

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**SHAWN BUONI,**

**Petitioner,**

v.

**WARDEN, CHILLICOTHE  
CORRECTIONAL INSTITUTION,**

**Respondent.**

**CASE NO. 2:12-CV-1147**

**JUDGE SARGUS**

**MAGISTRATE JUDGE KING**

**ORDER AND  
REPORT AND RECOMMENDATION**

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the *Petition*, Doc. No. 5, Respondent's *Motion to Dismiss*, Doc. No. 12, Petitioner's response to the *Motion to Dismiss*, Doc. No. 14, Petitioner's motion to stay these proceedings, Doc. No. 10, and Respondent's response in opposition to that motion, Doc. No. 11, and the exhibits of the parties. For the reasons that follow, the Magistrate Judge **RECOMMENDS** that Petitioner's motion to stay be **DENIED**, that Respondent's *Motion to Dismiss* be **GRANTED** and that this action be **DISMISSED**.

**FACTS and PROCEDURAL HISTORY**

The Ohio Tenth District Court of Appeals summarized the facts and procedural history of this case as follows:

On the night of September 9, 2009, officers from the Sunbury Police Department responded to a reported robbery at a United Dairy Farmers store in Sunbury, Ohio, located in Delaware County. Upon arrival, officers discovered the store clerk lying on the floor with a "busted lip." (Plea hearing Tr. 8.) According to the clerk, the assailant entered the store, brandishing a blue pocketknife, and threw her onto the floor. Holding a knife to her back, the robber told her to open the cash register and then to get

back on the floor. The robber took \$57.75 and an envelope with store keys. After learning that the store had been robbed and the clerk assaulted, police consulted the store's surveillance video and ascertained the suspect left the scene in a "dark-colored Jeep." (Plea hearing Tr. 9.) Based upon the clerk's description and the recorded footage, police issued a general description of the suspect and his vehicle.

At about 7:00 a.m. on the morning of September 10, a friend of defendant entered the Hilliard police station in Franklin County and informed an officer that defendant "was at home and confessed to [the friend] that he had just robbed the UDF up in Sunbury." (Plea hearing Tr. 9.) According to the friend, defendant indicated he was about to "go to his father's house to do some bodily harm to his father and then try to commit suicide by cop." (Plea hearing Tr. 9.)

The Hilliard officer contacted the Sunbury station. While the two departments were piecing together their information, another robbery occurred, this time at a Hilliard-area Burger King in Franklin County. According to the Burger King employees, a man entered the restaurant, grabbed a worker, put a knife to the worker's neck, and demanded money. After taking \$45.12 from the register, the man drove off in a black SUV. Hilliard police responded to the Burger King call and determined the suspect that the restaurant witnesses described fit the general description of defendant. Police also noted the parallels between the robberies, including the use of a pocketknife and the vehicle description.

Hilliard police went to defendant's residence in Hilliard. When they arrived, they observed defendant walking from the residence and ordered him to stop. Instead of complying, defendant got into an SUV and fled the area. After a pursuit through Franklin County, defendant's car went off the roadway and struck a fire hydrant. When a Hilliard police officer approached the stalled car, defendant exited the car, pulled a knife from his pocket, and began walking away despite the officer's warnings to stop. Following a struggle, officers took defendant into custody. Witnesses at the scene identified defendant; a sweatshirt and blue-handled knife matching the descriptions the Burger King employees gave, as well as some cash, were recovered from defendant's car.

Defendant first was indicted in Franklin County in September 2009 in case No. 09CR-5643 for the events that occurred in Franklin County. The indictment charged defendant with one count of aggravated robbery, two counts of robbery, three counts of

felonious assault, one count of failure to comply, and one count of assault.

Under a second indictment filed in Franklin County on August 16, 2010, defendant was charged in case No. 10CR-4786 with one count of aggravated robbery, two counts of robbery, and one count of kidnapping arising out of his conduct in Delaware County. The indictment stated that “Count One alleges an offense that is part of a course of criminal conduct between September 9, 2009 and September 10, 2009.” According to the indictment, “the course of conduct was part of the same chain of events or in furtherance of the same purpose or objective.”

On August 24, 2010, defendant appeared before the trial court on both cases. At that time, defendant entered a guilty plea in case No. 09CR-5643 to aggravated robbery, a first-degree felony, and assault on a police officer, a felony of the fourth degree. In case No. 10CR-4786, he pled guilty to aggravated robbery. Accepting the plea, and pursuant to the state's request, the trial court entered a nolle prosequi on the remaining charges. The trial court sentenced defendant in case No. 09CR-5643 to eight years for the aggravated robbery charge and one year on the assault, to be served concurrently. In case No. 10CR-4786, the court imposed a sentence of seven years on the aggravated robbery charge, to be served consecutively with his sentence in case No. 09CR-5643.

## II. Assignments of Error

On appeal, defendant assigns three errors:

Assignment of Error No. 1:

The trial court lacked jurisdiction to sentence Appellant as the indicted crime was alleged to have been committed in Delaware County Ohio, thereby violating Appellant's right to Due Process under the Fourteenth Amendment to the United States Constitution, and comparable provisions of the Ohio Constitution.

Assignment of Error No. 2:

The trial court abused its discretion by considering conduct of Appellant for which he had not been convicted and not relying on the statutory guidelines for sentencing, thereby violating his Due Process Rights under the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

Assignment of Error No. 3:

The trial court erred by not stating the specific reasons for ordering non-minimum consecutive sentences, thereby violating his Due Process Rights under the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

*State v. Buoni*, Nos. 11AP-111, 148, 149, 2011 WL 6834981, at \*1-3 (Ohio App. 10<sup>th</sup> Dist. Dec. 22, 2011). The appellate court affirmed the judgment of the trial court, *id.*, and the Ohio Supreme Court dismissed Petitioner's subsequent appeal. *State v. Buoni*, 131 Ohio St. 3d 1512 (2012). On January 13, 2013, Petitioner filed a motion in the state trial court to withdraw his guilty plea, alleging that he had been denied the effective assistance of counsel because his attorney failed to investigate the guilty plea, failed to advise the trial court that Petitioner had threatened to harm himself and misrepresented to Petitioner that his sentences would run concurrently with each other. *Exhibit 33 to Motion to Dismiss*. That action apparently remains pending in the state trial court.

On December 12, 2012, Petitioner filed the *pro se Petition*, alleging that he is in the custody of the Respondent in violation of the Constitution of the United States based upon the following grounds:

1. The state trial court violated petitioner's right to due process of law under the Fourteenth Amendment of the United States Constitution when it sentenced Petitioner without the Petitioner's waiver as to venue and the state appellate courts ruled contrary to established law and by affirming Petitioner's conviction and overruling-declining appeal on this ground denied him warranted relief. As origin of this claim, the Franklin County Court of Common Pleas entered guilty plea without Petitioner's waiver of venue from Delaware County, Ohio. Venue is a personal privilege. It is a fact which the state must prove beyond a reasonable doubt unless waived by accused.

2. The state trial court, the state court of appeals as well as the Ohio Supreme Court abused their discretion and violated Petitioner's right to due process under the Fourteenth Amendment of the United States Constitution by convicting, affirming said conviction and refusing jurisdiction which ultimately denied his appeal on this ground and denied Petitioner warranted relief. At the sentencing hearing, the trial court and the State's Attorney referenced Petitioner's involvement in helping a heart attack victim and how he ended up getting arrested by the Hilliard Police for disorderly conduct. Apparently, this was an item of interest to the court that let it to believe that Petitioner was a risk to the community, creating a purpose to sentence Petitioner under higher sentencing range, or maximum sentence, however, it is contrary to established law, and improper to abuse its discretion in this manner as Petitioner was never afforded the opportunity to defend the case in open court and it was not of any criminal conduct that was at issue in connection with the criminal charges embodied in the indictment. Here, while considering the allegations of conduct which have not been adjudicated by a finding of guilt or of criminal act being tried, Petitioner received a consecutive sentence of seven (7) years and eight (8) year for a total of fifteen (15) years.
3. In Ohio, and under instruction of House Bill 86, a trial court must make statutory findings to impose consecutive non-mandatory sentences. Here the appellate court, in overruling Petitioner's grounds for relief, or declining his appeal and affirming the state appellate court, denied Petitioner relief that was warranted under the law and violated his due process guarantee in equivalence to the right to be treated equally without indifference. Here federal law is applicable where it comes to equal rights specifically.

### **MOTION TO STAY**

Petitioner asks that these proceedings be stayed pending exhaustion of his motion to withdraw his guilty plea; Petitioner then intends to then amend the *Petition* to include the claims raised in that motion. Doc. No. 10. Citing *Rhines v. Weber*, 544 U.S. 269, 277 (2005), Respondent opposes the request.

Before a federal habeas court may grant relief, a state prisoner must exhaust his available remedies in the state courts. *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). If a habeas petitioner has the right under state law to raise a claim by any available procedure, he has not exhausted that claim. 28 U.S.C. § 2254(b), (c). Moreover, a constitutional claim for relief must be presented to the state's highest court in order to satisfy the exhaustion requirement. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990).

If the statute of limitations established by 28 U.S.C. § 2244(d) might bar a petitioner from re-filing his habeas corpus petition upon exhaustion of state remedies, a stay of proceedings may be warranted where the petitioner establishes “good cause” for failing to exhaust state remedies and where the petitioner’s unexhausted claims are potentially meritorious. *Rhines v. Weber*, 544 U.S. at 277.

[A] stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b) (2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State”).

*Id.* However, a prisoner seeking state postconviction relief who also files a “protective” petition in federal court may properly ask the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted. Under those circumstances, a “petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute ‘good cause’ for him to file in federal court.” *Pace v. DiGuglielmo*, 544 U.S. 408 (2003).

In his motion to stay, Petitioner expresses his intention to assert in this action claims of ineffective assistance of trial and appellate counsel once those claims have been exhausted in the state courts. He contends that he was unable to earlier raise these claims in the Ohio courts because the claims rely on recent decisions of the United States Courts, *i.e.*, *Frye v. Missouri*, -- U.S. --, 132 S.Ct. 1789 (2012), and *Lafler v. Cooper*, -- U.S. --, 132 S.Ct. 1376 (2012). *Petitioner's Reply*, PageID #371.

Petitioner's arguments are not persuasive. His claims of ineffective assistance of counsel in connection with his sentences were known to him at the time of sentencing in August 2010. Petitioner nevertheless waited until January 2013 to file his motion to withdraw his guilty plea in the state trial court. Neither *Lafler v. Cooper* nor *Missouri v. Frye* created a new substantive rule of constitutional law not previously defined and available for review under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Smith v. United States*, 2013 WL 3490662, at \*2-3 (W.D. Mich. July 11, 2013)(rejecting argument that otherwise time-barred habeas corpus petition is timely because claims under *Lafler v. Cooper* or *Missouri v. Frye* not previously available). Moreover, it does not appear that Petitioner has yet pursued a delayed application for reopening of his appeal pursuant to Ohio Appellate Rule 26(B), the means by which a claim of ineffective assistance of appellate counsel is properly raised in Ohio. Although Petitioner may still pursue a delayed Rule 26(B) application, Petitioner does not articulate any basis for his untimely filing, and such an application is therefore likely to be procedurally barred. In *Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005), the United States Court of Appeals for the Fifth Circuit held that claims are "plainly meritless" for purposes of deciding whether to grant a stay of habeas corpus proceedings where the petitioner is procedurally barred from raising his unexhausted claims in

the state courts. The record in this case likewise provides no basis for concluding that Petitioner's untimely claims of ineffective assistance of trial counsel are potentially meritorious.<sup>1</sup>

For all the foregoing reasons, Petitioner's motion to stay these proceedings pending resolution of his motion to withdraw guilty plea and/or other postconviction remedies, Doc. No. 10, is **DENIED**.

### **CLAIM ONE**

In claim one, Petitioner alleges that he was denied a fair trial because the offenses for which he was charged and sentenced allegedly occurred in a county other than the county of prosecution, and he did not waive venue. This claim offers no basis for federal habeas corpus relief. *See Williams v. United States*, 582 F.2d 1039, 1041 (6<sup>th</sup> Cir. 1978); *Wood v. Vasbinder*, No. 04-10049, 2007 WL 907642, at \*5 (E.D. Mich. March 27, 2007).

Claim one is without merit.

### **CLAIM TWO**

In claim two, Petitioner alleges that the trial court improperly considered Petitioner's involvement in helping a heart attack victim and Petitioner's arrest by Hilliard police for disorderly conduct. The state appellate court rejected this claim as follows:

Defendant's second assignment of error claims the trial court abused its discretion when it considered conduct "for which he had not been convicted." (Appellant's brief, 5.) Defendant contends the trial court improperly based its sentence on such conduct when he

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<sup>1</sup> Under Rule 32.1 of the Ohio Rules of Criminal Procedure, "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."



“did not have any meaningful opportunity to defend the case.” (Appellant's brief, 6.)

The incident to which defendant refers occurred while he was out of jail on bond following his plea hearing. As defendant's counsel explained, defendant was at a lounge having drinks with his girlfriend when a fellow patron began experiencing chest pains and difficulty breathing. Defendant transported the patron to a nearby fire station in search of help. At the fire station, paramedics attended to the patron, and a police officer told defendant to leave. Apparently frustrated by what he considered to be a slow response to the patron's medical needs, defendant became combative and was arrested for disorderly conduct. To support his contention that the trial court actually considered the incident, defendant points to the trial court's references to it at the sentencing hearing.

In *State v. English* (1991), 77 Ohio App.3d 371, 386, this court held that the trial court, at sentencing, “may consider information which would have been inadmissible at trial, including information regarding other arrests, regardless of whether convictions resulted.” (Internal citations omitted.) *Id.*, citing *State v. Burton* (1977), 52 Ohio St.2d 21, 23, quoting *United States v. Doyle* (C.A.2, 1965), 348 F.2d 715, 721, cert. denied, 382 U.S. 843, 86 S.Ct. 89 (stating “[f]ew things can be so relevant as other criminal activity of the defendant,” so that to argue “ ‘the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions’ ”); *Maple Heights v. Dickard* (1986), 31 Ohio App.3d 68, 71.

In sentencing defendant, the trial court noted that “at the end of the day it becomes \* \* \* about punishment for this case and also the safety of our community.” (Sentencing hearing Tr. 13.) The court then listed factors from the aggravated robberies and assault that proved relevant to its decision, including the “trauma that the victims experienced,” defendant's use of physical force and a knife in the commission of the robbery, and the police chase and “offenses against the police.” (Sentencing hearing Tr. 14–15); see R.C. 2929.12.

With those remarks, defendant contends that, whatever other factors the trial court cited, its considering his latest arrest was the impetus to the court's conclusion that defendant was a danger to the community and warranted a greater sentence. To the contrary, the court, in mentioning defendant's risk to the community, referenced the knife defendant used against the United Dairy Farmers clerk and Burger King employees, stating that “the community is at risk for whatever may come, whatever you have in

your arsenal, whether it be a knife. You know, this time it was a knife.” (Sentencing hearing Tr. 5.)

Moreover, defendant, through counsel, initiated discussion at the sentencing hearing of the most recent arrest. When the court asked if defendant wanted to “offer any type of mitigation,” defense counsel discussed his client's “recent setback,” acknowledged defendant “got a little emotional, let his mouth get the best of him,” and stated defendant “had good intentions at heart, was trying to be a good Samaritan.” Counsel concluded by asking the court “to consider these matters in imposing the sentence here today.” (Sentencing hearing Tr. 4.) The trial court explicitly stated that it was taking the post-bond incident into consideration “not in terms of his guilt but just in terms of the events and his inability to control his temper and recognize when to remove himself from a situation.” (Sentencing hearing Tr. 13.) The trial court's focus thus was on defendant's failure to control his behavior.

The trial court did not abuse its discretion in considering factors relating to defendant's conduct approximately two weeks before sentencing on the immediate convictions, particularly when defense counsel's offers of mitigating circumstances included several references to the incongruity between defendant's crimes and his general progress and good behavior during the same time period. *See State v. Polick* (1995), 101 Ohio App.3d 428, 431; *State v. Yontz* (1986), 33 Ohio App.3d 342, syllabus (noting a reviewing court will not disturb the sentence unless the trial court has abused its discretion in that regard”).

Defendant further contends the trial court abused its discretion by not relying on the statutory guidelines for sentencing. To the extent defendant contends the court failed to advise of and apply the appropriate statutory sentencing terms for the crimes committed, the record reflects defendant faced up to ten years in prison for the aggravated robbery conviction and up to 18 months in prison for the assault on a police officer conviction in case No. 09CR–5643, plus up to an additional ten years for the aggravated robbery conviction in case No. 10CR–4786, for a total of 21 and a half years, “if the court were to run those consecutive of one another.” (Plea hearing Tr. 17.) Moreover, the trial court's judgment entry indicates the court considered the factors in R.C. 2929.11 through 2929.14, which satisfies the court's obligations under those statutes. *State v. Sharp*, 10th Dist. No. 05AP–809, 2006–Ohio–3448, ¶ 6 (noting that such a representation “supports the conclusion that the trial court considered the requisite statutory factors prior to sentencing appellant”).

Because the trial court did not abuse its discretion in sentencing defendant, the second assignment of error is overruled.

*State v. Buoni*, 2011 WL 6834981, at \*5-6. This claim fails to provide Petitioner the relief he seeks. As the state appellate court noted, nothing in the United States Constitution prohibits a trial court from considering factors relevant to sentencing, particularly when those factors are first alluded to by the defendant through his counsel.

Claim two is without merit.

### **CLAIM THREE**

In claim three, Petitioner alleges that the trial court improperly failed to make factual findings prior to the imposition of consecutive terms of incarceration. The state appellate court rejected this claim as follows:

[D]efendant contends the trial court erred in imposing consecutive sentences without making the findings required by R.C. 2929.14(E)(4). Defendant argues the United States Supreme Court decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, in upholding the constitutionality of a similar statute, essentially overruled *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, insofar as *Foster* found R.C. 2929.14(E)(4) unconstitutional and severed it from Ohio's sentencing provisions.

The Supreme Court of Ohio recently addressed and rejected defendant's argument, concluding: “[t]he United States Supreme Court's decision in *Oregon v. Ice* \* \* \* does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*.” *State v. Hodge*, 128 Ohio St.3d 1, 2010–Ohio–6320, paragraph two of the syllabus. As a result, “[t]rial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made.” *Id.* at paragraph three of the syllabus.

*State v. Buoni*, 2011 WL 6834981, at \*6.

Petitioner's third claim fails to raise an issue of federal constitutional magnitude. The Ohio Supreme Court has authoritatively construed this aspect of Ohio law, and this Court is not vested with supervisory powers over the state courts to force them to act, or to refrain from acting, in ways that the Constitution neither prescribes nor prohibits. *See* 28 U.S.C. § 2254(a)(habeas relief is available to only those "in custody in violation of the Constitution or laws or treaties of the United States.").

Claim three is without merit.

**WHEREUPON**, Petitioner's motion to stay, Doc. No. 10, is **DENIED**. It is **RECOMMENDED** that Respondent's *Motion to Dismiss*, Doc. No. 12, be **GRANTED** and that this action be **DISMISSED**.

#### **PROCEDURE ON OBJECTIONS**

If any party objects to this *Report and Recommendation*, that party may, within fourteen (14) days of the date of this report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report*

*and Recommendation de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981).

The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

s/ Norah McCann King  
Norah McCann King  
United States Magistrate Judge  
August 1, 2013

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