

IN THE SUPREME COURT OF OHIO

On Appeal from the Cuyahoga County Eighth Appellate District Court

Case No. 396705

**07-1130**

STATE OF OHIO,

Plaintiff/Appellee,

Supreme Court No. \_\_\_\_\_

- VS -

CHARLES K. BAILEY,

Defendant/Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION

Appearances:

FOR THE DEFENDANT/APPELLANT

CHARLES K. BAILEY, #450-606

('pro se')

R.I.C.I.

P.O. Box 8107

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44901

FOR THE PLAINTIFF/APPELLEE

WILLIAM MASON (# )

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**FILED**

**JUN 22 2007**

**CLERK OF COURT  
SUPREME COURT OF OHIO**

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STATEMENT AS TO WHY THIS CASE IS OF GREAT  
PUBLIC INTEREST

[T]his case is of great public interest insomuch as it raises substantial constitutional questions on fundamental concepts and precepts of law.

This case addresses the systemic problem of courts not advising indigent criminal defendants of their substantive appellate rights and equally the collateral disabilities associated with this denial of basic constitutional rights.

This case also addresses substantive concerns and therein raises legitimate questions as to whether an incarceration can be allowed to stand where it is predicated wholly on a noted and declared unconstitutional sentencing scheme.

In this case, defendant was sentenced under Ohio Senate Bill 2 ('truth in sentencing provisions'), O.R.C. § 2929.14(B) and O.R.C. § 2929.14(E) to 'maximum and consecutive' terms of incarceration.

Those 'sentencing statutes' were later declared unconstitutional by this court in State v. Foster, and accordingly, inherently implicated the constitutionality of defendant's confinement.

Ultimately, ... this case is of great public interest because the record on its face shows a manifest miscarriage of justice and this injustice was only compounded when the court of appeals denied defendant's good faith motion for leave to file delayed appeal on manifest miscarriage of justice grounds.

Simply stated, this case is of great public interest because it is set upon compounded and substantive departures from the established modes and forms of law to which defendant/appellant is clearly entitled to relief.

STATEMENT OF CASE AND FACTS

[T]his case originated in the Cuyahoga County Common Pleas Court charging

a complex of felony offenses.

The 'indigent' defendant was appointed counsel 2-weeks prior to the trial by jury, and such counsel was denied a requested continuance for the sole purpose of trial preparation.

Defendant was thereafter convicted on multiple counts alleging forgery and receiving stolen property and sentenced to an 'aggregate' prison term of (10) ten years.

Defendant was never advised of any appellate rights by the trial court; counsel of the State of Ohio.

Defendant later sought leave to file delayed appeal, which request was denied 'without commentary or hearing' to which this action does thus follow.

[R]elief is accordingly sought.

#### LAW AND ARGUMENT:

#### PROPOSITION OF LAW NO. 1

It is a denial of the right to counsel, U.S.C.A. Const. Amend 6, and of due process of law, U.S.C.A. Const. Amend. 14 where a trial court fails to advise an indigent defendant of his appellate rights. see: Wolfe v. Randle, 267 F. Supp. 2d 743.

[A]s a threshold matter, it must be remembered, that:

"Whether to grant or deny leave to file a delayed appeal is in the sound discretion of the appellate court." see: State v. McGahan (1949), 86 Ohio App. 283.

A delayed appeal however should be granted where it appears on the face of the record the overruling of such motion would result in a miscarriage of justice. see: State v. Bendnarik (1954), 101 Ohio App. 339, 123 N.E. 2d 31.

In: State v. Kelley, Cuyahoga Co. Com. Pl. Ct. No. CR 91 263018-7A, the court was faced with an identical situation as is redolent here, to wit: an indigent criminal defendant had pled guilty to a felony offense and was never warned by the court of the state of his protected appellate rights.

The court relied upon the time-honored judgment of this court, to wit:

"Under State v. Sims (1971), 27 Ohio St. 2d 79, 'the state [has] a duty to warn every person convicted of crime of his right to appeal and his right to prosecute his appeal without expense to him by counsel appointed by the state, if he is indigent.'" id. at: 81-82.

The court furthered, holding that:

"The failure to give this advice does not render the conviction void, but effectively deprives the defendant of his right to counsel on direct appeal of his conviction." id.

This court in turn explicitly held in reference to such circumstances, that:

"... the appropriate remedy is for the court to vacate the judgment and then 'reenter the judgment against the defendant, with the result of reinstating the time within which the defendant may timely file a notice of appeal pursuant to App. R. 4(A).'" see: State v. Grover, supra.

In the instant case, the record irrefutably shows 'on its face' that the defendant/appellant was patently indigent, had entered pleas of guilty to a complex of felony offenses, and was never advised of or warned about his protected appellate rights.

Clearly, ... and under such circumstances as are evident upon the record, the court of appeals committed reversible error therein denying appellant of due process of law and fundamental fairness when it denied appellant's good faith motion for leave to file delayed appeal. see: State v. Bendnarik (1954), 101 Ohio App. 339, 123 N.E. 2d 31.

In addition to the above ['and in a federal constitutional context'] it has also been held, that:

"Due process claims are implicated when defendant is denied adequate opportunity to present his claim and receive adjudication on merits, or when defendants are treated differently in such way that affects their ability to pursue meaningful appeal." see: Wolfe v. Randle, 267 F. Supp. 2d 743 (S.D. Ohio 2003).

The court furthered, holding that:

"Due process is offended when defendant who pled guilty is kept completely ignorant of his appellate rights." id.

"Failure to inform indigent defendant of his appellate rights violates due process." id.

[a]nd that:

"In order to be properly informed, defendant must be told of his right to appeal, procedures and time limits involved in proceeding with that appeal, and right to have assistance of counsel for that appeal." id.

In each case, appellant was never advised of any appellate rights and because the 'appropriate relief in such cases' has repeatedly been established by both the state and federal courts of Ohio, the failure of the court of appeals to grant defendant's motion for leave to file delayed appeal under such vexing circumstances implicated both defendant's right to counsel and to due process of law in recognition, that:

"Although defendant is not necessarily denied constitutional right when state court denies request for delayed appeal, due process rights are implicated when delayed appeal is result of lower court's failure to ensure that indigent defendant's appellate rights are protected. U.S.C.A. Const. Amend. 14." see: Wolfe v. Randle, supra.

Under the above analysis, it was/is clear from the record that appellant had a manifest right to relief to which this court should in turn accept jurisdiction in and over this matter and grant relief as is otherwise required and prescribed by law.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 2

Where a criminal sentence is predicated wholly on a sentencing scheme which was/is obviously ['and declared to be unconstitutional'] any resulting incarceration is contrary to law and offends both the due process and equal protection provisions of the state and federal constitutions

[T]he facts of this case shows that defendant was sentenced by the Cuyahoga County Common Pleas Court on: 'May 9, 2003' to an 'aggregated' stated prison term of: (10) ten years with up to (5) five years of post release control.

Defendant's sentence included both 'maximum and consecutive' terms of incarceration and was predicated solely upon the provisions of Ohio Revised Code Sections 2929.14(B) and Ohio Revised Code Section 2929.14(E).

The trial court, and imposing those 'maximum and consecutive sentences' referenced above, made specific findings on the record and thereupon relied upon facts not charged in the indictment; submitted to the jury; or, proven beyond a reasonable doubt.

As was stated in the previous proposition of law, the trial court, after imposing sentence, completely failed to advise defendant of any appellate rights thereby defendant was left to believe that he had no right to appeal his 'maximum and consecutive sentences' on statutory or constitutional grounds.

Nonetheless, \*\*\* this Court later declared O.R.C. § 2929.14(B) and 2929.14(E) unconstitutional pursuant to the provisions of Blakely v. Washington (2004), 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403; and, United States v. Booker (2005), 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621. see: State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470.

Defendant in turn sought leave to file delayed appeal pursuant to this court's ruling in Foster, supra., wherein clearly, his sentence is both 'contrary to law' and violative of the Sixth Amendment's notice and jury trial guarantees.

It is the further position of defendant that the failure to impose a constitutionally sound sentence constitutes a fundamental miscarriage of justice and offends the provisions set forth in: State v. Beasley (1984), 14 Ohio St. 3d 74, 471 N.E. 2d 774.

In addition to the above, and perhaps as an interesting aside, a compelling question therefore exists as to whether even the Ohio Department of Rehabilitation and Correction, in light of the Foster-decision, has the requisite 'lawful privilege to intentionally confine defendant' thus inherently violating multiple Amendments to the United States Constitution as well.

Nonetheless, ... this constitutional proposition is tendered in good faith and where the record makes manifest that a fundamental miscarriage of justice has incurred of constitutional proportion.

This action does thus follow.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 3

Where mistakes of law occurring at trial have resulted

in a trial which was fundamentally unfair, such conviction must be set aside and a new trial ordered as a matter of law

[I]n raising this constitutional proposition, defendant does so from the position that the State of Ohio was required to prove beyond a reasonable doubt that defendant 'had the required knowledge' to form both ['intent'] and ['purpose'] to suppose, enable and obtain a conviction for the offense to which defendant was charged.

Defendant was found guilty by jury on a multiple count indictment alleging: \*forgery and \*receiving stolen property however, the State of Ohio patently failed its burden of proof and the trial court compounded that plain error by refusing to give a particular jury instruction on 'required knowledge;' 'intent' and 'purpose' to which the failure to do so deprived defendant of a fundamentally fair trial and to both due process and equal protection of law. see: U.S.C.A. Const. Amend. 6 and 14.

It is the position of defendant that in the absence of any proof establishing that defendant had the 'required knowledge' and/or that defendant had the 'intent and purpose' to commit a forgery and receive stolen property, that the resulting conviction ('in the absence of the appropriate and requested jury instruction') is the very antithesis to fundamental fairness and due process of law to which defendant is entitled to relief as a matter of law. see: United States v. Gaudin, 115 S. Ct. 2310, 2323 (1995); and, Sullivan v. Louisiana, 508 U.S. 275, 278 (1993).

[R]elief is accordingly sought. see: United States v. Miller, 84 F. 3d 1244, 1251 (10th Cir. 1996).

PROPOSITION OF LAW NO. 4

Where, and in a criminal trial, defense counsel appointed to an indigent criminal defendant openly admits that s/he is not prepared to go to trial after

being appointed to a complex case less than (2) two weeks before the trial and thereupon being denied a requested continuance for the sole purpose of trial preparation, such circumstances can only constitute a violation of the right to counsel as guaranteed under the Sixth Amendment to the United States Constitution

[T]he right to counsel is the right to effective assistance of counsel. see: McMann v. Richardson, 397 U.S. 759 (1970); and, Strickland v. Washington, 466 U.S. 668 (1984).

In: Strickland, supra, the United States Supreme Court established a two-prong test for evaluating claims of ineffective assistance, to wit: (1) "there was a deficiency;" and, (2) "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different ('the prejudice prong'). id.

In the instant case, defense counsel was appointed to represent defendant a mere (2) two weeks before the trial 'in a complex case' involving a 'multiple count indictment' of overlapping felony charges.

The record shows that counsel specifically requested a continuance of the trial to permit adequate trial preparation and an opportunity to investigate the case; to interview potential witnesses; to follow-up on impeachment and exculpatory evidence and materials; and to discuss the facts of the case and trial strategies with defendant.

Counsel urged 'on the record' that without the requested continuance s/he could not provide defendant effective assistance as contemplated by the Sixth Amendment to the United States Constitution and inherently could not contact witnesses who might have provided mitigating evidence.

The trial court however 'denied counsel's good faith request for a continuance' and ordered the matter to trial.

Defendant was in turn convicted on multiple counts and sentenced to (10) ten years in prison.

Clearly, and under the facts and circumstances of this case, defendant was deprived of his right to counsel as guaranteed by the Sixth Amendment and is thus entitled to relief as a matter of law.

[R]elief is accordingly sought. see: Hall v. Washington, 106 F. 3d 742 (7th Cir. 1997); and, Lawrence v. Armontrout, 900 F. 2d 589 (5th Cir. 1990).

PROPOSITION OF LAW NO. 5

It is a denial of due process and results in a denial of a fair trial where a trial court denies a criminal defendant's good faith 'timely' request for an 'in-camera' review of the Grand Jury transcript of \*exculpatory evidence

[T]he right to 'exculpatory evidence' is a fundamental right made obligatory by the Sixth and Fourteenth Amendments to the United States Constitution.

The State is under a duty to provide to all criminal defendants any and all 'impeachment and exculpatory evidence' in its position, see: Brady v. Maryland, 373 U.S. 83 (1963), and where such evidence is intentionally withheld ('though request') automatic reversal of conviction is required. see: United States v. Bagley, 473 U.S. 667 (1985).

In the case at bar, defendant had specifically requested an 'in-camera' inspection of the Cuyahoga County Grand Jury transcript pursuant to: State v. Tenbrook (citation omitted), on the proposition that such review would yield both 'exculpatory and impeachment evidence.'

Defendant had some prior knowledge that some of the testimony was materially false and as such, sought the in-camera inspection for the impeachment purposes at trial. see: Love v. Johnson, 57 F. 3d 1305, 1313 (4th Cir. 1995); and, United States v. Agurs 427 U.S. 97, 106.

The trial court ('as well the appellee-state') denied defendant's good faith motion for an in-camera inspection of the Grand Jury minutes and in turn deprived defendant of both due process of law and a fundamentally fair trial

in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 6

Where the jurisdiction of a trial court lies upon a felony complaint and such complaint is not and has never been part of the record 'in any court,' the resulting conviction can only be deemed a nullity [and] void as a matter of law where the jurisdiction of the trial court cannot be established pursuant to the prescribed modes and forms of law

[O]hio Criminal Rule 3 establishes the jurisdictional foundation for all criminal prosecutions and inherently provides the threshold and primary jurisdictional authority for the courts of common pleas.

While it is clear that all criminal proceedings must be brought by \*indictment or bill of information, Criminal Rule 3 in turn provides that the trial court's initial jurisdiction be predicated on a verified complaint.

Such complaint is essential for the determination of 'probable cause' for the arrest and initial confinement of a criminal defendant and in turn provides a substantive and required foundation for 'bind-over' proceedings from the Municipal Court to the Grand Jury.

Stated another way, ... in the instant case, defendant was allegedly arrested on the charges on the basis of a 'complaint.'

This complaint in turn was proffered to establish the initial and threshold 'probable cause' for both defendant's arrest and proceedings then to occur in the Municipal Court of Cleveland.

Likewise, the 'complaint processes' are not a mere hollow formality, rather, it provides, enables, and facilitates the foundational jurisdiction of

the court.

Once defendant had been arrested on the basis of the alleged complaint establishing probable cause, Municipal Court proceedings ensued resulting in a bind-over to the Cuyahoga County Grand Jury and ultimately defendant's indictment and initial appearance before the Cuyahoga County Common Pleas Court.

It is thus the position of defendant that where, as here, 'the processes contemplated by law' have not been met where there existed no initiating verified complaint, the trial court was manifestly without jurisdiction to entertain any proceedings against defendant/appellant as a matter of law in recognition, that:

"A judgment rendered by a court having no jurisdiction is a mere nullity, and will be so held and treated whenever and for whatever purpose it is sought to be used or relied upon as a valid judgment." see: Burnham v. Superior Court of California, County of Marin, Cal., 110 S. Ct. 2105, 495 U.S. 604, 109 L. Ed. 2d 631; and, Freeland v. Pfeiffer, Ohio 9 Dist., 621 N.E. 2d 857, 87 Ohio App. 3d 55.

"Judgment entered in a proceeding failing to comply with procedural due process are void, as is one entered by a court acting in a manner inconsistent with due process. see: Eastern Sav. Bank v. Cty. of Salem, 597 N.E. 2d 55; and, Bethany Med. Center v. Niyazi, 847 P. 2d 1341.

Under the above analysis, ... it is the position of defendant that in the absence of an underlying 'verified complaint' the trial court was divest of jurisdiction in and over the matter and the resulting judgment of conviction and sentence in violative of the Fourteenth Amendment's due process clause.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 7

It is violative of the Eighth Amendment's prohibition against 'excessive bail' to hold a defendant under a (2)

two million dollar cash bond where no one had suffered any physical harm and defendant was not a flight risk

[I]n forwarding this constitutional proposition, defendant does so from the position that the (2) two million dollar cash bond which was placed on him therein prohibiting his release on bail from custody, violated the Eighth Amendment's prohibition against 'excessive bail.'

The ['record'] in this case unquestionably shows that defendant was charged with 'garden variety' forgery and receiving stolen property offenses and that no one suffered any physical harm.

The ['record'] shows that defendant was no a flight risk, had substantial family ties to the community, and ultimately the record shows that defendant 'was indigent.'

The State of Ohio used the 'excessive 2-million dollar cash bond' to unconstitutionally prevent defendant from being released from custody to thus implicate defendant's right and ability to retain private counsel; to adequately prepare his case for trial and to locate witnesses critical to his defense at the trial.

Ultimately, ... it is from 'this type of' oppressive prejudicial misconduct that the Eighth Amendment's prohibition against 'excessive bail' was intended to protect.

The State of Ohio clearly used defendant poverty status and excessive bail as an instrument of oppression to which defendant is clearly entitled to relief as a matter of law and the resulting conviction should thus be set aside and a new trial ordered therefore.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 8

It is a denial of the right to a fair trial and to due process of law to permit a conviction to stand where clearly such conviction was against the manifest weight of

the evidence and patently insufficient to support the jury's verdict

[I]t is the position of defendant/appellant that the jury's verdict in this case was and is against the manifest weight of the evidence, Jackson v. Virginia, 443 U.S. 307, 319 (1979), and that 'that conviction' offends the Due Process Clause of the Fourteenth Amendment and the 'fundamental fairness' provision of the Sixth Amendment. see: In re Winship, 397 U.S. 358, 364 (1970)("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which his is charged."). id.

The appellee-state did not prove beyond a reasonable doubt the 'required knowledge' to form the requisite 'intent' and 'purpose,' and accordingly defendant is entitled to relief as a matter of law.

In addition to the above, it is the position of defendant that the evidence presented at the trial was 'insufficient' to support the jury's verdict therein depriving defendant of his Sixth Amendment right to a fair trial and to due process of law. see: U.S.C.A. Const. Amend. 6 and 14.

[R]elief is accordingly sought. see also: Vachon v. New Hampshire, 414 U.S. 478, 480 (1974).

PROPOSITION OF LAW NO. 9

It is a violation of the Sixth Amendment right to a speedy and public trial to compel a criminal defendant to trial ('in a complex criminal trial') within (2) two weeks after counsel was appointed to represent the indigent defendant

[T]he Sixth Amendment, along with guaranteeing the right to counsel, guarantees the right to a 'speedy and public trial.' see: Barker v. Wingo, \_\_\_ U.S. \_\_\_ (citation omitted).

The 'right to a speedy trial' has been defined in two distinctly different perspectives, i.e. (1) a trial not occurring over a protracted period of time resulting in prejudice to the defendant and/or his defense; and , (2) a trial occurring so quickly that it inherently implicates defendant's right and ability to have a fair trial.

In: Barker, supra, the United States Supreme Court established a 4-prong test for determining a Sixth Amendment violation, to wit: (1) length of the delay; (2) reason for the delay; (3) whether defendant asserted his right to a speedy trial; and, (4) prejudice resultant from the delay.

The court has also considered circumstances where, as here, a defendant ['whom had unsuccessfully requested a reasonable continuance for trial preparation'] was forced to trial so quickly so as to have amounted to a denial of the right to a speedy trial.

In the instant case, the indigent defendant was appointed counsel (2) two weeks before the trial, counsel sought a continuance for the purpose of trial preparation which was immediately denied by the trial court, and defendant's trial proceeded as scheduled to which the prejudice did systemically attach.

It is the position of defendant that his trial occurred so quickly after counsel was appointed that it violated his Sixth Amendment right to a speedy trial to which he is entitled to relief as a matter of law.

[R]elief is accordingly sought.

#### CONCLUSION:

[W]herefore, \*\*\* and for each of those reasons stated above and made evident by the record, this court should accept jurisdiction in and over this matter and permit defendant/appellant to fully and fairly present his statutory and constitutional claims for review therefore.

Defendant states that this case clearly involves a substantial

constitutional question, involves a felony, and is set upon a fundamental miscarriage of justice of constitutional magnitude.

[R]elief is accordingly sought.

[E]xecuted this 18<sup>th</sup> day of June, 2007.

Charles K Bailey

Charles K. Bailey, #450-606

R.I.C.I.

P.O. Box 8107

Mansfield, Ohio

44901

CERTIFICATE OF SERVICE:

This is to certify that the foregoing was duly served by United States Mail on the Office of the Cuyahoga County Prosecutor, at: 1200 Ontario Street, Cleveland, Ohio, 44113, on this 18<sup>th</sup> day of June, 2007.

Charles K Bailey

Charles K. Bailey, #450-606

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P.O. Box 8107

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44901

[ ]

*Judge Markes*  
**Court of Appeals of Ohio, Eighth District**

*R* FILED

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

*m(r/c)*

2007 MAY 24 A 9 57  
STATE OF OHIO

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

Appellee

COA NO.  
89871

LOWER COURT NO.  
CP CR-424092  
CP CR-430159

COMMON PLEAS COURT

-vs-

CHARLES K. BAILEY

*A450606*

Appellant

MOTION NO. 396705



Date 05/18/07

Journal Entry

MOTION BY APPELLANT, PRO SE, FOR LEAVE TO FILE DELAYED APPEAL IS DENIED.

THE STATE OF OHIO }  
Cuyahoga County } SS. I, GERALD E. FUERST, CLERK OF  
THE COURT OF COMMON PLEAS  
WITHIN AND FOR SAID COUNTY  
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY  
TAKEN AND COPIED FROM THE ORIGINAL *Journal Entry*  
NOW ON FILE IN MY OFFICE.  
WITNESS MY HAND AND SEAL OF SAID COURT THIS *31st*  
DAY OF *May* A.D. 20 *07*  
GERALD E. FUERST, Clerk  
By *Rosemary Reiman* Deputy

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MAY 18 2007

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEP.

Judge JAMES J. SWEENEY, Concurs

*[Signature]*  
Administrative Judge  
FRANK D. CELEBREZZE, JR.

CA07089871

45553459



NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED