

IN THE OHIO SUPREME COURT

19-1126

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MICHAEL D. HARWELL,

Defendant-Appellant.

: Supreme Court No.

(By Clerk)

: Montgomery Appeals No. 25852

: Montgomery C.P. No. 2012-CR-2367

: A claimed Appeal As Of Right From

The Judgment of the Montgomery

: County Court of Appeals

Defendant-Appellant Harwell's Memorandum In Support
Of Claimed Jurisdiction

FOR THE PLAINTIFF-APPELLEE
STATE OF OHIO

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Why this felony case involves a substantial constitutional question of law and is of general or great public interest

Substantial Constitutional Question

This case involves a substantial constitutional question of law because it will determine whether the appellant had a substantive right to have the government prove his guilty beyond a reasonable doubt as required by the Due Process Clause of the Ohio and United State Constitution.

Of General or Great Public Interest

This case is of genral or great public interest because it involves the appellant's absolute right to procedural due process of law and because of organized society's vested interest in observing that procedural due process is being adhered to.

STATEMENT OF THE CASE AND FACTS

In June, 2013, a Montgomery County Ohio petit jury found the appellant guilty of two counts of felony murder, two counts of attempted felony murder, six counts of kidnapping, and three counts of felonious assault. Each count included a three-year firearm enhancement. Following a bench trial, the trial court also found the appellant guilty of having weapons under a disability. At sentencing, the trial court merged several of the counts and firearm specifications and imposed an aggregate sentence of 32 years to life in prison. The appellant timely appealed.

On August 6, 2013, attorney William Daley was appointed as appellate counsel but filed an *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), brief and motion to withdraw.

Five months later attorney Robert Brenner filed a substitution of counsel indicating he was replacing Daley as appellant's counsel.

Appellant ultimately filed a motion in the court of appeals requesting leave to proceed pro se and to dismiss Robert Brenner as appellate counsel.

After reviewing the appeal, the court of appeals vacated the appellant's two attempted felony murder convictions pursuant to this Court's decision in *State v. Nolan*, 141 Ohio St. 3d 454, 25 N.E. 3d 1016 (2014), which held that attempted felony murder is not a cognizable crime in Ohio. The trial court's judgment was affirmed in all other respects.

On August 24, 2015, appellant filed an appeal to this Supreme Court of Ohio, however, on November 10, 2015, this Court declined to invoke it's appellate court jurisdiction.

On May 13, 2019, the appellant filed a delayed motion to reopen his direct appeal in the court of appeals pursuant to Ohio Appellate Rule 26(B), based upon a claim of the ineffective assistance of appellate counsel.

On June 27, 2019, the Montgomery County Court of Appeals overruled the motion to file a delayed motion to reopen the appeal of right because such request was untimely and that the appellant waived his right to the assistance of counsel on such direct appeal.

This timely appeal ensues.

Proposition of Law No. 1.

It was plain error and a violation of the appellant's absolute right to procedural due process of law under the Ohio and United States Constitution for the trial and appellate courts to convict and sentence the appellant for two counts of felony murder where the prosecution failed to meet its burden of proof

Law & Argument

In his motion for leave to file and litigate his delayed motion to reopen his appeal as of right in the court of appeals the appellant alleged that his conviction and sentence for two counts of felony murder was void because the prosecution failed to prove the factual

and elemental difference between felony murder pursuant to Ohio Revised Code § 2903.02(B) and involuntary manslaughter pursuant to Ohio Revised Code §2903.04.

The United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 124 S.Ct. 2531 (2004), and *United States v. Booker*, 125 S.Ct. 738 (2005) determined that whether the State of Ohio enacts similar statutes such as O.R.C. §§ 2903.02(B) and 2903.04 but each offense carries different maximum sentences the State is required to prove beyond a reasonable doubt the facts and elements that distinguish the two offenses.

In the case sub judice the prosecution failed to do so in violation of the appellant's due process rights under both the Ohio and United States Constitution. Cf. *In re Winship*, 387 U.S. 364 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979).

Accordingly, the appellant presented a colorable claim that he was actually innocent.

Although the court of appeals found that the appellant had no right to the assistance of appellate counsel during the appeal and that his application to reopen the appeal was untimely, this holding did not prevent that court from granting the application.

This must be true because the United States Supreme Court has determined that even if the appellant cannot show cause and prejudice for his defaults in state court, his federal constitutional claims may be heard on the merits if he presents a colorable claim of actual innocence. Cf. *Kuhlmann v. Wilson*, 477 U.S. 454 (1986).

In the case sub judice, the appellant presented a colorable claim that he was actually innocent of the two felony murder convictions where he alleged that the prosecution failed to prove beyond a reasonable doubt the factual and elemental difference between felony murder per R.C. § 2903.02(B) and involuntary manslaughter per R.C. § 2903.04.

Accordingly, it was plain error for the Court of Appeals not to recognize this exception to the procedural default rule.

Reversal and remand is required.

Proposition of Law No. 2.

Both the trial and appellate courts failed to recognize constitutional structural defect error where the trial court failed to instruct appellant's jury that the prosecution was required to prove beyond a reasonable doubt the difference between felony murder and involuntary manslaughter

Law & Argument

In re Winship, 397 U.S. 364 (1970) stands for the proposition that:

The burden of proof consists of two parts: the burden of production and the burden of persuasion. The burden of production required the prosecution to produce enough evidence to put a fact in issue. If the prosecution fails to sustain its burden of production that party is subject to an adverse ruling by the court to wit: an acquittal of the appellant. LaFave & Scott, Criminal Law § 1.8 (2ed. 1986); McCormick, Evidence §§ 336-337 (5th ed 1999).

In the case sub judice, not only did the State of Ohio fail to prove beyond a reasonable doubt the difference between felony murder and involuntary manslaughter, the trial court also failed to instruct the jury that the State was required to do so.

It is black-letter law that in both *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078 (1993), the United States Supreme Court determined that whenever a trial court acts in a way that 'eases' the prosecution's burden of proof to less than beyond a reasonable doubt, then a constitutional structural defect error has occurred requiring automatic reversal.

In the instant case at no time did the trial court instruct the appellant's jury that the prosecution was required to prove beyond a reasonable doubt the difference between felony murder and involuntary manslaughter.

Not only did constitutional structural defect error occur, but this error also manifests that a fundamental miscarriage of justice has occurred, thereby mandating that the Court of Appeals grant the delayed motion to reopen the appeal of right.

This must be so, because Article IV, §3(B)(1)(f), Ohio Constitution proves that:

(B)(1) The court of appeals shall have original jurisdiction in the following:

(f) In any cause on review as may be necessary to its complete determination. (emphasis added.)

Wherefore, it was plain error for both the trial and appellate courts not to recognize and honor the fact that constitutional structural defect error occurred in this case requiring not only that the Court of Appeals reopen the appeal of right but to actually acquit the appellant.

Reversal and discharge is therefore mandated.

Conclusion

Since both of the appellant's propositions of law manifest that a miscarriage of justice has occurred in this case under the Full Faith and Credit provisions of Article IV, and the mandate of Article VI, United States Constitution mandate that the application raises substantial constitutional questions of law but also is of general or great public interest.

Accordingly, this Court's appellate jurisdiction should be invoked.
It Is So Prayed For

Respectfully submitted,



Michael Harwell-Appellant

Certificate of Service

This is to certify that a copy of the foregoing memorandum in support of claimed jurisdiction was served by regular mail upon Mathis Heck Jr. via Michael J. Scarpelli, Assistant Montgomery County Prosecutor at 301 West Third Street, Dayton, Ohio 45422 this 7th day of August, 2019.



Defendant-Appellant

of attempted felony murder, six counts of kidnapping, and three counts of felonious assault. Each count included a three-year firearm specification. Following a bench trial, trial, the trial court also found Harwell guilty of having weapons while under disability. At sentencing, the trial court merged several of the counts and firearm specifications and imposed an aggregate sentence of 32 years to life in prison. Harwell then appealed.

On August 6, 2013, attorney William Daly was appointed as Harwell's appellate counsel. Following his appointment, Daly filed a brief under the authority of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), asserting the absence of any non-frivolous issues for appeal. Five months after the *Anders* brief was filed, attorney Robert Brenner filed a notice of substitution of counsel indicating that he was replacing Daly as Harwell's appellate counsel. Brenner also filed a motion requesting this court to strike the *Anders* brief filed by Daly and to provide an extension of time for him to file a merit brief on Harwell's behalf.

On February 25, 2014, this court granted both of Brenner's motions. Over the next several months, Brenner requested seven additional extensions of time to file a merit brief. Following Brenner's seventh request, on August 1, 2014, Harwell filed a motion to dismiss Brenner as his appellate counsel and for leave to file a pro se merit brief. Harwell also filed a pro se merit brief with his motion. Shortly after Harwell filed his motion for leave and pro se merit brief, Brenner also filed a merit brief on Harwell's behalf.

On September 5, 2014, this court issued an entry notifying Harwell that if he wished to proceed pro se, he would waive access to personal copies of the record prepared for him at the State's expense. The entry also notified Harwell that in order to proceed pro se, he must sign and return a waiver form to the court within 20 days. On September

16, 2014, Harwell returned the signed waiver form as instructed. After the signed waiver form was received, on October 28, 2014, this court issued an entry acknowledging that Harwell had elected to proceed pro se in the appeal. Within that same entry, this court accepted Harwell's pro se merit brief as filed and struck the merit brief filed by Brenner. From that point forward, Harwell acted pro se in the appeal.

After reviewing the appeal, this court vacated Harwell's two attempted felony murder convictions pursuant to the Supreme Court of Ohio's decision in *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016, which held that attempted felony murder is not a cognizable crime in Ohio. *State v. Harwell*, 2d Dist. Montgomery No. 25852, 2015-Ohio-2966, ¶¶ 34-35. As a result of vacating those convictions, this court remanded the matter to the trial court for resentencing. *Id.* at ¶ 90. The judgment of the trial court was affirmed in all other respects. *Id.*

On August 24, 2015, Harwell filed an appeal in the Supreme Court of Ohio. However, on November 10, 2015, the Supreme Court declined to accept jurisdiction of the appeal. *State v. Harwell*, 143 Ohio St.3d 1545, 2015-Ohio-4633, 40 N.E.3d 1181. After the Supreme Court declined Harwell's appeal, there was no activity on this case for over three years until Harwell filed the instant App.R. 26(B) application to reopen on May 13, 2019.

Law and Analysis

"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." App.R. 26(B)(5). By rule, "[a]n 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.” App.R. 26(B)(1). “Consistent enforcement of [App.R. 26(B)’s] deadline by the appellate courts in Ohio protects on the one hand the state’s legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved.” *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7.

This court’s decision on Harwell’s direct appeal was journalized on July 24, 2015. Harwell, however, did not file his application to reopen until May 13, 2019. Therefore, Harwell filed his application well beyond the 90-day deadline set forth in App.R. 26(B)(1). In an attempt to establish good cause for the delay in filing his application, Harwell claims that his appellate counsel did not give him notice of the 90-day deadline. This argument lacks merit because Harwell elected to proceed pro se in the appeal. Accordingly, Harwell has failed to establish good cause for filing his application over three years past the deadline.

Even if Harwell’s application to reopen had been timely filed, or if there had been good cause for its late filing, the application would not be well taken. The two-prong analysis in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard to assess whether an appellant has raised a “genuine issue” as to the ineffectiveness of appellate counsel in his application to reopen. *State v. Myers*, 102 Ohio St. 318, 2004-Ohio-3075, 810 N.E.2d 436, ¶ 8. Therefore, “[i]n order to establish a claim of ineffective assistance of appellate counsel, [Harwell] is required to establish that the performance of his appellate counsel was deficient and the deficiency

resulted in prejudice.” *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2015-Ohio-2146, ¶ 2, citing *Strickland* and *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

Generally, “[a]n individual who has waived his right to counsel and serves as his own counsel may not later claim that he had ineffective assistance of counsel.” *Baldwin v. Beightler*, N.D. Ohio No. 5:08CV2750, 2009 WL 2705922, *16 (Aug. 26, 2009), citing *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (“[a] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel’ ”). Accord *State v. McKinney*, 3d Dist. Defiance No. 4-04-12, 2004-Ohio-5518, ¶ 61. See also *Bilal v. Moore*, N.D. Ohio No. 3:05CV1733, 2007 WL 756690, *21 (Mar. 7, 2007) (“under [the] *Strickland* standard, * * * Petitioner[’s] ineffective assistance of counsel claim lacks merit as he chose to represent himself”).

In this case, Harwell argues that his appellate counsel was ineffective in failing to raise three assignments of error alleging, for various reasons, that his trial counsel provided ineffective assistance. Harwell’s proposed assignments of error all lack merit because Harwell waived his right to appellate counsel and elected to proceed pro se on appeal. In so holding, we also note that this court granted Harwell’s request to have his appellate counsel’s merit brief stricken. As a result, we only reviewed Harwell’s pro se arguments when deciding his appeal; none of appellate counsel’s arguments were considered. By claiming ineffective assistance of appellate counsel, Harwell is actually pointing to his own perceived oversights and is attempting to get a second bite at the apple based on those oversights. Although Harwell may now question the wisdom of his


his decision to waive his right to appellate counsel, the waiver was nevertheless valid and Harwell must live with the consequences of his decision. See *State v. Gibson*, 45 Ohio St.2d 366, 378, 345 N.E.2d 399 (1976).

Because Harwell's application to reopen is untimely and lacks merit it is hereby dismissed.

SO ORDERED.



JEFFREY M. WELBAUM, Presiding Judge



MARY E. DONOVAN, Judge



MICHAEL T. HALL, Judge

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