

IN THE SUPREME COURT OF OHIO  
2016

STATE OF OHIO,

Case No. 03-647

Plaintiff-Appellee,

-vs-

JAMES T. CONWAY, III,

DEATH PENALTY CASE

Defendant-Appellant.

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING APPLICATION FOR  
REOPENING**

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**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING APPLICATION FOR REOPENING**

For the reasons stated in the attached memorandum, the State opposes the untimely and successive application for reopening filed on July 14, 2016.

Respectfully submitted,

/s/ Steven L. Taylor

STEVEN L. TAYLOR 0043876  
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**MEMORANDUM IN SUPPORT**

Defendant’s arguments rehash claims already made in the 2006 application for reopening, which this Court denied. They also rehash arguments that were already rejected either in his direct appeal to this Court or in his post-conviction petition filed in the common pleas court on April 2, 2004. The common pleas court rejected that petition, the Tenth District affirmed that denial, and this Court declined review. See *State v. Conway*, 10th Dist. No. 05AP-76, 2005-Ohio-6377, appeal not accepted, Sup.Ct. No.06-47, 109 Ohio St.3d 1456, 2006-Ohio-2226.

S.Ct.Prac.R. 11.06 does not allow successive reopening applications anyway. The application is also untimely, and defendant does not demonstrate “good cause.”

**A. Lack of Good Cause for Untimely Filing**

The convictions were affirmed in this Court on March 8, 2006. Pursuant to S.Ct.Prac.R. XI(6)(A) (now S.Ct.Prac.R. 11.06) , defendant’s application for reopening was due within 90 days thereafter, June 6, 2006. Defendant filed a timely application for reopening on June 1, 2006, which this Court denied on August 23, 2006.

The second application recently filed by defendant was filed over *ten years late*.

Given this untimeliness, defendant is required to make “[a] showing of good cause for untimely filing \* \* \*.” S.Ct.Prac.R. 11.06(B)(2).

Defendant acknowledges the delay but contends that this delay is warranted by the development of information from the appellate attorneys through depositions of them in the federal habeas action. But the information cited by defendant does not materially advance any claim of appellate counsel ineffectiveness.

In addition, the defense filed the federal habeas petition in October 2007 but did not seek discovery regarding Messrs. Barstow and Graeff until filing a second motion for discovery in April and May 2011. Waiting around three-plus years even to seek discovery does not amount to any “good cause” for the 10-plus years of delay involved here.

#### **B. Additional Lack of Good Cause for Untimely Filing**

In the context of the reopening procedure under App.R. 26(B), this Court has recognized that “[g]ood cause can excuse the lack of a filing only while it exists, not for an indefinite period.” *State v. Davis*, 86 Ohio St.3d 212, 214 (1999), quoting *State v. Fox*, 83 Ohio St.3d 514 (1998). Whatever “good cause” might exist early on, such good cause will evaporate if the defendant does not act in a timely manner thereafter. This logic would apply equally under S.Ct.Prac.R. 11.06.

Any supposed “good cause” here would have evaporated long before now. The district court granted the discovery as to Barstow and Graeff in December 2011, but the defense did not file notice of their depositions until March 6, 2012, and the depositions did not occur until March 21, 2012. Then it was over four years later before the defense filed the present application for reopening.

If the depositions were so significant (they aren’t), it should not have taken over

four years to file the present application. Indeed, the defense waited over three years after the depositions, until April 1, 2015, before even asking the district court to expand their appointment to include pursuing another round of filings in state court. The district court granted that request on March 1, 2016, ordering that the defense file those matters within 45 days, which the court later extended 90 more days until July 14, 2016.

These extensive delays after the March 2012 depositions do not amount to “good cause” in this Court, and, it is more than 90 days even since the expanded appointment.

### **C. Second Application Barred as Successive**

Beyond the excessive delays, defendant’s current application for reopening constitutes his second application. The first was denied in 2006.

Successive reopening applications are not permitted and are barred by res judicata. As this Court has noted under the equivalent reopening procedure under App.R. 26(B), “App.R. 26(B) makes no provision for filing successive applications to reopen.” *State v. Peebles*, 73 Ohio St.3d 149, 150 (1995). “Neither App.R. 26(B) nor [*Murnahan*] provides for second and subsequent applications for reopening.” *State v. Richardson*, 74 Ohio St.3d 235, 236 (1996). “Once ineffective assistance of counsel has been raised and adjudicated, res judicata bars its relitigation.” *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, ¶ 10, quoting *State v. Cheren*, 73 Ohio St.3d 137, 138 (1995).

Equally so, this Court has denied successive applications for reopening as not allowed by S.Ct.Prac.R. 11.06. *State v. Issa*, 106 Ohio St.3d 1407, 2005-Ohio-3154 (“Motion denied \* \* \* because second or successive applications for reopening are not permitted under the rule.”); *State v. Jones*, 108 Ohio St.3d 1409, 2006-Ohio-179 (same).

#### **D. Standards for Reopening**

The two-pronged test in *Strickland v. Washington*, 466 U.S. 668 (1984), governs whether the defendant has raised a “genuine issue” of appellate counsel ineffectiveness. *State v. Hill*, 90 Ohio St.3d 571, 572 (2001). An appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 752 (1983); *State v. Allen*, 77 Ohio St.3d 172, 173 (1996). A reasonable counsel can discount the chances of success on some issues and spend time on others instead. *Id.*

**1. Failure to object to prejudicial questioning by the State.** Defendant errs in claiming that trial counsel acted ineffectively in failing to object to statements made during direct examination of Ronald Trent. The statements regarding “another killing” and “which murder case” were vague and did not specifically connect defendant to the commission of another murder. Counsel reasonably could choose not to object in order to avoid drawing attention to the statements. This Court in *State v. Conway*, 108 Ohio St. 3d 214, 2006-Ohio-791, ¶168 (*Conway I*) recognized that a trial counsel need not object to every alleged error.

Also, these vague statements did not create a reasonable probability of a different outcome. As this Court concluded, “the question of Conway’s guilt is not close in this case” in light of the “[s]trong evidence” that defendant retrieved the gun and fired eight shots at his victims, including at close range while the victims were defenseless. *Id.* ¶ 82. Conway also admitted to shooting the victims in his testimony. *Id.*

**2. Failure to conduct hearing on “substantive motion.”** The parties stipulated to admit a transcript of witnesses’ testimony for purposes of litigating the Multi-Branch Motion to Suppress, which was identical to the Multi-Branch Motion to Suppress filed in defendant’s other death-penalty case. Defendant’s claim that recalling the same witnesses at an identical

hearing could have resulted in different testimony is mere speculation, and pursuant to *Strickland*, defendant can show no prejudice in the admission of the transcript as opposed to the time-wasting task of repeating the same testimony in a duplicative hearing.

**3. Failure to present testimony from the firearms “expert.”** A defendant claiming error has the burden of proving that error by reference to matters in the appellate record.

*Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980). “[T]here must be sufficient basis *in the record* \* \* \* upon which the court can *decide* that error.” *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 342 (1986) (emphasis *sic*). This is why claims of trial counsel ineffectiveness are generally unreviewable on direct appeal, since the appellate record will lack sufficient information to rule on both prongs of the ineffectiveness issue. *Massaro v. United States*, 538 U.S. 500 (2003).

It is unclear how the expert would have testified or whether there were tactical reasons not to call the expert. For example, trial counsel could have decided not to call the expert because the expert might have other testimony that would damage the defense.

Moreover, the question of whether a bullet went through Gervais to hit Williams was not at issue. The Tenth District rejected this claim on post-conviction review:

[E]xpert testimony on this issue would have been irrelevant. The question whether a bullet went through Gervais to hit Williams was not at issue in the case. Rather, the issue was appellant’s mental state at the time he fired the shots, and the state offered Trent’s testimony as support for its argument that appellant intended to kill Williams. During the state’s closing argument, counsel stated:

Remember what Ronnie Trent said that James Conway told him. I had a .45. That's a big gun. I had a .45 and I knew that it would go through the white boy and get to Mandel. That makes sense, shows you what James Conway's mental state was, what his purpose was.

(Tr. at 2620.) Because the validity of appellant’s alleged statement was not at issue, appellant has not presented evidence sufficient to question counsel’s decision not to offer expert testimony on this point. See *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 652 N.E.2d 205.

*State v. Conway*, 2005-Ohio-6377, ¶ 21.

In these circumstances, trial counsel could reasonably conclude that it was unnecessary or unwise to have an expert testify. “[T]rial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance,” including the decision not to call an expert. *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998) (“reasonably sound trial strategy.”).

4. **Computer Simulation.** Given this Court’s conclusion that there was an inadequate proffer regarding the expert’s qualifications and regarding how the expert would have testified vis-à-vis the simulation, see *Conway I*, ¶ 116, defendant’s ineffectiveness claim must fail. The same inadequacy that prevented review of the simulation claim of error would prevent full review of the ineffectiveness claim. As a result, appellate counsel cannot be deemed ineffective in failing to raise the issue of trial counsel ineffectiveness.

This Court in *Conway I* determined that the exclusion of the computer simulation did not meet the first prong of the *Gilmore* test in that defendant could not prove that the exclusion of the simulation affected a substantial right. *Conway I*, ¶ 123.

The information from Cope’s video that the defense sought to put before the jury – that Williams had pulled Gervais into the line of fire – was admitted nevertheless in the testimony of two prosecution witnesses. Thus, defense counsel were able to present this information to the jury, and we find no merit to Conway’s claim that the exclusion of Cope’s testimony and exhibits restricted Conway’s right to present a defense.

Id. Accordingly, defendant cannot show actual prejudice under the *Strickland* standard for any claim of appellate-counsel or trial-counsel ineffectiveness in this regard.

**5. Exclusion of “death-prone” juror.** This issue has been litigated in the post-conviction petition, which this Court declined to accept review of. Additionally, discretionary tactical decisions, including those made in *voir dire*, are nearly immune from scrutiny. *State v. Mason*, 82 Ohio St.3d 144, 157 (1998); *State v. Watson*, 61 Ohio St.3d 1, 13 (1991).

Trial counsel was in a much better position than a reviewing court to determine whether a juror merits an in-depth examination. Accordingly, this Court has consistently deferred to counsel’s ability to determine whether a prospective juror is qualified to be on the panel and has repeatedly declined to call counsel ineffective for failing to rehabilitate a juror. *State v. Keith*, 79 Ohio St.3d 514, 521 (1997); *State v. Phillips*, 74 Ohio St.3d 72, 85 (1995); *State v. White*, 85 Ohio St.3d 433, 450-51 (1999).

Juror Finegold indicated that he understood that there were two phases and that it was important that he hear all of the information prior to coming to a decision. (T. 526, 537) The Court came to the same conclusion in overruling the defense challenge for cause. (T. 548-549) Further, there was a tactical reason not to exercise a peremptory challenge against Finegold because Finegold expressed his desire for “clearcut” guilt and “one hundred percent guilty” several times. (T. 525, 539)

Other matters may have played a role in the decision not to exercise a peremptory challenge. Using a peremptory challenge often involves a weighing process, including an assessment of whether the juror would be a better or worse juror than his replacement. There has been no showing that defense counsel was ineffective.

**6. Objection to course-of-conduct specification.** Even if trial counsel had objected to the

course-of-conduct jury instruction, such an objection would have reasonably been overruled. As this Court held in *Conway I*, there was abundant evidence that Conway intended to kill both Gervais and Williams. “Conway's evidence actually shows intentional killing. \* \* \* That Conway hit Gervais and Williams four times each and that the final shots were fired at defenseless victims and at close range belie his denial of a purpose to kill.” *Conway I*, ¶136.

#### **E. Defendant’s Other Claims Lack Merit**

In his second proposition, defendant challenges the constitutionality of lethal injection. But appellate counsel in fact did raise various constitutional challenges regarding the death penalty, and this Court summarily rejected them. *Conway I*, ¶ 180. Execution by lethal injection is constitutional. *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028; *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 118; *Glossip v. Gross*, 135 S.Ct. 2726 (2015). Defendant satisfies neither of the ineffectiveness prongs.

Defendant’s claim in his third proposition of law is without merit. In order to provide sufficient evidence to support his claim that prosecutorial misconduct caused defense counsel to be ineffective in preparing for the testimony of Ronald Trent, defendant would have to establish, first, that the prosecutor did not disclose the May 26, 2002 transcript of Ronald Trent’s statement to the Franklin County Sheriff’s Office to counsel before trial, and, second, that the prosecutor had knowledge beforehand that Trent would testify that defendant told him he kept shooting because he knew a .45 would go through both of them. The appellate record does not substantiate either claim.

In fact, defense counsel was provided Trent’s statements before trial. Counsel for the State and defense agreed that because of the large amount of materials included in the discovery, that it would be burdensome to file it with the Clerk of Courts. Therefore, the

parties agreed to keep a sealed copy of the discovery given in a box that was signed by all parties. An agreed entry was filed with the court on March 19, 2003 indicating the agreement between the parties. After defendant alleged during trial that the statement was not provided, counsel for the State opened the sealed box in the presence of witnesses and verified that the statement was included in the materials.

Defendant also claims, without proof other than Trent's trial testimony, that an undisclosed statement existed as to defendant's knowledge that a ".45 would go through him." The prosecutor stated during the hearing on defendant's motion for a new trial that there was no recorded or written statement by Ronald Trent with that comment. The prosecutor did not say that there was no statement of Trent describing defendant's use of a .45 caliber and his recitation of the events to Trent. Mr. Lowe indicated at the motion hearing that the State never saw a statement that Appellant "kept shooting because he knew a .45 would go through him." Mr. Lowe stated, "I have gone through every piece of paper, tape, transcript, and that statement does not appear in any statement that the State is in possession of or has ever been in possession of." The May 26, 2002 transcript does not include the information that defendant knew a .45 would go through him. Thus, the State was correct in asserting it did not have a statement to that effect.

Defense counsel had an opportunity to cross-examine Trent about that statement and to attempt to impeach him if the defense found it to be necessary. However, Mr. Trent's prior statements to police, as reflected in the April 25, 2002 transcript and the May 26, 2002 transcript essentially seem to suggest that defendant knew what he was doing and what a .45 caliber was capable of and shot Gervais to get to Williams.

Trial counsel exercised sound strategy in not cross-examining Trent on the

statement as it would only have called attention to the fact that defendant had no regard for Gervais' life and shot him in order to kill Mandel Williams. Trial counsel's decision to cross-examine a witness and the extent of such cross-examination are tactical matters. As such, decisions regarding cross-examination are within trial counsel's discretion and cannot form the basis for a claim of ineffective assistance of trial counsel. Questioning Trent about defendant's exact words to him about the incident would only have served to highlight this testimony. Defense counsel exercised sound trial strategy.

Many witnesses testified, including defendant himself. Defendant by his own admission, fired the weapon until it was empty and could have quit shooting at any time. This testimony, alone, supported the jury's finding.

Respectfully submitted,

/s/ Steven L. Taylor

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Chief Counsel, Appellate Division  
Counsel for Plaintiff-Appellee

#### **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by email on July 25, 2016, to Kort Gatterdam, gatterdam@carpenterlipps.com, and to Marc Triplett, marctrip@earthlink.net, counsel for defendant.

/s/ Steven L. Taylor

STEVEN L. TAYLOR 0043876