

# **IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

WALLACE LEWIS,

Defendant-Appellant.

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## **OPINION AND JUDGMENT ENTRY** **Case No. 18 MA 0059**

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Application to Reopen

**BEFORE:**

David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

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**JUDGMENT:**

Denied.

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*Atty. Paul J. Gains*, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Wallace Lewis, *Pro Se*, #A750580, 2075 South Avon Belden Road, Grafton, Ohio 44044, Defendant-Appellant.

Dated: January 27, 2020

**PER CURIAM.**

{¶1} On December 12, 2019, Appellant, Wallace Lewis, filed a timely pro se App.R. 26(B) application to reopen his criminal appeal in *State v. Lewis*, 7th Dist. Mahoning No. 18 MA 0059, 2019-Ohio-4081, based on a claim of ineffective assistance of appellate counsel. Appellee, the State of Ohio, filed a response one week later.

{¶2} Appellant was convicted and sentenced to 27 years in prison for murder with a repeat violent offender specification and tampering with evidence following a jury trial. On appeal, appellate counsel raised three assignments of error, including: (1) that Appellant's convictions were based on insufficient evidence and were against the manifest weight of the evidence; (2) that Appellant's speedy trial rights were violated; and (3) that the trial court erred in imposing a repeat violent offender specification. This court found no merit with any of the arguments asserted and affirmed the trial court's judgment on September 30, 2019. *Lewis, supra*, at ¶ 45.

{¶3} In his pro se application for reopening, Appellant argues his appellate counsel "failed to raise winnable issues in the direct appeal he prepared on his behalf, and failed to effectively argue those errors he did." (12/12/2019 Application for Reopening, p. 1).

App.R. 26(B) provides a means for a criminal defendant to reopen a direct appeal based on a claim of ineffective assistance of appellate counsel. A defendant must establish a colorable claim of ineffective assistance of appellate counsel in order to prevail on an application for reopening. *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, ¶ 7, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998). The test for ineffective assistance of counsel requires a defendant to prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for

reopening and that there was a reasonable probability of success had that issue been raised on appeal. *Spivey* at 25.

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Under App.R. 26(B), an applicant must set forth “(o)ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel’s deficient representation.” App.R. 26(B)(2)(c).

*State v. Hackett*, 7th Dist. Mahoning No. 17 MA 0106, 2019-Ohio-3726, ¶ 6, 9.

[Furthermore] [i]t should finally be noted that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. [*State v.*] *Tenace*, 109 Ohio St.3d 451 at ¶ 7, 849 N.E.2d 1, citing *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 761 N.E.2d 18. “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.” *Jones v. Barnes* (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987.

*State v. Jones*, 7th Dist. Mahoning No. 06 MA 17, 2008-Ohio-3352, ¶ 6.

{¶4} Appellant presents two main arguments in his application.

{¶5} First, Appellant posits that his convictions were against the sufficiency and manifest weight of the evidence. He specifically takes issue with the testimony of his co-defendants, Calvin Shelton and Felicia Ward, and with the testimony of the forensic pathologist, Dr. Joseph Felo. He also alleges there was insufficient evidence of purposeful intent. These issues address the main arguments raised by appellate counsel and considered by this court in the direct appeal under the first assignment of error. See *Lewis, supra* (sufficiency and manifest weight, ¶ 20-21; testimony of Shelton, Ward, and Dr. Felo, ¶ 5, 8-11, 15, 29-33; and purposeful intent, ¶ 23-35).

{¶6} Second, Appellant posits that his speedy trial rights were violated. He specifically takes issue with his trial counsel’s failure to file a motion to dismiss and to

seek a mistrial due to the alleged “surprise” testimony of Latise Mahinparvar, the victim’s daughter. These issues address the main arguments raised by appellate counsel and considered by this court in the direct appeal under the second assignment of error. See *Lewis, supra* (violation of speedy trial rights, ¶ 37; and failure to file a motion to dismiss, ¶ 38). The testimony of Mahinparvar was addressed and considered throughout the opinion. *Id.* (¶ 6, 12, 27, 33).

{¶7} Appellate counsel adequately raised three assignments of error challenging Appellant’s convictions and sentence. Appellant has not presented this court with any new assignments of error. See App.R. 26(B)(2)(c). The main arguments Appellant raises here were addressed and considered by this court in the direct appeal under the first and second assignments of error; the analysis is 20 paragraphs in length. See *Lewis, supra*, at ¶ 20-39. We note that it would have been futile for appellate counsel to allege ineffective assistance of trial counsel as the record shows that trial counsel performed favorably in this case, i.e., thoroughly cross-examined witnesses and raised objections. See *State v. Williams*, 7th Dist. Jefferson No. 11 JE 7, 2013-Ohio-2314, ¶ 11, 14. Upon consideration, Appellant’s arguments provide no basis for this court to reopen the appeal as he fails to present a colorable claim of ineffective assistance of appellate counsel. See App.R. 26(B); *Strickland, supra*, at 687.

{¶8} For the foregoing reasons, Appellant’s pro se application for reopening is hereby denied.

**JUDGE DAVID A. D’APOLITO**

**JUDGE CHERYL L. WAITE**

**JUDGE CAROL ANN ROBB**

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**

