

SUPREME COURT OF OHIO

State v. Moore

93 Ohio St. 3d 649, 2001-Ohio-1892 (2001) · No. No. 01-768 · Decided December 19, 2001

SUMMARY

The Supreme Court of Ohio affirmed the denial of Lee E. Moore Jr.'s application to reopen his direct appeal under Ohio Appellate Rule 26(B). The court held that Moore failed to raise a genuine issue demonstrating ineffective assistance of appellate counsel, and addressed his claims concerning untimeliness, judicial recusal, evidentiary proceedings, and appointment of counsel.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Per Curiam; Chief Justice Moyer; Justice Douglas; Justice Resnick; Justice F.E. Sweeney; Justice Pfeifer; Justice Cook; Justice Lundberg Stratton
JURISDICTION	Ohio
DECIDED	December 19, 2001
DOCKET	No. 01-768
DISPOSITION	affirmed
PROCEDURAL POSTURE	Moore appealed as of right from the Hamilton County Court of Appeals' denial of his application to reopen his direct appeal under Ohio Appellate Rule 26(B), alleging ineffective assistance of appellate counsel.
STANDARD OF REVIEW	The court applied App.R. 26(B)(5)'s genuine-issue standard and the two-pronged Strickland standard to the claims of ineffective assistance of appellate counsel. It also reviewed legal issues concerning recusal, record supplementation, and appointment of counsel.
PRECEDENTIAL VALUE	Published Ohio Supreme Court decision; binding precedent in Ohio subject to later treatment.
PARTIES	Lee E. Moore, Jr. v. State of Ohio

TOPICS

appellate procedure

post-conviction relief

ineffective assistance

criminal procedure

state post-conviction relief

PRACTICE AREAS

criminal appellate procedure

post-conviction criminal procedure

ineffective assistance of counsel

capital sentencing

QUESTIONS PRESENTED

1. Whether Moore raised a genuine issue as to deprivation of the effective assistance of appellate counsel sufficient to reopen his direct appeal under App.R. 26(B)(5).
2. Whether Moore could challenge the appellate judges' failure to recuse themselves without filing an affidavit of disqualification under R.C. 2501.13 and Article IV, Section 5(C) of the Ohio Constitution.
3. Whether the court of appeals could consider new evidence or matters outside the existing record in evaluating the App.R. 26(B) application.
4. Whether Moore was entitled to appointment of counsel in the App.R. 26(B) proceeding.
5. Whether Moore established good cause for filing his App.R. 26(B) application more than ninety days after journalization of the appellate judgment.

HOLDINGS

1. An applicant seeking to reopen an appeal under App.R. 26(B)(5) must raise a genuine issue showing a colorable claim that appellate counsel was ineffective, measured under the two-pronged Strickland standard. Moore failed to do so, so reopening was properly denied.
2. A party alleging bias by a court of appeals judge must seek relief by filing an affidavit of disqualification with the Supreme Court of Ohio; failure to do so forecloses the recusal complaint in the appeal.
3. A reviewing court may not add material to the record that was not before the lower court and decide the appeal on the basis of that new material; ineffective assistance of appellate counsel likewise cannot be assessed by adding new matter to the record.
4. Moore's request for appointment of counsel was moot because counsel had represented him in the court of appeals during the App.R. 26(B) proceeding.

KEY QUOTATIONS

“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.” (93 Ohio St. 3d at 649)

“We have reviewed Moore’s assertions of deficient performance by appellate counsel and find that Moore has failed to raise “a genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal” before the application to reopen can be granted, as required under App.R. 26(B)(5).” (93 Ohio St. 3d at 651)

FACTUAL BACKGROUND

Moore was convicted of aggravated murder and sentenced to death for the killing of Melvin Olinger. After affirmance of his conviction and sentence, and denial of post-conviction relief, he filed an App.R. 26(B) application alleging that appellate counsel had been ineffective in his first appeal. He also sought recusal of the appellate judges, an evidentiary hearing, permission to depose counsel, funds for an expert, and appointment of counsel.

PROCEDURAL HISTORY

Moore was convicted of aggravated murder and sentenced to death. The court of appeals and Supreme Court of Ohio affirmed his conviction and sentence, and the court of appeals later affirmed denial of post-conviction relief. Moore then filed an App.R. 26(B) application to reopen his direct appeal; the court of appeals denied it for failure to show good cause for filing more than ninety days after journalization of the appellate judgment. The Supreme Court of Ohio affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Moore, Hamilton App. No. C-950009, 1996 WL 348193 (Ohio Ct. App. June 26, 1996)
- State v. Moore, 81 Ohio St. 3d 22, 689 N.E.2d 1 (1998)
- State v. Moore, Hamilton App. No. C-970353, 1998 WL 638353 (Ohio Ct. App. Sept. 18, 1998)
- State v. Moore, 84 Ohio St. 3d 1472, 704 N.E.2d 579 (1999)
- State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992)
- Beer v. Griffith, 54 Ohio St. 2d 440, 377 N.E.2d 775 (1978)
- State v. Ishmail, 54 Ohio St. 2d 402, 377 N.E.2d 500 (1978)
- Strickland v. Washington, 466 U.S. 668, 687 (1984)
- State v. Reed, 74 Ohio St. 3d 534, 660 N.E.2d 456 (1996)
- State v. Spivey, 84 Ohio St. 3d 24, 701 N.E.2d 696 (1998)
- State v. Sheppard, 91 Ohio St. 3d 329, 744 N.E.2d 770 (2001)
- State v. Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373 (1989)
- White v. Schotten, 201 F.3d 743 (6th Cir. 2000)
- State v. Houston, 73 Ohio St. 3d 346, 652 N.E.2d 1018 (1995)