

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee

vs.

Case No. 2011-2005

JASON DEAN,

Death Penalty Case

Appellant

ON APPEAL FROM THE CLARK COUNTY
COURT OF COMMON PLEAS CASE NO. 05-CR-0348

STATE OF OHIO'S OPPOSITION TO
APPLICATION FOR REOPENING

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STATE OF OHIO'S OPPOSITION TO
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Dean's application to reopen his direct appeal should be summarily dismissed for untimely filing, in view of his failure to assert any grounds whatsoever to justify the delay. Beyond that, Dean's claims of ineffective assistance of appellate counsel lack factual support, and are based on obviously wrong interpretations of relevant case law. The Court should expeditiously determine that Dean's application to reopen his direct appeal should be denied.

1. Dean's application is untimely and lacking any statement of grounds to justify the delay.

Dean's Application to Reopen was filed on April 19, 2016, which is one hundred seventy-five days after the entry of judgment on October 27, 2015. See *State v. Dean*, 2015 Ohio 4347. Pursuant to S. Ct. Prac. R. 11.06, "An application for reopening shall be filed within ninety days from the issuance of the mandate of the Supreme Court, unless the appellant shows good cause for filing at a later time."

Dean's application to reopen was filed eighty-five days out of rule, and without any statement in respect to good cause for the delay. Under these circumstances, Dean's application to reopen should be summarily denied for unexcused untimely filing.

2. In view of a silent record regarding trial counsel's preparation of Dean to make his allocution, Dean's appellate counsel are not ineffective for not raising an issue that lacks any support in the record.

Due to the complete absence of any evidence in the record that would put appellate counsel on notice to raise such a claim, Dean's Proposition I(A) that faults appellate counsel for failure to raise a claim of ineffective assistance of trial counsel for supposed inadequate preparation of Dean to make his allocution lacks merit.

In his application to reopen, Dean unjustifiably draws an inference upon an inference to assert his allocution lacked any plausible strategy - the first inference - and that the failure of his allocution to bring about a non-death sentence was due to his inadequate preparation by trial counsel - the second inference. Since the record is wholly silent about both inferences, neither inference could be gauged as correct or incorrect by counsel on direct appeal, who are limited to raising errors as may be shown by the record. *Cf. Konigsberg v. Lamports Co.*, 116 Ohio St. 640, 642 (1927) (“The judgment of the trial court can only be reversed for error appearing upon the record.”) Where the record is completely silent as to the strategy behind Dean’s allocution, and is completely silent as to attorney-client communications related to Dean’s allocution, appellate counsel have no professional obligation to concoct a claim founded upon speculation rather than evidence.

It is plausible that Dean, in maintaining his assertion of innocence during his allocution, might have rationally intended to inject enough doubt in the trial court’s mind such that a life sentence might have been returned. Regardless, Dean’s allocution is a far cry from a directive that the jury should impose the death penalty, like this Court saw in the defendant’ unsworn statement in *State v. Barton*, 108 Ohio St. 3d 402, P38-39 (2006). The point to be made is that the bare content of Dean’s allocution, in maintaining the assertion of innocence he carried throughout the trial phase, was not so obviously out-of-bounds that reasonable appellate counsel would raise an issue of ineffective assistance of trial counsel, especially in view of the complete lack of any evidence about strategy and preparation.

If there be an issue at all, additional evidence outside the record would be necessary to adequately present, let alone establish, a claim that Dean was inadequately prepared by his trial counsel in respect to the delivery of his allocution.

The need for evidence outside the record for a claim like this can be seen in Dean's citation to the case of *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003). In *Hamblin*, the Court granted relief for ineffective assistance of counsel at the mitigation phase on the strength of evidence presented during state post-conviction proceedings. *Id.* at 491. ("The only other testimony by the defense during the penalty phase was a relatively short, rambling, almost incoherent, unsworn statement given by Hamblin to the jury in an attempt to explain his background. Counsel admitted he did nothing to help Hamblin prepare or give this statement. Jurek Aff. At ¶ 17.") In this respect, Dean's citation to *Hamblin* serves to contradict his contention that appellate counsel should have raised this claim. Since the *Hamblin* Court granted relief based on evidence presented to the state post-conviction court, the *Hamblin* case lends no support to Dean's Prop. I(A) of ineffective assistance of appellate counsel.

Because the record before this Court is silent, and the adverse inferences on which Dean rests his Prop. I(A) claim are wholly speculative, Dean has failed to assert good grounds to reopen his appeal.

3. Bare prior knowledge of the case by Juror 540 and Juror 453, and mild equivocation by Juror 452 regarding sympathy for the victim, would not cause reasonable appellate counsel to assign as error the trial court's denial of a motion for change of venue.

The record evidence on which Dean relies to contend that appellate counsel were ineffective for failure to challenge the trial court's denial of the defense motion for change of venue is so exceedingly weak that Dean's Prop. II lacks any merit. Relative to Juror 540 (never seated) and Juror 453 (seated as fourth alternate, Tr. Vol. 4, p. 924), Dean points to their superficial prior knowledge of the case as to the supposed grounds that would cause reasonable appellate counsel to challenge the denial of the motion for change of venue. Relative to Juror 452 (seated as fifth alternate, Tr. Vol. 4, p. 924), Dean points to her mild equivocation about sympathy for the

victim as to the supposed grounds that would cause reasonable appellate counsel to challenge the denial of the motion for change of venue.

In *State v. Mammon*, 139 Ohio St. 3d 467, P53- P74 (2014), this Court provided a comprehensive analysis as to the circumstances that would require a change of venue on grounds of pre-trial publicity. Bare prior knowledge of the case (Juror 540 and 453) and mild equivocation about sympathy for the victim (Juror 452) fall so far short of viable grounds on which to challenge the trial court's denial of a change of venue that reasonable appellate counsel would not raise the claim. This is even more true where Juror 540 was not seated at all, and Jurors 452 and 453 were alternates who never participated in the penalty or sentencing phase deliberations. See Tr. Vol. 11, pgs. 2736-2737, for polling of the sentencing phase jury. *Cf. Skilling v. United States*, 561 U.S. 358, 426 (2010) ("There are occasions in which such evidence [pretrial media attention and widespread community hostility] weighs heavily in favor of a change of venue. In the end, however, *if no biased jury is actually seated, there is no violation of the defendant's right to an impartial jury.*") (Alito, J., concurring.) (Emphasis added.)

Under these circumstances, where the record evidence to which Dean points is exceedingly weak, and none of the questioned jurors participated in deliberations, this Court should find Dean's Prop. II to be not well taken.

4. Dean's remaining propositions are at odds with settled law, such that reasonable appellate counsel would not be ineffective for not raising frivolous assignments of error.

Where this Court long ago determined the mitigation jury instruction stating that "Now, you must not be influenced by any consideration of sympathy or prejudice" passed constitutional muster under *California v. Brown*, 479 U.S. 538, 541 (1987), both Dean's Prop. I(B) and III(C) necessarily fail. See 2 CR Ohio Jury Instructions, § 503.11, Instruction No. 25; *State v. Steffen*,

31 Ohio St. 3d 111, 125 (1987). (“Our conclusion that such an instruction [that the jury in the penalty phase disregard feelings of sympathy in their deliberations] does not constitute error is buttressed by the recent decision of the United States Supreme Court in *California v. Brown*, 479 U.S. 538 (1987)”)

Similar reasoning applies to show the invalidity of Prop. III(A), no mercy instruction, and Prop. III(B), no residual doubt instruction. Two decades ago, this Court expressly determined that there is no right, under state or federal law, for a capital defendant to have the jury consider mercy as a mitigating factor. *State v. Allen*, 73 Ohio St. 3d 626, 638 (1995). (“Accordingly, there was no error in the trial court’s denial of the requested sympathy and mercy instructions.”) In the same vein, in *State v. McGuire*, 80 Ohio St. 3d 390 (1997), this Court expressly held that “Residual doubt is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death.” (Syllabus.)

In his arguments in support of these Propositions, Prop. I(B), Prop. III(A), Prop. III(B), and Prop. III(C), Dean offers nothing beyond a boilerplate statement of the claim. Dean fails to offer any rationale as to how appellate counsel were ineffective for failure to raise what would amount to frivolous claims. Under these circumstances, this Court should conclude Dean’s claims of ineffective assistance of appellate counsel are not well taken.

CONCLUSION

For the reasons expressed, the Court should summarily dismiss Dean’s application to reopen his direct appeal for unexcused untimely filing. Alternatively, the Court should deny the application to reopen for lack of factual and legal support.

Respectfully submitted,

/s D. Andrew Wilson

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Appellee State of Ohio's Opposition To Application For Reopening* has been delivered by e-mail to Angela Miller at awmiller@gmail.com on this the 13th day of May, 2016.

/s D. Andrew Wilson

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