

21-6673

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.

FILED

DEC - 8 2021

OFFICE OF THE CLERK

JOHN A. BEATTY — PETITIONER
(Your Name)

vs.

STATE OF OHIO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Fifth District Court of Appeals of Ohio

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John A. Beatty
(Your Name)

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(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Is the standards set forth in **Smith v. Murray**, 477 U.S. 527, 536 (1986) and **Evitts v. Lucey**, 469 U.S. 387, 396 (1985) the more appropriate test for appellate counsel's performance as opposed to the two-prong standard for trial counsel's performance in **Strickland v. Washington**, 466 U.S. 668 (1984)?
2. Is a guilty plea valid where it is made to less than all of the elements of the offense, thereby constituting selective enforcement of criminal laws?
3. Can a state disenfranchise a criminal defendant of substantive rights where there is no relinquishment or abandonment of a known right?
4. Does a State Appellate Court's refusal to reopen a direct appeal violate Due Process where an appellant makes the proper showing of ineffective assistance of Appellate Counsel, prejudice, and that but for such ineffective assistance, there is a reasonable likelihood the outcome of the appeal would have been different, where the State Rule makes reopening mandatory upon such showing?
5. Does a State Trial Court violate Due Process by rendering Judgment of conviction and sentencing a defendant after the State Trial Court lost jurisdiction as a matter of State law?
6. Does a State Court of Appeals violate Due Process by refusing to reopen an appeal and by failing to vacate a judgment, upon where it has been shown that the Trial Court's Judgment was rendered without, and after having lost, jurisdiction?

7. Can a criminal Judgment be Constitutionally sustained where State law has severed and terminated, with prejudice, the Trial Court's Jurisdiction over the criminal case for lack of proper notice of a pending charge, and the State's failure to bring a matter to trial within the required statutory time limit?

8. Can a defendant be Constitutionally convicted of an offense that requires prior notice of a "no trespass order" where the record does not affirmatively show such notice was validly given?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Ohio Supreme Court court appears at Appendix B to the petition and is
 reported at 164 Ohio St.3d 1432, 2021 OHIO 3091; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was Sept. 14, 2021. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Statement of the Case

This Petition for a Writ of Certiorari is taken from a denial by the Muskingum County, Ohio, Court of Appeals' refusal to reopen the Petitioner's Direct Appeal under Ohio Rule of Appellate Procedure 26(B), which requires reopening upon the Petitioner's showing that Appellate Counsel was ineffective, that the ineffective performance prejudiced the Petitioner, and but for Appellate Counsel's deficient performance, there is a reasonable likelihood that the outcome of the Appeal would have been different.

The Petitioner easily satisfied those requirements by showing that he was scared into pleading guilty by threats made by the State that were backed up by Trial Counsel, in a case where the State Trial Court had entirely lost jurisdiction to render judgment of conviction and to impose sentence; where the record shows that there is Constitutionally insufficient evidence to have convicted the Petitioner; and where raising these issues by either Trial or Appellate Counsel would have required dismissal of the indictment, with prejudice.

However, Appellate Counsel failed to raise these arguments, which are "dead bang winners", and May 26, 2021, the Appellate Court deprived the Petitioner of Due Process by refusing to reopen the Appeal to allow these issues to be decided on their merits. See State v. Beatty, Muskingum County Appeal No. CT2020-0015, Appendix A.

The Petitioner then timely filed his Notice of Appeal and Memorandum in Support of Jurisdiction in the Ohio Supreme Court.

The Ohio Supreme Court declined jurisdiction on September 14, 2021. See State v. Beatty, Ohio Supreme Court No. 2021-0838, Appendix B.

The Petitioner now seeks review of the United States Supreme Court, and requests that the United States Supreme Court Grant Certiorari to correct the manifest miscarriage of justice, and vacate the Judgment of the Muskingum County Court of Common Pleas that is void for want of jurisdiction, and otherwise in violation of Federal Law and the United States Constitution, as pointed out and argued in this Petition.

REASONS FOR GRANTING THE PETITION

This Honorable Court ought to grant petition and set a bright-line rule on standard of review for ineffective assistance of appellate counsel. Albeit this Court has made it unambiguously clear that the hallmark of effective appellate advocacy is focusing on arguments "more likely to succeed", **Smith v. Murray**, 477 U.S. 527, 536 (1986), and due process is violated when appellate counsel is unable to protect thee appellant's substantive rights, **Evitts v. Lucey**, 469 U.S. 387, 396 (1985), such has lost its force in the midst of the overshadowing, misapplied trial counsel standard pronounced in **Strickland v. Washington**, 466 U.S. 668 (1984). The problem with universally applying **Strickland** to appellate proceedings is that of equating the review process with the conviction process. Both processes proceed under unique rules. While appellate counsel may critique the performance of trial counsel, the same cannot be said of trial counsel critiquing appellate counsel's Appellate counsel's role is a little more complex, because he isn't constrained to just those issues preserved by trial counsel but may point out plain error or jurisdictional issues. Prejudice is presumed with the omission of "dead-bang" winning arguments and that is just what happened here.

It is plain error for a court to accept a guilty plea to less than all of the elements of an offense, and this Court has previously established such in **McCarthy v. United States**, 394 U.S. 459, 466 (1969)(must be a formal criminal charge supported by facts); **Menna v. New York**, 423 U.S. 61, 62 at fn. 2 (1975)(factual guilt must be established); and **Oyler v. Boles**, 368 U.S. 448, 456 (1962) (selective enforcement of the criminal laws when the elements are

not supported by facts).

Elements of Aggravated Burglary:

As the Ohio Supreme Court denied jurisdiction to determine the Petitioner's Claims, Ohio Court of Appeals was the highest State Court to decided the claims, and based its denial of the Petitioner's challenge to his Aggravated Burglary conviction and sentence, which he based mostly upon the element of "trespass", by holding that Walmart's act of placing the Petitioner on a "no trespassing" list and therefor could be found to have trespassed, stating that "While Walmart was open to the public, it was not 'open' to him." See Judgment Entry (Appendix B).

However, the Court of Appeals ignored the notice and knowledge requirement of "trespass" in order to come up with the untenable conclusion that a business, otherwise open to the public, could single out and cause a person to become a criminal trespasser by simply putting his name on a list without showing that it also provided notice to the person.

Ohio's version of Aggravated Burglary, R.C. 2911¹¹_A(A)(1), of which the Petitioner was charged, convicted and sentenced, states, in pertinent part, that "No person, by force, stealth, or deception, shall trespass in an occupied structure ... when another person ... is present, with purpose to commit ... any criminal offense, if any of the following apply: (1) The offender inflicts, or attempts to inflict physical harm on another".

Notwithstanding that the Petitioner is actually innocent of the element of "inflict physical harm on another" - as is

proven by Walmart video recording showing that it was the police officer's own actions that caused himself injury, and a victim injuring his own self is very different than "the offender inflicts physical harm on another", - the law and facts of the case show the Petitioner is actually innocent of the elements of the offense's main provision, Section (A).

The first element of Aggravated Burglary consists of three alternative elements: by force, stealth, or deception.

One element of the main body of supposed "Aggravated Burglary" was alleged to have occurred when the Petitioner walked through a front door into a Walmart, while it was open to the public, just like any other patron; the Petitioner did not have to force his way in; nor did he have to sneak in by "stealth"; nor did he have to engage in "deception", as he did not have to lie to anybody to gain entrance: he simply walked in.

Additionally, when the Petitioner was approached by police, he was "caught" in the atrocious act of being in possession of a shopping cart containing products in the very same manner as almost all other Walmart shoppers. As the police failed to find any items stashed in the Petitioner's pockets, or any other indication that a crime had been or was about to be committed, the Petitioner is also innocent of the element of "with purpose to commit ... any criminal offense".

However, because of his lack of legal knowledge and the failure of his Appellate Counsel to raise these issues, the Petitioner chose to base the majority of his challenge on the essential element of "trespass": invalidating that element in

this case is a "dead bang winner", and the implications of allowing the Charge of Aggravated Burglary, and especially the element of "trespass, to be misapplied and misused by Ohio Courts will undoubtedly result in illegal incarceration of countless Ohio citizens in the future.

Based upon the mere fact that the Petitioner was able to simply walk into Walmart unhindered and unchallenged, the State could prove he was trespassing only if the State could prove the Petitioner had knowledge, even though "knowledge" is not an element specifically listed in Aggravated Burglary. This is shown under the rule of "Para Materia":

Under Ohio law, no person is guilty of "trespass" without "knowledge", and no person can have "knowledge" without "notice".

Arravated Burglary's "trespass" element is a "criminal trespass" as exposed by the phrase "trespass in an occupied structure ... with purpose to commit in the structure ... any criminal offense", and therefor, Ohio's "Criminal Trespass" statute, R.C. 2911.21, is relevant.

R.C. prohibits persons, without privilege to do so, from recklessly entering or remaining the land or premises of another, as to which notice against unauthorized access or presence has been given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access.

(A)(1) generally prohibits persons from knowingly entering

or remaining on the land or premises of another, under similar circumstances.

(A)(2) prohibits the same conduct, with the same "Knowingly" scienter, while more specifically relating to land or premises that is lawfully restricted to certain persons, purposes, modes or hours, when the offender knows he is in violation of any such restrictions or is reckless in that regard.

(A)(3) uses the same general language as (A)(1), including "Knowingly", but includes a specific requirement that notice is given in some manner, and the offender disregards the risk that he is intruding.

The Committee Notes that accompany R.C. 2911.21 are relevant and show, not only that knowledge and notice are required, but also, at § 2, that "All of the four separate types of conduct defined as criminal trespassing require that such conduct be unprivileged. 'Privilege' is defined by new section 2901.01..."

Privilege includes an invitation to enter, which is the premise of all commercial retail advertisement, including Walmart's; and especially Walmart's advertisements that it is open 24 hours per day, every day, and never closes.

Ohio law does allow for commercial, as well as other, establishments, to rescind their invitation, and thus, a person's privilege to enter, but only where notice is actually provided to the specific person.

In State v. Briggs, 2019 Ohio 5290, it was determined that evidence was sufficient to establish a criminal trespass where the State provided two letters sent to that defendant by a retail

establishment, and there was no indication that the retail establishment had rescinded their letters.

In State v. Zuravel, 2017 Ohio 1540, it was determined that evidence was sufficient to establish a criminal trespass where the State provided a letter sent to that defendant by a mayor revoking that defendant's privilege to enter City Hall.

In State v. Popp, 2017 Ohio 7432, it was determined that evidence was sufficient to establish a criminal trespass where a school principal and police officer told that defendant to leave the school premises, and he refused.

In State v. Nigrin, 2016 Ohio 2901, it was determined that evidence was sufficient to establish a criminal trespass where that defendant was aware he was not permitted on the premises, having been warned by the resident and the police.

The State Court of Appeals' determination, in the Petitioner's case, that it was sufficient that Walmart had put his name on a "no trespassing list", fails to meet the mark of the required notice, as nothing in that finding, or on the record of the case, shows that the Petitioner was provided any notice at all, let alone the actual notice required by Ohio law.

It is important to note that the Committee Notes also expressly state, though not in these exact words, that accidental or trespass caused by error, mistake, or lack of notice, is not an offense under Ohio law, exposing that knowlege is essential to prove trespass as an element of Aggravated Burglary.

The "notice" element of Aggravated Burglary that is inherent in the "knowlege" required to establish the "trespass" element,

is notice that must be given prior to the alleged "trespass"; without which, there is no trespass, and thus, no Aggravated Burglary; not the "Oh, by the way"" after the fact "notice" relied on by the State Court of Appeals.

The record does contain a written no trespass order allegedly issued to the Petitioner by Walmart, but that notice does not amount to the actual and legal notice required by Ohio law, and is insufficient to prove Criminal Trespass necessary to support a conviction of Aggravated Burglary.

One problem with the alleged "notice" is not signed. Rather, someone wrote "refused" on the signature line. If Due Process allows unsigned "notices", surely due process would also require sufficient evidence that it was actually presented to a person who actually refused to sign, and that the person was actually the Petitioner.

Another problem with the alleged "notice" is that it was alleged to have been issued at a different Walmart, which leaves plenty of room for reasonable doubt as to how employees of a different Walmart many miles from the Walmart that supposedly issued the alleged "notice", could have identified the Petitioner as being the same person who apparently refused to sign the alleged "notice". See Appendix C: Notification of Restriction from Property.

A third problem with the alleged "notice" is that it was obviously altered: the name originally written on the "notice" was visibly scratched out, and the Petitioner's name written over top of the original, raising the question: Was it merely an act of correcting an error; an act of amending the "notice" previously issued to someone with a name similar make it appear as if it had been issued to the Petitioner; or was it a complete fabrication?

Either way, the alleged "notice" is legally deficient and cannot be relied upon to Constitutionally and lawfully deprive the Petitioner of years of his life.

The State Court of Appeals simply accepted the unsigned and modified "notice" as real and accurate despite there being no evidence put within the record that would tend to show the alleged "notice" was genuine, or that the person who "refused to sign" it was in fact the Petitioner, or that it had ever actually been presented to the Petitioner as "notice". In deed, had the Petitioner submitted a similar document purportedly exonerating him, claiming, without evidence, that it was issued by or to Walmart, but Walmart employees "refused to sign", the State Court of Appeals would have dismissed it as a forgery or as "self serving."

The Trial Court Lacked Jurisdiction over the Criminal Action Below:

Under Ohio law, the time in which a person who is incarcerated in a state prison must be tried is governed by R.C. 2941.401, rather than R.C. 2945.71, which relates to persons who are either free on bond or held in a County Jail.

R.C. 2941.401 enjoins a duty on the State to inform the incarcerated person in writing, the Petitioner in this case, when a charge is pending, so the incarcerated person may demand a speedy disposition of the charge(s) in order to invoke the 180 day limit set by the statute before the State Trial Court loses jurisdiction over the criminal action.

It would nullify the purpose of R.C. 2941.401 if the State's failure to provide that notice would operate to relieve the State of its burden and duty to try cases within the time limit and mandates of the statute. State v. Fitch, 37 Ohio App.3d 159, 162.

Further, if the State could simply avoid its statutory duty to provide the notice mandated by the provision, the State could circumvent the purposes of the statute, and relieve itself of its statutory duty and burden to try cases within the time constraints set by R.C. 2941.401. State v. Dillon (2007)

144 Ohio St.3d 154, P23.

"The statute places an affirmative duty upon the state to promptly advise the incarcerated defendant of his right to demand final disposition of the charge as well as the fact of the existence of the charge. Absent such advice, the state cannot rely upon the defendant's failure to demand final disposition, but must count the time as having commencing under R.C. 2941.401 upon the happening of the first triggering event." State v. Brown, 131 Ohio App.3d 387, 392, citing State v. Martin, 16 Ohio App.3d 172; Fitch, Supra; quoting State v. Curry, 1997 Ohio App. Lexis 4495.

In accord with other Ohio Courts, Brown's Trial Court held the failure of the State to perform its duty and notify the imprisoned defendant of the pending charges, so as to trigger the defendant's duty to request speedy disposition, triggered the 180-day time limit and required dismissal of the indictment with prejudice; the State appealed, and the Court of Appeals affirmed.

Thus, because the State failed to inform the Petitioner of the fact that the charges were pending in the two criminal actions below, the 180-day time limit for purposes of R.C. 2941.401 began in July 2019, and had expired prior to the disposition in the cases on February 18, 2020, and the statute specifically states that "If the action is not brought to trial within the time provided, subject to any continuances allowed pursuant to this section (which no such continuances occurred in Petitioner's case), no court any longer has jurisdiction

thereof, the indictment, information, or complaint is void, and the court shall enter an order dismissing the action with prejudice".

The Petitioner's right to notice is a substantive due process right, as is his right to have each of the elements of an offense proven beyond a reasonable doubt.

The Court of Appeals Deprived the Petitioner of Due Process of Law by Failing to Reopen the Appeal Under Ohio Rule of Appellate Procedure 26(B).

Ohio law mimics Constitutional Separation of Powers.

Article IV, Section 5, of Ohio's Constitution gives Ohio's Supreme Court the power to set Rules of Practice, including Appellate Rule 26(B). The power as law equaling that of Ohio's statutory law is demonstrated by the clause that declares a Rule of Procedure supersedes any statutory provision governing procedure that conflicts with the Rule of Procedure.

Ohio Rule of Appellate Procedure 26(B) has a provision that states a Court of Appeals shall reopen an appeal, making it mandatory, where an Appellant demonstrates he was prejudiced by an actual showing of Ineffective Assistance of Appellate Counsel.

Ohio law requires proof beyond a reasonable doubt that a defendant knowingly trespass in an occupied structure for the purpose of committing a criminal offense therein.

App.R. 26(B) requires a showing that there is a reasonably likelihood that, but for the ineffective assistance of Appellate Counsel, the outcome of the appeal would have been different; it does not require an absolute certainty the outcome would have been different.

This case has no reliable evidence, i.e., insufficient evidence, of the trespass element because the unsigned "notice" and lack of evidence to

show the Petitioner was served with it, and was actually the person who refused to sign it, and therefore knew of the "notice". Without Notice, there is no trespass under Ohio law, and with no trespass, there is no Aggravated Burglary, and therefore, Appellate Counsel provided ineffective assistance by failing to raise and argue that issue, as, had that issue been raised and argued, but for Appellate Counsel's ineffective assistance, there is a reasonable likelihood the outcome of the appeal would have been different.

The Petitioner filed two Motions seeking to fire his Trial Counsel, outlining his claim that the State's Response to his Discovery Request revealed no evidence of Aggravated Burglary and other offenses, and outlining that his Trial Counsel was simply attempting to get a better plea deal rather than preparing for an actual trial. (See Appendices D, E, and F.)

These Motions and attached letter to Trial Counsel show the Petitioner entered his guilty plea out of fear only after Trial Counsel and the Prosecutor, both threatening the Petitioner together as a team, coerced the Petitioner and stating that a trial would result in conviction and a sentence of at least 30 years.

The mere existence of these Motions on the record show competent Counsel should have been aware of the issues.

Lastly, because Ohio law is that the failure of the State to provide the Petitioner with written notice of pending charges deprives the Petitioner of his ability to demand a speedy trial, and therefore begins the 180 time limit, from the first triggering event, until the Trial Court loses jurisdiction over the case, as if notice had been given the Petitioner, and demand had been made for speedy disposition, had that issue been raised and argued by Appellate Counsel, there is a reasonable likelihood that the outcome

of the trial would have been different.

Prejudice seems obvious to the Petitioner: but for Appellate Counsel's ineffective assistance, there is a reasonable likelihood his conviction would have been overturned, and he would have been acquitted of Aggravated Burglary at a minimum; considering that he had products in a shopping cart and not concealed; Walmart employees only suspected him of something they couldn't quite name; the police officer who was injured, injured himself when he tackled the Petitioner, who had, at that point, only lied about his identity to avoid arrest on a pending warrant, had not assaulted the officers and had not yet attempted to flee. (See Field Case Report excerpt, page 17, Appendix G.)

These Issues, which require reversal under Ohio and Federal law, presented a prima facie showing of ineffective assistance of Appellate Counsel, and the State Court of Appeals deprived the Petitioner of Due Process by failing to reopen the Direct Appeal as mandated by Ohio Rule of Appellate Procedure 26(B).

Conclusion

The Petitioner was deprived of NOTICE of the so called "No Trespass Order" then convicted of a major offense that requires NOTICE of that prior to the offense having been committed. Imagine: Walmart, or any other store that is open to the public, can pick and choose who goes to jail or prison simply by saying they served a "No Trespass Order" and the person refused to sign, after calling the police to say the suspect, as in this case, MIGHT be up to something simply because he was wearing a hood and had items in a shopping cart. (See Field Case Report excerpt, page 21, 29, 56.) The Petitioner simply had products in a cart, and there is no evidence, other than he was wearing a hood (as many people do), and "looked very suspicious", that he was doing anything other than shopping. (If that were sufficient, nobody who wears

a hood, or puts items in a shopping cart could ever enter a store again.

The Petitioner was also deprived of NOTICE of the pending charged despite a clear statutory mandate enjoining a specific duty upon the State to provide the Petitioner with NOTICE; then, in a 180 degree flip of what the law requires, the Petitioner was held accountable by the State Court of Appeals for "failing" to make a demand for a speedy disposition that he had no knowledge or means of making without such NOTICE, and this, he was held accountable for the State's failure to comply with mandatory law to provide the Petitioner with that NOTICE.

This case revolves around the lack of NOTICE, and NOTICE is an apex element of Due Process. Without NOTICE, there can be no Due Process, as Due Process begins with NOTICE.

Wherefore, the United States Supreme Court should GRANT Certiorari and allow this matter to be fully briefed, argued, and decided on its merits, and a decision rendered answering the Questions Presented.

John A. Beatty
Petitioner

Dated: _____