[Cite as *State v. Kempton*, 2018-Ohio-928.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA3489
v.	:	DECISION AND JUDGMENT ENTRY
WILLIAM KEMPTON,	:	
Defendant-Appellant.	:	RELEASED 02/23/2018

APPEARANCES:

Timothy Young, Ohio Public Defender, and Nikki Trautman Baszynski, Assistant Ohio Public Defender, Columbus, Ohio, for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Assistant Ross County Prosecuting Attorney, Chillicothe, Ohio, for appellee.

Hoover, P.J.

{¶ 1} This is a reopened appeal by defendant-appellant, William Kempton, from his conviction and sentence for aggravated robbery entered by the Ross County Court of Common Pleas. On appeal, Kempton claims (1) that his Sixth Amendment right to counsel was violated when he was represented by an office that also represented an unindicted codefendant and key prosecutorial witness in an unrelated matter, who later testified against him at trial; (2) that the trial court violated Evid.R. 804(B)(1) by allowing the State to use the alleged victim's former testimony against him at trial; and (3) that his previous appellate counsel was ineffective by failing to ensure that a transcript of proceedings was included in the record. For the following reasons, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} On November 20, 2014, a complaint was filed in the Chillicothe Municipal Court charging Kempton with robbery in violation of R.C. 2911.02(A)(2), a felony of the second degree.

{¶ 3} On December 1, 2014, a preliminary hearing was conducted in the municipal court. Kempton was represented by Joseph Weckbacher, an Assistant Ohio Public Defender at the Office of the Ohio Public Defender's Ross County Branch ("Ross County Branch"). Several witnesses apparently testified, including the alleged victim, James Arnold. The municipal court found probable cause and bound the case over to the Ross County Court of Common Pleas.

{¶ 4} On December 19, 2014, Kempton was indicted on a single count of aggravated robbery in violation of R.C. 2911.01(A)(3), a felony of the first degree. He pleaded not guilty.

{¶ 5} The case proceeded to a jury trial on March 25, 2015. At trial, Kempton's counsel, Susan Pettit and Chase Carter, also Assistant Ohio Public Defenders at the Ross County Branch, orally raised a motion in limine seeking to prevent the State from introducing Arnold's preliminary hearing testimony at trial. Apparently, Arnold had passed away from an illness, and the State intended to introduce his former testimony under Evid.R. 804(B)(1).

{¶ 6} After reviewing Arnold's former testimony, the trial court denied Kempton's motion, concluding that it satisfied the requirements of Evid.R. 804(B)(1). The Prosecutor later read Arnold's former testimony into the record; and a copy of it was introduced as evidence.

{¶ 7} Arnold had previously testified that on the morning of October 17, 2014, his friends, Kempton and Jamie Moore-Guysinger ("Guysinger"), picked him up from his home in Waverly and drove him to the Kroger Pharmacy so he could pick up a prescription for Percocet. Kempton and Guysinger had taken Arnold to the pharmacy before, so this was not out of the

ordinary. Arnold sat in the front passenger seat; and Kempton sat in the backseat, directly behind him.

{¶ 8} After Arnold got his Percocet, Kempton asked Arnold whether he would mind going to the Scioto Trail State Park in Ross County because Kempton needed to get some money from his brother. Arnold agreed; and the trio drove into the park. As they were driving, Arnold began to feel "real strange" and then saw a belt come around his neck and jerk him back. He lost consciousness and awoke several hours later "way down in a ravine." His phone, eyeglasses, and Percocet were missing. He flagged down a truck driver who helped him to safety.

{¶ 9} In addition to Arnold's testimony, the State presented testimony from two investigating officers and Guysinger. Guysinger was granted immunity in exchange for her cooperation. Guysinger testified that on the morning of October 17, 2014, she and her boyfriend, Kempton, went to Arnold's house. When they arrived there, Arnold and Kempton had some coffee; and then the trio left for the Kroger pharmacy. Guysinger drove. Arnold sat in the front passenger seat; and Kempton sat in the backseat, directly behind Arnold.

{¶ 10} After Arnold picked up his prescription, Kempton asked Arnold if he could use Arnold's cell phone to call his brother. Arnold agreed; and Kempton made a call. When the call ended, Kempton told Guysinger to go to his brother's house so that he could get gas money. The trio left Kroger and headed toward Kempton's brother's house on Alma Omega Road.

{¶ 11} As they were driving up Alma Omega Road, Kempton told Guysinger to turn down a side road. Guysinger complied; and shortly thereafter, Kempton slipped a belt around Arnold's neck and began choking him. Guysinger told Kempton to stop; but he did not. Arnold quickly lost consciousness. A short while later, after the car was stopped, Kempton pulled Arnold out of the car, took the Percocet pills out of his pocket, and threw him into a ravine.

{¶ 12} When Kempton and Guysinger got home, Kempton made a call; and within the hour, Kempton left the house. He returned home with "some of the pills." Kempton instructed Guysinger to delete Arnold's number from her phone and avoid contact with him.

{¶ 13} Following the presentation of evidence, Kempton was found guilty and sentenced to 10 years in prison. He timely appealed, arguing that the trial court erred in admitting Arnold's former testimony under Evid.R. 804. However, we affirmed the judgment of the trial court when trial counsel, who was also handling the appeal, failed to ensure that a transcript of proceedings was included in the record. *State v. Kempton*, 4th Dist. Ross No. 15CA3489, 2016-Ohio-1183.

{¶ 14} Thereafter, Kempton filed an application to reopen his appeal, arguing that he received ineffective assistance of appellate counsel. We granted the application, concluding that there was a genuine issue as to whether Kempton received effective assistance from appellate counsel. Kempton was appointed new counsel, who supplemented the record with a transcript of proceedings. The parties have now submitted their briefs on reopening.

II. Assignments of Error

{¶ 15} Kempton assigns the following errors for our review:

Assignment of Error No. I:

> Mr. Kempton's Sixth Amendment right to counsel was violated when he was represented by an office that also represented an unindicted codefendant and key prosecutorial witness, who later testified against him at trial. Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 10; *United States v. Cronic* applies. 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Prof.Cond.R. 1.7, 1.10; Order of Immunity (Mar. 25, 2015); Preliminary Hr'g Tr. 5-6; Trial Tr. 69.

Assignment of Error No. II:

> The trial court violated Evid.R. 804(B)(1) by allowing the State to use Mr. Arnold's former testimony against Mr. Kempton at trial. Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 10; *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. McCormick*, 4th Dist. Jackson No. 95CA765, 1996 Ohio App. LEXIS 3072 (July 5, 1996); Evid.R. 801-804; Preliminary

> Hr'g Tr. 1-18; Trial Tr. 11-15, 24, 37-42, 60, 72-74, 77, 88-89, 93, 97-100, 108-109, 112, 121-130, 132, 142, 160.
>
> Assignment of Error No. III:
>
> Previous appellate counsel rendered ineffective assistance of counsel. Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 16; *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Kempton*, 4th Dist. Ross NO. 15CA3489, 2016-Ohio-1181; App.R.26(B)(7); Assignment of Error I; Assignment of Error II; Entry Granting Application to Reopen (Aug. 3, 2016).

III. Law and Analysis

A. Ross County Branch Office's Conflict of Interest

{¶ 16} In his first assignment of error, Kempton argues that his Sixth Amendment right to counsel was violated insofar as the Ross County Branch Office had a conflict of interest that prevented the office from rendering effective assistance of counsel to him throughout his criminal proceedings. Specifically, Kempton alleges that during a portion of his trial court proceedings Assistant Ohio Public Defender Jessica McDonald—also of the Ross County Branch Office—was representing Guysinger in an unrelated case. In support, Kempton cites multiple documents accessible on the Chillicothe Municipal Court's online docket which purportedly show that:

> Guysinger had been charged in Chillicothe Municipal Court with a theft offense on April 28, 2014. She was assessed a public-defender fee on May 5, 2014, and Attorney McDonald filed a motion to preserve evidence, jury demand, and demand for discovery in that case on May 7, 2014. Several months later, Attorney McDonald filed a written plea of not guilty by reason of insanity and filed a motion for leave to determine competency. Nearly two months after Mr. Kempton's preliminary hearing, Attorney McDonald filed a motion to withdraw as counsel due to a conflict of interest. The motion was granted.

(Citations omitted.) Appellant's Brief, p. 2-3. Kempton contends that this dual representation "created a conflict of interest at the preliminary hearing, which subsequently tainted the office's representation of Mr. Kempton throughout his criminal proceedings." Appellant's Brief, p. 7.

{¶ 17} In response, the State argues, first and foremost, that Kempton's argument is speculative because it relies upon facts not in the appellate record – specifically, the online municipal court docket. However, there are circumstances in which an appellate court may properly take judicial notice of publicly accessible records, including court documents and dockets, in deciding appeals. *See, e.g., State v. Bradford*, 2017-Ohio-3003, --N.E.3d--, ¶ 19 (4th Dist.) ("a review of the information available on the online docket for Hamilton County, in which we are both requested and permitted to take judicial notice, reveals that Appellant was, in fact, indicted for aggravated murder"); *Draughon v. Jenkins*, 4th Dist. Ross No. 16CA3528, 2016-Ohio-5364, ¶ 26 ("both the trial court and this court can take judicial notice of [appellant's] prior appellate cases, which are readily accessible on the internet"); *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶¶ 8, 10 (court can take judicial notice of appropriate matters, including judicial opinions and public records accessible from the internet, in determining a Civ.R. 12(B)(6) motion without converting it to a motion for summary judgment); *see generally* Giannelli, 1 Baldwin's Oh. Prac. Evid., Section 201.6 (3d Ed.2017) ("[t]his rule [generally precluding a court from taking judicial notice of other cases] has been relaxed if the record is accessible on the internet"). Thus, we can take judicial notice of the online municipal court docket to resolve Kempton's first assignment of error.

{¶ 18} Even with taking judicial notice of the municipal court docket, we nonetheless conclude that Kempton's first assignment of error is without merit. Generally, a subsequent indictment renders any defects in the preliminary hearing moot. *State v. Jones*, 3d Dist. Defiance

No. 4-15-11, 2015-Ohio-5443, ¶ 12, fn. 2; *State v. Barnes*, 8th Dist. Cuyahoga No. 92512, 2011-Ohio-63, ¶ 10; *State v. Henry*, 13 Ohio App.2d 217, 219, 235 N.E.2d 533 (4th Dist.1968). Here, even if we assume a conflict existed during the preliminary hearing, it was quickly resolved when Kempton was indicted and the Ross County Branch withdrew its representation of Guysinger in the unrelated criminal case. There is simply no evidence supporting Kempton's claim that he was prejudiced because his counsel at the preliminary hearing did not vigorously cross-examine Arnold, the victim, due to the conflict with Guysinger. Furthermore, even though Kempton's counsel did not cross-examine Guysinger at the preliminary hearing, Guysinger was subjected to cross-examination by counsel at trial. Accordingly, under these circumstances, we overrule Kempton's first assignment of error.

B. Trial Court Did Not Err in Admitting Arnold's Preliminary Hearing Testimony

{¶ 19} In his second assignment of error, Kempton argues that the trial court erred in admitting Arnold's testimony from the preliminary hearing under Evid.R. 804(B)(1). Specifically, he argues (1) that he had an insufficient opportunity to cross-examine Arnold at the preliminary hearing "[g]iven that [he had] only ten days prepare for the preliminary hearing, to investigate Arnold's statements to police, had not yet received discovery, and had not yet been told where exactly in Scioto Trails the crime took place"; and (2) that he had a dissimilar motive to develop Arnold's testimony at the preliminary hearing because the burden of proof at a preliminary hearing is much lower than that at a trial and the determination at a preliminary hearing is made by a judge, as opposed to a jury, which gives defense counsel less of a motive to explore and demonstrate a witness's bias or credibility. Appellant's Brief, p. 11-12.

{¶ 20} The admission or exclusion of evidence generally rests within the trial court's sound discretion. *State v. Green*, 184 Ohio App.3d 406, 2009–Ohio–5199, 921 N.E.2d 276, ¶ 14

(4th Dist.). Thus, absent a clear showing of an abuse of discretion with attendant material prejudice to defendant, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. *Id.* An abuse of discretion implies that a court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 21} " "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by [the Ohio Rules of Evidence] rules, or by other rules prescribed by the Supreme Court of Ohio." Evid.R. 802.

{¶ 22} "Evid.R. 804(B)(1) states that former testimony of a declarant who is not currently available to testify is not excluded as hearsay when the following separate, conjunctive requirements are met: (1) the party against whom the testimony is offered * * * had an opportunity to examine the declarant in the prior proceeding, and (2) that party had a motive that is similar to the motive that the party would have in the present proceeding to develop the former testimony by direct, cross, or redirect examination." *Burkhart v. H.J. Heinz Co.*, 140 Ohio St.3d 429, 2014-Ohio-3766, 19 N.E.3d 877, ¶ 3.

{¶ 23} "[T]he opportunity for cross-examination portion of Evid.R. 804(B)(1) focuses not on the actual cross-examination itself, but on whether * * * a party was allowed the opportunity for cross-examination." *State v. Strickland*, 10th Dist. Franklin No. 06AP-1269, 2008-Ohio-1104, ¶ 58, citing *State v. Howard*, 2d Dist. Montgomery No. 19413, 2003-Ohio-3235, ¶ 33. Furthermore, "An identical motive to develop testimony is not required

by Evid.R. 804(B)(1), only a similar motive." *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 182, quoting *State v. White*, 2d Dist. Montgomery No. 20324, 2005-Ohio-212, ¶ 26.

{¶ 24} At trial, Kempton argued that Arnold's testimony should not be admitted under Evid.R. 804(B)(1) because (1) the attorney conducting the preliminary hearing was provided with little to no discovery beforehand; (2) he was incarcerated and could not meet with or conduct investigations into the matter; and (3) the standard for a preliminary hearing is much less than the one at trial and therefore affects the questions asked. The trial court denied Kempton's motion, concluding that Kempton had a meaningful opportunity to cross-examine Arnold at the preliminary hearing and a similar motive to develop his testimony.[1]

{¶ 25} After reviewing Arnold's testimony, we cannot say that the trial court's decision was unreasonable, arbitrary, or unconscionable. The charges against Kempton at both the preliminary hearing and at trial were substantially similar; and therefore, the criminal conduct that the State sought to prove was the same at both proceedings. Arnold's testimony at the preliminary hearing was also given under circumstances similar to a trial, i.e., the hearing was held before a judge, the hearing was recorded, and Arnold was under oath. Finally, Kempton was represented by counsel; and counsel subjected Arnold to cross-examination. *E.g.*, *State v. Garnet*, 1st Dist. Hamilton No. C-090471, 2010-Ohio-3303, ¶ 9 (unavailable witness's testimony from juvenile bindover hearing admissible under Evid.R. 804(B)(1) where defendant had the opportunity to develop witness's testimony at bindover hearing and defendant's motive in developing witness's testimony at the bindover hearing was similar to that at trial: "to question, develop, explain, and expand on [witness's] testimony identifying [defendant] as the shooter");

[1] The parties agreed that Arnold was deceased and therefore unavailable pursuant to Evid.R. 804(A).

Howard at ¶ 24 (alleged victim's preliminary hearing testimony admissible under Evid.R. 804(B)(1) where charges at preliminary hearing and at trial were identical, the criminal conduct the State sought to prove was the same in both proceedings; testimony at preliminary hearing were made under circumstances closely approximating a trial; defendant was represented by counsel, who subjected witness to substantial and meaningful cross-examination that tested witness's credibility and the reliability of her statements).

{¶ 26} Accordingly, we overrule Kempton's second assignment of error.

C. Ineffective Assistance of Appellate Counsel Claim is Moot

{¶ 27} In his third assignment of error, Kempton argues that he received ineffective assistance of appellate counsel. Specifically, Kempton argues that previous appellate counsel was ineffective by failing to ensure that a transcript of proceedings was included in the record. However, since we reopened Kempton's appeal based on this claim and new appellate counsel was able to supplement the record with a transcript of proceedings, this assignment of error is rendered moot and need not be considered. *E.g., State v. Walker*, 3d Dist. Seneca No. 13-05-10, 2006-Ohio-6488, ¶ 12 (appellant's argument in reopened appeal that previous appellate counsel was ineffective for failing to have filed a brief rendered moot where application to reopen was granted based on that claim of ineffective assistance of appellate counsel); *State v. DeSalvo*, 7th Dist. Mahoning No. 04-MA-127, 2005-Ohio-3312, ¶ 10 (appellant's argument in reopened appeal that previous appellate counsel was ineffective for failing to have filed a brief rendered moot where application to reopen was granted based on that claim of ineffective assistance of appellate counsel).

{¶ 28} Accordingly, we overrule Kempton's third assignment of error.

IV. Conclusion

{¶ 29} Having overruled all of Kempton's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.