

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Plaintiff-Appellee, : Case No. 2015 - 0905
vs. :
ZACHARY D. THOMPSON, : On appeal from the Delaware County Court
Defendant-Appellant. : of Appeals, Fifth Appellate District, Case
No. 14 CAA 04-00021

MEMORANDUM IN OPPOSITION TO JURISDICTION

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Counsel for Appellant

**THERE ARE NO SUBSTANTIAL CONSTITUTIONAL QUESTIONS INVOLVED IN
THIS CASE AND THE ISSUES PRESENTED ARE NOT MATTERS OF GREAT
PUBLIC**

This Honorable Court should decline to grant jurisdiction in the above captioned case as the appeal does not involve a substantial constitutional question and there are no questions of great public interest.

In this case, Appellant merely seeks to relitigate the issues he unsuccessfully raised on direct appeal of his conviction. Once again he claims it was a manifest injustice for the trial court not to allow him to withdraw his guilty plea based upon the ineffectiveness of the counsel appointed to assist him in his petition for post-conviction relief and motion to withdraw his guilty plea. This very issue was litigated on direct appeal in Delaware County Case 14 CAA 04 0021. On January 13, 2015 the Fifth District Court of Appeals issued its opinion finding trial counsel was not ineffective, no manifest injustice occurred in this case, and his successive attempts to withdraw his guilty plea were barred by *res judicata*. Appellant never appealed that decision.

Instead of appealing the decision of the Fifth District Court of Appeals, Appellant filed an application to reopen his appeal on the basis he was denied effective assistance of appellate counsel. On May 4, 2015 the Fifth District Court of Appeals denied his application to reopen the appeal on the basis there was no evidence appellate counsel was deficient for raising the arguments set forth in his application. The Fifth District considered his arguments regarding the effectiveness of his appellate counsel and found them to be without merit. The Court of Appeals applied the appropriate legal standard, evaluated Appellant's arguments, and issued its decision accordingly.

This case involves a straightforward application of well-established constitutional principles to the facts of a specific case. There are no novel legal issues, no great constitutional questions, and no questions of great general or public interest. Appellant is merely dissatisfied by the adverse ruling.

STATEMENT OF FACTS AND ARGUMENTS OF LAW

In this case, Appellant pled guilty to multiple counts relating to his impaired driving and a vehicular collision that resulted in the death of his victims in this case. On February 2, 2010 the defendant was sentenced to a stated prison term which he is now serving. Appellant then filed a notice of appeal on February 22, 2010. Appellant's convictions were affirmed on November 5, 2010. While that appeal was pending, Appellant filed two motions to withdraw his guilty pleas and a number of other motions with the trial court.

On February 14, 2011 a hearing was held on Appellant's motions to withdraw his guilty pleas. Appellant was represented by counsel and presented evidence in support of his motion. On March 28, 2011 the trial court denied Appellant's motions to withdraw his guilty pleas. Appellant never appealed that adverse ruling. Instead, Appellant filed a motion with the trial court requesting it reconsider its March 28, 2011 decision. Appellant's motion to reconsider was denied on December 13, 2012.

On May 28, 2013 Appellant filed a third motion to withdraw his guilty pleas. He submitted supplemental "evidence" in support of the motion on August 15, 2013. On March 14, 2014 the trial court denied Appellant's third motion to withdraw his guilty pleas without a hearing. On April 10, 2014 Appellant filed a notice of appeal to contest the denial of his third motion to withdraw his guilty pleas. On January 13, 2015 the Fifth District Court of Appeals

affirmed the trial court's denial of Appellant's third motion to withdraw his guilty plea. Appellant never appealed the Fifth District's ruling.

On March 9, 2015 Appellant filed a fourth motion to withdraw his guilty pleas with the trial court. That motion was denied without hearing on March 12, 2015. On June 1, Appellant filed a notice of Appeal with this court alleging ineffective assistance of appellate counsel.

This Court should decline to exercise jurisdiction in the above captioned matter because the two issues raised by Appellant do not involve substantial constitutional issues and are not matters of great public interest.

Proposition of Law: Ineffective Assistance of Appellate Counsel

Appellant claims his appellate counsel was ineffective for failing "to raise any argument in support as to why the trial court abused its discretion and denied the motion (to withdraw his guilty pleas) as being barred by the doctrine of *res judicata*." However, appellate counsel's primary argument on appeal directly addressed this issue. In his brief, Appellate counsel argued that the trial court improperly applied the principle of *res judicata* when it denied Appellant's motions to withdraw his guilty pleas. He also argued that the "newly discovered evidence" presented to the court after his guilty plea supported Appellant's claim that a manifest injustice occurred when he entered a guilty plea. Far from being ineffective, Appellate counsel raised the argument Appellant now claims was never made.

While it is true appellate counsel did not raise every argument Appellant may have wished, that does not mean he was ineffective. *State v. Tenace*, 109 Ohio St. 451, 452; *Jones v. Barnes* (1983), 463 U.S. 745, 751. In his application for reopening filed pursuant to App.R. 26(B), appellant alleged his appellate counsel was ineffective for failing to argue the trial court improperly applied *res judicata*, improperly denied his motions based upon insufficient evidence,

erred when it found no manifest justice occurred, and erroneously “believed intoxication and driving left of center” were the cause of appellant’s collision.

As discussed above, appellate counsel indeed raised the Appellant’s claim that the trial court erred in applying *res judicata*. Similarly, appellate counsel argued that trial counsel was ineffective and Appellant’s guilty pleas were the product of a “miscarriage of justice.” Appellant’s remaining arguments are all contained under the umbrella of the arguments advanced by his Appellate counsel. Those arguments were considered and rejected on direct appeal. They were reconsidered by the Fifth District pursuant to Appellate Rule 26(B)(1) and once again rejected.

To show ineffective assistance, Appellant 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. Moreover, to justify reopening his appeal, Appellant “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.” *State v. Spivey* (1998), 84 Ohio St.3d, 24 at 25. Finally *Strickland* states reviewing courts must “appl[y] a heavy measure of deference to counsel’s judgments,” and to “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland v. Washington* (1984), 466 U.S. 668 at 691 and 689.

Appellant cannot satisfy his burden in this case. Appellant now seeks to relitigate the very same arguments he unsuccessfully advanced in his four motions to withdraw guilty pleas and on direct appeal. Having failed to appeal the adverse ruling of his direct appeal on the merits,

he now raises his meritless arguments that failed him at the trial level under the guise of ineffective assistance of appellate counsel.

CONCLUSION

For the forgoing reasons, Appellee respectfully requests this Court decline jurisdiction in this case.

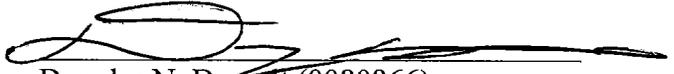
Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned Attorney at Law hereby certifies that a true and complete copy of the foregoing Memorandum was served upon Appellant, via ordinary U.S. Mail on this 30 day of June, 2015.



Douglas N. Dumolt (0080866)