ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. 2010-2198**
	:	
Appellee,	:	**CAPITAL CASE**
	:	
v.	:	
	:	
CALVIN S. McKELTON,	:	
	:	
Appellant.	:	

On Appeal from the Butler County Court of Common Pleas
Case No. CR2010-02-0189

SUR-REPLY OF APPELLEE

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PREFACE

Pursuant to this Court's Entry on October 22, 2014, the State of Ohio hereby submits the following sur-reply brief as to Proposition of Law XV(A). The sur-reply brief is solely intended to respond to Proposition of Law XV(A), and the Appellee still maintains all other arguments as put forth in its initial merit brief.

INTRODUCTION

In the culmination of a pattern of domestic violence, Appellant Calvin McKelton murdered his live-in girlfriend, attorney Margaret "Missy" Allen. Subsequently, he killed the only eyewitness to his crime, Germaine "Mick" Evans. A Butler County jury convicted him of both homicides and sentenced him to death for the murder of Mick Evans.

ARGUMENT

Proposition of Law XV:
Trial counsel does not render ineffective assistance of counsel by failing to make objections or motions that would have been unsuccessful.

As this Court has recently held, reversal of a conviction "for ineffective assistance requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 36. Moreover, both this Court and the United States Supreme Court have rejected Appellant's claim that counsel's standards of performance are to be measured against the American Bar Association's (ABA) Guidelines for the Appointment of Counsel in Death Penalty Cases. *Id.* at ¶ 39; *Bobby v. Van Hook*, — U.S. —, 130 S.Ct. 13 (2009). Moreover, even where deficient performance is established, Appellant must satisfy a high standard for prejudice. To warrant reversal, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

A. Plea Negotiations

In his reply brief, Appellant argues that he was denied the effective assistance of counsel based upon the Supreme Court of the United States decisions in *Lafler v. Cooper*, —— U.S. ——, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) and *Missouri v. Frye*, —— U.S. ——, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012). However, because the facts of Appellant's case fall outside of the holdings of these two cases, and because he received effective assistant, the State disagrees.

In *Frye*, the United States Supreme Court held that trial counsel had a duty to communicate the terms of a plea offer to a defendant and that counsel may be ineffective for failing to do so. *Frye*, 132 S.Ct. 1399. But, in the case at bar, the Appellant was aware of the terms of the plea deal, discussed the deal with all three of his counsel, and against counsel's unanimous advice, Appellant rejected the potential plea offer. As such, *Frye* is inapplicable. *See*, *State v. Carter*, 3d. Dist. No. 1–13–26, 2013-Ohio-4637, ¶ 18.

In *Cooper*, the United States Supreme Court held that counsel may be ineffective when counsel's advice led to the rejection of a plea deal that would have resulted in a lesser sentence. *Cooper*, 132 S.Ct. 1376. However, in the present case, the record clearly indicates that trial counsel advised Appellant to accept a plea offer, making *Cooper* inapplicable herein. Simply stated, Appellant chose to reject the offer that would have been better than the result of his jury trial. His counsel advised him to accept the offer. He cannot now get a second bite at the apple by trying to claim counsel made an error, when this is simply a situation of Appellant second guessing his own decision to reject the plea offer after seeing the results of his jury trial. *See, generally, State v. Baker*, 4th Dist. No. 13CA18, 2014-Ohio-1967, ¶ 23; *Carter*, 2013-Ohio-4637.

As neither *Frye* nor *Cooper* are factually applicable, this Court should squarely reject Appellant's attempt to twist new Supreme Court precedent to the uncontroverted facts of his case.

1. Experts.

In the face of the clear inapplicability of *Frye* and *Cooper*, Appellant twists his argument and states that if his trial counsel had hired more experts he would have then taken their advice. This argument must fail.

First, there is nothing in the record to support this argument, absent self-serving speculation. This Court has repeatedly held that when an issue on direct appeal would require evidence outside the record, such a claim is not appropriately considered on direct appeal. *See, State v. Keith*, 79 Ohio St.3d 514, 536-537, 1997-Ohio-367, 684 N.E.2d 47; *State v. Scott*, 63 Ohio App.3d 304, 308, 578 N.E.2d 841, 844 (1989).

What is more, trial defense counsel had the following exchange with the trial court on October 15, 2010:

> THE COURT: Okay. And I want to make sure that the record is very clear at this point, that back in February eight months ago, this Court authorized money for mitigation experts, forensic experts, investigators and mental health experts. And you've had that money available and I assume that if you felt it was necessary, that you have pursued all that with the Court; is that correct?
> MR. HOWARD: That's correct.
> THE COURT: Not with the Court, but with your client.
> MR. HOWARD: Yes, sir.
> THE COURT: And I want to make sure that at this point, there is nothing out there that could have been done that wasn't done, so that that would delay this hearing.
> MR. HOWARD: As far as mitigation, no, your Honor.
> THE COURT: Okay. I don't want to know what that mitigation is today. I just want to make sure that you had an opportunity to explore mitigation experts, mental health experts, investigators and everything that is necessary to present mitigation in this case.
> MR. HOWARD: Yes.

(October 15, 2010 Hearing; T.p. 16-17)

As such, there is nothing in the record to support the argument that trial counsel did not have everything that they needed to go forward with mitigation or the case in general. *See, State v. McGuire*, 80 Ohio St.3d 390, 399, 1997-Ohio-335, 686 N.E.2d 1112; *State v. Short*, 129 Ohio St.3d

360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 130.

Thereafter, Appellant again rehashes his argument that the ABA standards call for a certain number of experts. However, as has already been argued, the United States Supreme Court has held that the ABA guidelines are "only guides" to what reasonableness means, not its definition. *Hunter*, 2011-Ohio-6524, ¶ 39, citing *Van Hook*, 130 S.Ct. 13. What is more, this Court has already rejected the argument that the failure to hire a mitigation specialist/expert constitutes ineffective assistance of counsel. *See, State v. McGuire*, 80 Ohio St.3d 390, 399 ("First, he claims 'inadequate preparation and presentation of mitigation evidence,' because counsel should have hired a 'mitigation specialist' to gather mitigating evidence. However, he cites no authority that this is a requirement of effective assistance, and we hold that it is not."); *see, also Short*, 129 Ohio St.3d 360, ¶ 130.

Finally, it is also clear from the record that the reason Appellant rejected the State of Ohio's plea offer was because he believed himself to be innocent. (9/17/2017 Hearing, T.p. 13-20) The statements by Appellant that he did not want to accept the offer because he did not commit the crime (in his mind) are the reason given on the record and belie the arguments now put forth. No amount of expert assistance would have made Appellant accept responsibility when he clearly wanted to claim innocence. Appellant specifically stated in regards to why he rejected the plea offer "that I considered taking a plea deal, even though I am innocent" and "[a]ll I want is the opportunity to be able to go to trial with reliable counsel that I can prove my innocence." (9/17/2010 Hearing, T.p. 15, 20) As such, this proposition of law should be rejected.

2. Communication.

Appellant finally argues that he could not accept the advice of his counsel, even good advice, because "McKelton's attorneys had seen him once before they advised him to accept the State's plea deal, and that was an introductory visit." (Appellant's Reply Brief, p. 59) This is a false statement,

and cannot form the factual predicate to any ineffective assistance claim.

It must be remembered that Appellant had three attorneys. One was his own personally retained counsel, and the other two were death penalty certified counsel that were appointed by the trial court. It is unfathomable that Appellant's own personally retained counsel had only seen him once before advising him to accept the plea. Appellant was arraigned on 2/16/10, and had multiple court appearances with all his attorneys before the 9/17/10 hearing where the plea deal was discussed. (See, generally, hearings on 3/4/10, 6/9/10, 7/8/10, 8/6/10, 9/10/10) As such, it is clear that Appellant had seen his attorneys numerous times before deciding to reject their sound advice to accept the State's plea offer.

What is more, Appellant himself at the 9/17/10 hearing explains that it was his retained counsel, Richard Goldberg, that was coming to see him, and that he was fine with this arrangement. Specifically, Appellant stated "And as for Melynda and Greg, I only met with them privately twice. And I had no problem with that, because at the beginning of my case, my attorney, Richard Goldberg, told me he only needed them to handle all the necessary motions pertaining to the death penalty part of my case." (T.p. 13-14) As such, it is clear that Appellant had seen his counsel multiple times, was meeting with attorney Goldberg more often, and that at worst he simply only had two "private" meetings where his other two counsel were present. (T.p. 13) ("Richard only come to visit me when he wants, not when I ask him to.") This does not support Appellant's claims of ineffective assistance of counsel. Appellant had his own retained counsel, and two death penalty certified counsel all advising him to accept the State's offer. The fact that he decided to reject all of their advice does not make them ineffective. This Court should reject Appellant's arguments in Proposition of Law XV(A).

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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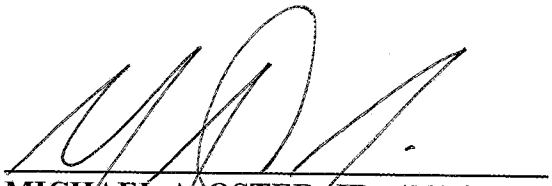

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PROOF OF SERVICE

This is to certify that a copy of the foregoing was served upon the following by ordinary U.S. mail this 29th day of October, 2014:

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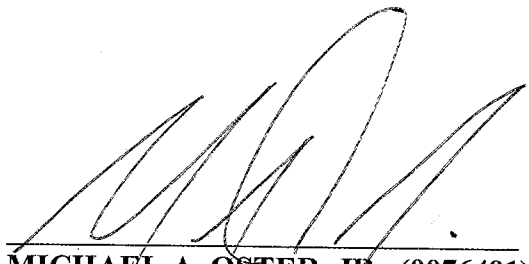

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