[Cite as *State v. Graffius*, 2019-Ohio-4961.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ROBERT D. GRAFFIUS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0008

Application to Reopen Direct Appeal

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Application Denied.

Atty. Robert Herron, Columbiana County Prosecutor, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Robert D. Graffius, Pro se, #A750-471, Noble Correctional Institution, 15708 McConnelsville Road, Caldwell, Ohio 43724-8902.

Dated: November 21, 2019

PER CURIAM.

{¶1} Appellant Robert D. Graffius has filed an application to reopen his appeal. He raises two assignments of error. Appellant first argues that, although the record reflects that the police officer who interviewed him read him his *Miranda* rights, the record fails to show he waived those rights. Appellant also argues that his counsel was ineffective for failing to follow the rules of evidence in attempting to admit an exculpatory photograph, pursuant to *Miranda v. Arizona*, 384 U.S. 436, 478-479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). For the reasons provided, Appellant's application for reopening is denied.

Factual and Procedural History

{¶2} On March 21, 2018, Appellant was convicted of one count of rape, a felony of the first degree in violation of R.C. 2907.02(A)(2). The trial court sentenced him to eight years of incarceration, with credit for 209 days served. We affirmed the judgment of the trial court in *State v. Graffius,* 7th Dist. Columbiana No. 18 CO 0008, 2019-Ohio-2714.

{¶3} On August 5, 2019, Appellant filed an appeal with the Ohio Supreme Court. The Supreme Court denied jurisdiction. *State v. Graffius*, 2019-Ohio-4211. On August 22, 2019, Appellant filed an application to reopen his appeal based on two instances of alleged ineffective assistance of counsel. The state failed to file a response brief. We note that on October 3, 2019, Appellant filed a "MOTION FOR JUDGMENT ON THE PROCEEDINGS," asserting that the state's failure to file a response brief amounts to a stipulation to his claims. However, a motion for judgment on the proceedings is a civil

rule and is not applicable here. Even so, pursuant to App.R. 26(B)(3), although the state is encouraged to a file a response brief, it is not required.

Reopening

{¶4} Pursuant to App.R. 26(B)(1), a criminal defendant "may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." An applicant must demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). If the application is granted, the appellate court must appoint counsel to represent the applicant if the applicant is indigent and unrepresented. App.R. 26(B)(6)(a).

{¶5} In order to show ineffective assistance of appellate counsel, the applicant must meet the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Pursuant to *Strickland*, the applicant must first demonstrate deficient performance of counsel and then must demonstrate resulting prejudice. *Id*. at 687. See also App.R. 26(B)(9).

ASSIGNMENT OF ERROR NO. 1

> THEE [SIC] APPELLANT ROBERT D. GRAFFIUS WAS DENIED HIS INALIENABLE RIGHT TO A FAIR TRIAL WHEN THE STATE OF OHIO USED TAINTED EVIDENCE, GAINED WITHOUT WAIVER OF MIRANDA RIGHTS, TO SECURE CONVICTION.

{¶6} Appellant concedes that Officer Whitfield testified that he read Appellant his *Miranda* rights before conducting the interview at issue. However, Appellant argues that

the record does not reflect that he executed a valid waiver of these rights. As such, he argues that statements he made during this police interview were improperly used against him at trial.

{¶7} "When a suspect is questioned in a custodial setting, the Fifth Amendment requires that he receive *Miranda* warnings to protect against compelled self-incrimination." *State v. Spring*, 7th Dist. Jefferson No. 15 JE 0019, 2017-Ohio-768, 85 N.E.3d 1080, ¶ 22, appeal not allowed, 150 Ohio St.3d 1410, 2017-Ohio-6964, 78 N.E.3d 910, ¶ 22 (2017), citing *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 34 (2013); *Miranda*, *supra*.

{¶8} However, a suspect may knowingly and intelligently waive his *Miranda* rights and make a statement to law enforcement. A *Miranda* waiver does not need to be in writing in order to be valid. *State v. Myers,* 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 68, citing *North Carolina v. Butler*, 441 U.S. 369, 373, 375-376, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Myers* at ¶ 68, quoting *Berghuis v. Thompkins*, 560 U.S. 370, 384, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). Such uncoerced statements are sufficient to establish a waiver. *Myers* at ¶ 71.

{¶9} Officer Whitfield testified that he advised Appellant of each *Miranda* warning, reading to Appellant from a warning card before he began the interview with Appellant. (Trial Tr. Vol. I, p. 179.) According to Officer Whitfield, Appellant answered questions regarding the subject incident and did not appear upset until asked about the

rape allegations, which he denied. Officer Whitfield noted that Appellant declined to provide a DNA sample, which was later obtained through a search warrant.

{¶10} In fact, Appellant concedes that he answered questions from Officer Whitfield after he was advised of his *Miranda* rights. He claims that his refusal to voluntarily provide a DNA sample provides evidence that he did attempt to exercise his right to remain silent per *Miranda*. The record does not support Appellant's assertion. Appellant does not deny that he voluntarily answered Officer Whitfield's questions nor does he claim that he requested counsel at any time during his interview. Thus, the uncoerced statements made by Appellant after he was given his *Miranda* warnings established an implied waiver of his rights. Counsel's failure to raise the issue on appeal cannot result in a determination that his counsel provided deficient performance.

{¶11} Additionally, Appellant cannot demonstrate prejudice. Even if his statement to Officer Whitfield had been excluded, the record contains ample evidence supporting Appellant's conviction. The jury heard the testimony of Clarrissia Miller, the Sexual Assault Nurse Examiner who performed the victim's examination. *Graffius* at ¶ 10. Miller testified that she observed an abrasion to the victim's periurethral area, the presence of light blood, and significant swelling. She also noted that the victim was unable to tolerate a speculum due to the amount of swelling. She testified that these injuries are indicative of force and are not consistent with consensual acts. During the examination, a single sperm cell and semen were found. The DNA testing of the cell matched Appellant's DNA sample. Appellant's DNA sample was obtained through a search warrant and Appellant does not dispute the validity of the warrant. Further, the jury heard testimony that Appellant repeatedly called and texted the victim's phone after the incident. In fact, one

such attempt at communication occurred in Officer's Whitfield's presence. *Id.* at ¶ 8. Finally, the jury heard from both the victim and Appellant. The jury was free to believe either version of the facts and, based on Appellant's conviction, apparently believed the victim. Hence, Appellant is unable to demonstrate prejudice. Accordingly, Appellant's first assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

> THEE [SIC] APPELLANT ROBERT D. GRAFFIUS WAS DENIED FAIR OPPORTUNITY TO PRESENT A COMPLETE DEFENSE WHEN TRIAL COUNSEL FAILED TO PROPERLY PRESERVE EXCULPATORY EVIDENCE FOR ADMISSION.

{¶12} Appellant argues that his counsel was ineffective for failing to raise as error the trial court's decision to grant the state's motion in limine prohibiting the defense from introducing a photograph at trial. According to Appellant, the photograph is a "selfie" which shows him relaxing in bed with the victim. He argues that this photograph is evidence the victim consented to the sexual activity.

{¶13} According to the trial transcripts, the trial court allowed defense counsel to show the photograph to Sergeant Wade Boley during his testimony but did not immediately rule on defense counsel's request to admit the photograph into evidence. (Trial Tr. Vol. I, pp. 227-230.) Sgt. Boley did not testify as to what was depicted in the photograph. His testimony was limited to stating that the photograph showed a picture of Appellant's bedroom. The court explained that it would not rule on counsel's request to admit the photograph into evidence until it could be authenticated. On March 20, 2018,

the state filed a motion in limine requesting that the photograph be excluded because the defense failed to provide the photograph during discovery and because the photograph does not include any date or time reference as to when it was taken. It does not appear that the court ruled on the state's motion in a judgment entry nor does it appear that the court ruled on the motion at trial.

{¶14} Regardless, this photograph, even if it shows what Appellant claims, would not serve to help him. The victim admitted in her testimony that she went to lay down in Appellant's bed and, shortly thereafter, he joined her in the bed. (Trial Tr. Vol. II, pp. 294-295.) She testified that she asked him what he was doing and he replied that he just wanted to listen to music. She explained that the two of them were in bed for a few minutes before Appellant made a sexual advance. The photograph, at best, could only serve to prove that the victim and Appellant were lying in bed together at some point. Because the victim admitted that she and Appellant were in bed together for at least a period of time prior to Appellant's sexual advances, the photograph is irrelevant. The photograph does not, in and of itself, prove that the sexual activity was consensual. Failure to admit the photograph into evidence was not error and appellate counsel is not ineffective for failing to raise the issue on appeal. Accordingly, Appellant's second assignment of error is without merit.

Conclusion

{¶15} As previously stated, in order to show ineffective assistance of appellate counsel, Appellant must demonstrate deficient performance of counsel and resulting prejudice. Appellant has failed to show a genuine issue as to whether he was deprived

of effective assistance of counsel on appeal. Accordingly, Appellant's application for reopening is denied.

JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

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