

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO | : | |
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| Appellee, | : | Case No. 2010-0944 |
| | : | |
| v. | : | On Appeal from the Cuyahoga |
| | : | County Court of Common Pleas |
| JEREMIAH JACKSON | : | Case No. 532145 |
| | : | |
| Appellant. | : | CAPITAL CASE |

APPELLEE'S MEMORANDUM IN RESPONSE TO APPELLANT'S
APPLICATION FOR REOPENING PURSUANT TO S.CT. PRAC. R. 11.06

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Appellee State of Ohio respectfully opposes Appellant Jeremiah Jackson’s Application for Reopening. To demonstrate ineffective assistance of appellate counsel, Appellant must prove that counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had counsel presented those claims on appeal. *State v. Sneed*, 96 Ohio St.3d 348, 349, 2002-Ohio-4768, 774 N.E.2d 1216 (2002). To warrant reopening, 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." *Id.*, quoting *State v. Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d 696.

Appellant has failed to show that appellate counsel were deficient for not raising these issues, nor that there was a reasonable probability of success had these claims been presented on direct appeal. As Appellant has failed to sustain his burden, his Application for Reopening should be denied.

PROPOSITION OF LAW I: A capital defendant's Sixth Amendment right to a jury trial is violated when the trial court prejudicially fails to ensure that the defendant's waiver of a jury trial is knowing, intelligent, and voluntary. U.S. Const. amends. VI, XIV; Ohio Const. Art. I, section 5.

Appellant quotes *State v. Jells*, 53 Ohio St.3d 22, 25 (1990) for the proposition that "the better practice [is] for the trial judge to enumerate all the possible ramifications of a waiver by jury." Appellant neglected to quote the remainder of this Court's holding, as follows, "While it may be better practice for the trial judge to enumerate all the possible implications of a waiver of a jury, *there is no error in failing to do so.*" *Id.*, emphasis added.

This Court found in *Jells*,

There is no requirement in Ohio for the trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel. See *State v. Morris* (1982), 8 Ohio App. 3d 12, 14, 8 OBR 13, 15-16, 455 N.E. 2d 1352, 1355.

Jells, 53 Ohio St.3d at 25-26.

Appellant has failed to cite any authority for his claims that the trial court was required to advise Jackson of the appellate issues he would be foregoing, that he could withdraw his waiver at any time prior to trial, and that the jury and judge would have

to agree to impose the death penalty. To the contrary, this Court held on direct appeal that R.C. 2945.05 was satisfied when “Jackson informed the trial judge in open court that he was waiving his right to a jury trial.” *State v. Jackson*, 141 Ohio St. 3d 171, 191, 2014-Ohio-3707, 23 N.E.2d 1023 (2014). “Further questioning was not required to ensure that Jackson understood all the rights to a jury trial that he was giving up. *See State v. Sanders*, 188 Ohio App.3d 452, 2010-Ohio-3433, 935 N.E.2d 905, ¶ 13-15 (10th Dist.)” *Id.*

Based on the above, Appellant has failed to prove appellate counsel were deficient in not raising this issue on direct appeal and that there was a reasonable probability of success had this claim been presented.

PROPOSITION OF LAW II: A capital defendant is denied the right to the effective assistance of counsel when counsel prejudicially fails to request an expert to adequately prepare the defense case for trial. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I sections 5, 10.

Appellant claims trial counsel should have moved for an expert in intellectual disability, arguing that Dr. Fabian’s role was limited to mitigation purposes. This Court has already considered and rejected this claim, finding “we reject this ineffectiveness claim because defense counsel obtained expert advice *before* deciding not to raise an *Atkins* claim.” *Id.*, at 205 (emphasis added).

The record established that Dr. Fabian evaluated Jackson before trial and submitted a report dated February 10, 2010, which trial counsel relied on in deciding not to raise an *Atkins* claim. (Tr. 233-235, 1971). Dr. Fabian testified as to his evaluations and conclusions at a pre-trial hearing. (Tr. 233-235, 238-240). This Court

found “Dr. Fabian had ample qualifications and experience to determine whether Jackson met the *Atkins* test for mental retardation.” *Id.*, at 204.

Appellant’s premise that Jackson’s IQ score was within the range of 70 – 75 is incorrect and misleading. Dr. Fabian administered the WAIS IV test; Jackson obtained a full scale IQ score of 75. (Tr. 192). In addition to Dr. Fabian, Jackson was evaluated before trial by Dr. Michael Aronoff of the Court Psychiatric Clinic for competency and sanity purposes. As part of this evaluation, Dr. Aronoff administered intelligence tests. Jackson obtained an IQ test result of 87. (Tr. 174). Dr. Aronoff testified to a “confidence range,” meaning that with 95% certainty, Jackson’s true full scale IQ score was within the range of 82 to 93. (Tr. 175). Dr. Aronoff found that with respect to symptoms of mental illness, Jackson was within the range of probable feigning as opposed to non-feigning. (Tr. 176-177). Dr. Aronoff testified that Jackson’s prison records reflected he had been administered the General Ability Measure for Adults (GAMA) test in 2003 and 2007, with scores of 87 and 87-93, respectively. (Tr. 184). Further, Dr. Aronoff testified that none of the records he was provided with suggested Jackson met the second part of the *Atkins* test – the onset of mental retardation before age 18. *Id.*, at 183.

Contrary to Appellant’s claim, the inquiry into whether Jackson was intellectually disabled did not end at his 75 IQ test result. Nor was Dr. Fabian’s evaluation and testimony limited to mitigation purposes.

The trial court conducted a pre-trial hearing “to build a record to establish that the *Atkins* issue was considered, diligently investigated, and a justifiable decision made to pursue it or not.” *Id.*, at 187. Dr. Fabian testified an *Atkins* evaluation consists of three areas, pre-age 18 information, current testing for IQ and adaptive behaviors. (Tr. 237). Dr. Fabian testified that he met with Jackson seven times between October 5, 2009 and January 30, 2010, and again on March 28, 2010. (Tr. 239, 1986). Dr. Fabian testified he researched at least 20 sources of information. (Tr. 239, 1988). Dr. Fabian interviewed Jackson’s family members including his mother, father, both brothers, Joe and Clem, and reviewed Jackson’s junior high school records and other material provided by the Public Defender’s Office. (Tr. 239, 1982, 1986-1989). Dr. Fabian opined that Jackson did not meet the definition of being mentally retarded with regard to *Atkins* and *Lott*. (Tr. 240). Dr. Fabian testified that ethically, as a forensic examiner and psychologist, if he believed Jackson was incompetent or mentally retarded, he would inform the defense, but “It’s my opinion that [i]t’s not there.” *Id.*, at 184.

Jackson never claimed he was mentally retarded. Dr. Aronoff and Dr. Fabian agreed there was no indication Jackson was mentally retarded under *Atkins*. “Dr. Fabian and Dr. Aronoff testified that Jackson did not possess significantly subaverage intellectual functioning, the first part of the *Atkins* test. *Id.*, at 205.

As this Court found, trial counsel obtained expert advice before deciding not to raise an *Atkins* claim and their expert, Dr. Fabian, “had ample qualifications and

experience to determine whether Jackson met the *Atkins* test for mental retardation.” *Id.*, at 204. As this issue was considered and rejected on direct appeal, Appellant’s proposition of law must fail.

PROPOSITION OF LAW III: A capital defendant is denied the right to the effective assistance of counsel when counsel prejudicially fails to support the motion to suppress statements with available evidence. U.S. Const. Amends. V, VI, XIV; Ohio Const. Art. I sections 5, 10.

Appellant’s claim that he asked deputies for an opportunity to call his attorney, but was refused, is unsupported and misleading. Jackson was not questioned by deputies but by Detectives Diaz and Sowa of the Cleveland Police Department Homicide Unit. State’s Exhibit A326, a 56 page transcript of the interview, was admitted at trial. The transcript established that Jackson was advised of his rights, including the right to an attorney, but never asked to call his attorney. (State’s Exh. A326, pg. 1).

Instead, the interview transcript demonstrates that Jackson’s request for phone calls were part of his demands for “luxury,” including a brand new bathroom and cell (State’s Exh. A326, pg. 4), books, free phone calls whenever he wanted, free visitation (State’s Exh. A326, pg. 5), a real toothbrush, real shampoo, some goodies, snacks, snickers, donuts (State’s Exh. A326, pg. 22), having a particular deputy, Theresa, assigned to take care of him and that she should be given an extra check for doing so (State’s Exh. A326, pg. 38), phone calls when he wanted, food, drinks anytime he wanted (State’s Exh. A326, pg. 50), special treatment including a better phone (State’s

and private phone conversations (State's Exh. A326, pg. 52), constant visitations whenever he wanted, in a nice room without a glass window, all privileges. (State's Exh. A326, pg. 53).

As established by the transcript of Jackson's interview, his claim that he asked to call his attorney prior to his interview with Cleveland Police detectives, or that such a request was refused, is wholly unsupported and without merit.

PROPOSITION OF LAW III: A capital defendant is denied the right to the effective assistance of counsel when counsel prejudicially fails to conduct an adequate mitigation investigation. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I sections 5, 10.

Appellant claims trial counsel should have met with Jackson's family members and prepared them to testify at mitigation hearing, despite Jackson's refusal to allow his family members to testify at mitigation. Appellant has failed to provide any support whatsoever for his assertion that trial counsel did *not* meet with Jackson's family members or prepare them to testify at the mitigation hearing.

As Appellant acknowledges, Jackson would not allow his family members to testify at the mitigation hearing. Trial counsel spent the eve of the mitigation hearing, Easter Sunday, with Jackson "going over it and over it" but informed the trial court that Dr. Fabian would be their only witness. (Tr. 1939). Counsel informed the trial court that "Mr. Jackson is well aware of the fact that we were allowed to call more mitigation witnesses. We certainly provided more names on our witness list for mitigation." (Tr. 2117). The record established that Jackson was satisfied with the extent of the

mitigation presented. (Tr. 2118). The trial court questioned Jackson directly, who confirmed he had been consulted on this issue, that the matter was fully considered, that he understood the panel was at his disposal and would gladly hear more witnesses if he wished, and that it was his decision not to present additional witnesses. (Tr. 2116-2119). While counsel claims trial counsels' compliance with Jackson regarding excluding his family members' testimony was unreasonable, this Court has held that "a defendant is permitted to prevent his counsel from presenting mitigation evidence." *State v. Spirko*, 59 Ohio St. 3d 1, 18, 570 N.E.2d 229 (1990), citing *State v. Tyler*, 50 Ohio St. 3d 24, 553 N.E. 2d 576 (1990).

Appellant's claim that trial counsel did not meet with Jackson's family or prepare them to testify at mitigation has no support. Appellant has failed to prove appellate counsel were deficient in not raising this issue on direct appeal and that there was a reasonable probability of success had this claim been presented.

CONCLUSION

Based on the foregoing, Appellee State of Ohio respectfully requests that Appellant Jeremiah Jackson's Application for Reopening be denied. Appellant has failed to prove that appellate counsel were deficient for not raising the above issues and that there was a reasonable probability of success had these claims been presented on

direct appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing Appellee's Response to Appellant's Application for Reopening Pursuant to S.Ct. Prac. R. 11.06 has been sent by regular U.S. Mail this 5th day of August, 2015 to Kathryn Sandford, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

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