

IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO,

Case No. 12-1212

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Common Pleas

CARON E. MONTGOMERY,

Common Pleas Case
No. 10CR-12-7125

Defendant-Appellant.

DEATH PENALTY CASE

**MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF OHIO OPPOSING
MOTION TO CONTINUE ORAL ARGUMENT**

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**MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF OHIO OPPOSING
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Briefing was completed in this direct appeal in October 2013, and the case was recently set for oral argument for January 27, 2016. Defendant has now filed a motion to continue the oral argument, contending that post-conviction proceedings might, someday, possibly, moot out the direct appeal because the defense might prevail in post-conviction review.

Defendant points to the Tenth District's decision in December 2014 to reverse the denial of post-conviction relief and to remand for an evidentiary hearing. Defendant also points to the fact that the State has filed its own appeal here (see No. 15-262), asking this Court to accept review and to reverse the Tenth District's deeply-flawed post-conviction decision.

Defendant's logic for seeking an indefinite continuance of the direct appeal is exactly backwards. If anything, the post-conviction remand should be delayed while the direct appeal proceeds and is decided. As the State is pointing out in its post-conviction appeal here, this Court's direct review of the case could very well confirm one of the State's main arguments for why an evidentiary hearing is unnecessary in the post-conviction case by recognizing that the triple-mass-murder and victim-under-13 aggravating circumstances constitute overwhelming aggravation that would still easily outweigh the meager additional mitigation that the defense contends should have been introduced. The direct appeal is far more likely to render moot some of the post-conviction arguments, instead of vice versa.

Defendant's motion also fails to recognize that the General Assembly intended that direct-appeal and post-conviction proceedings should proceed along parallel tracks, saving time in the process, by requiring that the post-conviction petition be filed within 180 days (now within 365 days), even when the direct appeal is still pending. The General Assembly intended to save time by having both proceedings proceed along parallel tracks, rather than having the post-conviction proceeding entirely wait for the complete resolution of the direct appeal, or vice versa.

The direct-appeal review is different than collateral post-conviction review, since direct-appeal review addresses the original trial record, and it necessarily addresses matters that cannot be addressed on post-conviction review because the issues to be resolved on direct appeal are barred by *res judicata* in post-conviction review. Likewise, post-conviction review is different, since it depends on the defense filing evidentiary documentation from outside the original trial record and then depends on the court deciding whether an evidentiary hearing is needed. The Ohio judicial system can perform such reviews simultaneously.

The post-conviction statute already addresses the narrow circumstance in which delay of the direct appeal would be justified in deference to the post-conviction proceedings. If the post-conviction proceedings have resulted in the trial court concluding that post-conviction relief is actually warranted, then, and only then, does the statute recognize that either party can ask the appellate court to remand the case so that the trial court can grant post-conviction relief. R.C. 2953.21(E) & (G).

In the present case, the post-conviction proceedings are still very far away

from any such point, as the trial court denied the petition, and the Tenth District merely ordered a hearing. Such a hearing, if it occurs, could occur many months from now and, even then, very well could result in the denial of post-conviction relief. Continuing the direct appeal based on the mere faint possibility of post-conviction relief in the future would undercut the legislative intent to have these different proceedings move along parallel tracks and ultimately would undercut the legislative intent that death-penalty direct appeals be given priority in this Court. R.C. 2929.05(B).

Nor can it be assumed that the Tenth District's decision in the post-conviction appeal is some bellwether of the likelihood of success on remand or is some barometer indicating a need for a continuance of the direct appeal here. As the State is pointing out in its appeal in No. 15-262, the Tenth District decision is deeply flawed for several reasons. The State incorporates its 2-17-15 memorandum supporting jurisdiction by reference here, and highlights those basic flaws, as follows.

As shown by the State's First and Second Propositions of Law in that appeal, the Tenth District ordered an evidentiary hearing based in major part on a wholly-unsupported "provocation" claim that the defense *never raised* and the State was *never given an opportunity to brief*. Had the State been given the opportunity to brief that claim, the State would have been able to point out that the claim finds no factual support in the record, is barred as untimely, and actually contradicts the law on provocation. The Tenth District's sua sponte consideration of this flawed claim deprived the State of a fair appellate process in the post-conviction appeal and defied

the actual facts in the case.

Ohioans expect all courts to take death-penalty cases seriously and to devote the substantial resources needed to give such cases their full and careful review. The Tenth District's post-conviction decision was so conclusory and so inattentive to factual and legal detail that it amounted to no real review at all.

At bottom, the Tenth District's slapdash review amounted to a failure by that court to adhere to precedents. For example, insofar as the "provocation" theory is concerned, this Court in the past has summarily reversed the author of the Tenth District majority opinion on this very point. As the State's Second Proposition of Law shows in No. 15-262, a victim's admission of infidelity to the offender is not serious "provocation" that is reasonably sufficient to incite the offender to use of deadly force. *State v. Dixon*, 97 Ohio St.3d 244, 2002-Ohio-6298, 778 N.E.2d 1044, following *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992), and summarily reversing *State v. Dixon*, 10th Dist. No. 01AP-22 (Aug. 21, 2001) (Tyack, J.). Another summary reversal is warranted in No. 15-262.

The State's Third Proposition of Law in No. 15-262 addresses defendant's eighth claim in his petition that his death sentences are "disproportionate" because other Franklin County capital defendants did not receive the death penalty. The State contended that this argument is barred by res judicata and fails on the merits because there is no cross-case proportionality constitutional requirement. The Tenth District never addressed these problems with the "disproportionate" claim and never purported to justify any evidentiary hearing on a claim that fails as a matter of law.

One has to guess at whether the Tenth District even ruled on this claim.

If the Tenth District was really finding possible merit in this “disproportionate” claim in the post-conviction appeal, then such conclusion directly conflicted with decisions of this Court, the United States Supreme Court, and other Ohio appellate districts, all of which have rejected it. *McCleskey v. Kemp*, 481 U.S. 279, 307 n. 28, 317, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Getsy v. Mitchell*, 495 F.3d 295, 305 (6th Cir. 2007) (en banc); *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 68; *State v. O’Neal*, 87 Ohio St.3d 402, 417, 721 N.E.2d 73 (2000); *State v. Moore*, 81 Ohio St.3d 22, 42, 689 N.E.2d 1 (1998); *State v. Hunter*, 1st Dist. No. C-090569, 2012-Ohio-2859, ¶ 57.

The State’s Fourth and Fifth Propositions of Law in No. 15-262 address the Tenth District’s failure to apply or even acknowledge the two-prong *Strickland* standard for ineffective-assistance-of-counsel (IAC) claims. Twelve of the fourteen post-conviction claims were IAC claims, but the Tenth District failed to mention or address either of the *Strickland* prongs, including the important second prong regarding whether the post-conviction materials would support the conclusion that there would be a reasonable probability of a different outcome.

Instead of analyzing the *Strickland* prongs, the Tenth District repeatedly stated that “counsel should have an opportunity to explain” what happened. 12-30-14 Decision, ¶¶ 14, 23, 24. But *Strickland* itself recognized that “a court need not determine whether counsel’s performance was deficient before examining the

prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989), quoting *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Post-conviction evidentiary hearings are not designed to provide a time-wasting forum for counsel to have an "opportunity to explain," and yet that is exactly why the Tenth District said it was remanding the IAC claims for a hearing.

Overall, the Tenth District simply failed to apply the correct standard of review in the post-conviction appeal. While the Tenth District acknowledged that an abuse-of-discretion standard controlled, it never said that the trial panel actually abused its discretion in dismissing the petition without an evidentiary hearing. It merely sustained the assignments of error, which claimed that the trial panel "erred." 12-30-14 Decision, at ¶ 15, 24.

In all respects, the Tenth District's decision fell far short of the kind of thorough judicial review that Ohio courts should be applying in capital litigation. The trial panel's 31-page decision and entry denying post-conviction relief deserves plaudits for the thoroughness of its review. The trial-panel decision could have served as a model for the Tenth District to follow. Instead, the Tenth District issued a

6-page decision that failed to address key arguments supporting the trial panel's ruling. And yet, paradoxically, the Tenth District reached out to address sua sponte a flawed "provocation" theory no one was raising.

The State hopes that this Court accepts review of the State's appeal in No. 15-262 to correct these serial errors in the Tenth District's decision in the post-conviction appeal. The State respectfully submits that the Tenth District's decision is so flawed that summary reversal is warranted. In any event, given the many flaws in that decision, it falls far short of justifying an indefinite continuance of the present direct appeal.

The State respectfully requests that this Court deny defendant's motion to continue the oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by email on December 4, 2015, to Kathryn L. Sandford, Kathryn.Sandford@opd.ohio.gov, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for defendant-appellant.

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