

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Supreme Court Case No. 10-1373

Appellee

On Appeal from the Summit
County Common Pleas Court
Case No. CR 08 07 2390

v.

ASHFORD L. THOMPSON

CAPITAL CASE

Appellant

**MEMORANDUM IN OPPOSITION
TO APPELLANT'S APPLICATION FOR REOPENING**

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**MEMORANDUM IN OPPOSITION
TO APPELLANT'S APPLICATION FOR REOPENING**

Appellant Thompson filed an Application for Reopening under S. Ct. Prac. Rule 11.06 on April 27, 2015. This Court should deny the application.

FACTS

A jury convicted defendant Thompson of aggravated murder with capital specifications and recommended death. The trial court accepted the recommendation and sentenced Thompson to death on one count of aggravated murder, R.C. 2903.01(E), with two capital specifications, purposefully killing a police officer and killing to escape detection.

Thompson shot Twinsburg Police Officer Josh Miktarian four times in the head with Thompson's firearm including more than once when the officer was on the ground, after the officer stopped Thompson for an apparent loud music violation. This Court affirmed. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, reconsideration denied January 28, 2015.

ARGUMENT

An application for reopening under S.Ct. Prac. Rule 11.06 tests whether the defendant had ineffective assistance of appellate counsel in the appeal to this Court.

The defendant has the burden of showing a genuine issue that the defendant was deprived of the effective assistance of appellate counsel. *Id.* (E). This customarily means that the defendant will argue that trial counsel was ineffective in some particular and that appellate counsel was ineffective for not raising trial counsel's ineffectiveness.

This Court explained the test for ineffective assistance in the context of an application for reopening in a court of appeals under App.R. 26(B) in *State v. Tenace*,

109 Ohio St.3d 451, 2006-Ohio-2987. The State believes there is no difference when an application is filed in this Court. The test follows.

The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess whether Tenace has raised a “genuine issue” as to the ineffectiveness of appellate counsel in his request to reopen his appeal in the court of appeals under App.R. 26(B)(5). See *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696. To show ineffective assistance, Tenace must prove that his counsel were deficient for failing to raise the issues that he now presents and that there was a reasonable probability of success had they presented those claims on appeal. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.

{¶ 6} Moreover, to justify reopening his appeal, Tenace “bears the burden of establishing that there was a ‘genuine issue’ as to whether he has a ‘colorable claim’ of ineffective assistance of counsel on appeal.” *Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d 696.

{¶ 7} *Strickland* charges us to “appl[y] a heavy measure of deference to counsel’s judgments,” 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 761 N.E.2d 18.

Speculation cannot prove the prejudice prong of ineffective assistance. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶115, ¶132; *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶121.

Thompson’s claims are first, that appellate counsel should have argued that trial counsel was ineffective for not requesting a competency hearing for Thompson. There is no legitimate basis to make this claim. Thompson made a knowing, voluntary, and

intelligent plea to aggravated murder and other charges. *See Thompson*, ¶103; Trial Court Docket Entry dated April 13, 2009. The record shows that Thompson later withdrew his plea. Trial Court Docket Entry dated January 15, 2010. Accordingly Thompson pre-trial understood legal procedures and was able to work with counsel.

Thompson claims that his displeasure with several attorneys and his statement at allocution indicate incompetency. This Court knows full well that defendants often express displeasure or dislike with counsel. Moreover, Thompson had been involved in church activities including leading Bible studies. *Thompson*, ¶289. It is not strange then that at allocution he would fall back on the familiar. This claim has no underpinning with expert opinion and is more appropriate for post-conviction relief under R.C. 2953.21 where evidence de hors the record is appropriate.

Next, Thompson says that a NGRI plea should have been pursued. This alleged issue must be relegated to R.C. 2953.21 proceedings as surely expert opinion is necessary to indicate that a severe mental disease or defect precluded knowledge of the wrongfulness of an act or acts. R.C. 2901.05; R.C. 2901.01(A)(14). The defense of insanity requires expert testimony particularly whether the defendant appreciated the wrongfulness of his conduct. *State v. Walter*, 8th Dist. No. 56562, 1990 WL 6995, 3 (Feb. 1, 1990); See *State v. House*, 2nd Dist. No. 25457, 2014-Ohio-138, ¶7-¶9.

Thompson says his actions prior to the shooting reveal him as a paranoid person. This Court should wonder where present counsel is drawing that conclusion from.

Next, Thompson says that trial counsel should have kept Juror Eberhardt off the panel. Eberhardt was a county employee and had a brother in law enforcement. The trial court inquired concerning the law enforcement tie. It is utter speculation that questioning by trial counsel would have sufficed for a challenge for cause and it is utterly

knowable why trial counsel wished to keep Eberhardt; perhaps Eberhardt appeared more favorable than others.

Where counsel may have made a tactical decision based on the state of the evidence or other reasonable considerations there is no ineffective assistance. See *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶202-¶205.

Trial counsel is entitled to exercise wide discretion in formulating voir dire questions. See *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, ¶ 139; *State v. Murphy* (2001), 91 Ohio St.3d 516, 539, 747 N.E.2d 765; *State v. Bradley* (1989), 42 Ohio St.3d 136, 143–144, 538 N.E.2d 373. The Ohio Supreme Court has repeatedly declined to impose a “hindsight view” as to how counsel might have examined the jury differently on voir dire. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 63; *State v. Mason* (1998), 82 Ohio St.3d 144, 157, 694 N.E.2d 932.

State v. Monford, 190 Ohio App.3d 35, 2010-Ohio-4732, ¶82.

Moreover,

counsel's acts and omissions during voir dire will not constitute reversible error without proof that they affected the trial's outcome. *State v. Taylor* (Sept. 21, 1994), 9th Dist. No. 93CA005765, at *2. Similarly, the decision whether to object is within the realm of trial tactics, and a failure to do so does not amount to ineffective assistance of counsel. *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992, at ¶ 76. Appellant must demonstrate that counsel's trial tactics prejudiced her, not merely speculate that counsel's allegedly deficient performance prejudiced the defense. See *Bradley*, 42 Ohio St.3d at 143. “Speculation is insufficient to establish the requisite prejudice.” *State v. Downing*, 9th Dist. No. 22012, 2004- Ohio-5952, at ¶ 27.

State v. Dovala, 9th Dist. No. 05CA008767, 2007-Ohio-4914, ¶16. This claim has no merit.

Next, Thompson says trial counsel should have used a booking video to impeach State witness Officer Quinn. The video indicates that Thompson was attacked/mistreated by Twinsburg police after his arrest. He says that the evidence

would have bolstered his argument that Officer Miktarian used more force than was necessary when the officer encountered Thompson.

Trial counsel's strategic and tactical decision are entitled to great deference. *Wong v. Belmontes*, 130 S.Ct. 383, 384 (2009).

The fact that after Thompson was arrested a certain police officer may have acted unprofessionally (and it must be remembered what the officer had just seen or learned) says absolutely nothing about what Officer Miktarian did when he encountered Thompson. The personalities of police officers are not fungible. And, Officer Miktarian did not encounter Thompson immediately after Thompson had shot and killed another officer.

Moreover, Thompson's evidence at the guilt phase concerning Officer Miktarian's actions has severe credibility problems. Danielle Roberson was the defense witness.

In her recorded statement, Roberson omitted much that she testified to at the guilt phase.

Roberson stated at trial that she was in the car when the officer approached the car. Trial T. 2120, 2122, 2124. The officer said that he should "rip all this shit out of your car" (meaning the loud stereo). T. 2120. Then Thompson fell back on his hands. T. 2124. Then she exited the car. T. 2124. Thompson was still on the ground. Id. Then Thompson got up and the officer told him not to try any bull or the officer would let out the dog. T. 2125. Then Thompson was cuffed (with one cuff). T. 2126. Then Thompson fell to the ground again. T. 2126. Then Thompson got up and the officer pushed Thompson towards the cruiser and slammed Thompson against the side fender. T. 2127, 2274.

Immediately before Thompson first shot the officer Roberson said the officer reached to his right side. T. 2127. She was not “going to say I saw him put a gun to his head.” T. 2276. Roberson said Thompson fired two more times, from an arm’s length away. T. 2130. Roberson never said when Thompson pulled out his gun. She said that she never saw Thompson’s gun until he fired it. T. 2256. She said that the officer never tried to get the other cuff on. T. 2270.

In her recorded statement given on July 13, 2008 (Trial T. 2293) Roberson did not say that the officer slammed Thompson against the cruiser. In the recorded statement she said that the officer was trying to put the other cuff on Thompson. She went to get back in Thompson’s car and was able, even though her back was turned, to see the officer “reach like this.” T. 2196-2198. She characterized the officer as being very rude. T. 2218. Nor did Roberson say in the recorded statement that the officer threatened Thompson with the K-9.

Accordingly, Thompson’s evidence at the guilt phase had credibility problems and indeed smacks of fabrication. Use or non-use of the booking video means nothing.

Next, Thompson attacks trial counsel for not impeaching blood spatter expert John Saraya. This Court addressed this issue. *Thompson*, ¶124-¶133. This Court noted,

Thompson argues that “the State failed to lay a proper foundation for the reliability of the science of blood spatter.” He claims that “blood spatter evidence may be misleading and confuse the jury.” But we have already “recognized that blood-spatter analysis is a proper subject for expert testimony.” *Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, at ¶ 56. ***

Saraya indicated that Miktarian’s head (the blood source) was probably no more than one foot away from Thompson’s shoes when the blood spatter was created. But the coroner also testified that Miktarian was shot at close range—twice from a distance of two or three feet, and twice with the gun touching his skin. And, consistent with Saraya’s testimony, Sergeant Gina McFarren testified that Miktarian was probably lying on the ground when the final three shots were fired because “he had the one shot in the head and then the three shots in the side of the head.” Likewise, Thompson’s own witness, Danielle Roberson,

testified that the officer was on the ground when the last shots were fired. Thus, Thompson cannot show that Saraya's testimony necessarily affected the trial outcome.

Thompson, ¶128, ¶133. This claim has no merit.

Next, Thompson says that trial counsel should have put on evidence of his ability to adapt to prison life as a mitigating factor. Thompson points to no evidence that says anything, good or ill, about his ability to adapt to life in prison. The claim is the height of speculation.

Moreover, the primary case on adjustment to prison as a mitigating factor is *Skipper v. South Carolina* (1986), 476 U.S. 1 (1986). The court in *Skipper* found error in the exclusion of testimony of jailers. Importantly the court found the error not harmless because the prosecution emphasized that Skipper would be a threat if sentenced to prison, claiming that he would rape other inmates. Hence evidence contrary to that theory may have affected the verdict. *Skipper* was explained and distinguished in *State v. Coleman*, 2nd Dist. No. 2001-CA-42, 2002-Ohio-5377 because the prosecutor in *Coleman* did not argue that the defendant would be a threat in prison. *Id.* ¶63-¶65. Here, Thompson points to no argument by the State at mitigation that Thompson would be a threat if sentenced to prison. The claim has no merit.

CONCLUSION

The State submits that Thompson has not shown even a colorable reason to reopen the appeal and that the application should be denied.

Respectfully submitted,

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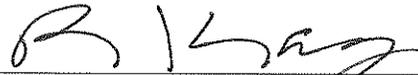
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been sent via regular U.S. mail to Attorney Angela Wilson Miller, 322 Leeward Drive, Jupiter, Florida 33477, on this 22nd day of May, 2015.



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