APPENDIX A
295

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State Of Ohio,	:	
Plaintiff,	:	**TERMINATION NO. 5**
vs.	:	**Case No. 17CR 2027**
Ramon A. Boyce	:	**Judge Brown**
Defendant.	:	

JUDGMENT ENTRY
(Prison Imposed)

On April 25, 2019, came the Prosecuting Attorney on behalf of the State of Ohio, the Defendant being in Court and the Court being fully advised in the premises that the Defendant was in Court and being represented by himself.

The Court finds that on April 25, 2019, a Jury returned a verdict finding the Defendant guilty of Count One of the indictment, to wit: **BURGLARY**, a violation of R.C. 2911.12, a Felony of the Second Degree.

The Defendant was informed of the aforestated verdict.

On April 29, 2019, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by the Prosecuting Attorney Renee Amlin and Defendant was represented by himself.

The Court afforded the Defendant an opportunity to speak on behalf of himself and addressed Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the Court has considered and weighed.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. **The Court finds that a prison term is mandatory pursuant to R.C. 2929.13(F).**

The Court hereby imposes the following sentence: **SIX (6) YEARS TO BE SERVED AT THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. This sentence shall be served consecutive to Clark County case numbers 17CR-761 and 18CR-77.**

The Court made factual findings on the record to support all of the following as it relates to a consecutive sentence. The Court finds that this consecutive sentence is necessary to protect the public from future crimes or to punish the offender and consecutive sentences are not

disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public, and the offender committed one or more of the multiple offenses while awaiting trial or sentencing.

Further, two of the multiple offenses were committed as part of one or more courses of conduct and the harm caused by two or more multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct. Finally, the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

After imposing sentence, the Court gave its finding and stated its reasons for the sentence as required by R.C. 2929.19(B)(2)(a)(b) and (c)(d) and (e).

The Defendant was further notified of his right to appeal as required by Criminal Rule 32(A)(2). **The Court appoints attorney April Campbell, Esq. as counsel for the purposes of appeal.**

The Court, pursuant to this entry, notified the Defendant that he **will** receive a **mandatory** period of **post-release control of three (3) years** and, if he violates post-release control his sentence will be extended administratively in accordance with State law.

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: **the Defendant shall pay court costs in an amount to be determined. NO FINE IMPOSED.**

The Court finds that the Defendant has **three hundred and sixty-three (363) days of jail time credit** and hereby certifies the time to the Ohio Department of Corrections. TheDefendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

Brown, Chris, JUDGE

Copies to:
Prosecuting Attorney: Renee Amlin
Counsel for Defendant: Ramon Boyce, Pro Se
Case No. 17CR 2027

THE STATE OF OHIO, Franklin County, ss } I, MARYELLEN O'SHAUGHNESSY, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY,

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL entry NOW ON FILE IN MY OFFICE

WITNESS MY HAND AND SEAL OF SAID COUNTY THIS 14 DAY OF May A.D. 20 19

MARYELLEN O'SHAUGHNESSY, Clerk

By UNK Deputy

APPENDIX B
14 pgs

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 19AP-313 (C.P.C. No. 17CR-2027)
Ramon A. Boyce,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on January 25, 2022, it is the judgment and order of this court that appellant's application to reopen is denied.

KLATT, SADLER & BEATTY BLUNT, JJ.

By: /S/JUDGE
Judge Lisa L. Sadler

Tenth District Court of Appeals

Date: 01-26-2022

Case Title: STATE OF OHIO -VS- RAMON A BOYCE

Case Number: 19AP000313

Type: JOURNAL ENTRY

So Ordered

/s/ Judge Lisa L. Sadler

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 19AP-313 (C.P.C. No. 17CR-2027)
v.	:	(REGULAR CALENDAR)
Ramon A. Boyce,	:	
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on January 25, 2022

On brief: [*G. Gary Tyack*], Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

On brief: *Ramon A. Boyce*, pro se.

ON APPLICATION TO REOPEN

SADLER, J.

{¶ 1} On June 7, 2021, defendant-appellant, Ramon A. Boyce, filed an application, pursuant to App.R. 26(B), seeking to reopen his appeal resolved by this court in *State v. Boyce*, 10th Dist. No. 19AP-313, 2021-Ohio-712. In the application, Boyce asserts a claim of ineffective assistance of appellate counsel. Plaintiff-appellee, State of Ohio, filed a memorandum in opposition to Boyce's application. For the following reasons, we deny Boyce's application to reopen the appeal.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Boyce was suspected of committing a series of burglaries in Franklin County, and a similar series of burglaries in Clark County. *Boyce* at ¶ 2. He was arrested by the Columbus Police Department on April 3, 2017 and indicted by a Franklin County Grand

Jury on a single count of burglary on April 12, 2017. *Id.* at ¶ 2-3. At the same time, he was subject to multiple charges in Clark County. *Id.* After several lengthy delays, Boyce was brought to trial in the Franklin County Court of Common Pleas beginning on April 22, 2019. *Id.* Boyce represented himself at trial. *Id.* A jury found Boyce guilty of burglary and the trial court sentenced him to a 6-year prison term, to be served consecutive to a 70-year prison term imposed in Clark County. *Id.* at ¶ 4.[1] On direct appeal, Boyce challenged the denial of his pro se motion to dismiss the burglary indictment due to violation of his right to a speedy trial. *Id.* at ¶ 6. We concluded Boyce's speedy trial rights had not been violated and overruled his sole assignment of error. *Id.* at ¶ 12-44.[2]

II. STANDARD OF REVIEW

{¶ 3} App.R. 26(B)(1) provides that "[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." The application must be filed within ninety days from journalization of the appellate judgment, unless good cause is shown for filing later. App.R. 26(B)(1). The application for reopening must set forth "[o]ne 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 any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c).

{¶ 4} An application to reopen "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). "To prevail on an application to reopen, defendant must make 'a colorable claim' of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984)." *State v. Sullivan*, 10th Dist. No. 11AP-414, 2014-Ohio-673, ¶ 6. Under the *Strickland* standard, a defendant must demonstrate that "(1) counsel was deficient in failing to raise the issues defendant now presents; and (2) defendant had a reasonable probability of success if the issue had been presented on appeal." *Id.*

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[1] Boyce's convictions in Clark County were affirmed on appeal by the Second District Court of Appeals in *State v. Boyce*, 2d Dist. No. 2018-CA-77, 2020-Ohio-3573.

[2] Boyce's direct appeal to the Supreme Court of Ohio was dismissed for failure to prosecute. *State v. Boyce*, 163 Ohio St.3d 1507, 2021-Ohio-2472.

III. PROPOSED ASSIGNMENTS OF ERROR

{¶ 5} Pursuant to App.R. 26(B)(2)(c), Boyce asserts the following assignments of error were not previously considered on the merits in his direct appeal:

> [1.] The trial court abused its discretion and prejudiced Mr. Boyce by not allowing him to represent himself prior to when it did.
>
> [2.] The trial court abused its discretion and prejudiced Mr. Boyce by not allowing Mr. Boyce to expose to the Jury the police run log which would have showed the Jury Boyce's innocence of the burglary. And committed Plain Error.
>
> [3.] The Trial court should have suppressed evidence obtained in violation of the 4th and 14th Amendments to the Ohio and U.S. Constitutions.
>
> [4.] The court committed Plain Error when it would not allow Mr. Boyce to make a claim for double Jeopardy.

IV. LEGAL ANALYSIS

A. Timing of allowing Boyce to exercise right of self-representation

{¶ 6} In his first proposed assignment of error, Boyce argues the trial court abused its discretion by not allowing him to represent himself earlier in the proceedings. Boyce asserts he moved to represent himself multiple times, orally and in writing, because his appointed counsel refused to review the discovery with him or to file relevant motions. Boyce further claims he was prejudiced when the trial court did not permit him to represent himself at a suppression hearing.

{¶ 7} Because Boyce was indigent, the trial court appointed attorney Blaise Baker to represent him in April 2017. Boyce first moved for withdrawal of Baker as counsel on August 23, 2018, asserting Baker was unprepared during multiple meetings and claiming he had lost confidence in Baker. At a hearing on the motion, held on August 27, 2018, Boyce asserted he felt Baker was unprepared and unfamiliar with his case. Baker advised the trial court he disagreed with Boyce about filing a motion to suppress, but was preparing the motion at Boyce's request. Near the end of the hearing, Boyce directly requested to represent himself:

> The Defendant: Your Honor, can I just represent myself then?
>
> The Court: Let's let Mr. Baker file this motion. If you wish to go pro se, you have that right. I don't think that's wise. It's my understanding that you went pro se in Clark County. Correct?

> The Defendant: I did, Your Honor.
>
> The Court: And we saw how that turned out. So I don't know that that's the wisest avenue for you to choose. I'll consider it when we come back in a couple weeks.

(Aug. 27, 2018 Tr. at 7-8.)

{¶ 8} On October 12, 2018, Baker filed the motion to suppress.[3] Boyce filed a second written motion for withdrawal of Baker as counsel on October 15, 2018. At a hearing on October 23, 2018, the trial court deferred ruling on the motion for withdrawal. The trial court indicated that if Boyce was permitted to proceed pro se, Baker would remain as advisory counsel.

{¶ 9} The trial court conducted a hearing on the motion to suppress on February 22, 2019. Near the end of the suppression hearing, Boyce again indicated his desire to represent himself, stating "I'm representing myself. I don't need this." (Feb. 22, 2019 Tr. at 114.) On February 26, 2019, the trial court issued an entry scheduling trial for April 22, 2019. In that entry, the trial court reserved ruling on Boyce's motion to withdraw Baker as counsel, stating it had "repeatedly cautioned [Boyce] about the wisdom of proceeding without counsel" and indicating it would rule on Boyce's motion prior to trial. (Feb. 26, 2019 Entry at 1.) On April 9, 2019, the trial court granted Boyce's motion to withdraw Baker as counsel and proceed pro se at trial. The trial commenced on April 22, 2019.

{¶ 10} A criminal defendant has a right to self-representation rooted in the Sixth Amendment to the United States Constitution, which is made applicable to the states through the Fourteenth Amendment. *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, ¶ 25; *State v. Phillips*, 10th Dist. No. 18AP-619, 2019-Ohio-2930, ¶ 12. Ohio Constitution, Article I, Section 10 affords a right to counsel that is "comparable to but independent of" the guarantees under the Sixth Amendment. *State v. Milligan*, 40 Ohio St.3d 341, 342 (1988). The right to counsel "is thwarted when counsel is forced upon an unwilling defendant, who alone bears the risks of a potential conviction." *Obermiller* at ¶ 26. Thus, "[i]f a trial court *denies* the right to self-representation, when properly invoked, the denial is per se reversible error." (Emphasis added.) *State v. Cassano*, 96 Ohio St.3d

[3] As discussed more fully below, Baker filed a supplemental motion to suppress on January 1, 2019, and Boyce filed a pro se amendment to the motion to suppress on January 14, 2019.

94, 2002-Ohio-3751, ¶ 32. *See also State v. Reed*, 74 Ohio St.3d 534, 535 (1996) (holding that application to reopen should have been granted because "[t]he failure to raise a constitutional issue of such magnitude as self-representation clearly constitutes deficient performance [by appellate counsel]").

{¶ 11} In this case, Boyce's exercise of his right to self-representation was not *denied* because trial court ultimately permitted him to proceed pro se at trial. Boyce's exercise of this right was *delayed* because the trial court did not grant his repeated requests for withdrawal of appointed counsel until April 9, 2019, less than a month before trial. Boyce essentially argues he should have been permitted to represent himself earlier in the proceedings, and that his appellate counsel was ineffective by failing to raise that issue on direct appeal.

{¶ 12} Boyce asserts in support of his first proposed assignment of error that Baker refused to file certain pretrial motions, but primarily focuses on the February 22, 2019 suppression hearing. Boyce claims he was prejudiced by not representing himself at that hearing because the trial court ignored the arguments contained in his pro se amendment to the motion to suppress.

{¶ 13} "It is well-settled that an appellate attorney has wide latitude and thus the discretion to decide which issues and arguments will prove most useful on appeal." *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 3. "Appellate counsel is not required to argue assignments of error which are meritless." *Id.* Although Boyce claims he was prejudiced by not being allowed to represent himself at the suppression hearing, the transcript establishes Boyce testified extensively at the hearing regarding alleged errors in the search warrant affidavit, and the trial court directly questioned Boyce to ensure it understood his arguments.

{¶ 14} To the extent Boyce argues he was prejudiced because he would have filed certain pretrial motions Baker refused to file, his argument is analogous to an ineffective assistance of trial counsel claim. Ineffective assistance based on failure to file a motion requires showing the motion had a "reasonable probability of success." *State v. Jones*, 10th Dist. No. 11AP-1123, 2012-Ohio-3767, ¶ 31. Thus, had the issue been raised on direct appeal, Boyce's appellate counsel would have been required to demonstrate that Boyce was prejudiced because he would have filed pretrial motions on his own behalf *and* there was a

reasonable probability those motions would have succeeded. Boyce has not demonstrated a reasonable probability that any of his proposed motions would have succeeded and, therefore, has not demonstrated a reasonable probability of success if the issue had been raised on direct appeal.

{¶ 15} Under these circumstances, where Boyce's right to self-representation was not denied but rather, at most, was delayed, we cannot conclude Boyce's appellate counsel performed deficiently by not raising the issue on direct appeal. Therefore, Boyce's first proposed assignment of error fails to set forth a colorable claim of ineffective assistance of appellate counsel.

B. Exclusion of "run log" evidence

{¶ 16} In his second proposed assignment of error, Boyce asserts the trial court erred by refusing to admit into evidence certain police "run logs" that Boyce claims would establish he was not in the area when the burglary occurred.

{¶ 17} " 'Absent an abuse of discretion, as well as a showing that the accused has suffered material prejudice, an appellate court will not disturb the ruling of the trial court as to the admissibility of evidence.' " *State v. Huber*, 10th Dist. No. 18AP-668, 2019-Ohio-1862, ¶ 10, quoting *State v. Oteng*, 10th Dist. No. 14AP-466, 2015-Ohio-1231, ¶ 31. Accordingly, to succeed on this issue on direct appeal, Boyce would have been required to establish that the trial court abused its discretion by refusing to admit the run logs as a defense exhibit.

{¶ 18} As explained more fully in our discussion of Boyce's third proposed assignment of error, Boyce was the subject of surveillance by Columbus Police Detective Jean Byrne and a team of plainclothes officers. He was ultimately arrested and charged with burglary of a residence at 150 West Royal Forest Boulevard in Columbus. At trial, the state marked records of police radio communications, referred to as "run logs," from the night of the burglary as state's Exhibits O1 and O2 and Detective Byrne identified them. Boyce marked the run logs as defense Exhibit 2A and cross-examined Detective Byrne about their contents. The state did not move to admit its Exhibits O1 and O2. When Boyce moved to admit the run logs as defense Exhibit 2A, the trial court refused because the exhibit "was only used to refresh one witness'[s] recollection" and "was not authenticated by any person." (Apr. 24, 2019 Tr. at 829.) The trial court ruled Boyce's proposed Exhibit

2A to be inadmissible because "[t]here was no one who testified about personal knowledge of that report." *Id.*

{¶ 19} "An exhibit must be authenticated before it is admitted into evidence." *State v. Boddie*, 10th Dist. No. 12AP-74, 2012-Ohio-5473, ¶ 14. "An exhibit is authenticated when the record establishes that it 'is what its proponent claims.' " *Id.* quoting Evid.R. 901(A). In this case, although Detective Byrne briefly identified the run logs, there was no testimony establishing they were true and accurate copies of the original run logs or any other form of authentication. Boyce argues the run logs would have been beneficial to his defense but offers no argument to establish why the trial court erred by refusing to admit them into evidence. Thus, Boyce has failed to demonstrate a reasonable probability of success if this issue had been raised on direct appeal. Therefore, Boyce's second proposed assignment of error fails to set forth a colorable claim of ineffective assistance of appellate counsel.

C. Denial of Boyce's motion to suppress

{¶ 20} In his third proposed assignment of error, Boyce asserts the trial court erred by denying his motion to suppress evidence obtained from his home and vehicle in violation of his constitutional rights.

{¶ 21} We begin by briefly reviewing the facts leading to the search of Boyce's residence and vehicle. Boyce became a subject of investigation after a burglary victim contacted Detective Byrne to report that her missing laptop was "pinging" near 970 Hidden Acres Court. Detective Byrne determined the address was a multi-unit townhouse building. She recorded the license plate numbers of the cars outside the building; one was a Ford Explorer belonging to Boyce's girlfriend, Alyshia Cook. Detective Byrne learned that law enforcement agencies in Springfield and Clark County had also recently searched Cook's license plate number. Detective Byrne also learned those agencies had obtained a GPS tracking warrant for Boyce's vehicle, a black BMW. Detective Byrne was given access to the GPS tracking information and began surveillance of Boyce.

{¶ 22} In the early morning hours of April 3, 2017, members of the surveillance team saw Boyce leave a house located at 150 West Royal Forest Boulevard. Boyce exited through a window by the front door carrying bags. Boyce ran to his car and drove away from the area. After hitting a curb with his car, Boyce fled on foot and returned to his residence. Detective Byrne obtained an arrest warrant for Boyce and a search warrant for 970 Hidden

Acres Court. Officers photographed and collected the items around Boyce's car and impounded the car. Detective Byrne obtained a search warrant for Boyce's car a few days later.

{¶ 23} Boyce's trial counsel, attorney Baker, filed a motion to suppress any evidence on October 12, 2018, asserting the search warrant for 970 Hidden Acres Court was invalid because it was based on information from a burglary victim claiming that her stolen laptop computer was pinging near that location. The motion asserted Boyce had a reasonable expectation of privacy in the location of the computer because it was in a private residence and the location data was gathered by a private individual rather than a third-party service provider.

{¶ 24} Baker filed a supplemental motion to suppress on January 1, 2019, asserting the evidence was obtained through an unconstitutional search. The motion claimed Boyce's home was improperly searched without a warrant after he was arrested and argued that the warrantless search could not be justified as a search incident to arrest.

{¶ 25} Boyce filed a pro se amendment to the motion to suppress on January 14, 2019. In the amendment, Boyce claimed that his home and car were searched before warrants were obtained. Boyce asserted police officers entered his home around 8:20 am and did not request a search warrant until 9:00 am. Boyce alleged Detective Byrne based her affidavits on stale, false, and irrelevant information. Boyce also claimed Cook's car was searched without a warrant.

{¶ 26} The trial court conducted a hearing on the motion to suppress on February 22, 2019. With regard to Boyce's claims that Detective Byrne's affidavits were based on false information, the trial court permitted Boyce, through attorney Baker, to ask Detective Byrne to ask about the assertions included in her search warrant affidavits.

{¶ 27} The trial court denied Boyce's motion to suppress, concluding that he did not have a reasonable expectation of privacy in the location of the stolen laptop. The trial court did not expressly address Boyce's claims that his home and car were searched before the respective search warrants were obtained, but the court referred to Detective Byrne having taken "all the proper steps in securing a warrant for the location, for the residence and for the BMW that was involved in the incident." (Feb. 22, 2019 Tr. at 112.) This comment indicates the trial court rejected Boyce's claims that his home and car were searched

without warrants. The trial court further concluded that Detective Byrne's affidavits did not contain false information; to the extent certain statements about a drug case in Clark County were inaccurate, the court found those statements could be excised from the affidavit and probable cause still would have existed.

{¶ 28} The Supreme Court of Ohio set forth the general standard of review for a motion to suppress in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372. *State v. Lee*, 10th Dist. No. 18AP-666, 2019-Ohio-3904, ¶ 11. The court held that appellate review of a motion to suppress involves a mixed question of law and fact, which requires us to accept the trial court's findings of fact if supported by competent, credible evidence, and independently determine whether those facts satisfy the applicable legal standard. *Id.*, citing *Burnside* at ¶ 8.

{¶ 29} In his application to reopen, Boyce alleges the police searched his residence before the search warrant was issued. He also claims his vehicle was seized and searched without a warrant. Boyce further asserts his counsel failed to question Detective Byrne about allegedly false statements in her search warrant affidavit.

{¶ 30} Regarding the search of Boyce's home, the arrest record indicates Boyce was arrested at 8:16 am. Detective Byrne testified that after the SWAT team arrested Boyce, she obtained a search warrant for his residence. The search warrant for Boyce's home was issued at 9:00 am. Consistent with Detective Byrne's account, Columbus Police Officer Lazar testified that after the SWAT team secured the residence, he and other officers waited until a search warrant was obtained before searching Boyce's residence. The evidence inventory indicates the search of Boyce's residence was conducted between 9:00 am and 3:00 pm. Boyce has not cited any evidence in his application to reopen or his pro se amendment to the motion to suppress to support his claim that police officers searched his home before the search warrant was issued.

{¶ 31} Similarly, regarding the search of his vehicle, Detective Byrne testified there were items that had fallen from the car after Boyce crashed it. She photographed the items, then gathered them up and placed them back into the vehicle. She obtained a search warrant for Boyce's car the day after he was arrested. Boyce has not cited any evidence in his application to reopen or his pro se amendment to the motion to suppress to support his claim that police officers searched his car before obtaining a search warrant.

{¶ 32} Additionally, the record reflects that attorney Baker questioned Detective Byrne about the sources of the information she included in her affidavit in support of the search warrant for Boyce's residence. Attorney Baker also questioned Detective Byrne about the details she included in her affidavit in support of the search warrant for Boyce's car. Boyce was also permitted to testify extensively about the alleged false claims in Detective Byrne's affidavits.

{¶ 33} Boyce fails to cite any evidence that would allow us to find the trial court's factual findings were not supported by competent, credible evidence. He also fails to provide any evidence or argument that would allow us to conclude that the trial court erred by finding there was probable cause to support the search warrants. Thus, Boyce has failed to demonstrate a reasonable probability of success if this issue had been raised on direct appeal. Therefore, Boyce's third proposed assignment of error fails to set forth a colorable claim of ineffective assistance of appellate counsel.

D. Violation of Double Jeopardy Clause

{¶ 34} In his fourth proposed assignment of error, Boyce asserts the trial court committed plain error by refusing to consider his motion to dismiss under the Double Jeopardy Clause.

{¶ 35} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, provides a defendant with three protections: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense. *State v. Ollison*, 10th Dist. No. 16AP-95, 2016-Ohio-8269, ¶ 28. The Ohio Constitution, Article I, Section 10, affords a defendant similar protection. *Id.*; *see also State v. Mutter*, 150 Ohio St.3d 429, 2017-Ohio-2928, ¶ 15 ("The protections afforded by the Ohio and United States Constitutions' Double Jeopardy Clauses are coextensive."). When determining whether a defendant is being successively prosecuted for the same offense, we apply the "same elements" test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932). *State v. Bridges*, 10th Dist. No. 14AP-602, 2015-Ohio-4480, ¶ 26; *see also State v. Soto*, 158 Ohio St.3d 44, 2019-Ohio-4430, ¶ 17 ("[U]nder the *Blockburger* test, it is plain that the child-endangering charge does not constitute the same offense as the murder

charges, because each of the murder offenses contains an element not found in child endangering and child endangering contains an element not found in the murder offenses.").

{¶ 36} After the trial court announced the jury's verdict, it proceeded immediately to sentencing. When the trial court asked Boyce if he wished to make a statement, Boyce claimed the prosecution should have been barred by the Double Jeopardy Clause. Boyce appeared to suggest one of the Clark County charges included a specification related to the burglary at 150 West Royal Forest. Boyce presented the trial court with a partial copy of the indictment and an unsigned verdict form from his Clark County case, asserting they mentioned the burglary at 150 West Royal Forest. After reviewing the documents, the prosecutor indicated they "seem[ed] to relate to [an] engaging in a pattern of corrupt activity count," in the Clark County case. (Tr. Vol. IV at 924.) The prosecutor asserted there did not appear to be a double jeopardy issue and objected to introduction of the Clark County documents after Boyce had been convicted. The trial court held that prosecution for the burglary at 150 West Royal Forest was not barred by the Double Jeopardy Clause even if it had formed the predicate for a charge of engaging in a pattern of corrupt activity charge in the Clark County case. The court effectively treated Boyce's statements as a motion to dismiss based on the Double Jeopardy Clause and denied the motion, concluding the prosecutions were for different offenses involving a different animus.

{¶ 37} Contrary to Boyce's representation, the record indicates the trial court considered his motion to dismiss based on the Double Jeopardy Clause. Boyce suggests prosecution in this case was barred by the Double Jeopardy Clause because he had been tried on the same facts in Clark County. Boyce has not provided any additional information to support his fourth proposed assignment of error; therefore, we are limited to the trial record.

{¶ 38} The Supreme Court has held " 'the conduct required to commit a RICO violation is independent of the conduct required to commit [the underlying predicate offenses].' "[4] *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, ¶ 13, quoting *State v.*

[4] R.C. 2923.32, which prohibits engaging in a pattern of corrupt activity, is also known as the Racketeer Influenced and Corrupt Organizations statute or "RICO statute." *See State v. Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971, ¶ 9. Accordingly, engaging in a pattern of corrupt activity is sometimes referred to as a "RICO violation."

Dudas, 11th Dist. No. 2008-L-109, 2009-Ohio-1001, ¶ 46; *see also State v. Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971, ¶ 9, quoting *State v. Schlosser*, 79 Ohio St.3d 329, 335 (1997) ("[T]he intent of Ohio's RICO statute 'is to impose additional liability for the *pattern* of corrupt activity involving the criminal enterprise.' " (Emphasis sic.)); *State v. Moulton*, 8th Dist. No. 93726, 2010-Ohio-4484, ¶ 37 ("Ohio's RICO statute was enacted to criminalize the pattern of criminal activity and is not similar to the underlying predicate acts."). Assuming for purposes of analysis that the burglary of 150 West Royal Forest formed part of the predicate for a pattern of corrupt activity conviction in Clark County, that would not be the same offense for double jeopardy purposes as the underlying burglary. Boyce has failed to demonstrate a reasonable probability of success if his appellate counsel had raised a double jeopardy claim on direct appeal. Therefore, Boyce's fourth proposed assignment of error fails to set forth a colorable claim of ineffective assistance of appellate counsel.

V. CONCLUSION

{¶ 39} For the foregoing reasons, we conclude Boyce's application fails to set forth a genuine issue as to whether he was deprived of the effective assistance of appellate counsel. Accordingly, we deny Boyce's application to reopen his appeal.

Application to reopen appeal denied.

KLATT and BEATTY BLUNT, JJ., concur.

APPENDIX C

1 pg.

The Supreme Court of Ohio

State of Ohio

v.

Ramon A. Boyce

Case No. 2022-0251

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Franklin County Court of Appeals; No. 21AP-313)

Maureen O'Connor
Chief Justice

APPENDIX D

USCS Const. Amend. 6, Part 1 of 17

Copy Citation

Current through the ratification of the 27th Amendment on May 7, 1992.

- United States Code Service
- Amendments
- Amendment 6 Rights of the accused.

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX E
1. Pg

USCS Const. Amend. 14, Part 1 of 15

Copy Citation

Current through the ratification of the 27th Amendment on May 7, 1992.

- United States Code Service
- Amendments
- Amendment 14

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F
1 pg.

Ohio Evid. R. 901

Copy Citation

Rules current through rule amendments received through June 8, 2022

- OH - Ohio Local, State & Federal Court Rules
- Ohio Rules Of Evidence
- Article IX. Authentication and identification

Rule 901. Requirement of authentication or identification

(A) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(B) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witness with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversation. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio or by other rules prescribed by the Supreme Court.

Ohio Crim. R. 12

APPENDIX H

3 pg.

Copy Citation

Rules current through rule amendments received through June 8, 2022

- OH - Ohio Local, State & Federal Court Rules
- Ohio Rules Of Criminal Procedure

Rule 12. Pleadings and motions before trial; Defenses and objections

(A) Pleadings and motions. Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) Filing with the court defined. The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

(1) The complaint, if permitted by local rules to be filed electronically, shall comply with Crim.R. 3.

(2) Any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.

(3) A provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.

(4) Any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

(C) Pretrial motions. Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.

(4) Requests for discovery under Crim. R. 16;

(5) Requests for severance of charges or defendants under Crim. R. 14.

(6) Requests for the appointment of expert witnesses in cases where the defendant is unable to afford the cost of the requested expert assistance. Upon request by defense counsel, a motion in this regard may be made in camera and ex parte, and the order concerning this appointment shall be under seal.

(7) Requests for the appointment of investigators in cases where the defendant is unable to afford the cost of the requested investigative assistance. Upon request by defense counsel, a motion in this regard may be made in camera and ex parte, and the order concerning the appointment shall be under seal.

(D) Motion date. All pretrial motions except as provided in Crim. R. 7(E) and 16(M) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(E) Notice by the prosecuting attorney of the intention to use evidence.

(1) At the discretion of the prosecuting attorney. At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under division (C)(3) of this rule.

(2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable, the defendant, in order to raise objections prior to trial under division (C)(3) of this rule, may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16.

(F) Ruling on motion. The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.

A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges.

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(G) Return of tangible evidence. Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if the defendant is entitled to possession of the property. The order shall be stayed pending appeal by the state pursuant to division (K) of this rule.

(H) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief from the waiver.

(I) Effect of plea of no contest. The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(J) Effect of determination. If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (C)(1) or (2) of this rule, when the motion raises issues that were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(K) Appeal by state. When the state takes an appeal as provided by law from an order suppressing or excluding evidence, or from an order directing pretrial disclosure of evidence, the prosecuting attorney shall certify that both of the following apply:

(1) the appeal is not taken for the purpose of delay;

(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, or the pretrial disclosure of evidence ordered by the court will have one of the effects enumerated in Crim. R. 16(D).

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on the defendant's own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal from an order suppressing or excluding evidence pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

(L) Motions by alleged victim. To the extent required by Article I, Section 10a of the Ohio Constitution or by the Revised Code, the trial court shall allow an alleged victim of the crime to file pretrial motions in accordance with the time parameters in subsection (D).

APPENDIX I
4 pgs

Ohio Crim. R. 16

Copy Citation

Rules current through rule amendments received through June 8, 2022

- OH - Ohio Local, State & Federal Court Rules
- Ohio Rules Of Criminal Procedure

Rule 16. Discovery and inspection

(A) Purpose, scope and reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery; Right to copy or photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;

(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

(5) Any evidence favorable to the defendant and material to guilt or punishment;

(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting attorney's designation of "counsel only" materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or

disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting attorney's certification of nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;

(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;

(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;

(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;

(5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of inspection in cases of sexual assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of prosecuting attorney's certification of non-disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to copy or photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. A public records request made by the defendant, directly or indirectly, shall be treated as a demand for discovery in a criminal case if, and only if, the request is made to an agency involved in the prosecution or investigation of that case. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;

(2) Results of physical or mental examinations, experiments or scientific tests;

(3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;

(4) All investigative reports, except as provided in division (J) of this rule;

(5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness list. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information not subject to disclosure. The following items are not subject to disclosure under this rule:

(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;

(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim.R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(4) To the extent required by Article I, Section 10a of the Ohio Constitution or by the Revised Code, the trial court shall allow an alleged victim of the crime, who has so requested, to be heard regarding objections to pretrial disclosure.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

APPENDIX J
3 pgs.

Ohio App. Rule 26

Copy Citation

Rules current through rule amendments received through June 8, 2022

- OH - Ohio Local, State & Federal Court Rules
- Ohio Rules Of Appellate Procedure
- Title III. General provisions

Rule 26. Application for reconsideration; Application for en banc consideration; Application for reopening.

(A) Application for reconsideration and en banc consideration.

(1) Reconsideration.

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A).

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

(2) En banc consideration.

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A). In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by App.R. 30(A). A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under App.R. 26(A)(2)(c) and, if so vacated, shall be reentered.

(e) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

(B) Application for reopening.

(1) 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 at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

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

(d) 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;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(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.

(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:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

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

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.

(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.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.