

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

SCOTT GROUP

DEFENDANT-APPELLANT

CASE NO.: **1999-1152**

ON APPEAL FROM **MAHONING
COUNTY COURT OF COMMON PLEAS.**

TRIAL COURT

Case No. **1997 CR 66**

DEATH PENALTY CASE

**STATE OF OHIO-APPELLEE'S RESPONSE TO
DEFENDANT'S APPLICATION FOR REOPENING**

JOSEPH E. WILHELM, 0055407
ASSISTANT STATE PUBLIC DEFENDER
Counsel of Record

VICKI R. ADAMS WERNEKE, 0088560
ASSISTANT STATE PUBLIC DEFENDER

JILLIAN S. DAVIS, 0067272
RESEARCH AND WRITING ATTORNEY

OFFICE OF THE OHIO PUBLIC DEFENDER
250 E. BROAD STREET, SUITE 1400
COLUMBUS, OH 43215
PH: (614) 466-5394
FX: (614) 644-0708
joseph_wilhelm@opd.ohio.gov
vicki_werneke@opd.ohio.gov
jillian_davis@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLANT

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR

RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

OFFICE OF THE MAHONING COUNTY
PROSECUTOR
21 W. BOARDMAN STREET, 6TH FL.
YOUNGSTOWN, OH 44503
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rivera@mahoningcountyoh.gov

COUNSEL FOR PLAINTIFF-APPELLEE

Statements of the Case, Facts, and Introduction

In January 1997, Defendant-Appellant Scott Group murdered Robert Lozier. This Court summarized the facts that supported Defendant's convictions and death sentence:

Robert Lozier's wife, Sandra Lozier, owned the Downtown Bar in Youngstown, Ohio. In late September 1996, the Loziers began buying wine and other merchandise from Ohio Wine Imports Company. Group, who was then employed as a deliveryman for Ohio Wine, made weekly deliveries to the Downtown Bar. Group never asked the Loziers to sign or initial a copy of the invoice when they took delivery, a practice Mrs. Lozier characterized as unusual.

On December 12, 1996, Group brought his cash receipts to the Ohio Wine warehouse manager's office to be counted and compared against his invoices. Group's cash receipts were approximately \$1,300 short. Although the police were notified, Group was never charged with stealing the missing money.

About a week before Robert Lozier's murder, Group went to the Downtown Bar and asked Mrs. Lozier to show him the bar's copies of invoices from Ohio Wine.

Less than a week before Robert Lozier's murder, two Ohio Wine employees saw Group with a revolver at work. They told him to take the gun out of the building, since possessing a firearm in the warehouse was illegal.

The day before the murder, Group quit his job at Ohio Wine. That night, two witnesses saw Group at the Downtown Bar. One of them, Robert Genuske, who worked at the bar, recalled that a few weeks earlier, Group had come to the bar looking for Mr. or Mrs. Lozier because he wanted to talk to them about an invoice.

The next day, January 18, the Loziers arrived at the Downtown Bar around 10:00 a.m. It was a cold day and Robert Lozier went upstairs to see whether the pipes had frozen. Sandra Lozier went to an office, opened a safe, removed five bags containing approximately \$1,200 to \$1,300 in cash, and set them on her desk.

As she counted the cash, Mrs. Lozier heard a knock at the bar's front door. She went to the door, looked through the peephole, and saw Group. Mrs. Lozier recognized Group and let him in. She noted that he was wearing tennis shoes, jeans, a dark blue

sweatshirt, and an undershirt. She particularly noticed that he wore both a sweatshirt and an undershirt because Group “never dressed that warmly.”

Group told Mrs. Lozier that he wanted to check the invoices again. Mrs. Lozier led him to the office. As Mrs. Lozier and Group searched through the invoices, Robert Lozier came into the office, sat at the desk, and took over counting the money. As Mrs. Lozier later testified, “[Group] just kept going through [the invoices], and it was like he just kept staring at them.”

Asking to use the restroom, Group left the office briefly. When he returned, he had a gun. Group ordered the Loziers to put their hands up and get into the restroom. Mrs. Lozier told Group to take the money, but Group replied, “This isn’t about money.” He forced the Loziers into the restroom at gunpoint and made them put their hands against the wall.

Group stated that “he was the brother of the girl that was missing.” Mrs. Lozier interpreted this as a reference to Charity Agee, a murder victim who had last been seen at the Downtown Bar on New Year’s Eve. The Loziers turned around, but Group ordered them to face the wall. Then he shot them both. He shot Robert Lozier once in the head. He shot Sandra Lozier twice: once in the back of the neck and once near her temple.

Mrs. Lozier lost consciousness. She woke to find her husband dead on the floor. Mrs. Lozier thought she was dying, so she tried to write “Ohio Wine” on the floor in her own blood as a clue for the police. At the time, she did not know Group’s name. She then crawled to the office, where she managed to dial 911. She told the operator that “the delivery man from Ohio Wine” had shot and robbed her and her husband. The 911 call was recorded; a voice timestamp on the tape established that the call was received at 11:05 a.m.

The first Youngstown police officer to arrive at the crime scene was Detective Sergeant Joseph Datko. Mrs. Lozier told Datko: “The Ohio Wine man shot me. The Ohio Wine man. Our delivery man shot us.” The money the Loziers had been counting before the shootings was gone and so was the box of invoices that Group had been looking through.

* * *

According to Group, after leaving his mother's house, he drove to the Diamond Tavern in Campbell, Ohio. Group testified that he did not know how long he was at the tavern but that he had left at noon.

There were about eight customers at the Diamond Tavern. Group bought at least two rounds of drinks for all of the customers. A fellow patron thanked Group and said, "I'll see you," but Group replied, "You aren't going to see me anymore." He had a similar exchange with the bartender, Bonnie Donatelli.

* * *

When Group arrived at the police station, he spoke with Captain Robert Kane, chief of detectives, and Detective Sergeant Daryl Martin. Kane and Martin noticed what looked like blood on one of Group's tennis shoes. When questioned about it, Group told Kane that he had cut his finger. He showed Kane the finger, and there was a cut on it, but it "looked like a superficial old cut" to Kane.

After brief questioning, Sergeant Martin arrested Group. Group said, "You better check out Sam Vona," a former driver for Ohio Wine. But Mrs. Lozier did not recognize Vona's picture when Martin later showed it to her.

Group's shoe was sent to Cellmark Diagnostics for DNA testing. An expert from Cellmark testified that the DNA pattern of the blood on the shoe matched the DNA pattern of a known sample of Robert Lozier's blood. She further testified that the same DNA pattern occurs in approximately 1 in 220,000 Caucasians, 1 in 81 million African-Americans, and 1 in 1.8 million Hispanics. The testing also revealed that Group was excluded as the source of the blood.

* * *

Robert Clark was an inmate at the Mahoning County Jail with Group. Clark mentioned to Group that he "was familiar with the people in the [Downtown] [B]ar." Group asked Clark whether he would "be willing to help [Group] out." Group then made up a story for Clark to tell police. Clark was to say that he had been near the Downtown Bar on the morning of the murder and had seen a man leave the bar carrying a large beer bottle box. In return, Group promised to help Clark "any way he could." Clark later

received an anonymous \$50 contribution to his commissary account.

Adam Perry was another Mahoning County Jail inmate at the time of Group's pretrial incarceration. Awaiting trial on pending charges, Perry was incarcerated with Group from December 1997 to May 1998. Perry was released on bond in May 1998.

In a letter postmarked March 20, 1998, before Perry's release, Group begged for Perry's help with his case:

"If you do bond out, let me know. There's something you may be able to do to help me with concerning my case. And I'm telling you, I need all the help I can get. * * * But seriously man, and this is no joke, I need your help with something if you get out. Please don't leave me hanging? We've known each other a long time and if anyone in your family needs help, you know I'll be there."

Before Perry was released, Group asked him to firebomb Mrs. Lozier's house. Group assured Perry that Mrs. Lozier no longer lived there. However, he told Perry that "[h]e didn't want Sandy Lozier to testify against him," and he wanted Perry to "firebomb the lady's house to either scare her from testifying or to lead the police into investigating others."

Group told Perry that he had \$300,000 hidden away. He offered Perry half of it in exchange for his help. Group also offered to dissuade a witness from testifying in Perry's trial.

Group explained to Perry how to make a firebomb by mixing gasoline with dish soap in a bottle, with a rag in the neck for a fuse. He instructed Perry to light the rag and throw it through the front window and then to drop a key chain with the name "Charity" on it on the front lawn. "[W]hat he wanted to do," Perry explained, "was to mislead the police into thinking that the firebomb and the murder [sic] was all involved as far as Charity's abduction and murder."

In a letter postmarked May 6, 1998, Group wrote to Perry: "So I need to know on everything if that party is still on where your sister lived. The party has to happen and happen the way we last talked. I've got to know bro, so I can figure some other things out in the next few weeks." Perry understood "the party" to refer to the planned firebombing of Mrs. Lozier's house.

Group also corresponded with Perry after Perry's release. State's Exhibit 37, a letter from Group to Perry, contains the following passage: "[Y]ou said you would take care of that flat tire for me and now that your [sic] out, I hope you do because it's a matter of life or death (mine)[.]" In the next sentence, Mrs. Lozier's address appears next to the name "Agee."

Group then wrote: "If you take care of the flat, please take care of it with that two step plan we talked about. * * * Theres [sic] \$300,000.00 in a wall of a certain house * * *. Half goes to you to do what you like."

The second page of State's Exhibit 37 contains Mrs. Lozier's address and describes the house as ranch-style. It also lists the following items: "Cheap key chain or ID bracelet-name (Charity)" and "3 liter wine jug-mix gas & dish soap."

In June 1998, Perry knocked on Mrs. Lozier's door. When she answered, he asked her whether a "Maria something lived there." Mrs. Lozier said no, and Perry left. Perry testified that he did not want to hurt Mrs. Lozier and so, after finding her at home, he took no further action. Perry later told the prosecutor about Group's plan.

State v. Group, 98 Ohio St.3d 248, 249-254 (2002). Defendant was convicted of Aggravated Murder (Robert Lozier), two Death Specifications, two counts of Attempted Aggravated Murder (Sandra Lozier), Intimidation, Aggravated Robbery, and the Firearm Specifications. This Court affirmed his convictions and death sentence. *Id.* at 275.

On March 20, 2000, Defendant timely filed his Postconviction Petition. More than 9 years later, Defendant amended his petition. The Seventh District affirmed the trial court's denial of his petition. *State v. Group*, 7th Dist. No. 10 MA 21, 2011 Ohio 6422.

This Court denied Defendant's discretionary appeal. *State v. Group*, Sup. Ct. Case No. 2012-0119.

On June 3, 2015, Defendant filed an Untimely Application for Reopening pursuant to S.Ct.Prac.R. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

Law and Argument

I. DEFENDANT FAILED TO ESTABLISH GOOD CAUSE FOR FILING AN UNTIMELY APPLICATION FOR REOPENING.

First, Defendant must establish good cause because his Application for Reopening was filed 4,538 days after this Court rendered its decision in his direct appeal. *See State v. Keith*, 119 Ohio St.3d 161, 162-163, 2008 Ohio 3866, 892 N.E.2d 912; S.Ct.Prac.R. 11.06(A). In *Keith*, this Court recognized that the lack of counsel does not establish good cause for filing an untimely application. *See id.* at 163.

Further, Defendant's current counsel was appointed to represent him on July 30, 2013—some 673 days before the application was filed. Thus, even if good cause existed at some point before their appointment, “good cause has long since evaporated. Good cause can excuse the lack of a filing only while it exists, not for an indefinite period.” *State v. Fox*, 83 Ohio St.3d 514, 516, 1998 Ohio 517, 700 N.E.2d 1253, citing *State v. Hill*, 78 Ohio St.3d 174, 677 N.E.2d 337 (1997), and *State v. Carter*, 70 Ohio St.3d 642, 640 N.E.2d 811 (1994).

Further, Defendant's appointed counsel was given ample opportunity to litigate his postconviction petition. The trial court allowed Defendant to amend his postconviction petition more than 9 years after his petition was filed.¹ While the trial court waited approximately 290 days to appoint postconviction counsel, the court gave Defendant and his counsel more than 9 years to investigate and amend his petition.

Thus, Defendant failed to establish good cause for filing his Application for Reopening 4,538 days after this Court's rendered its decision in his direct appeal.

¹ Defendant's postconviction petition was filed on March 20, 2000. The trial court granted Defendant's first motion to amend his postconviction petition on April 5, 2000. Defendant's amended postconviction petition was not filed until June 19, 2009.

II. DEFENDANT FAILED TO ESTABLISH THAT APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE—BOTH PROFESSIONALLY UNREASONABLE AND WAS PREJUDICED.

Second, even if this Court finds that Defendant established good cause for filing his Application for Reopening 4,538 days after this Court rendered its decision in his direct appeal, Defendant must still “prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a ‘reasonable probability’ that he would have been successful.” *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998 Ohio 704, 701 N.E.2d 696.

To prove appellate counsel, like trial counsel, was constitutionally ineffective, a defendant bears the burden to establish that (1) counsel’s performance was deficient, and (2) counsel’s deficient performance prejudiced his defense. *See State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458 (1996), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *see also State v. Bradley*, 42 Ohio St.3d 136 (1989).

“Deficient performance’ means performance falling below an objective standard of reasonable representation. ‘Prejudice,’ in this context, means a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *State v. Ludt*, 7th Dist. No. 07 MA 107, 2009 Ohio 2214, ¶ 3, citing *Strickland*, 466 U.S. at 667-668, 694; *see United States v. Morrow*, 977 F.2d 222, 229 (6th Cir., 1992).

Furthermore, “[i]t should finally be noted that *appellate counsel need not raise every possible issue* in order to render constitutionally effective assistance.” (Emphasis added.) *State v. Jones*, 7th Dist. No. 06 MA 17, 2008 Ohio 3352, ¶ 6, citing *State v. Tenace*, 109 Ohio St.3d 451, 452 (2006), citing *State v. Sanders*, 94 Ohio St.3d 150, 151-

152 (2002). “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.” *Jones*, supra at ¶ 6, quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Proposition of Law No. 1: Sandra Lozier clearly and unmistakably identified Defendant as the person who murdered her husband, and further tried to take her life on two separate occasions. Defendant ignores the fact that Lozier knew him prior to the shooting, because he was Ohio Wine’s regular delivery guy. From the moment Lozier wrote “Ohio Wine” with her own blood on the floor, to the 911 call, she identified Defendant as the perpetrator.

“Since the decision to call an expert witness falls under the ambit of counsel’s trial strategy, * * * we cannot say defense counsel’s decision not to call an expert on eyewitness identification fell below an objective standard of reasonable representation.” *State v. Horton*, 10th Dist. No. 10AP-466, 2011 Ohio 1387, ¶ 20, citing *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998 Ohio 343, 693 N.E.2d 267, citing *State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987) (stating “trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance,” including the decision to present expert testimony).

Proposition of Law No. 2: Defendant cannot establish that trial counsel’s opening statements “prejudiced the outcome of this case. There was overwhelming evidence of guilt here, and appellant has not demonstrated that even if this amounted to deficiency under the *Strickland* test, but for the statement, the result of the trial would have been otherwise.” *State v. McKinley*, 10th Dist. No. 02AP-371, 2002 Ohio 7197, ¶ 36.

Proposition of Law No. 3: Trial testimony regarding the \$1,300 was clearly relevant to corroborate Sandra Lozier’s testimony that Defendant inquired about the bar’s invoices from Ohio Wine, and the fact that Defendant stole approximately \$1,200 to \$1,300 and the invoices that he inquired about. *See Group*, supra at ¶¶ 3-13. Further, this testimony was admissible to establish Defendant’s “proof of motive, opportunity, intent, preparation, plan, knowledge, [and] identity.” Evid.R. 404(B).

Proposition of Law No. 4: “The scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel.” *State v. Conway*, 109 Ohio St.3d 412, 430, 2006 Ohio 2815, 848 N.E.2d 810, citing *State v. Hoffner*, 102 Ohio St.3d 358, 2004 Ohio 3430, 811 N.E.2d 48, ¶ 45, and *State v. Campbell*, 90 Ohio St.3d 320, 339, 738 N.E.2d 1178 (2000).

Proposition of Law No. 5: Trial counsel’s preparation of Defendant’s for the State’s cross-examination was neither professionally unreasonable nor prejudicial.

Proposition of Law No. 6: Defendant offers an unsupported assertion that Brian Ferguson murdered Robert Lozier. But, one must consider that after nearly 20 years, no credible evidence has ever been found that links Ferguson to the murder. Additionally, this unsupported assertion fails to take into account that the Sandra Lozier knew Defendant and identified him as the perpetrator; Robert Lozier’s blood was found on Defendant’s shoe; the jury rejected his alibi; and he subsequently tried to murder Sandra Lozier while he remained incarcerated awaiting trial. (Trial Transcript, March 29, 1999, before the Honorable Maureen A. Cronin, at 3301-3351.)

Further, Defendant created this fallacy regarding Charity Agee just before he entered the bar: “Group stated that ‘he was the brother of the girl that was missing.’ Mrs.

Lozier interpreted this as a reference to Charity Agee, a murder victim who had last been seen at the Downtown Bar on New Year’s Eve.” *Group*, supra at ¶ 11.

Proposition of Law Nos. 7 & 8: This Court previously reviewed the jury instructions and found no reversible error existed. *See Group*, supra at ¶¶ 125, 128.

Proposition of Law No. 9: this Court also previously concluded that “the record does not show that Group was prejudiced by the jury’s not viewing the crime scene.” *Group*, supra at ¶ 134. Further, the record does not show that counsel’s cross-examination of the State’s DNA expert was either deficient performance or prejudicial. Thus, “the record indicates that defense counsel researched the subject of DNA thoroughly before cross-examining the Cellmark expert.” *Group*, supra at ¶ 145.

Conclusion

WHEREFORE, State of Ohio-Appellee hereby requests this Honorable Court Deny Defendant-Appellant Scott Group’s Application for Reopening, and allow his conviction and death sentence to stand. Respectfully Submitted,

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR BY:

/x/ Ralph M. Rivera

RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

Office of the Mahoning County Prosecutor
21 W. Boardman St., 6th Fl.
Youngstown, OH 44503-1426
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov
Counsel for State of Ohio-Appellee

Certificate of Service

I certify that a copy of the State of Ohio's to Defendant's Application for Reopening was sent via **U.S. Regular Mail** to counsel for Defendant, **Joseph E. Wilhelm, Esq., Vicki Ruth Adams Werneke, Esq., and Jillian S. Davis, Esq.**, at their above address on July 2, 2015.

So Certified,

/x/ Ralph M. Rivera

Ralph M. Rivera, 0082063

Counsel for State of Ohio-Appellee