

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JOSE PENA,
Defendant-Appellant.

07-0964

CASE NO: Supreme Court

ON APPEAL FROM THE FRANKLIN
COUNTY COURT OF APPEALS
TENTH APPELLATE DISTRICT

Appeals Court Case No. 03-AP-174
"On Application To Reopen"

DECISION RENDERED ON:
April 12, 2007

APPELLANT JOSE PENA
MEMORANDUM IN SUPPORT OF JURISDICTION

JOSE PENA, #438-193
London Correctional Institution
P.O. Box 69
London, Ohio, 43140

Defendant-Appellant, Pro Se

RONALD J. O'BRIEN
FRANKLIN COUNTY PROSECUTING ATTY.

RICHARD TERMUHLIN, II
Assistant Prosecuting Attorney

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373 South High Street
Columbus, Ohio, 43215

Counsel For Plaintiff-Appellee

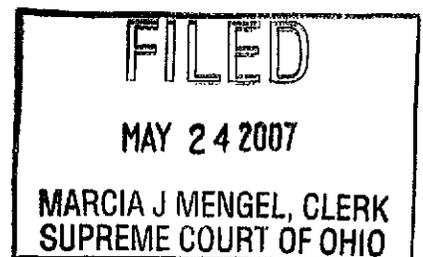


TABLE OF CONTENTS

	<u>Page</u>
Explanation Of Why This Case Is A Case Of Public Or Great General Interest And Involves A Substantial Constitutional Question	1
Statement Of The Case And Facts	4
Argument In Support Of Proposition Of Law	5
<u>Proposition Of Law No. 1: Appellate Counsel Was Ineffective When He Failed To Raise Assignment Of Error For Race Based Arrest When Arrest Was Based Solely On The Appellant's Hispanic Appearance Which Is Unconstitutional</u>	5
<u>Proposition Of Law No. 2: Appellate Counsel Was Ineffective When He Failed To Raise As Assignment Of Error That Trial Court Erred In Admitting Into Evidence Co-Defendant Cell-Phone And Records After Co-Defendant-Guzman Plead Guilty And Therein Denying Appellant His Right Embodied In The Confrontation Clause.</u>	7
<u>Proposition Of Law No. 3: Appellant Counsel Was Ineffective For Failing To Raise As Assignment Of Error That Trial Counsel Was Ineffective For Failing To Object To The Testimony Of States Star Witness Identifying Appellant As The Voice Or Person That Gave Him Instruction On How To Get To Columbus Where Said Testimony Was To Establish That Appellant Had Attained Constructive Possession Of Cocaine Hidden In Witness Truck</u>	9
<u>Proposition Of Law No. 4: Appellate Counsel Was Ineffective For Failing To Be Truthful With Appellant Concerning Issues Being Presented On Appeal And For Failing To Present Each Assignment Of Error In Its Proper Light, And For Failure To File A Timely Appeal Before The Supreme Court On All The Assignment Of Error Presented Herein On Delayed 26(B) And Direct Appeal.</u>	11
Conclusion	12
Certificate Of Service	13
Appendix	13
Statement Of Affidavit From Appellant Jose Pena	Exhibit "A"
Judgment Entry Of Sentence	"B"
Suppression Hearing Transcript (Pertinent Part)	"C"
Trial Transcripts (Pertinent Parts)	"D"
Tenth District Court Of Appeals Decision (Application To Reopen)	"E"

EXPLANATION OF WHY THIS CASE IS
A CASE OF PUBLIC OR GREAT GENERAL INTEREST
AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION!

The question presented to the Ohio Supreme Court is one of a constitutional standard that has been abandon by attorney's and appellate attorney's when representing a destitute and uneducated class of citizens in Ohio, and as such, this Honorable Court must stand by the Sixth Amendment protections guaranteed by the United States Constitution where it has been noted and decided many times by the United States Supreme Court that failure to inform a defendant of their appellate rights violates due process because a defendant is entitled to and must be accorded effective assistance of counsel throughout all phases of that stage of the criminal proceedings. See, Smith v. Robbins, 528 U.S. 259, 275-76, 120 S.Ct. 746 (2000). Harbison v. Bell, 408 F.3d 823, 829 (6th Cir.2005). Therefore, the question is can ineffective assistance of appellate counsel failure to file an appeal in the Ohio Supreme Court after he has been paid to do so serves as cause to overcome the procedural default on his appeal? And secondly, can ineffective assistance of appellate counsel failure to notify appellant of his right to appeal those grounds that was not overturned by lower appellate court 'when' one assignment of error was granted for resentencing, and can such failure overcome procedural default? Thirdly, can ineffective assistance of appellate counsel be good grounds to overcome default when appellate counsel purposely withheld notifying appellant of the appellate court decision until after the expiration of the 45 day period to file a timely notice of appeal serve to overcome a procedural default? Finally, can ineffective assistance of appellate counsel serve to overcome a procedural default when appellate counsel purposely tell appellant that he cannot file an appeal in the Ohio Supreme Court until after resentencing even though the time to file an appeal to the Ohio Supreme Court has expired?

In a more recent United Supreme Court case in Roe v. Flores-Ortega, (2000), 528 U.S. 470, 120 S.Ct. 1029, 1036, the Justice's held that "counsel has a constitutionally imposed duty to consult with the defendant an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known." Further, the United State Supreme Court held in Strickland v. Washington, (1984), 466 U.S. 668, 104 S.Ct. 2052, declared that "criminal defendants have a Sixth Amendment Right to 'reasonably effective' legal assistance" and announced a now familiar test: "A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation "fell below an objective standard of reasonableness," and (2) that counsel's deficient performance prejudiced the defendant. Today we hold that this applies to claims, like respondent's, that counsel was constitutionally ineffective for failing to file notice of appeal."

In this instant case, appellant hired appellate counsel John P. Rion, #002228, to handle both direct appeal and appeal to the Ohio Supreme Court if direct appeal was not successful in being granted a new trial. The Appellate Counsel John P. Rion, agreed to a fix sum of \$15,000.00 to handle both direct and discretionary appeal to the Ohio Supreme Court. Mr. Rion was paid in advance by appellant's family, and he assured them that appellant would get a new trial, but since they were out of state Mr. Rion sought to mislead them and give them false hope. Once the Appellate Court denied appellant's appeal on all grounds except one, and that was for resentencing. Mr. Rion did not notify appellant of the decision until after the 45 day time period had expired to appeal to the Ohio Supreme Court, and when appellant ask about appealing to the Ohio Supreme Court, Mr. Rion stated that he could not appeal

to the Ohio Supreme Court until after resentencing, and appellant believing Mr. Rion trusted what he had told him to be the truth. It was not until the resentencing hearing that appellant realized that Mr. Rion had lied to him and deceived appellant's family. At this point Mr. Rion would not accept any of appellant's calls or answer any letters, and appellant knew for certain that Mr. Rion had forfeited his appeals rights.

Mr. John P. Rion, lead appellant to believe that after resentencing if the trial court did not reduce the sentence he was going to incorporate new assignment of errors on appeal that would result in a new trial, but Mr. Rion had no intention of raising any new grounds for appeal that appellant have raised in his 'Delayed 26(B)' Application for Reopening. Mr. Rion has clearly violated the Professional Code of Responsibility to his client, and had prejudiced appellant from having an effective review of his case on appeal See, Stark Cty. Bar Assn. v. Russell, 856 N.E.2d 976 (2006).

The Appellant has clearly demonstrated a reasonable explanation for his failure to perfect a timely appeal and Application to Reopen 26(B), and the deficient performance of appellate counsel prejudiced this appellant as Strickland declared. *id.*, at 104 S.Ct. 2052. See also, United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039. Therefore, the final question is does appellate counsel with respect to the Sixth Amendment has a constitutional duty to inform his client with timely notice of the outcome of the appeal, and does appellant have a constitutional right to effective assistance of counsel during a direct appeal as of right. The Sixth Circuit Court of Appeals seems to think so in a recent decision in Smith v. State of Ohio Dept.Of Rehab., 463 F.3d 426 (6th Cir.2006), where it was held that counsel's delayed or failure to inform Smith's of the appeal decision within days of deadline constituted ineffective assistance.

Therefore, appellant prays this Court takes Jurisdiction to hear this case.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant, Jose Pena, was indicted by the Franklin County Grand Jury on May 29, 2002, on (1) count of Trafficking in Cocaine in violation of Ohio Revised Code § 2925.03 with a major drug offender specification, and (1) count of Possession of Cocaine in violation of O.R.C. § 2925.11 with major drug offender specification, and (2) counts of Complicity in violation of O.R.C. § 2923.03 with specification. The appellant pled not guilty, and a jury trial commenced on October 2, 2002, and the jury found appellant guilty of one count of Trafficking and Possession of Cocaine, both with specifications, and on December 11, 2002, appellant was sentenced to ten years on both counts Trafficking and Possession to run current, and to ten years on specification to run consecutive.

On February 25, 2003, notice of appeal was filed by way of appellate counsel Lou Friscoe (0031812), and brief's was filed by both appellant counsel wherein John P. Rion, replaced Lou Friscoe as appellate counsel. On January 29, 2004, the Court of Appeals issued its opinion overruling appellant's assignment of errors all but one, and ordered resentencing on the second assignment of error. On December 20, 2004, appellant was resentenced by trial court to the same sentence, and a timely notice of appeal was filed by appellant and the appellate court appointed appellant counsel Yeura R. Venters, from the Ohio Public Defenders Office. On November 17, 2005, the Court of Appeals overruled appellant's appeal, and appellant filed a timely appeal to the Ohio Supreme court on December 29, 2005, and the Ohio Supreme court ordered resentencing on Proposition of Law 1 and 2 to be consistent with State v. Foster, 109 Ohio St.3d 1, 2006-856. See also, State v. Pena, 2005-2432, 2006-Ohio-2109. Again on June 5, 2006, the appellant was resentenced to the same illegal and unconstitutional sentence on a major drug offender specification, and again, the appellant appealed and said appeal is still pending in the

Tenth District Court of Appeals, Case No. 06-AP-688.

On June 30, 2006, appellant filed a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On November 15, 2006, the United States Magistrate Judge Terence P. Kemp, (Case No. 2:06-CV-545), dismissed appellant habeas corpus claims without prejudice as unexhausted. The Appellant then filed a Delayed Appeal in the Ohio Supreme Court on December 4, 2006, Case No. 06-2235 which was subsequently dismissed by the Ohio Supreme Court. On December 23, 2006, the appellant filed a pro se Delayed Application to Reopen Appeal, to the Tenth Appellate District Court of Appeals alleging ineffective assistance of appellate counsel. On April 12, 2007, the Tenth District Court of Appeals dismissed application to reopen, and now appellant is before this Court on appeal.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition Of Law No. 1: Appellate Counsel Was Ineffective When He Failed To Raise Assignment Of Error For Race Based Arrest When Arrest Was Based Solely On The Appellant's Hispanic Appearance Which Is Unconstitutional.

A stop or arrest based solely on a defendant's Hispanic appearance is unconstitutional. See, United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 95 S.Ct. 2574 (1975). ("Hispanic appearance alone is insufficient to justify a stop"); Nicacio v. INS, 979 F.2d 700 (9th Cir.1985).

If the appellant's race was not the sole motivating factor, his arrest was nevertheless clearly illegal. After the search of his alleged vehicle and all the items within the vehicle, the police found nothing incriminating or had no probable cause to arrest Appellant at that point and time.

On May 19, 2002, detectives with the Columbus Police Department received information from a confidential informant that there was to be a delivery of cocaine that was to take place somewhere on Roberts Road in Columbus during

the early morning hours of May 20, 2002. The cocaine was to be delivered in a truck coming from Arizona and the individuals that would be conducting the transaction were Mexicans. The Appellant's name came up as one of the possible suspects. See the Suppression Hearing Transcripts and testimony of Detective Michael Johnson, who was the chief investigating detective who stated that they were looking exclusively for Mexicans involved in this drug deal, and who further stated why they were looking for Mexicans was because "Mexico is a drug source city" and this alone place every Mexican in jeopardy of being illegally arrested and rights violated. Sup.T.P. 16, 33 thru 42.

In U.S. v. Vite-Espinoza, 342 F.3d 462 (6th Cir.2003), the Sixth Circuit held: "The "racially-biased" assumption that a man of color wearing dreadlocks must have been an illegal alien from Jamaica, in combination with the "long-discredited drug source city rationale" was insufficient to create reasonable, articulable suspicion." United States v. Grant, 920 F.2d 376, 388 (6th Cir.1990). Further, "Merely observing a suspect conversing with known narcotics addicts by itself is insufficient to create reasonable suspicion." Sibron v. New York, 392 U.S. 40, 63-64, 88 S.Ct. 1889 (1968).

To have probable cause to arrest without a warrant, the officer must "know reasonably trustworthy information sufficient to warrant a prudent person in believing that the suspect has committed a crime." United States v. Butler, 74 F.3d 916, 920. In this case the so called informant had never been used before, and it could not be established if he was telling the truth. Therefore, once detectives and police searched Appellant vehicle and occupants, and did not discover any drugs, money, weapons or anything illegal, then probable cause ceased, and the only other suspicion was race based, and any evidence derived from that particular search should had been excluded as fruit of an illegal arrest. Davis v. Mississippi, 394 U.S. 721: Hayes v. Florida, 470 U.S. 811 (1985).

It is clear that the State used information taking from Mr. Guzman cell-phone to link Appellant to criminal activity, and all testimony derived from this illegal evidence should had been inadmissible.

Wherefore, the Appellate Counsel Mr. John P. Rion, was ineffective for failing to raise this obvious assignment of error that prejudice this Appellant from receiving a fair trial, and delayed relief should be granted.

Proposition Of Law No. 2:

Appellate Counsel Was Ineffective When He Failed To Raise As Assignment Of Error That Trial Court Erred In Admitting Into Evidence Co-Defendant Cell-Phone And Records After Co-Defendant-Guzman Plead Guilty And Therein Denying Appellant His Right Embodied In The Confrontation Clause.

In Burton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), there was created a federal constitutional right to confrontation which applies to state trials. Roberts v. Russell, 392 U.S. 293, 294, 88 S.Ct.1921, 1922 (1968). Wherein it was held "As the fundamental right embodied in the Confrontation Clause is the right to cross-examine one's adverse witness, it is nothing short of a denial of due process to rely on a jury's presumed ability to disregard a co-defendants confession implicating another defendant when the jury is determining the latter defendant's guilt or innocence."

In this case the trial counsel, Ms. Sarah Beauchamp, raised an objection at the beginning of Appellant's trial concerning the presentation of cell-phone records of co-defendant Rigoberto S. Guzman, taken from his cell-phone wherein the State presented to trial counsel the day of trial shortly after Mr. Guzman had plead guilty. The information in the cell-phone implicated the appellant Jose Pena, and other co-defendant Mr. Christopher Luty, phone numbers, and since Mr. Luty was turning states evidence, and the State had no other means of connecting the two defendants except through Mr. Guzman cell-phone that was recovered in an illegal arrest absent of probable cause.

The negative and prejudice bias created by the State presentation of this evidence violated two principle of constitutional protections and evidence rule. For example, the first amendment imposes special constraints on searches for and seizures of presumptively protected material, Lo-Ji Sales, Inc., New York, 442 U.S. 319, 326, n.5 (1979), and requires that the Fourth Amendment be applied with "scrupulous exactitude" in such circumstances. Standford v. Texas, 389 U.S. 476, 485 (1965). See also, Crawford v. Washington, 541 .S. 36, where it was held "the Confrontation Clause commands that reliability be assessed in a particular manner: by testing the crucible of cross-examination. Roberts allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one."

In this case the State star witness stated he never met or seen Appellant before the night of May 20, 2002. Further, his cell-phone he was using belonged to someone else, but it was released and not considered evidence though he was arrested with it. Then the State want to use Guzman cell-phone to connect there case because Mr. Luty, the states witness cannot proved Appellant called him, and the Appellant cannot cross-examine Mr. Guzman to find out if appellant did in fact call Mr. Luty and give him so called instruction to get to Columbus so that Mr. Luty could meet up with his boss Mr. Pablo. It is clear that this evidence was inadmissible and prejudice Appellant, especially at the closing argument when Prosecutor stated to the jury that co-defendant Guzman cellphone information was a very important to connect Appellant to possession of cocaine. See trial transcript page 15, 197, and 202: and United States v. Key, 725 F.2d at 1126: English v. United States, 620 F.2d at 152.

It is clear that the Appellant was deprived of the Constitutional Protection guaranteed by the Ohio and United States Constitution. Further, it is evenmore

obvious that trial counsel and appellate counsel was ineffective in their presentation of protecting their client rights and ensuring a fair trial and an effective appeal. Without being able to cross-examine Mr. Guzman there was no way Appellant could defend against the information obtained from Mr. Guzman cellphone. It is equally clear that the confrontation clause does not come into play where a potential witness neither testifies nor provides evidence at trial. See United States v. Coven, 662 F.2d 162, 170, cert.denied 456 U.S. 916; Mcallister v. Brown, 555 F.2d 1277; and Houser v. United States, 508 F.2d 509, 518. See Middletown v. Jones, 856 N.E.2d 1003, 2006-Ohio-3465.

Wherefore, Appellate Counsel, John P. Rion, was ineffective for failing to present obvious error on appeal and therein deny Appellant a fair review.

Proposition Of Law No. 3:

Appellant Counsel Was Ineffective For Failing To Raise As Assignment Of Error That Trial Counsel Was Ineffective For Failing To Object To The Testimony Of States Star Witness Identifying Appellant As The Voice Or Person That Gave Him Instruction On How To Get To Columbus Where Said Testimony Was To Establish That Appellant Had Attained Constructive Possession Of Cocaine Hidden In Witness Truck.

Every criminal defendant or co-defendant is privileged to testify in his own defense, or to refuse to do so. Now, more than ever, is that privilege to turn state evidence for lesser penalties for their involvement, and yet this privilege cannot be construed to include the right to commit perjury. Once having made that decision to turn states evidence, the co-defendant is under an obligation to speak truthfully and accurately, and in this case, the states star witness is an admitted liar, and admittedly this witness lied his way from the beginning of his arrest to making a deal with the state prosecuting attorney once he was able to gather enough information to compose a reasonable lie. However, what is disturbing in this case whether there

was impeachable testimony or not, the prosecution and the trial court allowed testimony that was not only unbelievable, unfounded, and unsupported by any logical and verifiable evidence. In other words, whatever story this guy told to the court and the jury it was going to be used to find this Appellant guilty. See Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480; Davis v. Alaska, 415 U.S. 308, 316-16, 94 S.Ct. 1105, 1110 (1974); United States v. Landerman, 109 F.3d 1053, 1061-64 (5th Cir.1997) (modified 116 F.3d 119). Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 3531, 2539 (1980). Middletown v. Jones, 856 N.E.2d 1003 (2006).

In this case the states star witness admitted he lied from his arrest up to his testimony at trial against Appellant. Mr.Luty, the co-defendant in this case stated under oath he was high on drugs (i.e. Methamphetamines and Cocaine) trial transcript page 166, and he further testifies that he never met or seen Appellant before the night of May 20, 2002, and then Mr. Luty, claims he recognized Appellant voice from the cell-phone giving him instruction on how to get to Columbus, Ohio. Throughout his entire testimony, Mr.Luty, claims his boss is Mr. Pablo, and Mr. Pablo was the only person who knew where all the drugs was hidden on the truck, and Mr. Luty further testifies that He was to meet his boss in Columbus, and the only conversation discussed twice on the cell-phones was getting direction, and giving direction to someone is in no way taking constructive possession of cocaine or the truck. See trial transcripts pages 132, 138, 141, or review the entire testimony Also see, Idaho v. Wright, 497 U.S. 805 @ 819, 110 S.Ct. 3139 @ 3148 (1990).

Wherefore, trial counsel was ineffective for failing to object to this prejudicial testimony which was a fabrication and distortion of the evidence presented and where said evidence was in violation of the fourth amendment of the United States Constitution, especially when said testimony was clear perjury and plain error before the trial court. Therefore, Appellate Counsel failure to raise trial counsel ineffectiveness therein denied effective review before the Appellate Court and violated Appellant due process rights.

Proposition Of Law No. 4:

Appellate Counsel Was Ineffective For Failing To Be Truthful With Appellant Concerning Issues Being Presented On Appeal And For Failing To Present Each Assignment Of Error In Its Proper Light, And For Failure To File A timely Appeal Before The Supreme Court On All The Assignment Of Errors Presented Herein On Delayed 26(B) And Direct Appeal.

The Ohio Supreme Court has held that "the two-pronged analysis found in Strickland v. Washington, (1984), 466 U.S. 668, 104 S.Ct. 2052, is the appropriate standard to assess whether an applicant has raised a 'genuine issue' as to the ineffectiveness of appellate counsel in his request to reopen under Appellate Rule 26(B)." State v. Palmer, (2001), 92 Ohio St.3d 241, 243, 749 N.E.2d 749. Therein concluding, that in order to show ineffective assistance, appellant must show that his counsel was "deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal." Id. quoting State v. Sheppard, (2001), 91 Ohio St.3d 329, 330, 744 N.E.2d 770.

The Appellant in this case is not from this country, and his family hired John P. Rion, as appellate counsel after counsel sold them on the idea that he could provide better services on appeal than Lou Friscoe (0031812), who had already filed a brief on Appellant's behalf. John P. Rion, had assured appellant and his family that he would raise assignments of errors concerning the arrest being illegal and race based, and evidence being inadmissible with the cell-phone and co-defendant Luty perjury testimony would be presented to the appeals court for review. However, appellate counsel Rion did not represent appellant zealously and truthfully. Appellate Counsel was untruthful when he told appellant that he could not appeal case to the Supreme Court until appellant be resentenced, and from this point he would not answer any telephone calls or respond to appellant concerning his appeal. He abandoned the case and left appellant without any competent representation and therein

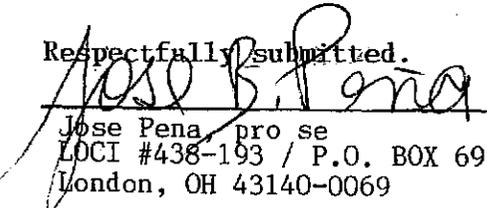
breached his code of professional responsibility, and violated appellant right to an effective review on both direct appeal and appeal to the Ohio Supreme Court. See Columbus Bar Assn. v. Farmer, 11 Ohio St.3d 137, 2006-Ohio-5342. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 1034, 1039 (2000); United States v. Stearns, 68 F.3d 328 at 330. Stark v. Russell, 856 N.E.2d 976 (2006).

The Sixth and Fourteen Amendment of the United States Constitution mandates that the accused be fairly represented by effective counsel through all stages of a criminal proceedings, and this includes direct appeals. However, from the record in this case it appears if the accuse is a non-citizen and lack constructive knowledge of the law then the constitutional protections do not exist or come into play in its entirety. In this case, an admitted liar and drug addict testimony was taken as the truth even when the evidence clearly demonstrated otherwise, and this bears the question would such lousy evidence and untrustworthy testimony be used to convict an 'Ohio Citizen'.(Emphasis added). I think we all know the answer to that question, but in any event, as it stand, appellate counsel was ineffective and this matter need to be reviewed and this matter reopen for appeal. Middletown v. Jones, 856 N.E.2d 1003 (2006).

C O N C L U S I O N

The Honorable Court retains jurisdiction to afford Appellant a meaningful review on appeal by the constitutional provisions mandate of the United States and Ohio Constitution. The principles behind the Supreme Court rulings is predicated upon the right to be heard, and a meaningful review. The record speaks for itself that appellant was denied effective assistant of trial and appellate counsel and this case should be properly reviewed by an unbiased tribunal that upholds the constitution.

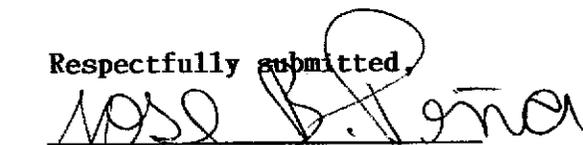
Respectfully submitted.


Jose Pena, pro se
LDCI #438-193 / P.O. BOX 69
London, OH 43140-0069

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant Memorandum In Support of Jurisdiction was served upon the Prosecuting Attorney Office to: Mr. Richard Termuhlen, II, Asst.Prosec.Atty., at 373 S. High Street, 13th Floor, Columbus, Ohio, 43215, by regular U.S. Mail on this 24th day of May, 2007.

Respectfully submitted,


Jose Pena, pro se
LOCI #438-193
P.O. BOX 69
London, OH 43140-0069

A P P E N D I X

Exhibits

Statement Of Affidavit From Appellant Jose Pena	"A"
Judgment Entry Of Sentence	"B"
Suppression Hearing Transcript (Pertinent Part).	"C"
Trial Transcripts (Pertinent Parts).	"D"
Tenth District Court Of Appeal Decision (Application To Reopen)	"E"

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

STATE OF OHIO)
)SS:
MADISON COUNTY)

AFFIDAVIT OF JOSE PENA

RE: DELAYED APPLICATION FOR REOPENING APPEAL / APPEAL CASE NO. 03-AP-174

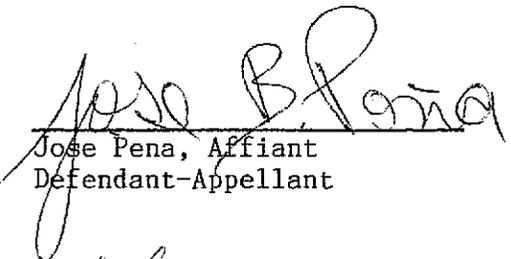
I, Jose Pena, first being duly cautioned and sworn according to law, depose and attest to the following as reasons for requesting a delayed appeal:

1. That I am presently incarcerated at London Correctional Institution in London, Ohio, serving a 20 year sentence, and that I am the Appellant in this cause of action.
2. That I have personal knowledge of the facts stated herein, and I am competent to testify and verify the truth of the same.
3. That I was represented by Appellate Counsel John P. Rion, in Case No. 03-AP-174, during the period of August 29, 2003 up to December 20, 2004; And during that period as appellate counsel he agreed to represent me through both level of appeals if the appeals court denied my appeal, he would appeal to the Ohio Supreme Court. That John P. Rion, sold my family on the idea that he would represent me in the lower appeals court and the Ohio Supreme Court if necessary, and they agreed on the fixed sum of \$15,000.00. That he convinced my family that he could do a better job representing me than Lou Friscoe (0031812) and raise all assignment of errors in connection with illegal arrest, inadmissible evidence, insufficient evidence, impeachable perjured testimony that should had never been allowed by the trial court, ineffective assistant of trial counsel and race based arrest.
4. That once I found out that the Tenth Appellate District had denied my appeal except for ground two, and ordered re-sentencing. I called John P. Rion office and asked if he was going to appeal to the Ohio Supreme Court. He told me that he could not file into the OHio Supreme Court until after I was re-sentenced. I asked him the same question again and he assured me once I was resentence he would appeal. From that point on John P. Rion, would not talk to me or my family, and finally his secretary told me that he wanted more money, but by that time six months had past and the 45 days had expired for filing , however, at that time I did not know all I had was 45 days. I was told that John P. Rion would be at my resentencing hearing, but he did not show up. I was abandoned by John P. Rion, and the Franklin County Public Defender Office told me that they would not appeal this matter to the Ohio Supreme Court.
5. I am not a citizen of this country, and I am ignorant to the law and do not understand how to file appeals or write well enough to express myself. I am being helped by jailhouse lawyers to file all my legal papers. My appellate counsel was ineffective and prejudiced me when he failed to raise all the assignment of errors he said he would, and then he was not

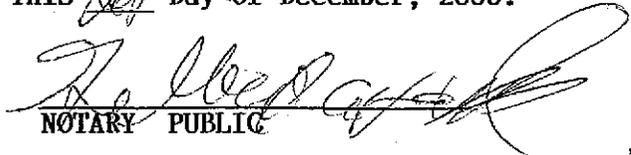
truthful with me or my family when he said he would appeal to the Supreme Court, and his failure to do so violated my 6th and 14th Amendment rights to proper review of my issues.

6. That all the grounds appellate counsel John P. Rion raised on appeal was without zeal and was not properly raised before this Appellate Court and merely going through the motion of filing an appeal was to just trick my family out of there hard earned money because we are not americans.
7. That Mr. John P. Rion deceptive practices is a direct violation of lawyers Code of Professional responsibility because we had an agreement that he would represent me in all phases of my appeals and he abandoned me without proper notice or stating he was no longer representing me because had he gave me proper notice then I would had filed a timely Application to Reopen my appeal for ineffective assistance of appellate counsel, and would had filed a timely notice of appeal to the Ohio Supreme Court had he just notified me telling me that he was no longer representing me after telling me that I could not file a notice of appeal in the Ohio Supreme Court until after resentencing. John P. Rion's lack of ethical practices has prejudiced and denied me the right to fully and properly heard on all issues.
8. That I ask this Court to accept my delayed application to reopen my appeal in the interest of justice free of the bias I have suffered by being a non-american.

Affiant further sayest naught.


Jose Pena, Affiant
Defendant-Appellant

Sworn To Before Me And Subscribed In My Presence This 1st Day Of December, 2006.


NOTARY PUBLIC



GILBERT A. HURWOOD
Notary Public
In and for the State of Ohio
My Commission Expires 01/09/08

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

~~47421E20~~

47508J12

FILED COURT
COMMON PLEAS, OHIO
2008 DEC 20 AM 9:21
CLERK OF COURTS

The State of Ohio, : TERMINATION NO. BY:
Plaintiff, :
vs. : Case No. 02CR-05-2880
Jose Pena, : Judge Crawford
Defendant. :

JUDGMENT ENTRY

On the 2nd, 3rd, and 4th days of October 2002, the State of Ohio was represented by Prosecuting Attorneys Jerry Maloon and Jeffrey Davis and the Defendant was represented by Attorney Sarah Beauchamp. Counts One and Two were tried by a jury which returned a verdict on October 4, 2002 finding the Defendant guilty of the following offenses:

Count One of the Indictment, to-wit: **Trafficking in Cocaine**, in violation of R.C. 2925.03, a felony of the first degree.

Count Two of the Indictment, to-wit: **Possession of Cocaine**, in violation of R.C. 2925.11, a felony of the first degree.

Counts Three and Four of the indictment were dismissed by the prosecutor prior to trial.

On December 6, 2002, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Prosecuting Attorneys Jerry Maloon and Jeffrey Davis and the Defendant was represented by Attorney Sarah Beauchamp.

The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the Court has considered and weighed.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term is mandatory pursuant to R.C. 2929.13(F).

The Court hereby imposes the following sentence: 10 years for Count One and 10 years for Count Two with an additional 10 years, because the Defendant has been found to be a major drug offender, to be served at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. Counts One and Two shall run concurrent with each other. The 10 years for the major drug offender shall run consecutive with Counts One and Two. (The Defendant is to receive 20 years on each count).

On December 15, 2004, a resentencing was held and the Court made the following findings on the record. In addition, the Court finds that:

The terms so imposed are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism and the terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

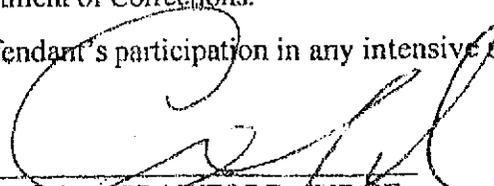
The Court has considered the Defendant's present and future ability to pay a fine and financial sanctions and, pursuant to R.C. 2929.18, renders a judgment for the following fine and/or financial sanctions: The Court, having been tendered an Affidavit of Indigency executed by the Defendant, finds the Defendant to be indigent and waives payment of the mandatory fine and Court costs pursuant to R.C. 2925.03(H).

After the imposition of sentence, the Court notified the Defendant, orally and in writing, of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e).

After imposing sentence, the Court gave its finding and stated its reasons for the sentence as required by R.C. 2929.14(B). The Defendant was notified that this is an appealable sentence.

The Court finds that the Defendant has 2001 days of jail credit effective December 6, 2002 and hereby certifies the time to the Ohio Department of Corrections.

The Court hereby disapproves the Defendant's participation in any intensive and/or shock incarceration.


DALE A. CRAWFORD, JUDGE

423608-14

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY,
CRIMINAL DIVISION

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
03 JUN -2 AM 10:10
CLERK OF COURTS

State of Ohio,
Plaintiff,
vs.

Rigoberto Guzman, : Case No. 02CR-2879
Christopher Luty, : Case No. 02CR-2878
Jose Pena, : Case No. 02CR-2880
Defendants : VOLUME II of III

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
03 APR 11 AM 10:29
CLERK OF COURTS

TRANSCRIPT OF PROCEEDINGS
MOTION TO SUPPRESS

APPEARANCES:

Mr. Jerry Maloon and Mr. Jeff Davis, Assistant Prosecutors
On behalf of the State.

Mr. Eric Yavitch, Esq. and Mr. Steve Palmer, Esq.
On behalf of the Defendant-Guzman

Mr. Darren McNeal, Esq.
On behalf of the Defendant-Luty

Ms. Sarah Beauchamp, Esq.
On behalf of the Defendant-Pena

BE IT REMEMBERED, that on the hearing
of the above-entitled cause at the September Term, 2002
of the Common Pleas Court of Franklin County, Ohio,
before the Honorable Dale A. Crawford, Judge, the
following proceedings were had, to wit:

ON COMPUTER C/C

03 APR 174

1 A. By that point in time, it was 1:00 in the
2 morning.

3 Q. A lot of vehicles moving around?

4 A. It was just the police following Mr. Guzman.

5 Q. So obviously pretty easy for them to spot you,
6 too?

7 A. Yes.

8 Q. Mr. Guzman flip around then?

9 A. He flipped around through the parking lot and
10 was driving directly back at us. And at that point in
11 time, we decided to stop him.

12 Q. And who all was in the vehicle?

13 A. Mr. Guzman was the only one in the vehicle.

14 Q. What did you do at that time?

15 A. We detained Mr. Guzman. I popped the trunk of
16 the car and there was nothing in the trunk. It was
17 empty.

18 Q. And so then what happened?

19 A. Based upon that, my next step was, well, the
20 dope is still in the truck. The exchange of the money
21 did not take place for the dope and apparently the dope
22 is going to be packed in the suitcase.

23 Q. And obviously at this point in time you were
24 already aware since Mr. Pena is no longer in his vehicle
25 that he is out and about somewhere?

1 involved?

2 A. Yes.

3 Q. But they didn't mention what type of truck,
4 did they?

5 A. No. A truck from Arizona is all I was told.

6 Q. When you say "from Arizona," did they tell you
7 that the truck had Arizona tags or was from Arizona?

8 A. The information I received was the shipment of
9 cocaine was coordinated by some Mexicans and it was
10 coming from Arizona on a truck. My assumption was the
11 truck had Arizona tags.

12 Q. So that's your assumption. Nobody told you
13 the truck had Arizona tags; is that correct?

14 A. No. I was told the truck was coming from
15 Arizona.

16 Q. It could have been a truck or car with Ohio
17 tags from Arizona?

18 A. I guess it could have been, yes.

19 Q. And 32 kilos, pound-wise, that's about a how
20 many pounds?

21 A. It came out to seventy some odd pounds.

22 Q. So you wouldn't need a large truck to carry
23 that much cocaine, would you?

24 A. You would need a large truck you said?

25 Q. You wouldn't need a semi tractor trailer to

1 carry seventy pounds of drugs, would you?

2 A. No, not necessarily. There was a suitcase all
3 the drugs --

4 Q. So nothing immediately alerted you to the fact
5 that the truck would be a tractor trailer?

6 A. I was told it was a truck from Arizona.

7 Q. Nothing alluded to the fact it would be a
8 tractor trailer?

9 A. No specifics, no.

10 Q. And you said there were no other trucks in the
11 Waffle House parking lot.

12 A. There may have been one parked on the other
13 side. I focused on that truck once I saw Mr. Luty
14 pacing about in a nervous manner and I saw the Arizona
15 tags and I saw Mr. Pena and Mr. Guzman inside and they
16 were nervous and stuff.

17 Q. So you didn't look in any other trucks to see
18 if they had Arizona tags?

19 A. I looked for Arizona tags. I drove through
20 the surrounding hotels. My first thought, maybe the
21 deal was going to happen at a hotel. Because frankly, a
22 lot of drug dealers do their deals at hotels. So we
23 circulated the hotels looking for Arizona tags. Didn't
24 see any.

25 And in the meantime, Mr. Pena and Guzman

1 arrived at the Waffle House and saw Mr. Luty's truck in
2 the back of the Waffle House with Arizona tags and he
3 was standing outside looking around.

4 Q. But now you think there were other trucks in
5 the Waffle House parking lot as well. Could be?

6 A. There may have been one on the other side or
7 something. But my attention was focused on Mr. Luty's
8 truck with Arizona tags.

9 Q. And so as you were riding around the area
10 looking at hotels and other things, did you go and look
11 at every truck that you saw?

12 A. I looked at every vehicle I saw, yes.

13 Q. How many trucks do you think you looked at?

14 A. I think there was only maybe one more truck at
15 the Waffle House that night.

16 Q. But the whole area that you swept --

17 A. I didn't see any other trucks in the hotels.

18 Q. No trucks?

19 A. Not in the hotels. It was just cars, vans.

20 Q. But no pickup trucks?

21 A. I looked at everything and the only Arizona
22 tag I saw was on Mr. Luty's truck.

23 Q. Okay. And the CI told you that individuals in
24 question were Mexicans?

25 A. That the people coordinating the shipment were

1 Mexican.

2 Q. And they said Mexican and not Hispanic?

3 A. No. The CI said Mexican.

4 Q. And is Mr. Luty Mexican?

5 A. No. He is an average white guy.

6 Q. So you weren't looking for a male white, were
7 you?

8 A. My assumption was if it was Mexicans in charge
9 of the cocaine, they probably weren't going to send a
10 Mexican because the profile, typically, law enforcement
11 would stop this truck coming to Columbus, Ohio with no
12 load in the back trailer and a Mexican driving it. If
13 it was me I would have had suspicions something wouldn't
14 have been right.

15 Q. Why?

16 A. Because Mexico is a drug source city.

17 Q. Is it illegal to drive a truck without a load?

18 A. It's not illegal. However, when trucks drive
19 loads -- when truckers drive trucks without a load, they
20 lose money. Sure. So no trucker is going to come to
21 Columbus, Ohio with an empty truck. They are going to
22 take a load someplace and take a load back most of the
23 time.

24 Q. But it's not illegal to have an empty trailer,
25 is it?

1 A. Not at all.

2 Q. But that's suspicious to you?

3 A. I'm saying as a patrol officer if I would have
4 made a traffic stop on an Arizona truck for whatever
5 violation and there was no load in the back and Mr. Luty
6 was sitting in the truck, I would have investigated
7 further thinking something was amiss.

8 Q. So when you saw Mr. Luty sitting outside the
9 truck, you didn't know if the truck was empty or not,
10 did you?

11 A. No, I didn't.

12 Q. But you just saw him and he looked nervous; is
13 that your testimony?

14 A. Well, the first thing I noticed was his truck
15 with Arizona tags.

16 Q. Okay.

17 A. And I saw him pacing about nervously. And in
18 light of all the prior information I had --

19 Q. But this is your hunches and assumptions now,
20 not what the informant told you.

21 A. I had probable cause to believe that Mr.
22 Luty's truck had cocaine in it based upon the prior
23 information that I had received.

24 Q. Based upon looking for a Mexican in a truck?

25 A. Not necessarily a Mexican in a truck. I was

1 told a truck from Arizona. The shipment was coordinated
2 by Mexicans.

3 Q. And when you saw Mr. Luty walking about
4 nervously, was he involved in any criminal activity?

5 A. He was standing outside the truck like he was
6 waiting on somebody. He was looking around.

7 Q. And is that illegal?

8 A. Not at all.

9 Q. Did he have a cell phone with him?

10 A. I was quite a distance off so I wouldn't be
11 compromised.

12 Q. Like how far away were you?

13 A. I was sitting in the Holiday Inn lot with
14 binoculars looking over that way and I could see the
15 truck and I could also see the front of the Waffle House
16 where the silver Nissan was parked.

17 Q. Okay. Now, the silver Nissan you think is Mr.
18 Pena's vehicle?

19 A. It was a rental car that his girlfriend had
20 rented.

21 Q. Okay. And they were inside at the counter; is
22 that correct?

23 A. They were in a booth.

24 Q. At a booth. At some point in time, did some
25 officers come into the Waffle House?

1 A. Yes. Steve Overholser and Mike Saari.

2 Q. And did they sit in the booth as well?

3 A. I know they sat right next to them. I don't
4 know how -- I couldn't see them; so you'd have to ask
5 him.

6 Q. Next to him in another booth?

7 A. I think so. I'm not positive. You'd have to
8 ask Detective Saari. I know they were sitting right
9 next to them so Mike Saari could overhear their
10 conversation because he's fluent in Spanish.

11 Q. And he didn't overhear that much, did he?

12 A. You will have to ask Detective Saari.

13 Q. You testified earlier that the words, okay,
14 okay, okay, okay in Spanish were spoken.

15 A. That's what Detective Saari told me.

16 Q. Okay. And you interpret that to mean that the
17 deal was going on, didn't you?

18 A. I didn't personally interpret it for
19 anything. This was after the fact that he relayed to me
20 what he heard and his feelings on the conversation.

21 Q. Well, earlier you said that the impression was
22 that we were out here and the deal was going to start.
23 Didn't you say that?

24 A. No. That was what was indicated to me by
25 Detective Saari after we took off Mr. Luty and Guzman

1 and stuff. I didn't hear any of the conversation. I
2 was outside.

3 Q. And did you have radio contact with the
4 officers inside?

5 A. No. It would be a little obvious if they are
6 talking on the radio sitting next to them.

7 Q. And so you had two officers inside, correct?

8 A. Uh-huh.

9 Q. And you were outside?

10 A. Uh-huh.

11 Q. Who else was outside?

12 A. Detective Kallstrom and Douglas Eckhart and
13 Robin Eckhart.

14 Q. Were these guys far away like yourself in
15 another parking lot?

16 A. We were just positioned in different areas as
17 to try to have an eyeball on as much of the lot as we
18 could.

19 Q. And you were in unmarked cars; is that
20 correct?

21 A. Uh-huh.

22 Q. And did you observe Mr. Guzman and Mr. Pena
23 exit the Waffle House?

24 A. Yes.

25 Q. You saw that yourself?

1 A. Yes, I did.

2 Q. And you saw them get to the car?

3 A. Yes, I did.

4 Q. Did you see them drive around the rear to the
5 Waffle House?

6 A. Yes.

7 Q. Did you have visual observation at all times?

8 A. I lost sight for a couple seconds. I
9 obviously didn't want to follow them right on their
10 bumper. So I did the best I could and came around,
11 hopefully so I wouldn't be compromised. And they were
12 meeting with Mr. Luty.

13 Q. And so when you came up or when you
14 reestablished contact, where was the car?

15 A. It was parked next to the semi-truck.

16 Q. Like how far away from the semi truck?

17 A. It was parallel to the truck. The truck was
18 facing west. The car was facing east. And I want to
19 say the gap between the car and the truck was maybe
20 twenty-five feet maybe. That would be my best guess.

21 Q. And so when you came up, had both Mr. Guzman
22 and Mr. Pena, had they exited the Maxima?

23 A. Well, I wouldn't refer to it as coming up. I
24 stayed back quite a distance, obviously. But I got in
25 position where I could see. And I saw Guzman and Pena

1 out of the car and I saw Mr. Luty standing next to the
2 truck.

3 Q. You didn't see them get out of the car, did
4 you?

5 A. No. When I got back there and got my line of
6 sight, they were already out of the car.

7 Q. And you testified you saw what appeared to be
8 Mr. Luty with the suitcase in his hand?

9 A. Yes.

10 Q. Okay. And what did he do with the suitcase?

11 A. Put it in the truck from what I saw.

12 Q. Can you tell me how he put it in the truck?

13 A. Turned around, opened up the door and got in
14 the truck.

15 Q. Did he have the suitcase himself? It was a
16 large suitcase, correct?

17 A. Yes.

18 Q. And he handed it to him, what, with two hands?

19 A. I don't remember if he had two hands. I
20 remember he had the suitcase, opened up the door and got
21 in the truck.

22 Q. Did he put the suitcase down?

23 A. I couldn't tell. I saw him get in the truck.
24 I was quite a ways.

25 Q. Suitcase to the ground?

1 too.

2 Here in Columbus once this dope
3 finally got here, you're going to hear evidence our
4 detectives were there waiting at the Waffle House, 270
5 and Roberts.

6 Before this case, used to eat there
7 quite a bit. Haven't eaten there since.

8 Jose Pena is on the phone with Luty.
9 Luty stopped outside of a truck stop outside of Toledo.
10 Jose is telling him exactly where to go. Jose takes
11 control of that dope from Pablo. You're going to hear
12 about Pablo. Jose Pena takes control of that dope when
13 he tells Mr. Luty where to go and how to get here.

14 This case is about trafficking in
15 cocaine in Franklin County, Ohio. You're going to hear
16 about the aiding and abetting done by this man.

17 You're also going to hear a little bit
18 about a man named Rigoberto Guzman. He was also
19 arrested that night. You'll hear about him.

20 Interesting thing about him, he had a
21 cell phone on him that we got. He's going to tie things
22 together real nice.

23 You're going to hear a lot of
24 evidence. You're going to hear from Mr. Luty. He's
25 going to tell you he's scared. He's going to tell you

1 a truck driver in some way?

2 A. Yes, sir.

3 Q. About when was that?

4 A. March of 2001, sir.

5 Q. I want to take you to May 19th into the early
6 morning hours of May 20, 2002. Do you remember that
7 evening?

8 A. Yes, sir.

9 Q. What happened that evening to you?

10 A. I was making a delivery of a large amount of
11 cocaine to Columbus, Ohio. I was -- I was stopped in
12 Toledo because I didn't know where I was supposed to go.

13 Q. Let's back up. Were you arrested that night,
14 late that night?

15 A. Yes.

16 Q. Here in Columbus?

17 A. Yes, sir.

18 Q. Okay. Said you were making a delivery. Where
19 did your trip start?

20 A. Phoenix, Arizona.

21 Q. And what did you get or where did you get the
22 items you were supposed to deliver?

23 A. From my supposedly boss's apartment.

24 Q. And what was it you were supposed to deliver?

25 A. Cocaine.

1 A. Yes, sir.

2 Q. Where did you go from Omaha?

3 A. From Omaha I went en route to Aurora,
4 Illinois.

5 Q. Why are you choosing these places to go? Is
6 it what you're choosing to do or what's going on?

7 A. I'm not choosing them, sir. I take the same
8 route all the time. I get a phone call, you're going to
9 stop here. You're going to stop in Aurora, Illinois.
10 Get your map out when you get there. I'll call you back
11 and tell you where to drop the truck off.

12 Q. Who are you conferring with over the cell
13 phone?

14 A. Pablo.

15 Q. Same Pablo from Arizona?

16 A. Yes, sir.

17 Q. Indeed, did that happen on this trip?

18 A. No, sir. I didn't go to Aurora, Illinois. I
19 was detoured to Columbus, Ohio.

20 Q. How were you detoured?

21 A. En route, I received a phone call; asked where
22 I was at. I told him I was almost to Illinois. He said
23 you're going to take a detour, go to Columbus, Ohio. At
24 that time, Pablo said he'd meet me there and him and I
25 would drive to New York.

1 A. Yes, sir, I did.

2 Q. Where was that?

3 A. That would be at the Waffle House at 270 and
4 Roberts Road.

5 Q. And who was that individual?

6 A. Jose Pena.

7 Q. Did you know, ever lay eyes on Jose Pena
8 before that time?

9 A. No, sir.

10 Q. So the girl calls you, you can't understand
11 her. Another person calls. And that's Mr. Pena?

12 A. Yes, sir.

13 Q. What did he say?

14 A. He did ask me where I was at. And I told him
15 I was in Toledo and he asked me how long would it take
16 to get there. And he said he'd keep in contact with me
17 every hour, hour and a half phone call.

18 Q. What happened?

19 A. Then I hung up and I'm not too clear on a lot
20 of stuff, sir, because at the time I was heavily on
21 drugs myself. But I do remember I did receive a phone
22 call also from Pablo. And I explained to him what was
23 going on. Told him I got the one call from the female,
24 couldn't understand what she was saying and then I got
25 the phone call from Pena and he told me to wait for

1 A. Outside my truck, right -- actually right
2 outside the cab of my truck.

3 Q. What was discussed then?

4 A. I had told him that I didn't know where all
5 the drugs were at, that my boss Pablo told me he knew
6 where they were all at. And then he had told me he
7 didn't know where they were all at. I told him I'd also
8 need a bag to put these in because I didn't have one.
9 And he said okay. And he had to make a phone call and
10 he'd get back with me. So he had walked away.

11 I climbed into my truck and started taking out
12 the ones that I knew where they were at. At that time,
13 I got another phone call from Pablo and he told me to
14 give him everything. And he said don't keep nothing. I
15 told him I don't want to keep nothing. I just want to
16 get this done and I don't want it no more. He told me
17 to give everything. He kept pushing on give him
18 everything. And I said I don't know where it's all at.
19 And he said -- that's all he kept saying. I kept trying
20 to find out where they are at. He said give them
21 everything. He wouldn't tell me where they are all at.

22 Q. And did you attempt to do that?

23 A. Yes, sir.

24 Q. After the phone call with Pablo, what happens
25 next?

1 statement to the police that evening -- is that right?

2 A. Yes.

3 Q. You said you weren't using drugs, you had
4 given up drugs to the officers. Do you remember that?

5 A. Yes, ma'am.

6 Q. Was that true?

7 A. At that time it wasn't, no.

8 Q. You were actually high on drugs.

9 A. Yes, ma'am.

10 Q. What drugs were you high on that night?

11 A. Cocaine and glass.

12 Q. What's glass?

13 A. Methamphetamines.

14 Q. How much cocaine had you ingested during that
15 eight hours before you were arrested?

16 A. I couldn't tell you. Not -- not --

17 Q. Did you get your cocaine from the product that
18 you were shipping or from another source?

19 A. Some of it was from the stuff from Nebraska.

20 Q. Does that mean that it was some of the product
21 that you were shipping that you took?

22 A. Yes, ma'am.

23 Q. Now, as to the glass, where did you get that?

24 A. I received that from Pablo when I came back to
25 Arizona on my first trip.

1 back on the cell phone. Talking more about the drugs
2 with him when he gave him a suitcase. You know Luty is
3 telling the truth because you also have Officer Johnson
4 telling you he saw Jose Pena with that same suitcase.
5 Only suitcase in there. Only suitcase in there with the
6 defendant's girlfriend's name attached to it. You know
7 where that suitcase came from. Luty told you it came
8 from Pena. Officer Johnson told you it came from Pena.
9 And Fatima Brea's name tag was on that suitcase. Luty
10 is unloading the drugs, giving that suitcase to give to
11 Pena.

12 What are the odds, Pena happens to be
13 at the Waffle House; happens to approach an Arizona
14 truck, cell phone -- Guzman tells you -- what a great
15 piece of evidence the State found. You have photos that
16 link everything. You'll see 7:45 p.m. was the last
17 phone call from Guzman's cell phone to Pena's cell
18 phone; which by the way, no, we didn't find. We know he
19 had it on him when he was running through the brush and
20 the creek though because Luty told you. They are
21 sitting in the tank together for a week after this.
22 Luty told you all about that stuff. He had no idea what
23 these peoples names were. Never met them. Recognized
24 his voice that this was the guy calling when he first
25 met him at the Waffle House parking lot. Found out who

1 This case was short. This case was
2 packed with incriminating evidence against this
3 defendant. Take a look at everything. Take a look at
4 the facts.

5 You folks, now, this is your time. We
6 are done. This is for you folks to take this in your
7 hand to go back into that deliberation room. And now
8 you folks have the power. I submit to you, argue to you
9 that you have absolutely overwhelming evidence that Jose
10 Pena is guilty to both counts.

11 Now I do want to tell you a couple
12 things on the side. You will get all that evidence back
13 there. That evidence. It's not pretty to be around for
14 long, as I think some of you found out. Well, it did
15 dry me up finally. It also burned my eyes. I will have
16 absolutely no objection, nor do I think anybody else
17 will, that if in two minutes back there you guys raise
18 the white flag and say get it out of here, we've
19 reviewed it enough, we are not going to torture you back
20 there if you don't want it back there.

21 The other thing, you'll have Guzman's
22 cell phone. It works. Those numbers are still there.
23 That list that the detectives were talking about that
24 was taken off just a couple days ago, it's all there. I
25 would warn you, strangely enough, I have the same type

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN COUNTY, OHIO
2007 APR 12 PM 12:31
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State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 03AP-174
 : (C.P.C. No. 02CR-2880)
 Jose Pena, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

MEMORANDUM DECISION

Rendered on April 12, 2007

Ron O'Brien, Prosecuting Attorney, and *Richard Termuhlen, II*, for appellee.

Jose Pena, pro se.

ON APPLICATION FOR REOPENING

McGRATH, J.

{¶1} On December 26, 2006, defendant-appellant, Jose Pena, filed, pro se, an application for reopening pursuant to App.R. 26(B).

{¶2} Appellant was indicted by a Franklin County Grand Jury in a four-count indictment. Counts Three and Four of the indictment were dismissed prior to trial. On October 4, 2002, following a jury trial, appellant was found guilty on Count One of the indictment, trafficking in cocaine, in violation of R.C. 2925.03, and Count Two of the indictment, possession of cocaine, in violation of R.C. 2925.11, both felonies of the first

Exhibit-E

degree. A sentencing hearing was held pursuant to R.C. 2929.19 on December 6, 2002, and the trial court imposed the following sentence: ten years for Count One and ten years for Count Two with an additional ten years, because the defendant was found to be a major drug offender. Counts One and Two were to be served concurrent with each other, and the ten years for the major drug offender was to be served consecutive with Counts One and Two. A judgment entry reflecting such was journalized on December 20, 2004. Appellant was represented by counsel at both the trial and sentencing hearings.

{¶3} Appellant appealed his convictions and asserted six assignments of error. On January 29, 2004, in *State v. Pena*, Franklin App. No. 03AP-174, 2004-Ohio-350, this court overruled five of the stated assignments of error that related to appellant's conviction, and sustained appellant's second assignment of error, which related to appellant's sentence and the trial court's failure to make the required statutory findings when imposing maximum and consecutive sentences. Therefore, the matter was remanded to the trial court for resentencing. On December 15, 2004, a sentencing hearing was held and the original sentence was imposed with the requisite findings. After the resentencing, appellant filed an appeal asserting various issues pertaining to *State v. Blakely* (2004), 542 U.S. 296, 124 S.Ct. 2531. On November 17, 2005, this court affirmed the trial court's resentencing in *State v. Pena*, Franklin App. No. 05AP-41, 2005-Ohio-6103. The Supreme Court of Ohio accepted a discretionary appeal pending *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and reversed and remanded for sentencing. See *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109. An appeal of appellant's third sentencing is currently pending before this court.

The Ohio Supreme Court overruled appellant's motion for a delayed appeal on this case on January 24, 2007. See *State v. Pena*, 112 Ohio St.3d 1439, 2007-Ohio-152.

{¶4} Appellant now seeks a reopening of this court's decision rendered January 29, 2004 pursuant to App.R. 26(B) based on ineffective assistance of appellate counsel. Appellant submits the following four assignments of error for review:

Assignment of Error No. 1

APPELLATE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO RAISE ASSIGNMENT OF ERROR FOR RACE BASED ARREST WHEN ARREST WAS BASED SOLELY ON THE APPELLANT'S HISPANIC APPEARANCE WHICH IS UNCONSTITUTIONAL.

Assignment of Error No. 2

APPELLATE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO RAISE AS ASSIGNMENT OF ERROR THAT TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE CO-DEFENDANT CELL-PHONE AND RECORDS AFTER CO-DEFENDANT-GUZMAN PLEAD GUILTY AND THEREIN DENYING APPELLANT HIS RIGHT EMBODIED IN THE CONFRONTATION CLAUSE.

Assignment of Error No. 3

APPELLANT COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AS ASSIGNMENT OF ERROR THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TESTIMONY OF STATE'S STAR WITNESS IDENTIFYING APPELLANT AS THE VOICE OR PERSON THAT GAVE HIM INSTRUCTION ON HOW TO GET TO COLUMBUS WHERE SAID TESTIMONY WAS TO ESTABLISH THAT APPELLANT HAD ATTAINED CONSTRUCTIVE POSSESSION OF COCAINE HIDDEN IN WITNESS TRUCK.

Assignment of Error No. 4

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO BE TRUTHFUL WITH APPELLANT CONCERNING

ISSUES BEING PRESENTED ON APPEAL AND FOR FAILING TO PRESENT EACH ASSIGNMENT OF ERROR IN ITS PROPER LIGHT, AND FOR FAILURE TO FILE A TIMELY APPEAL BEFORE THE SUPREME COURT ON ALL THE ASSIGNMENT OF ERRORS PRESENTED HEREIN ON DELAYED 26(B) AND DIRECT APPEAL.

{¶5} App.R. 26(B) permits applications for reopening of an appeal from the judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B) provides, in pertinent part:

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. *An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.*

(2) An application for reopening shall contain all of the following:

* * *

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record[.]

(Emphasis added.)

{¶6} As evidenced by the above-stated rule, it is required that an application for reopening establish a showing of good cause for untimely filing if the application is filed

more than 90 days after journalization of the appellate judgment. Appellant's application to reopen was not filed until nearly two years after journalization of the appellate judgment. Appellant's reason for failing to timely file an application for reopening of his appeal "is predicated upon being wrongfully advised by appellate counsel, who refused to file a timely appeal to the Ohio Supreme Court as requested by appellant." (Appellant's Brief at 1.) However, we find that under Ohio law, appellant has failed to establish good cause for the untimely filing of his application to reopen his appeal.

{¶7} As previously noted by this court, an appellant has no right to counsel in the preparation and filing of an application for reopening. *State v. Tolliver*, Franklin App. No. 02AP-811, 2005-Ohio-2194 at ¶17, discretionary appeal not allowed by 106 Ohio St.3d 1488, 2005-Ohio-3978, cert. denied by (2006), 126 S.Ct. 117 (holding that appellate counsel's alleged failure to timely inform appellant of ineffective assistance claims is irrelevant to the question of good cause for the delayed filing). See, also, *State v. Agosto*, Cuyahoga App. No. 87283, 2007-Ohio-848 (holding that continued representation by appellate counsel does not provide good cause to excuse an untimely filing of an App.R. 26(B) motion). Also recognized in *Tolliver*, is the notion that "[a]ppellant could have filed his application for reopening on his own within 90 days of journalization of this court's appellate judgment, even though his appellate counsel continued to represent him in an appeal to the Supreme Court." *Id.* at ¶12, citing *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755. In *Gumm*, the Supreme Court of Ohio held that the applicant could not ignore the 90-day deadline of App.R. 26(B), even if it meant retaining new counsel or filing the application himself. The court stated, " 'Lack of effort or imagination, and

ignorance of the law * * * do not automatically establish good cause for failure to seek timely relief under App.R. 26(B)." *Gumm* at 163.

{¶8} Here, journalization of the appellate judgment occurred on January 29, 2004. Appellant filed the instant application to reopen his appeal on December 26, 2006. Appellant's stated reasons for failing to comply with the 90-day requirement of App.R. 26(B) are based on appellate counsel's actions with respect to filing an appeal with the Supreme Court of Ohio. However, as has been established, the excuse of failing to independently prepare and file an App.R. 26(B) application for reopening until appellate counsel's representation ends does not constitute good cause for purposes of App.R. 26(B). *Tolliver, Gumm*. We find no reason to reach a different conclusion under the circumstances in this case. Appellant waited nearly two years after the journalization of the appellate judgment before filing the instant application to reopen his appeal, and has failed to provide good cause for the untimely filing.

{¶9} For the foregoing reasons, we find that appellant's application for reopening pursuant to App.R. 26(B) was untimely filed, and appellant has failed to establish good cause for the same. Consequently, appellant's application for reopening is hereby denied.

Application for reopening denied.

SADLER, P.J., and PETREE, J., concur.
