

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY**

State v. Wagner

2022-Ohio-801 (Ohio Ct. App. 2022) · No. 109678 · Decided March 16, 2022

SUMMARY

The Eighth District Court of Appeals of Ohio granted David Wagner’s application to reopen his criminal appeal under Ohio App.R. 26(B). The court found a genuine issue regarding ineffective assistance of appellate counsel based on the alleged failure to raise the omission of a competency evaluation and presentence-investigation report from the record. The reopened appeal was limited to Wagner’s proposed assignments of error, and counsel was appointed.

CASE DETAILS

COURT	Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County
WRITING FOR THE COURT	Emanuella D. Groves; Kathleen Ann Keough; Cornelius J. O’Sullivan
JURISDICTION	Ohio
DECIDED	March 16, 2022
DOCKET	109678
DISPOSITION	other
PROCEDURAL POSTURE	David Wagner filed a timely application under Ohio Appellate Rule 26(B) to reopen his previously decided direct appeal based on ineffective assistance of appellate counsel. The Eighth District granted the application and reopened the appeal for further proceedings limited to the eight proposed assignments of error.
STANDARD OF REVIEW	At the first stage of an App.R. 26(B) application, the applicant must show a genuine issue or colorable claim that appellate counsel was ineffective; conclusive proof of ineffective assistance is not required until the reopened appeal proceeds to the second stage.
PRECEDENTIAL VALUE	Published Ohio Court of Appeals opinion; precedential under applicable Ohio law.
PARTIES	David Wagner v. State of Ohio

TOPICS

appellate procedure

ineffective assistance

post-conviction relief

criminal procedure

sentencing

PRACTICE AREAS

criminal appellate procedure

ineffective assistance of appellate counsel

sentencing

QUESTIONS PRESENTED

1. Whether Wagner satisfied the first-stage requirement under App.R. 26(B) by presenting a genuine issue or colorable claim of ineffective assistance of appellate counsel.
2. Whether there was a reasonable probability that the result of the original appeal would have been different if appellate counsel had raised the proposed errors concerning the competency report and presentence-investigation report.
3. What limits and record procedures should govern the reopened appeal.

HOLDINGS

1. An applicant seeking to reopen a criminal appeal under App.R. 26(B) need only demonstrate at the first stage a genuine issue, or colorable claim, that appellate counsel was ineffective; the applicant is not required at that stage to conclusively establish ineffective assistance or prove that the reopened appeal will ultimately succeed.
2. Wagner established a genuine issue and a reasonable probability that the result of his original appeal may have been different if appellate counsel had presented the proposed assignments of error concerning the omitted competency report and presentence-investigation report.
3. The reopened appeal is limited to Wagner's eight proposed assignments of error, and the record may be supplemented with the competency report, presentence-investigation report, and other materials omitted from the record by error or accident or misstated.

KEY QUOTATIONS

“Thus, the two-stage procedure prescribed by App.R. 26(B) requires that the applicant seeking permission to reopen his direct appeal show at the first stage that there is at least a genuine issue — that is, legitimate grounds — to support the claim that the applicant was deprived of the effective assistance of counsel on appeal.” (¶ 25)

“He was not required to conclusively establish ineffective assistance of appellate counsel just to be allowed to argue in a reopened appeal that he was deprived of the effective assistance of appellate counsel.” (¶ 35)

FACTUAL BACKGROUND

Wagner received consecutive sentences totaling 15 years in the Cuyahoga County Court of Common Pleas. He asserted that trial counsel failed to include a competency evaluation and a presentence-investigation report in the record for the sentencing court's consideration. He argued that those materials contained mitigation information that could have supported a lesser term of incarceration and that appellate counsel was ineffective for failing to raise the issue on direct appeal.

PROCEDURAL HISTORY

Wagner's original appeal affirmed the trial court's imposition of consecutive sentences totaling 15 years. He then sought reopening under App.R. 26(B), arguing that appellate counsel should have raised trial counsel's failure to place a competency evaluation and presentence-investigation report before the sentencing court. The court found a genuine issue and a reasonable probability that the appeal's result could have been different, granted reopening, appointed counsel, and ordered reassembly and supplementation of the record.

DISPOSITION

other

REMAND INSTRUCTIONS

The application for reopening is granted. The clerk must reassemble and transmit the record from the original appeal within 45 days. Wagner may supplement the record with the competency report, the presentence-investigation report, and other material omitted by error or accident or misstated. The reopened appeal is limited to the eight proposed assignments of error; appointed counsel must apply for compensation within 30 days after journalization of the final decision in the reopened appeal, and the parties must file briefs under the applicable appellate rules.

CASES CITED

- Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)
- State v. Spivey, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998)
- State v. Leyh, Slip Opinion No. 2022-Ohio-292
- State v. Nix, 8th Dist. Cuyahoga No. 106894, 2019-Ohio-1640
- State v. Rosemond, 1st Dist. Hamilton No. C-180221, 2011-Ohio-768
- State v. Wagner, 8th Dist. Cuyahoga No. 109678, 2021-Ohio-3107

OPINION

PER CURIAM.

[Cite as State v. Wagner, 2022-Ohio-801.] COURT OF APPEALS OF OHIO EIGHTH APPELLATE DISTRICT COUNTY OF CUYAHOGA STATE OF OHIO,; Plaintiff-Appellee,; No. 109678 v.: DAVID WAGNER,; Defendant-Appellant.; JOURNAL ENTRY AND OPINION JUDGMENT: APPLICATION GRANTED RELEASED AND JOURNALIZED: March 16, 2022 Cuyahoga County Court of Common Pleas Case No. CR-19-636068-B Application for Reopening Motion No. 551045 Appearances: Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Mary M. Frey, Assistant Prosecuting Attorney, for appellee.

John P. Parker, for appellant. EMANUELLA D. GROVES, J.: David Wagner has filed a timely application for reopening pursuant to App.R. 26(B). Wagner seeks to reopen the appeal, rendered

in *State v. Wagner*, 8th Dist. Cuyahoga No. 109678, 2021-Ohio-3107, that affirmed the trial court's imposition of consecutive sentences, totaling 15 years, in *State v. Wagner*, Cuyahoga C.P.

No. CR-19-636068-B. We grant Wagner's application for reopening. Pursuant to App.R. 26(B)(1), an appellant in a criminal matter may move to reopen an appeal based on a claim of ineffective assistance of appellate counsel.

The test for ineffective assistance of trial counsel, found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard to determine whether appellate counsel was ineffective under App.R. 26(B)(5).

The applicant "must prove that his counsel [was] deficient for failing to raise the issue he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

To prevail on an application to reopen, defendant must establish "a colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland*. The Supreme Court of Ohio, in *State v. Leyh*, Slip Opinion No. 2022- Ohio-292, a very recent opinion issued on February 8, 2022, reversed the Ninth District Court of Appeals on the basis that the applicant, through his App.R.

26(B) application for reopening, had demonstrated that there existed a genuine issue as to whether he was deprived of the effective assistance of appellate counsel. The Ohio Supreme Court further held that the applicant is not initially required, through his application for reopening, to conclusively establish ineffective assistance of appellate counsel.

Thus, the two-stage procedure prescribed by App.R. 26(B) requires that the applicant seeking permission to reopen his direct appeal show at the first stage that there is at least a genuine issue — that is, legitimate grounds — to support the claim that the applicant was deprived of the effective assistance of counsel on appeal. See App.R. 26(B)(5). If that showing is made and the application is granted, the applicant must then establish at the second stage the merits of both the direct appeal and the claim for ineffective assistance of appellate counsel.

See App.R. 26(B)(9). *Leyh* at ¶ 25. The facts, pertinent to *Leyh*, involved the failure of appellate counsel to include as part of the record, a transcript, and a confidential presentence- investigation report ("PSI"). Similar to the facts in *Leyh*, Wagner argues that there exists a genuine issue as to whether appellate counsel was ineffective for failing to raise on appeal the failure of trial counsel to include a competency evaluation and a PSI as part of the trial court record.

Specifically, Wagner argues that the competency report and the PSI contained mitigation information that may have resulted in the trial court imposing a lesser sentence of incarceration.

As stated by the Supreme Court of Ohio: As we have noted, the structure and text of App.R. 26(B) plainly contemplate stages of analysis.

In this case, Leyh had to show only at the first stage of the procedure a genuine issue that he was deprived of the effective assistance of appellate counsel. He was not required to conclusively establish ineffective assistance of appellate counsel just to be allowed to argue in a reopened appeal that he was deprived of the effective assistance of appellate counsel.

Contrary to the reasoning of the court of appeals, Leyh did not have to prove that he would win the reopened direct appeal and prevail on his claim of ineffective assistance of appellate counsel as a precondition to reopening the direct appeal for further legal proceedings to contest the trial court's alleged failure to merge allied offenses. Leyh at ¶ 35. Herein, there exists a genuine issue as to whether Wagner was deprived of the assistance of appellate counsel.

We further find that there exists a reasonable probability that had appellate counsel presented the proposed assignments of error contained within the application for reopening, the results of the appeal may have been different.

As a result, we find that the application for reopening is well taken. *State v. Nix*, 8th Dist. Cuyahoga No. 106894, 2019-Ohio- 1640; *State v. Rosemond*, 1st Dist. Hamilton No. C-180221, 2011-Ohio-768. The reopened appeal will be limited to the issues raised in Wagner's eight proposed assignments of error in support of the application for reopening. Issues previously addressed by this court, in Wagner's original appeal, shall not be considered.

See App.R. 26(B)(7). The court appoints John P. Parker, 988 East 18th Street, Cleveland, Ohio 44119, 216-881-0900, to represent Wagner. Counsel is instructed to apply for compensation within 30 days after journalization of this court's final decision in the reopened appeal. See Loc.App.R. 46(C).

The clerk of courts is ordered to reassemble and transmit, within 45 days of the date of this entry, the record in 8th Dist. Cuyahoga No. 109678 as it existed during the court's original review of the judgment rendered in *State v. Wagner*, Cuyahoga C.P. No. CR-19-636068-B. Wagner is permitted to supplement the reassembled record with the competency report, the PSI, and any other material that has been omitted from the record "by error or accident or is misstated." See App.R.

9(E) and 26(B)(2)(e). Briefs of the parties shall be filed in accordance with the time frames established within Loc.App.R. 16 and shall conform to the App.R. 16 and 19. Application for reopening is granted. _____ EMANUELLA D. GROVES, JUDGE
KATHLEEN ANN KEOUGH, P.J., and CORNELIUS J. O'SULLIVAN, J., CONCUR