ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	15-0062
Appellee	)	Appeal No: 2013-L-090
Vs.	)	ON APPEAL FROM THE COURT OF
ROBERT F JARRELLS	)	APPEALS OF OHIO ELEVENTH
Appellant	)	APPELLATE DISTRICT COUNTY OF
	)	LAKE
	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT

ROBERT F JARRELLS

Appellant/ProSe

ROBERT F JARRELLS 633-536

2500 S. Avon Beldon rd

Grafton, Ohio 44044

Attorney for Appellee

ALANA A. REZAEE

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FILED

JAN 12 2015

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This is a case of public or great interest and involves a substantial Constitutional question because currently this Court has granted review of the Court of Appeals for the Ninth District Appellate Court decision, State V South, 2014 Ohio 2245, 2014 LEXIS 1234, 139 Ohio St.3d 1402 9 N.E.3d 1061.

The appellate in this case was charged with two counts of OVI under 4511.19(A)(1)(a). When he entered a Guilty plea the Trial Court erroneously informed Appellant that the maximum penalty for third degree felony OVI was Five years in prison.

Even though the Trial Court acknowledged the error at sentencing when informing the Appellant his true maximum penalty was no more than 36 Months, Its Appellants contention his Guilty plea was not Knowingly, Intelligently or Voluntarily entered because of the Trial Courts error during the Crim.P.Rule 11 proceedings.

Furthermore, It is the Appellants contention that his four year sentence under the Specification R.C.2941.1413 attached to the OVI offense was unlawful because the Specification could have only carried with it a true maximum of 36 Months maximum penalty under the reasoning set forth in the South, Supra, decision. Appellant was sentenced to four years in prison on the Specification.

Furthermore, the Constitutionality of the Specification is now in grave doubt based on the State V Klembus, 2014-Ohio-3227.

Based on the above factual precedent authority, this Court should grant jurisdiction to review this case pursuant to South, Supra, pending Before this Court.

STATEMENT OF THE CASE AND FACTS

The Appellant was indicted on two counts of Operating a vehicle Intoxicated with a Specification that Appellant had previously been convicted of OVI which also made both counts felonies of the third degree. the indictment also carried one count of failure to comply with order or signal of a police officer, which also constitutes a felony of the third degree.

On August 12, 2013, The State proceeded to sentence the Appellant to one count of OVI under 4511.19(A)(1)(a) with the felony enhancement specification to a total of 6 years. 2 years on the OVI and 4 years on the specification. The State also sentenced the Appellant to 2 years on the failure to comply with order or signal of a Police Officer. Each sentence was to be served consecutive to the other for a total sentence of 8 years. On November 15, 2013, Appellant in and through Appellate Counsel (Vanessa Clapp) filed a timely Notice of Appeal. The Eleventh Appellate District affirmed the Trial Courts decision. State V Jarrells,11th dist.No.2013-L-090, 2014-Ohio-2703.

On July 17, 2014, Appellant timely filed an application 26(B) to reopen his direct Appeal citing that the Appellate attorney was ineffective for not supplementing his Direct appeal with the fact that Appellants Guilty plea was not knowingly, intelligenly or voluntarily entered. and that Appellant counsel rendered ineffective for failure to supplement his direct Appeal with a claim of error challenging the Constitutionality of the Specification.

On December 8, 2014, the Eleventh District Court denied

Appellants Rule 26(B) application, State V Jarrells, 11th dist. No.2013-L-090, 2014-Ohio-2703.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO 1

WEATHER APPELLATE COURT ERRED WHEN RULING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR NOT RAISING A CLAIM CHALLENGING THE CONSTITUTIONALITY OF THE SPECIFICATION WHEN REQUESTED TO DO SO BY APPELLANT. .

Appellant contends that his constitutional rights were violated and that he was not afforded equal protection when charged and sentenced for the Specification under 2941.1413. In State v Klembus, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-1830 (Vacated and superseded on reconsideration by State V Klembus, 2014-Ohio-3227) The majority agreed with the Appellants argument that R.C.2941.1413 the repeat OVI specification, violated equal protection because the specification was based on the same information and proof to establish the underlying fourth degree violation under 4511.19(A)(1)(a).

In the instant case, The Appellate Court held that Appellant was charged under 4511.19(A)(1)(a) but sentenced under 4511.19(G)(1)(e) which was a third degree felony. Appellant contends that he was not sentenced under 4511.19(G)(1)(e) but was sentenced under 4511.19(A)(1)(a) In the Rogue Klembus case the question was not which part of R.C.4511.19 Appellant was sentenced under but in fact the constitutionality of the Specification under R.C.2941-1413.

Klembus argued that the Specification to R.C.4511.19 violates equal protection because the specification violates equal protection because the specification permits the prosecution to obtain a greater punishment for the underlying offense without proof of any additional elements or facts. In support of this argument Klembus cites Wilson, 58 Ohio St.2d 52, 388 N.E.2d 745 for the proposition that if two different statutes prohibit identical activity and require identical proof, yet impose different penalties, sentencing the person under the statute with the higher penalties violates equal protection.

If the repeat OVI specification was imposed with uniformity on all similarly situated offenders, it would be rationally related to the States interest in protecting the public and punishing the offender. However there is no requirement that the specification be applied with uniformity, and there is no logical rationale for the increased penalty imposed on some repeat OVI offenders and not others requiring proof of some additional element to justify the enhancement. especially since the class is composed of offenders with similar histories of OVI convictions. In the instant case Appellant was charged in the Cuyahoga County Court with the same exact third degree felony OVI, but wihtout the Specification. state V. Jarrells, CR-556216, 2014-Ohio-101707.

BAsed on the above factual circumstances surrounding the Appellants reasoning and justification, the Appellate Court erred in its procedural rulling.

PROPOSITION OF LAW NO 2

WHETHER APPELLATE COURT ERRED WHEN IT FAILED TO RENDER APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO RAISE A CLAIM UNDER HOUSE BILL 86 R.C.2929.14(A)(3)(a) WHICH DOES NOT LIST R.C.2941.1413 THE OVI SPECIFICATION AS ONE OF THE THIRD DEGREE FELONIES CARRYING A SENTENCE OF 5 YEARS

The Appellant contends that Appellate counsel rendered ineffective when failing to supplement his direct appeal with the Claim that under House Bill 86 the General assembly under R.C.2929(A)(3)(a) list a total of 9 offenses that are third degree felonies that would still carry with it a sentence of 5 years. All others under R.C.2929.14(A)(3)(b) would only carry a sentence of 36 months.

Appellant claims that the General Assembly did not intend for the OVI specification to be included in the third degree felony sentencing statute that carried with it the more severe sentence. If in fact that was their intention it would have been listed under R.C.2929.14(A)(3)(a).

Such contention is based on the fact that Appellant was sentenced after September 30, 2011, the effective Date of H.B.86 for third degree felony OVI R.C.4511.19(A)(1)(a) with the specification R.C.2941.1413. It is Appellants contention that since the Court recognized H.B.86 and sentenced the Appellant under H.B.86 for the OVI offense that the specification should have also carried with it a sentence of 9 to 36 Months as stated in 2929.14(A)(3)(b) for third degree felony sentencing. Appellant was entitled to the amended sentencing provisions yet received a 4 year

mandatory sentence for the Specification. If the specification is in fact an enhancement to the Third degree felony OVI under 4511.19(A)(1)(a), then the enhancement can carry no more than the Charge itself. If the Specification is in fact another charge that has its own statute of R.C.2941.1413 then it should also carry with it a degree of felony and would in fact then be a violation of the Double Jeopardy clause.

Based on the above factual circumstances and compelling reasons and precedent authority, this Court should grant jurisdiction to review this case or reverse this case back to the Appellate Court once this court issues its ruling in State v South, 2104-Ohio-2245 and or State v Klembus, 2014-Ohio-3227.

CONCLUSION

This Court should grant jurisdiction to review this case pursuant to State V Klembus And State V South, Supra, pending before this Honorable Court.

Respectfully Submitted

Robert F Jarrells 633-536
2500 S. Avon Beldon rd
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CERTIFICATE OF SERVICE

I Robert F. Jarrells, Appellant/Defendant in ProSe, Hereby certify that a true copy of this Appeal to the Supreme Court of Ohio was sent to the Lake County Prosecutor at 105 Main Street, Painsville Ohio 44077, on this 5th day of Janusry 2015 by regular U.S. Mail.

Robert F Jarrells 633-536

Appellant/Defendant ProSe

APPENDIX A

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	)SS.	
COUNTY OF LAKE	)	**ELEVENTH DISTRICT**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

ROBERT F. JARRELLS, JR.,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2013-L-090

FILED
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MAUREEN S.
CLERK
LAKE COUNTY

On July 17, 2014, appellant, Robert F. Jarrells, Jr., filed a pro se application to reopen his appeal pursuant to App.R. 26(B) based upon a claim of ineffective assistance of appellate counsel. Appellant is attempting to reopen the judgment rendered by this court in *State v. Jarrells*, 11th Dist. Lake No. 2013-L-090, 2014-Ohio-2703. In *Jarrells*, this court affirmed the trial court's judgment sentencing appellant following a guilty plea for failure to comply with order or signal of police officer and operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them ("OVI"), with an accompanying specification.

On July 29, 2014, appellee, the state of Ohio, filed a response in opposition to appellant's application for reopening. Appellant filed a pro se reply to the state's response on August 7, 2014.[1]

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1. On October 8, 2014, appellant filed a one-page pro se "Motion to Supplement Pending Appeal 26(B) For Good Cause Shown." It appears appellant is attempting to supplement his application for reopening with the brief and arguments of the amicus curiae in another case pending before the Supreme Court of Ohio. In his motion, appellant states that the merit brief of amicus curiae is

The determination of an App.R. 26(B) exercise involves a two-prong test, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). At the first prong, an applicant must make a threshold showing that there is a genuine issue as to whether he was deprived of effective assistance of appellate counsel. App.R. 26(B)(5). If the applicant succeeds in this showing, the matter proceeds to the second prong. At this prong, in order to have the prior appellate judgment altered, the applicant is required to show that the performance of appellate counsel was deficient and that the deficiency prejudiced the outcome of the appeal. *See* App.R. 26(B)(9).

Applying the *Strickland* standard, the Supreme Court of Ohio held that the two-prong analysis "is the appropriate level of review to determine whether an appellant has raised a 'genuine issue' in an application for reopening an appeal * * * [.]" *State v. Reed*, 74 Ohio St.3d 534, 535 (1996). Appellate counsel's failure to raise an issue on appeal is prejudicial if it would have had a "reasonable probability" of success had it been asserted. *Id.* at 535-536.

In his application, appellant takes issue with his appellate counsel's representation and specifically raises the following four claims as assignments of error:

"attached." However, this court has only received appellant's one-page motion and a review of the docket reveals that nothing was attached to said motion. The next day, the state filed a motion to strike maintaining that there are no appellate rules that provide for such a filing, nor is it proper for appellant to attempt to supplement his application for reopening with a brief filed by another party in another case. Upon consideration, we agree with the state's position and hereby overrule appellant's motion to supplement.

"1. Appellate counsel rendered ineffective assistance of counsel when counsel failed to raise a claim challenging the constitutionality and voluntariness of appellant's guilty plea when the trial court failed to inform appellant of the true maximum penalty in violation of Ohio Crim. Rule 11(C)(2)(a).

"2. Appellate counsel rendered ineffective assistance of counsel when counsel failed to raise a claim that the trial court committed reversible error when the court ordered a portion (60-days) of the OVI offense sentence mandatory when also ordering the specification sentence mandatory.

"3. Appellate counsel rendered ineffective assistance of counsel when counsel failed to raise a claim that the trial court's journal entry imposed additional sanctions against appellant that went beyond the trial court's oral sentence imposed violating appellant's rights under Ohio Crim. Rule 43(A).

"4. Appellate counsel rendered ineffective assistance of counsel when counsel failed to raise a claim challenging the constitutionality of the specification under *State v. Klembus*, 2014-Ohio-1830, 2014 Ohio App. LEXIS 1794 (Ohio App. 8th Dist. May 1, 2014), when requested to do so by the appellant."

In his appeal, appellant, through his appellate counsel, asserted the following assignment of error:

"'The trial court erred by sentencing the defendant-appellant to eight years in prison.'" *Jarrells, supra,* at ¶6.

In the underlying case, a police officer observed appellant's vehicle weaving left of center. *Id.* at ¶2. After activating the cruiser's lights and sirens, the officer followed appellant's vehicle over an eight mile period in which other

officers joined in the pursuit. *Id.* Appellant was eventually stopped after officers deployed stop sticks and deflated the tires on his car. *Id.* After the stop, officers made additional observations that appellant was impaired, including the smell of an alcoholic beverage, slurred speech, and glassy eyes. *Id.*

Appellant was subsequently indicted on three counts: count one, failure to comply with order or signal of police officer, a felony of the third degree, in violation of R.C. 2921.331(B); count two, OVI, a felony of the third degree, in violation of R.C. 4511.19(A)(1)(a), with an accompanying specification pursuant to R.C. 2941.1413; and count three, OVI, a felony of the third degree, in violation of R.C. 4511.19(A)(2), with an accompanying specification pursuant to R.C. 2941.1413. *Id.* at ¶3. The offenses were committed while appellant was out on bail in a Cuyahoga County OVI case. *Id.*, fn. 1. Appellant's record includes five or more prior OVI violations within 20 years of committing the instant offenses. *Id.*

Appellant ultimately pleaded guilty to counts one and two, with the accompanying OVI specification. *Id.* at ¶4. The trial court accepted appellant's plea and dismissed count three. *Id.* The trial court sentenced appellant to 24 months in prison on count one and 24 months on count two, to be served consecutively. *Id.* at ¶5. The court also sentenced appellant to an additional four years on the OVI specification in count two. Thus, appellant was sentenced to a total of eight years in prison. *Id.* He also received a four year prison term in the Cuyahoga County case. *Id.*, fn. 2. Additionally, the court suspended appellant's driver's license, ordered him to complete a drug and alcohol treatment program,

and notified him that post-release control is optional up to a maximum of three years. *Id.*

On appeal, this court held that the trial court gave due deliberation to the relevant statutory considerations, considered the purposes and principles of felony sentencing under R.C. 2929.11, balanced the seriousness and recidivism factors under R.C. 2929.12, and properly advised appellant regarding post-release control. *Id.* at ¶40. Therefore, this court determined that the trial court complied with all applicable rules and statutes and, as a result, properly sentenced appellant. *Id.*

Before embarking on appellant's four claims contained in his application in which he asserts amount to ineffective assistance, we note that "appellate counsel need not raise every possible issue in order to render constitutionally effective assistance." *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶7. Rather, appellate counsel should only raise those arguments he or she deems strongest.

With regard to appellant's first claim, he contends his appellate counsel should have argued that the trial court erroneously informed him of the maximum prison term he faced for his third-degree felony OVI offense. He takes issue with a correspondence from his trial counsel, attached to his application, alluding that he was somehow misinformed regarding the maximum penalty. Our review of the correspondence reveals, however, that appellant's trial counsel notified him that the state's offer was to *recommend* five years in prison for the OVI offense.

Our review further reveals that trial counsel gave appellant his informed recommendation to accept a plea offer.

Additionally, at appellant's change of plea hearing, as well as in his written plea of guilty, he was advised that the maximum sentence for the underlying third-degree felony OVI offense was five years. However, at appellant's sentencing hearing, the trial court engaged in a colloquy with appellant and corrected its prior advisement with respect to the maximum penalty. Specifically, the trial court told appellant that the maximum prison term for the third-degree felony OVI offense was 36 months. This court also made this point in appellant's appeal. *Jarrells, supra,* at ¶14. The record reveals that appellant indicated he understood the maximum prison term he faced was 36 months, two years less than that with which he was previously advised. Appellant indicated he had an opportunity to discuss this change with his counsel and that the change did not affect his desire to proceed with sentencing.

Appellant further contends that trial counsel gave erroneous advice by believing the specification could be ordered to run concurrent. At sentencing, however, trial counsel's statements indicate that he was asking that the time imposed on the specification be run concurrent to the time he was serving on the Cuyahoga County case, which is exactly what the trial court ultimately ordered.

Appellant also asserts he did not receive proper notification regarding post-release control. However, the record before us does not substantiate such assertion. A review of appellant's change of plea hearing reveals that the trial court informed appellant that if he was placed on post-release control, he could

be sent back to prison for a violation that could not exceed one-half of his original sentence. In doing so, the trial court substantially complied with the requirements of Crim.R. 11(C)(2)(c). In addition, the trial court notified appellant at his sentencing hearing that he may be subject to post-release control and could be sent to prison for a violation of post-release control that could not exceed one-half of his original sentence. The sentencing entry further notified appellant regarding post-release control and the possible consequences for violating such conditions pursuant to R.C. 2967.28. As such, the trial court complied with the requirements of R.C. 2929.19(B)(2)(d) and (e).

Upon review, appellant's claim that he would never have pleaded guilty had he not been misinformed by the trial court and by his trial counsel is both unpersuasive and not supported by the record.

We fail to see any ineffective assistance of appellate counsel warranting a reopening under appellant's first claim.

With respect to appellant's second claim, he alleges that appellate counsel was ineffective because he did not raise an assignment that the trial court erred in ordering a portion (60 days) of the OVI offense sentence mandatory when also ordering the specification sentence mandatory. In imposing a 24-month sentence on the third-degree felony OVI, the trial court stated at the sentencing hearing that it believed the first 60 days are mandatory days to be served. However, the trial court's sentencing entry does not reflect the imposition of a mandatory 60-day prison term. *See State v. Jirousek*, 11th Dist. Geauga Nos.

2013-G-3128 and 2013-G-3130, 2013-Ohio-5267, ¶18 ("a court speaks only through its journal entries.")

We fail to see any ineffective assistance of appellate counsel warranting a reopening under appellant's second claim.

Regarding appellant's third claim, he maintains his appellate counsel failed to raise the fact that the trial court imposed additional sanctions in its sentencing entry that were not orally ordered at his sentencing hearing. He claims the trial court never orally ordered that he pay any supervision fees under R.C. 2929.18(A)(5)(a) and that the sentencing entry indicated appellant was to pay supervision fees. Although the court generically included language regarding supervision fees, such fees are not permitted in this case since he was sentenced to mandatory prison time, not to a community control sanction. *See* R.C. 2929.18(A)(5)(a)(i); 2951.021. Thus, because the foregoing is not applicable to appellant, he suffered no harm or prejudice.

Appellant also asserts the trial court never orally notified him regarding the potential implications of R.C. 2929.141. However, the court did in fact notify appellant at his sentencing hearing that if his violation of post-release control is for committing a new felony offense, he may also be prosecuted for that new offense with the imposition of an additional prison term. The consecutive language in the court's entry caused no harm or prejudice to appellant.

We fail to see any ineffective assistance of appellate counsel warranting a reopening under appellant's third claim.

With respect to his fourth and final claim, appellant maintains his appellate counsel was ineffective for failing to supplement his appeal with the Eighth District's decision in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-1830 (McCormack, J., dissenting) (vacated and superseded on reconsideration by *State v. Klembus*, 2014-Ohio-3227). Upon review of that case, appellant's reliance is misplaced. In *Klembus*, a 2-1 decision, the majority agreed with the appellant's argument that R.C. 2941.1413, the repeat OVI specification, violated equal protection because the specification was based on the same information and proof to establish the underlying fourth-degree OVI violation under R.C. 4511.19(A)(1)(a) and 4511.19(G)(1)(d). In our case, however, appellant pleaded guilty to a third degree OVI felony in violation of R.C. 4511.19(A)(1)(a) and punished under R.C. 4511.19(G)(1)(e).

We fail to see any ineffective assistance of appellate counsel warranting a reopening under appellant's fourth and final claim.

Based on the foregoing, we determine that appellant has failed to set forth a colorable claim of ineffective assistance of appellate counsel, pursuant to App.R. 26(B)(5). Even assuming arguendo that appellant made a threshold showing that he was deprived of effective assistance of appellate counsel, appellant is unable to meet the second prong of *Strickland*, *supra,* because he failed to show that the performance of appellate counsel was deficient and that the deficiency prejudiced the outcome of the appeal.

Accordingly, appellant's pro se application for reopening is hereby overruled.

The clerk of courts is instructed to serve appellant, Robert F. Jarrells, Jr., PID: A633-536, Richland Correctional Institution, P.O. Box 8107, 1001 Olivesburg Road, Mansfield, OH 44905, with a time-stamped copy of this entry.

JUDGE COLLEEN MARY O'TOOLE

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.