IN THE SUPREME COURT OF OHIO
2017

STATE OF OHIO,	Case No. 2017-0853
Plaintiff-Appellee,	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
-vs-	
DEVONERE SIMMONDS,	Court of Appeals
Defendant-Appellant.	Case No. 16AP-332

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

After a jury trial, defendant Devonere Simmonds was convicted of aggravated murder, attempted murder, and other offenses relating to the killing of Imran Ashgar and the attempted killing of William Rudd a few days later. At sentencing, Simmonds's counsel presented two psychological reports discussing extensively—among other things—Simmonds's low intellectual functioning, emotional immaturity, drug use, head injuries, family background, and negative influences. Simmonds's attorney also discussed the relevant Supreme Court precedents outlining the scientific and legal justifications for why juveniles and those with intellectual disabilities are generally less culpable than other offenders. The trial court sentenced Simmonds—who was 17 years old at the time of the offenses—to life without parole (LWOP) for the aggravated murder of Ashgar, consecutive to 48 years on the other counts and specifications.

The Tenth District affirmed the LWOP sentence, finding that it was not cruel and unusual punishment and that the trial court complied with *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849. *State v. Simmonds*, 10th Dist. No. 14AP-1065, 2015-Ohio-4460 (*Simmonds I*), jurisdiction declined, 145 Ohio St.3d 1422, 2016-Ohio-1173. (Simmonds separately pleaded guilty to murder and attempted murder relating yet another incident that occurred three days before he killed Ashar. Thus, in the span of less than a week, Simmonds killed or attempted to kill *four people*—all while committing aggravated robberies.)

Simmonds later sought postconviction relief, claiming that his trial counsel were ineffective at the sentencing hearing. The trial court denied the petition, finding that counsel were not deficient and that Simmonds failed to show prejudice, as required under *Strickland v. Washington*, 466 U.S. 668 (1984). The Tenth affirmed this decision as well. *State v. Simmonds*, 10th Dist. No. 16AP-332, 2017-Ohio-2739 (*Simmonds II*). The court held that a "prejudicial per se" standard does not apply to Simmonds's ineffective-assistance claim. *Id*. at ¶¶ 19-24. The

court further held that, even if counsel were deficient, Simmonds failed to show prejudice. *Id*. at ¶¶ 25-28.

Simmonds now asks this Court to review the Tenth District's decision affirming the dismissal of the postconviction petition. But Simmonds does not identify any conflict or tension among the districts on any legal point. As the Tenth District noted, there is "no constitution, statute, rule, case, or other legal source" that supports Simmonds's argument that a "per se prejudice" standard should apply here. *Id*. at ¶ 22. Thus, under the well-settled and decades-old standard for ineffective-assistance claims set forth in *Strickland*, Simmonds was required to show both deficient performance and prejudice—and the Tenth District correctly held that Simmonds failed to show prejudice. Indeed, *four* judges—the trial court and the three judges on the Tenth District panel—have found that there is no reasonable probability that the evidence attached to Simmonds's petition would have resulted in a different sentence. Reviewing this fact-specific holding would not settle any legal issue and would have minimal, if any, application to future cases.

Without question, LWOP "should rarely be imposed on juveniles." *Long* at ¶ 29, citing *Miller v. Alabama*, 567 U.S. 460, 479 (2012). But Simmonds is the "the rarest of juvenile offender, [] whose crimes reflects permanent incorrigibility." *Simmonds II* at ¶ 27, quoting *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016). Because Simmonds's proposition of law presents no questions of such constitutional substance or of such great public interest as would warrant this Court's review, jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

In the summer of 2013, three delinquency complaints were filed in Franklin County Common Pleas Court, Juvenile Division, against Simmonds (born May 26, 1996). The first contained one count of murder, alleging that Simmonds purposely caused the death of Imran

Ashgar by "shooting the victim with a firearm." The second also contained one count of murder, alleging that Simmonds purposely caused the death of Quinten Prater by "shooting him in the head with a shotgun." And the third contained one count of attempted murder, alleging that Simmonds "purposely shot William Rudd in the face with a handgun." Also charged in the last complaint was one count of aggravated robbery, alleging that Simmonds shot Rudd "while stealing his vehicle."

In all three cases, the State moved the juvenile court to relinquish jurisdiction. At the outset of a hearing to address the State's motions, the parties stipulated that (1) Simmonds was 17 years old and a resident of Franklin County at the time of the offenses; (2) he, his counsel, and his grandmother were all served with the motions to relinquish jurisdiction; and (3) that all the charges in the three complaints were supported by probable cause. The juvenile court then announced that the case would be transferred to the General Division.

The prosecutor next recited the facts of the cases. The three complaints all arose from the same course of conduct in July 2013. As pertinent to this appeal, on July 24, 2013, Simmonds, Nathaniel Brunner, and Darrel Durham robbed a convenience store on Livingston Avenue, and Ashgar—who was working behind the counter—was shot and killed during the robbery. Three days after that, on July 27, 2013, Simmonds and Brunner obtained a woman's car and were driving west on I-70, when the car broke down. Simmonds and Brunner stopped at a truck stop in London, where they shot Rudd in the head while he was gassing his vehicle. They then stole Rudd's vehicle, but were later arrested in Dayton.

Simmonds was indicted and the case eventually proceeded to jury trial. Among the evidence presented was video surveillance footage clearly showing Simmonds shooting Ashgar twice at point-blank range. Furthermore, witnesses at the truck stop testified that Simmonds shot

Rudd in the head. As the Tenth District recounted, "Simmonds basically executed the store clerk by shooting him in the eye once and then returning to shoot the clerk in the head a second time after the clerk briefly survived the first shot. A few days later, while fleeing central Ohio, Simmonds found himself in need of a motor vehicle. He shot the owner of a vehicle in the head while stealing the car. The owner miraculously survived the shooting and was able to testify at trial." *Simmonds I* at ¶ 2. There was a "massive amount of evidence" against Simmonds, "including surveillance tape showing the clerk being executed." *Id*. at ¶ 7.

As it relates to the Ashgar killing, the jury found Simmonds guilty of aggravated robbery, aggravated murder and murder, all with firearm specifications. As it relates to the Rudd shooting, the jury found Simmonds guilty of aggravated robbery, attempted murder, and felonious assault, all with firearm specifications. The trial court separately found Simmonds guilty of having a weapon while under disability.

At sentencing, Simmonds's counsel submitted and discussed two psychological reports explaining Simmonds's low intellectual functioning, emotional immaturity, vulnerability, drug use, family background, and negative influences, including his father, and she also discussed relevant Supreme Court precedent addressing juvenile offenders and intellectual disabilities. The trial court sentenced Simmonds to LWOP for the aggravated murder of Ashgar, to be served consecutively to a total of 48 years on the other counts and specifications.

Simmonds appealed to the Tenth District. He raised a variety of constitutional challenges to the bindover and sentence, but none of these issues was properly preserved for appeal, and the Tenth District found no plain error. Simmonds also claimed that his trial attorneys were ineffective, but the Tenth District found that Simmonds failed to show a "reasonable probability that the results of the proceeds would have been different." *Simmonds I* at ¶ 35.

Meanwhile, Simmonds also sought postconviction relief in the trial court, claiming that his trial counsel were ineffective. Simmonds attached to his petition various documents, affidavits, and other exhibits that he claimed his trial counsel should have presented to the trial court at sentencing. The trial court dismissed the petition, finding that "trial counsel [were] not deficient in their representation of Petitioner." Additionally, the trial court found that, "even assuming trial counsel's performance was deficient, petitioner's motion for post-conviction relief, including the accompanying affidavits and exhibits, do not demonstrate Petitioner was prejudiced by counsel's failures." Simmonds appealed the trial court's dismissal, and the Tenth District affirmed. *Simmonds II* at ¶ 30.

Simmonds now seeks discretionary review.

ARGUMENT

> **Response to Proposition of Law:** To show ineffective assistance of counsel, the record must demonstrate that counsel was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

To establish ineffective assistance of counsel, a defendant must show that his attorneys' performance was deficient, and that their deficient performance resulted in prejudice. *Strickland* at 687. To establish deficient performance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. Courts must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance." *Id*. at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). The defendant's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland* at 687.

To show prejudice, a defendant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693. Rather, counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

Simmonds argues that LWOP for a juvenile is "analogous to the death penalty." MSJ, p. 5. This is true, in that LWOP and the death penalty are the maximum sentence for juvenile and adult offenders, respectively. And it is also true that a sentencing hearing is a "critical stage" to which a juvenile is entitled to effective assistance of counsel. MSJ, p. 6. But none of this means that the two-prong test in *Strickland* should apply to a juvenile sentenced to LWOP any differently than to an adult sentenced to death. Just as an adult sentenced to death must show both deficient performance and prejudice to establish ineffective assistance, so must a juvenile sentenced to LWOP.

In the present case, Simmonds's counsel at sentencing submitted two psychological reports explaining Simmonds's low intellectual functioning, emotional immaturity, vulnerability, drug use, family background, and negative influences, including his father. His counsel also discussed the relevant precedent from the United States Supreme Court and this Court, which address the reduced culpabilities of juvenile offenders and those with and intellectual disabilities. The trial court therefore had ample information regarding Simmonds's "age and age-related characteristics." *Miller* at 489. As the trial court found in dismissing the postconviction petition, this was reasonable performance.

Even if Simmonds's counsel were deficient, Simmonds was required to show prejudice under *Strickland*. However, relying mostly on *State v. Johnson*, 24 Ohio St.3d 87 (1986), Simmonds claims that the trial court erred in not applying the "per se prejudice" standard to his

ineffective-assistance claim. In *Johnson*—a death-penalty case—this Court held that the defendant's counsel failed "to conduct any investigation into appellant's background for purposes of obtaining evidence in mitigation." *Id*. at 88. Counsel told the trial court that he had not even discussed with the defendant the penalty aspect of the case. *Id*. No continuance was requested, *id*. at 90, and at the mitigation hearing held the next day, counsel presented only the defendant's unsworn statement; no other mitigation evidence was offered, *id*. at 89. During closing, counsel merely "berat[ed] the jurors for their guilty verdict and repeatedly urg[ed] them to 'reconsider the evidence,'" thereby making the "jurors feel that their integrity was impugned." *Id*. at 91. There was a "complete lack of preparation and zeal on the part of defense counsel regarding the question of whether their client should live or die." *Id*. at 89. This Court therefore concluded that the defendant "was deprived of any effective, meaningful assistance from his counsel at this obviously critical stage of the proceedings." *Id*. This Court further applied a "per se prejudice" standard to counsel's ineffectiveness. *Id*. at 89, n. 4.

After *Johnson,* the United States Supreme Court has held that the "per se prejudice" standard applies only "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." *Bell v. Cone,* 535 U.S. 685, 697 (2002), quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984) (emphasis in *Bell*). A simple failure to adduce mitigation evidence is subject to *Strickland*'s "performance and prejudice components." *Bell* at 697.

While Simmonds maintains that the "per se prejudice" standard applies in a juvenile LWOP case when "counsel fails to present mitigation during the sentencing hearing," MSJ, p. 7, the Supreme Court has held that a defendant must show prejudice when his counsel fails to put on any mitigating evidence in a *death-penalty case*. *Bell* at 697, citing *Darden v. Wainwright,* 477 U.S. 168, 184 (1986), and *Burger v. Kemp,* 483 U.S. 776, 788 (1987). Given that LWOP is

analogous to the death penalty, there is no reason that *Bell* should not apply to juvenile LWOP cases as well.

Simmonds contends that the "per se prejudice" standard applies because his attorneys "fail[ed] to investigate and present mitigation evidence." MSJ, p. 8. Not only does this argument conflict with *Bell*, it is not accurate factually. As explained above, Simmonds's counsel *did* present mitigation at the sentencing hearing. Relying on two psychological reports and Supreme Court precedent, counsel gave a lengthy statement at sentencing that resisted the State's request for an LWOP sentence. No matter what criticisms one might have of Simmonds's counsel, it cannot be said that counsel *entirely* failed to ensure an adversarial sentencing hearing. Counsel made a case for a non-LWOP sentence, but the trial court decided that LWOP was the appropriate sentence.

This case is, therefore, far different from the circumstances in *Johnson*. *State v. Ayers*, 5th Dist. No. 98 CA 52 (Nov. 25, 1998) (distinguishing *Johnson*, per se standard did not apply because counsel's alleged failure to prepare was not as egregious as counsel's conduct in *Johnson*); *State v. Bradley*, 42 Ohio St.3d 136, 146 (1989) (per se prejudice standard did not apply because the record did not show that counsel "*completely* failed to undertake a pre-trial investigation") (emphasis sic). Moreover, the holding in *Johnson* cannot be divorced from the nature of the proceeding at issue in that case—i.e., a mitigation hearing in a death-penalty case. A complete failure in a death-penalty mitigation hearing will look far different from a complete failure in a R.C. 2929.19 sentencing hearing in which the death penalty is not at issue.

In short, even if counsel were deficient, the "per se prejudice" standard does not apply and Simmonds was required to show prejudice under *Strickland*. And, as both the trial court and the Tenth District held, Simmonds failed to show prejudice. The evidence attached to

Simmonds's petition was largely duplicative of the two psychological reports and Supreme Court precedent that counsel submitted at sentencing. Put differently, the evidence attached to Simmonds's petition "would barely have altered the sentencing profile presented to the sentencing judge." *Strickland* at 699-700. As stated by the Tenth District, "We are not convinced that any amount of mitigation of the sort proposed by the postconviction petition and supporting materials would have stood a reasonable probability of changing Simmonds's sentence." *Simmonds II* at ¶ 27.

Moreover, while Simmonds argued in his postconviction petition that his attorneys should have retained experts from various fields, much of these arguments were based on speculation. Simmonds maintained that his counsel should have presented testimony from a mitigation specialist, a neuropsychologist, and a substance abuse expert, but Simmonds presented no affidavits from any such experts. Without this evidence, it is impossible to determine what testimony or evidence these experts would have provided. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, ¶ 130 ("Nothing in the record indicates what a mitigation specialist could have discovered. Thus, Short's ineffective-assistance claim is speculative.").

In the end, the trial court was well within its discretion in finding that Simmonds failed to prove prejudice, and the Tenth District correctly affirmed the trial court's judgment. Further review is unwarranted.

CONCLUSION

For the foregoing reasons, the State respectfully requests that jurisdiction be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by electronic mail this day, July 20, 2017, to Charlyn Bohland, at charlyn.bohland@opd.ohio.gov.

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