

[Cite as *State v. Herring*, 2017-Ohio-727.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 15 JE 0015
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
NATHAN DA'SHAWN "BOO" HERRING)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Jefferson County,
Ohio
Case No. 99-CR-115

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Jane M. Hanlin
Prosecuting Attorney
Jefferson County Justice Center
16001 State Route 7
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No Brief Filed

For Defendant-Appellant: Atty. Bernard C. Battistel
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: February 27, 2017

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WAITE, J.

{¶1} Appellant Nathan Herring appeals the Jefferson County Common Pleas Court's May 27, 2015 decision to deny his motion in arrest of judgment. Appellant bases his claim on the fact that the Ohio Supreme Court held, in his codefendant's case, that the trial court lacked jurisdiction to hear this matter as the underlying homicides occurred in Pennsylvania. Appellant argues that his convictions on non-homicide charges were part of the same course of criminal conduct as his original homicide charges. Thus, he claims that in accordance with the Ohio Supreme Court's decision, the trial court lacked jurisdiction to hear any charges stemming from the homicide. Additionally, Appellant argues that the trial court failed to ensure that he received adequate representation during a critical stage of the proceedings. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Procedural and Factual History

{¶2} In *State v. Herring*, 7th Dist. No. 00 JE 37, 2002-Ohio-2786 ("*Herring I*"), this Court set out the facts of this case:

In the early morning hours of May 31, 1999, Terrell Yarbrough (codefendant in this case) and Herring broke into the home of Aaron Land, Brian Muha and Andrew Doran located at 165 McDowell Avenue, Steubenville, Ohio. Yarbrough and Herring beat and kidnapped Land and Muha. Andrew Doran escaped from the house and called the police.

Yarbrough and Herring forced Land and Muha into Muha's Chevy Blazer. Yarbrough and Herring proceeded to drive the victims through Ohio, West Virginia and into Pennsylvania. In Pennsylvania, Yarbrough and Herring forced the victims up a hillside along U.S. 22. On that hillside both victims were shot in the head at close range.

Yarbrough and Herring immediately proceeded to drive to Pittsburgh, Pennsylvania, where Herring was caught on a bank video trying to use Muha's ATM card. While in Pittsburgh, Herring and Yarbrough robbed Barbara Vey at gunpoint of her BMW. These events occurred within hours of the murders of Land and Muha.

Yarbrough drove the stolen Blazer back to Steubenville, while Herring drove the stolen BMW back to Steubenville. Yarbrough and Herring were later apprehended. Fingerprints and blood of Herring were found in both the BMW and in the Blazer.

Herring was indicted in a twenty count indictment. The indictment included two counts of aggravated robbery, each with a firearm specification; one count of aggravated burglary, with a firearm specification; two counts of kidnapping, each with a firearm specification; one count of gross sexual imposition; six counts of aggravated murder for the murder of Land, each with firearm specifications and aggravating circumstances specifications (capital

offense); six counts of aggravated murder for the murder of Muha, each with firearm specifications and aggravating circumstances specifications (capital offense); one count of receiving stolen property; and one count of grand theft. Herring's case went to trial. The jury found him guilty on all charges except for the gross sexual imposition charge. During the sentencing phase, the jury returned a recommendation of life imprisonment without parole for each of the two murders.

The trial court sentenced Herring to a total of twelve years for the firearm specifications. He received three years on each of the firearm specifications in the two kidnapping counts; three years on the firearm specifications for the aggravated murder of Land; and three years on the firearm specifications for the aggravated murder of Muha. The trial court sentenced Herring to a total of fifty-three years for two counts of aggravated robbery, two counts of kidnapping, one count of aggravated burglary, one count of receiving stolen property, and one count of grand theft. The trial court followed the jury's recommendation and sentenced Herring to two life terms in prison without the possibility of parole for the murders of Land and Muha. The trial court held that consecutive sentences were necessary to fulfill the purposes of R.C. 2929.11. Therefore, Herring was sentenced to serve the twelve years for the firearm specifications first, followed by the fifty-three year sentence for

the other charges followed by the first life sentence, followed by the second life sentence.

Herring I at ¶ 2-7.

{¶3} In *Herring I*, Appellant unsuccessfully challenged both his conviction and sentence. However, Appellant's co-defendant, Yarbrough, received a death sentence. His appeal was directly taken and heard by the Ohio Supreme Court. The Ohio Supreme Court held that the trial court lacked jurisdiction to try the murder charges associated with the case, as those offenses occurred in Pennsylvania. The remaining non-homicide convictions were, however, affirmed. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 57.

{¶4} After *Yarbrough* was released, Appellant filed an untimely postconviction petition, which was partially successful. Based on *Yarbrough*, the trial court vacated Appellant's murder convictions and sentence, but found that Appellant could not satisfy the requirements of R.C. 2953.23(A)(1),(2) as to the remaining non-homicide offenses. In *State v. Herring*, 7th Dist. No. 06 JE 8, 2007-Ohio-3174 ("*Herring II*"), we affirmed the trial court's decision.

{¶5} Appellant later filed a motion for resentencing. The state did not oppose the motion. However, the parties disputed whether Appellant was entitled to a *de novo* or limited resentencing hearing to address postrelease control. The trial court agreed with the state and conducted a sentencing hearing limited to the imposition of postrelease control. Appellant appealed the trial court's decision and argued that he was entitled to a *de novo* sentencing review and that the trial court

erroneously failed to vacate the firearm specifications that had been attached to his vacated murder charges. *State v. Herring*, 7th Dist. No. 12 JE 32, 2015-Ohio-1281 (“*Herring III*”). We did vacate these firearm specifications, but held that Appellant was entitled only to a limited resentencing hearing to address the imposition of postrelease control.

{¶6} At the resentencing hearing, Appellant’s counsel informed the trial court that Appellant had handed him a *pro se* motion in arrest of judgment and requested a hearing on the matter. Although counsel agreed to represent Appellant at the hearing, Appellant, who drafted the motion, argued the merits of the motion. The trial court found that it had jurisdiction to adjudicate the non-homicide offenses and denied the motion. Appellant has timely appealed. We note that the state failed to file a response brief.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT RELIEF TO ARREST THE JUDGMENT DURING HIS EVIDENTIARY HEARING. THE CONVICTION SENTENCE AND JUDGMENT ARE VOID FOR A LACK OF SUBJECT MATTER JURISDICTION DUE TO THE FACT THAT REMAINING OFFENSES CHARGED ARE NOT WITHIN THE JURISDICTION OF THE COURT PURSUANT TO OHIO REVISED CODE §2901.11(B) UNDER THE "ANY ELEMENT" RULE. AS THE GENESIS OF THE ERROR THAT MANDATES APPELLANT'S REMAINING CHARGES BE DISMISSED FOR A LACK

OF SUBJECT MATTER JURISDICTION. THIS WAS THE RESULT OF THE STATE'S FAILURE TO DISTINGUISH BETWEEN THE VENUE STATUE [SIC] AND THE JURISDICTION STATUE [SIC] IN DRAFTING THE INDICTMENT. A VIOLATION OF ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶7} As the Ohio Supreme Court determined in his co-defendant's case that Ohio courts lacked jurisdiction to hear the murder charges, Appellant argues that the trial court also lacked jurisdiction to hear the remaining, non-murder charges, as they were part of the same course of criminal conduct. Consequently, he urges that his convictions stemming from these charges are void.

{¶8} Appellant's arguments are virtually identical to the claims he raised in *Herring II*. In *Herring II*, Appellant argued that the trial court erroneously denied his postconviction relief claims regarding his non-homicide convictions. Appellant based his arguments on *Yarbrough, supra*. In *Yarbrough*, the Ohio Supreme Court considered the case of Appellant's co-defendant, who was convicted of the same offenses as Appellant but had an additional conviction for gross sexual imposition. The Ohio Supreme Court determined that the trial court lacked jurisdiction to hear Yarbrough's murder charges because those offenses were committed in the state of Pennsylvania. The Court explicitly stated, however: "we find that Ohio jurisdiction extends to Counts 1 through 5 (robbery, burglary, kidnapping of Land and Muha, and

gross sexual imposition), Count 12 (the robbery of Vey), and Count 20 (theft of the Blazer).” *Id.* at ¶ 57.

{¶9} Despite the clear pronouncement of the Supreme Court, in *Herring II*, Appellant continued to argue that the trial court improperly denied his postconviction claims pertaining to the non-homicide offenses. We held that Appellant’s petition, which was admittedly untimely, failed as it did not satisfy either of the two exceptions listed within R.C. 2953.23(A)(1)(a). Pursuant to R.C. 2953.23(A)(1)(a), a petitioner may obtain relief by demonstrating the existence of a newly discovered fact that he must rely on to present a claim for relief. We determined that although *Yarbrough* held that the trial court lacked jurisdiction over the murder charges, the fact that the murders were committed in Pennsylvania was not a new fact. Regardless, the argument was based on a legal theory rather than a fact. Thus, it failed to satisfy the “fact requirement.” A petitioner may also show the existence of a new federal or state right that has been recognized by the United States Supreme Court. We noted that the U.S. Supreme Court has not recognized a new federal or state right. *Yarbrough* was released by the Ohio Supreme Court. Even so, we found that the right at issue in *Yarbrough* was not a new right. Instead, it was a long-standing right that the trial court and the parties had misconstrued.

{¶10} In addition to R.C. 2953.23(A)(1)(a), subsection (b) requires the petitioner to show by clear and convincing evidence that no reasonable factfinder would find him guilty but for the constitutional error. Noting that the Ohio Supreme Court found substantial evidence supporting the non-homicide offenses, we

concluded that, based on the similarity of the cases, it would be difficult to find that a jury would not have found Appellant guilty of these offenses as well.

{¶11} In this appeal, Appellant’s arguments stem from a trial court motion in arrest of judgment. Appellant cited to *Yarbrough* and again argued that the trial court lacked subject matter jurisdiction to hear the non-homicide charges because they were intertwined with the charges for the Pennsylvania murders. Appellant focused on language from *Yarbrough* stating: “Ohio had no jurisdiction to hear any criminal charges involving those homicides.” *Id.* at ¶ 56. At the close of the trial court hearing, the court denied Appellant’s motion, reasoning that *Yarbrough* expressly upheld the court’s ability to hear the non-homicide offenses because those offenses were committed in Ohio.

{¶12} Pursuant to R.C. 2947.02:

A judgment may be arrested by the court upon motion of the defendant, or upon the court's own motion, for either of the following causes:

- (A) The offense charged is not within the jurisdiction of the court;
- (B) The facts stated in the indictment or information do not constitute an offense.

{¶13} On appeal, Appellant continues to cite the following language from *Yarbrough*: “Ohio had no jurisdiction to hear any criminal charges involving those homicides.” *Id.* at ¶ 56. He completely overlooks the language that follows in the very next paragraph: “However, we find that Ohio jurisdiction extends to Counts 1

through 5 (robbery, burglary, kidnapping of Land and Muha, and gross sexual imposition), Count 12 (the robbery of Vey), and Count 20 (theft of the Blazer).” *Id.* at ¶ 57. In *Herring II*, we recognized this portion of the holding and stated: “The Ohio Supreme Court in *Yarbrough* upheld the conviction for robbery, burglary, kidnapping, gross sexual imposition and theft despite the fact that the convictions for homicide were vacated based on subject matter jurisdiction.” *Id.* at ¶ 36.

{¶14} *Yarbrough* was Appellant’s codefendant. As the Ohio Supreme Court expressly held that the trial court had jurisdiction over *Yarbrough*’s non-homicide offenses, it follows that the trial court also had jurisdiction to hear Appellant’s non-homicide offenses. Appellant cannot meet the requirements of R.C. 2947.02. The trial court’s denial of Appellant’s motion in arrest of judgment was proper.

{¶15} Accordingly, Appellant’s first assignment of error is without merit and is overruled.

ASSIGNMENTS OF ERROR NOS. 2 & 3.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ENSURE THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING A CRITICAL STAGE OF THE EVIDENTIARY HEARING PROCEEDINGS WHEREIN COUNSEL DID NOT PROVIDE ANY REPRESENTATION [SIC], OR ADEQUATE ASSISTANCE, OF COUNSEL, A VIOLATION OF SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION, THE VI AMENDMENT OF THE UNITED

STATES CONSTITUTION, AND THE XIV AMENDMENT TO THE UNITED STATES CONSTITUTION.

APPELLANT NATHAN HERRING RECEIED [SIC] INEFFECTIVE ASSISTANCE OF COUNSEL DURING A CRITICAL STAGE OF THE EVIDENTIARY HEARING PROCEEDINGS WHEREIN COUNSEL ALLOWED APPELLANT TO DEFEND HIMSELF WITHOUT THE ADEQUATE ASSISTANCE OF COUNSEL. A VIOLATION OF SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION, AND THE VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶16} Despite agreeing to represent Appellant at the hearing on his motion in arrest of judgment, Appellant argues that his counsel stood by while he represented himself. Consequently, Appellant contends that the trial court failed to ensure that he was adequately represented during the motion hearing, which he asserts is a critical stage of the proceedings.

{¶17} Regardless whether this motion hearing constituted a critical stage of the proceedings, the trial court did appoint counsel to represent Appellant. Hence, the issue here is whether trial counsel's actions, or lack thereof, amounted to ineffective assistance of counsel. Despite Appellant's assertion that this assignment of error is subject to an abuse of discretion standard, the controlling law is found within *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶18} The test for an ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient and, if so, whether such deficiency resulted in prejudice. *State v. White*, 7th Dist. No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland, supra*; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694.

{¶19} Appellant concedes that he is limited to a plain error analysis. A three-part test is employed to determine whether plain error exists. *State v. Parker*, 7th Dist. No. 13 MA 161, 2015-Ohio-4101, ¶ 12, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "First, there must be an error, *i.e.* a deviation from a legal rule. Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.' " *Parker* at ¶ 12, citing *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25.

{¶20} The motion in arrest of judgment was made during a hearing to correct the postrelease control portion of Appellant's sentence. Appellant's counsel informed the trial court that Appellant had handed him the motion before the proceedings began and he did not know its contents. Counsel requested a hearing on the matter

and agreed to represent Appellant at the hearing. During the hearing, which was two days later, counsel stated:

Your Honor, with regards to [Appellant's] motion that he filed on the 19th of this month to arrest the judgment pursuant to Criminal Rule 34, on Wednesday I discussed that motion with [Appellant].

He has already prepared statements and notes. After reviewing his motion, reviewing the Court of Appeals' decision and the Supreme Court's decision in this matter, at this time I believe it's in my client's interest to address the Court with his notes and research that he's prepared on this motion.

As the Court's [sic] aware, I had no hand in the preparation of this motion or the research on it. So, I would allow [Appellant] at this time to speak to his motion.

(5/22/15 Motion Hrg. Tr., p. 3.)

{¶21} Appellant appears to argue that counsel's actions amounted to a withdrawal from the case and constituted ineffective assistance. However, there is nothing within the record to indicate that counsel withdrew from his representation. While counsel admittedly allowed Appellant to argue the merits of the motion, the record demonstrates that counsel remained at the hearing and was available to assist Appellant, if necessary. Thus, it does not appear that trial counsel withdrew.

We are left to determine whether counsel's actions amounted to ineffective assistance of counsel.

{¶22} As to the first *Strickland* prong, whether trial counsel's performance was deficient, it is at least arguable that counsel's decision was reasonable. According to counsel, Appellant had prepared statements and completed the relevant research. Additionally, it appears that Appellant initially prepared to represent himself on the matter and did not object to personally arguing it before the court. Even if counsel's decision to allow Appellant to argue the merits of the *pro se* motion was unreasonable, there is nothing within this record to allow us to find prejudice. As earlier stated, Appellant's claims in this matter have been extinguished in the Ohio Supreme Court's *Yarbrough* decision. It cannot be said that but for counsel's decision Appellant would have prevailed on the matter. Appellant cannot demonstrate prejudice and so cannot satisfy the second *Strickland* prong.

{¶23} Accordingly, Appellant's second and third assignments of error are without merit and are overruled.

Conclusion

{¶24} Appellant contends that the trial court's denial of his motion in arrest of judgment is contrary to the Ohio Supreme Court's decision in *Yarbrough*. Appellant has misconstrued *Yarbrough*, which expressly held that the trial court had jurisdiction on the non-homicide offenses. Appellant also argues that he received ineffective assistance of counsel during a critical stage of the proceedings. Appellant is quite clearly unable to demonstrate prejudice even if his counsel was ineffective, although

it appears he was not. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.