period.” *State v. Davis*, 86 Ohio St.3d 212, 214 (1999), quoting *State v. Fox*, 83 Ohio St.3d 514 (1998). Whatever “good cause” might exist early on, such good cause will evaporate if the defendant does not act in a timely manner thereafter. This case law would apply to the twin reopening procedure adopted under S.Ct.Prac.R. 11.06.

Any supposed “good cause” here would have evaporated by now. The discovery order cited by defendant was entered on September 21, 2012. The defense did not begin the depositions until July 2013 and then took a break in the depositions and did not

complete them until October 2013. Then it was over ten months later before the defense filed the present application for reopening.

There is no justification for this delay. If the depositions were so significant (they aren't), it should not have taken over ten months to file the present application. Adding to the lack of good cause here is the fact that the defense obtained the discovery order in September 2012 and yet took several months to undertake the depositions. Again, foot-dragging in the federal habeas action may serve the purposes of the defense there, but it does not amount to "good cause" in this Court.

C. Second Application Barred as Successive

Beyond the excessive delay, defendant's current application for reopening constitutes his second application. The first was denied in 2006.

Successive reopening applications are not permitted and are barred by res judicata. As this Court has noted under the equivalent reopening procedure under App.R. 26(B), "App.R. 26(B) makes no provision for filing successive applications to reopen." *State v. Peeples*, 73 Ohio St.3d 149, 150 (1995). "Neither App.R. 26(B) nor [*Murnahan*] provides for second and subsequent applications for reopening." *State v. Richardson*, 74 Ohio St.3d 235, 236 (1996). "Once ineffective assistance of counsel has been raised and adjudicated, res judicata bars its relitigation." *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, ¶ 10, quoting *State v. Cheren*, 73 Ohio St.3d 137, 138 (1995).

Equally so, this Court has denied successive applications for reopening as not allowed by S.Ct.Prac.R. 11.06. *State v. Issa*, 106 Ohio St.3d 1407, 2005-Ohio-3154 ("Motion denied * * * because second or successive applications for reopening are not permitted under the rule."); *State v. Jones*, 108 Ohio St.3d 1409, 2006-Ohio-179 (same).

D. Standards for Reopening

The two-pronged test in *Strickland v. Washington*, 466 U.S. 668 (1984), governs whether the defendant has raised a “genuine issue” of appellate counsel ineffectiveness. *State v. Hill*, 90 Ohio St.3d 571, 572 (2001) (citations omitted). An appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 752 (1983); *State v. Allen*, 77 Ohio St.3d 172, 173 (1996). A reasonable counsel can discount the chances of success on some issues and spend time on others instead. *State v. Allen*, 77 Ohio St.3d 172, 173 (1996).

1. “Incomplete Record” Complaints

Based on trial counsel Rigg’s billing of “in court” time for four dates on which there was no transcript in the appellate record, defendant argues that the appellate record was incomplete and that defendant’s appellate counsel were ineffective in failing to raise the issue of an incomplete record. But incomplete-record issues routinely fail, either because the defense did not object to the lack of recordation, because the defense has not attempted to employ record-correction procedures to show the significance of what was omitted, and/or because it is apparent that nothing vital to appellate review has been omitted. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶¶ 182, 183 (“Leonard failed to object or ask that these conferences be recorded and has waived this issue.”); “reversal will not occur as a result of unrecorded proceedings when the defendant failed to object and fails to demonstrate material prejudice.”); *State v. Palmer*, 80 Ohio St.3d 543, 555 (1997) (“defense counsel made no request on the record that they be recorded, thereby waiving the error”); *State v. Grant*, 67 Ohio St.3d 465, 481 (1993) (“defense counsel never requested that they be recorded, thereby waiving any error”); *State v.*

Brewer, 48 Ohio St.3d 50, 60-61 (1990) (“appellant failed to object or move for recording at trial. More significantly, appellant’s present counsel failed to invoke the procedures of App. R. 9(C) or 9(E) to reconstruct what was said or to establish its importance. In the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice, the error may be considered waived.”).

As for what occurred here, trial counsel Rigg’s excerpted deposition indicates that only routine matters would have been addressed on those dates, i.e., continuances/scheduling or perhaps the judge signing unopposed pretrial orders for the defense. (Rigg Dep. 104, 105 – “we had a lot of court dates and a lot of times we would just continue the case”) The answer beginning at the bottom of page 105 appears to be relevant, but defendant does not provide page 106 as part of his application regarding what Rigg testified to at that point.

The mere fact that routine unopposed continuances or entries were being approved would not make any lack of recordation significant, prejudicial, or worthy of raising as a proposition of law in the appeal. Even after deposing Rigg, the defense fails to indicate how anything prejudicial to the defense or vital to appellate review occurred on these dates. Appellate review does not require a perfect record of the lower-court proceedings. *Palmer*, syllabus. Defendant falls far short of demonstrating that appellate counsel were ineffective under both prongs of the *Strickland* standard.

2. Failure to Oppose Correction of the Record

Defendant’s complaint about the correction of the record is frivolous. During the pendency of the appeal in this Court, the State noticed that the transcript was in error. The trial court’s written instructions indicated that the court during the penalty-phase

instructions read off the three verdict forms for the penalty phase, i.e., (1) recommending death; (2) hung jury and recommending life; (3) recommending life. In reviewing the transcript, however, the State noted a discrepancy, with the transcript reflecting that only the first two forms were read off as part of the instructions. Given that the court had been reading the written instructions verbatim, including a reference to 24 verdict forms (i.e., three for each of the eight capital counts), and given the absence of any objection to any failure to read off the third verdict form, the State concluded that the transcript was in error and that the court in fact did orally read the third verdict form. The State filed a motion to correct the record, which was not opposed by defendant's appellate counsel. The trial court granted the motion, finding that the transcript was in error in omitting the court's oral reading-off of the third verdict form. The trial court found that "all three verdict forms in the penalty phase were read off exactly as written in the written instructions that went back with the jury in the penalty phase." This Court later granted the State's motion to supplement the record with the trial court's entry.

Defendant now takes issue with the correction of the record. But defendant takes major liberties with the truth. First, the defense wrongly contends that the reason the appellate attorneys did not respond in the trial court was because they were not appointed for purposes of trial-court proceedings. Appellate counsel Edwards testified that they did not oppose the motion to correct because there was no reason to oppose it and because it was unimportant and "much ado about nothing." (Edwards Dep. 94-97) While both Barstow and Edwards noted their lack of appointment for purposes of trial-court proceedings, Edwards' testimony shows that they would not have ignored the motion merely because it was filed in the trial court; rather, as appellate counsel, they would

have reviewed it and made the judgment that no response was needed. (Id.) The depositions do not establish that the appellate attorneys acted unreasonably.

The defense citation to Barstow's testimony here is especially misleading because he could not recall the motion or what was done or not done in response. (Barstow Dep. 92-93 – "don't remember"; "don't recall") Barstow's lack of memory does not establish any ignoring of the motion based purely on lack of trial-court appointment.

While the defense now contends that the motion should have been opposed, the defense notably bases its argument on a flat-out falsehood. The defense contends that the original transcript was more credible because the court reporter would not have omitted the reading off of the third form "eight separate times while accurately taking down the other portions of the instructions." But there were no "eight separate times." As the transcript and written instructions both show, the court read off the verdict forms *once* as to Count One and then stated that "[t]he verdict forms with respect to counts two, three, four, five, six, seven and eight are the same." (T. 1515; Instructions, pp. 9-10). The major premise of the current defense argument is just plain wrong.

Another problem with the current defense argument is that it leads nowhere. Even if the court omitted an *oral* reading off of the third form, the oral and written instructions in their entirety still gave the jury the ability to return a unanimous life recommendation, and there is no contention or support for the view that the jury was not given that third form. The court told the jury it would have 24 verdict forms, which meant that the jury would have all three forms for each count. In light of the overall instructions, appellate counsel would have gained no traction at all by contending that the court omitted an oral reference to the third form, especially since that issue would have

been reviewed under plain-error standards that would have required a showing of clear outcome determination. The defense does not satisfy that high standard even now and therefore cannot show that appellate counsel were constitutionally ineffective under both prongs of the *Strickland* standard in failing to pursue this red-herring issue.

The defense also posits now that there needed to be a hearing on the motion to correct the record. While such motions can result in a hearing, there would have been no reason for the court to have one on an unopposed motion. In addition, there is no indication that the trial court would have denied the motion to correct even if the appellate counsel had objected. The motion to correct made sense, and the trial court still would have granted it. It could rely on its own memory of events to ultimately find that the court did read off the third form.

3. Failure to Consult with Defendant

While there is a duty to consult with a criminal defendant on the fundamental question of whether an appeal will be pursued, the decision on what issues to raise in an appeal is ultimately up to appellate counsel, as counsel need not raise even non-frivolous issues desired by the client. *Jones v. Barnes*, 463 U.S. at 751-752. There would be no requirement that counsel ship a copy of the transcript to the defendant or to receive his approval on what issues to raise, especially in this case, in which appellate counsel Edwards concluded from his meeting with defendant that defendant “was very noncommunicative” and “did not seem real interested in reviewing any documentation.” (Edwards Dep. 30-31, 48)

In addition, a supposed lack of consultation regarding what issues to raise would not amount to ineffectiveness unless both prongs of the *Strickland* test were satisfied.

Defendant fails to indicate how more consultation would have benefitted the defense on appeal, how appellate counsel's alleged failure to consult resulted in counsel's failure to bring any meritorious claim, see *Smith v. Robbins*, 528 U.S. 259, 288 (2000), or how he was prejudiced by the supposed omission of any issue that defendant might have desired to raise. *Strickland*, 466 U.S. at 687. There is especially no reason to pursue this claim nine years late, since the defense would have been able to talk to defendant himself all along to develop any supposed lack of consultation.

4. Failure to Raise Prosecutorial Misconduct

Defendant now complains about the prosecutor making "repeated veiled references to Appellant's criminal history" during voir dire of the jury. The defense cites pages 74-75, 204-205, and 277-78 of the transcript, contending that the prosecutor's hypotheticals illustrating differential sentencing for different defendants somehow prejudiced defendant. But the prosecutor's statements were in hypothetical terms, not mentioning defendant and clearly indicating the prosecutor was speaking only by way of example. There was no "reference," veiled or otherwise, to defendant.

There was no objection either, and so appellate counsel would have been doubly grasping at straws to raise this issue under a plain-error standard requiring clear outcome determination. The issue fares no better in terms of trial counsel ineffectiveness, which would have failed under both prongs of the *Strickland* test if raised by appellate counsel.

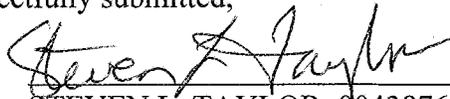
5. Prior Reopening Claims

Defendant claims that pages 82-83 of the Barstow deposition and pages 121-124 of the Edwards deposition support claims that were made in the previous reopening application because no tactical or strategic thinking was involved in not raising certain

claims of error. But Barstow's answers were "I don't remember," and such non-answers do not establish anything. And Edwards' answers reveal that he would not have raised the claims because of lack of record support and/or lack of merit.

Indeed, none of the issues would have had any merit even if raised by appellate counsel. As pointed out in the State's 2-10-06 memorandum opposing reopening, the claims raised in the first reopening application were really outside-the-record post-conviction claims. As Edwards' testimony discusses, raising such claims on direct appeal would have violated the "bedrock principle" in Ohio appellate practice "that an appeals court is limited to the record of the proceedings at trial." *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13, citing *State v. Ishmail*, 54 Ohio St.2d 402 (1978). Counsel cannot be faulted for having failed to raise claims not supported by the record. Counsel also has no duty to raise losing claims simply for the purpose of preserving them for federal habeas review. *State v. McGuire*, 80 Ohio St.3d 390, 397-98 (1997).

Respectfully submitted,



STEVEN L. TAYLOR 0043876

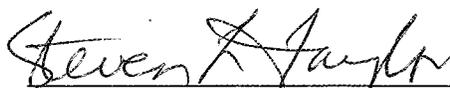
(Counsel of Record)

Chief Counsel, Appellate Division

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this October 6, 2014, to Kimberly S. Rigby, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for defendant-appellant.



STEVEN L. TAYLOR 0043876