

ORIGINAL

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO,
Appellee,**

S.Ct. Case No. 2015-1568

**On Appeal from the Warren
County Court of Appeals,
Twelfth Appellate District**

v.

**Court of Appeals
Case Nos. CA2014-11-138
CA2014-11-139**

**GREGORY CLAYTON
Appellant.**

**APPELLANT GREGORY CLAYTON APPLICATION FOR REOPENING
PURSUANT TO OHIO S.CT. R. 11.06**

**GREGORY CLAYTON, (PRO SE)
1720 Freeman Avenue
Cincinnati, Ohio 45214**

COUNSEL FOR APPELLANT

**WARREN COUNTY PROSECUTOR
PROSECUTING ATTORNEY DAVID P. FORNSHELL#0071582
ASSISTANT PROSECUTOR MICHAEL GREER#0084352 (Counsel of Record)
500 Justice Drive
Lebanon, Ohio 45036**

COUNSEL FOR APPELLEE

RECEIVED
OCT 11 2016
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SUPREME COURT OF OHIO

FILED
OCT 11 2016
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Now comes the Appellant, Gregory Clayton pro se pursuant to S.CT. R. 11.06 requesting delayed re-opening of his appeal in Ohio Supreme Court Case No. 2015-1568 for the reason that Appellant Counsel Edward Kathman(0055446) rendered ineffective on appeal by not filing a timely merit brief in accordance with Ohio S.Ct. R. 16.02(A)(2), thus Appellant's appeal must be re-opened and appointment of counsel appointed to brief the issues of the appeal.

II. STATEMENT OF THE CASE AND FACTS

On September 24, 2015, Attorney Edward Kathman(0055446) filed a timely jurisdictional appeal along with a memorandum in support of jurisdiction. **Exhibit 1.**

The Court granted the jurisdictional appeal on January 20, 2016. **Exhibit 2.**

On March 20, 2016, this Court dismissed the jurisdictional appeal for counsel failure to file the merit brief, thus failed to prosecute the appeal. **Exhibit 3.**

On March 31, 2016, counsel filed a motion for reconsideration pursuant to S.Ct. Prac. 18.02(B)(2). Counsel alleged in his motion for reconsideration that he was waiting for the Clerk of Courts to send him scheduling order, thus the deadline was not apparent to file the brief. **Exhibit 4.**

On May 18, 2016, this Court denied counsel's motion for reconsideration. **Exhibit 5.**

Appellant has called counsel numerous times seeking the status of his case, however, counsel has not returned his calls.

On September 27, 2016, Appellant took off work and visited the Warren County Common Pleas Clerk of Courts Office and discovered that his appeal in this Court was dismissed on March 30, 2016.

The instant application for reopening follows.

III. LAW AND ARGUMENT

To prevail on an application to reopen, Appellant must make "a colorable claim" of

ineffective assistance of appellate counsel under the standard established in Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See State v. Lee, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶2, citing State v. Sanders, 75 Ohio St.3d 607, 1996 Ohio 38, 665 N.E.2d 199 (1996).

The Sixth Amendment right to effective assistance of counsel extends to appellate counsel on direct appeal of a criminal conviction. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). The Sixth Circuit Court of Appeals has held that:

In order to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show errors so serious that counsel was scarcely functioning as counsel at all and that those errors undermine the reliability of the defendant's convictions. Strategic choices by counsel, while not necessarily those a federal judge in hindsight might make, do not rise to the level of a Sixth Amendment violation.

McMeans v. Brigano, 228 F.3d 674, 682 (6th Cir. 2000), cert. denied, 532 U.S. 958, 121 S. Ct. 1487, 149 L. Ed. 2d 374 (2001) (Citations omitted.). The failure of appellate counsel to assert claims on appeal cannot rise to the level of denial of a constitutional right unless such failure was so ill-advised as to have caused petitioner to effectively have been without counsel. Burton v. Renico, 391 F.3d 764 (6th Cir. 2004). A petitioner asserting appellate counsel's failure to raise unasserted claims will not be able to establish such a showing even if the unasserted claims are deemed not to have been frivolous, if those claims are without merit. *Ibid.*

In case identical to the instant, Evitts v. Lucey (1985), 469 U.S. 387, respondent's counsel filed a timely notice of appeal to the Kentucky Court of Appeals, but failed to file the statement of appeal as required by a Kentucky Rule of Appellate Procedure. The Kentucky Supreme Court therefore dismissed the appeal and denied a motion for reconsideration. In affirming the federal district court's order that respondent be released unless his appeal was reinstated or he was granted a new trial, the United States Supreme Court stated:

"[The] right to counsel is limited to the first appeal as of right, see Ross v. Moffitt, 417 U.S. 600 (1974), and the attorney need not advance every argument, regardless of merit, urged by the appellant, see Jones v. Barnes, 463 U.S. 745 (1983). But the attorney must be available to assist in preparing and submitting a brief to the appellate court, Swenson v. Bosler, 386 U.S. 258 (1967) (per curiam), and must play the role of an active advocate, rather than a mere friend

of the court assisting in a detached evaluation of the appellant's claim. See *Anders v. California*, 386 U.S. 738 (1967); see also *Entsminger v. Iowa*, 386 U.S. 748 (1967)." (Emphasis sic.) Id. at 394.

It was concluded that "[a] first appeal of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." (Footnote omitted.) Id. at 396.

The facts in the instant case are similar to those in *Evitts v. Lucey*, supra. That is, although a timely notice of appeal was filed in this court, appellant's counsel failed to file a brief pursuant to Ohio S.Ct. R. 16.02(A)(2) and the appeal was dismissed.

It is not excuse for counsel to not know the Ohio Supreme Court Rules of Practice. S.Ct.Prac.R. 16.02(A)(2) provides that once the record is transmitted, the appealing party has 40 days to submitted a brief. A properly licensed attorney is presumed competent. *State v. Smith* (1985), 17 Ohio St.3d 98, 100, 17 OBR 219, 477 N.E.2d 1128. The failure to read the Ohio Supreme Court Rules of Practice and file a brief is not a attorney that should be considered competent by any standards. There is clearly no doubt that counsels actions, non-actions rather, prejudice appellant.

Counsel raised two proposition of laws in this Court. (1) Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures; (2) the extended and contained detention of individuals is unconstitutional once a canine did not detect illegal drugs, and any actions taken by the investigating officers after the fact were beyond the scope of the detention. The good faith exception to the exclusionary rule based upon the search warrant was not obtained until four hours elapsed after the stop.

The instant case presented two issues for the Court to decide that involved the Fourth and Fourteenth Amendment to the U.S. Constitution as it relates to a citizen's right to be free from prolonged detention when the arresting officers are essentially on a fishing expedition. See **Exhibit 1.**

Had counsel in this case filed the brief, there is a strong possibility that the judgment of the Twelfth District Court of Appeals in *State v. Raphael*, 2015-Ohio-3179; 2015 Ohio App. LEXIS 3096, 12th Dist. Aug. 10, 2015) would have been reversed and all evidence suppressed.

Appellant has suffered tremendous prejudice in this case. Appellant now is facing the possibility of spending the next eight (8) years of his life in prison because of his attorney's incompetence in not filing a brief in this court.

VI. CONCLUSION

In the instant case, Appellant contends that a lawyer reasonably knowledgeable of rules of court for this Court would have not failed to file a brief. There exist a strong possibility of a different result on appeal had appellate counsel had file a brief pursuant to Ohio S.Ct.Prac.R. 16.02(A)(2). There exist a strong possibility that the trial courts entry granting suppression of all evidence would have been affirmed and Appellant's liberty interest stayed in tacked.

Essentially, two inquiries are necessary: (1), whether competent counsel would have file a timely brief as a standard practice under professional norms; (2), whether most reasonable attorney's would have done so. It is reasonable to conclude that a reasonable competent knowledgeable attorney should at least be familiar with the rules of courts he practice in.

Accordingly, Appellant has show both, cause and prejudice. Appellant respectfully request this Honorable Court to grant his APPLICATION FOR RE-OPENING PURSUANT TO OHIO S.CT. R. 11.06, reinstate the appeal and appoint new appellate counsel to fully brief the proposition of laws.

RESPECTFULLY SUBMITTED,



GREGORY CLAYTON
1720 Freeman Avenue
Cincinnati, Ohio 45214

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail to the Warren County Prosecutor at 500 Justice Drive, Lebanon, Ohio 45036 on this 3rd day of October, 2016.



Talesia Tribble

TALESIA TRIBBLE
Notary Public, State of Ohio
My Commission Expires
September 20, 2020

Gregory Clayton

GREGORY CLAYTON
1720 Freeman Avenue
Cincinnati, Ohio 45214

AFFIDAVIT OF GREGORY CLAYTON

I, Gregory Clayton, first being cautioned as to the penalty of perjury swear and state that:

1. I am the Appellant in the instant motion for relief from judgment, Ohio Supreme Court Case No. 2015-1568;
2. That I was and am without the means to afford a attorney for this instant action;
3. That the Court rendered its judgment on January 20, 2016 accepting the jurisdictional appeal;
4. That I was never appraised of said judgment;
5. That court appointed counsel Edward Kathman(0055446) never informed me of said judgment and to this very day, counsel will not return my calls;
6. That the clerk of courts never sent notice of said judgment to me;
7. On September 27, 2016, Appellant took off work and went to the Warren County Common Pleas Clerks Office and discovered that Appellant's appeal in this Court was dismissed March 30, 2016 for counsel's failure to prosecute the appeal;
8. Had I been aware that this Court rendered judgment and accepted the jurisdictional appeal on January 20, 2016, I would have filed a timely pro se merit brief or made sure that appellate counsel filed a timely brief with the Ohio Supreme Court;
9. That counsel failed to file the brief and as a result of counsel's incompetence in failing to file the brief, Appellant's appeal was dismissed thus rendering Appellant's liberty interest in jeopardy;
10. I was prejudiced by counsel's incompetence in failing to file the brief, there was a strong possibility that the judgment of the Twelfth District Court of Appeals in State v. Raphael, 2015-Ohio-3179; 2015 Ohio App. LEXIS 3096, 12th Dist. Aug. 10, 2015) would have been reversed and all evidence suppressed. I have suffered tremendous prejudice in this

case. I'm now is facing the possibility of spending the next eight (8) years of his life in prison;

11. I have presented operative facts warranting my Motion for Relief from Judgment pursuant to S.Ct. Prac. R. 11.06. I respectfully request the granting of my Motion for Relief from Judgment pursuant to S.Ct. Prac. R. 11.06.

FURTHER AFFIANT SAYETH NAUGHT.

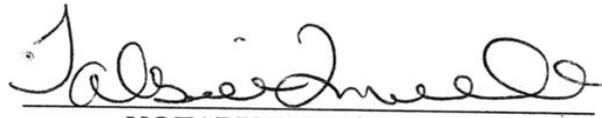

AFFIANT- GREGORY CLAYTON

Sworn to and subscribed in my presence this 3rd day of October, 2016.

SEAL:



TALESIA TRIBBLE
Notary Public, State of Ohio
My Commission Expires
September 20, 2020


NOTARY PUBLIC

The Supreme Court of Ohio

FILED

COURT OF APPEALS
WARREN COUNTY
FILED

MAR 30 2016

MAY 23 2016

CLERK OF COURT
SUPREME COURT OF OHIO

James L. Spaeth, Clerk
LEBANON OHIO

State of Ohio

v.

Jason Raphael, et al.

Case No. 2015-1568

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF APPEALS

This cause is pending before the court as an appeal from the Court of Appeals for Warren County. The records of this court indicate that appellants have not filed a merit brief, due March 23, 2016, in compliance with the Rules of Practice of the Supreme Court of Ohio and therefore have failed to prosecute this cause with the requisite diligence.

Upon consideration thereof, it is ordered by the court that this cause is dismissed.

It is further ordered that mandates be sent to and filed with the clerks of the Court of Appeals for Warren County and the Court of Common Pleas for Warren County.

(Warren County Court of Appeals; Nos. CA2014-11-138 and CA2014-11-139)

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OCT 11 2016
CLERK OF COURT
SUPREME COURT OF OHIO

Maureen O'Connor
Chief Justice

CERTIFY that this document is a true and accurate copy of the judgment entry of the Supreme Court of Ohio filed on 5-20-16 in Case No. 15-1568 and constitutes the mandate of the Court pursuant to S.Ct.Prac.R. 18.04.

witness, I have subscribed my name (I) affixed the seal of the Supreme Court of Ohio on this 19 day of May, 20 16.
Clerk of Court , Deputy Clerk