

IN THE SUPREME COURT OF OHIO

STATE OF OHIO
Plaintiff-Appellee

v.

VERDELL STARKS, Pro'Se
Defendant-Appellant

On Appeal from the Lucas
County Court of Appeals
Sixth Appellate District

[EVIDENTIARY HEARING REQUESTED]

07-1668

Court of Appeals
Case No. L-07-1226

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT VERDELL STARKS

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FILED
SEP 06 2007
CLERK OF COURT
SUPREME COURT OF OHIO

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

This cause presents the Mandatory provisions contained within App.R. 9(E) and R.C. §2953.21, Appellate Rule 9 provides the conditions under which a party ' On Proper Suggestion and/or the Court's Own Initiative ' shall bring to the attention of the reviewing jurisdictional Court, ' anything that is material to a party that has been omitted from the record by error or accident or is misstated therein; and, R.C. § 2953.21, involves Constitutional deprivations that occurred outside/off the trial record, to be raised to the Trial Court's attention.

App.R. 9(E) also requires that ' all other questions as to the form and content of the record SHALL be presented to the Court of Appeals. Two things are clear from the rule. First, is that either the Trial Court or the Court of Appeals may ORDER that a record be corrected and supplemented. Secondly, ' where there are gaps in or disputes about the record, App.R. 9(E) provides a procedure for correction or modification. Under that provision, a Court of Appeals may direct the Trial Court to settle the record. If Defendant-Appellant was being afforded this right, there would be no need for this matter to be brought forth to this Honorable Court's attention.

In this case at bar, Defendant-Appellant has filed three pro'se Motions: (1) Stay of Proceedings, (2) Motion for Correction or Modification of the record, 'On Proper Suggestion and/or the court's Own Initiative, pursuant to App.R.9(E), and, (3) The Trial Court abused its discretion by denying Defendant-Appellant his rights to Due Process of Law, by Staying his postconviction petition, pending the decision of the Sixth Appellate District. This Court of Appeals has refused to entertain, claiming hybrid representation with supporting caselaw(s) that strictly have to due with the trial phase, ' NOT ' the first appeal of right.

The issues before this Honorable Court are: (1) Whether or not a criminal defendant has a right to App.R.9(E), to assure themselves their Constitutional

rights by utilizing 'all' due diligence, when due diligence is required to invoke one's Constitutional rights, and, two; Should Defendant-Appellant be denied his rights to a fair and proper adjudication of his postconviction petition while his direct appeal is pending. The Judgement of the Court of Appeals, has great general significance (public interest), because App.R.9(E) does not specifically preclude criminal defendant's from invoking their rights to present their claims to an Appellate Court, nor is there any thing precluding an Appellate Court from accepting the pro'se brief/claim(s) contained in a brief raised by a pro se litigant. The rules specifically require that a party bring to the attention of the reviewing Court any omissions or misstatements; and, for notification to be utilized by exercising Due Diligence when the finding of abuse is discovered.

By invoking the procedures of App.R.9(E) & R.C. § 2953.21, a criminal Defendant is exercising their rights to Due Process. They do not in anyway constitute an act of hybrid representation, but an act of Due Diligence. If a criminal Defendant is represented by an Appellate counsel on direct appeal, and a criminal defendant is guaranteed, by right, one direct appeal, the fact that a criminal defendant submits to the reviewing Court the mandatory requirements set forth in both App.R.9(E) & R.C. § 2953.21 does not in anyway indicate that the Defendant is acting hybridly, and outside the guidelines of appellate procedures.

The Trial Court stated that: ' He is Ordering Defendant-Appellant's postconviction Petition Stayed, pending a decision ' on related ' issues in Defendant-Appellant's direct appeal.' Defendant-Appellant's contention is that this is yet another deceptive tactic, in an attempt to sway Defendant-Appellant from setting forth his ' Actual Innocence '. The Sixth Appellate District Court has stated since the Trial Court's decision is not a final appellable order..., the Sixth Appellate District Court is clearly and convincingly attempting to deny what this Honorable Court has long held... the Courts are carefully to exercise their judicial function and in doing so; assure that ALL rights and obligations of both parties are fairly treated and respected.

Contrary to the decision of the Court of Appeals, several Court's have ruled that the failure of a criminal defendant to seek correction or modification of the record prior to and after the record is submitted to the Court of Appeals on their own, constituted a waiver of the argument for later review. If App.R. 9(E), provides Appellate Court's with the authority to direct correction of any omissions, errors or misstatements, then it is mandatory that due diligence be exercised and that these omissions, and misstatements be addressed on their merits by criminal defendant's exercising due diligence, not ignored and/or blatantly stricken from the record for review.

The decision of the Sixth District Court of Appeals is noticeably prejudicial and violative to the Constitutional rights of 'ALL' criminal defendant's who seek to initiate the provisions available to them. These provisions are mandatory and are necessary in affording all Appellant's their first right to the Appeal process.

The Trial Court abused it's discretion when it Ordered a Stay of Proceedings on Defendant-Appellant's postconviction Petition, pending a decision on the direct appeal. These are clearly two unrelated/separate (excluding the Actual Innocence), appellate procedures, for postconviction Petition's are matters ' outside ' the record; while the direct appeal concerns matters on the record. Therefore, the Trial and the Sixth Appellate District Court's are in fact abusing their discretion by attempting (once again) to erroneously set-forth that Defendant-Appellant cannot and should not utilize Due Diligence because he has counsel.

Defendant-Appellant asserts that he is in fact being deprived of his Constitutional rights to bringforth his Actual Innocence in a timely manner due to the Trial and the Sixth Appellate District Court's decision(s) of not allowing due diligence to be utilized to free this wrongfully convicted, Innocent man.

In other words, this case involves a substantial constitutional question. If a defendant has a Constitutional right pursuant to App.R.9(E) & R.C. § 2953.21, to

have the record on appeal complete and absent any material omissions and/or misstatements corrected and/or modified prior to and after the record is transmitted to the Court of Appeals, as well as the right to have his postconviction petition adjudicated in a timely and orderly fashion, and; if a criminal defendant exercises Due Diligence by bringing forth these errors to the reviewing Court, then only to be denied a fair and meaningful review would in fact be a total miscarriage of Justice for without the correction(s) being pursued by Defendant-Appellant, then it would automatically be assumed to be correct.

The decision of the Appellate Court permits appellate attorney's to deny the effective assistance of appellate counsel to criminal defendant-appellant's; which in essence, would be going against the grain of the Constitution of the United States of America. Further to allow the Trial Court to further stay it's decision of the postconviction, would be in violation of what the Sixth Circuit Court has held in Lopez v Wilson, 426 F.3d. 339,350 (6th Cir. 2005); ' The Court shall consider a Petition... even if a direct appeal of the Judgement is pending.'

The Sixth Circuit Court further went on to say: ' ... a postconviction petition filed in an Ohio trial Court under R.C. § 2953.21 represents an attack on the judgement of the trial court and is ' not ' part of the original trial.

The Sixth District Court of Appeals in Stojetz v Ishee, 389 F.Supp.2d. 858,886 (S.D. Ohio 2005) has held: ' As to appeals in postconviction proceedings, and the Ohio Rules of Appellate procedure, are stated in unmistakable language, are consistently enforced, and, together, serve the State's interest in finality and Judicial economy by ensuring that postconviction appeals are adjudicated in a timely and orderly fashion.

Furthermore, the Court of Appeals for the Sixth District of Ohio did in fact entertain Appellant's prior Motions submitted to the Court concerning the record on appeal. This recent ruling; striking the Appellant's App.R.9(E), is totally contrary to their OWN previous rulings on the related Motions.

In sum, this case puts at issue the Constitutional rights of criminal defendant's pursuant to App.R.9(E) & R.C. §2953.21, to invoke the procedures pro' se, in exercising due diligence in making a minimum attempt to correct any omissions and/or misstatements of the record on appeal, and, to receive fair and proper adjudication in a timely manner for postconviction petitions. Not to act as their own attorney, but to preserve their rights to the United States Constitution. Defendant-Appellant's rights to due process have been blatantly ignored, mistreated and overlooked.

The decision of the District court to use judicial fiat to eliminate Defendant-Appellant's Constitutional rights under the 14th Amendment of the United States Constitution, Section 16, Article One of the Ohio Constitution, Section 10, Article One, of the Ohio Constitution, is in fact a matter that all the public would have a great general interest in, due to the involvement of the substantial Constitutional rights that are being deprived from this Defendant-Appellant. If the Constitutional rights are overlooked on one that is innocent of the crimes that he is wrongfully convicted, and wrongfully incarcerated, then this Honorable Court should accept jurisdiction to ensure that we as a nation are All afforded our Constitutional rights.

STATEMENT OF THE CASE AND FACTS

This case arises on the sole basis of Appellant's Constitutional rights being afforded to him while utilizing due diligence in bringing forth the true facts that are within the record on appeal.

On October 14, 2004, the Appellant was indicted on two counts of aggravated robbery (F-1), with firearm specification and two counts of robbery (F-2). On case No. CR-04-3093. Appellant was arrested and taken into custody on October 4, 2004. The first indictment charged Appellant with robbing a B.P. Gas Station on Reynolds Road (Toledo, Ohio on September 25, 2004, and a Sunoco Gas Station on Monroe Street (Toledo, Ohio), on September 26, 2004. Counts one and two were eventually dismissed due to proof beyond a reasonable doubt not being possible to prove.

On January 28, 2005, the Appellant was charged in a separate indictment in Case No. CR-05-1209, being charged with another (4) four counts of Aggravated Robbery each carrying firearm specifications (F-1) and four counts of robbery (F-1 and F-2). On February 10, 2005, the same motions filed in Case No. CR-04-3093, were refiled in Case No. CR-05-1209.

The second indictment arose from a robbery at the Cash Advance on Alexis Road on August 23, 2004, at the B.P. Gas Station at 324 S. Detroit on August 29, 2004, and the Sky Bank on Heatherdowns Road on September 30, 2004, all in Toledo, Ohio.

Counts (3) three and (7) seven, involving the B.P. Gas Station robbery on September 26, 2004, were eventually nolle due to proof problems. Counts (4) four and (8) eight regarding the Sky Bank robbery were severed and that case was tried separately on August 29, 2005. A nolle prosequi was entered as to Count (4) four at the conclusion of the State's case.

Both of these cases, CR-04-3093 and CR-05-1209, were consolidated for purposes of trial and appeal. In summary, of the (12) twelve original counts, four were

nolled and two severed, (of those severed, one was nolled during trial). The State had to dismiss nearly half of its case in chief due to the lack of evidence/proof.

Following trial on August 29,2005, the Appellant was convicted of (1) one count of robbery (F-2), pertaining to the Sky Bank robbery. Following the trial on October 17, and 18 of 2005, the Appellant was convicted as follows: Guilty of Aggravated Robbery but not Guilty of the firearm specification regarding the Cash Advance robbery. Guilty of Aggravated robbery and guilty of the firearm specification regarding the Sunoco and B.P. Gas Station counts. On November 22,2005,, the Appellant was sentenced to five years on Count One (CR-05-1209), for the Cash Advance robbery, concurrent to all other sentences. Five years on Count Three (CR-04-3093), for the Sunoco Gas Station robbery, with (3) years consecutive for the firearm specification, consecutive to all the other sentences.

Five years on Count Two (CR-05-1209), for the B.P. Gas Station robbery, with three (3) years consecutive for the firearm. This term of imprisonment consecutive to all the others. Four (4) years on Count Eight (CR-05-1209) for the Sky Bank robbery, also consecutive. For the aggravate term of incarceration of twenty (20) years.

The Appellant is **Actually Innocent** of the charges and wrongful convictions currently related to this appeal before this Honorable Court. Appellant has diligently attempted to prove this fact prior to and after the record was transmitted to the Court of Appeals. Appellant filed a Motion for 'Correction or Modification of the Record', pursuant to App.R.9(E) with the trial Court, on December 26,2006. The Appellant avers that he did in fact represent himself (Pro se) during the trial phase in October 17,&18 of 2005, and that he had been informed by his Appellate counsel on October 23,2006, that: material testimony establishing that the pre-trial photo-array procedures used to wrongfully identify the Appellant, was from the result of impermissibly suggestive and tainted actions

of the investigating officers of the Toledo Police Department, was omitted from the record.

On October 24, 2006, Appellant's Brief was filed by the appointed appellate counsel.

On December 29, 2006, the Appellant filed a Motion To Stay Proceedings with the Sixth District Court of Appeals, Lucas County, Ohio, asking the Court to 'Stay the Proceedings ' pending the resolution of the Appellant's 'Motion for Correction or Modification of the Record' that was pending in the Trial Court. The Motion to Stay the Proceedings set-forth the relevant facts establishing why the Appellant had to exercise ' Due Diligence ', after Appellate counsel refused to make a minimum attempt to correct the incorrect record on appeal.

On March 13, 2007, the Appellee's Brief in Opposition was filed by the Assistant State Prosecutor (Ms. Brenda J. Majdalani).

On April 2, 2007, the Appellant filed a ' Writ of Mandamus ' with the Sixth District Court of Appeals, relating to case numbers CR-05-1209 (B.P. gas Station), CR-05-1209 (Cash Advance), and CR-04-3093 (Sunoco Gas Station), Pro Se, which was in fact entertained by the Court on April 18, 2007, ORDERING the Trial Judge to do the act requested by the Appellant, in part.

The State of Ohio neither initially opposed nor objected to the Appellant's Pro se App.R.9(E) Motion. On April 20, 2007, the Trial Court ORDERED the prosecuting attorney to respond to Appellant's (Pro se) Motion for Correction or Modification of the Record. On April 24, 2007, the Prosecuting Attorney filed a Motion in Opposition to Defendant-Appellant's (Pro se) Motion to Correct the Appellate Record. On April 26, 2007, the Trial Court denied Appellant's App.R.9(E) Motion, absent any Findings of Fact and Conclusions of Law. (It should be noted that neither the State of Ohio or the Trial Court "ever" argued hybrid representation. Neither did the Sixth District Court of Appeals when it initially

entertained the above style cases in granting review on its own initiative, without prior leave from that Court).

The Appellant filed numerous Pro se Motions with both the Trial and Appeals Court's, exercising due diligence in an attempt to correct the incomplete ' Transcripts of Proceedings '. On June 8, 2007, the Appellant filed a 'Motion for Correction or Modification of the Record ', "On proper Suggestion and/or the Court's Own Initiative", pursuant to App.R.9(E), with the Sixth District Court of Appeals. The App.R.9(E) motion filed contained all the relevant facts establishing and substantiating that the Appellant's record on appeal was incomplete with substantial omissions and misstatements, material to Appellant's 'Actual Innocence'. The Court of Appeals erred in striking Appellant's App.R.9(E) motion from the record.

On July 6, 2007, Appellant filed an 'Instant Notice' to the Sixth District Court of Appeals notifying them that he wished for an investigation to be brought forth (and possible charges lodged) on the Assistant State Prosecuting Attorney (Ms. Brenda J. Majdalani) for Slander and Falsification. On July 11, 2007, the Sixth District Court denied same, solely on the basis of hybrid representation.

On August 1, 2007, Appellant filed his Memorandum In Support of Jurisdiction into this Honorable Court raising the issue of: the Court of Appeals (for the Sixth District Court) abused its discretion to the prejudice of the Appellant when it struck Appellant's App.R.9(E) Motion from the record, whereby denying Appellant his Constitutional rights under the Fourteenth Amendment of the United States Constitution, Section 10, Article One of the Ohio Constitution, Section 16, Article One of the Ohio Constitution.

On November 28, & 30, 2006, there were two Petitions filed into the Trial Court (although, Defendant-Appellant mailed both at the exact same time), to vacate And/or set aside the Sentence, of these two (2) Petitions; one was for the Sky Bank, with the other being for the B.P. Gas Station, Cash Advance & Sunoco Gas Station, (filing date of November 30, 2006).

On April 30,2007, Defendant-Appellant filed a Motion to Supplement the Record on his Petition(s) To Vacate And/or Set Aside the Sentence. This Supplementation concerned the trial testimonies of four (4) material witnesses; (1) Ms. Victoria Hall, (2) Ms. Gwen Bowers, (3) Ms. Laura Maunz, and, (4) Mrs. Andrea Starks.

On May,7, 2007, Defendant-Appellant filed a Motion into the Trial Court for ' Separate Findings of Fact And Conclusions of Law '.

On May 29,2007, the Trial Court filed its Opinion And Judgement Entry concerning these four (4) issues. Within this Entry, The Trial Court Ordered a Stay (On the two (2) Petitions pending a decision on related matters in (Petitioner's) Defendant-Appellant's Direct Appeal. Also, within this Judgement Entry the Trial Court denied Appellant's Motion to Supplement the Record.

On July 16, 2007, Appellant filed The Brief on these four (4) issues into the Sixth District Court of Appeals.

On July 24,2007, the Sixth District Court denied Appellant's Brief on the basis of hybrid representation, it was also ruled that since the Trial Court's ' Stay Order ' was not a final appellable Order since no ruling has been made.

Defendant-Appellant, now comes to this Honorable Court exercising Due Diligence in bringing forth his Constitutional rights violation(s).

ARGUMENT(S) IN SUPPORT OF PROPOSITION(S) OF LAW:

Proposition of Law No. 1:

THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION TO THE PREJUDICE OF OF APPELLANT WHEN IT FAILED TO CORRECT THE OBVIOUS OMISSIONS AND/OR MISSTATEMENTS, ON ' PROPER SUGGESTION ' OR ' ITS OWN INITIATIVE ', PRIOR TO DENYING THE APPELLANT'S TIMELY FILED ' MOTION FOR CORRECTION OR MODIFICATION OF THE RECORD, App.R.9(E).

The record on appeal consist of the original papers and exhibits filed in the trial Court, the 'TRANSCRIPT OF PROCEEDINGS ', if any, including exhibits, and a certified copy of the docket and Journal Entries. App.R.9(A). App.R. 9(E), provides the conditions under which a Trial Court record may be corrected:

If ANY differences arises as to whether the record truly discloses what occurred in the trial court, the differences SHALL be submitted to and settled by that Court and the RECORD MADE TO CONFORM TO THE ' TRUTH '. If ANYTHING ' MATERIAL ' to either party is OMITTED from the record by error or accident or is ' Misstated ' therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Court of Appeals, or the Court of Appeals, on proper suggestion or of its own initiative may direct that omission or misstatement be corrected, and if necessary, that a supplemental record be certified and transmitted. See State v Jones, 643 N.E.2d. 547, 550 fn. 2).

Prior to denying the Defendant-Appellant's Motion to Supplement the Record, the Trial Court failed to ' Act on it's Own Initiative ' to correct the material omissions and misstatements of the transcript of proceedings, App.R.9(E), which Defendant-Appellant deems highly prejudicial to a fair and meaningful judicial review, since the transcripts of proceedings are considered the record on appeal, and omissions or misstatements is required by the mandatory procedures of App.R.9(E), which was filed by the Defendant-Appellant prior to the trial court's judgement entry filed on May,29,2007. Defendant-Appellant contends this to be an abuse of discretion due to the Trial Court Judge being in the best possible position to correct what he presided over. In Re Holmes, 821 N.E.2d. 568 (Ohio 2004). See also, Inland Bulk transfer Co. v Cummings Engine Co., 332 F.3d. 1007,1011 (6th Cir. 2003).

The Trial Court's refusal to correct the obvious material omissions and misstatements, (that of which is the glaring misstatements and omissions of the Transcripts, including the first page of Vol. One (1), and the Index of Vol. One), which mistakenly states and/or omits material information contained in the Transcripts of Proceedings, as the Record on appeal constitutes trial court error and abuse of discretion. Graphic Laminating, Inc. v Creative Enterprises, Inc., (Dec. 7,1978), Cuyahoga App. No. 38030, unreported; and, Blecher v Blecher, (Jan.,31,1980), Cuyahoga App. No. 39662, due to the fact that it was the duty of the trial court to review and ' Correct ' the transcripts of the proceedings, pursuant to App.R.9(E) prior to denying Defendant-Appellant's Motion to Supplement the Record.

Irregardless, of the substance of the testimony contained within the Transcripts of Proceedings, this Honorable Court has no way of determining whether or not the substance of the testimony is accurate or inaccurate without first resolving the disputed issues presented concerning the incomplete transcripts, see Jones, Supra, ' in the event that defendant's misconduct is determined ' NOT ' to be the cause of nonproduction of the Appellate record, absence of the record may require reversal of the underlying conviction, and granting of a New Trial '.

As a result, the trial Court's failure to correct the obvious material omissions and misstatements, prior to denying the ' Motion to Supplement the Record ', on it's own initiative is highly prejudicial, and should have been corrected to preserve the Record for appellate purposes. Therefore, this proposition of Law has merit and must be sustained.

Proposition of Law No. 2;

THE TRIAL COURT ERRED AND/OR ABUSED IT'S DISCRETION TO THE PREJUDICE OF APPELLANT BY NOT RULING ON THE TIMELY FILED PETITION FOR POSTCONVICTION, PURSUANT TO Crim.R.35, WITHOUT PROVIDING SUFFICIENT CAUSE FOR DELAY, AND ABSENT ANY FINDINGS OF FACT AND CONCLUSIONS OF LAW.

On May,29,2007, the Trial Court filed a ' Opinion and Judgement Entry ', which included an ORDER by the trial Court ' Staying ' it's decision on Defendant-Appellant's Postconviction Petition(s).

In the trial Court's Judgement Entry, the Trial Court provides insufficient cause for delaying it's ruling on Defendant-Appellant's timely filed Postconvictions, by simply stating it's insufficient reason as being due to 'RELATED' issues on Defendant-Appellant's direct appeal. Lopez v Wilson, 426 F.3d. 339, 350 (6th Cir. 2005)," The Court 'SHALL' consider a petition... even if a direct appeal of the Judgement is pending ". Defendant-Appellant asserts that the Trial Court Judge is clearly going against what the Sixth District Court has deemed as appropriate.

The Defendant-Appellant further contends that: the Postconviction Petition(s) are CIVIL in nature, See R.C. §2953.21 (E), Unless the Petition and the files and

records of the case show the Petitioner is not entitled to relief, the Court 'SHALL' proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.

The issues raised in 'BOTH' petitions are in 'fact' outside the trial record and have not been made a part of the record on the direct appeal, Lopez, Supra; ' Similarly, a postconviction petition filed in an Ohio trial Court under Ohio Rev. Code § 2953.21 represents an attack on the judgement of the trial court and is 'NOT' part of the original trial.

Without providing a sufficient cause for the delay on ruling on the postconviction petition(s), and with the record being absent any written (substantial) reasons for the delay, Appellant contends that he is being prevented from any meaningful Judicial review and precluded from any meaningful timely adjudication that substantiates his "ACTUAL INNOCENCE".

It is Appellant's contention that the trial Judge is only abusing his Judicial authority in a delay tactic to wrongfully contain this wrongfully convicted Innocent man.

Therefore, this proposition of Law has merit and must be sustained.

Proposition of Law No 3:

THE TRIAL COURT ABUSED ITS DISCRETION WITH ITS RULING DENYING APPELLANT'S App.R.9(E) MOTION WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING, GIVEN THE FACTS THAT WERE OBVIOUSLY MATERIAL OMISSIONS AND MISSTATEMENTS IN THE TRANSCRIPTS OF PROCEEDINGS THAT WAS NOT DUE TO THE FAULT OF APPELLANT.

The transcripts of the proceeding(s) are not consistent with the name of the person conducting which type of examination. This is at 'No' fault of Appellant, In Re Holmes, Supra. Due to such; an evidentiary hearing should've been held to determine the responsible party. State v Jones, Supra, Without this hearing, the Trial Court failed to satisfy the minimum requirements, Associated Estates Corp. v Fellows, 463 N.E.2d.417. A evidentiary hearing should've been held to determine the disputed issues, Joiner v Illuminating Co., 380 N.E.2d.361,366. Since no hearing was held the Trial Court could've permitted Appellant's

statements/Affidavit(s) that are from his recollection, U.S. v Taylor, 9 Fed. Appx. 468. Due to Appellant representing himself pro' se at the trial level, the Trial Court erred/abused its discretion. Therefore, this proposition of law has merit, and must be sustained.

Proposition of Law No. 4:

THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO ITS DENIAL OF APPELLANT'S MOTION TO SUPPLEMENT THE RECORD, WHICH PRECLUDES APPELLANT FROM MAKING A REASONABLE APPEAL AND/OR PREVENTS THE APPELLATE COURT FROM ANY MEANINGFUL JUDICIAL REVIEW.

On April 30,2007, the Defendant-Appellant (hereinafter Appellant), filed a Motion to Supplement the record, with Supplemental Statements of the proceedings, this was denied by the Trial Court on May 29,2007, absent any findings of fact and conclusions of law. In the trial court's Entry the trial Court concluded that the testimony of Victoria Hall, Gwen Bowers, Laura Maunz, and Andrea Starks was inaccurate without providing 'ANY' reasons for its decision and in what respect the testimony contained therein did not conform to accuracy that is (and has been) asserted by Appellant. The Trial Court further prejudiced this Appellant because it did not address the question that were in fact submitted, and, once again asserted by Appellant.

The Appellant asserts that it was the function of the trial court to decide what evidence was presented, including the questions previously submitted to that court. These were all submitted by Appellant from his best recollection, U.S. v Taylor, 9 Fed.Appx. 468; being that Appellant represented himself pro' se at the trial, it is obvious that Appellant knows what was asked, answered/elicited from the witnesses at the trial phase. Without the Trial Court making the necessary findings of fact and conclusions of law, and, without the Court holding a hearing on the disputed facts, Appellant's Constitutional rights continue to be violated for Appellant must be afforded an opportunity to present a fair and just appeal. Hayes v Hawes, 921 F.2d. 100; Defendant was 'NOT' precluded from

filing a pro' se brief on appeal in addition to the brief filed on his behalf by counsel. While there is no Sixth Amendment right to file a pro' se brief when defendant is represented by counsel, ' NOTHING ' precludes an appellate court from accepting the pro' se brief and considering the arguments contained therein.

The State prosecutor, the Trial & appellate Court 'All' would like this Court to believe that Appellant is not entitled to use due diligence in raising his Constitutional violations. Appellant asserts that there is a up and coming Journalized 'Decision and Judgement Entry ' (filed on 8-13-07, by the Sixth District Court), within this Entry the Court states: 'the only order Starks[Appellant] may appealis for Findings of Fact and Conclusions of Law'.

Appellant asserts that this will be brought before this Court in a timely manner when the time arises shall it be necessary, further it is now upon the record that the Sixth District Court acknowledges that Appellant(s) do indeed have a right to present their Constitutional violations to the Courts for proper adjudication.

CONCLUSION:

Due to the Trial Court's failure to set forth ' Findings of Fact and Conclusions of Law, Appellant is entitled to have the abused discretion utilized by the Trial & Appellate Court, reviewed by this Honorable Court. Wherefore this Court should accept Jurisdiction for the propositions herein contain merit and must be sustained.

CERTIFICATE OF SERVICE:

This is to certify that a true and exact copy of the foregoing was sent by ordinary U.S. Mail to Brenda J. Majdalani, Lucas County Prosecutor's Office, at 700 Adams St., Toledo, Ohio 43604, on this 29 day of August, 2007.



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[COUNSEL FOR APPELLANT Pro' se]

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-07-1226

Appellee

Trial Court Nos. CR-2004-3093
CR-2005-1209

v.

Verdell Starks

DECISION AND JUDGMENT ENTRY

Appellant

Decided: JUL 24 2007

* * * * *

This case is before the court sua sponte. Appellant, Verdell Starks, has filed a notice of appeal from a May 29, 2007 decision of the trial court which states that Starks' motions for postconviction relief are stayed pending conclusion of his direct appeal of his convictions to this court. The stay order is not a final appealable order since no ruling has yet been made on Starks' postconviction relief motions. The trial court's May 29 decision also denies Starks' motion to supplement the record on appeal in the direct appeal of his convictions pending before this court. We find that Starks may not appeal from the decision denying his motion to supplement since the motion was filed by Starks pro se and he is represented by counsel in his direct appeal of his convictions. "A defendant has no right to a 'hybrid' form of representation wherein he is represented by

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counsel, but also acts simultaneously as his own counsel. *McKaskle*, 465 U.S. at 183, 104 S. Ct. at 953, 79 L. Ed. 2d at 136; *State v. Thompson* (1987), 33 Ohio St. 3d 1, 6, 514 N.E. 2d 407, 414." *State v. Keenan* (1998), 81 Ohio St.3d 133, 138.

Finding that there is nothing which Starks may appeal in the May 29, 2007 decision of the trial court, this appeal is ordered dismissed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, P.J.

William J. Skow, J.

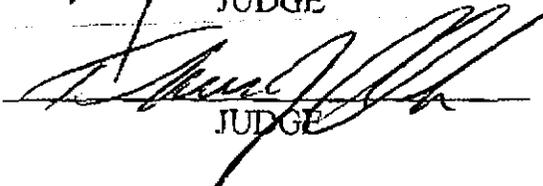
Thomas J. Osowik, J.
CONCUR.



JUDGE



JUDGE



JUDGE

FAXED