

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ) Case No. 2006-1608  
)  
Plaintiff-Appellee, )  
) On Appeal from the  
) Lake County Court of Appeals,  
v. ) Eleventh Appellate District  
)  
LARRY M. SCHLEE )  
) Court of Appeals Case No. 2005-L-105CA  
Defendant-Appellant. )

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**MERIT BRIEF OF APPELLEE, STATE OF OHIO**

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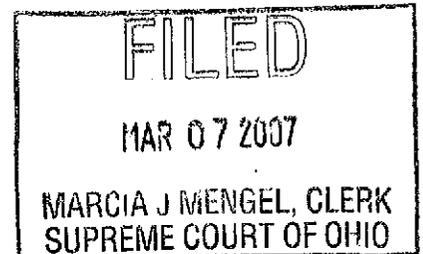


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## STATEMENT OF THE CASE AND FACTS

On September 28, 1992, Larry M. Schlee (hereinafter Appellant), was indicted on one count of Aggravated Murder. (T.d. 1). The charge was brought in relation to the death of Frank Carroll which occurred on or about February 2, 1980. Although Mr. Carroll was murdered in 1980, his body was not discovered until October 21, 1981, in western New York. Because there was no identification of the body, Mr. Carroll's body remained unidentified until the summer of 1992.

Appellant pled not guilty to the charge against him, and the case proceeded to a jury trial that began on March 23, 1993. (T.d. 4, 93). On March 31, 1993, the jury returned a guilty verdict, and Appellant was sentenced to life imprisonment with parole eligibility after 20 years. (T.d. 94, 98).

On appeal, the Eleventh District Court of Appeals affirmed Appellant's conviction and sentences in *State v. Schlee* (Dec. 23, 1994), Lake App. No. 93-L-082. (T.d. 117). Appellant then sought leave to appeal this judgment to this Honorable Court, however, jurisdiction was denied on the basis that there was no substantial constitutional question. *State v. Schlee* (1995), 72 Ohio St.3d 1518, 649 N.E.2d 278.

After exhausting the direct appeal process, Appellant filed his first petition for post-conviction relief in the trial court on September 23, 1996, alleging the ineffective assistance of counsel. (T.d. 127). Then on May 15, 1997, the trial court overruled Appellant's petition without holding an evidentiary hearing. (T.d. 146). Appellant, again, directly appealed to the Eleventh District, and the court reversed and remanded the case to the trial court so that the trial court could file findings of fact and conclusions of law that address each of Appellant's claims that were not barred by the doctrine of res judicata. *State v. Schlee* (Dec. 31, 1998), Lake App. No. 97-L-121.

Then, while the second appeal was still pending, Appellant filed another petition for post-conviction relief on December 18, 1997. (T.d. 156). Appellant claimed that he had newly discovered evidence to prove that the State committed a Crim.R. 16 discovery violation during his March 1993 murder trial. The State filed a Motion to Dismiss Appellant's second petition, and, on July 22, 1998, the trial court denied said petition (again without holding an evidentiary hearing). (T.d. 168, 173). Specifically, the trial court ruled that it could not consider Appellant's second petition because he failed to satisfy the requirements governing a second or successive petition for post-conviction relief under R.C. 2953.23. From this judgment, Appellant filed his third Notice of Appeal with the Eleventh District on August 21, 1998. (T.d. 174). The court in *State v. Schlee* (Dec. 17, 1999), Lake App. No. 98-L-187, affirmed the trial court's denial of Appellant's second petition for post-conviction relief. (T.d. 184). Appellant further attempted to appeal this judgment to this Court, however, again, jurisdiction was denied because there was no substantial constitutional question at issue. *State v. Schlee* (2000), 88 Ohio St.3d 1481, 727 N.E.2d 131. (T.d. 182).

On remand from Appellant's first appeal, the trial court addressed that which this court ordered it to do - specifically issue new findings of fact and conclusions of law addressing those claims of ineffective assistance of counsel that were not barred by res judicata. From that denial, Appellant timely appealed on July 21, 1999. (T.d. 178). The Eleventh District in *State v. Schlee* (Sept. 22, 2000), Lake App. No. 99-L-112, affirmed the judgment of the trial court. (T.d. 184). This judgment, too, was appealed by Appellant to this Court on November 16, 2000. And on February 27, 2001, this Court, one more time, dismissed his appeal as not involving any substantial constitutional question. (T.d. 186).

Following the exhaustion of all his post-conviction relief avenues, Appellant filed a Motion for New Trial based on newly discovered evidence and prosecutorial misconduct. (T.d. 197). The trial court granted the Motion on August 21, 2002. (T.d. 217). The Eleventh District court denied the State's Motion for Leave to Appeal on March 24, 2003, and the case proceeded to a new trial on or about March 8, 2004. (T.d. 228, 299). Defendant was again convicted of the aggravated murder of Mr. Carroll on March 19, 2004, and sentenced to life imprisonment with parole eligibility after serving 15 years. (T.d. 306).

On April 2, 2004, Appellant filed a Motion for New Trial which the trial court overruled on April 15, 2004, after a hearing. (T.d. 317). Appellant then proceeded to file another Notice of Appeal with the Eleventh District on April 23, 2004, which challenged the trial court's decision. (T.d. 319). The court in *State v. Schlee* (Sept. 23, 2005), Lake App. No. 2004-L-070, affirmed the judgment of the trial court. (T.d. 364). Jurisdiction was then subsequently denied by this Court on February 22, 2006.

After the second jury verdict of guilty, Appellant, on October 26, 2004, made an application for DNA testing. (T.d. 336). This application was denied on November 16, 2004, by the trial court based on a previous FBI DNA report which was returned as inconclusive. (T.d. 337). Appellant then filed a Notice of Appeal with the Eleventh District on this matter as well, challenging the trial court's denial of his DNA application. (T.d. 338). The Eleventh District, on May 12, 2006, in *State v. Schlee*, 11<sup>th</sup> Dist No. 2004-L-207, 2006-Ohio-2391, affirmed the trial court's decision. After another appeal, this Court again decided not to accept the case for review.

On March 16, 2005, Appellant filed with the trial court a Motion for Relief from Judgment Pursuant to Civ.R. 60(B). (T.d. 343). In this motion Appellant raised numerous alleged instances

of prosecutorial misconduct leading up to both of his trials as well as an alleged double jeopardy due process violation. The State then timely filed a Motion to Dismiss on April 8, 2005, and properly served Appellant's counsel of record, Ms. Carolyn Kucharski and Mr. Charles Grieshammer. (T.d. 345). Appellant, on April 21, 2005 proceeded to file a Motion to Have State's Motion to Dismiss Stricken From the Record and a Motion for Default Judgment. (T.d. 346-347). The State quickly responded to these motions by filing respective Briefs in Opposition on May 5, 2005. (T.d. 348-349). Again, the State served Appellant's counsel of record with these Briefs in Opposition. And on May 23, 2005, Appellant filed an additional Motion to Strike and to Renew Motion for Default Judgment. (T.d. 350).

On May 24, 2005, the trial court ordered the State to serve upon Appellant (instead of serving his counsel of record) all past and future motions and briefs relating to his motion for relief from judgment. (T.d. 351). The State quickly complied with the trial courts order and filed a certificate of service with the court indicating that all the motions and briefs already filed by the State were served upon Appellant. (T.d. 352). The trial court, on June 14, 2005, then issued an order that: (1) the State's Motion to Dismiss is granted; (2) the Defendant's Motion for Relief From Judgment is dismissed; (3) the Defendant's Motion to Have the State's Motion to Dismiss is denied; (4) the Defendant's Motion for Default Judgment is denied; and (5) the Defendant's Motion to Strike and Renew Motion for Default Judgment is denied. (T.d. 353).

Then on June 20 and 23, 2005, Appellant respectively filed (1) a Motion to Vacate, in Part, Court's May 24, 2005, Order and to Strike State's Answers From the Record and to Stay Further Proceedings and; (2) a Motion to Vacate This Court's June 14, 2005, Order Regarding Defendant's Civ. R. 60(B) Motion. (T.d. 355-356). The State timely filed its Briefs in Opposition to these

motions on June 28, 2005, and on July 5, 2005. (T.d. 357-358). And on July 8, 2005, the trial court ruled on and denied Appellant's June 20, 2005, Motion to Vacate, in Part, Court's May 24, 2005, Order and to Strike State's Answers From the Record and to Stay Further Proceedings. (T.d. 359). Also, on July 8, 2005, Appellant filed a Motion in Response to State's Brief in Opposition Filed June 28, 2005, and Motion to Renew Defendant's Motions to Vacate Filed June 20 and June 23, 2005. (T.d. 360). It is unclear from the record if the trial court ever ruled on Appellant's June 23, 2005, or July 8, 2005, motions.

And finally, on July 11, 2005, Appellant filed a Notice of Appeal to the Eleventh District regarding the trial court's dismissal of his Civ. R. 60(B) Motion for Relief from Judgment. (T.d. 361). The Eleventh District affirmed the trial court's decision on June 23, 2006, in *State v. Schlee*, 11<sup>th</sup> Dist No. 2005-L-105, 2006-Ohio-3208. However, in addition to affirming the trial court's decision, the court also recognized that there was a conflict of law in Ohio regarding to application of Civ. R. 60(B) motions in criminal cases. Thus, based on this conflict, this Honorable Court accepted the case at bar for review on this issue.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**CERTIFIED CONFLICT QUESTION:** “Whether the trial court can recast [a]ppellant’s Motion For Relief From Judgment as a petition for post-conviction relief when it has been unambiguously presented as a Civil Rule 60(B) [motion].”

**APPELLEE STATE OF OHIO’S PROPOSITION OF LAW:** When a criminal Defendant (who has not filed a petition for post-conviction relief) files a Motion for Relief from Judgment Pursuant to Civ. R. 60(B) subsequent to the filing of a direct appeal, and is seeking vacation of the judgment on the basis that his constitutional rights have been violated, it is proper for the trial court who is considering said motion to recast it as a petition for post-conviction relief.

**I. CIVIL R. 60(B) IS NOT APPLICABLE IN THE CASE AT BAR BECAUSE IN LIGHT OF CRIM. R. 57(B), THERE IS A “PROCEDURE\*\*\*PRESCRIBED BY RULE.”**

**A. Breakdown of the holdings of the Appellate Courts in Ohio with respect to the applicability of Civil R. 60(B) in criminal cases.**

As this Court is well aware, over the past few decades, the appellate courts of Ohio have considered the application of Civ.R. 60(B) motions in criminal cases and have come to a number of different conclusions. As will be detailed below, even some appellate districts in Ohio, over time, have changed their opinions regarding the applicability of such motions in the criminal context. Nevertheless, the following districts have held that Civ.R. 60(B) is generally not a proper vehicle to attack a judgment in a criminal case:

Second District Court of Appeals:

- *State v. Billheimer* (Dec. 3, 1992), Montgomery App. No. 13281, at \*2 (held that the use of Civ.R. 60(B) was proper because there was no procedure in the criminal rules to address whether or not the judge acted inadvertently when he signed an order dismissing an indictment with prejudice).
- *State v. Israfil* (Nov. 15, 1996), Montgomery App. C.A. CASE NO. 15572, at \*1 (“Civ.R. 60(B) has no application to judgments in criminal cases. Accordingly, the trial court had a choice of considering Israfil’s motion for Civ.R. 60(B) relief as a petition for

post-conviction relief, and addressing the merits, or of treating the motion as a nullity, and not considering it at all.”)

- *State v. Talley* (Jan. 30, 1998), Montgomery App. No. 16479, at \*3 (Held that “[w]e also agree with the state that Talley’s motion under Civ.R. 60(B) was barred by 2953.23. Post-conviction relief in Ohio is pursued through quasi-civil proceedings. *State v. Nichols* (1984), 11 Ohio St.3d 40, 41-42, 463 N.E.2d 375. Normally, a civil litigant is permitted to file a motion under 60(B) after the trial court has rendered judgment. However, were 60(B) motions permitted as a means of seeking post-conviction relief, the intent of the legislature in enacting R.C. 2953.23 would be frustrated, especially in regard to the 1995 amendments that restricted the discretion of trial courts to entertain post-conviction claims. If the statute did not encompass 60(B) motions, criminal defendants could file successive post-conviction petitions merely by restyling them to fit under the civil rule. Thus, we conclude that the *Reynolds* rule should apply to 60(B) motions. Where a petition is styled as a motion under Civ.R. 60(B) but is, in substance, a post-conviction petition under R.C. 2953.21, it should be treated as the latter. See, e.g., *State v. Carpenter* (Dec. 6, 1996), Jefferson App. No. 96-JE-8, unreported, at 2.”)
- *State v. Palmer*, 2<sup>nd</sup> Dist. No. 18778, 2001-Ohio-1393, at \*1 (“Civ.R. 60(B) has no application to judgments in criminal cases. *State v. Israfil* (Nov. 15, 1996), Montgomery App. No. 15572, unreported. As the trial court in this case noted, Mr. Palmer’s filing has to be treated as a motion for post conviction relief, citing *State v. Reynolds* (1997), 79 Ohio St.3d 158. See also *State v. Talley* (Jan. 30, 1998), Montgomery App. No. 16479, unreported.”)

Fifth District Court of Appeals:

- *State v. Haddix* (Nov. 15, 1999), Stark App. No. 1999CA00227, at \*2 (Relying on *State v. Reynolds* (1997), 79 Ohio St.3d 158, 679 N.E.2d 1131, held that because Appellant’s Civ.R. 60(B) motion was filed subsequent to his direct appeal and was seeking a vacation or correction of his sentence on the basis that his constitutional rights had been violated, it was a petition for postconviction relief).
- *State v. Kirkland* (Jan. 24, 2000), Stark App. No. 1999CA00308, at \*3 (Held that in light of its previous opinion in *State v. Haddix* (Nov. 15, 1999), Stark App. No. 1999CA00227, unreported, the trial court

“properly addressed appellant’s motion to vacate pursuant to Civil Rule 60(B)(3) and (5) as a petition for post-conviction relief.”)

- *State v. Johnson*, 5<sup>th</sup> Dist. No. 01-CA-88, 2002-Ohio-254, at \*1 (“Because the Civil Rules do not apply in criminal cases, we agree with the *Tyler* court’s decision a criminal defendant’s Civ.R. 60(B) motion for relief from a criminal conviction should be treated as a petition for post-conviction relief pursuant to R.C. 2953.21.”)
- *State v. Szerlip*, 5<sup>th</sup> Dist. No. 02CA45, 2003-Ohio-6954, (Held that [s]ince the Civil Rules do not apply in criminal cases, a criminal defendant’s Civ.R. 60(B) motion for relief from a criminal conviction should be treated as a petition for post-conviction relief pursuant to R.C. 2953.21. See *State v. Johnson*, Richland App. No. 01-CA-88, 2002-Ohio-254.”)
- *State v. Brack*, 5<sup>th</sup> Dist. No. 2005CA00298, 2006-Ohio-3783, at ¶19 (Agreed with the trial court that “[a] motion to vacate pursuant to Civ.R. 60(B) may be used in a criminal case only when a defendant has filed a petition for post-conviction relief pursuant to R.C. 2953.21 and a defendant seeks to have the court revisit its ruling on the said petition.”)

Seventh District Court of Appeals:

- *State v. Carpenter*, 116 Ohio App.3d 292, 295, 688 N.E.2d 14, (“Although styled as a Civ.R. 60(B) motion, appellant’s motion was in essence a petition for postconviction relief under R.C. 2953.21.”)
- *State v. Reed*, 7<sup>th</sup> Dist. No. 04 MA 236, 2005-Ohio-2925, at ¶12 (“Civ. R. 60(B) relief is not a substitute for appellate review of prejudicial error.” *Doe v. Trumbull Cty. Children’s Services Bd.* (1986), 28 Ohio St.3d 128, 502 N.E.2d 605.)

Eighth District Court of Appeals:

- *State v. Wagner* (May 15, 1980), Cuyahoga App. Nos. 40194, 40195, at \*3 (“There is a persuasive reason for finding Civ.R. 60(B) ‘clearly inapplicable’ to post-conviction remedies. That reason is that both post-conviction relief (R.C. §2953.21) and Civ.R. 60(B) are corrective measures. The former is designed to protect against vices in criminal proceedings which cannot be reached by appeal. The other aims to requite faults in civil proceedings in cases which qualify

for relief. See *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 102-103, 316 N.E.2d 469.”)

- *State v. Bluford*, 8<sup>th</sup> Dist. No. 83112, 2003-Ohio-6181, at ¶15 (“Appellant spends much time in his brief arguing that the trial court erred because he met the requirements of Civ.R. 60(B)(5) regarding relief from judgment. This case is a criminal matter, however, and, therefore, the civil rules are not applicable. Thus, any argument regarding the requirements of Civ.R. 60(B) and whether appellant has satisfied those requirements is irrelevant. Moreover, Civ.R. 60(B) pertains to motions for relief from judgment. Appellant appealed from the trial court’s order denying his motion to modify its journal entry of October 7, 2002, not from an order denying a motion for relief from judgment.”)
- *State v. Briscoe*, 8<sup>th</sup> Dist. No. 83471, 2004-Ohio-4096, at ¶8 (“The State initially argues that Civ.R. 60(B) motions for relief from judgment are civil in nature and are, therefore, inapplicable in criminal proceedings. However, under R.C. 2953.21, an action for postconviction relief is treated as a civil proceeding in which the prosecuting attorney represents the state as a party. We find the trial court properly considered appellant’s Civ.R. 60(B) motion for relief from a criminal conviction as a petition for postconviction relief pursuant to R.C. 2953.21. *State v. Johnson*, Richland App. No. 01-CA-88, 2002-Ohio-254.”)

Ninth District Court of Appeals:

- *State v. Windmiller* (March 1, 2000), Lorain App. No. 99CA007347, at \*1 (“Civ.R. 60(B) has no application to judgments in criminal cases.” *State v. Israfil* (Nov. 15, 1996), Montgomery App. No. 15572, unreported, 1996 Ohio App. LEXIS 4955, at \*2. We hold that Civ.R. 60(B) is inapplicable in proceedings to revoke probation. If the outcome of a probation revocation hearing is unfavorable to a defendant, his recourse is to appeal that decision.”)

Likewise, there are a number of other appellate districts in Ohio that have held that held that Civ.R.

60(B) motions can be considered in the criminal context, but only in some circumstances:

Fourth District Court of Appeals:

- *State v. Riggs* (Oct. 4, 1993), Meigs App. Nos. 503, 506, \*7, 8 (“In those instances where no procedure is specifically provided by the criminal rules, trial courts may nevertheless look to the rules of civil procedure. Crim.R. 57(B). Appellant relies on the provisions of Civ.R. 60(B) in support of his motion for relief from the judgment. Although Appellant cites us to no authority for the proposition that this particular civil rule has been incorporated into criminal procedure, our own research indicates that it has in fact been so associated on a number of occasions. See e.g. *State v. Wells* (Mar. 30, 1993), Franklin App. No. 92AP-1462, unreported; *State v. Billheimer* (Dec. 3, 1992), Montgomery App. No. 13281, unreported; *State v. Groves* (Dec. 23, 1991), Warren App. No. CA91-02-014.\*\*\*It is well settled law that relief under Civ.R. 60(B) will not be granted as a substitute for relief which would have been available on appeal of the original judgment.”)

Sixth District Court of Appeals:

- *State v. Hasenmeier* (March 18, 1994), Erie App. No. E-93-33, at \*3 (“Our research shows that courts have entertained motions pursuant to Civ.R. 60(B) in criminal cases. *State v. Wells* (Mar. 30, 1993), Franklin App. No. 92AP-1462, unreported; *State v. Billheimer* (Dec. 3, 1992), Montgomery App. No. 13281, unreported; *State v. Groves* (Dec. 23, 1991), Warren App. No. CA91-02-014. More recently, in *State v. Riggs* (Oct. 4, 1993), Meigs App. Nos. 503 and 506, unreported, the Fourth District Court of Appeals review the merits of a Civ.R. 60(B) motion filed by an appellant who had been denied “shock” probation. The state’s argument of excusable neglect was an appropriate subject to raise in a Civ.R. 60(B) motion.”)
- *State v. Plassman*, 6<sup>th</sup> Dist. No. F-03-017, 2004-Ohio-279, at ¶7 (“Appellant correctly notes that Civ.R. 60(B) is available in criminal cases for certain procedures that were not anticipated by the criminal rules. Crim.R. 57(B); *State v. Cockerham* (1997), 118 Ohio App.3d 767; *State v. Spillman* (Jan. 18, 2000), 4<sup>th</sup> Dist. App. No. 99 CA 13; and *State v. Hasenmeier* (March 18, 1994), 6<sup>th</sup> Dist. App. No. E-93-33. However, this case does not fit within that category. In essence, appellant is challenging that the Ohio Adult Parole Authority has violated his plea agreement by retroactively imposing parole eligibility guidelines it adopted years after appellant was convicted. Appellant has other avenues by which he could raise this issue.”)

Tenth District Court of Appeals:

- *State v. Wells* (March 30, 1993), Franklin App. No. 92AP-1462, at \*2 (Held that because the criminal rules of procedure do not specifically provide for motions to enforce plea agreements, application of Civ.R. 60(B) to Appellant's situation was proper).
- *State v. Garcia* (Aug. 24, 1995), Franklin App. No. 94APA11-1646, at \*1 ("Motions for relief from judgment are provided for in a civil context through Civ.R. 60. There is no such procedure in the criminal arena. However, in those instances where no procedure is specifically provided for in the criminal rules, trial courts may, nevertheless, look to the rules of civil procedure. See Crim.R. 57(B). In fact, court have applied Civ.R. 60(B) in the context of criminal proceedings on a number of occasions.\*\*\**State v. Riggs* (Oct. 4, 1993), Meigs App. No. 503, unreported,\*\*\**State v. Hasenmeier* (March 18, 1994), Erie App. No. E-93-33, unreported.")
- *State v. Wooden*, 10<sup>th</sup> Dist. No. 02AP-473, 2002-Ohio-7363, at ¶¶8-9 ("Appellant does not specifically explain, but we assume he cited Crim.R. 57(B) in an attempt to utilize Civ.R. 60(B). Crim.R. 57(B) permits a court to look to the rules of civil procedure if no applicable rule of criminal procedure exists. Although Civ.R. 60(B) is a civil rule, on occasion courts, including this court, have entertained Civ.R. 60(B) motions in criminal cases. See *State v. Israfil* (Nov. 15, 1996), Montgomery App. No. 15572; *State v. Garcia* (Aug. 24, 1995), Franklin App. No. 94APA11-1646; *State v. Riggs* (Oct. 4, 1993), Meigs App. No. 503; *State v. Wells* (March 30, 1993), Franklin App. No. 92AP-1462; and *State v. Groves* (Dec. 23, 1991), Warren App. No. CA91-02-014.\*\*\*However, when alleging a defect as to the sufficiency of an indictment, a defendant must raise the issue on direct appeal. *State ex rel. Hadlock v. McMackin* (1991), 61 Ohio St.3d 433, 434, 575 N.E.2d 184. A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal. *State ex rel. McCoy v. Coyle* (1997), 80 Ohio St.3d 1430, 685 N.E.2d 542; *State ex rel. Durkin v. Ungaro* (1988) 39 Ohio St.3d 191, 192, 529 N.E.2d 1268.")
- *State v. Scruggs*, 10<sup>th</sup> Dist. No. 02AP-621, 2003-Ohio-2019, at ¶18, 26 ("As noted previously, defendant filed his motion for relief from judgment pursuant to Crim.R. 57(B) and Civ.R. 60(B). The Ohio Rules of Procedure provide for motions for relief of judgment in the civil context, see Civ.R. 60; however, no such procedure exists in the

criminal arena. Crim.R. 57(B) permits a court to look to the rules of civil procedure if no applicable rule of criminal procedure exists. Without endorsing the propriety of challenging a criminal conviction via Civ.R. 60(B), we note that on occasion courts, including this court, have considered Civ.R. 60(B) challenges in criminal cases. *State v. Wooden*, Franklin App. No. 02AP-473, 2002-Ohio-7363, at ¶8; *State v. Wells* (March 30, 1993), Franklin App. No. 92AP-1462; \**State v. Hasenmeier* (March 18, 1994), Erie App. No. E-93-33; and *State v. Riggs* (Oct. 4, 1993), Meigs App. No. 503.\*\*\* A review of the record demonstrates that the issue raised in defendant's motion for relief from judgment could have been raised prior to trial or on direct appeal."

- *State v. Brooks*, 10<sup>th</sup> Dist. No. 03AP-636, 2004-Ohio-585, ¶¶8-10 (Held that Appellant's use of Civ.R. 60(B) was proper because his motion for relief from judgment did not challenge his conviction, but rather addressed the trial court's decision and entry denying his petition for post-conviction relief.)

Eleventh District Court of Appeals:

- *State v. Jones*, 11<sup>th</sup> Dist. No. 2001-A-0072, 2002-Ohio-6914, at ¶9 ("[T]here is sufficient precedent for the filing of Civ.R. 60(B) motions for relief from judgment in connection with the trial court's denial of a petition for post-conviction relief.")
- *State v. Belknap*, 11<sup>th</sup> Dist. No. 2002-P-0021, 2004-Ohio-5636, at ¶¶26-27 ("In the third assignment of error, appellant maintains that he was denied a fair trial because of the admission of the tape recorded 9-1-1 call to the Garrettsville Police Department. Appellant alleges that the prosecution mistakenly presented the call as a 9-1-1 call, and as a result, his judgment should be reversed under Civ.R. 60(B). As previously mentioned, Civ.R. 60(B), a civil procedure rule, is generally not applicable in this criminal matter. Nevertheless, the trial court has broad discretion in the admission and exclusion of evidence. *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126.")
- *State v. Harrison*, 11<sup>th</sup> Dist. No. 2004-P-0068, 2005-Ohio-4212, at ¶10 ("The trial court held that Civ.R. 60(B) does not apply because this is a criminal matter. Ohio courts have taken a variety of approaches regarding the application of Civ.R. 60 to criminal proceedings. Some courts have simply held that it does not apply to

criminal proceedings. Other courts have rules that a Civ.R. 60 motion filed in a criminal matter must be treated as a motion for postconviction relief. However, for the reasons that follow, we hold Civ.R. 60 may be applied in criminal cases under certain circumstances.”

- *State v. Clevenger*, 11<sup>th</sup> Dist. No. 2004-T-0130, 2006-Ohio-128, at ¶¶12-13 (“This court notes that the relief sought by Clevenger would, more appropriately, have been sought through the filing of a properly drafted Civ.R. 60(B)(4) motion, pursuant to Crim.R. 57(B), or perhaps, by filing a complaint under Civ.R. 3(A) to set aside the judgment. Cf. *State v. Good*, 10<sup>th</sup> Dist. Nos. 03AP549 and 03AP550, 2004-Ohio-1736, at ¶5, 6.\*\*\*Crim.R. 57(B) directs the courts to look to the civil rules if no criminal rule is applicable; Civ.R. 60(B) motions are commonly entertained in criminal proceedings, pursuant to Crim.R. 57(B). See, e.g., *State v. Lehrfeld*, 1<sup>st</sup> Dist. No. C-030390, 2004-Ohio-2277, at ¶5-7; *State v. Garcia* (Aug. 24, 1995), 10<sup>th</sup> Dist. No. 94APA11-1646, 1995 Ohio App. LEXIS 3511, at 3-4. Civ.R. 60(B)(4) provides that a court may relieve a party of a final judgment if “\*\*\*it is no longer equitable that the judgment should have prospective application\*\*\*.”)
- *State v. Schlee*, 11<sup>th</sup> Dist. No. 2005-L-105, 2006-Ohio-3208, at ¶¶21-24 (Held that in light of its previous opinion in *State v. Harrison*, 11<sup>th</sup> Dist. No. 2004-P-0068, 2005-Ohio-4212, at ¶¶10-12, “in certain circumstances, Civ.R. 60 may be applicable to criminal matters.”)

Twelfth District Court of Appeals:

- *State v. Groves* (Dec. 23, 1991), Warren App. No. CA91-02-014, at \*2 (“[I]t appears that Crim.R. 57 and Civ.R. 60(B)(3) do provide a trial court with the power to vacate its order for a new trial if such order was based on fraud.”)

And finally, one appellate court, the First District Court of Appeals, has held that Civ.R. 60(B), via Crim.R. 57(B), can afford a criminal defendant relief from a judgment of conviction. *State v. Lehrfeld*, 1<sup>st</sup> Dist. No. C-030390, 2004-Ohio-2277, at ¶5-7. The State asserts that the *Lehrfeld* decision, our conflict case, simply ignores the existence of Crim.R. 35 and R.C. 2953.21, as well as the clear legislative intent behind the Ohio post-conviction relief statute.

**B. Crim.R. 35 and R.C. 2953.21 is the “procedure prescribed by rule” under Crim.R. 57(B) in Appellant’s case.**

**1. *Post-conviction Relief Applies***

As has been highlighted above, Crim.R. 57(B) enables trial courts to look to other areas of the law if there is no applicable criminal rule on point. Crim.R. 57(B) specifically states:

**(B) Procedure not otherwise specified.** If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.

In light of this Criminal Rule, the State contends that in Appellant’s case there was a procedure to address his concerns specifically prescribed by rule. And that rule was Crim.R. 35. A clear review of Crim.R. 35 reveals that it briefly describes the procedure by which criminal defendants can file petitions for post-conviction relief, and also incorporates by reference the entire post-conviction relief statute contained in R.C. 2953.21. It is evident from Appellant’s Motion for Relief From Judgment Pursuant to Civ.R. 60(B) that the basis for his request for relief are numerous alleged instances of prosecutorial misconduct. See Appellant’s Civ.R. 60(B) Motion, 5-11. The alleged misconduct by the State detailed by Appellant includes acts before both his 1993 and 2004 trials. There is no question that the criminal rules offered Appellant an opportunity via Crim.R. 35 and R.C. 2953.21 to address these alleged prejudicial and constitutional violations. It is well settled that prosecutorial misconduct may support a R.C. 2953.21 petition for postconviction relief. *State v. Singerman* (1996), 115 Ohio App.3d 273, 276, 685 N.E.2d 279 citing *State v. Walden* (1984), 19 Ohio App.3d 141, 483 N.E.2d 859. Thus, because a rule of criminal procedure did exist at the time Appellant filed his Civ.R. 60(B) motion, the trial court, by law, could not resort to the civil rules of

procedure to address his concerns. Contrary to Appellant's belief, Civ.R. 60(B) was not an acceptable procedural vehicle for him to present alleged evidence of prosecutorial misconduct.

Appellant suggests in his merit brief that the post-conviction statutes do not apply in his case because he lacked the evidentiary materials necessary for filing such a petition. This argument must fail for two separate reasons. First of all, R.C. 2953.21(A)(1)(a) does not state that it requires a criminal defendant to bring forth evidentiary materials as Appellant is suggesting. All that it states is that "[t]he petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief." R.C. 2953.21(A)(1)(a) (Emphasis added.) And secondly, just because Appellant cannot furnish any evidence whatsoever regarding his claims of prosecutorial misconduct, he should not be able to then skirt the criminal rules of procedure and avail himself of a civil remedy. This potential circumvention is exactly what Crim.R. 57(B) was meant to prohibit! If there is an applicable rule of criminal procedure, then there is no need for the court to look to the civil rules of procedure and/or to the applicable law.

Appellant's amici further suggests that his Civ.R. 60(B) motion was proper because it was not a collateral attack on his underlying conviction, but was rather "aim[ed] at protecting the integrity of the court and its proceedings in the case." (Amicus Brief, 5). However, nowhere in their brief does amici explain how it is possible to attack the integrity of a judgment without also attacking the validity of that judgment. Moreover, amici clearly ignores the fact that Appellant specifically asks the trial court in his Civ.R. 60(B) motion to "reverse his conviction and dismiss the indictment against him with prejudice." (T.d. 343).

Black's Law Dictionary defines a "collateral attack" as "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial

proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective.” Black’s Law Dictionary (8<sup>th</sup> Ed. Rev. 2004), 278. And “[a] motion to vacate judgment pursuant to Civ.R. 60(B) is a collateral attack upon a judgment. It is an allegation that the judgment is voidable on account of fraud, mistake, excusable neglect or some other reason.” *Horst v. First Nat. Bank in Massillon* (June 25, 1990), Stark App. No. CA-8057, at \*3 citing *Security Ins. v. Regional Transit Authority* (1982), 4 Ohio App.3d 24, 446 N.E.2d 220. Even the language of Civ.R. 60(B) demonstrates that its purpose is to attack and “relieve a party or his legal representative from a final judgment, order or proceeding.” Amici’s suggestion that Appellant’s Civ.R. 60(B) motion did not challenge the merits of his conviction is certainly false.

## **2. Reynolds and Bush**

Appellant also relies heavily on this Court’s decisions in *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131, and *State v. Bush*, 96 Ohio St.3d 235, 773 N.E.2d 522, in his brief to support his argument, however, the State submits that these two cases are readily distinguishable from the case at bar. In *Reynolds*, the defendant, after he was convicted of aggravated robbery with a firearm specification and had unsuccessfully appealed, filed a “Motion to Correct or Vacate Sentence” with the trial court. 79 Ohio St.3d at 158-159. In the motion, the defendant asserted that the State had failed to prove the firearm that he allegedly used was operable beyond a reasonable doubt. *Id.* at 159. The trial court then granted the defendant’s motion and vacated the conviction and sentence for the firearm specification. *Id.* The State then appealed the trial court’s ruling. *Id.* The appellate court affirmed the trial court’s decision, however, upon the allowance of a discretionary appeal this Court reversed the judgment of the court of appeals and reinstated the defendant’s sentence for the firearm

specification. Id. at 159, 163. In so doing, this Court held that despite the caption of the defendant's Motion to Correct or Vacate Sentence, the motion was, in fact, a petition for post-conviction relief pursuant to R.C. 2953.21(A)(1), "because it is a motion that was (1) filed subsequent to\*\*\*[the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence." Id. at 160. And because the defendant's motion was a petition for post-conviction relief, this Court subsequently reasoned that it was barred by the doctrine of res judicata since the issues he raised could have been raised on direct appeal. Id. at 161.

Approximately five years after *Reynolds* this Court issued its opinion in *Bush*. In *Bush*, the Defendant, in 1997, pled guilty to two counts of breaking and entering, one count of grand theft of a motor vehicle, one count of theft, and one count of possessing criminal tools. 96 Ohio St.3d at 235. In 2000, after attempting to obtain judicial release, the defendant filed a Crim.R. 32.1 motion to withdraw his guilty plea. Id. In this motion the defendant argued that his attorney and the trial court judge has erroneously assured him that he would be eligible for judicial release from prison after serving thirty days, as opposed to the required five years specified in R.C. 2929.20. Id. at 236. The trial court denied the defendant's motion and he immediately appealed. Id. The Third District Court of Appeals affirmed the decision of the trial court after citing this Court's decision in *Reynolds*, but also sua sponte certified a conflict to this Court as well. Id. This Court then reversed the judgment of the court of appeals. Id. at 239. In reversing the appellate court's decision, this Court held:

The *Reynolds* syllabus must be read in the context of the facts of that case. When we decided *Reynolds*, our rules provided that "[t]he syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court

*for adjudication.*” (Emphasis added.) Former S.Ct.R.Rep.Op. 1(B), 3 Ohio St.3d xxi. Thus, when read in context, the rule of *Reynolds* reaches *only* a motion *such as the one in that case* - a “Motion to Correct or Vacate Sentence” - that fails to delineate specifically whether it is a postconviction release petition or a Crim.R. 32.1 motion. Such irregular “no-name” motions must be categorized by a court in order for the court to know the criteria by which the motion should be judged. Our decision in *Reynolds* set forth a means by which courts can classify such irregular motions. See *State v. Reynolds*, 3d Dist No. 12-01-11, 2002-Ohio-2823, at ¶24, 2002 WL 1299990 (plurality opinion) (“[I]n *Reynolds* the Supreme Court was considering a vaguely titled ‘Motion to Correct or Vacate Sentence’ and not a motion filed pursuant to a specific rule of criminal procedure. Since there was no controlling rule or statutory provision governing or providing for a Motion to Correct or Vacate Sentence, the Ohio State Supreme Court looked at the contents fo the defendant’s motions [sic] and determined that substantively it was a petition for post conviction relief and then treated it as such”). *Reynolds* therefore does not obviate Crim.R. 32.1 postsentence motions. Instead, *Reynolds* sets forth a narrow rule of law limited to the context of that case.

\*\*\*

Accordingly, we hold that R.C. 2953.21 and 2953.23 do not govern a Crim.R. 32.1 postsentence motion to withdraw a guilty plea. Postsentence motions to withdraw guilty or no contest pleas and postconviction relief petitions exist independently. A criminal defendant can seek under Crim.R. 32.1 to withdraw a plea after the imposition of sentence. See *State v. Smith* (1977), 49 Ohio St.2d 261, 3 O.O.3d 402, 361 N.E.2d 1324, paragraph one of the syllabus. R.C. 2953.21 and 2953.23 do not govern the timeliness of such a motion. And Crim.R. 32.1 itself does not prescribe a time limitation. This is not to say that timeliness is not a consideration, however, as an “undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.” *Smith*, 49 Ohio St.2d 261, 3 O.O.3d 402, 361 N.E.2d 1324, paragraph three of the syllabus.

*Bush*, 96 Ohio St.3d at 237-239. Clearly, this Court intended to greatly limit its holding in *Reynolds* when it issued *Bush*.

Appellant, in his brief avers that this Court's decision in *Bush* controls in the case at bar. More specifically, Appellant claims that because the trial court in this case recast his Civ.R. 60(B) motion as a petition for post-conviction relief, he is in a situation that is akin to the defendant in *Bush*. According to Appellant because he, like the defendant in *Bush*, filed a clearly labeled motion which invoked a specific rule of procedure (Civ.R. 60(B)), the trial court, in light of the *Bush* decision, should have considered the motion on its face. But what makes Appellant's case notably distinguishable from *Bush*, is the specific rule of procedure he chose to file his motion under - Civ.R. 60(B). As noted above, the defendant in *Bush* filed his motion pursuant to Crim.R. 32.1, and there was no provision in the Criminal Rules of Procedure that prevented the trial court from considering it as such. However, that is not the case with Appellant's Civ.R. 60(B) motion. Crim.R. 57(B) prevented the trial court from considering Appellant's motion on its face because there was an applicable rule of criminal procedure in place - Crim.R. 35. The trial court even stated in its June 14, 2005, order that "[b]ecause there is an applicable statute, it is not necessary to look to the civil rules in this situation." (T.d. 353).

The case at bar is also distinguishable from this Court's decision in *Reynolds* because the defendant's motion in *Reynolds* was not filed under any rule of procedure, and was simply named "Motion to Correct or Vacate Sentence." However, the State submits that Appellant's case, is more comparable to *Reynolds* than it is to *Bush*. This is true because after the trial court determined that Civ.R. 60(B) was not a proper rule of procedure for Appellant to file his motion under, all that was left for the court to consider was (1) the remaining words in the caption which were "Motion for Relief from Judgment"; and (2) the contents of the motion. And that is almost exactly what this Court was left to consider in *Reynolds* when it determined that his "Motion to Correct or Vacate

Sentence, despite its caption,\*\*\*[met] the definition of a motion for postconviction relief set forth in R.C. 2953.21(A)(1).” *Reynolds*, 79 Ohio St.3d at 160. And in the case at bar, the trial court, after looking at what was left of Appellant’s motion, properly found “that because the\*\*\*motion for relief from judgment pursuant to Civ.R. 60(B) is a motion filed by a criminal defendant, subsequent to the filing of a direct appeal, seeking vacation of the judgment on the basis that his constitutional rights have been violated, it meets that definition of petition for postconviction relief under R.C. 2953.21.” (T.d. 353 citing *Reynolds*, 79 Ohio St.3d at 160).

**C. The Legislative intent of R.C. 2953.21 - evidenced in provision (J) of the statute.**

In addition to the existence Crim.R. 35, the Ohio State Legislature in its 121<sup>st</sup> General Assembly clearly demonstrated its intent to have the remedy provided by R.C. 2953.21 be the exclusive remedy by which a defendant could bring a collateral attack to the validity of his or her conviction and/or sentence. In this Assembly Senate Bill No. 4 was passed on June 20, 1995, and in this bill a new provision was added to R.C. 2953.21 which stated:

(J) The remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or a related order of disposition.

1995, S.B. No. 4. This provision has since been revised by the General Assembly, and now currently states:

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an

adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

R.C. 2953.21(J).

In addition R.C. 2953.21(J), which speaks for itself, some Ohio appellate courts have also provided insight regarding the legislative intent behind R.C. 2953.21 in light of Civ.R. 60(B) motions. Specifically, the Eight District Court of Appeals in *State v. Wagner* reasoned:

There is a persuasive reason for finding Civ.R. 60(B) “clearly inapplicable” to post-conviction remedies. That reason is that both post-conviction relief (R.C. §2953.21) and Civ.R. 60(B) are corrective measures. The former is designed to protect against vices in criminal proceedings which cannot be reached by appeal. The other aims to requite faults in civil proceedings in cases which qualify for the relief. See *Adomeit v. Baltimore* (1974), 30 Ohio App.2d 97, 102-103, 316 N.E.2d 469.

To allow Civ.R. 60(B) relief to modify post-conviction relief pyramids remedies in a fashion this court will not endorse. A fair justice system is characterized by adequate remedies. But such fairness does not require an embarrassment of procedural riches.

Despite the civil nature of post-conviction proceedings, it is clear the legislature did not intend that an individual could seek relief from a criminal judgment by raising 60(B) defects where the action either substantively or procedurally has failed. In short, only a single avenue of relief outside the appellate system was intended. And, of course, neither PCR nor Civ.R. 60(B) relief were intended as substitutes for appeal.

Cuyahoga App. Nos. 40194, 40195, at \*3. Likewise, both the Second and Fifth District Court of Appeals have also explained how the allowance of Civ.R. 60(B) motions to seek relief from criminal judgment would frustrate the intent of the legislature:

However, were 60(B) motions permitted as a means of seeking post-conviction relief, the intent of the legislature in enacting R.C. 2953.23 would be frustrated, especially in regard to the 1995 amendments that restricted the discretion of trial courts to entertain post-conviction claims. If the statute did not encompass 60(B) motions, criminal defendants could file successive post-conviction petitions merely by restyling them to fit under the civil rule.

*State v. Haddix* (Nov. 15, 1999), Stark App. No. 1999CA00227, at \*2 citing *State v. Talley* (Jan. 30, 1998), Montgomery App. No. 16479, at \*3. Clearly, the legislature when it enacted provision (J) of R.C. 2953.21, did not intend to have criminal defendants in Ohio filing Civ.R. 60(B) motions attacking their convictions and/or sentences in addition to, or in substitute of, a properly filed petition for post-conviction relief.

**D. The *Gonzalez v. Crosby* decision.**

The United States Supreme Court's decision in *Gonzalez v. Crosby* (2005), 545 U.S. 524, 125 S.Ct. 2641, further supports the position that this Court should use the exclusivity provision in R.C. 2953.21(J) to bar the usage of Civ.R. 60(B) to collaterally challenge the validity of a conviction and/or a sentence in a criminal case. In *Gonzalez*, the Court addressed the issue of whether, in a habeas case, a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(B) is subject to the additional restrictions that apply to "second or successive" habeas corpus provisions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 526. In so doing, the Court held that a Civ.R. 60(B) motion filed by a habeas petitioner will be treated successive habeas petition if it (1) present's one or more "claims" as used in §2244(b); and (2) those claims assert a "federal basis for relief from a state court's judgment of conviction." *Id.* at 530-531. The reasoning behind this holding was that:

A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a "habeas application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with" the statute. 28 U.S.C. § 2254 Rule 11. Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction - even claims couched in the language of a true 60(b) motion - circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. § 2244(b)(2).

Id. at 531.

Although the *Gonzalez* decision deals with federal habeas corpus law, this Court should still find it quite persuasive because there are a significant number of similarities between Ohio's limitations on post-conviction relief and the federal limitations on habeas corpus relief. If we were to apply the *Gonzalez* reasoning to the case at bar, Appellant's Civ.R. 60(B) motion would clearly be viewed as a petition for post-conviction relief. Appellant specifically attacks the validity of his conviction on constitutional grounds, and allowing to do so under Civ.R. 60(B) would be enabling him to circumvent provisions set forth in R.C. 2953.21 and 2953.23 regarding post-conviction collateral challenges. And this type of circumvention is exactly what the United States Supreme Court wanted to abolish in *Gonzalez*, and exactly what this Honorable Court should abolish in this case.

**II. THIS COURT SHOULD ADOPT THE PROCEDURE SET FORTH IN *CASTRO V. UNITES STATES*, BUT ONLY FOR CASES WHERE THE TRIAL COURT SUA SPONTE RECASTS/RECHARACTERIZES A *PRO SE* LITIGANT'S MOTION.**

In his brief Appellant asks this court to adopt a certain procedure that is specified in the United States Supreme Court's decision in *Castro v. United States* (2003), 540 U.S. 375, 124 S.Ct. 786. In *Castro*, the Court held "that a federal district court cannot *sua sponte* recharacterize a *pro*

*se* litigant's motion as a first §2255 motion unless it informs the litigant of the consequences of the recharacterization, thereby giving the litigant the opportunity to contest the recharacterization, or to withdraw or amend the motion." *Pliler v. Ford* (2004), 542 U.S. 225, 233, 124 S.Ct. 2441 citing *Castro*, 540 U.S. at 377. More specifically, *Castro* "dealt with a District Court, of its own volition, taking away a petitioner's desired route - namely, a Federal Rule of Criminal Procedure 33 motion - and transforming it, against his will, into a §2255 motion." *Id.* citing *Castro*, 540 U.S. at 386. As a result of the District Court's recharacterization in *Castro*, the United States Supreme Court, through its supervisory powers over the federal judiciary, created a new practice for all the District Courts in the country. The Court specifically held that:

In light of these consequences, we hold the court cannot so recharacterize a *pro se* litigant's motion as the litigant's first §2255 motion *unless* the court [1.] informs the litigant of its intent to recharacterize, [2.] warns the litigant that the recharacterization will subject subsequent §2255 motions to the law's "second or successive" restrictions, and [3.] provides the litigant with an opportunity to withdraw, or to amend, the filing. Where these things are not done, a recharacterized motion will not count as a §2255 motion for purposes of applying §2255's "second or successive" provision.

*Castro*, 540 U.S. at 377. The State certainly supports the adoption of the above-cited federal procedure in Ohio, however, only in cases where the trial court, sua sponte determines that it is going to recast/recharacterize a *pro se* litigant's motion.

As the record reveals, *Castro* is inapplicable to the case at bar because the trial court did not sua sponte recast Appellant's motion. Appellant filed his Civ.R. 60(B) motion on March 16, 2005. The State then responded to Appellant's motion by filing a Motion to Dismiss Defendant's Motion for Post-Judgment Relief on April 8, 2005. In the Motion to Dismiss, the State asserted (1) that Appellant's Motion for Relief from Judgment Pursuant to Civ.R. 60(B) is, in fact, a R.C. 2953.21

motion for post-conviction relief; and (2) that Appellant's claims in his motion were barred by the doctrine of res judicata. Appellant had an opportunity to file a response to the State's Motion to Dismiss, but he never did. Nevertheless, in its June 14, 2005 order, the trial granted the State's Motion to Dismiss after also finding that Appellant's Civ.R. 60(B) motion was truly a petition for post-conviction relief under R.C. 2953.21. What makes this case separate and distinct from *Castro* is that the trial court here only recast Appellant's motion after it had considered the arguments set forth in the State's Motion to Dismiss. Unlike in *Castro*, in no way did the trial court act out of its own volition - it was moved to act in one way or another by the State.

**III. APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS NOT, IN ANY WAY, VIOLATED WHEN THE TRIAL COURT RECAST HIS CIV.R. 60(B) MOTION AS A PETITION FOR POST-CONVICTION RELIEF.**

Appellant also claims that the trial court violated his right to due process of law when it recast his Motion for Relief from Judgment Pursuant to Civ.R. 60(B) as a R.C. 2953.21 petition for post-conviction relief. As will be explained below, Appellant's claim is without merit.

As detailed above, the State filed a Motion to Dismiss approximately three weeks after Appellant filed his Civ.R. 60(B) motion. And in that Motion to Dismiss Appellant was put on clear notice that the State wanted to have his Civ.R. 60(B) motion treated as a time-barred petition for post-conviction relief. Moreover, after Appellant was put on notice that the State had moved the trial court to recast his motion, he had a definitive opportunity to be heard on this exact issue. Nothing prevented Appellant from filing a response to the State's Motion to Dismiss and requesting an oral hearing. Thus, in no way was Appellant denied due process of law.

Appellant further takes issue with the fact that the trial court's recasting deprived him of any opportunity to have his claims heard on the merits. The State submits that the only reason Appellant's claims were not heard by the trial court on the merits is because the law did not allow them to be. As discussed in Section I above, Appellant filed a Motion for Relief from Judgment under a rule which the trial court could not consider - Civ.R. 60(B). The reason the trial court could not consider Appellant's motion under this rule is because Crim.R. 57(B) only allows a trial court to resort to the civil rules in a criminal case if no applicable rule of criminal procedure exists. And here, clearly there was a criminal rule of procedure in existence which Appellant could have used to address his claims, namely, Crim.R. 35.

The trial court was then left with a motion which was filed under a rule that it could not consider. So what did the trial court do next? It did exactly what this Court did in *Reynolds*. It looked at the remaining title of the motion, and reviewed the motion's contents. And as a result of this review, and in light of the State's Motion to Dismiss, the trial court determined that Appellant's motion would be best considered as a R.C. 2953.21 petition for post-conviction relief.

Now after the trial court recast Appellant's motion as a petition for post-conviction relief, it had to next determine if it was timely filed under R.C. 2953.21(A)(2), or if it was untimely filed, if it could satisfy the requirements set forth in R.C. 2953.23. After considering these two statutes, the trial court properly ruled that Appellant could not satisfy either of them. As a result of this ruling, the trial court could not have heard Appellant's claims on the merits because they were not properly before the court.

Nevertheless, Appellant suggests that the trial court had the choice of confronting the merits of his claims and ruling on his motion under Civ.R. 60(B) standards. But as highlighted above, this is simply not true. Appellant paints a picture of a trial court that did not want to treat him fairly, and did everything in its power to dismiss his motion without considering the assertions contained within. This is also not true. Even the United States Supreme Court in *Castro* recognized that recasting/recharacterizing pro se motions is sometimes necessary in order “to create a better correspondence between the substance of a *pro se* motion’s claim and its underlying legal basis.” 540 U.S. at 381-382. And it is for this reason that the trial court chose to recast Appellant’s Civ.R. 60(B) motion as a petition for post-conviction relief in this case.

CONCLUSION

For the reasons discussed above, Appellant respectfully requests that this honorable Court adopt the Appellee State of Ohio's Proposition of Law and affirm the decision of the trial court.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

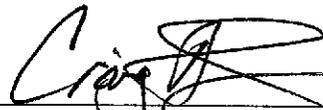
By: 

Craig A. Swenson (0078409)  
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**PROOF OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Douglas R. Cole, Esquire, Jones Day, P.O. Box 165017, Columbus, OH 43216-5017, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, David Bodiker, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, on this 6<sup>TH</sup> day of March, 2007.



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Craig A. Swenson (0078409)

Assistant Prosecuting Attorney

CAS/klb

## APPENDIX

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(Cite as: Not Reported in N.E.2d)

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Horst v. First Nat. Bank in Massillon Ohio App., 1990. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark County.

Samuel HORST, Plaintiff-Appellee,

v.

FIRST NATIONAL BANK IN MASSILLON, et al., Defendants-Appellants.

No. CA-8057.

June 25, 1990.

Civil Appeal from Common Pleas Court, Case No. 136025.

Ralph Lehman, Logee, Hostetler & Stutzman, Kidron, for plaintiff-appellee.  
Lemuel R. Green, Edgar M. Moore, Jr., Canton, for defendants-appellants.

Before MILLIGAN, P.J., and HOFFMAN and GWIN, JJ.

*OPINION*

MILLIGAN, Presiding Judge.

WILL-ANTE-MORTEM PROCEEDINGS, R.C. 2107.081-CIV.R. 60(B) RELIEF

\*1 On March 10, 1989, Samuel Horst, an 87 year old childless widower with a substantial estate, executed a pour-over will and a separate trust, favoring a Catholic charity (one-half) and dividing the balance among twelve adult nieces and nephews of whom six received substantially more than the balance.

\*1 On that date, the will was filed with the Stark

County Probate Court. R.C. 2107.07, .08. Contemporaneously, a petition for judgment declaring the will to be valid was filed.

\*1 (A) A person who executes a will allegedly in conformity with the laws of this state may petition the probate court ... for a judgment declaring the validity of the will.

\*1 The petition may be filed in the form determined by the probate court of the county in which it is filed.

\*1 R.C. 2107.081(A).

\*1 The necessary parties, including the appellants, were served with process and a copy of the testator's will, as required by the probate court. R.C. 2107.082.

\*1 A hearing was held on May 31, 1989, at which the petitioner-testator and others testified. None of those persons served with notice of the hearing, including appellants, appeared at the hearing.

\*1 On June 1, 1989, the court, *inter alia*, found:

\*1 3. Plaintiff's [Samuel Horst] last will and testament is properly executed pursuant to R.C. 2107.03 or the applicable Ohio law in effect at the time of execution; and

\*1 4. At the time of execution, plaintiff was of the requisite testamentary capacity and freedom from undue influence pursuant to R.C. 2107.02 and 2107.084.

\*1 The court found the last will and testament valid and ordered it sealed pursuant to R.C. 2107.084(B).

\*1 On June 26, 1989, testator died, and his will was admitted to probate on July 31, 1989.

\*1 On October 12, 1989, four of the heirs filed a

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motion to vacate and set aside the June 1, 1989 judgment.

\*1 On December 1, 1989, the Stark County Probate Court overruled the motion for relief from judgment. The movants appeal, assigning four errors:

\*1 I. WHERE THE TESTATOR DURING HIS LIFETIME IN A HEARING CONDUCTED PURSUANT TO OHIO REVISED CODE SECTION 2107.081 REVEALS THAT HE IS SUBSTANTIALLY DELUDED OR MISINFORMED REGARDING THE EXTENT OF HIS ESTATE; AND OTHERWISE REVEALS HIS INCOMPETENCY TO EXECUTE A VALID WILL, THE PROBATE COURT FOLLOWING HIS DEATH WAS IN ERROR IN NOT GRANTING THE TESTATOR'S HEIRS' MOTION FOR RELIEF UNDER RULE 60(B) VACATING ITS JUDGMENT DECLARING THE WILL VALID.

\*1 II. AT A HEARING TO DECLARE THE VALIDITY OF A WILL PURSUANT TO OHIO REVISED CODE SECTION 2107.081 THERE MUST BE AFFIRMATIVE EVIDENCE OF FREEDOM FROM UNDUE INFLUENCE TO SUPPORT THE COURT'S ORDER DECLARING THE VALIDITY OF THE WILL. THE COURT ERRED IN THIS CASE BY FINDING THE WILL TO BE VALID WITHOUT EVIDENCE OF FREEDOM FROM UNDUE INFLUENCE ON THE PART OF THE TESTATOR.

\*1 III. WHEN AN ACTION IS BROUGHT TO DECLARE THE VALIDITY OF A WILL PURSUANT TO OHIO REVISED CODE SECTION 2107.081 DURING THE LIFETIME OF A TESTATOR, ALL DOCUMENTS DISPOSING OF THE TESTATOR'S ESTATE MUST ACCOMPANY THE DOCUMENTS SERVED UPON THE HEIRS AND NEXT OF KIN.

\*2 IV. WHERE THERE WAS EVIDENCE OF A MERITORIOUS CLAIM THAT THE TESTATOR LACKED TESTAMENTARY CAPACITY, THE COURT IS REQUIRED TO GRANT A RULE

60(B) MOTION, VACATE ITS PREVIOUS JUDGMENT AND PERMIT THE OBJECTING PARTIES TO LITIGATE FULLY THE ISSUE OF THE TESTATOR'S COMPETENCE. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANTS' RULE 60(B) MOTION.

\*2 We conclude that the Stark County Probate Court acted neither contrary to law nor by abuse of discretion in overruling the request for relief from judgment. *Beacon Journal Publishing Co. v. Stow* (1986), 25 Ohio St.3d 347, 496 N.E. 2d 908.

#### CIV.RULE 60(B) RELIEF FROM ANTE-MORTEM JUDGMENT

\*2 Appellee argues that rights established in an ante-mortem proceeding are binding upon the parties and may not be challenged after the death of the testator-petitioner, pursuant to Civ.R. 60(B).

\*2 Legislative authorization of ante-mortem probate proceedings has several commendable facets. A testator, who may testify, has the opportunity to personally defend challenges to his testamentary discretion. Obviously that opportunity is lost in death. The proceedings also enhance the quality of relevant corroborating evidence inasmuch as it is necessarily comparatively fresh. Issues of undue influence and captation are early resolved, particularly when the testator is available for testimony.

\*2 Since relevant corroborating evidence in testamentary competency litigation concerns only that period of time immediately surrounding a will's execution, the acceleration of its contestation to a point prior to the testator's death can only serve to upgrade its quality and ease its acquisition.

\*2 "The Ante-mortem Alternative to Probate Legislation in Ohio," 9 Capital U.L.Rev. 717 (1980).

\*2 Finally, it is contemplated that such procedure eliminates spurious challenges by:

\*2 Requir[ing] all challengers to personally

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confront the testator with their allegations concerning his mental capacity. Even if this distasteful requirement is meant, the spurious challenger must remain to confront a potentially overwhelming burden of proof.

\*2 *Supra*, 9 Capital U.L.Rev. 721.

\*2 Another commentator points out two additional values: insulation of the probate attorney from malpractice, and early identification of drafting problems (such as the rule against perpetuities). 32 Case Western Reserve L.Rev. 825.

\*2 Clearly, the legislature intended to extend to an ante-mortem judgment a high level of integrity.

\*2 Any such judgment declaring a will valid is binding in this state as to the validity of the will on all facts found, unless provided otherwise in this section, section 2107.33, or division (B) of section 2107.71 of the Revised Code, and, if the will remains valid, shall give the will full legal effect as the instrument of disposition of the testator's estate, unless the will has been modified or revoked according to law.

\*2 R.C. 2107.084(A).

\*2 (E) A declaration of validity of a will, or of a revocation or modification of a will previously determined to be valid, given under division (C) of this section, is not subject to collateral attack, except by a person and in the manner specified in division (B) of section 2107.71 of the Revised Code, but is appealable subject to the terms of Chapter 2721. of the Revised Code.

\*3 R.C. 2107.084(E).

\*3 The direct remedies for an erroneous judgment are either timely appeal or motion for new trial, Civ.R. 59. The function of Civ.R. 60 is to provide a mechanism for a collateral attack upon the final judgment. Notwithstanding the provisions of Civ.R. 60, a collateral attack may be registered against a judgment that is *void*. See *Lincoln Tavern v. Snader* (1956), 165 Ohio St. 61, 133 N.W.2d 606, 59 O.O. 74.

\*3 A motion to vacate judgment pursuant to Civ.R. 60(B) is a collateral attack upon a judgment. It is an allegation that the judgment is voidable on account of fraud, mistake, excusable neglect or some other reason.

\*3 *Security Ins. v. Regional Transit Authority* (1982), 4 Ohio App.3d 24, 446 N.E.2d 220.

\*3 We conclude that a Civ.R. 60(B) proceeding that does not allege that the ante-mortem judgment is void, is prohibited by the specific provisions of R.C. 2107.084(E).<sup>FNI</sup>

\*3 Nothing in the motion for relief from judgment elevates the contest to one challenging the proceedings as *void*.

\*3 Upon the procedural posture of this case, we conclude that Civ.R. 60(B) relief is not a viable remedy for a party to an ante-mortem proceeding following the death of the petitioner-testator.

\*3 We conclude, therefore, that the trial court had no subject matter jurisdiction to entertain the motion for relief from judgment, and did not err in denying such relief.

\*3 Our rationale is consistent with the denial of Civ.R. 60(B) relief in forcible entry and detainer provisions:

\*3 One situation in which the Civil Rules would be clearly inapplicable is when the proceeding is established by a statute which also sets out specific procedures to be followed ... The Civil Rules would also be inapplicable if their application would frustrate the purpose of the proceeding ... Rule 60(B) should not apply to such cases when it disrupts the statutory purpose....

\*3 *Larson v. Umoh* (1988), 33 Ohio App.3d 14.

\*3 Further, we conclude that even if Civ.R. 60(B) relief is available in ante-mortem proceedings, following the death of the petitioner, appellant has failed to demonstrate entitlement pursuant to the tri-partite requirement of *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351

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N.E.2d 113.

I

\*3 The evidence fails to demonstrate a meritorious claim for relief.

\*3 Testimony at the ante-mortem hearing of the petitioner that he had "around \$34,000" when in fact there was over \$850,000 is unpersuasive of issues of delusion, misinformation, or testamentary competence. To the leading question, "it was more like six or seven hundred thousand dollars. Does that sound right to you, or what is your response to that," the decedent answered, "I would say that would be correct," and then proceeded to the qualify his answer again.

\*3 Nor does his testimony, mistaken, that Carl Bradford (a Wayne County lawyer) is a nephew demonstrative of what would be needed to demonstrate lack of testamentary capacity.

\*4 Also in explaining his disparate division among nieces and nephews, his answers that "others are closer home and they are helpful" which is, in some respects, inconsistent with geography, does not avail on the issue of testamentary capacity.

\*4 Finally, the "mistake" contemplated by Civ.R. 60(B)(1) is not a mistake by a witness in a previous hearing. Rather, what is contemplated here is a mistake of process by one who is prejudiced by the prior outcome. Accord, Fed.R.Civ.P. 60(b).

\*4 The first assignment of error is overruled.

II

\*4 There is no demonstration that the trial court failed, in his examination of the petitioner and in his assessment of the evidence to consider whether the testator was free of undue influence. A fundamental purpose of the ante-mortem procedure is, in the one hand, to procure a judicial determination of testamentary capacity and freedom from undue influence, by allowing interrogation of

the testator (a luxury never enjoyed in a will contest), and, on the other hand, to allow an opportunity to those who would be prejudiced by the testimonial dispositions to appear and confront the issue.

\*4 The second assignment of error is overruled.

III

\*4 Appellant claims favor of Civ.R. 10(D), providing that when a claim is founded on a "written instrument," a copy thereof must be attached to the pleading, or its omission explained.

\*4 Appellant claims that the failure to attach the *inter vivos* trust, which was the heart and soul of the estate plan, was an error fatal to the validity of the judgment.

\*4 We find no legal error in the failure to serve the copy of the trust, and find that the service of the copy of the will was substantial compliance with the responsibilities explicit in the civil rules requiring notice.

\*4 The third assignment of error is overruled.

IV

\*4 For the reasons above enumerated, we overrule the fourth assignment of error.

\*4 The judgment of the Stark County Probate Court is affirmed.

HOFFMAN and GWIN, JJ., concur.

#### JUDGMENT ENTRY

\*4 For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Probate Division, Stark County, Ohio, is affirmed.

FNI. R.C. 2107.71(B) specifically denies

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will contest subject matter jurisdiction to persons named in the ante-mortem proceedings, as here.

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(Cite as: 1992 WL 380578 (Ohio App. 2 Dist.))

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.

**STATE** of Ohio, Plaintiff-Appellant,

v.

Timothy **BILLHEIMER**, Defendant-Appellee.

No. 13281.

Dec. 3, 1992.

Mathias H. Heck, Jr., Pros. Atty., Carley J. Ingram, Asst. Pros. Atty., Dayton, for plaintiff-appellant.

Steven Michael Cox, Dayton, for defendant-appellee.

OPINION

GRADY, Judge.

\*1

(Cite as: 1992 WL 380578, \*1 (Ohio App. 2 Dist.))

This is an appeal by the State of Ohio from a final order of the trial court dismissing an indictment on the motion of the Defendant Timothy Billheimer.

Billheimer was charged by indictment with murder and involuntary manslaughter in the death of Kim Burkhart. He moved to dismiss, arguing that his earlier plea of guilty and conviction for felonious assault in the shooting of Ms. Burkhart, the act that allegedly resulted in her later death, created a double jeopardy bar to the later indictment. The State opposed the motion, relying on the authority of *State v. Thomas* (1980), 61 Ohio St.2d 254.

The Defendant's motion to dismiss was heard by the Honorable Carl D. Kessler. On July 9, 1990, Judge Kessler issued and filed a Final Judgment Entry of Dismissal that had been prepared by counsel for Defendant Billheimer. It provided:

This matter having come on for hearing on Defendant's motion to dismiss, and after consideration of the testimony and exhibits therein presented, Defendant's motion to dismiss is hereby SUSTAINED and this case DISMISSED WITH PREJUDICE.

On July 17, 1990, Judge Kessler issued and filed an Order Vacating Decision, which had been prepared by an assistant county prosecutor. It provides:

The Court hereby VACATES and holds for naught its decision in the within cause as the Court erroneously signed Final Judgment Entry of Dismissal, filed July 9, 1990, through inadvertence.

The July 17 Order was accompanied by a three page memorandum Decision in which Judge Kessler expressly adopted the arguments presented by the State concerning double jeopardy.

Judge Kessler died on October 19, 1990.

On June 7, 1991, Defendant Billheimer filed a second motion to dismiss, arguing that Judge Kessler had erred in issuing his order of July 17. The trial court and the parties concluded that the order of July 17 was void, though the precise reason for this view is not in the record. On that basis, the trial court ordered an evidentiary hearing to determine whether, in fact, Judge Kessler's first order, of July 9, 1990, had been issued inadvertently. The court imposed the burden of that showing on the State.

The test for inadvertence adopted by the court was that applicable to Civ.R. 60(B), which specifically mentions

mistake, inadvertence, or excusable neglect as grounds on which to vacate a final order. Though this was a criminal proceeding, the court followed that civil rule standard on the authority of Crim.R. 57(B), which permits a court to "look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists."

George Patricoff, the assistant prosecutor who prepared the July 17 order, testified that Judge Kessler instructed him to prepare it because the Judge discovered that he had inadvertently signed the prior order of July 9, which produced a result-dismissal of indictment-contrary to the Judge's intended disposition of the issue. Judge Richard Dodge also testified and discussed several conversations with Judge Kessler concerning the matter, in which Judge Kessler had indicated to Judge Dodge that he would find for the Defendant and dismiss the indictment on double jeopardy grounds.

\*2

(Cite as: 1992 WL 380578, \*2 (Ohio App. 2 Dist.))

The trial court found that the first order, of July 9, 1990, was not erroneously signed through inadvertence. Having found that State failed to meet its burden under Civ.R. 60(B), the court overruled the State's motion for relief from judgment.

The State of Ohio has appealed, arguing that the trial court erred in determining that Judge Kessler did not act inadvertently when he signed the order of July 9, dismissing the indictment with prejudice.

In order to reach its decision the trial court first found that the order of July 17 vacating the order of July 9 was void. We agree.

The July 17 entry was in the nature of an order *nunc pro tunc*, that is, an order made "now for then", to correct the record of the court. Such orders are within the inherent power of the court. Jacks v. Adamson (1897), 56 Ohio St. 397. The power to issue such orders, without notice or hearing to the parties affected, is now embodied in Crim.R. 36, which is similar to Civ.R. 60(A).

The sole function of an order *nunc pro tunc* is to correct a clerical error in the execution of a ministerial act. Helle v. Public Utilities Commission (1928), 118 Ohio St. 435. It is not available to correct an error in the judgment itself. Caprita v. Caprita (1945), 145 Ohio St. 5. A *nunc pro tunc* order is not available to make the record reflect orders the court should have made or intended to make but did not, or to modify its prior judgment entry. McKay v. McKay (1985), 24 Ohio App.3d 74. The power to enter such orders does not extend to correction of errors made in consequence of mistake, neglect, omission, or inadvertence. Brown v. L.A. Wells Construction Co. (1944), 143 Ohio St. 580. The existence of those grounds is a question of fact, which may be determined by the court only after notice to the parties whose rights are affected thereby and an opportunity for them to be heard concerning the matter in issue.

"Inadvertence" was the ground on which Judge Kessler issued his order of July 17, which expressly modified the prior entry of July 9, upon a finding that the court did not intend to make it. Therefore, though the facts were in the Judge's exclusive recollection and not easily susceptible to collateral attack, the power to issue an order *nunc pro tunc* was not available. Absent that, the parties had a right to notice and an opportunity to be heard, even though the prospect of persuading the Judge that he did not know his true mind might be slight. Because that course was not followed, the order of July 17 was void, as the trial court found.

We see no error in the course followed by the court, which was to adopt the requirements of Civ.R. 60(B) pursuant to Crim.R. 57(B), there being no procedure specifically provided in the Criminal Rules for resolution of the issue. Whether or not Judge Kessler had issued the order of July 9 erroneously through inadvertence was a question of fact.

Defendant's original motion to dismiss his indictment for the murder of Kim Burkhart was heard by Judge Kessler on March 30, 1990. At that hearing Defendant sought to prove that Burkhart was deceased when Defendant entered his plea to Felonious Assault for shooting her, creating a double jeopardy bar to the later indictment for Murder.

\*3

(Cite as: 1992 WL 380578, \*3 (Ohio App. 2 Dist.))

George Patricoff, the assistant county prosecutor who represented the State at the March 30 hearing, testified that Judge Kessler telephoned him after the hearing and stated that he intended to overrule Defendant Billheimer's double jeopardy motion to dismiss the second indictment. Mr. Patricoff also testified that he was surprised when he later received a copy of Judge Kessler's order of July 9, 1990, granting the motion and dismissing the indictment

with prejudice, and that he initially intended to appeal the decision. However, he subsequently spoke with Judge Kessler about it. In that conversation, according to Mr. Patricoff, Judge Kessler stated that his true intention was to overrule the motion, and that the Judge believed that his order had that result. Mr. Patricoff insisted otherwise, and Judge Kessler instructed him to prepare an order vacating the July 9 order and denying Defendant's motion. Mr. Patricoff did, and it was signed by Judge Kessler and filed on July 17, 1990. No appeal was taken from the July 9 order.

Judge Richard S. Dodge, of the Montgomery County Court of Common Pleas, testified that the Billheimer murder case had been assigned to him, but that for administrative reasons Billheimer's double jeopardy motion had been transferred for hearing and determination to Judge Kessler. Judge Dodge testified that he spoke with Judge Kessler on several occasions after the March 30 hearing, the last occasion being near or on the date of the July 9 order of dismissal. The following colloquy appears at pp. 37-38 of the transcript, with questions from counsel for the Defendant and answers by Judge Dodge:

Q. I would ask whether or not, in your understanding, from speaking to Judge Kessler, that his original intention after the hearing was to overrule the motion?

A. Yes. That's correct.

Q. I would ask you whether or not it is your understanding from your conversations with Judge Carl Kessler that he subsequently changed his mind and decided to grant the motion?

A. That's correct also. And it was based upon some technicality in the death certificate as I recall. I mean that is the extent of our conversation. It actually went into the merits.

Q. And, in fact, I'll ask you whether that conversation with him was not at-virtually contemporaneous with his signing of (the July 9 order).

A. My statement would be it's inconceivable (sic) it was the same day, because I was remembering I was acting upon a phone call from you, with you. I can remember talking with Carl in his office. I can remember very specifically Linda Howland being there-I'm sure she doesn't remember the conversation-that it was his intent to sign (the order) to dismiss with prejudice because it was double jeopardy.

Q. Did he sign it erroneously through inadvertence?

A. Not to my knowledge.

Judge Dodge also testified that when Judge Kessler told him that the motion would be sustained, " \* \* \* I probably called (Defendant's attorney) on the phone and said get an entry over here. The Judge is going to sustain the motion." (T. 44).

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(Cite as: 1992 WL 380578, \*4 (Ohio App. 2 Dist.))

After hearing the foregoing evidence, the trial court held that the State had failed to bear its burden of proof under Civ.R. 60(B), adding: "The Court finds that \* \* \* the judgment and entry dismissing the case was not signed by inadvertence or erroneously." (T. 45). On that basis the court left the July 9 order of dismissal undisturbed.

The State argues on appeal that the trial court erred in its finding. The State first argues that the July 9 order was defective for failure to comply with the requirement of Crim.R. 48(B) that an order dismissing an indictment shall state the findings of fact and the reasons for the dismissal. The State also argues that the holding was contrary to *State v. Thomas, supra*. Even if these arguments have merit, however, the State's failure to file a timely appeal from the July 9 order did not preserve those issues for appellate review.

The State's second and more basic argument is that the trial court erred in finding that the July 9 order was not signed erroneously through inadvertence. That is an argument going to the weight of the evidence. However, judgments supported by some competent, credible evidence going to all the essential elements of the issue decided will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Company v. Foley Construction Co., (1978), 54 Ohio St.2d 279*. The testimony elicited from Judge Dodge concerning Judge Kessler's statements to him is competent, credible evidence in support of the court's judgment that Judge Kessler did not sign the order of July 9 by inadvertence or erroneously. Therefore, we may not reverse.

For the foregoing reasons the assignment of error is overruled and the judgment of the trial court will be affirmed.

FAIN, P.J., and BROGAN, J., concur.

Copr. (C) West 2007 No Claim to Orig. U.S. Govt. Works Ohio App. 2 Dist., 1992.  
State v. Billheimer  
Not Reported in N.E.2d, 1992 WL 380578 (Ohio App. 2 Dist.)

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(Cite as: 1995 WL 502562 (Ohio App. 8 Dist.))

Not Reported in N.E.2d, 1995 WL 502562 (Ohio App. 8 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.  
**STATE** of Ohio, Plaintiff-appellee,  
 v.  
 Carlos **GARCIA**, Defendant-appellant.  
 67858.  
 Aug. 24, 1995.

Criminal appeal from Court of Common Pleas, No. CR-310, 350.

Stephanie Tubbs Jones, Cuyahoga County Prosecutor, Deborah Naiman, Asst., Cleveland, for plaintiff-appellee.

Donald J. O'Connor, Cleveland, for defendant-appellant.

#### JOURNAL ENTRY AND OPINION

PRYATEL, Judge: FN\*

FN\* SITTING BY ASSIGNMENT: August Pryatel, retired Judge of the Eighth Appellate District.

**\*1**

(Cite as: 1995 WL 502562, \*1 (Ohio App. 8 Dist.))

Carlos Garcia was found guilty after a jury trial of two counts of aggravated drug trafficking in violation of R.C. 2925.03 and one count of possession of criminal tools, including the gym bag and the cereal boxes wherein the heroin was found, in violation of R.C. 2923.24. He now appeals, raising two assignments of error for this court's review:

I. THE APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE COURT'S REFUSAL TO ORDER THE PROSECUTION TO REVEAL THE IDENTITY OF THE INFORMANT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION OF WITNESS[ES] AGAINST HIM.

For the reasons that follow, we find no error in the judgment below and affirm.

#### I.

The convictions stem from the transporting of 71.76 grams of heroin from New York to Cleveland, Ohio. The appellant was arrested and indicted along with three other individuals not parties to this appeal, co-defendants Yoraina Garcia, Emilio Rodriguez and Jose Gonzales. Defendant Gonzales pleaded guilty to reduced charges in exchange for which he testified against the appellant, Mr. Rodriguez and Ms. Garcia at their joint trial. In addition to the testimony of Mr. Gonzales, the State of Ohio presented the testimony of six Cleveland police officers in its case against the appellant; viz., Patrolman and Canine Handler Timothy Russell, Detective Charles Charney, Detective Andrew Charchenko, Detective Edward Prinz, Detective Greg Whitney and Detective Daniel Rood.

On April 14, 1994, a confidential informant advised Det. Rood of the Narcotics Unit that a large shipment of heroin was being transported to Cleveland from New York City via a Greyhound bus the following morning, April 15, 1994. The informant described the couriers as (1) an Hispanic male by the name of Carlos, (2) an older Hispanic male with short hair and (3) a third unidentified Hispanic male.

It was subsequently learned from Greyhound that there were two buses coming in from New York City the next

morning, one at 7:00 a.m. and the other at approximately 9:15 a.m. With this information, the police, together with the confidential informant, set up surveillance at the Greyhound bus station shortly before 7:00 a.m. on April 15, 1994. Det. Rood and the confidential informant were stationed in a van directly opposite the front doors to the Greyhound station. Following Det. Rood's instructions, the other officers were assigned to various locations in and around the Greyhound station.

At approximately 9:18 a.m., the appellant exited the Greyhound bus station, at which time the confidential informant identified him as "Carlos," one of the couriers. Det. Rood notified the rest of the surveillance team that the suspects had arrived. He gave a description of what the appellant was wearing to the other officers. A few minutes later, a second older Hispanic male, later identified as Jose Gonzales, exited the terminal. The confidential informant also identified Mr. Gonzales as one of the couriers. Det. Rood similarly passed this information on to the rest of the surveillance team.

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(Cite as: 1995 WL 502562, \*2 (Ohio App. 8 Dist.))

Mr. Gonzales was observed by police officers carrying a yellow and black bag into the terminal area. The appellant and Ms. Garcia were observed using a telephone in the terminal. Mr. Gonzales put the yellow and black bag by the wall by the telephone and went into the area between the double set of doors. At this time, Mr. Gonzales realized there were undercover police at the bus station. Mr. Gonzales returned to where the appellant and Ms. Garcia were standing and told them there were police on the scene. Mr. Gonzales then returned to where the bag was lying, picked it up and walked outside through the double set of doors and lit a cigarette. Mr. Gonzales quickly extinguished his cigarette and returned to the terminal.

About this time, a third Hispanic male in an older model Chrysler, later identified as Emilio Rodriguez, parked behind an undercover vehicle. Mr. Rodriguez exited the car and went into the Greyhound station, where he was observed talking with the appellant. The confidential informant also identified Mr. Rodriguez as being connected to this investigation. Det. Rood notified the other members of the surveillance team of Mr. Rodriguez's connection to the investigation. After a couple of minutes, Mr. Rodriguez returned to his vehicle and moved it to the front of the bus station. The appellant and Ms. Garcia then exited the bus station and entered the vehicle. As the vehicle pulled away, it was immediately stopped by the officers. No weapons or drugs were found on the appellant, Mr. Rodriguez or Ms. Garcia.

Mr. Gonzales was arrested inside the terminal area. The yellow and black travel bag containing the heroin was discovered inside the waiting area between two sets of doors. Mr. Gonzales was identified by the police as the person who carried the bag into the terminal area.

Through an interpreter, Jose Gonzales testified that prior to their arrest, he had known the appellant for approximately eight months. He was first introduced to the appellant in New York by the appellant's uncle, Alberto Pena. Mr. Pena would pay Mr. Gonzales \$50 and two packages of heroin to transport heroin to Cleveland from New York City. Mr. Gonzales testified that he had carried drugs to Cleveland for Mr. Pena approximately eight or nine times before the April 15, 1994 transport. On each of these occasions, including the April 15, 1994 transport, Mr. Pena or the appellant would give Mr. Gonzales a travel bag containing drugs which were already packaged for sale. The appellant and Mr. Gonzales would then travel to Cleveland together. Mr. Gonzales's role was solely to carry the bag containing the drugs. The appellant was responsible for making sure the drugs were delivered to the right people in Cleveland and for collecting and carrying the money from the drug sales. After all of the money was collected, the duo would then return to New York together. According to Mr. Gonzales, the appellant would not carry the bag containing the drugs because he was afraid of getting caught.

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(Cite as: 1995 WL 502562, \*3 (Ohio App. 8 Dist.))

With regard to the April 15, 1994 transport, Mr. Gonzales said Mr. Pena called him on April 14, 1994 and told him he had a package he needed him to bring to Cleveland for a "Mr. Able." Mr. Gonzales indicated that they had brought drugs to Cleveland for Mr. Able several other times. Mr. Pena also told Mr. Gonzales that the appellant would accompany him to Cleveland. Mr. Gonzales went to Mr. Pena's apartment, where he was given the yellow and black bag to take to Cleveland. Mr. Gonzales, the appellant and Yoraina Garcia then took the midnight bus to Cleveland, where they were arrested upon arrival.

II.

A-11

In his first assignment of error, the appellant asserts the jury's findings that he possessed and transported heroin were against the manifest weight of the evidence. The appellant argues that there was no competent, credible evidence from which it could be inferred that he exercised dominion or control over the heroin or that he played a role in transporting the heroin to Cleveland. More specifically, the appellant argues that the testimony of his co-defendant, Mr. Gonzales, was not worthy of belief because Mr. Gonzales had a personal interest at stake; *i.e.*, his plea bargain.

In *State v. Martin* (1983), 20 Ohio App.3d 172, the court aptly set forth the test to be used by an appellate court when reviewing a claim that a conviction is against the manifest weight of the evidence. The *Martin* court stated as follows:

\* \* \* [t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. \* \* \*  
\* See, *Tibbs v. Florida* (1982), 4547 U.S. 31, 38-42.

See, also, *State v. Thomas* (1982), 70 Ohio St.2d 79, 80 ("It is emphasized that an appellate court may not reverse the judgment of conviction unless reasonable minds could not fail to find reasonable doubt of the defendant's guilt. It is fundamental that the weight to be given the evidence and credibility of the witnesses are primarily for the trier of facts.")

In *State v. Zahn* (Oct. 17, 1991), Cuyahoga App. No. 59121, unreported, this court held that where sufficient credible evidence exists for the trier of fact to conclude that a defendant is guilty, even if such evidence is based solely on the testimony of a co-defendant, the guilty verdict must be affirmed.

After a review of the evidence adduced at trial, we find the prosecution presented substantial, competent and credible evidence upon which the trier of fact could have reasonably concluded that the appellant had constructive possession,<sup>FN1</sup> *i.e.* dominion and control over the heroin, and further that the appellant knowingly prepared for shipment, shipped, transported, delivered, prepared for distribution or distributed heroin, knowing or having reasonable cause to believe the heroin was intended for sale or resale.

FN1. A person has constructive possession of a thing or substance when he is able to exercise dominion or control over it. *State v. Wolery* (1976), 46 Ohio St.2d 316, 332.

\*4

(Cite as: 1995 WL 502562, \*4 (Ohio App. 8 Dist.))

The jury was fully aware of the fact that Mr. Gonzales was allowed to plead guilty to lesser offenses in exchange for his testimony against the appellant. Nevertheless, the jury chose to believe Mr. Gonzales's testimony that he carried the drugs to Cleveland because the appellant was afraid to carry them and that it was the appellant who (1) arranged for the delivery of the drugs in Cleveland and (2) collected and carried the money from the sales.

Moreover, there was no evidence presented conflicting with that of Mr. Gonzales from which this court could now conclude that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.

From all of the evidence presented, we conclude that a rational trier of fact could infer that the appellant was, in fact, the person controlling and directing the transportation of the heroin and that Mr. Gonzales was simply a "mule," a person paid to transport drugs from one location to another. Thus, we cannot find that the verdicts are against the manifest weight of the evidence.

The appellant's first assignment of error is overruled.

In his second assignment of error, the appellant asserts that the trial court erred by not granting his motion to reveal the identity of the confidential informant, thereby denying him of the right to confrontation as guaranteed by the Sixth Amendment to the United States Constitution. The appellant argues that his ability to confront and cross-examine the informant may have proved to be exculpatory in that it may have revealed he was entrapped.

In *State v. Williams* (1983), 4 Ohio St.3d 74, syllabus, the Ohio Supreme Court held that an accused is entitled to the disclosure of the identity of a confidential informant when " \* \* \* the testimony of the informant is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a

defense to criminal charges." (Emphasis added.) The burden of establishing the need for disclosure falls upon the defendant. *State v. Parsons* (1989), 64 Ohio App.3d 63, 69. Something more than speculation about the possible usefulness of an informant's testimony is required. The mere allegation of entrapment is not, alone, sufficient to justify allowing the appellant access to the identity of the informant. *State v. Butler* (1984), 9 Ohio St.3d 156. A defendant must present some evidence of entrapment before the defense is properly raised, *State v. Doran* (1983), 5 Ohio St.3d 187. Until the defense is properly raised, a court need not order the state to disclose the identity of the informant. *State v. Butler, supra*; *State v. Watson* (Dec. 29, 1993), Greene App. No. 92CA13, unreported; *State v. Ray, supra*.

Additionally, the trial court's decision whether disclosure of an informant's identity is necessary is not reversible absent an abuse of discretion. *State v. Feltner* (1993), 87 Ohio App.3d 279; *State v. Ray* (Jan. 27, 1994), Cuyahoga App. No. 63966, unreported. An abuse of discretion means more than an error of law or judgment; it implies an attitude upon the part of the trial court that is arbitrary, unreasonable or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 1511, 157.

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(Cite as: 1995 WL 502562, \*5 (Ohio App. 8 Dist.))

In this case, we find no abuse of discretion by the trial court in denying the appellant's motion to reveal the identity of the confidential informant. The appellant presented no evidence at the hearing on his motion for disclosure of the identity of the informant sufficient to raise the defense of entrapment, and, thus, we decline to hold that the trial court improperly refused to grant the appellant's motion for disclosure.

In addition, it is apparent to this court that the confidential informant's identity was disclosed at trial during the state's case. During defense counsel's cross-examination of Mr. Gonzales, Mr. Gonzales testified that Mr. Abel was with the police at the time the defendants were apprehended. Also during his cross-examination, Det. Charney indicated that Mr. Abel was the informant. As the informant's identity came out at trial, appellant could have subpoenaed the informant if he chose to do so.

For the foregoing reasons, the appellant's second assignment of error is overruled.

Judgment affirmed.

PORTER, P.J., and KARPINSKI, J., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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State v. Garcia

Not Reported in N.E.2d, 1995 WL 502562 (Ohio App. 8 Dist.)

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----- (Cite as: 1991 WL 274317 (Ohio App. 12 Dist.)) -----

Not Reported in N.E.2d, 1991 WL 274317 (Ohio App. 12 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Warren County.

**STATE** of Ohio, Plaintiff-Appellee,

v.

Eugene **GROVES**, Defendant-Appellant.

No. CA91-02-014.

Dec. 23, 1991.

Timothy A. Oliver, Warren County Prosecuting Attorney, John Lieser, Lebanon, for plaintiff-appellee.  
Kaufman & Florence, Mark Florence, Lebanon, for defendant-appellant.

*OPINION*

YOUNG, Judge.

\*1

----- (Cite as: 1991 WL 274317, \*1 (Ohio App. 12 Dist.)) -----

On June 29, 1988, defendant-appellant, Eugene Groves, was indicted by the Warren County Grand Jury for the attempted murder of Richard Flood in violation of R.C. 2923.02(A)(1) and 2903.02(A)(1). When indicted, appellant was an inmate at an Ohio correctional institution. Appellant was found guilty by a jury of attempted murder, and was sentenced to an indeterminate period of incarceration for not less than thirteen years but not more than twenty-five years.

On May 15, 1989, appellant filed a motion for a new trial. In an entry dated January 18, 1990, the Warren County Court of Common Pleas granted appellant a new trial. The trial court ordered the new trial after it heard the testimony of two newly discovered witnesses at an August 30, 1989 hearing. The testimony bolstered appellant's claim of self-defense. The two new witnesses, Curtis Jordan and Raymond Brown, were inmates at the Lucasville, Ohio, prison. Even though the trial court considered the inmates' credibility "suspect," the court noted that the newly discovered testimony "seem[ed] to suggest that [appellant did] possess evidence which the jury in fairness must hear and consider."

On February 20, 1990, the state filed a motion for leave to appeal the trial court's decision to grant appellant a new trial and a memorandum in support. This court, however, denied the state's motion for leave to appeal. Subsequently, the state filed a motion to set aside the trial court's order for a new trial in the Warren County Court of Common Pleas on May 9, 1990. The state's motion to set aside the new trial order was filed because inmate Jordan apparently recanted the testimony he gave at the August 30, 1989 new trial hearing. During the hearing on the state's motion to set aside the order for a new trial, Jordan testified that he did not provide a knife to the victim. Jordan further testified that appellant asked him to lie about giving a knife to the victim, and that appellant coached him on what to say at the August 30, 1989 hearing.

On January 15, 1991, the trial court entered a decision vacating its new trial order. The court noted that it was misled by Jordan's previous testimony on August 30, 1989. Furthermore, the court stated that inmate Brown's testimony at the hearing on the motion for new trial did not provide a basis for granting appellant a new trial.

Appellant has filed this timely appeal and assigns as error the following:

Assignment of Error No. 1:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN PROCEEDING ON THE STATE OF OHIO'S MOTION TO SET ASIDE ORDER FOR NEW TRIAL. [ sic ]

## Assignment of Error No. 2:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN PERMITTING THE STATE OF OHIO TO LITIGATE AN ISSUE THAT THIS APPELLATE COURT HAD DETERMINED BY DENYING THE STATE OF OHIO'S MOTION FOR LEAVE TO APPEAL THE TRIAL COURT'S GRANTING OF A NEW TRIAL.

## Assignment of Error No. 3:

A TRIAL COURT COMMITS ERROR TO THE PREJUDICE OF A PERSON CONVICTED OF ATTEMPTED MURDER IN VIOLATION OF SECTIONS 2923.02(A)(1) AND 2903.02(A)(1), OHIO REVISED CODE, BY SENTENCING SUCH PERSON TO A TERM OF NOT LESS THAN THIRTEEN YEARS NOR MORE THAN TWENTY-FIVE YEARS.

\*2

(Cite as: 1991 WL 274317, \*2 (Ohio App. 12 Dist.))

Appellant asserts in his first assignment of error that the trial court did not have jurisdiction to set aside its order granting him a new trial. We do not agree.

The state argues that appellant perpetrated a fraud upon the court below. We find that there is evidence in the record to support this contention. Since there is evidence showing that appellant did in fact commit a fraud upon the court below, the state submits that the trial court was permitted to vacate its order granting a new trial. We find the state's argument to be persuasive because, but for the fraud perpetrated by appellant and his cohort, the new trial order would not have been granted.

As both parties concede in their briefs, the Ohio Rules of Criminal Procedure do not specifically authorize a trial court to vacate its order granting a new trial, even if a court's order is the result of a party's fraudulent action. However, Crim.R. 57(B) does provide that " \* \* \* if no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." In the present action, the applicable Rule of Civil Procedure is found under Civ.R. 60(B)(3), which states, in pertinent part, that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from final judgment, order or proceeding for the following reasons: \* \* \* (3) fraud \* \* \*, misrepresentation or other misconduct of an adverse party \* \* \*." Thus, it appears that Crim.R. 57 and Civ.R. 60(B)(3) do provide a trial court with the power to vacate its order for a new trial if such order was based on fraud.

Having conducted an exhaustive review of the case law on the question of whether or not a trial court may vacate a final order in a criminal proceeding, we have found only one decision that falls squarely within the present factual situation. In City of Montgomery v. George S. Leach (Apr. 10, 1985), Hamilton App. No. C-840467, unreported, the defendant was arrested and charged with the offense of driving while intoxicated, in violation of the city of Montgomery Traffic Rules. After entering a plea of not guilty in the Montgomery Mayor's Court, the cause against the defendant was transferred to the Hamilton County Municipal Court for trial. The defendant was subsequently found guilty of the DWI charge and sentenced to serve three days at the Drake Hospital in Cincinnati.

A problem arose, however, as to who bore the financial responsibility for the defendant's incarceration at Drake Hospital. Since the city of Montgomery had no contract with Drake Hospital to pay for the defendant's incarceration, Drake Hospital refused to admit him. Therefore, the defendant was brought before the trial court again, in order to determine what type of sentence could be imposed upon him. The trial court decided to grant the defendant's motion for a new trial on the condition that once the cause against him was remanded to the Montgomery Mayor's Court, he would plead no-contest. When the defendant returned to the Montgomery Mayor's Court, he refused to enter a plea of no-contest, and instead pleaded not guilty to the DWI charge. The city of Montgomery subsequently moved the trial court to set aside its order granting the defendant a new trial on the ground that the defendant failed to comply with the condition attached to the order granting a new trial. The court granted the city of Montgomery's motion and re-imposed its original sentence upon the defendant.

\*3

(Cite as: 1991 WL 274317, \*3 (Ohio App. 12 Dist.))

In affirming the trial court's decision, the First District Court of Appeals held that:

\* \* \* we take guidance from the longstanding deep-rooted rule of law that a court has a power to vacate its judgments which have been fraudulently induced. \* \* \* When a fraud is perpetrated upon the court, the impartial adjudication of cases is resultantly obviated. We find, particularly in this case, that concern for impartiality in the

administration of justice supersedes concern for maintenance of finality of the court's order that a new trial be conducted. The court below should be permitted to rescind its order which, but for the misrepresentations of defendant Leach, never would have been granted.

*Id.* at 5. Further, the court, citing to Civ.R. 60(B)(3), stated that it found that particular rule to be " \* \* \* strongly indicative of an abhorrence for the finality of a trial court ruling predicated on a fraud." *Id.* at 6.

When considering the power of a trial court to vacate its judgment on the ground of fraud, the Ohio Supreme Court has stated that Ohio courts possess the

\* \* \* inherent authority and the power to vacate \* \* \* judgments for fraud. Independent of and without the sanction of legislative enactment, a court of general jurisdiction such as the Common Pleas Courts of Ohio has the inherent right and power to protect itself against the perpetration of a fraud. Without such right and power the courts would become impotent as the judicial branch of government. A corollary to the possession of such right and power is the duty to exercise such power. The procurement of a judgment by fraud is a fraud upon the court, as well as upon the opposing litigant. A judgment so procured can be vacated by exercise of the inherent power of the court.

*Jelm v. Jelm* (1951), 155 Ohio St. 226, 240-241. See, also, *Horman v. Veyerka* (1987), 30 Ohio St.3d 41 (it has long been settled that a trial court has inherent discretion with respect to its orders, and as such, its orders may be set aside at the court's discretion); *Armstrong v. Feldhaus* (1950), 87 Ohio App. 75 (upon motion to set aside an order granting a new trial, the trial court has the power to correct its journal, and in the absence of an abuse of discretion, such action will not be disturbed by a reviewing court).

Having reviewed the statutory and case law in Ohio, we are of the opinion that a trial judge, who has the discretion to determine whether or not a new trial should be granted, should be free to change the ruling if upon further and more mature deliberation, the judge concludes that justice so requires. See *United States v. Smith* (1946), 156 F.2d 642. Thus, we hold that where a motion for a new criminal trial is granted by a common pleas court at the request of the defendant, and it is granted solely in reliance on a defendant's perpetration of a fraud upon the trial court, the court, prior to commencement of a new trial, can revoke its order and re-impose its original sentence upon the defendant.

\*4

(Cite as: 1991 WL 274317, \*4 (Ohio App. 12 Dist.))

Accordingly, appellant's first assignment of error is overruled.

In his second assignment of error, appellant contends that once this court denied the state's motion for leave to appeal, the doctrine of the "law of the case" prohibited the trial court from vacating its original new trial order. Initially, we note that this doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Gohman v. St. Bernard* (1924), 111 Ohio St. 726, 730, rev'd. on other grounds *New York Life Ins. Co. v. Hosbrook* (1935), 130 Ohio St. 101. The purpose of this doctrine is to ensure that, upon remand, the mandate of the appellate court is followed by the trial court. *Stemen v. Shibley* (1982), 11 Ohio App.3d 263.

Appellant, in support of his proposition that the "law of the case" precludes the trial court from vacating its order for a new trial, directs us to the syllabus in *Nolan v. Nolan* (1984), 11 Ohio St.3d1. The Ohio Supreme Court held in *Nolan* that "[a]bsent extraordinary circumstances \* \* \*, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Id.* at syllabus.

Appellant's general assertion that the trial court cannot disregard the mandate of this court, namely, our denial of the state's motion for leave to appeal, is correct. However, appellant's proposition is not appropriate under the scenario presented. We agree with the state's contention that the doctrine of the "law of the case" does not bar the state's motion to set aside the new trial order because that particular motion and this court's denial of the state's motion for leave to appeal are based upon different issues.

In *Nolan*, the Ohio Supreme Court held that "where \* \* \* a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law." *Id.* at 3. Unlike *Nolan*, the trial court here was not confronted with the same issues of fact and law. Specifically, the issue in the state's motion for leave to appeal was appellant's alleged violation of time limits for filing a motion for a new trial. The issue in the state's motion to set aside the order for a new trial, however, concerned newly discovered evidence that appellant had perpetrated a fraud upon the trial court. As a result of

appellant's fraudulent action, the trial court had awarded him a new trial.

Clearly, different issues and facts were involved in the two motions filed by the state. Thus, we conclude that the state's motion for leave to appeal, which dealt with time limits, did not preclude the trial court from vacating its new trial order. Therefore, we are convinced that the "law of the case" doctrine does not prohibit the trial court from considering the state's motion to set aside its own order for a new trial. Appellant's second assignment of error is therefore overruled.

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(Cite as: 1991 WL 274317, \*5 (Ohio App. 12 Dist.))

In his final assignment of error, appellant submits that his sentence was contrary to law. We agree. Appellant was convicted of attempted murder, a first degree felony, in violation of R.C. 2923.02(A)(1) and R.C. 2903.02(A)(1). Consequently, he was sentenced to an indeterminate period of not less than thirteen years but not more than twenty-five years. Under the sentencing guidelines for Ohio, an individual convicted of a felony of the first degree shall receive a minimum term of four, five, six, or seven years, and a maximum term of twenty-five years. R.C. 2929.11(B)(4). The state concedes that appellant was entitled to the applicable sentencing provisions found in R.C. 2929.11(B)(4).

Appellant's third assignment of error is therefore sustained. We accordingly remand this matter to the trial court for further proceedings consistent with this opinion.

WALSH, J., concurs.

KOEHLER, P.J., concurs in part and dissents in part.

KOEHLER, Presiding Judge, concurring in part and dissenting in part.

I concur in the majority's remand of this cause for proper sentencing; however, I must dissent from its denial of appellant's quest for a new trial.

Appellant's motion for new trial was supported by testimony of two fellow inmates which, according to the trial court, "seems to suggest that [appellant] does possess evidence which the jury in fairness must hear and consider." Although the trial court considered such newly discovered evidence suspect, it exercised its discretion and granted appellant a new trial. At a new trial, the suspect testimony could be presented to a jury, and the credibility of the witnesses would properly be determined by the ultimate factfinder.

The state, being dissatisfied with the trial court's decision and unwilling to retry the case, sought relief through the appellate process. Having exhausted, or at least being not confident of success in its effort to establish the granting of a new trial as appealable in this instance, the state ingeniously opted to request reconsideration of the trial court's earlier decision. The only basis for relief set forth in the request styled "motion to set aside order for new trial" was that Curtis Jordan, a fellow inmate of appellant, had recanted his earlier "suspect" testimony.

At hearing on the state's motion, the recanting witness testified. On this occasion, the trial court found the witness credible, made a determination of a fact material to appellant's defense of self-defense, and granted the state's motion to reconsider. The trial court denied the appellant an opportunity to have a jury decide the impact of Curtis Jordan's testimony.

I believe appellant's contentions have merit. First, I would find that Crim.R. 33(D) mandates a new trial under these circumstances. Further, the Criminal Rules make no provision for a motion to set aside such order nor to reconsider its prior decision and order granting a new trial. Second, assuming the Civil Rules become applicable in this cause, there is no provision therein making the trial court's order granting a new trial subject to a motion for reconsideration. Even if the state is successful in transmuting such motion into a Civ.R. 60(B) motion to vacate a judgment, it must fail for its failure to meet the criteria set forth in the rule.

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(Cite as: 1991 WL 274317, \*6 (Ohio App. 12 Dist.))

Beyond my general disagreement with the majority on the procedural issues raised herein, a review of the minimal transcript of the recanting witness's testimony is enlightening. My review of the record indicates: (1) the recanting

witness did not recant his previous testimony concerning the material facts essential to appellant's defense of self-defense; (2) the record does not support the trial court's finding that appellant perpetrated a fraud upon the court; (3) the witness was under pressure from inmates, the state highway patrol, and the court to recant his prior testimony; (4) the trial court misunderstood the witness's testimony in that it was the victim's friends, not appellant's friends, who were threatening him, causing the witness to seek a transfer from Lucasville incarceration to a safe place of detention.

Assuming the state's motion was properly before the court, I believe the court below abused its discretion in its denial of appellant's right to a new trial. There was no substantial evidence before the trial court that the appellant was guilty of a fraud upon the court and there is therefore no basis for the majority's reliance upon a court's inherent powers to permit the trial court to usurp the jury's fact-finding function.

Copr. (C) West 2007 No Claim to Orig. U.S. Govt. Works Ohio App. 12 Dist.,1991.

State v. Groves

Not Reported in N.E.2d, 1991 WL 274317 (Ohio App. 12 Dist.)

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----- (Cite as: 1999 WL 1071980 (Ohio App. 5 Dist.)) -----

Not Reported in N.E.2d, 1999 WL 1071980 (Ohio App. 5 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark County.  
**STATE** of Ohio, Plaintiff-Appellee,

v.

Douglas E. **HADDIX**, Defendant-Appellant.

No. 1999CA00227.

Nov. 15, 1999.

Criminal Appeal from the Court of Common Pleas, Case No.1995CR00111.

Ronald Mark Caldwell, Assistant Prosecutor, Canton, Ohio, for Plaintiff-Appellee.

Douglas E. Haddix, Pro Se, Inmate No. 304-270, Leavittsburg, Ohio, for Defendant-Appellant.

WISE, P.J., and HOFFMAN and EDWARDS, JJ.

*OPINION*

WISE.

\*1

----- (Cite as: 1999 WL 1071980, \*1 (Ohio App. 5 Dist.)) -----

Appellant Douglas Haddix appeals the decision of the Stark County Court of Common Pleas that denied his motion for relief from judgment pursuant to Civ.R. 60(B). The following facts give rise to this appeal.

In February 1995, the Stark County Grand Jury indicted appellant with three counts of rape, one count of gross sexual imposition and one count of child endangering. The charges were the result of appellant sexually molesting Lita Webster between June 1, 1994, and June 11, 1995. Appellant moved into Lita's mother's residence and the sexual molestation occurred when appellant babysat the young girl.

This matter proceeded to trial on April 25, 1995. Following deliberations, the jury found appellant not guilty of one count of rape but guilty of the remaining charges contained in the indictment. After accepting the verdict, the trial court sentenced appellant to two concurrent indeterminate terms of incarceration of ten to twenty-five years on the rape convictions, a consecutive indeterminate term of five to twenty-five years on the felonious sexual penetration conviction and a consecutive determinate term of two years on the gross sexual imposition conviction.

Thereafter, appellant filed a notice of appeal to this court. On June 3, 1996, we affirmed appellant's convictions and sentences.<sup>FN1</sup> On February 24, 1997, appellant filed a petition for postconviction relief, pursuant to R.C. 2953.21, seeking to have his criminal sentence vacated and modified according to the new sentencing provisions of Senate Bill 2. Upon motion of the State of Ohio, the trial court dismissed appellant's petition on the basis that the petition did not state grounds warranting relief. Appellant appealed the trial court's dismissal of his petition to this court. We remanded the matter to the trial court to permit appellant to respond to the state's motion to dismiss.<sup>FN2</sup>

FN1. *State v. Haddix* (June 3, 1996), Stark App. No. 95-CA-0175, unreported. A motion for delayed appeal to the Ohio Supreme Court was overruled. *State v. Haddix* (1999), 85 Ohio St.3d 1478, 709 N.E.2d 850.

FN2. *State v. Haddix* (Oct. 6, 1997) Stark App. No.1997CA00084, unreported.

On remand, appellant attempted to raise a new claim concerning a confrontation clause violation. The trial court reaffirmed its earlier dismissal of appellant's petition on the basis that the sentencing provisions of Senate Bill 2

were not retroactive and did not apply to appellant because he was convicted and sentenced prior to the effective date of the legislation. Appellant appealed the trial court's decision to this court. We affirmed the trial court's decision on September 28, 1998.<sup>FN3</sup>

FN3. *State v. Haddix* (Sept. 28, 1998), Stark App. No.1998CA00096, unreported.

On June 21, 1999, appellant filed, in his criminal case, a motion pursuant to Civ.R. 60(B)(5) to have his sentence for felonious sexual penetration merged with his rape sentence. Appellant argues House Bill 445, effective September 3, 1996, eliminated the offense of felonious sexual penetration and redefined the elements of that offense. On June 29, 1999, the trial court overruled appellant's motion on the grounds that the motion constituted a petition for postconviction relief under R.C. 2953.21 and did not qualify as a timely or successive postconviction relief filing.

Appellant timely filed a notice of appeal and sets forth the following assignment of error for our consideration:

\*2

----- (Cite as: 1999 WL 1071980, \*2 (Ohio App. 5 Dist.)) -----

I. A MISCARRIAGE OF JUSTICE OCCURRED BY THE TRIAL COURT WHEN IT DENIED THE CIV.R. 60(B) MOTION AND ALSO CITED R.C. 2953.21 ET SEQ., PURSUANT TO THE FIRST, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 1, 2, & 16 OF THE OHIO CONSTITUTION.

### I

Appellant maintains, in his sole assignment of error, that the trial court erred when it dismissed his Civ.R. 60(B) motion in which he sought to have his sentence for felonious sexual penetration merged with his rape sentence. We disagree.

In the case of *State v. Reynolds* (1997), 79 Ohio St.3d 158, 679 N.E.2d 1131, the Ohio Supreme Court set forth the standard by which postconviction pleadings are to be reviewed for purposes of R.C. 2953.21. The Court held:

Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.

Thus, based on the law contained in *Reynolds*, we find the motion appellant filed, pursuant to Civ.R. 60(B)(5), is a petition for postconviction relief. The trial court properly addressed appellant's motion as such.

In a factually similar case, the Montgomery County Court of Appeals explained:

We also agree with the state that [appellant's] motion under Civ.R. 60(B) was barred by 2953.23. Post-conviction relief in Ohio is pursued through quasi-civil proceedings. *State v. Nichols* (1984), 11 Ohio St.3d 40, 41-42, 463 N.E.2d 375. Normally, a civil litigant is permitted to file a motion under 60(B) after the trial court has rendered judgment. However, were 60(B) motions permitted as a means of seeking post-conviction relief, the intent of the legislature in enacting R.C. 2953.23 would be frustrated, especially in regard to the 1995 amendments that restricted the discretion of trial courts to entertain post-conviction claims. If the statute did not encompass 60(B) motions, criminal defendants could file successive post-conviction petitions merely by restyling them to fit under the civil rule. Thus, we conclude that the *Reynolds* rule should apply to 60(B) motions. Where a petition is styled as a motion under Civ.R. 60(B) but is, in substance, a postconviction petition under R.C. 2953.21, it should be treated as the latter. See, e.g., *State v. Carpenter* (Dec. 6, 1996), Jefferson App. No. 96-JE-8, unreported, at 2. *State v. Talley* (Jan. 30, 1998), Montgomery App. No. 16479, unreported, at 3, appeal dismissed (1998), 82 Ohio St.3d 1411, 694 N.E.2d 74.

The record indicates appellant's Civ.R. 60(B)(5) motion, as a petition for postconviction relief, was filed untimely under R.C. 2953.21(A)(2). This section of the statute provides:

\*3

----- (Cite as: 1999 WL 1071980, \*3 (Ohio App. 5 Dist.)) -----

(A)(2) A petition under (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or

adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

Further, appellant did not attempt to satisfy the requirements of R.C. 2953.23 for late and successive postconviction relief petitions. This section of the statute provides:

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:

(1) Either of the following applies:

(a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.

(b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

\* \* \*

Having failed to meet these statutory requirements, we find the trial court properly overruled appellant's motion.

Appellant's sole assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

HOFFMAN, J., and EDWARDS, J., concur.

#### JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

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State v. Haddix

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----- (Cite as: 1994 WL 88769 (Ohio App. 6 Dist.)) -----

Not Reported in N.E.2d, 1994 WL 88769 (Ohio App. 6 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Erie County.

**STATE** of Ohio, Appellee,

v.

Kathryn **HASENMEIER**, Appellant.

No. E-93-33.

March 18, 1994.

Kevin Baxter, Pros. Atty., and Mary Ann Barylski, for appellee.  
Richard E. Graham, for appellant.

*DECISION AND JUDGMENT ENTRY*

\*1

----- (Cite as: 1994 WL 88769, \*1 (Ohio App. 6 Dist.)) -----

This matter is before the court on appeal from the Erie County Court of Common Pleas.

On September 6, 1990, appellant, Kathryn Hasenmeier, was indicted on one count of aggravated vehicular homicide, a violation of R.C. 2903.06 and one count of involuntary manslaughter, a violation of R.C. 2903.04. On October 24, 1990, appellant was indicted on two counts of aggravated vehicular assault, violations of R.C. 2903.08. On January 7, 1991, appellant pled guilty to involuntary manslaughter and one count of aggravated vehicular assault. She was sentenced to an indefinite term of not less than five years nor more than ten years for the offense of involuntary manslaughter. She was sentenced to an eighteen month term of concurrent incarceration for the offense of aggravated vehicular assault.

On July 10, 1991, appellant filed a motion to grant "super shock" probation pursuant to R.C. 2947.061. On July 23, 1991, the court granted appellant's motion. On August 2, 1991, the state filed a motion for relief from judgment pursuant to Civ.R. 60(B)(1) alleging surprise and excusable neglect. The state argued that it had been unable to respond to appellant's motion since it never received a copy of the motion. They further argued that the court erred in granting the motion before the time had passed for the state to file a timely response. Included with the motion was a sworn affidavit from the prosecutor stating that she never received a copy of appellant's motion for "super shock."

On August 21, 1991, appellant filed a brief in opposition to the state's motion for relief from judgment. Appellant argued that a court's decision to grant "super shock" probation was not reviewable under *State v. Delaney* (1983), 9 Ohio App.3d 47 and that the state had received a timely copy of appellant's motion for "super shock." Appellant's motion included an affidavit from her attorney stating that he delivered a copy of the motion to the prosecutor's office though he acknowledged that he had no documentary proof to support his contention.

On September 13, 1991, the court granted the state's motion for relief from judgment. Appellant now appeals setting forth the following assignments of error:

"APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION BY THE TRIAL COURT'S RECONSIDERATION AND SUBSEQUENT DENIAL OF PROBATION AFTER ITS ORIGINAL GRANTING OF PROBATION PURSUANT TO R.C. 2947.061.

"THE TRIAL COURT'S ENTRY OF SEPTEMBER 13, 1991, WAS A NULLITY BECAUSE IT HAD LOST JURISDICTION OVER THE MOTION, THEREBY DENYING APPELLANT DUE PROCESS OF LAW UNDER OHIO AND UNITED STATES CONSTITUTIONS.

"APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL LEVEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

"APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE OHIO AND UNITED STATES CONSTITUTIONS WHEN HER PROBATION WAS REVOKED."

\*2

(Cite as: 1994 WL 88769, \*2 (Ohio App. 6 Dist.))

In her first assignment of error, appellant contends that the court lacked jurisdiction to entertain the state's Civ.R. 60(B) motion and to reverse its prior order granting her "super shock" probation. Specifically, appellant contends that the only way the state could challenge the court's order was to file a motion for leave to appeal in the appellate court.

In support, appellant cites *State v. Fisher* (1988), 35 Ohio St.3d 22, paragraph one of the syllabus which states: "The state may appeal from an order granting shock probation only by leave of court, pursuant to R.C. 2945.67(A)." The state in *Fisher* argued it had an absolute right to appeal an order granting shock probation. R.C. 2945.67(A) delineates the circumstances under which the state may appeal as of right in a criminal case. Orders granting shock probation are not among the circumstances listed in R.C. 2945.67(A). The state argued that an order granting shock probation was much the same as an order granting post conviction relief, a judgment the state may appeal as of right pursuant to R.C. 2945.67(A)(4). The Ohio Supreme Court disagreed and ruled that the state may appeal only by leave of court, a decision within the discretion of the appellate court.

Appellant also cites *State v. Kean* (Jan. 25, 1990), Franklin App. No. 89AP-152, unreported. Kean filed a motion for "super shock" probation which the trial court denied. Kean then filed a motion for reconsideration. The trial court denied the motion finding that it had no jurisdiction to reconsider the prior order denying Kean shock probation in that the criminal rules do not permit motions for reconsideration. On appeal, Kean argued that his motion for reconsideration could be viewed as a motion to vacate pursuant to Civ.R. 60(B)(5) due to the poor physical condition of the judge at the time of the initial order. The appellate court rejected this argument noting there was no evidence presented to suggest that the judge's physical condition affected his initial order.

Appellant contends that under the *Fisher* and *Kean* decisions, the state is precluded from using a Civ.R. 60(B) motion to challenge a court order granting shock probation. We disagree with appellant's interpretation of these decisions. In the *Fisher* case, the narrow issue before the court dealt with the nature of the state's appeal. Specifically, whether the state had an appeal as of right from an order granting probation or whether the state's ability to appeal rested within the discretion of the appellate court. The *Kean* court avoided the issue of whether or not a Civ.R. 60(B) motion was a proper vehicle with which to challenge a court's order granting a defendant shock probation.

It has long been settled that a trial court has inherent discretion with respect to its orders. *Horman v. Veverka* (1987), 30 Ohio St.3d 41, 42. Crim.R. 57(B) states: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." Civ.R. 60(B) states:

\*3

(Cite as: 1994 WL 88769, \*3 (Ohio App. 6 Dist.))

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; \* \* \* or (5) any other reason justifying relief from the judgment. \* \* \*"

Our research shows that courts have entertained motions pursuant to Civ.R. 60(B) in criminal cases. *State v. Wells* (March 30, 1993), Franklin App. No. 92AP-1462, unreported; *State v. Billheimer* (Dec. 3, 1992), Montgomery App. No. 13281, unreported; *State v. Groves* (Dec. 23, 1991), Warren App. No. CA91-02-014. More recently, in *State v. Riggs* (Oct. 4, 1993), Meigs App. Nos. 503 and 506, unreported, the Fourth District Court of Appeals reviewed the merits of a Civ.R. 60(B) motion filed by an appellant who had been denied "shock" probation.

The state's argument of excusable neglect was an appropriate subject to raise in a Civ.R. 60(B) motion. Based on the foregoing, we conclude that the trial court had jurisdiction to rule on the state's motion. Accordingly, appellant's first assignment of error is found not well-taken.

In her second assignment of error, appellant contends that the trial court lacked jurisdiction to deny appellant's motion for "super shock" probation based on the time requirements of R.C. 2947.061, the statute governing shock and "super shock" probation. R.C. 2947.061(B) states: "The court shall hear any motion authorized by this division within sixty days after it is filed and shall enter its ruling on the motion within ten days after the hearing." In *State v. Delaney* (1983), 9 Ohio App.3d 47, the court held:

"When the trial judge chooses to hold no hearing on the shock probation motion, he should rule on the motion within sixty days after it is filed. If the judge fails to hold a hearing or rule on the motion within sixty days after it is filed, he loses jurisdiction to grant the motion." *Id.* at 48.

Appellant filed her motion on July 10, 1991. The court granted her motion without a hearing on July 25, 1991. The court vacated its initial order and thereby denied appellant's motion on September 13, 1991. Appellant contends that because the court's September order was issued beyond the sixty day time limit of R.C. 2947.061(B), the court lacked jurisdiction to deny appellant's motion for "super shock" probation.

We disagree. R.C. 2947.061(B) states that the court must rule on the motion within the time limit. The court initially ruled on appellant's motion within the sixty day time limit. The court did not lose jurisdiction but rather retained its jurisdiction to rule on the state's Civ.R. 60(B) motion. Appellant's second assignment of error is found not well-taken.

In her third assignment of error, appellant contends she was denied effective assistance of counsel.

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(Cite as: 1994 WL 88769, \*4 (Ohio App. 6 Dist.))

The standard of review for evaluating ineffective assistance of counsel was enunciated by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, as follows:

"2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arised from counsel's performance. ( *State v. Lytle* [1976], 48 Ohio St.2d 391; *Strickland v. Washington* [1984], 466 U.S. 668, followed.)

"3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

Further, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance \* \* \*." *Bradley, supra*, at 142 quoting *Strickland, supra*, at 689. Ohio presumes a licensed attorney is competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299.

Appellant contends that her trial counsel and her subsequent counsel appointed for purposes of postconviction relief proceedings were ineffective for failing to file a delayed appeal pursuant to App.R. 5. Appellant contends that an earlier delayed appeal arguing the *Fisher, supra*, and *Kean, supra*, cases would have resulted in a reversal of the court's September 13, 1991 order. Based on our disposition of appellant's first assignment of error, we conclude that appellant has not shown that the result in this case would have been different but for the conduct of appellant's counsel. Appellant's third assignment of error if found not well-taken.

In her fourth and final assignment of error, appellant contends she was denied due process of law when her probation was revoked. The revocation of probation is a procedure outlined in R.C. 2951.09 which is applicable when a defendant has violated one or more of the terms of his or her probation. In this case, appellant's probation was not revoked. Rather, her motion for "super shock" probation was denied pursuant to Civ.R. 60(B), as discussed in the first and second assignments of error. Accordingly, appellant's fourth assignment of error is found not well-taken.

On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Erie County Common Pleas Court is affirmed. Court costs assessed to appellant.

ABOOD, P.J., and MELVIN L. RESNICK and SHERCK, JJ., concur.

State v. Hasenmeier  
Not Reported in N.E.2d, 1994 WL 88769 (Ohio App. 6 Dist.)

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----- (Cite as: 1996 WL 665006 (Ohio App. 2 Dist.)) -----

Not Reported in N.E.2d, 1996 WL 665006 (Ohio App. 2 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.

**STATE** of Ohio, Plaintiff-Appellee,

v.

Mumin **ISRAFIL**, Defendant-Appellant.

C.A. CASE NO. 15572.

Nov. 15, 1996.

JOHN J. AMARANTE, Atty. Reg. No. 0038613, Suite 315-Appellate Division, 41 N.Perry Street, Dayton, Ohio 45402

Attorney for Plaintiff-Appellee

MUMIN ISRAFIL, # 289-920, P.O. Box 56, Lebanon, Ohio 45036 Defendant-Appellant

WOLFF, J.

\*1

----- (Cite as: 1996 WL 665006, \*1 (Ohio App. 2 Dist.)) -----

Mumin Israfil appeals from a summary judgment of dismissal of his July 3, 1995 "motion for relief from judgment pursuant to Ohio Civ.R. 60(B)(5)." Israfil was seeking relief from his conviction of murder and a firearm specification. Israfil presents three assignments of error, the third being:

**THE LOWER COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT RELIEF AS PROVIDED UNDER A POST-CONVICTION ACTION BROUGHT UNDER R.C. 2953.21.**

The State and the trial court treated Israfil's motion for Civ.R. 60(B)(5) relief as a petition for post-conviction relief, as provided for by R.C. 2953.21 et seq. Israfil contends that he was seeking relief pursuant to Civ.R. 60 and not R.C. 2953.21 et seq., and that the trial court, in effect, preempted him from seeking post-conviction relief pursuant to R.C. 2953.21 et seq. in the future.

Civ.R. 60(B) has no application to judgments in criminal cases. Accordingly, the trial court had a choice of considering Israfil's motion for Civ.R. 60(B) relief as a petition for post-conviction relief, and addressing its merits, or of treating the motion as a nullity, and not considering it at all.

The trial court did not err in choosing to treat the motion as a petition for postconviction relief and the third assignment is overruled.

Israfil's first two assignments of error are:

1. THE LOWER COURT FAILED TO ADDRESS THE ISSUES OF THE FRAUD UPON THE COURT MATTERS CONTAINED IN THE APPELLANT'S MOTION FOR RELIEF FROM JUDGEMENT BROUGHT UNDER OHIO CIV.R. 60(B)(5).
2. THE LOWER COURT ERRONEOUSLY APPLIED THE DOCTRINE OF RES JUDICATA AS TO BAR ISSUES FROM BEING HEARD IN THE APPELLANT'S MOTION FOR RELIEF FROM JUDGEMENT BROUGHT UNDER CIVIL RULE OF PROCEDURE 60(B)(5).

The trial court sustained the State's motion for summary judgment and dismissed Israfil's motion for the reason that the issues he raised were barred by the doctrine of *res judicata*. For the reason stated in our disposition of the third assignment, we likewise overrule Israfil's first assignment, which is based on Civ.R. 60(B), and we will focus our attention on whether the trial court properly invoked the doctrine of *res judicata* to reject Israfil's contentions in support of post-conviction relief, or otherwise properly rejected his contentions.

Israfil has filed his motion in the trial court and his brief in this case *pro se*. Both are difficult to comprehend. We have used our best efforts to identify and understand his contentions.

Israfil's first contention appears to be that the murder charge of which he was convicted was procured by false statements. We discussed this issue at length in our opinion in Israfil's direct appeal from his conviction:

III. APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW IN THAT THE INITIAL COMPLAINT WAS BASED ON FALSE STATEMENTS IN THE AFFIDAVIT.

Israfil claims that the affidavit in support of the complaint which was issued against him the day of his arrest contained false statements, and that these false statements rendered the complaint defective. He argues that his due process rights were violated because he was held under a defective complaint from July 10 through October 1, 1993, when he was indicted.

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(Cite as: 1996 WL 665006, \*2 (Ohio App. 2 Dist.))

The affidavit contained two statements in support of the probable cause determination. The statements were:

Defendant was identified as the perpetrator of the offense by Jami Israfil who was an eyewitness to the offense.

Defendant admitted to committing the offense to Det. Burke & Pearson.

At trial, Jami Israfil and Detective Burke's testimony contradicted these statements somewhat. Jami testified that he did not witness the shooting itself, but that he did hear someone who sounded like his brother say, "That's what you get, you snitch," as his brother's car backed out of the driveway where the shooting occurred. Detective Burke testified that when Jami talked to the police the night of the shooting, he implicated his brother, stating, "I have to be truthful. I know who did it. My brother."

Regarding Israfil's own admissions to the police, the testimony at trial revealed that Israfil first told the police that both he and Fantroy had been fired upon during a drive-by shooting. Then, when confronted with evidence from the crime scene which contradicted that version, Israfil claimed that he shot Fantroy accidentally with a machine gun. Thus, Israfil admitted to shooting Fantroy, although he said it was an accident; he did not admit to purposely killing Fantroy.

Although, based upon the testimony at trial, the statements in the affidavit were technically inaccurate, they did not violate Israfil's due process rights. Statements which tracked the trial testimony with complete accuracy would have supported a finding of probable cause when the complaint was filed. Therefore, Israfil was not prejudiced by the wording of the statements in the affidavit.

Furthermore, Israfil has failed to demonstrate that either of these statements were made with any improper purpose, malicious intent, or reckless disregard for the truth. We note that Israfil waived his right to a preliminary hearing at which he could have challenged the existence of probable cause to detain him for the offense of murder. At trial, he was not required to answer the complaint, but the indictment. Under these circumstances, Israfil's due process rights were not compromised by the statements in the complaint.

The third assignment of error is overruled.

*State v. Israfil* (Mar. 10, 1995), Montgomery App. No. 14573, unreported.

The Supreme Court of Ohio declined further review. *State v. Israfil* # 95-804, 73 Ohio St.3d 1410.

*State v. Perry* (1967), 10 Ohio St.2d 175 provides:

7. Constitutional issues cannot be considered in postconviction proceedings under Section 2953.21 *et seq.*, Revised Code, where they have already been or could have been fully litigated by the prisoner while represented by counsel, either before his judgment of conviction or on direct appeal from that judgment, and thus have been adjudicated against him.

8. The Supreme Court of Ohio will apply the doctrine of *res judicata* in determining whether postconviction relief should be given under Section 2953.21 *et seq.*, Revised Code.

\*3

(Cite as: 1996 WL 665006, \*3 (Ohio App. 2 Dist.))

9. Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment.

On the authority of *Perry*, the trial court properly determined that Israfil's first contention was barred from further consideration by *res judicata*.

Israfil's next complaint is with the search which produced the murder weapon. He contends that it was accomplished without a search warrant and without probable cause.

Israfil moved for suppression of evidence and statements prior to trial and an evidentiary hearing on his motion was held February 18, 1994, following which the trial court overruled the motion stating in part as follows:

Upon due consideration of the evidence and the law, the court is satisfied that defendant's constitutional rights have not been violated and that the motion is not well taken.

On July 9, 1993, Allen Fantroy was shot to death. Defendant became a suspect almost immediately following the shooting. A police officer saw defendant walk into Sam's Bar on West Third Street. Dayton Police Officers Pauley and Kielbaso went to the bar where defendant and another were arrested, patted down, taken to a cruiser and transported to the Safety Building. The officers were instructed not to ask defendant anything and he was not "Mirandized" by them.

In the meantime, other officers went to defendant's residence at 535 Hollencamp in Dayton. They were met by defendant's mother, Khadija Ahmad, who admitted the officers to the residence and authorized them to search defendant's room. She told the officers that she did not use the room. Ms. Ahmad signed the consent to search form (St.Ex. 1) at 1:15 a.m. on July 10, 1993. When the officers learned that the mother did not use the room, the consent to search form was sent to the Safety Building where defendant executed the form at 2:20 a.m. on July 10, 1993 and the search was completed thereafter. Both Mrs. Ahmad and defendant (who is twenty-two years old) signed the lease for the residence (Defendant's Exhibit A). The search was conducted by Officer Philpot and was completed between 2:30 and 3:00 a.m. (T-55). Various items were found, including ammunition and two guns.

Ms. Ahmad appears to challenge the chronology of events, but her testimony lacks credibility since she responds with "I believe so," "I really have to tell you the honest truth. I ... I don't remember." (See T-60 et seq).

In any event, this court is of the opinion that the search was not constitutionally flawed so the items seized will not be suppressed.

Detective Doyle Burke questioned defendant at about 2:30 a.m. on July 10, 1993, at the Safety Building. The testimony supported the conclusion that defendant was advised of his Miranda rights and executed the department's standard Pre-interview form (St.Ex. 2). Initially, defendant claimed that his friend was shot by someone who had driven by in a car in the alley (T-34). Burke had been to the scene and believed the shooting could not have occurred in that manner. Upon being so advised, defendant said that he was playing with the gun and that it discharged accidentally, killing Fauntroy. He then demonstrated how he held the gun, "waving it around from place to place," (T-35); that he shot his friend and "got the f out of there."

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(Cite as: 1996 WL 665006, \*4 (Ohio App. 2 Dist.))

Burke then asked if he could take a videotaped statement from defendant, which was refused, so the interview was terminated.

In this court's opinion, the evidence did not produce any constitutional violations. Defendant was advised of his constitutional rights; he signed the appropriate waiver of rights; and when he refused the video statement, the questioning stopped.

The motion to suppress the items seized at the time of the search and the statements made by defendant is hereby **OVERRULED** in its entirety.

It is clear that the trial court found that Israfil had consented to the search that produced the murder weapon.

Consent obviates the need for either a warrant or probable cause. Furthermore, the suppression issue was not pursued further on appeal and for that reason was barred from consideration in post-conviction relief proceedings. *Id.*

Israfil also contends that the State failed to make timely disclosure of a laboratory report dealing with a urine sample given by Israfil, presumably on July 9, 1993, the day of the shooting that resulted in his being taken into custody.

In connection with its motion for summary judgment, the State filed the affidavit of the assistant prosecuting attorney to which was appended various letters from him to defense counsel showing delivery of the report, which was itself dated August 12, 1993, to defense counsel on September 8, 1993, and again on March 1, 1994. Trial commenced April 25, 1994. The affidavit also stated that defense counsel did not complain at trial of not having received the report. Israfil does not refute the assertions of the assistant prosecutor's affidavit with evidence authorized by Civ.R. 56. While we are not as confident as the State that this matter was foreclosed from consideration by the doctrine of *res judicata*, we are satisfied that the State established that there is no material issue of fact as to this issue.

Israfil may also contend that his right to a speedy trial was abridged. We discussed this issue at length in our opinion on Israfil's direct appeal and determined that Israfil's right to a speedy trial had not been violated. *State v. Israfil, supra*, at pp. 3-8. This issue is also barred by *res judicata* from further consideration.

Israfil may also contend that a certain "motion to relieve judgment" filed November 30, 1994, was improperly dismissed. The record reflects that the trial court found it "nonsensical" and ordered it "stricken from the files" due to the pendency of the direct appeal. If Israfil wished to challenge what was, in effect, a dismissal, his remedy was an appeal from the order striking his motion. The trial court properly rejected this contention.

We have addressed the contentions we believe Israfil intended to assert in his July 3, 1995 motion. Like the trial court, we believe that Israfil "may be trying to raise other issues but does so (so) inartfully that the Court may not be comprehending his assertions." In any event, several readings of Israfil's motion satisfy us that his other contentions, if any, are based on the record created in the trial court prior to the judgment of conviction and as such are not matters subject to consideration on a petition for post-conviction relief.

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(Cite as: 1996 WL 665006, \*5 (Ohio App. 2 Dist.))

The second assignment is overruled.

The judgment will be affirmed.

FAIN and GRADY, JJ., concur.

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(Cite as: 2000 WL 94292 (Ohio App. 5 Dist.))

Not Reported in N.E.2d, 2000 WL 94292 (Ohio App. 5 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark County.  
**STATE** of Ohio, Plaintiff-Appellee,  
 v.  
 Cecil P. **KIRKLAND**, Defendant-Appellant.  
 No. 1999CA00308.  
 Jan. 24, 2000.

Ronald Mark Caldwell, Stark County Prosecutor, Canton, OH, for Plaintiff-Appellee.  
 Cecil P. Kirkland, Defendant-Appellant Pro Se.

GWIN, P.J., and FARMER and EDWARDS, JJ.

*OPINION*

EDWARDS.

\*1

(Cite as: 2000 WL 94292, \*1 (Ohio App. 5 Dist.))

Defendant-appellant Cecil P. Kirkland appeals from the September 9, 1999, Judgment Entry of the Stark County Court of Common Pleas overruling his motion to vacate.<sup>FN1</sup> Plaintiff-appellee is the State of Ohio.

FN1. The trial court's September 9, 1999, Judgment Entry also overruled appellant's motion for default judgment and motion for summary judgment. Appellant, however, has not appealed the overruling of such motions.

*STATEMENT OF THE FACTS AND CASE*

Appellant Cecil P. Kirkland worked with the Massillon Police Department's special investigations unit for over one year as a confidential informant. During this time, appellant had been in the unit's office, where evidence was stored. Appellant observed Detective Bruce Wilson unlock the cabinet to retrieve his cash payment.

On March 2, 1997, appellant broke into the office and stole evidence, including \$7,000 in cash and over 180 grams of crack cocaine. The building janitor discovered the break in the next day. The evidence cabinet was always locked, with only Detective Wilson and the office secretary having keys to the cabinet. The stolen evidence pertained to two defendants: Mark Jones and Marcellus Woods. Appellant was involved as a confidential informant on two of the three charges against Jones.

Detective Wilson spoke with appellant on the day the break in was discovered. Appellant gave a written statement claiming that at the time of break in, he was with his girlfriend, sister, mother, and a friend at the Elks Club. Detective Wilson thought he observed glass slivers in the soles of appellant's shoes. Appellant agreed to turn over the shoes for testing. Glass samples were also collected from the carpet in appellant's car, with his consent.

Appellant was arrested on March 15, 1997. After appellant's girlfriend gave Detective Wilson a taped statement, appellant admitted his involvement in the break in. Appellant gave a detailed confession, claiming that he smoked some of the drugs and kept some of the money, while giving some of the drugs and money away. However, appellant claimed that he dumped most of the drugs and money into a river. Appellant alleged that his motivation for the break in was threats made by Mark Jones and Jones' wife due to appellant's involvement as an informant.

On March 20, 1997, appellant was indicted for Possession of Cocaine in violation of R.C. 2925.11(A), a felony of the first degree, Tampering with Evidence in violation of R.C. 2921.12, a felony of the third degree, Breaking and Entering in violation of R.C. 2911.13, a felony of the fifth degree, and Theft in violation of R.C. 2913.02, a felony of the fourth degree. The case proceeded to jury trial in the Stark County Common Pleas Court. At trial, appellant did not deny breaking into the office and stealing the evidence. However, he claimed that he had committed the crimes under duress resulting from the threats made by Mark Jones and Jones' wife.

Appellant was convicted as charged, and sentenced on May 14, 1997, to ten years incarceration for Possession of Cocaine and twelve months incarceration for Theft. The two sentences were to be served concurrently. Appellant was also sentenced to one year incarceration for Tampering with Evidence, and six months for Breaking and Entering, to be served consecutively to the sentences for Possession of Cocaine and Theft.

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(Cite as: 2000 WL 94292, \*2 (Ohio App. 5 Dist.))

Appellant appealed his conviction and sentence to this court, claiming that the jury's verdict was against the manifest weight of the evidence. Appellant, in his appeal, also claimed that his trial counsel was ineffective for failing to move to suppress appellant's taped confession on the grounds of coercion and for stipulating to the nature and identity of the property stolen from the evidence cabinet. This court affirmed the judgment of conviction and sentence. *State v. Kirkland* (June 22, 1998), Stark App. No. 1997CA00168, unreported.

On September 16, 1997, appellant filed a Petition for Post-conviction Relief claiming that counsel was ineffective for failing to challenge multiple convictions for the same act, and for failing to move to suppress appellant's confession. The trial court dismissed the petition without a hearing finding that appellant had failed to support his claims with evidentiary material. This court, pursuant to an opinion filed on December 14, 1998, affirmed the judgment of the Stark County Court of Common Pleas dismissing appellant's Petition for Post-conviction Relief. *State v. Kirkland* (Dec. 14, 1998), Stark App. No. 1997CA00358, unreported.<sup>FN2</sup>

FN2. During the pendency of such appeal, appellant, on August 7, 1998, had filed a motion to vacate. The trial court, pursuant to a Judgment Entry filed on January 8, 1999, denied such motion, finding that it was barred by the doctrine of res judicata and was not timely filed. Appellant did not appeal from the January 8, 1999, Judgment Entry denying his motion to vacate.

Subsequently, appellant filed a motion to vacate pursuant to Civ. R. 60(B)(3) and (5) on January 8, 1999, a motion for default judgment on April 7, 1999, and a motion for summary judgment on June 23, 1999. Appellant, with respect to his motion to vacate, argued that he should not have been convicted for possession of cocaine since no cocaine was found on or about his person. The trial court, which deemed all three of appellant's motions to be motions for post-conviction relief, overruled all three of appellant's motions pursuant to a Judgment Entry filed on September 9, 1999. The trial court specifically found that appellant's motions had not been timely filed and that the issues presented in the same were barred by the doctrine of res judicata.

It is from the trial court's September 9, 1999, Judgment Entry that appellant prosecutes his current appeal, raising the following assignments of error:

#### ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT CONSTRUED APPELLANT'S CIVIL RULE 60(B) MOTION AS A MOTION FOR POST-CONVICTION RELIEF.

#### ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT DISMISSED THE APPELLANT'S MOTION ON THE BASIS OF RES JUDICATA AFTER APPELLANT SHOWED HOW DISMISSING HIS MOTION ON THIS BASIS WOULD BE UNJUST AND CAUSE A MANIFEST MISCARRIAGE OF JUSTICE.

This case has been assigned to the court's accelerated calendar.

## I

Appellant, in his first assignment of error, maintains that the trial court erred when it construed appellant's motion to vacate pursuant to Civil Rule 60(B)(3) and (5) as a Motion for Post Conviction Relief pursuant to R.C. 2953.21.

As this court recently noted in *State v. Haddix*:

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(Cite as: 2000 WL 94292, \*3 (Ohio App. 5 Dist.))

"In the case of *State v. Reynolds* (1997), 79 Ohio St.3d 158, 679 N.E.2d 1131, the Ohio Supreme Court set forth standards by which post conviction pleadings are to be reviewed for purposes of R.C. 2953.21. The Court held: where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for post-conviction relief as defined in R.C. 2953.21.

Thus, based on the law contained in *Reynolds*, we find that the motion appellant filed, pursuant to Civ. R. 60(B)(5), is a petition for post-conviction relief."

*State v. Haddix* (Nov. 15, 1999), Stark App. No. 1999CA00227, unreported.

As the Montgomery County Court of Appeals explained in *State v. Talley*:

"We also agree with the state that [appellant's] motion under Civ.R. 60(B) was barred by 2953.23. Post-conviction relief in Ohio is pursued through quasi-civil proceedings. *State v. Nichols* (1984), 11 Ohio St.3d 40, 41-42, 463 N.E.2d 375. Normally, a civil litigant is permitted to file a motion under 60(B) after the trial court has rendered judgment. However, were 60(B) motions permitted as a means of seeking post-conviction relief, the intent of the legislature in enacting R.C. 2953.23 would be frustrated, especially in regard to the 1995 amendments that restricted the discretion of trial courts to entertain post-conviction claims. If the statute did not encompass 60(B) motions, criminal defendants could file successive post-conviction petitions merely by restyling them to fit under the civil rule. Thus, we conclude that the *Reynolds* rule should apply to 60(B) motions. Where a petition is styled as a motion under Civ.R. 60(B) but is, in substance, a postconviction petition under R.C. 2953.21, it should be treated as the latter. See, e.g., *State v. Carpenter* (Dec. 6, 1996), Jefferson App. No. 96-JE-8, unreported, at 2. *State v. Talley* (Jan. 30, 1998), Montgomery App. No. 16479, unreported, at 3, appeal dismissed (1998), 82 Ohio St.3d 1411, 694 N.E.2d 74."

Since the trial court, therefore, properly addressed appellant's motion to vacate pursuant to Civil Rule 60(B)(3) and (5) as a petition for post-conviction relief, appellant's first assignment of error is overruled.

## II

In his second assignment of error, appellant contends that the trial court erred in denying his motion to vacate on the basis of res judicata. Appellant, specifically argues that the trial court erred in denying his motion since appellant's conviction for possession of cocaine was contrary to the evidence since no cocaine was found on or about appellant's person and the cocaine itself was never found. Thus, appellant asserts that his conviction for possession of cocaine was against the sufficiency of the evidence.

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(Cite as: 2000 WL 94292, \*4 (Ohio App. 5 Dist.))

Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. The doctrine of res judicata applies in determining whether postconviction relief should be granted under R.C. 2953.21 *et seq. Id.*

As is stated above, appellant's conviction was affirmed on appeal pursuant to an opinion issued by this court on June 22, 1998. *State v. Kirkland* (June 22, 1998), Stark App. 1997CA00168, unreported. Since appellant's current claim that his conviction for possession of cocaine was against the sufficiency of the evidence could have been raised on direct appeal, such claim is, therefore, barred by the doctrine of res judicata. The trial court, therefore, did not err in

overruling appellant's motion to vacate on res judicata grounds.

Appellant's second assignment of error is, therefore, overruled.<sup>FN3</sup>

FN3. This assignment of error could be overruled as moot, also. The trial court dismissed appellant's 60 (B)/Post Conviction Relief Motion as untimely filed. The appellant did not raise that ruling as error. Once we concluded that the appellant's 60(B) motion was properly treated as a motion for post-conviction relief, it then follows that the filing of the motion is governed by the time parameters for filing a motion for post-conviction relief. Therefore, appellant's motion was properly dismissed as being untimely filed. There was no need for the trial court to reach any substantive issues.

The Judgment of the Stark County Court of Common Pleas is affirmed.

GWIN, P.J., and EDWARDS and FARMER, JJ., concur.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the Judgment of the Stark County Court of Common Pleas is affirmed. Costs to appellant.

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State v. Kirkland  
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----- (Cite as: 1993 WL 405491 (Ohio App. 4 Dist.)) -----

Not Reported in N.E.2d, 1993 WL 405491 (Ohio App. 4 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Meigs County.  
**STATE** of Ohio, Plaintiff-Appellee,  
 v.  
 Jason **RIGGS**, Defendant-Appellant.  
 Nos. 503, 506.  
 Oct. 4, 1993.

Sowash, Carson & Shostak, L.P.A., Herman A. Carson, Athens, for appellant.  
 John R. Lentes, Meigs County Prosecutor, and Christopher E. Tenoglia, Asst. Pros. Atty., Pomeroy, for appellee.

#### DECISION AND JUDGMENT ENTRY

STEPHENSON, Judge.

**\*1**

----- (Cite as: 1993 WL 405491, \*1 (Ohio App. 4 Dist.)) -----

This is a consolidated appeal of two judgments entered by the Meigs County Court of Common Pleas which, in effect, denied Jason Riggs, defendant below and appellant herein, shock and super shock probation on his previous convictions. The following errors have been assigned for our review:

- I. "THE TRIAL COURT ABUSED ITS DISCRETION, AND ERRED BY NOT PROPERLY CONSIDERING THE STATUTORY FACTORS OF OHIO REVISED CODE SECTION 2951.02, IN OVERRULING APPELLANT'S MOTIONS FOR SUPER SHOCK PROBATION."
- II. "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR SHOCK/SUPER SHOCK PROBATION WITHOUT A HEARING WHERE APPELLANT SPECIFICALLY REQUESTED A HEARING AND INFORMED THE COURT THAT ADDITIONAL EVIDENCE WOULD BE PRESENTED AT HEARING FOR THE COURT'S CONSIDERATION."
- III. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT." (Renumbered by the Court.)

The record reveals the following facts pertinent to this appeal. Appellant was an eighteen (18) year old high school student on the eve of his graduation when the tragic events of this case unfolded. On June 2, 1990, at approximately 10:00 p.m., appellant was driving a pick-up truck on westbound State Route 248 in Meigs County. He was accompanied by a friend, Doug Harris, twenty-six (26) years old. As appellant was passing through Chester, Ohio, his vehicle rounded a curve and struck Victor Will, an eighty-two (82) year old pedestrian attending a reunion at a local school. The force of the impact was such that Mr. Will was thrown up over the hood and roof of the vehicle and into the back bed of the truck. Appellant stopped the vehicle, turned and saw the body of Mr. Will lying in the bed of his truck. Both men panicked and Mr. Harris urged his friend to flee the accident scene. Appellant then drove away without bothering to ascertain if Mr. Will might still be alive and in need of medical attention.

The body of Mr. Will was, eventually, dumped over a hill several miles from the accident scene and the two men began to construct an alibi for their activities that evening. Appellant set fire to the pick-up truck in an attempt to cover the evidence and the vehicle was later reported as stolen. Although the men initially denied any involvement in the homicide, they ultimately admitted their respective roles therein.

On June 15, 1990, appellant was indicted by the Meigs County Grand Jury on one count of aggravated vehicular homicide in violation of R.C. 2903.06, one count of tampering with evidence in violation of R.C. 2921.12 and one count of gross abuse of a corpse in violation of R.C. 2927.01(B). Appellant entered a plea of no contest and, on August 29, 1990, the court below entered judgment finding appellant guilty on all counts. A sentencing entry was

filed on September 19, 1990, ordering that appellant be incarcerated for a term between five (5) and ten (10) years for the aggravated vehicular homicide. This was to be served concurrently with an eighteen (18) month term of incarceration for tampering with evidence and a consecutive two (2) year term for gross abuse of a corpse. The trial court also imposed \$12,500.00 in fines and ordered that appellant make restitution to the Will family. An appeal was taken as to the fines and in *State v. Riggs*, (Jun. 13, 1991), Meigs App. No. 454, unreported, we vacated that portion of the sentence.<sup>FN1</sup>

FN1. It would appear from the record that Mr. Harris, appellant's friend and companion on the night of the homicide, was charged only with obstruction of justice. The court below noted that, as of December 9, 1992, Mr. Harris was no longer incarcerated.

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(Cite as: 1993 WL 405491, \*2 (Ohio App. 4 Dist.))

On November 13, 1990, appellant filed a motion for shock probation on the consecutive three and a half (3 1/2) years of imprisonment on the two non-aggravated felonies.<sup>FN2</sup> Appellant also indicated that a similar motion would be filed with respect to the indeterminate five (5) to ten (10) year term on the aggravated felony once the mandatory minimum time had been served.<sup>FN3</sup> On December 28, 1990, the trial court entered an order holding this initial motion in abeyance until such time as appellant filed a second motion with respect to the aggravated felony.

FN2. Aggravated vehicular homicide is an *aggravated* felony, see R.C. 2903.06(B), whereas tampering with evidence and gross abuse of a corpse are not. See R.C. 2921.12(B) & R.C. 2927.01(C). It is essential to distinguish between aggravated and non-aggravated felonies for purposes of determining when to apply for shock probation.

FN3. A motion for shock probation on a non-aggravated felony may be filed no sooner than thirty (30) days, nor later than sixty (60) days, after the individual is incarcerated. R.C. 2947.061(A). By contrast, a motion for shock probation on an aggravated felony (or "super shock probation") may be filed only after the individual has served six (6) months of his sentence. *Id.* at (B). In the cause *sub judice*, appellant initially sought shock probation on sentences for nonaggravated felonies which were being served concurrently to a sentence on an aggravated felony. Thus, even if the motion was granted, appellant would still remain incarcerated on the aggravated felony. Appellant conceded that fact and explained that he intended to file a motion for super shock probation on the other sentence as soon as the six (6) months had expired and was taking this action to preserve his rights and avoid a waiver.

On November 24, 1992, appellant filed that motion and sought shock probation on the remainder of the indeterminate five (5) to ten (10) year term. The state filed its response commending appellant as an offender who had demonstrated true rehabilitation and recommending that the motions be granted.<sup>FN4</sup> Nevertheless, on December 9, 1992, the trial court entered judgment denying the motions. Appellant then filed a motion for relief from that judgment arguing that the court should have granted him a hearing and that its decision was "based upon mistake of fact(s) as to pertinent issues ..." The lower court overruled the motion on February 10, 1993, and this appeal followed.<sup>FN5</sup>

FN4. The state is represented in criminal proceedings by the county prosecutor. See *State v. Penrod* (1992), 81 Ohio App.3d 654, 661. It should be noted that the Meigs County Prosecutor which has appeared on appeal is different than the one which appeared in the action below. Consequently, the state's position has changed and it now opposes shock probation being granted to appellant.

FN5. Appeals were taken from both the judgment of December 9, 1992, overruling the motions for shock probation and the judgment of February 10, 1993, overruling the motion for relief from that judgment. On April 5, 1993, we ordered that these appeals be consolidated.

Before addressing the merits of those arguments raised by appellant in his assignments of error, we must first address a threshold jurisdictional problem. The state argues that an order denying shock probation is not a final judgment and that this court should dismiss the appeal for lack of jurisdiction. We disagree.<sup>FN6</sup>

FN6. This court has jurisdiction to review only final orders or judgments of inferior courts within our district. See Section 3(B)(2), Article IV of the Ohio Constitution. A final order is one which affects a

"substantial right" and, in effect, determines the action. R.C. 2505.02. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed. *Kouns v. Pemberton* (Dec. 22, 1992), Lawrence App. No. CA92-7, unreported at 2; *Lisath v. Cochran* (Apr. 14, 1993), Lawrence App. No. CA92-5, unreported at 3-4. Thus, we must first address the state's argument that the denial of shock probation is not a final order before we adjudicate the merits of this case.

Admittedly, there is a substantial body of caselaw to the effect that the decision to grant or deny shock probation is not a final appealable order and is not reviewable. See e.g. *State v. Jones* (1987), 40 Ohio App.3d 123, 124; *State v. Delaney* (1983), 9 Ohio App.3d 47, 48; *State v. Glaude* (Jan. 16, 1992), Cuyahoga App. No. 61576, unreported; *State v. Martone* (Sep. 13, 1991), Ashtabula App. No. 91-A-1587, unreported; also see *State v. Ledbetter* (1991), 72 Ohio App.3d 377, 379-380 (applying similar principles by analogy to conditional probation under R.C. 2951.04). The origin of this rule lies with the high degree of discretion which is vested in the trial courts for granting shock probation. The reasoning goes that, because of the level of judicial discretion, there is no "substantial right" to shock probation and, therefore, a denial of such probation is not an order affecting a "substantial right" for purposes of R.C. 2505.02. See *Jones, supra* at 124. With all due respect for our learned colleagues, we do not find this explanation to be particularly persuasive.

There are a great number of matters in our system of criminal jurisprudence which are relegated to the sound discretion of the trial court. See e.g. *State v. Sage* (1987), 31 Ohio St.3d 173 at paragraph two of the syllabus (admission or exclusion of relevant evidence); *State v. Lorraine* (1993), 66 Ohio St.3d 414, 423 (grant or denial of a continuance). Nobody doubts that the resolution of one of these issues would be a final appealable order once the case is concluded. The same should be true of a denial of a motion for shock probation. Provisions in R.C. 2947.061 allow for convicted felons to seek shock probation after conclusion of the initial criminal case against them. This is a separate proceeding and a decision to deny shock probation most assuredly determines that proceeding. Moreover, while the movant may not have a "substantial right" entitling him to shock probation, he does have a "substantial right" to make such a motion pursuant to statute and have it considered by the trial court. Thus, we perceive no reason why a judgment overruling a motion for shock probation should be treated as anything other than a final appealable order.

\*3

(Cite as: 1993 WL 405491, \*3 (Ohio App. 4 Dist.))

A number of courts have been troubled by dismissing these appeals and have made exceptions for denial of shock probation which are accompanied by statutory or constitutional violations. See e.g. *State v. Hatfield* (1990), 61 Ohio App.3d 427, 431; *State v. Kean* (Jan. 25, 1990), Franklin App. No. 89AP-152, unreported; *State v. Bauer* (Apr. 15, 1987), Hamilton App. No. C-860357, unreported. Appellant urges us to adopt this exception in the Fourth Appellate District and construe his arguments as addressing alleged statutory violations under R.C. 2947.061. We decline.

Instead, we reject entirely the proposition that denial of a motion for shock probation is not a final appealable order. The Second District Court of Appeals in *State v. Brandon* (Mar. 12, 1993), Greene App. No. 92CA27, unreported, reached the same conclusion and held that "[t]he 'substantial right' affected is the right of an offender to have the trial court exercise its discretion in ruling on the motion for shock probation in a non-arbitrary, and rational manner." We agree. Accordingly, we find that the judgment being appealed is a final order and that this court has jurisdiction to consider the case on its merits.

We now turn to appellant's first assignment of error wherein he argues that the lower court failed to consider the proper statutory factors before overruling his motion(s) for shock probation. A trial court may grant shock probation so long as the statutory requisites of R.C. 2947.061 are met and the general probation criteria of R.C. 2951.02 are favorable to such disposition. In determining whether (shock) probation should be granted, the trial court must consider the risk that the offender will commit another offense, the need for public protection, the nature and circumstances of the offense and the history, character and condition of the offender. *Id.* at (A). The provisions of R.C. 2951.02(B) also provide the following factors to be considered in favor of granting shock probation:

- "(1) The offense neither caused nor threatened serious harm to persons or property ...
- (2) The offense was the result of circumstances unlikely to recur.
- (3) The victim of the offense induced or facilitated it.
- (4) There are substantial grounds tending to excuse or justify the offense, though failing to establish a defense.

- (5) The offender acted under strong provocation.
- (6) The offender has no history of prior delinquency or criminal activity ...
- (7) The offender is likely to respond affirmatively to probationary or other court-imposed treatment.
- (8) The character and attitudes of the offender indicate that he is unlikely to commit another offense.
- (9) The offender has made or will make restitution or reparation to the victim of his offense for the injury, damage, or loss sustained.
- (10) Imprisonment of the offender will entail undue hardship to himself or his dependents."

Appellant argues that the lower court failed to consider these criteria in its decision to deny shock probation. We disagree. The judgment entry of December 9, 1992, states that appellant's motions were being overruled "after considering all the relevant factors outlined in ... Ohio Revised Code Section 2951.02 ..." Appellant then goes on to argue that the lower court erred by not giving an express analysis of each criteria in the statute. Again, we disagree. There is nothing in R.C. 2951.02 which requires that a trial court give an express item by item analysis of each factor when considering a motion for shock probation. The gist of appellant's argument is that he has so compellingly satisfied the criteria of R.C. 2951.02 that the court must be presumed to have ignored the statute or it would have granted him shock probation. We are not persuaded.

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(Cite as: 1993 WL 405491, \*4 (Ohio App. 4 Dist.))

To be sure, appellant has made a strong case for shock probation. The death of Mr. Will was caused through the *reckless* operation of a motor vehicle and was not a purposeful or intentional killing. All indications are that appellant, upon seeing the body in the back of his truck, was shocked and panicked and heeded the advice of Mr. Harris to flee the scene. This flight eventually led to appellant committing the other offenses in order to conceal the initial crime. The suggestion is made that, were it not for the urging of the older Mr. Harris to flee the accident scene, appellant might have stopped and attempted to assist his victim. It was also suggested that if the body of Mr. Will had landed on the roadside rather than in the back of his pick-up truck, appellant might not have panicked and fled. These factors, together with appellant's youth and immaturity at the time of the offenses, support the conclusion that there is little likelihood of the crimes ever recurring and that appellant is no real danger to society. See R.C. 2951.02(A) & (B)(2).

There are also other factors which lean toward granting shock probation. First, it would seem that appellant has already made restitution to the Will family in a civil suit brought subsequent to the criminal proceedings. *Id.* at (B) (9). Second, there are a number of letters in the record from, among others, appellant's former school principle, former employer(s) and church pastor all attesting to his good character and work habits and urging the court to grant probation. There are also extensive petitions from local citizens asking the lower court to release appellant "from further incarceration and allow him to become a productive member of society again." The state once endorsed appellant's release on shock probation and even the Meigs County Sheriff wrote and recommended that appellant be released back into society. It also bears mentioning that appellant has maintained "honor" status while incarcerated at Southeastern Correctional Institution and has taken college classes through the Lancaster Branch of Ohio University. Appellant has participated in a number of programs at prison, held several jobs and become a steam boiler operator. Upon his release, appellant intends to become involved with a speaking program to warn other youths about making the same mistakes he has made. These factors clearly indicate that appellant is likely to respond favorably to probation and his character is such that he is unlikely to commit another offense. *Id.* at (B)(7) & (8).

Indeed, appellant satisfies a number of the statutory criteria for being granted shock probation. It does not follow, however, that the lower court was required to make such a ruling. The provisions of R.C. 2951.02(B) expressly state that the ten factors specified therein "do not control the court's discretion." (Emphasis added.) Moreover, there are a number of favorable statutory criteria which appellant did not satisfy.<sup>FN7</sup>

FN7. For instance, the offenses caused serious harm to Mr. Will who did nothing to induce or facilitate it. See R.C. 2951.02(B)(1) & (3). There is nothing to excuse or justify the offenses and appellant did not commit them under provocation. *Id.* at (B)(4) & (5). Appellant has no dependents and there is no indication that his imprisonment will cause any undue hardship beyond that which any prisoner must endure. *Id.* at (B)(10).

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(Cite as: 1993 WL 405491, \*5 (Ohio App. 4 Dist.))

There are also a number of factors in this case which weigh against granting shock probation. One negative statutory factor that the lower court was required to consider in opposition to the motion was that Mr. Will was over sixty-five (65) years of age at the time he was killed. R.C. 2951.02(D)(4). We also note that there are several negative evaluations of appellant by the Southeastern Probation Treatment Alternative Center (hereinafter referred to as "SEPTA") to which appellant was referred shortly after he was sentenced. A SEPTA intake summary dated September 7, 1990, declared that appellant was not a suitable candidate for its program because he would not take responsibility for his crimes and, instead, blamed the homicide on the victim and the events subsequent thereto on Mr. Harris. The summary also opined that appellant's later attempts to conceal the homicide were more "deliberate and purposeful" than they were indicative of panic. It was also reported that appellant expressed more regret over the destruction of his pick-up truck than the death of Mr. Will.

Appellant requested a second evaluation by SEPTA in August of 1992. A new intake summary dated September 16, 1992, noted that the facts had remained unchanged from the time of its first evaluation and that appellant remained "an *unacceptable and inappropriate* candidate for the ... program." (Emphasis added.) SEPTA noted that, even after thirty (30) months of incarceration, appellant still did not accept full responsibility for his own actions and did not even "know the first name of the victim." The lower court indicated in its judgment entry of December 9, 1992, that these two negative SEPTA intake summaries were part of the reason it overruled

The court below also relied on several other factors in denying shock probation. One such factor was a letter from the Will family which warned that an early release would cause "devastating" emotional trauma and make the "healing process more difficult if not impossible." Appellant concedes that such input by the victim's family may be considered, but argues that it was given disproportionate weight by the lower court, was the sole basis for the court's ruling and amounts to an improper "victim's veto" of shock probation. We are not persuaded. As discussed extensively herein, there are a number of factors on which the court relied in denying appellant's motion. This letter from the Will family was only one of those factors.

Final consideration was also given by the trial court to the nature and circumstances of appellant's offenses. See R.C. 2951.02(A). The court recounted that appellant had "fatally hit Mr. Will with his truck, refused to take the victim to the hospital ... dumped the body over a hillside [and] attempted to establish an alibi[.]" The court acknowledged that "Mr. Will's body may not have been found had [Mr. Harris] not confessed." These actions were characterized by the court as "heinous." Appellant counter-argues that these factors should not have been considered because he had already served the consecutive sentences for tampering with evidence and abuse of a corpse. He also points out that Mr. Will would have died anyway on impact, or soon thereafter, irrespective of any assistance rendered to him. These arguments miss the point. Appellant's actions demonstrate a callous disregard for human life and a profound disrespect for both the body of the decedent and the sentiments of his family. The lower court obviously found these actions disturbing and so does this court. While appellant may have already served his time on two of the three felonies, the nature and circumstances of those crimes may still be considered under R.C. 2951.02(A) in determining whether he merits shock probation on the remaining felony.

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(Cite as: 1993 WL 405491, \*6 (Ohio App. 4 Dist.))

It is clear from this review that the lower court had a good deal of material, both favorable and unfavorable, to consider. The decision to grant or deny a motion for shock probation rests, as aforesaid, in the sound discretion of the trial court. See *State v. Hawk* (1992), 81 Ohio App.3d 296, 301; *State, ex rel. Dallman, v. Court of Common Pleas* (1972), 32 Ohio App.2d 102, 108. An abuse of that discretion is shown only if it can be demonstrated that the decision of the lower court was arbitrary, unreasonable or unconscionable. See *State v. Xie* (1992), 62 Ohio St.3d 521, 527; *State v. Moreland* (1990), 50 Ohio St.3d 58, 61; *State v. Adams* (1980), 60 Ohio St.2d 151, 157. In light of the various factors weighing against a grant of shock probation in the cause *sub judice*, we are not persuaded that the lower court abused its discretion. Appellant presented a strong case in support of his motion and we do not envy the lower court its task of balancing the different considerations. It may even be that some members of this court might have come out differently. However, that is not the standard for reviewing an exercise of discretion and we are not permitted to merely substitute our opinions for those of the trial court. See *Reck v. Beachler* (App.1952), 67 Ohio Law Abs. 63, 64; also see *Suiter v. Walker* (Jul. 21, 1992), Lawrence App. No. 91CA13, unreported at 4; *Barber v. Barber* (Jul. 30, 1992), Ross App. No. 1804, unreported at 10. Suffice it to say that the factors weighing against shock probation are such that we cannot find the decision of the lower court to be arbitrary, unreasonable or unconscionable. The first assignment of error is, accordingly, overruled.

Appellant's second assignment of error is that the trial court improperly overruled his motion(s) for shock probation without granting him an oral hearing. We note at the outset that there is no statutory requirement that such a hearing be held and the matter is best left to the sound discretion of the trial court. *See Delaney, supra* at 47; *State v. Hatcher* (1991), 71 Ohio App.3d 823, 826; *State v. Orris* (1971), 26 Ohio App.2d 87, 89; also see *State, ex rel. Stern v. Corrigan* (Jun. 12, 1984), Jefferson App. No. 84-J-9, unreported; *State v. DeNiro* (Feb. 10, 1977), Cuyahoga App. No. 35493, unreported. Appellant argues several points to the effect that the trial court abused its discretion in not providing a hearing and an opportunity to present additional evidence to bolster his position in requesting shock probation. We find no merit in any of these arguments.

Appellant first contends that he could have provided testimony to rebut the SEPTA intake summaries that he did not show remorse over the death of Mr. Will or accept responsibility for his actions. We note, however, that appellant's affidavit and the reference letters submitted in support of the motion already tend to rebut the SEPTA reports. Even assuming that this repetitive testimony had been allowed, and further assuming that it was found perfectly credible, the fact would still remain that appellant had failed to persuade two (2) separate SEPTA intake officers of his sincerity. The lower court could still rely on those intake summaries as a basis for denying shock probation.

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(Cite as: 1993 WL 405491, \*7 (Ohio App. 4 Dist.))

Appellant also argues that a number of individuals who had written letters on his behalf were prepared to testify at a hearing and were then denied the opportunity to do so. In that these individuals had already made recommendations for appellant, we fail to see how the nonadmission of this repetitive testimony was arbitrary, unreasonable or unconscionable. Appellant then goes on to state that Mr. Harris was granted a hearing on his motion for shock probation and it would be fundamentally unfair not to give him the same opportunity. It is not apparent from the record whether a hearing was granted to Mr. Harris on his motion and, in the event that it was, it would have no bearing on this case. Finally, appellant cites us to a portion of the lower court's December 9, 1992, judgment wherein his testimony as to several issues during the previous sentencing hearing is questioned. Appellant now contends that he has new corroborative evidence of that testimony which he should have been able to present at a hearing on his motion. We are not persuaded. Although the trial court specifically questioned appellant's credibility below, this was not listed as one of the explicit reasons for denying shock probation.

As a final matter, we would note that the lower court overruled the motion for a variety of reasons including the nature of the offenses, the sentiments of the decedent's family and other factors specified in R.C. 2951.02 (e.g. the victim's age). The testimony which appellant sought to introduce at a shock probation hearing below would have had no effect on these other reasons at all. That being said, we find no abuse of discretion in ruling on the motion without granting a hearing and the second assignment of error is overruled.

The final assignment of error asserts that the lower court should have granted appellant's motion for relief from the December 9, 1992, judgment. We disagree. It should initially be noted that, while the Ohio rules of procedure provide for such motions in the civil context, see e.g. Civ.R. 60, there is no such procedure in the criminal arena. In those instances where no procedure is specifically provided by the criminal rules, trial courts may nevertheless look to the rules of civil procedure. Crim.R. 57(B). Appellant relies on the provisions of Civ.R. 60(B) in support of his motion for relief from the judgment. Although appellant cites us to no authority for the proposition that this particular civil rule has been incorporated into criminal procedure, our own research indicates that it has in fact been so associated on a number of occasions. See e.g. *State v. Wells* (Mar. 30, 1993), Franklin App. No. 92AP-1462, unreported; *State v. Billheimer* (Dec. 3, 1992), Montgomery App. No. 13281, unreported; *State v. Groves* (Dec. 23, 1991), Warren App. No. CA91-02-014, unreported. Thus, we proceed with our analysis on the assumption that such a motion was proper and would lie in the cause *sub judice*.

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(Cite as: 1993 WL 405491, \*8 (Ohio App. 4 Dist.))

Appellant's motion for relief from judgment is couched in terms of Civ.R. 60(B)(4) & (5). However, appellant's arguments therein are that the trial court erred by not granting an oral hearing and, without such a hearing, made its decision on the basis of "mistake of fact(s) as to pertinent issues ..." The motion then goes on to argue the relative weight which should have been given by the court to evidentiary materials before it. These arguments were improper in a motion for relief from judgment under Civ.R. 60(B). These were arguments which should have been made, and in fact were made, on an appeal from the judgment denying shock probation. It is well settled law that relief under Civ.R. 60(B) will not be granted as a substitute for relief which would have been available on appeal of the original judgment. See *Dahl v. Kelling* (1986), 34 Ohio App.3d 258, 260; *May v. Leidli* (1986), 32 Ohio App.3d 36, 37; also see *Hines v. Ison* (Jun. 6, 1991), Ross App. No. 1656, unreported at 6. Given the impropriety of raising these arguments in a Civ.R. 60(B) motion, and considering our earlier rejection herein of most of the same

arguments, we perceive no

Our holding is further buttressed by the fact that a substantive review of this motion reveals it to be, in essence, no more than a request for the trial court to reconsider its judgment denying shock probation.<sup>FN8</sup> The Ohio Rules of Civil Procedure do not provide for motions for reconsideration after a final judgment in a trial court, *Pitts v. Dept. of Transportation* (1981), 67 Ohio St.2d 378 at paragraph one of the syllabus, and such motions are considered a nullity. *State, ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60; also see *State, ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 35. There is also no authority for a motion for reconsideration under the criminal rules and these too will be considered a nullity. See *Cleveland Heights v. Richardson* (1983), 9 Ohio App.3d 152, 154; *State v. Hicks* (May 30, 1991), Cuyahoga App. No. 60985, unreported at fn. 1; *State v. Carpenter* (Jun. 15, 1990), Allen App. No. 1-88-58, unreported; *Geneva v. Zendarski* (Jun. 26, 1987), Ashtabula App. No. 1305, unreported. This principle applies with equal force to a motion for reconsideration of a denial of shock probation. See *Kean, supra*. For these reasons, the third assignment of error is overruled.<sup>FN9</sup>

FN8. Although a party's motion may be styled as something different, the appellate courts will conduct a substantive review of that motion and, if necessary, recharacterize it as one for reconsideration irrespective of the title on its face. See e.g. *Sereda v. Szogle* (1992), 71 Ohio App.3d 497, 500; *DWP Corp. v. Dixie Machine & Supply Co.* (May 9, 1992), Pike App. No. 466, unreported at 5.

FN9. Having found that appellant's motion for relief from judgment was improper and, in fact, was a null motion for reconsideration, we do not address the four specific arguments raised by appellant in this assignment of error. Even assuming *arguendo* that we would find merit in any of those arguments, we would still affirm the lower court's denial of the motion for those reasons specified herein.

Having reviewed all errors assigned and argued before us, and finding the same to be without merit, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

#### JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and APPELLEE recover of APPELLANT costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the MEIGS COUNTY COMMON PLEAS COURT 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 continued for a period of thirty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court a memorandum in support of jurisdiction accompanied by a motion for a further stay from that court during the pendency of proceedings in that court. The stay as herein continued will terminate at the expiration of the thirty day period. The stay will also terminate if the Supreme Court refuses to hear the appeal prior to the expiration of the thirty days. This stay is conditioned upon appellant filing a notice of appeal to the Supreme Court within seven days of entry of this judgment.

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

PETER B. ABELE, J., concurs in judgment and opinion.

GREY, J., dissents with dissenting opinion.

GREY, Judge, dissenting:

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(Cite as: 1993 WL 405491, \*8 (Ohio App. 4 Dist.))

I respectfully dissent. I would sustain the first assignment of error and remand this case for a hearing.

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(Cite as: 1993 WL 405491, \*8 (Ohio App. 4 Dist.))

I agree with the majority holding that there is no statutory requirement for a hearing, but rather that it is within the discretion of the court. However, this is a close case. Indeed, the greater part of the majority opinion dealing with the first assignment of error discusses how close the various factors are. It points out how difficult the trial court's task was and even that some members of this court might have decided differently. In light of the closeness of the question, it seems to me that it was an abuse of discretion to refuse to conduct a hearing on the matter.

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(Cite as: 1993 WL 405491, \*9 (Ohio App. 4 Dist.))

Although there was no hearing, we are asked to review the trial court's decision and exercise of its discretion, and frankly, this is an almost impossible job. The record has many examples of contested matters which should have been presented in a hearing. For example, Riggs referring to the decedent as "Mr. Harris" is characterized on one hand as evidence of his lack of remorse because he does not even know the victim's first name. On the other hand, it is characterized as the formal, and properly respectful form of application.

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(Cite as: 1993 WL 405491, \*9 (Ohio App. 4 Dist.))

Another example is the SEPTA summary. There is nothing in the record about the SEPTA program, what its standards are, or what kind of persons are rejected or accepted. My only knowledge of it is that it is some kind of CBCF, community based correctional facility. It is my understanding that SEPTA is, itself, a kind of probation, but probation from a secure facility. It is a very specialized program designed, I believe, to foster and encourage good employment habits by having the participants engage in work release programs. It also tries to work on alcohol and drug problems. I am, of course, only describing my limited personal knowledge of SEPTA, and nothing I have mentioned here is in the record.

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(Cite as: 1993 WL 405491, \*9 (Ohio App. 4 Dist.))

But this is the very point I want to make. None of this is in the record! Had there been a hearing, we would not have to guess at what the trial court relied on in reaching its decision in this admittedly close case. I am not convinced the trial court could have adequately considered all the factors listed in R.C. 2951.02(B) without a hearing. I am sure the court intended to consider all the factors, but this is why we have prosecutors, defense counsel and hearings-to make sure all relevant evidence is presented on the criteria.

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(Cite as: 1993 WL 405491, \*9 (Ohio App. 4 Dist.))

In the present state of the record, lacking any evidence on the criteria which would have been adduced at a hearing on the issue, I do not see how this court can adequately review the trial court's exercise of discretion in this matter. I would, therefore, sustain the second assignment of error, reverse the judgment of the trial court, and remand for a hearing.

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(Cite as: 1993 WL 405491, \*9 (Ohio App. 4 Dist.))

Thus, I dissent.

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State v. Riggs

Not Reported in N.E.2d, 1993 WL 405491 (Ohio App. 4 Dist.)

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(Cite as: 1998 WL 31516 (Ohio App. 2 Dist.))

Not Reported in N.E.2d, 1998 WL 31516 (Ohio App. 2 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.  
**STATE** of Ohio, Plaintiff-Appellee,  
 v.  
 Ronald L. **TALLEY**, Defendant-Appellant.  
 No. 16479.  
 Jan. 30, 1998.

MATHIAS H. HECK, JR., Prosecuting Attorney, By Carley J. Ingram, Assistant Prosecuting Attorney, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 41 N. Perry Street, Suite 315, Dayton, Ohio 45422, Atty. Reg. #0020084, Attorneys for Plaintiff-Appellee.  
 RONALD L. TALLEY, # 319-630, London Correctional Institution, P.O. Box 69, London, Ohio 43140, Defendant-Appellant, Pro Se.

OPINION

BROGAN, J.

\*1

(Cite as: 1998 WL 31516, \*1 (Ohio App. 2 Dist.))

Appellant, Ronald Talley, appeals from a judgment of the Montgomery County Court of Common Pleas denying various petitions and motions for post-conviction relief. Because Talley had already filed a post-conviction petition, which was denied upon the state's summary judgment motion, the consideration of successive petitions was barred by R.C. 2953.23(A). Furthermore, Talley failed to show manifest injustice that would support the motion to withdraw his guilty plea, made pursuant to Crim.R.32.1. Accordingly, we affirm the judgment below.

On December 9, 1994, Ronald Talley was charged by indictment with one count of attempted murder and one count of felonious assault. On October 13, 1995, pursuant to a plea bargain, Talley pleaded guilty to attempted murder. On November 17, 1995, the trial court sentenced Talley to an indefinite term of seven to twenty-five years. Talley did not pursue a direct appeal from his conviction.

On July 1, 1996, Talley filed a petition for post-conviction relief under R.C. 2953.21. The state responded with a motion for summary judgment. On September 9, 1996, the trial court granted summary judgment in favor of the state and denied Talley's petition. Talley did not appeal this judgment.

On November 27, 1996, Talley filed a petition with the court styled a "Motion For a New Trial" pursuant Civ.R. 60(B). On December 11, 1996, he filed a "Supplement" to his earlier petition moving, alternatively, for the court to permit him to withdraw his guilty plea under Crim.R. 32.1. On January 23, 1997, Talley filed a "Motion to Correct an Injustice" ostensibly seeking conditional probation under R.C. 2951.04(A) and renewing his requests for a new trial and the withdrawal of his guilty plea.

On February 28, 1997, the state filed a motion with the trial court requesting that these three filings by Talley, along with several other petitions filed by him, be overruled. The state amended its motion on March 3, 1997 to include further documents filed by Talley. On the same day, the trial court granted the state's motion, denying and overruling all of Talley's motions and petitions then before it. Talley now appeals from this judgment of the court with regard to the three motions noted above.

Talley raises six assignments of error on appeal. They are:

I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY DISMISSING ALL THREE OF HIS MOTIONS ON THE SAME JUDGMENT ENTRY WITHOUT GIVING ANY REASONS FOR THE DENIAL OR DISMISSAL.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY NOT GIVING A FACTUAL FINDING AND CONCLUSION OF LAW ON EACH ERROR PRESENTED TO IT FOR REVIEW.

III. DEFENDANT-APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN SEVERAL OF [sic] RESPECTS AS FOLLOWS:

IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT DIDN'T GIVE A FAVORABLE RULING CONCERNING THE NEWLY DISCOVERED EVIDENCE.

V. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT DENIED APPELLANT A NEW TRIAL BASED UPON THE FACT THAT THERE WAS NO COMPLAINT ON THE CHARGE OF FELONIOUS ASSAULT, AND THE TRIAL COURT REFUSAL TO ALLOW A WITHDRAWAL OF HIS GUILTY PLEA. [sic.]

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(Cite as: 1998 WL 31516, \*2 (Ohio App. 2 Dist.))

VI. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY DENYING HIS MOTION FOR CONDITIONAL PROBATION AND NOT PROPERLY ADDRESSING THE ISSUE OF HIS DRUG DEPENDENCY AT HIS TRIAL THEREBY DENYING HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAW. Each of Talley's assignments of error relates to the propriety of the trial court's decision to overrule one or more of the three papers filed between November 27, 1996 and January 11, 1997. Because the state has raised a threshold question relating to each of these documents, we will consider the assignments of error jointly.

Talley has variably styled his motions as governed by Civ.R. 60(B), Crim.R. 32.1, and R.C. 2951.04(A). Nevertheless, the state contends that all of Talley's filings are, in essence, petitions for post-conviction relief. The state points out that Talley filed an earlier post-conviction petition, which was denied. Because R.C. 2953.23 prohibits successive post-conviction petitions, except under certain narrow circumstances, the state argues that all three documents were barred from consideration in the trial court.

The state relies, in part on the Ohio Supreme Court's recent opinion in *State v. Reynolds* (1997), 79 Ohio St.3d 158, 679 N.E.2d 1131. Therein, the Court held:

Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21. *Id.*, paragraph one of the syllabus. Talley's "Motion to Correct an Injustice" citing R.C. 2951.04(A) falls the most clearly within the *Reynolds* rule. The petitioner in *Reynolds* designated his filing as a "Motion to Correct or Vacate Sentence." Nevertheless, the Court treated the "Motion" as a petition filed under R.C. 2953.21. The *Reynolds* opinion instructs courts to consider the substance of such petitions, rather than their form. See *id.* at 160, 679 N.E.2d 1131. To the extent that Talley raised any cognizable claims in his motion, they were constitutional defects, asserted after the time for appeal had expired. Thus, we agree with the state that Talley's "Motion to Correct an Injustice" was a post-conviction petition subject to the bar against subsequent petitions under R.C. 2953.23.

R.C. 2953.23 bars the consideration of second or successive petitions for post-conviction relief unless the petitioner can show either that he "was unavoidably prevented from discovery" of essential evidence or that he is asserting a newly-recognized constitutional right. See 2953.23(A)(1). The petitioner must also show actual prejudice. See 2953.23(A)(2). Talley does not assert a newly-recognized constitutional right. Neither does he allege, in this petition, any newly discovered evidence. Therefore, this petition was barred. Trial courts are permitted to deny second or successive petitions for post-conviction relief without filing findings of fact and conclusions of law. *State ex rel. Jennings v. Nurre* (1995), 72 Ohio St.3d 596, 598, 651 N.E.2d 1006. Accordingly, we find no error with the trial courts judgment in reference to Talley's "Motion to Correct an Injustice."

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(Cite as: 1998 WL 31516, \*3 (Ohio App. 2 Dist.))

We also agree with the state that Talley's motion under Civ.R. 60(B) was barred by 2953.23. Post-conviction relief in Ohio is pursued through quasi-civil proceedings. *State v. Nichols* (1984), 11 Ohio St.3d 40, 41-42, 463 N.E.2d 375. Normally, a civil litigant is permitted to file a motion under 60(B) after the trial court has rendered judgment. However, were 60(B) motions permitted as a means of seeking post-conviction relief, the intent of the legislature in enacting R.C. 2953.23 would be frustrated, especially in regard to the 1995 amendments that restricted the discretion of trial courts to entertain post-conviction claims. If the statute did not encompass 60(B) motions, criminal defendants could file successive post-conviction petitions merely by restyling them to fit under the civil rule. Thus,

we conclude that the *Reynolds* rule should apply to 60(B) motions. Where a petition is styled as a motion under Civ.R. 60(B) but is, in substance, a post-conviction petition under R.C. 2953.21, it should be treated as the latter. See, e.g., *State v. Carpenter* (Dec. 6, 1996), Jefferson App. No. 96-JE-8, unreported, at 2.

We agree, also, with the state that Talley's petition which was captioned as a 60(B) motion was barred from consideration under R.C. 2953.23. Talley failed to show either of the two causes for delay specified in R.C. 2953.23 (A)(1). Although Talley asserts eight instances of "newly discovered evidence," most are legal claims rather than evidence, and any facts asserted were available to Talley and his counsel before his time for appeal expired. Talley failed to show why this late attempt at post-conviction relief was excepted from the bar of R.C. 2953.23. Accordingly, we see no error in the court's disposition of this petition.

More problematic is the state's contention that Talley's motion pursuant to Crim.R. 32.1 is barred by R.C. 2953.23. We agree with the state that Talley's motion meets all of the distinguishing criteria of a petition for post-conviction relief under the *Reynolds* holding. Talley's motion was (1) filed after his time for appeal had expired, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for a vacation of the judgment and sentence. See *Reynolds*, 79 Ohio St.3d at 160, 679 N.E.2d 1131.

Nevertheless, the weight of authority holds that a motion under Crim.R. 32.1 is not governed by R.C. 2953.21. See, e.g., *State v. Nathan* (1995), 99 Ohio App.3d 722, 726, 651 N.E.2d 1044 (distinguishing a Crim.R. 32.1 motion from a post-conviction petition); *State v. Buchanan* (June 10, 1997), Franklin App. No. 96APA11-1527, unreported, at 3 ("Crim.R. 32.1 operates by its terms as a 'postconviction' mechanism, although not literally postconviction relief under R.C. 2953.21."); *State v. Halliwell* (Dec. 19, 1996), Cuyahoga App. No. 70369, unreported, at 3; cf. *State ex rel. WLWT-TV5 v. Leis* (1997), 77 Ohio St.3d 357, 360, 673 N.E.2d 1365 (listing Crim.R. 32.1 and R.C. 2953.21 as separate post-conviction remedies). Furthermore, the Supreme Court has found that Crim.R. 32.1 imposes no absolute time limit on when post-sentence motions can be granted. *State v. Smith* (1977), 49 Ohio St.2d 261, 264, 361 N.E.2d 1324. R.C. 2953(A)(2), however, now imposes a 180-day limitations period after the time for an appeal of right. Given the above-cited authorities, we are reluctant to apply the time constraints of R.C. 2953.21 and R.C. 2953.23 to motions made under Crim.R. 32.1.

\*4

(Cite as: 1998 WL 31516, \*4 (Ohio App. 2 Dist.))

Consequently, we will review the merits of appellant Talley's motion to withdraw his plea. A post-sentence motion to withdraw a plea is only permitted to correct a "manifest injustice." Crim.R. 32.1. A criminal defendant bears the burden in proving such an injustice occurred. *Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of syllabus. An appellate court will only review a trial court's determination of a Crim.R. 32.1 motion for an abuse of discretion. *State v. Blatnik* (1983), 17 Ohio App.3d 201, 202, 478 N.E.2d 1016.

Talley asserts essentially two claims of manifest injustice. First, he claims inadequate assistance of counsel. When a defendant pleads guilty, a claim of inadequate assistance is only relevant to the extent the alleged ineffectiveness made the plea less than knowing and voluntary. *State v. Xie* (1992), 62 Ohio St.3d 512, 524, 584 N.E.2d 708. Nothing in the record supports Talley's claim other his own self-serving affidavit. Such a record is insufficient to overcome the presumption that Talley's plea was voluntary. See *State v. Kapper* (1983), 5 Ohio St.3d 36, 38, 448 N.E.2d 823. Thus, this claim fails.

Second, Talley alleges eight different instances of "newly discovered" evidence. As noted earlier, most of these are legal claims rather than evidence, and most do not even approach suggesting that Talley's plea was involuntary. The only claim that bears on that question is Talley's assertion that he was under the influence of medication at the time of his plea. Specifically, he claims to have taken Fiorinal with codeine and Alka Seltzer Plus cold medicine. Talley also claims that he tested positive for marijuana use on that day, although he does not actually declare that he was under the influence of the drug at the time of his plea.

We note that the record of the instant action does not contain a transcript of either the plea or the sentencing hearing. The burden of providing a trial transcript falls upon the appellant. See App.R. 9(B). Without a complete record, an appellate court must presume that the proceedings below were conducted without defect. See *State v. Frost* (1984), 14 Ohio App.3d 320, 321, 471 N.E.2d 171. None of Talley's claims of being under the influence of drugs are substantiated by anything in the record, other than his affidavit. Where proceedings were conducted in conformity with Crim.R. 11, as we presume in this instance, unsubstantiated claims of drug-use are insufficient to show a manifest injustice under Crim.R. 32.1. See *State v. Phillips* (Sept. 29, 1995), Huron App. No. H-95-014, unreported, at 2. Nor is a trial court required to hold a hearing upon such claims. See *id.* (citing *Blatnik*, 17 Ohio App.3d at 204, 478 N.E.2d 1016). Thus, this claim of manifest injustice fails.

\*5

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(Cite as: 1998 WL 31516, \*5 (Ohio App. 2 Dist.))

Because Talley failed to show manifest injustice, we see no error in the lower court's determination of his motion. A court may deny a Crim.R. 32.1 motion, moreover, without issuing written findings of fact or conclusions of law. *Halliwell, supra*, at 3. Thus, Talley's assignment alleging error in that regard is not well taken.

Having found that the trial court did not err in denying Talley's variously styled petitions and motions, we overrule his six assignments of error.

The judgment of the trial court is Affirmed.

WOLFF and FAIN, JJ., concur.

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State v. Talley  
Not Reported in N.E.2d, 1998 WL 31516 (Ohio App. 2 Dist.)

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-----{Cite as: 1980 WL 354451 (Ohio App. 8 Dist.)}-----

Not Reported in N.E.2d, 1980 WL 354451 (Ohio App. 8 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.  
**STATE OF OHIO, PLAINTIFF - APPELLEE,**  
 v.  
**CARL WAGNER, DEFENDANT - APPELLANT.**  
 NOS. 40194 & 40195.  
 May 15, 1980.

APPEAL FROM COMMON PLEAS COURT, No. Cr. 18570.

John T. Corrigan, Esq., Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, for Plaintiff-Appellee.

Richard L. Aynes, Esq., J. Deane Carro, Esq., Appellate Review Office, School of Law, The University of Akron, 302 E. Buchtel, Akron, Ohio 44325, for Defendant-Appellant.

### JOURNAL ENTRY AND OPINION

DAY, J.

**\*1**

-----{Cite as: 1980 WL 354451, \*1 (Ohio App. 8 Dist.)}-----

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

SEE OPINION INCORPORATED HEREIN BY REFERENCE.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

KRUPANSKY, P.J., PATTON, J., CONCUR.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

OPINION

SYLLABUS

A-46

1. App. R. 4(A) requires that a notice of appeal in a civil action be filed within thirty days from the date the appealed judgment or order is entered. A judgment is "entered" within the meaning of the rule when it is filed for journalization. The thirty-day period for appeal runs from that date.
2. The filing of findings of fact and conclusions of law in post-conviction relief actions does not suspend the running of the appeal period or affect the finality of the judgment.
3. Civ. R. 1(C) exceptions proscribe the application of individual civil rules where "clearly inapplicable".
4. Civ. R. 60(B) remedies are clearly inapplicable to judgments denying post-conviction relief absent a clear legislative intent to provide persons convicted of crime more than one avenue of relief outside the appellate system.

DAY, J.

Defendant-appellant, Carl Wagner (defendant) was convicted of murder on April 25, 1975, in violation of Revised Code (R.C.) §2903.02. On direct appeal to this Court defendant's conviction was affirmed.<sup>FN1</sup>

FN1. See, *State v. Wagner*, No. 34684, unreported (8th App. Dist. Ohio, 1976).

On May 2, 1977, defendant filed a pro se petition to vacate judgment pursuant to R.C. §2953.21, *et seq.* He claimed his counsel failed to object to the trial court's erroneous instruction on self-defense. This he asserted denied him effective assistance of counsel. The State filed a motion to dismiss. The trial court, without making findings of fact and conclusions of law, dismissed defendant's petition on January 13, 1978. No appeal was taken by defendant from this judgment until November 22, 1978 (Court of Appeals No. 40194).

In the interim (on October 20, 1978), defendant, through his counsel, filed a motion for relief from judgment pursuant to Civil rule 60(B). Defendant contended he did not receive "written notice" of the January 13 judgment of the court dismissing his petition for post-conviction relief (PCR). He further contended the lack of notice prevented his appeal of that judgment to the Court of Appeals.

\*2

(Cite as: 1980 WL 354451, \*2 (Ohio App. 8 Dist.))

On October 25, 1978, nine months after the denial of defendant's petition for PCR, the trial court filed findings of fact and conclusions of law. The court found that the failure of defendant's counsel to object to the charge on self-defense did not constitute *per se* ineffective assistance of counsel. The following day, October 26, 1978, the trial court denied defendant's motion for relief from judgment.

On November 27, 1978, defendant filed a second notice of appeal.<sup>FN2</sup> The second appeal challenged the denial of his motion for relief from judgment (Court of Appeals No. 40195). The appeals of November 22, 1978, and November 27, 1978, were consolidated.

FN2. Thirty-two days after the order from which appeal was taken (October 26, 1978 - November 27, 1978).

Defendant raises two assignments of error. These are set out in the margin.<sup>FN3</sup> For reasons assessed below the defendant cannot prevail.

FN3. "I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION TO VACATE JUDGMENT BASED ON A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE ERRONEOUS PLACEMENT ON APPELLANT OF THE BURDEN OF PROVING THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE DENIED APPELLANT SUBSTANTIAL JUSTICE AND A FAIR TRIAL.

"II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT, WHICH WAS PREMISED ON THE TRIAL COURT'S FAILURE TO NOTIFY APPELLANT OF THE ENTRY OF A FINAL JUDGMENT ON HIS PETITION TO VACATE, RENDERED ON JANUARY 13, 1978. THE FAILURE OF NOTICE HERE WORKED TO DENY THE APPELLANT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT."

## I.

The first appeal (Case No. 40194), which challenges the dismissal of defendant's post-conviction relief petition by the trial court, raises a jurisdictional question: was the appeal timely?

In *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49, 325 N.E.2d 540, the Ohio Supreme Court has said that post-conviction relief actions [R.C. §2953.21, et seq.] were civil proceedings. In civil appeals a notice of appeal to be effective must be filed within thirty days from the date the judgment is entered. Otherwise, the Court of Appeals lacks jurisdiction, App. R. 4(A); *Bosco v. Euclid* (1974), 38 Ohio App.2d 40, 42-43, 311 N.E.2d 870.

Both defendant and the State erroneously contend that the judgment of the trial court was final *only* after the findings of fact and conclusions of law were filed.<sup>FN4</sup> This argument is misplaced. App. R. 4(A) specifically indicates that a judgment in a civil case is entered once it has been filed for journalization with the clerk of the trial court and time runs from that date.<sup>FN5</sup>

FN4. See the notice of appeal (Case No. 40194) and Appellee's Brief, p. 5). Cf. Civil Rule 52 and Revised Code §2953.21(E). Neither the rule nor the statute indicate that findings and conclusions are a prerequisite to finality. Moreover, App. R. 4(A) specifies only two motions (N.O.V., Civ. R. 50(B) and New Trial, Civ. R. 59), which suspend the running of the appeal period.

FN5. Appellate Rule 4(A) in pertinent part:

"(A) *Appeals in civil cases.* In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from."

\* \* \*

". . . A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization." (Emphasis supplied.) Cf. Civil Rule 58.

In the PCR proceeding in this case, the judgment of the trial court was filed for journalization on January 19, 1978. Defendant was required to file his notice of appeal within thirty days from that date. That is, his notice was due on or before February 18, 1978. He did not file until November 22, 1978.

Accordingly, there is no jurisdiction in this court to review defendant's first assignment of error on the merits. His appeal of the judgment denying PCR is dismissed.

## II.

The appeal in Case No. 40195, the denial of relief from judgment, presents a more difficult question. The difficulty stems from the civil nature of post-conviction relief.<sup>FN6</sup> The question is whether Civ. R. 60(B) is available to vacate a final judgment on petition for PCR. Even though the latter remedy is deemed civil by the Supreme Court of Ohio, *State v. Milanovich, supra*, it is also a statutory proceeding evoking an interpretation of the civil rules to establish the extent to which the rules are "clearly inapplicable".<sup>FN7</sup> In order to avoid a series of procedural hiatus, it is presumed that the exceptions in Civ. Rule 1(C) were intended to proscribe the application of *individual* civil rules where "clearly inapplicable" leaving those which are *not* clearly inapplicable in force.

FN6. Defendant argues that the "Due Process Clause" requires that he be given actual notice of the filing of the judgment entry determining his claims. This argument is rejected. In this jurisdiction no actual notice need be given to the parties of the filing of a judgment entry, *Town & Country Drive-In Shopping Centers, Inc. v. Abraham* (1975), 46 Ohio App.2d 262, 265-268, 348 N.E.2d 741.

FN7. Civil Rule 1 states in relevant part:

"(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the

exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule."

\* \* \* \*

"(C) Exceptions. *These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure* (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) *in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.*"

### III.

\*3

(Cite as: 1980 WL 354451, \*3 (Ohio App. 8 Dist.))

There is a persuasive reason for finding Civ. R. 60(B) "clearly inapplicable" to post-conviction remedies. That reason is that both post-conviction relief (R.C. §2953.21) and Civ. R. 60(B) are corrective measures. The former is designed to protect against vices in criminal proceedings which cannot be reached by appeal. The other aims to requite faults in civil proceedings in cases which qualify for the relief. See *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 102-103, 316 N.E.2d 469.

To allow Civ. R. 60(B) relief to modify post-conviction relief pyramids remedies in a fashion this court will not endorse. A fair justice system is characterized by adequate remedies. But such fairness does not require an embarrassment of procedural riches.

Despite the civil nature of post-conviction proceedings, it is clear the legislature did not intend that an individual could seek relief from a *criminal judgment* by raising 60(B) defects where the action either substantively or procedurally has failed. In short, *only* a single avenue of relief outside the appellate system was intended. And, of course, neither PCR nor Civ. R. 60(B) relief were intended as substitutes for appeal.<sup>FN8</sup>

FN8. *Perry v. State* (1967), 10 Ohio St.2d 175, 182, 226 N.E.2d 104; *McCue v. Ins. Co.* (1979), 61 Ohio App.2d 101, 105-106, 399 N.E.2d 127.

This analysis compels a finding that the trial court did not err in overruling defendant's motion for relief from judgment.

Accordingly, the assignment of error is without merit.

Judgment affirmed.

KRUPANSKY, P.J., PATTON, J., CONCUR.

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State v. Wagner

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(Cite as: 1993 WL 104858 (Ohio App. 10 Dist.))

Not Reported in N.E.2d, 1993 WL 104858 (Ohio App. 10 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.  
**STATE** of Ohio, Plaintiff-Appellee,  
v.  
Ronald **WELLS**, JR., Defendant-Appellant.  
No. 92AP-1462.  
March 30, 1993.

Appeal from the Franklin County Court of Common Pleas. specification.

OPINION

BRYANT.

**\*1**

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(Cite as: 1993 WL 104858, \*1 (Ohio App. 10 Dist.))

Defendant-appellant, Ronald Wells, Jr., appeals from a judgment of the Franklin County Court of Common Pleas overruling his motion to enforce his plea agreement with plaintiff-appellee, State of Ohio.

In December 1983, defendant was indicted on three counts of aggravated murder in violation of R.C. 2903.01, with specifications, as well as one count of aggravated robbery in violation of R.C. 2911.01, with one specification.

Although defendant initially entered a not guilty plea to the foregoing charges, on May 14, 1984, pursuant to a plea agreement between the state and defendant, defendant changed his plea and entered a guilty plea to count two of the indictment: one count of aggravated murder, including one specification to that count. By entry dated May 21, 1984, the trial court sentenced defendant to twenty years-to-life on the guilty plea, dismissing the remaining charges and specifications.

On March 24, 1992, defendant filed a motion to enforce the plea bargain between the state and defendant, seeking that his guilty plea to aggravated murder be vacated and that he be allowed to enter a guilty plea to murder. While defendant, at least tacitly, acknowledges that the reduction was contingent on defendant's providing information leading to additional indictments regarding the murder, defendant contends that despite his having provided the state with sufficient information to obtain additional indictments, the state has steadfastly refused to proceed, thereby unjustly depriving defendant of the benefit of his plea agreement with the state.

The state responded to defendant's motion, acknowledging that the plea bargain permitted defendant to plead guilty to aggravated murder with a death penalty specification and to receive a sentence of life imprisonment with twenty full years of imprisonment in return for his cooperation; that defendant was further told that if his cooperation ultimately led to additional indictments, and if he continued to cooperate by testifying truthfully, the prosecuting attorney would later allow him to withdraw his plea to aggravated murder and then plead guilty to murder with a sentence of fifteen years-to-life. The state, however, argued that defendant had failed to provide information which would enable it to obtain further indictments; that the information defendant supplied was internally inconsistent and did not support any subsequent indictment; that, as a result, "defendant had received the benefit of his plea bargain, life with twenty (20) full years in return for his initial cooperation, [defendant having] done nothing further nor has he been asked to do anything which would entitle him to further consideration."

By decision and entry filed September 18, 1992, the trial court overruled defendant's motion, apparently without a hearing. The trial court noted that defendant's motion was filed some eight years after his conviction and five years after the legislative change which arguably would allow, without corroboration, defendant's testimony regarding the alleged conspiracy to murder indicated in the information defendant provided to the state herein. Ultimately, the trial court concluded that it would not disturb the prosecutor's judgment on the merits of seeking other indictments, nor

would it force the prosecution to "do a useless act." Although the trial court refers to a transcript clearly showing that an additional indictment and subsequent truthful testimony were required before the prosecution would seek a reduction in sentence, the record before us contains no transcript.

\*2

(Cite as: 1993 WL 104858, \*2 (Ohio App. 10 Dist.))

Defendant appeals therefrom, assigning the following error:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING WITHOUT A HEARING THE DEFENDANT'S MOTION TO ENFORCE THE PLEA AGREEMENT."

Defendant acknowledges that his motion is not to withdraw a guilty plea, but rather to vacate the guilty plea entered and to enforce the plea agreement. Defendant argues that in deciding his motion the trial court, at the least, was required to hold a hearing to resolve the disputed facts surrounding enforcement of the plea agreement, including defendant's assertion that he has fully performed his obligation under the plea agreement and has given the state adequate information to support an indictment.

The trial court is correct that the state has discretion in determining when to pursue an indictment; nonetheless, the factual dispute between the parties herein suggests that a hearing would be appropriate to determine whether the state properly had failed to pursue an indictment based on the information defendant supplied.

We recognize, however, that no standard procedures exist in a case of this nature, given that the criminal rules of procedure do not specifically provide for motions to enforce plea agreements. However, Crim.R. 57(B) provides:

"If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists."

Defendant's motion, in effect, is a motion which in the civil arena would fall within the parameters of Civ.R. 60(B): defendant seeks to vacate the guilty plea entered pursuant to his plea agreement with the state and to enforce the agreement he alleges he has fulfilled.

Application of Civ.R. 60(B) to the present facts only further supports the need for a hearing. When a party presents facts which arguably support granting relief under Civ.R. 60(B), the trial court is bound to conduct a hearing on the motion to determine the merits of the movant's assertions. Matson v. Marks (1972), 32 Ohio App.2d 319. On its face, defendant's motion raises an issue necessitating a hearing as to the timeliness of defendant's motion and as to defendant's assertions that he has fulfilled his obligations under the plea agreement and that an indictment may be obtained if the state would pursue it. Thus, under the authority of Crim.R. 57(B) and with Civ.R. 60(B) as a guide, the trial court erred in failing to hold a hearing on defendant's motion. To that extent, defendant's single assignment of error is sustained.

Having sustained defendant's single assignment of error to the extent set forth above, we reverse the judgment of the trial court and remand for further proceedings in accordance herewith.

*Judgment reversed and cause remanded.*

WHITESIDE and CACIOPPO, JJ., concur.

CACIOPPO, J., retired, of the Ninth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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State v. Wells  
Not Reported in N.E.2d, 1993 WL 104858 (Ohio App. 10 Dist.)

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----- (Cite as: 2000 WL 235555 (Ohio App. 9 Dist.)) -----

Not Reported in N.E.2d, 2000 WL 235555 (Ohio App. 9 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Lorain County.  
**STATE** of Ohio, Appellee,

v.

William C. **WINDMILLER**, Appellant.

No. 99CA007347.

March 1, 2000.

Appeal from Judgment Entered in the Court of Common Pleas, County of Lorain, Ohio Case Nos. 93CR043797, 93CR043878.

William C. Windmiller, 284-633, Chillicothe Correctional Institution, Chillicothe, Ohio, Pro Se, Appellant.

Gregory A. White, Prosecuting Attorney, Elyria, Ohio, for Appellee.

#### DECISION AND JOURNAL ENTRY

BATCHELDER.

**\*1**

----- (Cite as: 2000 WL 235555, \*1 (Ohio App. 9 Dist.)) -----

Appellant William Windmiller appeals from the judgment of the Lorain County Court of Common Pleas, denying his motion for relief from judgment. We affirm.

In 1993, Windmiller pleaded guilty to two counts of robbery and was sentenced to a prison term of five to fifteen years. In July 1995, Windmiller moved for probation, and the trial court granted the motion, placing him on probation for three years.

In January 1996, it was alleged that Windmiller had violated his probation, and a *capias* was issued for his arrest. Windmiller was not arrested until July 1996. He waived the probable cause hearing. The final revocation hearing was held on January 6, 1997. After the hearing, the trial court revoked Windmiller's probation and reimposed his prison sentence.

On August 22, 1997, Windmiller moved for a delayed appeal from the trial court's judgment. This court denied the motion on September 16, 1997.

On March 18, 1999, Windmiller moved for relief from judgment, under Civ.R. 60(B)(5). The trial court denied the motion on March 24, 1999. This appeal followed.

Windmiller asserts in his sole assignment of error that the trial court erred by denying his Civ.R. 60(B) motion. He contends that Civ.R. 60(B) may be applied in the context of his case by operation of Crim.R. 57(B), which provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." Windmiller argues that this rule permits a trial court to entertain a motion under Civ.R. 60(B) in proceedings to revoke probation.

We find that Windmiller's argument is without merit. "Civ.R. 60(B) has no application to judgments in criminal cases." State v. Israfil (Nov. 15, 1996), Montgomery App. No. 15572, unreported, 1996 Ohio App. LEXIS 4955, at \*2. We hold that Civ.R. 60(B) is inapplicable in proceedings to revoke probation. If the outcome of a probation revocation hearing is unfavorable to a defendant, his recourse is to appeal that decision. Therefore, because we find that Windmiller was not entitled to seek relief under Civ.R. 60(B), the trial court did not err by denying his motion.

Windmiller's assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is

affirmed.

*Judgment affirmed.*

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

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(Cite as: 2000 WL 235555, \*2 (Ohio App. 9 Dist.))

Costs taxed to Appellant.

Exceptions.

CARR, P.J., and WHITMORE, J., concur.

Copr. (C) West 2007 No Claim to Orig. U.S. Govt. Works Ohio App. 9 Dist.,2000.

State v. Windmiller

Not Reported in N.E.2d, 2000 WL 235555 (Ohio App. 9 Dist.)

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## Civil Rule 60. Relief from Judgment or Order

### 1. (a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

### 2. (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

## **Criminal Rule 32.1 Withdrawal of Guilty Plea**

**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.**

## **Rule 35. Correcting or Reducing a Sentence**

### **1. (a) Correcting Clear Error.**

Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

### **(b) Reducing a Sentence for Substantial Assistance.**

#### **(1) *In General.***

Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

#### **(2) *Later Motion.***

Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

#### **(3) *Evaluating Substantial Assistance.***

In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

#### **(4) *Below Statutory Minimum.***

When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

### **(c) "Sentencing" Defined.**

As used in this rule, "sentencing" means the oral announcement of the sentence.

## **Criminal Rule 57. Rule of Court; Procedure Not Otherwise Specified**

**2. (A) Rule of court. (1) The expression "rule of court" as used in these rules means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and is filed with the Supreme Court.**

**(2) Local rules shall be adopted only after the court gives appropriate notice and an opportunity for comment. If the court determines that there is an immediate need for a rule, the court may adopt the rule without prior notice and opportunity for comment, but promptly shall afford notice and opportunity for comment.**

**(B) Procedure not otherwise specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.**

**R.C. 2929.20. Judicial release.**

**(A) As used in this section, "eligible offender" means any person serving a stated prison term of ten years or less when either of the following applies:**

- (1) The stated prison term does not include a mandatory prison term.**
- (2) The stated prison term includes a mandatory prison term, and the person has served the mandatory prison term.**

**(B) Upon the filing of a motion by the eligible offender or upon its own motion, a sentencing court may reduce the offender's stated prison term through a judicial release in accordance with this section. The court shall not reduce the stated prison term of an offender who is not an eligible offender. An eligible offender may file a motion for judicial release with the sentencing court within the following applicable period of time:**

**(1) (a) Except as otherwise provided in division (B)(1)(b) or (c) of this section, if the stated prison term was imposed for a felony of the fourth or fifth degree, the eligible offender may file the motion not earlier than thirty days or later than ninety days after the offender is delivered to a state correctional institution.**

**(b) If the stated prison term is five years and is an aggregate of stated prison terms that are being served consecutively and that were imposed for any combination of felonies of the fourth degree and felonies of the fifth degree, the eligible offender may file the motion after the eligible offender has served four years of the stated prison term.**

**(c) If the stated prison term is more than five years and not more than ten years and is an aggregate of stated prison terms that are being served consecutively and that were imposed for any combination of felonies of the fourth degree and felonies of the fifth degree, the eligible offender may file the motion after the eligible offender has served five years of the stated prison term.**

**(2) Except as otherwise provided in division (B)(3) or (4) of this section, if the stated prison term was imposed for a felony of the first, second, or third degree, the eligible offender may file the motion not earlier than one hundred eighty days after the offender is delivered to a state correctional institution.**

**(3) If the stated prison term is five years, the eligible offender may file the motion after the eligible offender has served four years of the stated prison term.**

**(4) If the stated prison term is more than five years and not more than ten years, the eligible offender may file the motion after the eligible offender has served five years of the stated prison term.**

**(5) If the offender's stated prison term includes a mandatory prison term, the offender shall file the motion within the time authorized under division (B)(1), (2), (3), or (4) of this section for the nonmandatory portion of the prison term, but the time for filing the motion does not begin to run until after the expiration of the mandatory portion of the prison term.**

**(C) Upon receipt of a timely motion for judicial release filed by an eligible offender under division (B) of this section or upon the sentencing court's own motion made within the appropriate time period specified in that division, the court may schedule a hearing on the motion. The court may deny the motion without a hearing but shall not grant the motion without a hearing. If a court denies a motion without a hearing, the court may consider a subsequent judicial release for that eligible offender on its own motion or a subsequent motion**

filed by that eligible offender. If a court denies a motion after a hearing, the court shall not consider a subsequent motion for that eligible offender. The court shall hold only one hearing for any eligible offender.

A hearing under this section shall be conducted in open court within sixty days after the date on which the motion is filed, provided that the court may delay the hearing for a period not to exceed one hundred eighty additional days. If the court holds a hearing on the motion, the court shall enter a ruling on the motion within ten days after the hearing. If the court denies the motion without a hearing, the court shall enter its ruling on the motion within sixty days after the motion is filed.

(D) If a court schedules a hearing under division (C) of this section, the court shall notify the eligible offender of the hearing and shall notify the head of the state correctional institution in which the eligible offender is confined of the hearing prior to the hearing. The head of the state correctional institution immediately shall notify the appropriate person at the department of rehabilitation and correction of the hearing, and the department within twenty-four hours after receipt of the notice, shall post on the database it maintains pursuant to section 5120.66 of the Revised Code the offender's name and all of the information specified in division (A)(1)(c)(i) of that section. If the court schedules a hearing for judicial release, the court promptly shall give notice of the hearing to the prosecuting attorney of the county in which the eligible offender was indicted. Upon receipt of the notice from the court, the prosecuting attorney shall notify the victim of the offense for which the stated prison term was imposed or the victim's representative, pursuant to section 2930.16 of the Revised Code, of the hearing.

(E) Prior to the date of the hearing on a motion for judicial release under this section, the head of the state correctional institution in which the eligible offender in question is confined shall send to the court a report on the eligible offender's conduct in the institution and in any institution from which the eligible offender may have been transferred. The report shall cover the eligible offender's participation in school, vocational training, work, treatment, and other rehabilitative activities and any disciplinary action taken against the eligible offender. The report shall be made part of the record of the hearing.

(F) If the court grants a hearing on a motion for judicial release under this section, the eligible offender shall attend the hearing if ordered to do so by the court. Upon receipt of a copy of the journal entry containing the order, the head of the state correctional institution in which the eligible offender is incarcerated shall deliver the eligible offender to the sheriff of the county in which the hearing is to be held. The sheriff shall convey the eligible offender to the hearing and return the offender to the institution after the hearing.

(G) At the hearing on a motion for judicial release under this section, the court shall afford the eligible offender and the eligible offender's attorney an opportunity to present written information relevant to the motion and shall afford the eligible offender, if present, and the eligible offender's attorney an opportunity to present oral information relevant to the motion. The court shall afford a similar opportunity to the prosecuting attorney, the victim or the victim's representative, as defined in section 2930.01 of the Revised Code, and any other person the court determines is likely to present additional relevant information. The court shall consider any statement of a victim made pursuant to section 2930.14 or 2930.17 of the Revised Code, any victim impact statement prepared pursuant to section 2947.051 [2947.05.1]

of the Revised Code, and any report made under division (E) of this section. The court may consider any written statement of any person submitted to the court pursuant to division (J) of this section. After ruling on the motion, the court shall notify the victim of the ruling in accordance with sections 2930.03 and 2930.16 of the Revised Code.

(H) (1) A court shall not grant a judicial release under this section to an eligible offender who is imprisoned for a felony of the first or second degree, or to an eligible offender who committed an offense contained in Chapter 2925. or 3719. of the Revised Code and for whom there was a presumption under section 2929.13 of the Revised Code in favor of a prison term, unless the court, with reference to factors under section 2929.12 of the Revised Code, finds both of the following:

(a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;

(b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense.

(2) A court that grants a judicial release to an eligible offender under division (H)(1) of this section shall specify on the record both findings required in that division and also shall list all the factors described in that division that were presented at the hearing.

(I) If the court grants a motion for judicial release under this section, the court shall order the release of the eligible offender, shall place the eligible offender under an appropriate community control sanction, under appropriate community control conditions, and under the supervision of the department of probation serving the court, and shall reserve the right to reimpose the sentence that it reduced pursuant to the judicial release if the offender violates the sanction. If the court reimposes the reduced sentence pursuant to this reserved right, it may do so either concurrently with, or consecutive to, any new sentence imposed upon the eligible offender as a result of the violation that is a new offense. The period of the community control sanction shall be no longer than five years. The court, in its discretion, may reduce the period of the community control sanction by the amount of time the eligible offender spent in jail for the offense and in prison. If the court made any findings pursuant to division (H)(1) of this section, the court shall serve a copy of the findings upon counsel for the parties within fifteen days after the date on which the court grants the motion for judicial release.

Prior to being released pursuant to a judicial release granted under this section, the eligible offender shall serve any extension of sentence that was imposed under section 2967.11 of the Revised Code.

If the court grants a motion for judicial release, the court shall notify the appropriate person at the department of rehabilitation and correction of the judicial release, and the department shall post notice of the release on the database it maintains pursuant to section 5120.66 of the Revised Code.

(J) In addition to and independent of the right of a victim to make a statement pursuant to

section 2930.14, 2930.17, or 2946.051 [2946.05.1] of the Revised Code and any right of a person to present written information or make a statement pursuant to division (G) of this section, any person may submit to the court, at any time prior to the hearing on the offender's motion for judicial release, a written statement concerning the effects of the offender's crime or crimes, the circumstances surrounding the crime or crimes, the manner in which the crime or crimes were perpetrated, and the person's opinion as to whether the offender should be released.

## **R.C. 2953.21. Petition for postconviction relief.**

**(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.**

**(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.**

**(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.**

**(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.**

**(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.**

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and

file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

**(H)** Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

**(I) (1)** If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

**(2)** The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

**(3)** Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

**(J)** Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

**R.C. 2953.23. Time for filing petition; appeals.**

**(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:**

**(1) Both of the following apply:**

**(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.**

**(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.**

**(2) The petitioner was convicted of a felony, the petitioner is an inmate for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.**

**As used in this division, "actual innocence" has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code.**

**(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.**

## U.S. Code, Title 28, Section 2255.

### Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18. A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain -
  - (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

- (2) **a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.**