

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-1159
Carlos Davenport,	:	(C.P.C. No. 10CR-05-2709)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 26, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

The Law Office of Eric J. Allen, LTD, and *Eric J. Allen*, for appellant.

ON APPLICATION TO REOPEN

TYACK, J.

{¶ 1} Carlos Davenport has filed an application to reopen his direct appeal, alleging that his appellate counsel rendered ineffective assistance of counsel. Davenport and his new counsel rely on App.R. 26(B), which reads:

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One 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;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

{¶ 2} Davenport's new appellate counsel lists four issues which he asserts should have been raised by prior appellate counsel:

I. APPELLANT WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL COURT WHEN HE WAS DENIED ACCESS TO THE SEARCH WARRANT FOR HIS CELLULAR PHONE, AS WELL AS HIS CELLULAR PHONE WHICH HELD EXCULPATORY INFORMATION, AND WHEN HE HAD HIS BOND REVOKED WITHOUT CAUSE AND WAS JAILED FOR REQUESTING APPOINTED COUNSEL.

II. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO FILE A MOTION TO SUPPRESS THE UNLAWFUL SEARCH OF THE CELLULAR PHONE.

III. APPELLANT WAS DENIED DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION AND MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT WHEN THE TRIAL COURT REFUSED TO ALLOW APPELLANT TO INTRODUCE PHONE RECORDS DETAILING CALLS BETWEEN HE AND THE PROSECUTING WITNESS' MOTHER AND WHEN THE COURT REFUSED TO ALLOW APPELLANT TO INTRODUCE A VIDEO OF APPELLANT AND THE DETECTIVE IN THIS CASE DISCUSSING THE EXCULPATORY EVIDENCE CONTAINED ON THE CELL PHONE.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS BY APPOINTING HIS RETAINED ATTORNEY WITHOUT HIS KNOWLEDGE OR PERMISSION.

{¶ 3} The fourth issue attacks the trial court's appointing of the attorney who Davenport hired to represent him to continue representing him. Davenport stopped paying the attorney which caused their relationship to deteriorate. The trial court judge, rather than get a new attorney involved and delay the trial while the new attorney investigated the case, appointed the originally retained attorney while expressing doubts that Davenport was indigent even though a \$250,000 bond had been posted. This all occurred over one year before the trial commenced. In fact, a new defense attorney did become involved and the new attorney tried the case. The trial court judge's actions in trying to avoid further delays in the case going to trial did not prejudice Davenport in any way. Former appellate counsel had no basis for asserting this issue as prejudicial error and clearly was not rendering ineffective assistance of counsel when he failed to assert it.

{¶ 4} The issue at trial was whether Davenport sexually abused a young child, not whether Davenport continued to talk to the child's mother on a cell phone after the child began claiming that Davenport had sexually abused the child. The child testified at the trial. Davenport testified at the trial and categorically denied sexually abusing the child.

The jury clearly did not believe that Davenport's testimony raised a reasonable doubt about the accuracy of the child's testimony and claims of sexual abuse.

{¶ 5} Nothing in the record on appeal suggests that the child had any access to the cell phone or any involvement with the cell phone's contents. Whether the search of the cell phone was proper was irrelevant to the central issue in the case. The argument about the cell phone and its contents shows all the signs of being the proverbial red herring. Appellate counsel did not have to pursue those issues.

{¶ 6} The cell phone issue, despite its irrelevance, was addressed in the trial court. Further, Davenport and his counsel had the opportunity to develop cell phone records about calls to Davenport's cell phone. The fact that the child's mother continued to communicate with Davenport did not mean the child was lying about the sexual abuse.

{¶ 7} Further, the record before us does not show that police unlawfully searched the cell phone. Davenport claimed to police that he had cleared the phone of most or all of its contents, so there was apparently nothing to search for or seize. Again, the cell phone issues could not have created prejudicial error so prior counsel did not fail his duties to Davenport by failing to assert the issues via assignment of error.

{¶ 8} No ineffective assistance of appellate counsel occurred.

{¶ 9} The application for reopening under App.R. 26(B) is denied.

Application for reopening denied.

SADLER and DORRIAN, JJ., concur.
