

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

*

Appellee,

*

Case No. 2008-2370

v.

*

Appeal taken from Wood County
Court of Common Pleas
Case No. 2007-CR-0359

CALVIN NEYLAND,

*

Appellant.

*

Death Penalty Case

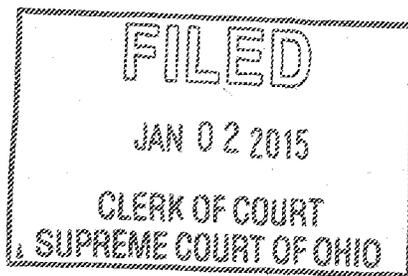
MEMORANDUM OF LAW IN RESPONSE TO
APPELLANT'S APPLICATION FOR REOPENING

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ON BEHALF OF PLAINTIFF-APPELLE

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I. APPELLANT'S APPLICATION IS UNTIMELY

Supreme Court Rule of Practice 11.06 governs applications for reopening, and mandates that an application be filed “within ninety days from the issuance of the mandate of the Supreme Court, unless the appellant shows good cause for filing at a later time.” S.Ct.R. 11.06(A). In this case, the Court issued its judgment on May 6, 2014, and its opinion on May 8, 2014. Appellant’s deadline for an application expired on August 7, 2014. His application is almost 120 days late, with no explanation offered and no good cause shown.

II. NEITHER OF THE TWO NEW CLAIMS RAISED BY APPELLANT HAVE MERIT

As with claims of ineffective assistance of trial counsel, the two-pronged *Strickland v. Washington* analysis governs claims of ineffective assistance of appellate counsel: to prove ineffectiveness, a defendant must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). To show deficient performance, a defendant must show that “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. An attorney does not need to argue every conceivable issue on appeal because it is his duty to “examine the record with a view to selecting the most promising issues for review.” *Jones v. Barnes*, 463 U.S. 745, 752 (1983). “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000). A defendant must prove prejudice by showing that “there is a reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.” *Jones* at 694.

Neyland has demonstrated neither. The two claims Neyland raises in this petition pale in comparison to the claims appellate counsel raised on direct appeal before this Court. And

evidence of appellate counsel's competence and persuasion can be found in the dissenting opinions filed by two of this Court's justices. (See, J. Pfeifer concur in part, dissent in part; J. O'Niell dissent.)

Facts

Both of Neyland's propositions of law relate to the trial court's determination that he was competent to stand trial. Trial counsel first raised the issue of Neyland's competency on October 29, 2007. (R. 29.) After the first evaluation was completed, the State requested a second one. (R. 36, 40.) The evaluations reached different conclusions, so, at the request of Neyland's counsel, a third evaluation was ordered. (R. 44, 45.) After counsel for the State and Neyland submitted the names and qualifications of proposed evaluators for the third evaluation, the trial court chose a third expert. (R. 49.) A competency hearing was conducted on March 21, 2008 and all three of the competency evaluators testified. (Apx. Vol. 1, pg. 29; Def. Motion # 3; 3/21/08 Hrg; Tr. pg. 1-115.)

According to Dr. Smith, Neyland only cooperated with tasks and requests that he deemed were beneficial to him, and refused to cooperate on anything he deemed potentially unfavorable. (3/18/2008; Tr. pg. 33.) Dr. Smith concluded that Neyland's behavior was more consistent with a personality disorder, as opposed to a mental illness. (3/18/2008; Tr. pg. 34.) Notably, Dr. Smith was able to observe Neyland "cooperate when he chose... and that when he chose not to be cooperative it was just that, it was a choice that he was making and not the product of some mental illness..." (3/18/2008; Tr. pg. 35.) Dr. Smith also testified that Neyland's expressed "preference would have been for a private attorney" and "he was aware of the appeals process and that was always an option that he had in the future." (3/18/2009; Tr. pg. 47-48.)

Dr. Kristen Haskins, Ph.D. observed and tested Neyland while he stayed thirty (30) days at the Twin Valley Health Care Facility. (3/18/2008; Tr. pg. 55-57.) Dr. Haskins testified Neyland understood the indictment, plea bargaining, the role of the judge and lawyers, and possible consequences of a capital trial. (3/18/2008; Tr. pg. 63-64.) According to Dr. Haskins, to a reasonable degree of certainty, Neyland did not suffer from a serious mental illness. (3/18/2008; Tr. pg. 67.) Dr. Haskins concluded that Neyland “is capable of understanding the nature and objective of the proceedings against him and of assisting in his own defense.” (3/18/2008; Tr. pg. 68.) Although, Dr. Haskins acknowledged that Neyland will prove difficult to represent due to insistence on focusing on irrelevant topics, in the end, Dr. Haskins testified “[i]t’s not that (Neyland) doesn’t understand reality. It’s not that he is incapable of understanding reality. It’s just that he has his own ways of looking at things, and he’s not likely to be very giving about that.” (3/18/2008; Tr. pg. 70-71.) According to Dr. Haskins, “[m]y full opinion is that [Neyland] is not mentally ill... and he is capable of assisting his own defense should he choose to do so.” (*Id.*)

According to Dr. Bergman, the expert appointed by the trial court, Neyland did not want an evaluation for competency conducted because he had previously been found competent to stand trial. (3/18/2008; Tr. pg. 92.) During the evaluation, Dr. Bergman attempted to question Neyland. (*Id.*) While questioning Neyland, Dr. Bergman found him to be condescending, irritable, and very controlling. (3/18/2008; Tr. pg. 93.) However, Dr. Bergman also described Neyland as pleasant, articulate, focused, goal-oriented, and logical - so long as she allowed him to talk. (*Id.*) Dr. Bergman opined that Neyland did not suffer from a mental illness. (*Id.*) According to Dr. Bergman, these personality disorders did not render him incapable of understanding charges against him or assisting in his defense. (*Id.*) In her opinion, Neyland

understood the significance of the charges, nature and objectives of the court proceedings, and was capable of assisting his attorneys, and capable of participating in court proceedings in a meaningful manner. (3/18/2008; Tr. pg. 95.) Dr. Bergman acknowledged, due to his personality disorder, Neyland “thinks he’s always right,” “is reluctant to cooperate,” and would prove difficult to represent. (*Id.*) However, Dr. Bergman described Neyland’s thought process as logical, linear, as capable of following a discussion or concept to conclusion, and able to focus attention and concentration on topic. (*Id.* at 96-97.) Although Dr. Bergman found that his interpersonal style might prove difficult for his attorneys to work with, she did not find evidence of mental illness. (*Id.* at 97.) In conclusion, Dr. Bergman found that Neyland was not mentally ill. (3/18/2008; Tr. pg. 100.) According to Dr. Bergman, “although [Neyland] thinks he’s right and thinks he knows the way the case should go, [he] is not incapable of listening to his attorney and considering what attorney has to say. He’s not incapable of doing that.” (3/18/2008; Tr. pg. 105.)

After hearing from Doctors Sherman, Smith, Haskins, and Bergman, the trial court found Neyland competent to stand trial. (R. 62.) In its decision finding Neyland competent, the trial judge acknowledged “Defendant would be difficult to represent... but this appears to be his voluntary choice in refusing to assist due to his guarded nature.” (R. 62.) After the competency hearing, a psychologist, Dr. Wayne Graves, was appointed at defense counsel’s request to conduct an evaluation of Neyland in preparation for mitigation. (R. 148, 161.) After this appointment, trial counsel filed a motion for reconsideration of competency because Neyland continued to refuse to cooperate with his attorneys, the mitigation specialist, or the defense psychologist. (R. 201.) The State opposed reconsideration of competency. (R. 211.) The trial court denied Neyland’s request for reconsideration of competency by noting Neyland “is rational

and able to logically assess his situation and legal difficulties. The fact that he may be difficult to keep focused on relevant issues and facts makes his defense troublesome, but it does not meet the statutory definition.” (R. 214.)

PROPOSITION OF LAW NO. I: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails to have his client’s competency revisited during his capital trial and sentencing.

Neyland’s first proposition of law lacks merit and is refuted by the record, and, therefore, his appellate counsel was not ineffective for not making this argument on direct appeal. According to Neyland, appellate counsel is ineffective for not raising a claim to this Court that trial counsel was ineffective because trial counsel allegedly failed to request “an additional hearing on his competency where they could have presented their *continued inability* to work with Neyland[.]” (Pet. p. 4.) (emphasis added.) Appellate counsel cannot be constitutionally obligated to bring an argument that was not only unsupported by the record, but actually refuted by it. In fact, on September 19, 2008, trial counsel filed a motion for reconsideration of competency based on Neyland’s refusal to cooperate with his attorneys, the mitigation specialist, or the defense psychologist. (R. 201.) The Sixth District Court of Appeals noted this glaring misrepresentation by stating “Neyland’s allegation that counsel was ineffective for failing to request his reevaluation for competency at trial lacks factual support in the record.” *State v. Neyland*, 2013-Ohio-3065, ¶31 (6th Dist. Ct. App. 2013). That court went on to find, “[i]n actuality, Neyland’s counsel attempted to readdress the issue of Neyland’s competency, but the trial court denied his motion.” *Id.*

Trial counsel raised the issue of competency and a competency hearing was conducted. After hearing from Doctors Sherman, Smith, Haskins, and Bergman, the trial court found Neyland

competent to stand trial. (R. 62.) There is no dispute that trial counsel filed a motion for reconsideration of competency. (R. 201.) The trial court denied Neyland's request for reconsideration of competency by noting Neyland "is rational and able to logically assess his situation and legal difficulties. The fact that he may be difficult to keep focused on relevant issues and facts makes his defense troublesome, but it does not meet the statutory definition." (R. 214.) Since trial counsel did exactly what Neyland alleges they failed to do, this claim lacks merit.

Because Neyland cannot show he was incompetent to stand trial, Neyland cannot show prejudice under *Strickland*. See, *Cowans v. Bagley*, 639 F.3d 241, 250 (6th Cir. 2011) (Petitioner must demonstrate he was actually incompetent before he can establish prejudice.) This Court recently denied the underlying premise of Neyland's claim – that he was tried while incompetent. This Court noted the well-established law "a defendant is presumed to be competent to stand trial..." *State v. Neyland*, 139 Ohio St.3d 353, 357 (2014). Denying the claim, this Court held "the trial court did not abuse its discretion in finding that Neyland was competent to stand trial." *Id.* This Court went on to conclude that the "trial court [omit] reasonably determined that greater weight should be given to testimony of a psychiatrist and psychologist who examined Neyland during a 30-day observation period rather than a psychiatrist who spent only a little more than an hour with him." *Id.* at 363.

Moreover, it is pure speculation to assume had trial counsel more forcefully requested another hearing that the trial court would have convened another hearing *and* its decision would have changed. The trial court's decision was reached after a lengthy hearing and testimony from multiple experts; it is highly unlikely that adding only the fact that Neyland continually refused to work with his defense attorneys would have merited reconsideration of the trial court's previous factual findings and ruling. There is an insufficient showing of "prejudice" where "one

is left with pure speculation on whether the outcome... could have been any different.” *Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004).

This proposition of law lacks merit. Because the proposition is not a strong argument, much less an argument stronger than those presented by appellate counsel, it does not support Neyland’s contention that his appellate counsel was deficient for not including it on direct appeal. And Neyland cannot demonstrate that he was prejudiced by its omission, since it is meritless and would not have changed the result. In other words, Neyland has not demonstrated that appellate counsel was ineffective for not including this proposition of law in the direct appeal.

PROPOSITION OF LAW NO. II: When the trial court is confronted with indicia that the defendant is incompetent to stand trial, the trial court’s failure to order a competency evaluation and conduct a hearing violates the defendant’s procedural due process rights.

Neyland’s second proposition of law lacks merit because the trial court was under no obligation to *sua sponte* order another competency hearing, and, therefore, his appellate counsel was not ineffective for not making this argument on direct appeal. Neyland alleges that his appellate counsel “dropped the ball” when they did not raise a claim alleging that “[t]he trial court had an obligation to hold a *second* hearing on Neyland’s competence” even though the trial court had only recently conducted a lengthy hearing, heard ample evidence, and found that Neyland was competent to stand trial. (Pet. p. 6.) In light of the extensive and complete nature of the competency hearing that played out before the trial court, appellate counsel was under no constitutional obligation to raise a claim stating the trial court was wrong for not holding a second hearing based solely on Neyland’s continued refusal to get along with his attorneys and their team. This theme was exhausted during the competency hearing before the trial court. And there is no question that appellate counsel extensively challenged the trial court’s competency

determination during the direct appeal; a claim that this Court rejected. *Neyland, supra*, at ¶¶ 31-61.

Contrary to Neyland's assertions, the issue of his competency was properly and fully vetted before Neyland's trial. It is well settled that a defendant cannot be tried while legally incompetent. *State v. Berry*, 72 Ohio St.3d 354, 359 (1995). The evidence showed that Neyland was competent to stand trial. *Neyland, supra*, at ¶¶ 31-61. In order to make a substantive competency claim, Neyland must demonstrate that he was actually tried and convicted while mentally incompetent. *State v. Neyland*, 139 Ohio St.3d 353, 357 (2014). A defendant must demonstrate a lack of competency by a preponderance of the evidence. *State v. Jordan*, 101 Ohio St.3d 216 (2004). Moreover, a trial court's finding that a defendant is competent to stand trial will be upheld if supported by some reliable and credible evidence. *State v. Vrabel*, 99 Ohio St.3d 354 (2003). "Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *United States ex rel. Foster v. De Robertis*, 741 F.2d 1007, 1012 (7th Cir. 1985). Likewise, "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Burkett v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000). In the present case, the trial court conducted a competency hearing. (Apx. Vol. 1, pg. 29; Def. Motion # 3; 3/21/08 Hrg; Tr. pg. 1-115.) By invoking R.C. § 2945.37 and conducting a hearing, the trial court actively protected Neyland's rights.

According to Neyland, one competency hearing was not enough – he needed a second hearing. However, an inmate "cannot rely on testimony already considered at the first competency hearing as cause to demand a second." *Franklin v. Bradshaw*, 695 F.3d 439, 450 (6th Cir. 2012). In *State v. Franklin*, this Court held the defendant was not entitled to a second

competency hearing because the “evidence did not need be reconsidered because similar testimony had been presented at the [omit] pretrial competency hearing.” 97 Ohio St.3d 1, 5 (2002). Neyland is relying upon evidence that purportedly showed he was unwilling to work with his attorneys and experts. That issue was exhaustively hashed-out during the initial competency hearing. Moreover, a defendant’s refusal to cooperate with counsel does not compel a finding that he was incompetent to stand trial. *Berry*, 72 Ohio St.3d at 361. As such, a defendant’s unwillingness to participate or assist his attorneys does not equate to an inability to do so. *Id.* at 362. “Deference on these issues should be given ‘to those who see and hear what goes on in the courtroom.’” *State v. Were*, 118 Ohio St. 3d 448, 455 (2008). The trial court did not err in refusing to conduct a second competency hearing to rehash Neyland’s continued unwillingness to assist his attorneys, a major topic of the first hearing. Thus, appellate counsel was clearly not ineffective for failing to raise such a claim.

Moreover, because Neyland cannot show he was incompetent to stand trial, Neyland cannot show prejudice under *Strickland*. See, *Cowans v. Bagley*, 639 F.3d 241, 250 (6th Cir. 2011) (Petitioner must demonstrate he was actually incompetent before he can establish prejudice.) As pointed out previously, this Court recently denied the underlying premise of Neyland’s claim – that he was tried while incompetent. *Neyland*, 139 Ohio St.3d at 357.

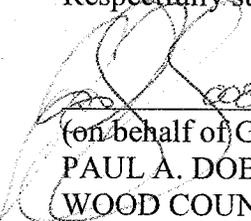
The trial court’s finding that Neyland was competent to stand trial is supported by the record. This proposition of law lacks merit. Because the proposition is not a strong argument, much less an argument stronger than those presented by appellate counsel, it does not support Neyland’s contention that his appellate counsel was deficient for not including it on direct appeal. And Neyland cannot demonstrate that he was prejudiced by its omission, since it is

meritless and would not have change the result. Neyland has not demonstrated that appellate counsel was ineffective for not including this proposition of law in the direct appeal.

III. CONCLUSION

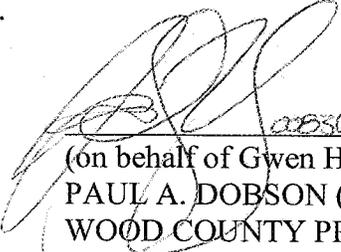
The State of Ohio respectfully requests that this Court deny Appellant's application for reopening because it is untimely and lacks merit.

Respectfully submitted,


003646 per email authority
(on behalf of Gwen Howe-Gebers)
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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing memorandum was served upon Tyson Fleming and Pam Prude-Smithers, Attorneys for Appellant and Assistant State Public Defenders, Office of the Ohio State Public Defender, 250 East Broad St., Suite 1400, Columbus, Ohio 43215, by regular U.S. mail this 2nd day of January, 2015.


003646 per email authority
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