

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2010-0854
Plaintiff-Appellee	:	On Appeal From The Hamilton County Court of Common Pleas, Case No. B-0600596
vs.	:	
ANTHONY KIRKLAND	:	This Is A Capital Case.
Defendant-Appellant	:	

RESPONSE TO APPELLATE RULE 26(B) APPLICATION TO REOPEN

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STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Anthony Kirkland was charged by the Hamilton County Grand Jury in two indictments, numbered B-0901629 and B-0904028. The indictments were consolidated for trial under the earlier number, B-0901629. The twelve counts charged involved four victims as follows:

(1.) **Casonya Crawford**: Attempted Rape, Aggravated Murder during an Attempted Rape with death specification (course of conduct, attempted rape), Aggravated Murder during an Aggravated Robbery with death specification (course of conduct, aggravated robbery), Aggravated Robbery, and Abuse of a Corpse. All offenses occurred on May 4, 2006.

(2.) **Esme Kenney**: Attempted Rape, Aggravated Murder during an Attempted Rape with two death specifications (course of conduct, attempted rape), Aggravated Robbery, Aggravated Murder during an Aggravated Robbery, with two death specifications (course of conduct, aggravated robbery) and Abuse of a Corpse. All offenses occurred on March 7, 2009.

(3.) **Mary Jo Newton**: Murder and Abuse of a Corpse. Both offenses occurred on June 14, 2006.

(4.) **Kimya Rolison**: Murder and Abuse of a Corpse. Both offenses occurred on December 22, 2006.

On March 4, 2010, after a jury was impaneled, the defendant entered a guilty plea to Counts 6 and 7 in Case B-0901629, and Counts 1 and 2 in case B-0904028. These were the murder and abuse of a corpse counts involving victims Mary Jo Newton and Kimya Rolison. (See T.p. 825-845) Sentencing was deferred.

Kirkland was found guilty as charged on the remaining counts in a jury trial. At the conclusion of the sentencing hearing on March 17, 2010, the jury recommended death on all the

capital counts. On March 31, 2010, the trial court did impose the death penalty as recommended by the jury and maximum consecutive sentences on the remaining counts.

Kirkland, as required by law, filed his direct appeal to this Court. Kirkland's brief was filed in that court on March 21, 2011. In it he raised ten propositions of law, including claims of ineffective assistance of counsel at mitigation, ineffective assistance of counsel at voir dire, and prosecutorial misconduct. The State filed its responsive brief on July 11, 2011. This Court affirmed on May 13, 2014. *State v. Kirkland*, 140 Ohio St.3d 73, 15 N.E.2d 818, 2014-Ohio-1966.

MEMORANDUM

Appellate Rule 26(B) allows a defendant to reopen his direct appeal when he has fallen victim to ineffective assistance of appellate counsel. In *State v. Murnahan* and its progeny, this Court ruled that a defendant moving to reopen his direct appeal must (1) set forth a colorable claim of ineffective assistance of appellate counsel; (2) show that, when res judicata would bar these claims, applying the doctrine would be unjust; and (3) show that there was a reasonable probability that the new assignments of error would have been successful if they had been raised in the direct appeal. *State v. Murnahan* (1992), 63 Ohio St. 3d 60, 66, 584 N.E.2d 1204; *State v. Dillon*, 74 Ohio St. 3d 166, 171, 1995-Ohio-169, 657 N.E.2d 273; *State v. Spivey*, 84 Ohio St. 3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

In order to demonstrate ineffective assistance of counsel, the defendant must show that counsel made errors so serious that he "was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Johnson* (1986), 24 Ohio St.3d 87, 494 N.E. 2d 1061. Furthermore, appellate

counsel need not raise every non-frivolous issue. *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308.

In *Strickland v. Washington*, the United States Supreme Court stated:

“Judicial scrutiny of counsel’s performance must be highly deferential...a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”

A finding that prejudice is lacking precludes inquiries as to whether an essential duty was breached.

Under App. R. 26(B)(2)(c), an appellate court shall consider only those “assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court.” Thus, an issue that has already been dealt with below may not be revisited simply due to the filing of an Application to Reopen.

In Kirkland’s first and third propositions of law, he argues that appellate counsel were ineffective for failing to include the juror questionnaires in the record before they filed the Brief of Appellant, depriving appellate counsel of the ability to raise issues based off the juror questionnaires. But this simply was not the case. Appellate counsel raised an ineffective assistance of trial counsel claim on direct appeal alleging that counsel conducted a “garden variety” felony voir dire. The central focus of this claim was that trial counsel failed to weed out biased jurors. This Court rejected this claim. *State v. Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014-Ohio-1966, at ¶’s 98-102. Since this Court already considered juror bias, it need not be revisited here.

Moreover, Kirkland failed to demonstrate that certain jurors were biased based on the answers they gave on their juror questionnaires, which answers were explored in more detail during voir dire.

Kirkland argues that Juror Mascus was biased because she wrote on the juror questionnaire that if she were the defendant she would not want someone with her state of mind on the jury. The record, however, shows that defense counsel discussed this and other issues raised from Juror Marcus's questionnaire with her during voir dire. Juror Marcus was adamant that she could be a fair and impartial juror and would follow the court's instructions. She also clarified that she never had personal contact with victim Crawford's family. (T.p. 570-574) Kirkland's trial counsel explored all the issues raised from Juror Marcus's questionnaire during voir dire and, as her answers indicate, there is nothing contained therein suggesting that she was biased.

Kirkland next argues that jurors Casada, Kelso, Lubbers, and alternate juror Antoniades indicated bias. But the record demonstrates otherwise. Each of these jurors was questioned by Kirkland's trial counsel during voir dire. Juror Casada indicated that even though she had little kids she would be able to look at the graphic photographs of the victims. (T.p. 523-524) Juror Kelso indicated that her father was a federal district court judge but that she would set aside any information she learned from her father and follow the law given by the court in this case. (T.p. 650) Juror Lubbers indicated that she had no problem with following the law and that she could be fair and impartial to both sides. (T.p. 639) Alternate juror Antoniades was questioned and indicated that she could be fair and impartial. (T.p. 744-747) In sum, none of these jurors expressed any demonstrable bias. Appellate counsel was not ineffective for failing to make the juror questionnaires part of the appellate record.

In his second proposition of law, Kirkland argues that appellate counsel were ineffective on direct appeal for failing “to raise several instances of trial court errors, prosecutorial misconduct, and ineffective assistance of counsel in violation of Kirkland’s due process rights. Appellate counsel raised numerous errors on direct appeal, including prosecutorial misconduct and ineffective assistance of counsel. *State v. Kirkland*, 2014-Ohio-1966, at ¶’s 72, 78. To the extent these issues were dealt with on direct appeal, they need not be revisited here.

Moreover, Kirkland does not cite to portions of the record where these alleged errors occurred or attempts to argue how he was prejudiced by appellate counsel’s failure to raise these issues on direct appeal. Absent any attempt to demonstrate prejudice, this proposition of law should fail. This Court should not be left to speculate prejudice where no prejudice has been identified.

In Kirkland’s fourth proposition of law, he does not argue ineffective assistance of appellate counsel. Instead, he argues that the trial court violated his federal and state constitutional rights when it (1) admitted cumulative, gruesome photographs, (2) allowed the admission of victim impact evidence and (3) improperly admitted all trial phase exhibits during the penalty phase. To prevail on an application to reopen, the applicant must set forth a colorable claim of ineffective assistance of appellate counsel. *State v. Murnahan*, supra. Since these claims do not involve the performance of appellate counsel, they are barred from being raised here.

Should these claims be generously construed as issues appellate counsel failed to raise on direct appeal, Kirkland still has not provided any basis to reopen his appeal. Kirkland has failed to identify the specific photographs, victim impact evidence, or trial exhibits that he believes were improperly admitted. Again, Kirkland does not even attempt to show any particular demonstrable prejudice in the admission of this evidence.

In his fifth proposition of law, Kirkland argues that appellate counsel were ineffective for failing to raise various claims of ineffective assistance of trial counsel at the guilt and mitigation phases on direct appeal. These claims include counsel's failure to: (1) object to other acts testimony, gruesome photographs and victim impact evidence; (2) object to prosecutorial misconduct throughout the trial; (3) advocate for their client during the trial phase; (4) ensure statements were properly redacted; (5) effectively conduct voir dire; (6) request change of venue; and, (7) effectively advocate during mitigation.

The State notes that appellate counsel did raise claims of ineffective assistance of trial counsel at both phases of the trial. *State v. Kirkland*, 2014-Ohio-1966, at ¶¶ 72-77. Moreover, Kirkland again has failed to identify how he was prejudiced by trial or appellate counsel's alleged ineffectiveness. Most of the ineffective assistance of counsel allegations involve second guessing counsel's strategic decisions. No real attempt is made by Kirkland to identify or explain how he was prejudiced by trial or appellate counsel's performance. Prejudice cannot be presumed; it is Kirkland's burden to demonstrate it.

In his sixth proposition of law, Kirkland raises various claims of prosecutorial misconduct. Such claims were raised on direct appeal and should not be revisited here. *State v. Kirkland*, 2014-Ohio-1966, at ¶¶ 78-98. Again, Kirkland merely alleges prosecutorial misconduct without making any attempt to demonstrate that the prosecutor engaged in improper conduct that resulted in prejudice.

In sum, Kirkland has failed to show that his appellate counsel were ineffective. His application contains claims that are not based on ineffective assistance of appellate counsel. Kirkland's claims that are based on ineffective assistance of appellate counsel are broad based

conclusory allegations wherein Kirkland made no attempt to establish how he was prejudiced by appellate counsel's ineffectiveness.

For the foregoing reasons, Kirkland's application to reopen must be denied.

CONCLUSION

Hunter falls far short of meeting the standards for a reopening of his appeal. Appellee submits that Hunter's application must be denied.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Rachel Troutman (0076741) and Elizabeth Arrick (0085151), Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998, counsel of record, this 8th day of January, 2015.



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