

ORIGINAL

**IN THE SUPREME COURT OF OHIO
2015**

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

MOHAMED IBRAHIM,

Defendant-Appellee.

Case No. 15-0685

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 14AP-355

MEMORANDUM OF DEFENDANT-APPELLEE OPPOSING JURISDICTION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street – 13th Floor
Columbus, Ohio 43215
(614) 525-3555

And

BARBARA A. FARNBACHER 0036862
(Counsel of Record)
Assistant Prosecuting Attorney
bfarnbacher@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLANT

ALAN D. GABEL 002503
(Counsel of Record)
Attorney at Law
P.O. Box 1423
Dayton, Ohio 45401
(937) 222-5335
COUNSEL FOR DEFENDANT-APPELLEE

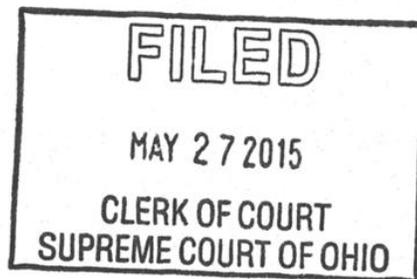


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant-Appellee respectfully requests this Court to decline jurisdiction, as this case presents no questions of such great public interest that review by this Court is warranted. The Appellate Court decided this case under an abuse of discretion standard. This standard is well articulated and defined in the law. Consequently, additional guidance from the Supreme Court regarding the correct standard to be applied would not be imminently beneficial to Ohio's bench and bar, as the State alleges.

The gist of the State's argument is that the Appellate Court misapplied the "abuse of discretion" review standard. However, the Appellate Court's Decision very clearly expressed the correct standard which governed Appellee's Post-Conviction Relief Petition, and stated, "We fully and carefully considered these standards and applied them accordingly." *Id.*

A motion for reconsideration is not designed to be used in instances in which a party simply disagrees with the logic or conclusions of the court. *State v. Burke*, 10th Dist. No. 04AP-1234, 2006-Ohio-1026, citing *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996). Consequently, the State should not be permitted to use this petition to the Ohio Supreme Court to rehash the arguments it has already made in its Appellate Brief and Motion for Reconsideration to the Appellate Court. *Garfield Hts. City School Dist. v. State Bd. of Education*, 85 Ohio App.3d 117, 128-128 (10th Dist.1992).

STATEMENT OF THE CASE AND FACTS

Appellee was charged in a multiple-count indictment with aggravated burglary, felonious assault, kidnapping, aggravated robbery and robbery. He maintains his innocence of these charges. It is significant that Defense Counsel was very ill with cancer at the time he represented Defendant in this matter. In fact, Defense Counsel closed his law office after this trial occurred. On the rare occasions during his year-long incarceration when Appellee saw Counsel, Counsel was obviously ill, often coughing or having difficulty breathing.

Appellee and the alleged victims in this case are Somalian. Defendant and these alleged victims are members of enemy tribes that have retained their tribal identities after arriving in the United States. In his Post-Conviction Brief and accompanying Affidavit, Appellee alleged that while Appellee was in jail, alleged victims of this offense directly approached Amina Manguera, Appellee's aunt, and attempted to extort \$10,000 from Appellee's family as their price for not incriminating Appellee at trial.

Mr. Ibrahim, Appellee's brother, had similar information to offer by way of Affidavit. This testimony is admissible under Ohio Evid.R. 611, 613, and 616 to prove the alleged victims' bias and motivation to fabricate evidence and also explains their rationale for providing orchestrated, negative testimony against Appellee as a group. This testimony is further corroborated by a jail visitation list which reveals that alleged victims Farheyo Adbulkar and Abdi Aden, attempted, unsuccessfully, to visit Appellee while he was incarcerated in jail.

Appellee's brother and his mother attempted to locate Appellee's Trial Counsel by going personally, and repeatedly, to his office. Trial Counsel was never present at his office at those times. Appellee's brother repeatedly tried to contact Petitioner's Trial Counsel by phone, leaving messages, but never received a return call. An attempt was even made to locate Counsel

when he was scheduled to appear in court, but the proceedings had been cancelled. Despite their diligent efforts, the family members' information had never been communicated to Defense Counsel before Appellee's trial.

The family did not pay the \$10,000 extortion demand to the alleged victims of the offense who, in turn, appeared at trial and provided incriminating evidence against Appellee. Appellee was left with his own testimony, which could have been interpreted as self-serving in light of opposing testimony of multiple alleged victims, who had had ample opportunity to synchronize their stories and to present them for revenge when the family refused to meet their extortion demand.

Further, Mowlina Aboke, who also submitted an affidavit in this case, could have been subpoenaed and examined with regard to his allegation that a prosecuting witness, Abdi Mohamed, appeared at his barbershop and reported that there had been no robbery and that the robbery had been falsely reported to protect the alleged victims who were involved in a drug operation.

Appellee was found guilty. The Trial Court imposed a 57-year sentence for this young man. Subsequently, Appellee filed a Petition for Post-Conviction Relief. Attached to this Petition, were Affidavits from Appellee's family members outlining significant evidence that had not been presented at Appellee's trial due to Defense Counsel's failure to investigate the case. The Trial Court found that, because these affidavits were submitted by family members, they were biased and self-serving and did not warrant a hearing.

The Appellate Court found that these averments could implicate all of the State's prosecuting witnesses in that the victims stated that no robbery had actually occurred and tried to

extort money for their silence. The Appellate Court additionally held that this could have resulted in a different outcome at trial, thereby prejudicing Appellee.

The claims with respect to the attempt to extort money from Mr. Ibrahim's family, the pre-existing animosity of the alleged victims toward Appellee, and the statement that the robbery report was fabricated, were far from vague and uncertain. Defense Counsel's failure to investigate this case severely prejudiced Appellee, who is now serving a 57-year prison sentence for a crime that he contends he did not commit.

ARGUMENT

Proposition of Law One:

The Appellate Court cited and applied the correct standard of review. An application for reconsideration should not be granted when a party merely disagrees with the court's logic or conclusions, or when the moving party seeks to rehash its appellate arguments. *State v. Burke*, 10th Dist. No. 04AP-1234, 2006-Ohio-1026, citing *State v. Owens*, 112 Ohio app.3d 332, 336 (11th Dist. 1996).

The purpose of post-conviction relief is to correct the denial of a defendant's constitutional rights. *State v. Gondor*, 2004-Ohio-7219, 2002P0073, 04-LW-6010 (11th); *State ex rel. Turpin v. Court of Common Pleas* (1966), 8 Ohio St.2d 1. The Sixth Amendment "confers a 'fundamental right' on criminal defendants, one that 'assures the fairness, and thus the legitimacy, of our adversary process'." *Gondor, supra*, quoting *Withrow v Williams* (1993), 507 U.S. 680, 688, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 374.

Fairness and due process dictate that the jury was entitled to hear the exculpatory evidence concerning an alleged extortion attempt of Appellee's family and an alleged victim's statement that the robbery report was fabricated. Information concerning the extortion attempt provided motivation for the alleged victims to fabricate and coordinate their stories against

Appellee. The statement that a robbery had never occurred in the first place was also material, exculpatory evidence the jury should have heard. Defense Counsel's failure to investigate the relevant, material information these witnesses had to offer, despite repeated attempts to reach him, did not amount to reasonable professional judgment.

Further, the Trial Court erred in simply dismissing these witnesses' Affidavits out of hand. While the credibility of affidavits may be measured by looking to contradictory evidence in the record, a petition should not be dismissed on credibility grounds merely because some of the parties are relatives. (See, e.g., *State v. Strutton* (1988), 62 Ohio App.3d 248, 252, 575 N.E.2d 466, in which a defendant's mother's affidavit, while only slightly corroborative of his claim, was sufficient to warrant a hearing.).

In *Strutton, supra.*, the Court held:

In his original petition, Strutton alleged that his original trial counsel failed to pursue the evidentiary lead represented by a letter that Strutton had supposedly received from the complainant's mother, in which the mother had written that her daughter had admitted that the charges against Strutton were groundless. That is certainly an important enough evidentiary lead to raise a question whether Strutton's original trial counsel met minimum standards of competence in failing to pursue that lead, assuming that Strutton succeeds, in a hearing, in establishing the facts that he has alleged.

Id., at 251.

Further, Affiant Mowlina's affidavit did not indicate that he was related to Appellee in any way, or that he had any other interest or bias with respect to Appellee's prevailing at trial. Moreover, alleged victims Farheyo and Aden testified at trial and could have been cross-examined concerning the jail visitor's list, which showed that they attempted, unsuccessfully, to visit Appellee while he was in jail. Their testimony would not have constituted hearsay. Moreover, Abdi Mohamed could have been subpoenaed and examined concerning information he presented by way of Affidavit if Defense Counsel had been aware of it.

The Appellate Court was entitled to determine whether substantive grounds for relief existed that would warrant a hearing based upon the petition, the supporting affidavits and the files and records in the case. *State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 18 O.O.3d 348, 350, 413 N.E.2d 819, 822. It was obvious to the Appellate Court that the Affidavits at issue presented sufficient operative facts to warrant a hearing. The Appellate Court's Decision on Appellee's initial Appeal, as well as its Decision and Judgment Entry pertaining to Appellee's Motion for Reconsideration, makes clear that the Appellate Court both cited the correct standard of review and correctly decided the post-conviction issues.

Further, the State's allegation that the Appellate Court failed to accord the Trial Court's Decision appropriate deference is not supported by the record, as the Appellate Court upheld the Trial Court's Decision rejecting the bulk of Appellee's affidavits in support of his Post-Conviction Petition.

Moreover, the Appellate Court was justified in determining whether or not the Trial Court had abused its discretion in discounting the credibility of Appellee's affidavits based on the drafter's familial relationship to him. *State v. Gholston*, 2003-Ohio-2758, Appeal C020557, 03-LW-2058 (1st). For instance, the *Gholston* appellate court, upon review of the record, concluded that the common pleas court had erred in discounting the credibility of the affidavits offered in support of a post-conviction claim, and, in so doing, abused its discretion.

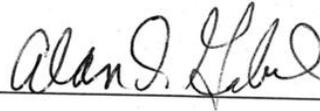
CONCLUSION

Appellee's Post-Conviction Petition, as well as its supporting affidavits, reveal a serious deficiency in Defense Counsel's performance at trial such that the trial cannot be said to have reliably produced a just result. The Trial Court abused its discretion in dismissing Appellee's affidavits in support of his Petition for Post-Conviction Relief. The Appellate Court articulated

the appropriate review standard and set forth in detail its reasons for finding as it did. The Appellate Court correctly applied an accurately-stated standard of review. There is no reason for this Court's intervention. Consequently, Appellee respectfully requests this Court to decline to exercise jurisdiction in this matter.

Respectfully submitted,

/s/ Alan D. Gabel



Alan D. Gabel

Sup. Ct. #0025034

Attorney for Appellant Mohamed Ibrahim

P.O. Box 1423

Dayton, Ohio 45401

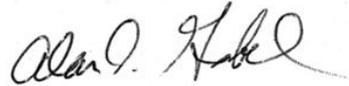
(937) 222-5335

alan.gabel@yahoo.com

CERTIFICATE OF SERVICE

This is to certify that an accurate copy of the foregoing was served upon the Prosecuting Attorney by US mail on this 27th day of May 2015.

/s/ Alan D. Gabel



Alan D. Gabel

Attorney for Appellant Mohamed Ibrahim