**[Cite as *State v. Young*, 2010-Ohio-3059.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 92197**

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## REGINALD YOUNG

DEFENDANT-APPELLANT

**JUDGMENT:**
**APPLICATION DENIED**

Application for Reopening
Motion No. 430334
Cuyahoga County Common Pleas Court
Case No. CR-503327

**RELEASE DATE:** June 28, 2010

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JAMES J. SWEENEY, J.:

**{¶ 1}** Reginald Young has filed a timely application for reopening pursuant to App.R. 26(B). Young is attempting to reopen the appellate judgment, as rendered in *State v. Young*, Cuyahoga App. No. 92127, 2009-Ohio-5354, which affirmed his conviction for the offenses of rape and

gross sexual imposition. For the following reasons, we decline to reopen Young's appeal.

**{¶ 2}** This court, through App.R. 26(B), may reopen an appeal based upon a claim of ineffective assistance of appellate counsel. In order to establish a claim of ineffective assistance of appellate counsel, Young must demonstrate that appellate counsel's performance was deficient and that but for the deficient performance, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456. In order for this court to grant an application for reopening, Young must establish that "there is a genuine issue as to whether he was deprived of the assistance of counsel on appeal." App.R. 26(B)(5).

**{¶ 3}** "In *State v. Reed* [supra, at 458] we held that the two-prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [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. Thus, [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, at 25.

**{¶ 4}** It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987. Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones v. Barnes*, supra; *State v. Grimm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

**{¶ 5}** In *Strickland v. Washington,* supra, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for an appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "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 presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689. Finally, the United States Supreme Court has upheld the appellate attorney's discretion to decide which issues are the most fruitful arguments and the importance of winnowing out weaker arguments on appeal and focusing on one central issue or at most a few key issues. *Jones v. Barnes*, supra.

**{¶ 6}** In support of his claim of ineffective assistance of trial counsel, Young raises one proposed assignment of error:

**{¶ 7}** "Trial counsel provides ineffective assistance by failing to timely raise evidence in a pretrial rape shield hearing, and by failing to adequately cross-examine a witness. Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution."

**{¶ 8}** Young, through his proposed assignments of error, raises three separate issues: (1) trial counsel was ineffective for failing to request a hearing pursuant to R.C. 2907.02, Ohio's rape shield statute; (2) trial court did not apply a "balancing test" when deciding whether evidence of the victim's sexual activity was admissible; and (3) trial counsel was ineffective by failing to fully cross-examine the victim. The doctrines of res judicata and collateral estoppel, however, prevent Young from relitigating the issues of failure to request a hearing pursuant to R.C. 2907.02 and the failure of the trial court to apply a "balancing test" to the admissibility of the victim's prior sexual activity, because the issues were litigated before this court on appeal. See *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204; *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. See, also, *State v. Bey*, 85 Ohio St.3d 487, 1999-Ohio-283, 709 N.E.2d 484; *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 1997-Ohio-371, 683 N.E.2d 1112; State v. Phillips, 74 Ohio

St.3d 72, 1995-Ohio-171, 656 N.E.2d 643, citing *Ashe v. Swenson* (1970), 397 U.S. 436, 90 S.Ct. 1189. 25 L.Ed.2d 469; *Thompson v. Wing*, 70 Ohio St.3d 176, 1994-Ohio-358, 637 N.E.2d 917; *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 462 N.E.2d 158.

**{¶ 9}** In *State v. Young*, supra, this court held that:

**{¶ 10}** "Thus, Ohio's rape shield statute 'essentially prohibits the introduction of any extrinsic evidence pertaining to the victim's sexual activity,' with the limited exceptions being 'evidence of the origin of semen, pregnancy, or disease, or of the victim's past sexual activity with the offender. *State v. Williams* (1986), 21 Ohio St.3d 33, [487 N.E.2d 560], 34. Some of the legitimate state interests to be advanced by Ohio's rape shield law include: 'guarding the victims' sexual privacy and preventing them from undue harassment; discouraging a tendency in sexual assault cases to try the victims rather than the defendant; and, by excluding inflammatory, prejudicial and only marginally probative evidence, aiding in the truthfinding process.' *State v. Gardner* (1979), 59 Ohio St.2d 14, 17-18, 391 N.E.2d 337.

**{¶ 11}** "In this case, Young does not contend that the evidence at issue was admissible as falling within one of the exceptions to the rape shield statute; rather, he claims that the trial court's exclusion of the evidence under

the rape shield statute infringed upon his right of confrontation and the ability to present a defense. * * *.

**{¶ 12}** "In determining whether R.C. 2907.02(D) is unconstitutional as applied, a balancing test must be employed, whereby a court 'must thus balance the state interest which the statute is designed to protect against the probative value of the excluded evidence.' *Gardner* at 17. Importantly, in order to be admissible, such evidence must involve more than a mere attack on the credibility of a witness. Id. Further, in order '[t]o assess the probative value of excluded evidence, it is necessary to examine its relevance to the issues which it is offered to prove.' Id.

**{¶ 13}** "A trial judge has discretion to determine the relevance of evidence and to apply R.C. 2907.02(D) 'in the first instance, and we therefore review a judge's action for abuse of discretion.' *Brisco,* supra. It is also within the sound discretion of the trial court to apply the rape shield law to best meet the purposes behind the statute. *In re Michael,* citing *State v. Leslie* (1984), 14 Ohio App.3d 343, 346, 471 N.E.2d 503. See, also, *State v. Hart* (1996), 112 Ohio App.3d 327, 331, 678 N.E.2d 952, 954, *State v. Davis*, (Aug. 16, 1990), Cuyahoga App. No. 57404, unreported. 'While the right to confrontation is flexible enough to allow the trial court to exercise discretion in admitting evidence, our review of the constitutional question is de novo.'

*State v. Ziepfel* (1995), 107 Ohio App.3d 646, 652, 669 N.E.2d 299. A defendant has no Sixth Amendment right to confront a witness with irrelevant evidence. *In re Michael*, citing *Leslie*. * * *.

**{¶ 14}** "Even though Young did not comply with R.C. 2907.02(E), he now proposes that his conviction be vacated because the trial court did not employ the 'Gardner balancing test.' But the Ohio Supreme Court has found that trial courts do not have a duty to sua sponte hold a R.C. 2907.02(E) hearing. *State v. Acre* (1983), 6 Ohio St.3d 140, 144, 451 N.E.2d 802. See, also, *State v. Evans*, Cuyahoga App. No. 85396, 2005-Ohio-3847. * * *. We also find no error with the trial court's failure to expressly state on the record that it was employing the Gardner balancing test." *State v. Young*, supra, at ¶21.

**{¶ 15}** Clearly, the issues of trial counsel's failure to request a hearing pursuant to R.C. 2907.02 and the alleged failure of the trial court to apply a "balancing test," in deciding whether evidence of the victim's sexual activity was admissible, were addressed upon appeal and found to be without any merit. Thus, res judicata and collateral estoppel prevent relitigation of the issues.

**{¶ 16}** Notwithstanding the application of res judicata and collateral estoppel, a substantive review of the issues of trial counsel's failure to request a hearing pursuant to R.C. 2907.02 and the alleged failure of the trial court to

apply a "balancing test" in deciding whether evidence of the victim's sexual activity was admissible fails to establish that Young was prejudiced and that there was a reasonable probability that he would have been successful on appeal. As stated previously, Ohio's rape shield statute prevents the admission of any evidence of the victim's sexual activity, unless the evidence is related to the victim's past sexual activity with Young and there exists clear proof of prior acts on the part of the victim. Herein, the record before this court clearly demonstrated that the victim had not been subjected to any prior sexual abuse, that the allegation of past abuse was dissimilar to the allegations the victim made against Young, and that the victim had not been exposed to pornography.

**{¶ 17}** "In addition, although our review of relevant Ohio case law shows that appellate courts have not dealt extensively with this issue, other states have found that the probative value as to prior acts protected by the rape shield statute are dependent on clear proof that they had occurred. In *State v. Budis* (N.J. 1991), 593 A.2d 784, 790, the court found that: * * *.

**{¶ 18}** "In this case, there was no evidence that the prior sexual abuse occurred. The allegation that C.J. had been abused by his mother's boyfriend was noted in the child's CCDCFS case file, which was reviewed in camera by the court and counsels. According to the case file, it was the mother who, in

2004, reported that her boyfriend was abusing crack cocaine, hit her in the head with a bottle, and made C.J. touch his penis. CCDCFS investigated the mother's claim that her boyfriend sexually assaulted C.J. and concluded the allegation was 'unsubstantiated.' We find that because there is no evidence that the abuse ever occurred, any testimony regarding the allegation would not be probative.

**{¶ 19}** Additionally, we find that the allegation of past abuse was dissimilar to the allegations C.J. made against Young; therefore, we find that the allegation was also not relevant. Relevant evidence means 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Evid.R. 401. Cf. *In re Michael*, supra (holding that evidence that victim had been sexually abused in the past was essential to defense particularly where victim had been sexually abused in the identical manner as the allegations against the defendant).

**{¶ 20}** "Next, Young argues that he should have been allowed to confront C.J. regarding whether the child had previously viewed pornography. During his argument to the court, counsel stated that the record was 'replete with C.J. seeing pornography, viewing pornography, asking to see pornography.' But a careful review of both C.J.'s case file and the lower court record show

little evidence that C.J. ever saw or viewed pornography. There is no mention of pornography in C.J.'s case file. In fact, the only mention of pornography in the lower court record is in the trial transcript. During Young's case in chief, the foster father testified that a social worker informed him that the then five-year old C.J. asked a social worker if she had any 'X-rated' videos. During cross-examination, defense counsel began to question C.J. about pornography and the State objected. The trial court overruled the objection and for whatever reason defense counsel chose not to ask any additional questions regarding the subject. Thus, the trial court did not fail to allow counsel to confront C.J. regarding his exposure to pornography nor do we find that any alleged failure prejudiced Young's defense." *State v. Young*, supra, at ¶32.

**{¶ 21}** Based upon the record before this court, a request for a hearing pursuant to R.C. 2907.02 would not have resulted in the admission of evidence of any sexual activity of the victim. It must also be noted, that the trail court did conduct a limited inquiry into the admissibility of evidence of any sexual activity of the victim and that a "balancing test" was indeed applied. Thus, Young has failed to demonstrate that he was prejudiced by the failure of trial counsel to request a hearing pursuant to R.C. 2907.02.

**{¶ 22}** The final issue raised by Young, through his proposed assignment of error, is that trial counsel was ineffective by failing to fully cross-examine the victim. The decision to cross-examine a witness, however, constitutes trial strategy and is within the sound discretion of a defendant's trial counsel, which this court shall not disturbed on appeal absent a clear showing of prejudice. *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270; *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263; *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836. Herein, Young's counsel did cross-examine the victim. The extent of the cross-examine constituted trial strategy on the part of Young's trial counsel. In addition, Young has failed to demonstrate any prejudice that resulted from the cross-examination of the victim.

**{¶ 23}** Accordingly, Young's application for reopening is denied.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J. and
MARY J. BOYLE, J., CONCUR