

NO. 2015-0181

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

ANDREW QUINONES

Defendant-Appellant

MEMORANDUM IN OPPOSITION TO JURISDICTION

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I. EXPLANATION OF WHY THIS APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

Defendant-Appellant requests that this Court reverse the findings by the Eighth District Court of Appeals, however this Court should decline jurisdiction as the appellate court properly determined the issues in this matter. First, Appellant's claim of ineffective assistance of counsel does not present a novel issue of law or issue of great public interest. Second, Appellant's claim of ineffective assistance of counsel fails under both prongs of *Strickland v. Washington*, 466 U.S. 688, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

II. STATEMENT OF THE CASE AND FACTS

On December 4, 2012, Defendant-Appellant Andrew Quinones, was indicted by the grand jury on three counts of rape, four counts of kidnapping, one count of gross sexual imposition, and one count of pandering obscenity involving a minor. The indictment of Appellant arose from a disclosure by S.H. at the age of sixteen that Appellant raped her when she was between the ages of eight and ten. (Tr. 240). Appellant retained defense counsel and the case proceeded to a jury trial before Judge Robert McClelland on May 6, 2013. After three days of deliberation, the jury was deadlocked and a mistrial was declared. (Tr. 940). On November 18, 2013, a jury trial was set to begin before Judge Robert McClelland. Appellant refused to use his court appointed counsel and instead retained his own attorney. Quinones then for the first time expressed a desire to waive a jury and try the case in a bench trial. Judge McClelland then recused himself because he had already heard all the evidence. Judge Michael Donnelly was randomly assigned and the case was transferred to his docket.

On November 19, 2013 a bench trial began. On December 2, 2013, the Court found Appellant guilty. (Tr. 1627). Appellant was sentenced to five years for gross sexual imposition,

ten years for rape, and life in prison with the possibility of parole after ten years for kidnapping. Each of these sentences were to run concurrently. (Tr. 1632). Additionally, Appellant was found to be an aggravated sexually-oriented offender which requires lifetime registration. (Tr. 1601)

The facts introduced during the trial are as follows: in April 2004, S.H. was first introduced to Defendant-Appellant. Appellant was romantically involved with S.H.'s older sister Heather Hamar, and he moved in with S.H., Heather, their mother, and W.H. the eleven year old brother. (Tr. 991). During this time, Heather and Appellant had a child, got married, and Appellant went AWOL from the military. (Tr. 991). Appellant continued to reside at this residence with his wife and her family, and their young daughter. It was during this time that S.H. endured sexual abuse at the hands of Appellant.

Helen Hamar, S.H.'s mother, had a job with Clerk of Courts office in Newburgh Heights. Additionally, Heather Hamar worked at a drug store when she was not on maternity leave. (Tr. 992). During this time, Defendant-Appellant could barely hold down a job and had a spotty work record at best. (Tr. 992). Consequently, S.H. and her brother W.H. were often left alone with Defendant-Appellant, especially during the summer months when S.H. and W.H. were not in school during the day.

When S.H. was between the ages of nine and ten, Defendant-Appellant began sexually abusing her. It began with a kiss, seemingly innocent to the young child. (Tr. 1242). The abuse then escalated quickly, resulting in Defendant-Appellant instructing S.H. to grope him, inappropriately touching her, and forcing her to perform oral sex on regular occasions. (Tr. 1244). S.H., a confused child, complied with his requests because of Appellant's varying emotions he displayed toward her. (Tr. 1241). S.H. testified that on one hand Appellant would admonish her for "poor behavior" which could easily be categorized as a young child acting as a young child,

and on the other hand he would show her affection and talk sweetly to her and then he would force her to perform the sexual act. (Tr. 1240).

While S.H. was dealing with the confusing feelings she was experiencing regarding her relationship with the only father figure she ever had, the sexual abuse again escalated. S.H. testified that his requests progressively became more frequent and aggressive. On one specific occasion, Appellant forcibly pinned her down on her bed, causing her physical pain, and he forced her to again perform oral sex. (Tr. 1250). Also, on multiple occasions he brought her down to the basement and forced her to endure anal sex. (Tr. 1251).

It was not until S.H. was a junior in high school that she began to confront what had happened to her. At this time S.H. was experiencing feelings of depression, suicide, guilt, and shame, all resulting from the abuse she endured as a young child. During a junior varsity basketball practice, S.H. initially confided what she had endured as a young child to an adult she trusted, specifically her basketball coach. (Tr. 1265). Her basketball coach set up a meeting with S.H.'s guidance counselor.

S.H.'s testimony vehemently indicated that Defendant-Appellant continually and aggressively abused her when she was between the ages of nine or ten. Furthermore, the trial judge concluded that Appellant was guilty of the crimes for which he was charged.

Appellant appealed his convictions to the Eighth District Court of Appeals. The Eighth District Court of Appeals held that Defendant-Appellant "did not demonstrate a 'reasonable probability' that the outcome of the proceedings would have been different but for defense counsel's deficient performance" and that the court will "refrain from second-guessing strategic decisions counsel makes at trial, even where counsel's trial strategy was questionable." *State v. Quinones*, 2014-Ohio-5544.

III. LAW AND ARGUMENT

A. THIS COURT SHOULD DECLINE JURISDICTION OVER DEFENDANT-APPELLANT'S SOLE PROPOSITION OF LAW

In his sole proposition of law, Appellant proposes that a “[w]here defense counsel’s performance is so completely deficient that the trial loses its character as a confrontation between adversaries, and defense counsel does not subject the state’s case to a meaningful adversarial testing, the defendant is entitled to a new trial.” Appellant claims his counsel was deficient in three ways. First, Appellant claims his counsel’s strategy and tactics were poor. Second, Appellant claims his counsel allowed for impermissible evidence to come into trial. Third, Appellant claims his counsel failed to prepare for trial. This Court should decline jurisdiction over Defendant-Appellant’s sole proposition of law because Defendant-Appellant’s argument raises no new issues of law and because it fails both prongs of the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

1. Strategy and tactics

This is a case where the Appellant clearly orchestrated his own defense strategy. Appellant’s main defense throughout this trial was that his penis was too large to anally rape the victim.

MR. FRENDE: Mainly his size and his - - and their - - his sexual appetite, his specific sexual appetite, which was not anal oral.
(Tr. 1440).

MR. COURT: She’s testified that they never had sexual - - anal sex, and now you’re posing the question if you did have it, can you imagine how that would feel? What are you trying to establish?

MR. FRENDE: That this would have hurt. This child, if it happened, she would have screamed. It could not happen.
(Tr. 1441).

It is clear that Appellant is the one who construed this defense and instructed his attorney to pursue this line of questioning. The entire defense was centered on Appellant's past sexually partners, which were called to testify to the fact that it was anatomically impossible for Appellant to rape the victim. Furthermore, it should be noted that Appellant was previously appointed counsel and then independently sought and retained Mr. Frenden in order to put on this defense. Appellant actively prompted this defense and sought counsel that would pursue the defense.

i. Misunderstanding of the law

In regards to specific strategy and tactics, Defendant-Appellant first argues that he received ineffective assistance of counsel based on the claim that his counsel misunderstood the law and relied on a defense based on this misunderstanding. In *State v. Jackson*, (2006), 107 Ohio St.3d 300, 839 N.E. 3d 362 this Court dealt with a similar claim. The defendant in *Jackson* argued that his counsel was ineffective because his counsel based a defense on the idea that if a home owner gave the defendant permission to enter the property then there was no trespass. However, the defendant in *Jackson* claimed that his counsel was "unaware" that such a defense to burglary and robbery was precluded by prior decisions of that court. This Court, in *State v. Jackson*, held that the defense set forward by defense counsel constituted trial strategy and the court would not "second-guess strategic decision counsel makes at trial, even when counsel's trial strategy was questionable." *Id.* at ¶ 137 (quoting *State v. Clayton*, 62 Ohio St.2d at 49, 402 N.E.2d 1189). Similarly, the defense that Appellant's counsel set forth in this case should be considered trial strategy. Further it has been held that a court will not question strategic decisions that counsel uses during a trial, even if the strategy is questionable. *Clayton*, 62 Ohio St.2d at 49. Therefore, the defense set forward by defense counsel was a trial tactic that did not constitute ineffective assistance of counsel.

Additionally, Defendant-Appellant has not shown that the defense strategy his counsel presented prejudiced his defense to the point of demonstrating a “reasonable probability” that the outcome of his case would have resulted differently had his counsel employed a different strategy. It is notable that Appellant’s memorandum in support of jurisdiction is devoid of any indication of a trial strategy that should have been implemented. Appellant has failed to present any recommendations as to how counsel should have rebutted the direct testimony by the victim that she was repeatedly raped by Appellant. Therefore, Appellant has not demonstrated prejudice under the second prong of *Strickland*.

ii. Witnesses

Next, Appellant claims that his counsel failed to present a witness that would have illustrated his trial strategy, and rather, only relied on the cross-examination of the State’s witnesses to demonstrate his point. However, deciding whether to call a witness or how to conduct a cross-examination is a matter of trial tactics and strategy. *Strickland*, 104 S.Ct. at 2065. As stated previously, this Court has held that debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. *Clayton*, 62 Ohio St.2d at 49. Moreover, Appellant fails to name a specific witness that should have been called to support a more effective trial strategy.

iii. Cross-examination

Appellant also claims that he was denied ineffective assistance of counsel based on his counsel’s execution of cross examination. In *State v. Leonard* (2004), 104 Ohio St.3d 54, 82, 818 N.E.2d 229, 264, the defendant argued that he received ineffective assistance of counsel based on the claim that “more effective cross examination could have bolstered the defense’s argument.” This Court held that “the extent and scope of cross examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. *Id*; see

also *State v. Campbell* (2000), 90 Ohio St.3d at 339, 738 N.E.2d 1178. Therefore, failure to call a witness and the cross-examination techniques counsel used constitute trial tactics which should not be second guessed by the court.

Moreover, Appellant has failed to establish that his counsel's failure to call witnesses or a more efficient cross-examination technique prejudiced his case. In *State v. Braddy*, 8th Dist. Cuyahoga No. 83462, 2005-Ohio 282, the defendant claimed he received ineffective assistance of counsel because his counsel failed to call certain witness, and conducted questionable cross-examination. The court held in addition to those claims consisting of trial tactics which the court would not second guess, the defendant failed to demonstrate how the result of his trial would have been different if the additional witness had testified or if his counsel had done a better job on cross examination. *Id.* at 3. Similar to our case, Appellant failed to show that any of the trial tactics he contends would have changed the outcome of the case with a "reasonable probability."

2. Evidentiary issues

Appellant claims that he received ineffective assistance of counsel because his counsel failed to object on certain occasions, and allegedly introduced evidence that was prejudicial to their own case. First, Defendant-Appellant claims that his counsel was ineffective because his counsel failed to object to certain statements made by witness. However, "experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment . . . and in light of any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial . . . that failure to object essentially defaults the case to the state." *State v. Johnson* (2006), 112 Ohio St.3d 210, 230, 858 N.E.3d 1144, 1168 (quoting *Lundgren v. Mitchell* (C.A. 6, 2006), 440 F.3d 754, 774). This Court went on further to note that "defense counsel must so consistently fail to use objections, despite numerous and clear reasons

for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice." *Id.* at 230 (quoting *Lundgren v. Mitchell* (C.A. 6, 2006), 440 F.3d 754). In the present case, Appellant only exemplified two instances where counsel failed to object which would hardly constitute his counsel "so consistently fail[ing] to use objections." Rather, his counsel relied on sound trial strategy and decided not to object at every available opportunity as it may have been detrimental to the case.

Moreover, Appellant has failed to establish that his alleged deficiency prejudiced his case to the point that it would be "reasonable probable" a different outcome would have occurred had defense counsel objected at each individual opportunity. Appellant claims that his counsel's failure to object to allegedly prejudicial testimony of Detective O'Connell prejudiced his case. However, the Judge stated on the record that he did not consider the inadmissible testimony of the detective when he was deciding this case.

THE COURT: I want the reviewing court to realize that certain testimony, and particularly the testimony that was elicited by the defense on cross-examination which was opinion testimony by the detective in the case about whether he believed the defendant was telling the truth during the course of his statement, the Court did not consider the opinion testimony in reaching its verdict, or anyone else.

(Tr. 1623).

Therefore, these "evidentiary issues" did not prejudice the outcome of this case because they were not even considered by the judge when the verdict was reached.

Additionally, Appellant argues that his counsel introduced evidence that was prejudicial to their case. In *State v. Mays*, 8th Dist. Cuyahoga No. 78619, 2001 WL 1075722 (Sept. 13, 2001), the defendant claimed he received ineffective assistance of counsel because his counsel introduced prejudicial evidence regarding defendant's drug addiction and possible motive for committing the crimes. The court however, held that "the defense counsel made a tactical decision . . . and they

came within the range of professionally reasonable judgment.” Similarly, Defendant-Appellant claims defense counsel introduced prejudicial evidence into this case. Defense counsel’s introduction of evidence in this case should be considered trial strategy and therefore is not a basis for a claim of ineffective assistance of counsel.

Additionally, Appellant has not shown that the addition of this evidence prejudiced him to the extent that there would be a “reasonable probability” that the outcome of the case would have been different had the evidence not been introduced.

3. Preparation

Appellant further claims that his counsel failed to inform him of his right not to take the stand prior to trial and failed to prepare him for his testimony at trial. However, Appellant previously appeared and testified at his former trial, which was declared a mistrial. Therefore, he was previously made aware of his right not to take the stand and could reasonably ascertain what his testimony would entail during this trial. Furthermore, the judge in this case stated what Appellant’s rights consisted of, and gave him time to decide whether he wanted to take the stand:

THE COURT: You also have the right not to take the witness stand, and if you choose to exercise that right, that decision cannot be used by this Court in making its decision in this case and it cannot be commented upon by the State of Ohio in their argument or as evidence that it’s indicative of you guilt. The entire burden of proving the charges lies upon the State of Ohio.

We heard the State’s case this is your opportunity. You have the right to take the witness stand under oath and you have the right not to take the witness stand, and if you chose to exercise your right not to take the witness stand, it cannot be held against you. Do you understand that?

THE DEFENDANT: Yes.

(Tr. 1447).

Furthermore, the Judge gave the Defendant-Appellant a break in order to discuss his options with his attorney. After this break Defendant-Appellant stated he was fully aware of his rights regarding testifying in this case.

THE COURT: Please be seated. You had an opportunity to now consult? You're fully aware of your rights?

THE DEFENDANT: Yes, I am fully aware of my rights.

(Tr. 1448).

Therefore, Appellant was well aware of his rights in regards to testifying at this trial, and made a knowing and voluntary decision to testify. Consequently, Appellant did not receive ineffective assistance of counsel because he was already exposed to this process in his previous trial and the Judge informed him of his rights, giving him time to decide whether to testify. Moreover, Defendant-Appellant has not demonstrated how counsel's failure to inform him of his right not to testify, and his failure to prepare him for testimony prejudiced his case. Appellant was given the opportunity to freely and voluntarily decide whether he wanted to testify after the Judge informed him of his rights regarding the matter, and gave him a recess to decide what he wished to do. Furthermore, Appellant has failed to demonstrate how more time would have aided him in his defense.

Additionally, while Appellant is claiming he was not adequately prepared for his testimony, this Court should know that Appellant tried to manipulate the trial court and create his own error. A defendant cannot create his own error. The invited-error-doctrine states that a party "cannot take advantage of an error that the party invited or induced the court to commit. *State v. LaMar*, 95 Ohio St.3d 181, 206, 767 N.E.2d 166. Appellant stated on the record that he was concerned his defense counsel had not prepared him enough.

THE DEFENDANT: I guess my only concern is whether or not there has been preparation for direct examination of me.

(Tr. 1449).

It is clear that this statement was only articulated in order to create error that could be used by the defendant to his advantage. Here, Appellant invited error by electing to take the witness stand at trial and now complains that his testimony on direct examination was somehow deficient. Furthermore, Appellant's created error would be considered trial strategy and therefore not reconcilable by the court. "An invited error involves the exercise of trial strategy, and the courts have repeatedly held that an appellate court will not question matters of trial strategy." *State v. Doss*, 8th Dist. Cuyahoga No. 84433, 2005 WL 433531. Therefore, since Appellant chose to take the stand with a clear indication of his right not to take the stand, he was not prejudiced by defense counsel's alleged failures.

Additionally, as indicated by the trial transcripts, it is more than evident that Appellant was prepared for this trial and worked closely with his counsel. Appellant was quite active in his defense during trial and often times took the liberty to answer questions posed to his counsel.

MS. WELSH: Objection

THE COURT: What is the relevance of this?

THE WITNESS (DEFENDANT-APPELLANT): Just to demonstrate that they were formally instructed on sexual inappropriate behaviors and sex ed during the time period that Samantha did attend the school as well. I have first-hand knowledge because my daughter also attended that school.

(Tr. 1508).

Moreover, Mr. Frenden, on many occasions, discussed the defense strategy and even openly asked him for clarifications, which is a clear indication that Appellant was coordinating his defense.

MR: FRENDENT: May I ask my client a question?

THE COURT: Yes.

THE DEFENDANT: She was present with me and saw the interaction between me and Samantha. He was present in the home in Galion.

THE COURT: I want the record to reflect that Mr. Frenden is going over to his client, and without admonishment from defense counsel, is talking freely in open court.

Is this going down on the record?

(Tr. 1367).

Therefore, as evidenced from the trial transcript, Appellant was more than prepared for this trial because he single-handedly composed the defense strategy and instructed his attorney on how to proceed at trial.

For the aforementioned reasons, this Court should decline granting jurisdiction on this issue.

IV. CONCLUSION

The appellate court properly found that there was no error based on Appellant's failure to demonstrate reasonable probability that the outcome of the proceedings would have been different but for defense counsel's performance. *State v. Quinones*, 2014-Ohio-5544 at ¶ 25. Furthermore, Appellant has not established that his trial counsel was ineffective or that there was prosecutorial misconduct. Accordingly, as Appellant's alleged errors are without merit, this Court is not being asked to determine substantive issues of law. As such, this Court should decline granting jurisdiction and not accept this matter for review upon Appellant's sole propositions of law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition to Jurisdiction has been mailed this 4th day of March, 2015, to Ericka Cunliffe, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113.

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