In The Supreme Court of Ohio

State of Ohio,
Appellee,
v.
Alexander F. Henize,
Appellant.

No. 20-1273

On Appeal from the Franklin County Court of Appeals, 10th Appellate District

COA No. 19AP-89

Memorandum in Support of Jurisdiction of Appellant Alexander F. Henize

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Explanation

This case raises substantial constitutional questions of the Appellant's Ohio Const. art. 1, § 14, U.S. Const. Amend. 4, and U.S. Const. Amend 14 rights being violated. The Court of Appeals relied on two officers conflicting testimony regarding consent, each of which denied ever receiving it and what the consent was for. Original appellant counsel also never raised the issues of the false statements made by the search warrant affiant, who clearly and knowingly added blatant lies to prove probable cause. Also, the search warrant was executed outside of the city of Columbus making the search warrant defective. Finally, municipal police officers responded to a 911 call outside of their assigned territory without the assistance or knowledge of the municipal police of the offense location.

Statement of Case & Facts

On June 27, 2018 the trial court denied Henize's motion to suppress.

On December 10, 2018 Henize plead no contest to the sixteen counts in the indictment.

On January 24 and 28, 2019 Henize was sentenced to a mandatory term of 18 years imprisonment.

Henize timely appealed and on December 17, 2019 the court of appeals for the Tenth District of Ohio affirmed the trial courts decision. State v. Henize, 10th Dist. No. 19AP-89, 2019-Ohio-5202.

On March 4, 2020 Henize filed a motion to reopen pursuant to App. R. 26(b) arguing ineffective assistance of appellant counsel. On March 31, 2020 the court of appeals denied the motion.

On August 6, 2020 due to the Covid-19 health crisis Henize timely filed a motion to reconsider pursuant to App. R. 26(a). On September 3, 2020 the court of appeals agreed the motion was timely but decided to not analyze Henize's arguments because he raised new arguments to support his ineffective assistance of appellant counsel. Therefore, the court of appeals denied the motion.

Henize is now before this Court to show if his arguments were analyzed the outcome of his suppression issues would be different. The arguments have never been considered or analyzed.

Proposition of Law No. I

Agument in Support:

The two-pronged analysis set forth in Strickland v. Washington (1984), 466 U.S. 668 is the appropriate standard

to assess whether thee appellant has raised a genuine issue as to the ineffectiveness of appellant counsel in a request to reopen appeal under color of App. R. 26(A). To show ineffectiveness thee applicant must prove that his appellant counsel was deficient for failing to raise the issue(s) he now presents and that there was a reasonable probability of a different outcome had he presented those claims on appeal. State v. Hill (2001), 90 Ohio St. 3d 571, 572. "Reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceedings. State v. Waddy (1992), 62 Ohio St. 3d 424, 433.

While it is well-settled that appellate counsel need not raise every non-frivolous issue (State v. Allen (1996), 77 Ohio St. 3d 172, 173) and enjoys a heavy measure of deference in the judgement of what should be raised (State v. Sanders (2002), 94 Ohio St. 3d 150, 151-152), the benchmark for a claim of ineffectiveness must be whether counsel so undermined the proper functioning of the adversarial process that the proceedings cannot be relied on an producing a just result (Strickland, 466 U.S. at 686).

Sub-section A: Consent:

"The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Consfitution require the police to obtain a warrant based on probable cause before they conduct a search." State v. Brown, 63 Ohio St. 3d 349. Although, "A warrantless police entry into a private residence is not unlawful if

made upon exigent circumstances, a "specifically established and well-delineated exception" to the search warrant requirement State v. Applegate, 68 Ohio St. 3d 348." Absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstatutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." Payton v. New York, 445 U.S. 573. Another exception is consent. All responding officers in this case admitted that Henize self-surrendered and was placed under arrest outside the residence. Officers admitted they immediately entered the residence, after placing Henize in the police cruiser, to conduct a protective sweep. "The Fourth Amendment permits a properly limited protective sweep in conjunction with an 'in-home' arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie, 494 U.S. 325. Henize was the only suspect, verified by 911 call, the victims mother at the scene, and the victim during communications through the third story window with officers before Henize self surrendered. Also, "There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." State v. Brown, 63 Ohio St. 3d 349. Henize self surrendered outside the residence, was placed under arrest in a police cruiser. There was no possibility of Henize accessing any weapons inside of the residence, police officers had no supporting facts of

reasonable belief of any danger inside the residence with Henize being handcuffed and inside the cruiser.

After illegally entering the residence the police officers made contact with the victim and asked if a firearm was involved. The victim pointed to a rifle and told officers they could grab it. From that point on every officer provided conflicting statements and testimony of what happened. No officer admitted to obtaining consent from the victim to search the residence. All officers provided completely different versions of what the consent was for, what the knowledge the officers had during the time spand, and what officer had asked for consent. During these moments of unclarity, while officers were illegally searching the residence, one officer observed a closed bucket. The officer admitted that the contents of the bucket were not visible, but he thought that it could contain a firearm. Once the bucket was opened the officer immediately stopped the search to obtain a search warrant." In justifying a particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure,

or the search, warrant a man of reasonable caution in the belief that the action taken was appropriate. Anything less would invite intrusions upon constitutionally garuanteed rights based on nothing more substantial than inarticulable hunches, a result the court has consistently refused to sanction." State v. Carter, 69 Ohio St. 3d 57. The officers actions of immediately stopping the search to obtain a search warrant clearly shows the officer knew he exceeded his limits and inappropriately opened the closed container. After admitting the contents were not in plain view and consent were not given" Simple good faith on the part of the arresting officer is not enough. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." State v. Carter, 69 Ohio St. 3d 57. Furthermore, " a search cannot depend on mere suspicion." State v. Castagnola, 145 Ohio St. 3d 1.

Sub-Section B: Warrant Affidavit

In Franks v. Delaware (1978), 438 U.S. 154, the court decided the issue of whether a defendant could attack the truthfulness of factual averments in the affidavit for a search warrant. In substance the court held a hearing is required only if the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in his affidavit for the warrant, and if

the allegedly false statements are necessary to the finding of probable cause. In this case Detective Friend knowingly and intentionally falsified his search warrant affidavit to hide the Fourth Amendment violations resulting from the illegal and warrantless entry into the residence, and to establish establish probable cause for that same entry and the warrant to seize the contraband found during the illegal search. Detective Friend first falsity in the affidavit was the addressing of the offense location as "3894 Preserve Crossing Blvd, Columbus, Ohio." The offense took place in Gahanna, Ohio and, Friend even addressed his evidence inventory sheets as Gahanna, Ohio. Second, Friend stated that " officers arrived at the scene, a female knocked the screen out of apartment window and screamed for help." There are no statements or testimony made by any responding officer saying that they observed the screen being knocked out or that the victim screamed for help. Friend made this false statement to paint a picture of exigent circumstances, he also never stated that the suspect was already arrested outside. Finally, Friend stated " Patrol officers were let into apartment by female." Responding officers clearly stated and testified that they entered the residence without consent, performing a protective sweep, even though Henize had already been arrested outside the residence.

Friend clearly made these false statements knowingly and intentionally, with total disregard of the truth " and, with the afidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search

warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." State v. Dibble, 133 Ohio St. 3d 451.

Sub-Section C: Search Warrant

The search warrant in this case was signed for 3894 Preserve Crossing Blvd, Columbus, Ohio, and to be executed within 72 hours in the City of Columbus, Ohio. The offense address is in Gahanna, Ohio and, the Federal search warrant signed at a later date clearly states it as Gahanna, Ohio. With the address outside of the city of Columbus, Ohio this makes the warrand deficient. See ORC Ann. 2933.24.

~~Sub~~-Section D: Municipal Jurisdiction

The authority granted in R.C. 2935.03 to a police officer to "arrest and detain a person found violating a law of the state" does not confer authority upon a municipal police officer to arrest without a warrant outside the geographical boundaries of his municipal territory." Police officers have no arrest powers, as police officers, when acting outside the boundaries of their political subdivisions, subject to narrowly tailored and inapplicable exceptions, such as hot pursuit." Sawicki v. Ottawa Hills, 37 Ohio St. 3d 222. In this case officers did not observe the incident nor were they in hot pursuit. Officers responded to a 911 call of an offense possibly

taking place outside of their jurisdiction by a caller who was not present to confirm the events as truly happening. Officers were not assisting, assisted, or in any communications with the municipal police of the offense locations jurisdiction. Columbus Police's mere presence on the scene was Illegal.

Conclusion

Wherefore, Having demonstrated a great probability of a different outcome if it weren't for appellate counsel's neglegence in studying discovery and transcript, Henize is entitled of relief that will correct the miscarriage of justice.

May it be So Ordered.

Respectfully Submitted,

Alexander F. Henize
Counsel for Appellant, prose.

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Sheryl L. Prichard, Assistant County Prosecutor,

373 S. High St., 13th Floor, Columbus, Ohio 43215 on this 13th day of October, 2020.

Alexander F. Heintze

Counsel for Appellant, pro se

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 19AP-89 (C.P.C. No. 18CR-1028)
v.	:	
Alexander F. Henize,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on September 3, 2020

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Alexander F. Henize, pro se.

ON APPLICATION FOR RECONSIDERATION

LUPER SCHUSTER, J.

{¶ 1} On August 6, 2020, defendant-appellant, Alexander F. Henize, filed an application to reconsider pursuant to App.R. 26(A) of this court's March 31, 2020 memorandum decision in *State v. Henize*, 10th Dist. No. 19AP-89. In that decision, we denied Henize's App.R. 26(B) application to reopen his appeal from the judgment of the Franklin County Court of Common Pleas convicting him of multiple drug-related offenses. In the appeal, we rejected Henize's argument that the trial court erred in denying his motion to suppress evidence and accordingly affirmed. *State v. Henize*, 10th Dist. No. 19AP-89, 2019-Ohio-5202. For the following reasons, we deny Henize's application.

{¶ 2} App.R. 26(A) provides for the filing of an application for reconsideration, which must 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)." The test generally applied to an application for reconsideration is whether the application calls to the court's attention an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been. *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981). An application for reconsideration "is not designed for use in instances where a party simply disagrees with the logic or conclusions of the court." *State v. Burke*, 10th Dist. No. 04AP-1234, 2006-Ohio-1026, ¶ 2, citing *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996). Further, an application for reconsideration is not a means to raise new arguments or issues. *State v. Wellington*, 7th Dist. No. 14 MA 115, 2015-Ohio-2095, ¶ 9.

{¶ 3} Plaintiff-appellee, State of Ohio, argues Henize's application for reconsideration is untimely. The state asserts Henize requests reconsideration of this court's December 17, 2019 decision affirming the trial court's judgment. Construed as such, the application filed on August 6, 2020 is untimely. Although we agree Henize's application contains language suggesting he seeks reconsideration of this court's decision affirming the trial court's judgment, we construe the application as seeking reconsideration of our decision denying his request to reopen his appeal. And insofar as Henize argues this court should reconsider the March 31, 2020 denial of his application to reopen, the application for reconsideration is timely pursuant to the tolling order the Supreme Court of Ohio issued in response to the COVID-19 health crisis. *See In re Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court & Use of Technology*, 158 Ohio St.3d 1516, 2020-Ohio-2975.

{¶ 4} Irrespective of the timeliness issue, Henize's application lacks merit. In his request to reopen his appeal, Henize argued his appellate counsel was ineffective in failing to raise a double jeopardy claim, in not challenging his sentence on the basis that the indictment was improperly amended at the plea hearing to increase the degree of the offenses charged, and in not alleging the forfeiture amount was excessive. We rejected these arguments and concluded he failed to present a colorable claim of ineffective assistance of appellate counsel. Now, in seeking reconsideration of that conclusion, Henize argues his appellate counsel did not adequately argue the suppression issue, the search warrant was defective, and the Columbus police officers had no jurisdiction to respond to

the incident that led to the searches. Henize's attempt to raise new arguments in his application for reconsideration is improper; thus, we will not analyze those arguments. *Wellington, supra.*

{¶ 5} Because Henize fails to identify any obvious error in our decision or raise an issue that this court either did not consider at all or did not fully consider when it should have been, we deny his application for reconsideration.

Application for reconsideration denied.

SADLER, P.J., and NELSON, J., concur.