

[Cite as *State v. Ganaway*, 2009-Ohio-2575.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 89722**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CLARENCE GANAWAY**

DEFENDANT-APPELLANT

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**JUDGMENT: APPLICATION DENIED**

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APPLICATION FOR REOPENING  
MOTION NO. 41111  
LOWER COURT NO. CR-489067  
COMMON PLEAS COURT

**RELEASE DATE:** June 2, 2009

**ATTORNEYS FOR PLAINTIFF-APPELLEE**

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PATRICIA A. BLACKMON, J.:

{¶ 1} On July 14, 2008, the applicant, Clarence Ganaway, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State of Ohio v. Clarence Ganaway*,<sup>1</sup> in which this court affirmed his convictions and sentences for (1) aggravated robbery with one- and three-year firearm specifications, (2) failure to comply with the order or signal of a police officer, (3) possessing criminal tools, (4) having a weapon under disability, and (5) carrying a concealed weapon. Ganaway

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<sup>1</sup> Cuyahoga App. No. 89722, 2008-Ohio-1629.

maintains that his appellate counsel was ineffective for failing to argue that (1) the indictment for aggravated robbery was defective because it did not aver a mens rea element and (2) trial counsel was ineffective for failing to move to suppress, or in the alternative, move to strike the identification of Ganaway made by the victim. On July 24, 2008, the State of Ohio filed its brief in opposition, and on August 4, 2008, Ganaway filed a reply brief. For the following reasons, this court denies the application to reopen.

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense.<sup>2</sup>

{¶ 3} In *Strickland* the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The Court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

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<sup>2</sup> *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”<sup>3</sup>

{¶ 4} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate’s prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”<sup>4</sup> Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the Court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every “colorable” issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*.<sup>5</sup>

{¶ 5} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a

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<sup>3</sup> *Strickland*, 104 S.Ct. at 2065.

<sup>4</sup> *Jones v. Barnes* (1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308, 3313.

<sup>5</sup> 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 6} In his first argument Ganaway asserts that his indictment for aggravated robbery under R.C. 2911.01(A)(1) is fatally defective because it did not aver a mens rea element. In *State v. Colon*<sup>6</sup> the Supreme Court of Ohio held that the indictment for robbery under R.C. 2911.02(A)(2) was fatally defective because it did not include a mens rea element. The court further ruled that because the robbery statute did not explicitly state what the mens rea element is, recklessness is the proper mens rea pursuant to R.C. 2901.21(B), which provides that recklessness is the default culpable mental state. Furthermore, in *Colon* the failure to include a mens rea element was a structural error because it allowed the defect to permeate the entire trial, including not giving notice to Colon of each and every element, not allowing him to prepare a defense to a culpable mental state, compromising the jury instructions and allowing the prosecutor to imply that the state did not need to prove a culpable mental state for the robbery charge. Moreover, a structural error mandates a finding of per se prejudice and is not waived by the failure to raise it at the trial court level.

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<sup>6</sup> 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

Thus, Ganaway argues that the failure to include a mens rea element in his indictment also created a structural error which mandates a finding of prejudice and a reopening of his appeal.

{¶ 7} However, Ganaway was indicted under R.C. 2911.01(A)(1), committing a theft offense while having a deadly weapon and either displaying it, brandishing it, using it or indicating possession of it.<sup>7</sup> This district has repeatedly ruled that the mens rea element for R.C. 2911.01(A)(1) is strict liability and that *Colon* is inapplicable to convictions for aggravated robbery under R.C. 2911.01(A)(1).<sup>8</sup> Thus, the court concludes that there is no prejudice. Had appellate counsel argued *Colon*, this court would have rejected it, just as it had in the cited cases.

{¶ 8} Ganaway next maintains that appellate counsel should have argued that trial counsel was ineffective for not moving to suppress or strike the victim's identification testimony. Approximately two hours after the robbery, the police asked

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<sup>7</sup> The victim testified that he is a service technician for a laundry coin service company and that he drives a van to service and collect the proceeds from coin-operated laundry machines. On the day of the incident the victim was in the van when he felt a hand on his shoulder and someone telling him to get out. When he turned around, he saw a masked man pointing a gun in his face.

<sup>8</sup> *State v. Saucedo*, Cuyahoga App. No. 90327, 2008-Ohio-3544; *State v. Cochran*, Cuyahoga App. Nos. 91768, 91826, and 92171, 2009-Ohio-1693; *State v. Herron*, Cuyahoga App. No. 91362; 2009-Ohio-2128; and *State v. Price*, Cuyahoga App. No. 90308, 2008-Ohio-3454, discretionary appeal not allowed 120 Ohio St.3d 1459, 2008-Ohio-6813, 848 N.E.2d 968. The court further notes that the Third, Sixth and Tenth District Courts of Appeals have reached the same conclusion. *State v. Jelks*, Allen App. No. 17-08-18, 2008-Ohio-5828; *State v. Mason*, Lucas App. No. L-06-1404, 2008-Ohio-5034 and *State v. Ferguson*,

the victim to come to the arrest scene and identify a few things. The victim testified that “the robber was present in one of the cruisers.”<sup>9</sup> At trial he identified Ganaway as the man in the cruiser. The victim said that the dark-colored clothing and the voice indicated to him that Ganaway was the robber. The victim also identified the gun and the ski mask as those used in the robbery.

{¶ 9} Ganaway cites *State v. Waddy*<sup>10</sup> for the proposition that when a witness has been confronted with a suspect before trial, due process demands a court to suppress the identification of the suspect if the confrontation was unnecessarily suggestive of the suspect’s guilt and the identification was unreliable under all the circumstances. Ganaway then argues that having victim see him handcuffed in the police car was unnecessarily suggestive of guilt. Moreover, the identification was unreliable under all the circumstances because the robber wore a mask and the victim saw him only for a few moments and heard the robber speak only a few words. Thus, Ganaway continues that trial counsel erred in not moving to suppress or strike the identification, and appellate counsel missed a “dead bang” winner which would have resulted in a reversal.

{¶ 10} However, trial counsel successfully impeached the victim on cross-examination into admitting that he could not identify Ganaway as the man who

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Franklin App. No. 07AP-640, 2008-Ohio-3827.

<sup>9</sup> (Tr. Pg. 122.)

<sup>10</sup> (1992), 63 Ohio St.3d 424, 588 N.E.2d 819.

robbed him because of the mask.<sup>11</sup> Arguably, this tactic could achieve more than moving to strike or suppress. Thus, it is understandable that appellate counsel in the exercise of professional judgment would eschew an argument which would necessarily debate the efficacy of trial counsel's strategy and tactics. This court is not convinced that either trial counsel or appellate counsel were deficient.

{¶ 11} Moreover, there was no prejudice. As this court noted in its opinion, the evidence of Ganaway's guilt was overwhelming. The laundry coin service company had installed a GPS system in the van and tracked its location and movement throughout the robbery and ensuing chase. The GPS records showed that during that time the van stopped only twice and both times for no more than two minutes. After Ganaway had led the police on a high-speed chase, he crashed the van and then tried to flee on foot. The police caught him almost immediately. He was wearing the victim's raincoat and carrying a 9-millimeter handgun, which the victim identified as the gun pointed in his face. In Ganaway's pocket was a lipstick holder carrying additional 9-millimeter rounds. He also had the ski mask which the victim identified as the one worn by the robber and approximately \$90 in coins. Thus, issues of whether the victim's identification of Ganaway was reliable under all the circumstances or should have been suppressed, or whether it was cured by

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<sup>11</sup> (Tr. Pg. 151.)

cross-examination or was prejudicial to Ganaway does not undermine this court's confidence in the outcome.

{¶ 12} Accordingly, this court denies the application to reopen.

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PATRICIA A. BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and  
CHRISTINE T. MCMONAGLE, CONCUR