

In the
Supreme Court of Ohio

State of Ohio,

Appellee,

-vs-

Case No. 2014-2194

Devven Beaver,

Appellant

On Appeal from the Union County
Court of Appeals
Third Appellate District
Case No. 14-13-15

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE STATE OF OHIO**

Devven Beaver, pro se
Southeastern Correctional Institution
5900 B.I.S. Road
Lancaster, Ohio 43130

DAVID W. PHILLIPS (0019966)
Union County Prosecuting Attorney
By: Lester R. Rodger, Jr. (0041574)
Assistant Prosecuting Attorney
221 West Fifth Street
Suite 333
Marysville, Ohio 43040
937-645-4190
937-645-4191 fax
rrodger@co.union.oh.us

Counsel for State of Ohio

EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

This case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. Rule 3.1 of the Rules of Practice of the Supreme Court of Ohio requires Appellant to provide a thorough explanation of why a substantial constitutional question is involved, why the case is of public or great general interest, or, in a felony case, why leave to appeal should be granted. Appellant sets forth the same issues brought before the Third District Court of Appeals without raising any new issues or any substantial constitutional questions. Despite moving this Court to grant a right to appeal “based on a showing that his case does raise a substantial constitutional question”, he never identifies to the Court what constitutional question is raised, why this case is one of public or great general interest or why his appeal should be permitted. He simply reiterates the same brief which was filed on his behalf in the Third District Court of Appeals.

There are no substantial constitutional questions raised herein and Appellant’s appeal should not be granted. Appellant claims prejudice from the trial court’s order permitting the victim to be called as the Court’s witness pursuant to Ohio Evidence Rule 614(A), when Appellant’s counsel was denied the ability to question the witness regarding a letter sent to Appellant, and because he was deprived of the effective assistance of counsel.

The Court of Appeals held that the trial court’s decision to call a witness under Evidence Rule 614(A) is within the trial court’s discretion. The Court also noted that Appellant did not object to the trial court’s calling of Ms. Buckner as it’s witness and had filed no written opposition to the State’s Motion. Because of this, Appellant waived the issue on appeal. The Court of Appeals also determined that the Court never issued an Order prohibiting Appellant from inquiring

into a letter written by Ms. Buckner to the Appellant. It was counsel's decision not to proceed with further questioning. Lastly, the Court also determined that counsel was not ineffective when it he failed to inquire about the contents of the letter and determined this to be in the realm of trial tactics and does not establish ineffective assistance of counsel. Counsel was also not ineffective for failing to file any response to the State's Motion to declare Ms. Buckner to be a Court's witness as the failure to file a motions is no per se ineffective assistance of counsel. The Court found no merit in his argument.

Appellant presents no compelling reason for this Court to expend its scarce judicial resources to review his case. He provides no reason why this case would be of statewide interest that would be helpful to the bench and bar. Therefore, it is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

The Union County Grand Jury indicated Appellant, Devvon E. Beaver, for Felonious Assault, Robbery, Abduction and Kidnapping.

Appellant entered a plea of not guilty to all charges and the matter was scheduled for trial. Prior to trial, the State of Ohio filed a Motion with the court seeking an order directing that the victim of the offenses be arrested and held as a material witness as she was not cooperative and was making herself unavailable to be served with a subpoena. The State of Ohio also filed a Motion, pursuant to Ohio Evidence Rule 614, requesting that the court call the victim as a witness. A hearing was held on July 8, 2013 in which the court confirmed that the victim was finally served with a subpoena and released her on her own recognizance. The Court also granted the State's motion for the court to call the victim as a witness.

Prior to trial, the State of Ohio dismissed the Robbery count.

On July 10 and 11, 2013, the court conducted a jury trial. Following the trial, the court found Appellant guilty of Felonious Assault. As a result, the court sentenced Appellant to 8 years in prison which was to be served consecutively to his conviction from the Marion County Court of Common Pleas, Case No.: 2003-CR-0389. Appellant has appealed his conviction to the Third District Court Appeals and they affirmed the decision of the trial court by a decision rendered November 10, 2014.

Appellee, State of Ohio, incorporates the facts as set forth by the Third District Court of Appeals in its decision rendered November 14, 2014.

RESPONSE TO PROPOSITION OF LAW I

THE TRIAL COURT DID NOT ERR WHEN GRANTING THE MOTION TO CALL A WITNESS PURSUANT TO OHIO EVIDENCE RULE 614

Appellant claims he was prejudiced by the trial court calling Krista Buckner as a Court's witness pursuant to Ohio Evidence Rule 614 and claims that the "label placed on Ms. Buckner as a court's witness elevated her to a prominent status in the jury's eyes". Appellant claims that the court impermissibly called Ms. Buckner as a witness and somehow gave the jury the impression that her testimony should be given more weight than any of the other witnesses. Yet, at the hearing on the Motion and at the trial, Appellant did not file anything in opposition to the Motion nor did he object at trial when the court called Ms. Buckner as a witness herein. He has waived this issue.

Ohio Evidence Rule 614 provides:

(A) The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

Ohio Evidence Rule 614 does not require any preliminary findings of surprise or that the witness is a hostile witness in order to be called as a court's witness. *State v. Apanovitch* (1987), 33 Ohio St. 3d 19. It is solely within the discretion of the court to call a person as a court's witness. *State v. Adams* (1980), 62 Ohio St. 2d 151. If a witness is called by the court, all parties are then permitted to cross examine the witness and may use a prior inconsistent statements to impeach the witness. *State v. Dacons* (1982), 5 Ohio App. 3d 112. This rule permits either party to suggest that a witness be called as a court's witness. A witness whose appearance is important to the proper determination of the case, but who appears to be favorable to the other party, is a principal candidate for application of this rule. *State v. Brewer*, 10th Dist. No.: 84AP-854. The prime candidate is a victim and an eyewitness who will not otherwise cooperate with the party originally planning to call him. *State v. Hazel*, 2012-Ohio-835.

The trial court granted the motion after a hearing in which it found that the State was unsuccessful in attempting to obtain service of a subpoena on Ms. Buckner, was unable to contact her and her own indication in a letter that she did not want to testify against the Appellant. At trial, Ms. Buckner affirmed her unwillingness to testify absent the Court's Order. Ms. Buckner's testimony was essential in determining the case against the Appellant and it was necessary that she testify as the victim.

This is exactly why the request was made to have the court call Ms. Buckner as a witness. It is in the courts sole discretion to permit this. Given the letter she wrote, her evading being subpoenaed, etc. it was certainly appropriate for the court to call her as a witness. There was no advantage to the State and certainly no detriment to the Appellant as he was still permitted to cross examine the witness.

As stated by the Third District Court of Appeals, “the purpose of calling a witness as a court’s witness is to allow for a proper determination in a case where a witness is reluctant or unwilling to testify, or there is some indication that the witness’ trial testimony will contradict a prior statement made to police. *State v. Renner*, 2013-Ohio-5463; *State v. Curry*, 2007-Ohio-5721; *State v. Arnold*, 2010-Ohio-5379. In *Renner*, the Court indicated that the “prime candidate is a victim and an eyewitness who will not otherwise cooperate with the party originally planning on calling the witness. *Renner, supra*. The decision to call a witness under Ohio Evidence Rule 614(A) is within the trial court’s discretion. *State v. Croom*, 2013-Ohio-3377, citing *State v. Jones*, 1996-Ohio App. LEXIS 291.

Appellant has failed to show that the trial court abused its discretion in granting the motion, failed to raise objections in the trial court to the same and, thus, waived the issue before the Court of Appeals and this Court. Likewise, as the Court of Appeals noted, the Appellant failed to set forth any argument that he was prejudiced by having Ms. Buckner declared to be a Court’s witness. By simply setting forth the assignments of error he filed in the Third District Court of Appeals, the Appellant, once again, fails to set forth any argument as to how he was prejudiced.

Therefore, as the Appellant has failed to set forth any constitutional issue or prejudice to him, this Court should decline review of this matter.

RESPONSE TO PROPOSITION OF LAW II

A TRIAL COURT DID NOT DENY APPELLANT’S COUNSEL THE ABILITY TO QUESTION THE WITNESS ABOUT A LETTER

Appellant submits that the trial court abused its discretion when it denied his counsel the ability to question Ms. Buckner about a letter she wrote to Appellant as he sat in jail. As pointed out by the Third District Court of Appeals, the trial court did not issue an order prohibiting his counsel from questioning the witness about the letter. Instead, his counsel discontinued his line of questioning as to the letter on his own.

At trial, Appellant's counsel questioned Ms. Buckner but mischaracterized the wording of a letter she had written to Appellant and indicated Ms. Bucker had lied when, in fact, she had not. Appellant relies on a portion of the letter in which the victim speaks about why there are so many charges and that all of them weren't true. The victim was not in agreement with the Abduction and Kidnapping charge which is what she was referring to when writing the letter. She never indicated in the letter that she lied about anything. Counsel mischaracterized the letter which is what the Court and the State were referencing when speaking with the Court at the bench. Appellant failed to raise any objection to anything the Court stated. He should be barred from raising such issues now. *State v. Gilman*, 1989 Ohio App. LEXIS 763. It is well established that the failure to object at the trial court level waives a party's right to challenge those actions on appeal as it is deemed waived, absent plain error. *In Re Sturm*, 2006-Ohio-3122.

Following the discussion held at the bench and away from the jury, the court did not issue a ruling prohibiting Appellant's counsel from questioning the victim regarding the contents of a letter she had written to Appellant. Counsel could have gone on and continued questioning the victim about letter but he did not choose to do so.

The trial court did not abuse it's discretion when commenting on the mischaracterization of the letter. The admissibility of relevant evidence is left to the sound discretion of the trial

court. *State v. Atkinson*, 2010-Ohio-2825. An “abuse of discretion” is more than an error of law or judgment; rather, it implies that a Court’s attitude is unreasonable, arbitrary or unconscionable. *State v. Herring*, 94 Ohio St. 3d 246; *State v. Adams*, 62 Ohio St. 2d 151. When reviewing for an abuse of discretion, an Appellate Court must not substitute their judgment for that of the trial court. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St. 3d 728; *State v. Tumey*, 2013-Ohio-345.

Absent the mischaracterization of the letter, counsel was free to ask about the letter but chose not to do so. Appellant’s counsel could have rephrased his question or asked other questions about the contents of the letter but chose to move on to other questions. The court did not restrict counsel from doing so. The court’s comments were not in error and were not unreasonable, arbitrary or unconscionable. The Court of Appeals held that since the trial court made no ruling preventing counsel from questioning the witness, they did not need to address any assignment of error and overruled his assignment of error.

Any objection that the Appellant may have had is waived as he failed to do so at the trial court level. Appellant also fails to raise or disclose to the Court any substantial constitutional question regarding this issue or why it is of such great public or great general interest. He also fails to set forth why an appeal should be permitted.

RESPONSE TO PROPOSITION OF LAW III

**THE APPELLANT CLAIM OF INEFFECTIVE ASSISTANCE
OF COUNSEL LACKS MERIT**

To succeed on a claim of ineffective assistance, Appellant must demonstrate two things: (1) trial counsel acted incompetently; and (2) but for counsel's incompetence, there is a reasonable probability the result of the proceeding would have been otherwise. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

When counsel's alleged ineffectiveness involves the failure to pursue an objection, the Appellant must first show that the objection "is meritorious," and, second, the Appellant must show that there is a reasonable probability that the result would have been different if the objection had been granted. See *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); see also, *State v. Santana*, 90 Ohio St.3d 513, 739 N.E.2d 798 (2001).

Appellant claims that trial counsel committed error when he failed to object to the trial court's ruling regarding the letter from Ms. Buckner as indicated above. However, there was never a ruling for his counsel to object to. The Appellate Court determined that Appellant's counsel was not ineffective in this regard or for the failure to file a responsive pleading objecting to the court's Order declaring Ms. Buckner to be a Court's witness. The Court determined that the Appellant provided no support for his arguments and stated that "this Court is left with nothing other than conjecture to evaluate his contention." There is no evidence in the record that the actions of the Appellant's attorney was deficient in any way, or that the Appellant suffered any prejudice as a result of his representation.

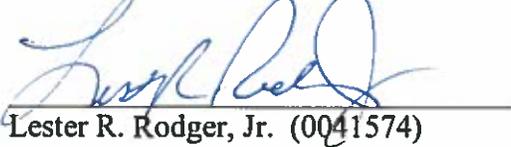
Appellant's propositions of law are without merit and do not justify review by this Court.

CONCLUSION

The within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. Jurisdiction should be declined.

Respectfully submitted,

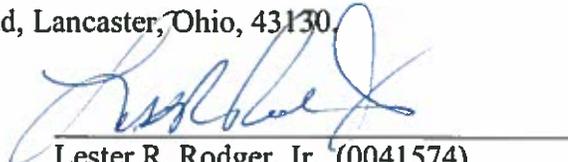
DAVID W. PHILLIPS
Union County Prosecuting Attorney



Lester R. Rodger, Jr. (0041574)
Assistant Prosecuting Attorney
State of Ohio

CERTIFICATE OF SERVICE

I certify I have served a true and accurate copy of the foregoing by regular U.S. Mail, postage prepaid, this 15 day of January, 2015, to Devven Beaver, #687-028, Southeastern Correctional Institution, 5900 B.I.S. Road, Lancaster, Ohio, 43130.



Lester R. Rodger, Jr. (0041574)
Assistant Prosecuting Attorney