ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2014-1560
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
TYSHAWN BARKER	:	Court of Appeals Case Number C-1300214
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

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

This Court should not accept Tyshawn Barker's case for review. Although a decision from this Court regarding the constitutionality of R.C. 2933.81(B) would be welcome by the State, Barker failed to raise a due process claim in the First District Court of Appeals and cannot pursue it now.

Moreover, Barker's statement was knowingly, intelligently, and voluntarily given. Barker was advised of his *Miranda* rights, waived those rights, and was not coerced by police. His entire interview was video recorded, and reviewed by the trial court.

And finally, Barker was represented by highly competent counsel. He cannot show that his attorney was deficient in any way, and certainly has failed to show any resulting prejudice from his allegedly deficient representation.

Although Barker was young when he committed his crimes, he committed two heinous, premeditated murders. Barker's constitutional rights were well protected throughout the police investigation and his court proceedings. As such, this Court need not accept review of his case.

STATEMENT OF THE CASE AND FACTS

On October 16, 2011, Cincinnati Police got a 911 call from an eyewitness to a shooting. (T.p. 14).[1] The caller had heard shots, looked out her window, and saw three teenage male blacks wearing dark clothing and white gloves. (T.p. 54). They were laughing and walking southbound on nearby train tracks. (T.p. 14, 52-53). The three briefly came back to a body lying on the tracks, and then walked away again. (T.p. 53).

When police responded to the scene, they found the female victim, who was already dead. (T.p. 14-15). Her clothing had been rifled, as if someone had gone through her pockets.

[1] The following references to the transcript are from the Juvenile Court hearing on November 16, 2011.

(T.p. 15). The girl had suffered multiple gunshot wounds to her face and head, as well as one wound to her back. (T.p. 16).

A Cincinnati District Four officer who was on scene told the homicide investigators that there had been a shooting two days earlier, and that the victim might have been involved. (T.p. 16). Police had been given a description of a female matching the victim, who was seen fleeing from the shooting two days earlier. (T.p. 17). Police soon confirmed the seventeen-year-old victim was Carrielle Conn. (T.p. 18).

The previous shooting had occurred on October 14, 2011, at the home of Samuel Jefferies on Greenwood Avenue. (T.p. 28). Jefferies was the boyfriend of Lakeshia Prince, who is Dequantez Nixson's mother. (T.p. 28). Prince had recently been arrested for a felonious assault and domestic violence charge after she tried to run Jefferies over with her car. (T.p. 29). Nixson was present during that incident and planned to shoot Jefferies as payback for getting his mother arrested. (T.p. 29-30, 36, 47).

While Nixson and his little brother, Tyshawn Barker, waited in a stairwell, Brendan Washington and Carrielle Conn approached Jefferies' apartment, waited until a man answered the door, and shot him. (T.p. 22, 30-31, 36-38, 45-47, 67). Rudell Englemon was a friend of Jefferies, and was at his apartment that day. (T.p. 29). He had answered the door. (T.p. 31-32). As the four teens ran, Nixson saw they had shot the wrong person. (T.p. 31, 36-37).

Later, the group was concerned that Conn was snitching about Englemon's shooting. (T.p. 24, 36, 44). Nixson called Conn and lured her out of her house. (T.p. 34, 44). While walking along some nearby train tracks, Washington shot Conn from behind, then fired more shots while she was on the ground. (T.p. 22, 34). The gun was passed to Nixson and Barker, and they all pulled the trigger. (T.p. 22-23, 34, 69).

In investigating Conn's homicide, police first interviewed Nixson. His mother was present at the Englemon shooting, and had identified Conn. (T.p. 18). Nixson had a red and black cell phone when he was interviewed. (T.p. 20). He had stolen it from Conn during the murder, and switched the SIM card with his own. (T.p. 20-21). Nixson had been the last person to call Conn before she was killed. (T.p. 22). He said the gun did not fire when it was passed to him. (T.p. 23).

Washington's account of the murder was similar to Nixson's and Barker's, but he claimed that Nixson shot Conn in the back, and said when the gun was passed to him, it didn't work. (T.p. 43-44). Washington also admitted he was at the door during the Greenwood murder, but claimed Conn fired the shot. (T.p. 45).

Barker explicitly admitted that he shot Conn while she was on the ground. (T.p. 34-35).

While fleeing into the woods after Conn's murder, the group emptied the shell casings from the gun. (T.p. 25). They wore gloves to avoid leaving fingerprints on the gun, or having gunshot residue on their hands. (T.p. 26, 35). The only physical evidence police recovered were the bullets retrieved from Conn's body. (T.p. 56).

On October 18, 2011, Cincinnati Homicide Detective Kurt Ballman filed a complaint alleging that Tyshawn Barker was delinquent for committing aggravated murder of Carrielle Conn, who was then seventeen years old. (11/10085 T.d. 1). Six days later, Ballman filed a complaint alleging that Barker was delinquent for committing murder of Rudell Englemon. (11/10303 T.d. 1). The State moved to relinquish jurisdiction over both cases. (11/10085 and 11/10303 T.d. 4). On November 16, 2011, after a hearing, the court found probable cause for both charges. (11/10085 T.d. 8; 11/10303 T.d. 10). Four days later, the court held a hearing to determine Barker's amenability to the juvenile system. Finding that the factors in favor of

bindover outweighed the factors against bindover, the court transferred the charges for criminal prosecution. (11/10085 T.d. 9; 11/10303 T.d. 11).

On December 1, 2011, a Hamilton County Grand Jury indicted Barker for two counts of aggravated murder with capital non-death specifications, two counts of aggravated murder, and two counts of conspiracy. (T.d. 1). These counts all had witness and firearm specifications attached. The Grand Jury also indicted Barker for two counts of aggravated robbery with firearm specifications, and three counts of tampering with evidence with firearm possession specifications. (T.d. 1).

Barker filed a motion to suppress his statement before the trial court. (T.d. 18). At the motion to suppress, the court heard evidence that Barker was read a rights notification form and signed it before his interview shortly after midnight on October 18, 2011. (T.p. 14;[2] State's Ex. 8). Detective Kurt Ballman testified that he had no reason to believe that Barker did not understand his rights, or that he was not making a voluntary statement. (T.p. 14). Barker's interview was recorded by audio and video, and these recordings were entered into evidence. (T.p. 10; State's Ex. 3A and 3B). Transcripts of the interviews were also admitted at the motion to suppress hearing. (T.p. 12; State's Ex. 4A-4C). The court denied the motion.

Barker entered a no contest plea to the charges. (T.d. 68). The court found Barker guilty and sentenced him to an aggregate term of twenty-five years' to life incarceration. (T.d. 69, 72).

[2] All references to the transcript are from the hearing on May 30, 2012, unless otherwise noted.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: When applied to a child, the statutory presumption that a custodial statement is voluntary under R.C. 2933.81(B) violates due process. Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

Barker's claim is barred by *res judicata* because he did not raise it before the First District Court of Appeals, but could have done so. "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on an appeal from that judgment." *State v. Saxon*, 109 Ohio St.3d 176, 2006–Ohio–1245, 846 N.E.2d 824, ¶16–17, quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. The doctrine of *res judicata* promotes principles of finality and judicial economy by preventing endless relitigation of an issue upon which there was already a full or fair opportunity to be heard. *Saxon* at ¶18. Therefore, where a party had the opportunity to assert specific arguments in an earlier appeal but he or she failed to seize that opportunity, the doctrine of *res judicata* bars that party from asserting those arguments in the current appeal. *State v. Jama*, 10th Dist No. 11AP–210, 2012-Ohio-2466, ¶45.

Proposition of Law No. 2: The Statutory presumption of voluntariness created by R.C. 2933.81(B) does not affect a reviewing court's analysis of whether a defendant waived his *Miranda* rights. Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

Barker's recorded statement is presumed voluntary, and Barker bore the burden of proving that his statements were not voluntary. R.C. 2933.81(B). There has been little review of R.C. 2933.81 since its passage.

"Appellate review of a motion to suppress presents a mixed question of law and fact. At a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. An appellate court must accept a trial court's findings if competent, credible evidence supports them. A reviewing court then conducts a de novo review of the trial court's application of the law to the facts of the case." *State v. Garmon*, 1st Dist. No. C-080426, C-080427, C-080428, 2009-Ohio-1373, ¶8, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71.

In determining whether a confession was voluntary, the court considers the totality of the circumstances, including the defendant's "age, mentality, and prior criminal experience *** the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), at paragraph two of the syllabus. Courts may also consider whether the accused has received his or her *Miranda* rights. *State v. Evans*, 144 Ohio App.3d 539, 560-561, 760 N.E.2d 909 (2001).

Whether or not police properly advised a defendant of his rights under *Miranda* must be viewed from the totality of the circumstances. *State v. Taylor*, 144 Ohio App.3d 255, 261, 759 N.E.2d 1281, 1285 (2001), *citing State v. Clark*, 38 Ohio St.3d 252, 261, 527 N.E.2d 844, 854 (1988). "The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." *State v. Ulery*, 4th Dist. No. 07CA28, 2008-Ohio-2452, *quoting Duckwoth v. Eagan*, 492 U.S. 195, 202-203, 109 S.Ct. 2875106 L.Ed.2d 166 (1989).

A statement made after valid *Miranda* warnings is only involuntary if the evidence shows that the suspect's will was overcome due to coercive police conduct. *State v. Dailey*, 53 Ohio St.3d 88, 91-92, 559 N.E.2d 459 (1990), *citing Colorado v. Connelly*, 479 U.S. 157, 170, 107 S.

Ct. 515, 93 L. Ed. 2d 473 (1986). "[I]n order for a confession to be considered involuntary and thus violative of the Due Process Clause, it must have been the product of state action." *State v. Wiles*, 59 Ohio St. 3d 71, 81, 571 N.E.2d 97 (1991), *citing Colorado v. Connelly*, 479 U.S. 157, 165, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Colorado v. Connelly*, 479 U.S. 157, 166, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Suppressing Barker's statements serves no constitutional purpose. Barker does not even allege that he was coerced by police, and nothing in the record shows that he was coerced by police in any way.

The court properly found that Barker's statements were voluntary. Barker was a student in the tenth grade. (T.p. 30). He could read and write. (T.p. 31). When Barker was arrested, before his interview, he was with his family. (T.p. 33). Nothing in the record shows whether they advised Barker about the police or whether they attempted to accompany him into his interview. Although Barker was a juvenile, he was fifteen years old when he was interviewed. (T.p. 33). And, in this case, the court had the opportunity to review the recording of Barker's entire interview. (Transcript of June 13, 2012, p. 2).

Moreover, nothing in the record shows that Barker's statement was "the product of ignorance of rights or of adolescent fantasy, fright or despair." *See In re: Gault*, 387 U.S. 1, 55, 87 S.Ct. 1428 (1967). Based on the entire record before the court, including the recordings admitted at the motion to suppress, it appears that Barker understood his *Miranda* rights. And it appears from the record that his statement was voluntarily made, even considering that he was a juvenile. Barker fails to show that the trial court erred in finding that his statement was voluntary. The second proposition of law need not be reviewed by this Court in this case.

<u>Proposition of Law No. 3</u>: Trial counsel renders ineffective assistance by failing to present evidence that would have affected the outcome of the juvenile court amenability proceedings. Sixth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

Counsel also argues that Barker's trial attorney was ineffective for not calling Dr. Deardorff, who performed Barker's bindover evaluation, and relying on Deardorff's written report instead. Counsel also argues that trial counsel should have hired an independent psychologist to "educate the court" that a juvenile is unable to assess risk. Lastly, appellate counsel claims that Barker's trial attorney should have explained to the judge what sentence and services would have been available in juvenile court. All of these arguments fail.

In order to prove a claim of ineffective assistance of counsel, a defendant must show: 1) that trial counsel's performance fell below an objective standard of reasonable representation, and 2) that prejudice arose from this performance. Counsel's performance is presumed to be within the range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2065 (1984). The issue in judging any claim of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. at 2064. To show prejudice, a defendant "must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373, 380 (1989).

Barker fails to rebut the presumption that counsel's performance was reasonable. At the amenability hearing, counsel admitted that the two homicides Barker committed were as serious as any crime. (T.p. 9).[3] But, counsel argued that Barker was not psychologically, mentally, or physically, fit to spend life in prison. (T.p. 9). Counsel noted that although Barker was not new

[3] The following references to the transcript are from the Juvenile Court hearing on November 30, 2011, unless otherwise noted.

to Juvenile Court, he had not received necessary services. (T.p. 10). Moreover, counsel raised Barker's mental status as being a reason to retain jurisdiction. Barker was three years behind in his education, and it was indicated that he had slight mental retardation. (T.p. 11). Trial counsel raised these appropriate issues for the court, and also argued that Barker was the least culpable of all three co-defendants.

Counsel pointed out to the court that Barker was the youngest and smallest of all three, and was a follower, not a leader. (T.p. 7). Counsel denied that Barker was actively involved in either murder. (T.p. 7-8). He argued that Barker was merely present at the shootings. (T.p. 8). Based on the totality of the information trial counsel presented to the court, Barker cannot show that his attorney's representation was below the appropriate standard.

Barker also fails to show that he would not have been bound over for criminal prosecution even if his appellate counsel had represented him at this time. Dr. Deardorff's report would not have changed. Barker was not incompetent – he understood police when he was questioned and understood the judge during his plea hearing. (Nov. 16, 2011 T.p. 63; Feb. 4, 2013 T.p. 15). And the juvenile court is educated regarding its own abilities and the services possible within the juvenile system. Trial counsel was not in a superior position to the judge in this regard.

Barker cannot show that trial counsel's representation was unreasonable. This Court need not review the third proposition of law.

Proposition of Law No. 4: Trial counsel renders ineffective assistance by failing to present evidence at a suppression hearing that the defendant did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. Sixth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

Barker claims that his trial attorney was deficient for failing to have him evaluated regarding his understanding of the notification of rights form used by police.

In order to prove a claim of ineffective assistance of counsel, a defendant must show: 1) that trial counsel's performance fell below an objective standard of reasonable representation, and 2) that prejudice arose from this performance. Counsel's performance is presumed to be within the range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2065 (1984). The issue in judging any claim of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. at 2064. To show prejudice, a defendant "must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373, 380 (1989).

Barker fails to rebut the presumption that counsel's performance was reasonable. Barker was not incompetent – he understood police when he was questioned and understood the judge during his plea hearing. (Nov. 16, 2011 T.p. 63; Feb. 4, 2013 T.p. 15). And, although appellate counsel argues that Barker's trial counsel should have admitted a copy of Barker's amenability hearing during the motion to suppress, she fails to show that this omission caused Barker prejudice. From review of the report, it appears that Barker's mental health was good, and that he possessed borderline intelligence. (Bindover Evaluation, p.6-7). He appeared to understand the purpose of Dr. Deardorff's examination. (Bindover Evaluation, p.5). Nothing in the report proves that Barker's statement to police was involuntary.

Again, Barker cannot show that his trial counsel was ineffective.

CONCLUSION

This Court need not accept Barker's case for review.

Respectfully,

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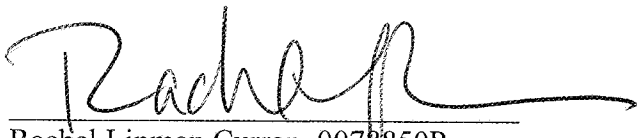

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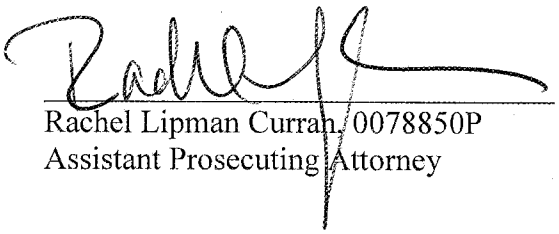
I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Sheryl Trzaska, The Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel of record, this 8th day of October, 2014.



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