

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 2023-567

Plaintiff-Appellee,

vs.

BRANDON WILLIAM LEIGH

Defendant-Appellant.

On appeal from the Montgomery
County Court of Appeals,
Second Appellate District
Court of Appeals Case No. 28821

**MEMORANDUM IN RESPONSE TO JURISDICTION
OF APPELLEE, THE STATE OF OHIO**

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WHY LEAVE TO APPEAL SHOULD BE DENIED

Appellant Brandon Leigh seeks leave to appeal the decision of the Second District Court of Appeals that denied his application for reconsideration of that court's January 13, 2023 Opinion and Final Judgment, which affirmed his conviction for murder and other charges relating to the shooting death of Keyona Murray. *See State v. Leigh*, 2d Dist. Montgomery No. 28821, 2023-Ohio-91. When Leigh first sought leave to appeal the Second District's Opinion, this Court declined to accept jurisdiction. *See State v. Leigh*, __ Ohio St.3d __, 2023-Ohio-1507 (May 9, 2023 Tables). Leigh now seeks leave to appeal the Second District's refusal to reconsider its Opinion because, according to Leigh, the Second District did not properly consider whether the doctrine of implied bias should have applied to his counsel's failure to seek the dismissal of one of his jurors.

This Court should again decline to grant Leigh leave to appeal for two reasons. First, in its decision denying Leigh's application for reconsideration, the Second District did not misapply or misinterpret the law, it did not create new law, nor did it change existing law. Consequently, there is nothing of substance for this Court to review or decide. Second, given the soundness of the Second District's Opinion, this case does not involve matters of public or great general interest, nor is there a substantial constitutional question involved that has any reasonable merit. Leigh's arguments before this Court simply represent those of a criminal defendant who is dissatisfied with the outcome of his appeal.

For these reasons, jurisdiction over Leigh's proposition of law should be declined, and this appeal should be dismissed.

STATEMENT OF THE CASE AND FACTS

On the evening of February 16, 2018, Jacqueline Moaty and her family were in their Dayton home when a barrage of bullets came through the walls and windows. One of the bullets struck Jacqueline's twenty-two-year-old daughter, Keyona, in the head as Keyona sat on a bed eating dinner. Keyona, and the ten-week-old fetus she was carrying, died at the hospital later than night. The evidence at trial established that Appellant Brandon Leigh, who was angry at Keyona's brother for stealing his gun, fired seven bullets into the home while standing in the back alley.¹

During voir dire, Juror No. 15 indicated that he was a victim of a drive-by shooting where someone fired shots into his home when he lived in Denver. When questioned about his ability to set aside the drive-by shooting he experienced and judge Leigh's guilt or innocence based only on the evidence presented in this case, Juror No. 15 indicated he could. *Leigh*, 2d Dist. Montgomery No. 28821, 2023-Ohio-91, ¶ 97. When asked if he would be predisposed to finding someone guilty because of the drive-by shooting he experienced, Juror No. 15 confirmed that he would not. *Id.* And Juror No. 15 confirmed that he could be fair and impartial, despite what he had personally experienced. *Id.*

After the jury found him guilty of murder, involuntary manslaughter, improperly discharging a firearm at or into a habitation, and having weapons while under disability, Leigh appealed to the Second District Court of Appeals and raised five assignments of error. *Leigh*, 2d Dist. Montgomery No. 28821, 2023-Ohio-91. Relevant here was Leigh's third assignment of error, in which he claimed that his trial counsel provided ineffective assistance for, among other

¹ In his Memorandum in Support of Jurisdiction, Leigh refers to his actions in this case as a "drive-by shooting." (See Memorandum in Support at p. 9) But the evidence presented at trial suggested that Leigh was dropped off several blocks from Keyona's home, walked to the alley behind the home, fired shots into the home, then walked several more blocks before being picked up again.

things, failing to strike Juror No. 15 for cause during voir dire because the juror was biased and predisposed to find him guilty. *Id.* at ¶ 97, 99. The Second District found no merit to Leigh's argument and explained:

In this case, Juror #15 made clear that he would be able to be fair and impartial, despite the similar nature of the incidents, and that he could judge the case solely on the evidence provided in court. Juror #15 gave no indication that he would be predisposed to find Leigh guilty based on the drive-by shooting of his house in Denver. Given Juror #15's answers during voir dire, defense counsel could have reasonably concluded that he had no basis to seek Juror #15's removal for cause.

We likewise cannot conclude that defense counsel acted deficiently in failing to exercise a peremptory challenge to remove Juror #15. Juror #15 was not initially among the 12 prospective jurors who would be seated as the jury, and he joined that group only after the State and defense counsel each exercised a peremptory challenge. Defense counsel subsequently exercised his three remaining peremptory challenges on other prospective jurors. While one might question why defense counsel elected to use peremptory challenges on other individuals rather than Juror #15, defense counsel's decision was within the realm of trial strategy, which we will not second-guess. Moreover, on this record, we cannot conclude that there was a reasonable probability that the outcome of the trial would have been different had defense counsel made different decisions during jury selection.

Id. at ¶ 100-101.

This Court declined jurisdiction over Leigh's appeal of the Second District's decision. *Leigh, __ Ohio St.3d __, 2023-Ohio-1507.* In the meantime, Leigh filed an application for reconsideration with the court of appeals, asking the court to reconsider the portion of its decision relating to his counsel's failure to seek the removal of Juror No. 15. The Second District denied the application after first finding that the application was untimely under App.R. 26(A)(1)(a). *State v. Leigh, 2d Dist. Montgomery No. 28821 (Jan. 13, 2023 Order on Application for Reconsideration)* at p. 4. But despite the untimeliness, the Second District addressed the merits of Leigh's application and, after applying relevant Ohio precedent, found no obvious error in its conclusion that Leigh did not establish a valid claim of ineffective assistance of counsel and that, consequently, reconsideration under App.R. 26(A) was unwarranted. *Id.* at pp. 4-8.

Leigh now seeks leave of this Court to appeal the Second District's decision denying his application for reconsideration.

ARGUMENT

Response to Appellant's Proposition of Law:

Under App.R. 26(A)(1), reconsideration of an appellate court's earlier decision is appropriate when the appellate court makes an obvious error or fails to fully consider an issue when it should have. Applying that standard, the Second District rightly determined that Leigh's application for reconsideration should be denied.

To begin, it is important to note what this appeal is, and is not, really about. What Leigh seeks leave to appeal does not really involve the issue of implied bias on the part of one of his jurors; that issue was addressed in the Second District's resolution of his third assignment of error on direct appeal, *Leigh, 2d Dist. Montgomery No. 28821, 2023-Ohio-91, ¶ 97-101*, which this Court previously declined jurisdiction to review. *Leigh, __ Ohio St.3d __, 2023-Ohio-1507* (May 9, 2023 Tables). Rather, the decision Leigh seeks leave to appeal is the Second District's denial

of his application for reconsideration of its resolution of his third assignment of error. On this narrow issue, Leigh’s challenge to the Second District’s decision on his application has no merit and is not worthy of further review by this Court.

The accepted standard for reviewing an application for reconsideration under App.R. 26(A)(1) requires the appellate court to determine whether the application “calls to the attention of the court an obvious error in its decision, or raises an issue for consideration which was either not considered at all or was not fully considered by the court when it should have been.” *State v. Jones*, 12th Dist. Butler No. CA2009-05-140, ¶ 2, quoting *Grabil v. Worthington Industries, Inc.*, 91 Ohio App.3d 469, 471, 632 N.E.2d 997 (10th Dist.1993). See also *State v. Crawford*, 1st Dist. Hamilton No. C-030540, 2004-Ohio-4505, ¶ 3; *State v. Gillispie*, 2012-Ohio-2942, 945 N.E.2d 145, ¶ 9 (2d Dist.).

Here, the Second District first found that Leigh failed to timely file his application for reconsideration under App.R. 26(A)(1)(a) and App.R. 14(B), and that he did not present any extraordinary circumstances to justify the delay. *Leigh*, 2d Dist. Montgomery No. 28821 (Jan. 13, 2023 Order on Application for Reconsideration) at p. 4. This reason alone would have been sufficient for the court of appeals to deny Leigh’s application. The Second District nevertheless elected to address the merits of Leigh’s arguments.

In rejecting the merits of Leigh’s argument that the court committed an obvious error when it concluded that he failed to establish an valid claim of ineffective assistance of counsel relating to his counsel’s failure to strike Juror No. 15, the Second District noted that, based upon this Court’s precedent, “[w]hen a defendant bases an ineffective-assistance claim on an assertion that his counsel allowed the impanelment of a biased juror, the defendant ‘must show that the juror was *actually biased* against him.’” (Emphasis added in *Mundt*.) *State v. Mundt*, 115 Ohio St.3d 22,

2007-Ohio-4836, 873 N.E.2d 828, ¶ 67, quoting *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir.2001). This is true regardless of whether the defendant's contention is that his counsel should have struck the juror because the evidence showed the juror was *actually* biased or merely *impliedly* biased. That is because it makes no difference, for purposes of an ineffective-assistance-of-counsel claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 20252, 80 L.Ed.2d 674 (1984), or *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), why a juror is biased; if the juror is not actually biased against the defendant, then the defendant has not shown both deficient representation and resulting prejudice came about from counsel's failure to strike that particular juror.

Accordingly, when the Second District originally overruled Leigh's ineffective-assistance-of-counsel claim based on Leigh's failure to show that Juror No. 15 was actually biased against him and that his counsel's actions resulted in prejudice, it made no difference whether the Second District's analysis of the issue specifically included consideration of implied bias as well as actual bias; the result would be the same. And because Leigh did not establish that the Second District committed an obvious error or failed to fully consider his ineffective-assistance-of-counsel claim, his application for reconsideration was properly denied.

CONCLUSION

The Second District Court of Appeals did not err, in law or fact, in assessing the merits of Brandon Leigh's application for reconsideration and in concluding that Leigh's application did not call the court's attention to an obvious error in its decision or raise issues that the court either failed to consider or did not fully consider when it originally overruled Leigh's ineffective-assistance-of-counsel claim on direct appeal. In denying Leigh's application for reconsideration, the court of appeals did not misapply or misinterpret the law, it did not create new law, nor did it change

existing law. As a result, there is nothing further for this Court to decide or review. For these reasons, the State of Ohio respectfully requests that this Court decline jurisdiction over Leigh's proposition of law and that this appeal be dismissed.

Respectfully submitted,

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**Attorney for the State of Ohio,
Plaintiff-Appellee**

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2023, a copy of the foregoing *Memorandum in Response to Jurisdiction* was sent by first class mail, postage pre-paid, to counsel for Appellant: Timothy B. Hackett, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215.

/s/ Andrew T. French
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