[Cite as *State v. Snyder*, 2009-Ohio-2473.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon: Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-25
TIMOTHY L. SNYDER	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Application to re-open direct appeal pursuant to App. R. 26(B). Licking County Court of Common Pleas, Case Nos. 06CR494, 06CR553 & 07CR363
JUDGMENT:	Denied
DATE OF JUDGMENT ENTRY:	May 22, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT DANIEL H. HUSTON 20 S. Second Street, 4th Floor Newark, OH 43055	TIMOTHY L. SNYDER #a 569-272 Chillicothe Correctional Institute Box 5500 Chillicothe, OH 45601

Gwin, P.J.

{¶1} Appellant Timothy L. Snyder has filed a timely application for re-opening his appeal pursuant to App. R. 26 (B) claiming ineffective assistance of appellate counsel. Appellant has also filed a motion to "cause surrender of transcripts and trial record." Additionally, appellant has filed a motion to stay our decision pending his receipt of the transcript and record. Further, on April 7, 2009 appellant filed a "Notice of appeal appellant Timothy L. Snyder on Handwriting Expert."[1] Finally, on April 27, 2009, appellant filed a pro se a document styled, "Appeal Rule 26. B. Reopening Amended."

{¶2} App. R. 26 (B) states:

{¶3} "(B) Application for reopening:

{¶4} "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 later.

{¶5} "An application for reopening shall contain all of the following:

{¶6} "The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

{¶7} "A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

{¶8} "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

[1] Although filed as an "appeal" from the trial court's denial of his March 5, 2009 motion for appointment of counsel and motion for expert assistance, we find the issue raises one of ineffective assistance of appellate counsel pursuant to App. R. 26.

any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

{¶9} "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;

{¶10} "Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies."

{¶11} On December 18, 2008 this Court upheld appellant's convictions and sentences on two counts of theft by deception from an elderly person, felonies of the second degree in violation of R.C. 2913.02(A)(3) and (B)(3), one count of misuse of a credit card, a third degree felony in violation of R.C. 2913.21(B)(2), one count of grand theft by deception from an elderly person, a felony of the fourth degree in violation of R.C. 2913.02(A)(2) and (A)(3), and one count of theft by deception from an elderly person, a felony of the fourth degree in violation of R.C. 2913.02(A)(3). See, *State v. Snyder*, Fifth Dist. No. 2008-CA-25, 2008-Ohio-6709.

{¶12} Our original judgment was filed on December 18, 2008, and appellant's application was filed March 18, 2009. Accordingly, appellant's application was timely filed within ninety (90) days of the journalization of our opinion in appellant's case. Because appellant filed his application within 90 days of journalization, we must consider the application. *State v. Davis, supra* at ¶17. App.R. 26(B)(5) states that "[a]n 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." Our mandate in addressing a timely filed application for reopening is to determine whether that "genuine issue" exists. *State v. Davis, supra* at ¶17.

{¶13} "To show ineffective assistance, appellant must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal." *State v. Sheppard* (2001), 91 Ohio St.3d 329, 330, 744 N.E.2d 770, 771, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. See, also *State v. Brooks* (2001), 92 Ohio St.3d 537, 539, 751 N.E.2d 1040, 10412. Moreover, to justify reopening his appeal, appellant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey,* 84 Ohio St.3d at 25, 701 N.E.2d at 697.

{¶14} "The clear intent of App. R. 26 (B) is for the appellate court to function as the trier of fact in determining whether the defendant has demonstrated a genuine issue as to the ineffectiveness of his appellate counsel…App. R. 26 (B) provides the court the necessary evidentiary tools to make its determination. App. R. 26 (B) presents the reviewing court the opportunity for a meaningful review of the record upon the application for the re-opening of the appeal…A substantive review of the claim is an essential part of a timely filed App.R. 26(B) application. The court of appeals in addressing [the defendant's] App. R. 26 (B) application for re-opening should have determined whether he had alleged a genuine issue of ineffective assistance of appellate counsel." *State v. Davis,* 119 Ohio St.3d 422, 2008-Ohio-4608 at ¶18-21; 26.

{¶15} We are re-opening this case for the limited purpose of considering whether appellant has raised a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel. If appellant carries this burden then this Court would "appoint counsel to represent the applicant if the applicant is indigent and not currently represented," and the case would proceed as on the initial appeal. App.R. 26(B) (6) (a) and (B) (7).

{¶16} In the event we deny appellant's application for re-opening then we must set forth our reasons for denying the application. App. R. 26 (B) (6). "[T]he App.R. 26(B) process bears a marked resemblance to post conviction review in several other ways… App.R. 26(B) (6) requires the court to 'state in the entry the reasons for denial.' A parallel provision in [the post-conviction relief statute] R.C. 2953.21(G) requires 'findings of fact and conclusions of law.'" *Morgan v. Eads,* 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157 at¶ 17.

{¶17} In construing the analogous provisions of the post conviction relief statute, R.C. 2953.21(G), the Supreme Court of Ohio noted in *State v. Mapson* (1982), 1 Ohio St.3d 217, 219, important policy considerations underlie the requirement of findings of fact and conclusions of law. "The obvious reasons for requiring findings are '* * to apprise petitioner of the grounds for the judgment of the trial court and to enable the appellate courts to properly determine appeals in such a cause.' "Id*.,* quoting *Jones v. State* (1966), 8 Ohio St.2d 21, 22. "The existence of findings and conclusions are essential in order to prosecute an appeal. Without them, a petitioner knows no more than he lost and hence is effectively precluded from making a reasoned appeal. In addition, the failure of a trial judge to make the requisite findings prevents any

meaningful judicial review, for it is the findings and the conclusions which an appellate court reviews for error." *Id.* See, also *State v. Were*, 120 Ohio St.3d 85, 896 N.E.2d 699, 2008-Ohio-5277. [Capital defendant failed to show error by Court of Appeals in failing to conduct evidentiary hearing before denying application to reopen direct appeal; defendant was not entitled to an evidentiary hearing under App.R. 26(B) (8), and *opinion of Court of Appeals showed that the court carefully considered each of the issues that defendant wanted to raise on a reopened appeal before denying his application.*] Id. at ¶ 4.

{¶18} In his present motion to re-open, appellant maintains he received ineffective assistance of appellate counsel on direct appeal. Appellant contends that his appellate counsel, on direct appeal, was ineffective for failing to raise the assignment of error of ineffective assistance of trial counsel.

{¶19} Several of appellant's arguments focus upon a claim of prosecutorial misconduct occurring during the cross-examination of appellant at trial. Specifically, appellant contends that the prosecuting attorney held up a copy of a notarized contract between appellant and one of his victims and referred to the document as "bogus." He further contends the prosecutor's use of the word "lie" during cross-examination and argument constituted prejudicial error. Finally, he argues that trial counsel should have presented testimony from a handwriting expert to rebut the testimony of Jeff Stahl concerning the amount of money paid back by appellant.

{¶20} The prosecutor's duty in a criminal trial is two-fold. The prosecutor is to present the case for the State as its advocate and the prosecutor is responsible to

ensure that an accused receives a fair trial. *Berger v. U. S.* (1935), 295 U. S. 78; *State v. Staten* (1984), 14 Ohio App. 3d 197.

{¶21} Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768. The touchstone of analysis is "the fairness of the trial, not the culpability of the prosecutor." *State v. Underwood* (1991), 73 Ohio App.3d 834, 840-841, 598 N.E.2d 822, 826, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87-88. An appellate court should also consider whether the misconduct was an isolated incident in an otherwise properly tried case. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203, 209-210; *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶22} In *State v. Draughn* (1992), 76 Ohio App. 3d 666, 602 N.E. 2d 790, this Court stated: "[i]n opening closing argument the prosecutor is limited to comments upon the evidence, and the logical and appropriate conclusions to be drawn therefrom. Thus, he can bolster his own witnesses, and conclude by saying, in effect, 'The evidence supports the conclusion that these witnesses are telling the truth.' He cannot say, 'I believe these witnesses,' because such argument invades the province of the jury, and invites the jury to decide the case based upon the credibility and status of the prosecutor. See *State v. Smith* (1984), 14 Ohio St. 3d 13, 14 OBR 317, 470 N.E. 2d 883. In a sense, such argument by the prosecutor injects himself into the trial as a thirteenth juror, and claims to himself the first vote in the jury room. Further, it is inappropriate for the prosecutor to vouch for the integrity of his witnesses. Id.

{¶23} "As to the defense witnesses, including the defendant, the prosecutor may comment upon the testimony, and suggest the conclusions to be drawn therefrom. He can say, 'The evidence supports the conclusion that the defendant is lying, is not telling the truth, is scheming, has ulterior motives, including his own hide, for not telling the truth.' See *State v. Strobel* (1988), 51 Ohio App.3d 31, 554 N.E.2d 916. He may not say, 'I believe the defendant is lying,' for the same reasons as above.

{¶24} "In his rebuttal argument, the prosecutor may argue that the evidence does not support the conclusion postulated by defense counsel. He may comment upon the circumstances of witnesses in their testimony, including their interest in the case, their demeanor, their peculiar opportunity to review the facts, their general intelligence, and their level of awareness as to what is going on. He may conclude by arguing that these circumstances make the witnesses more or less believable and deserving of more or less weight.

{¶25} "Generally the credibility of various witnesses will now have been put in issue by the argument of the defense. Considerable additional latitude is due the prosecutor at this juncture, either on fair play grounds or because the comments are invited by the defense. The prosecutor should be allowed to go as far as defense counsel. Thus, if the defense accuses witnesses of lying, the prosecutor should have the same right.

{¶26} "However, the prosecutor may not invite the jury to judge the case upon standards or grounds other than the evidence and law of the case. Thus, he cannot inflame the passion and prejudice of the jury by appealing to community abhorrence or expectations with respect to crime in general, or crime of the specific type involved in

the case. *United States v. Solivan* (C.A.6, 1991), 937 F.2d 1146". Id. at 670-71, 602 N.E.2d at 793.

{¶27} We thoroughly reviewed the facts and the evidence presented during appellant's trial in our disposition of appellant's direct appeal. Under these circumstances, there is nothing in the record to show that the jury would have found the appellant not guilty had the comment not been made on the part of the prosecution. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227.

{¶28} Accordingly, appellant has failed in his burden to demonstrate that appellate counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. For that reason, we find that appellant's contention raises "no genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal***" *State v. Smith* 95 Ohio St. 3d 127, 2002-Ohio-1753.

{¶29} Appellant next contends that trial counsel was ineffective because he failed to present the testimony of an expert witness to analysis Mr. Stahl's signature. Further, appellant has filed a motion to appoint a handwriting expert together with his App. R. 26 application to re-open.

{¶30} Appellant cites neither rule of criminal procedure nor statute which authorizes a "motion to appoint expert witness" to be filed in a criminal case where the defendant has exhausted his or her direct appeals. "It is the duty of the appellant, not this court, to demonstrate [his] assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3. See, also, App.R. 16(A) (7). "It is not the function of this court to

construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60.

{¶31} A decision regarding which defense to pursue at trial is a matter of trial strategy "within the exclusive province of defense counsel to make after consultation with his client." *State v. Murphy,* 91 Ohio St.3d 516, 524, 2001-Ohio-0112. This court can only find that counsel's performance regarding matters of trial strategy is deficient if counsel's strategy was so "outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff." ' *State v. Woullard,* 158 Ohio App.3d 31, 813 N.E.2d 964, 2004-Ohio-3395, ¶ 39, quoting *State v. Yarber* (1995), 102 Ohio App.3d 185, 188, 656 N.E.2d 1322. Further, the Ohio Supreme Court has recognized that if counsel, for strategic reasons, decides not to pursue every possible trial strategy, defendant is not denied effective assistance of counsel. *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523. When there is no demonstration that counsel failed to research the facts or the law or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189, citing *People v. Miller* (1972), 7 Cal.3d 562, 573-574, 102 Cal.Rptr. 841, 498 P.2d 1089; *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008 at ¶21.

{¶32} "Debatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner* (2004), 102 Ohio St.3d 358, 365, 2004-Ohio-3430, ¶ 45. Trial counsel's failure to request an expert is a "debatable trial tactic," and does not amount to ineffective assistance of counsel. See *State v. Thompson* (1987), 33 Ohio St.3d 1, 9 (trial counsel's failure to obtain a forensic pathologist to "rebut" issue of rape was not

ineffective assistance of counsel); *State v. Foust,* 105 Ohio St.3d 137, 153-154, 2004-Ohio-7006, ¶ 97-99 (trial counsel's failure to request funds for a DNA expert, an alcohol and substance-abuse expert, a fingerprint expert, and an arson expert did not amount to ineffective assistance of counsel because appellant's need for experts was "highly speculative" and counsel's choice "to rely on cross-examination" of prosecution's expert was a "legitimate tactical decision"); *State v. Yarger* (May 1, 1998), 6th Dist. No. H-97-014 (trial counsel's failure to hire an expert medical doctor to rebut state's expert witness was not ineffective assistance of trial counsel); *State v. Rutter,* 4th Dist. No. 02CA17, 2003-Ohio-373, ¶19, 28 (trial counsel's failure to hire an accident reconstructionist did not amount to ineffective assistance of counsel).

{¶33} The jury heard both sides of the argument during trial; they chose to believe Mr. Stahl rather than appellant. There is nothing in the record to show the jury would have found the appellant not guilty had an expert witness testified. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227.

{¶34} Appellant has failed in his burden to demonstrate that appellate counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. For that reason, we find that this issue raises "no genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal***" *State v. Smith* 95 Ohio St. 3d 127, 2002-Ohio-1753.

{¶35} In his "amended' application to re-open, appellant claims the state failed to prove the requisite amount to support a second degree felony classification with respect

to Count Two and Count Three of the indictment, i.e. theft by deception and misuse of a credit card.

{¶36} First, we note there is no right to file successive applications for reopening pursuant to App.R. 26(B). *State v. Richardson,* 74 Ohio St.3d 235, 1996-Ohio-258, 658 N.E.2d 273; *State v. Cheren,* 73 Ohio St.3d 137, 1995-Ohio-28, 652 N.E.2d 707; *State v. Peeples,* 73 Ohio St.3d 149, 1995-Ohio-36, 652 N.E.2d 717. Nor is provision made for "amending" the application.

{¶37} Furthermore, the state presented evidence at trial relative to Count Two of the indictment in excess of $25, 000.00. Specifically, as we noted in our original opinion in this mater, "During a two-year period between May 2004 and August 2006, appellant received nearly $36,000.00 from seventy-three year old James Bauer…" 2008-Ohio-6709 at ¶ 27.

{¶38} With respect to Count Three of the Indictment, we noted,

{¶39} "Appellant additionally utilized cash advances, purchases and checks to obtain an additional $3,000.00 from Mr. Bauer's credit card…. After indictment, while on bond and with the specific term that he have no contact with Mr. Bauer, appellant obtained $3,400.00 from Mr. Bauer in the form of cash advances." Id.

{¶40} Appellant simply reiterates his argument that the jury should have believed his version of the events. However, the jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt. We previous overruled appellant's assignment of error that his conviction was against the manifest weight of the evidence.

{¶41} Appellant has failed in his burden to demonstrate that appellate counsel was deficient for failing to raise the issues he now presents and that there was a

reasonable probability of success had he presented those claims on appeal. For that reason, we find that this issue raises "no genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal***" *State v. Smith* 95 Ohio St. 3d 127, 2002-Ohio-1753.

{¶42} For the foregoing reasons, appellant's motion to re-open his appeal is hereby DENIED.

{¶43} In light of our disposition of appellant's motion to re-open, we find appellant's motion to surrender transcripts, and his motion to stay to be MOOT.

{¶44} IT IS SO ORDERED.

By Gwin, P. J., and

Delaney, J., concur;

Farmer, J., dissents

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY

WSG:clw 0409

Farmer, J., dissenting

{¶45} I respectfully dissent from the majority's reopening procedure because I find it violates App.R. 26(A)(5), (6), and (7) which state the following:

{¶46} "(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.

{¶47} "(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:

{¶48} "(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

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

{¶50} "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.

{¶51} "(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."

{¶52} The analysis of the ineffective assistance of appellate counsel argument based on the ineffective assistance of trial counsel and prosecutorial misconduct goes

beyond the mere statement of reasons required by App.R. 26(A)(6). In particular, based upon the majority's determination at ¶27 after an independent analysis of the record as a whole, I would find this detailed subjective analysis should have been afforded to appellant via a reopening pursuant to App.R. 26(A)(7).

{¶53} I would find the majority's analysis denies appellant the ability to develop and expand his legal arguments on the issues as provided for in App.R. 26(A)(7). In addition, he would be entitled to new counsel if he meets the requirements of App.R. 26(A)(6)(a).

{¶54} Based on the foregoing reasons, I respectfully dissent from the majority's opinion.

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Judge Sheila Farmer

[Cite as *State v. Snyder*, 2009-Ohio-2473.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TIMOTHY L. SNYDER Defendant-Appellant	:	CASE NO. 2008-CA-25

For the reasons stated in our accompanying Memorandum-Opinion, the appellant's application to reopen his direct appeal pursuant to App. Rule 26(B) is denied. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY