

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Plaintiff-Appellee, : Case No. 07-2333
-vs- : 1st Dist. No. C-070728
CHRISTOPHER SMITH, :
Defendant-Appellant. :

MEMORANDUM IN SUPPORT OF JURISDICTION

TRIAL COURT NO. B-0501249

FOR APPELLANT:

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Lebanon Corr. Inst.
P.O. BOX 56
Lebanon, Ohio 45036-0056

Appellant, in pro se

FOR APPELLEE:

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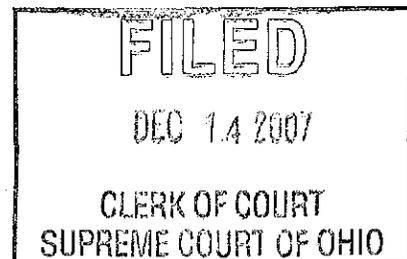


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JURISDICTIONAL STATEMENT

This case presents several substantial Constitutional questions including an examination of the due process and equal protection right to access available appellate remedies. As well as the Constitutional right to access effective counsel for the direct appeal process. Both of these questions have recently been addressed by the Sixth Circuit and the United States Supreme Court and have previously been firmly entrenched in favor of the litigant for decades, as set forth in the accompanying arguments.

In addition, this case presents questions relative to the constitutionality of Ohio's sentencing provisions when view in light of **Blakely v. Washington** (2004) 542 U.S. 296, and this Court's interpretation in **State v. Foster** (2006) 109 Ohio St.3d 1.

The state and trial court's failure to properly establish jurisdiction of the elements increasing the defendant's sentence and defense counsel's failure to defend against the structural defects, prejudices the defendant, violating his most basic Constitutional right. In light of this Court's recent decision in **Foster**, *supra*, the defendant's sentence is void ab initio and this Court should accept jurisdiction to cure a manifest injustice.

This Court should accept jurisdiction over this case independently of the **Blakely** issue and interpret Ohio's court of appeals treatment of delayed appeals in light of the recent higher court decisions.

STATEMENT OF THE CASE AND FACTS

PROCEDURAL POSTURE

On or about July 28, 2005, Appellant was convicted of one count of attempted murder and one count of aggravated robbery with firearm specifications attached. Appellant was then sentenced to a term of incarceration of 4 1/2 years for attempted murder, consecutive to 4 1/2 years for aggravated robbery with the 3 year gun specifications merged but consecutive to the 1st and 2nd counts, for a total stated prison term of 12 years.

Appellant was represented by a state appointed counsel that failed to timely file an appeal and, on September 13, 2007, appellant filed an application for leave to file a delayed appeal with all the required accompanying motions. On October 31, 2007, the First District Court of Appeals denied the application in a one page decision and this timely appeal follows.

In this case, Appellant was tried and convicted of additional elements that were used to enhance his sentence and to run the sentences consecutive to each other without providing him with notice of these additional elements, without establishing subject matter jurisdiction, and without providing any evidence to a jury to prove the facts beyond a reasonable doubt, in reality, lowering the prosecutions burden of proof to zero.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. I

IT WAS AN ABUSE OF DISCRETION AND A DENIAL OF DUE PROCESS WHEN THE APPELLATE COURT DENIED LEAVE TO FILE A DELAYED APPEAL PURSUANT TO OHIO APP. R. 5(A), WHERE NO WAIVER OF APPEAL WAS FILED AND APPELLANT SET FORTH SUFFICIENT REASONS FOR THE FAILURE TO TIMELY FILE THE APPEAL.

LAW AND ARGUMENT

It is well established that all persons are entitled to meaningful access to the courts. **Bounds v. Smith** (1977) 430 U.S. 817. This includes the right to an appeal where there is an established appeal process in a state court. **Douglas v. California** (1963) 372 U.S. 353. Where a state does provide appellate remedies, both the remedies and access thereto, must comport with the requirements of due process and equal protection. **Griffin v. Illinois** (1956) 351 U.S. 12.

It is also well established that the Sixth Amendment and Ohio law extends the right to appointed counsel to indigent defendants on their first direct appeal as of right, **Evitts v. Lucey** (1985) 469 U.S. 387; **Douglas**, supra; **State v. Gentry** (1983) 10 Ohio App.3d 227, citing **State v. Sims** (1971) 27 Ohio St.2d 79, and that the right to be furnished counsel for the timely filing of a direct appeal does not depend upon a request. **Carnley v. Cochran** 369 U.S. 506.

In **Roe v. Flores-Ortega** (2000) 529 U.S. 470, the U.S. Supreme Court noted that where counsel in a criminal case failed to file a timely notice of appeal on behalf of his client, even if the client does not request an appeal, so long as a reasonable person would have wanted to appeal, constituted a constitutional violation of ineffective assistance of counsel and due process. Appellant asserts that it is apparent that he would of wanted to prosecute an appeal, whereas he has file a delayed appeal upon learning of his appellate rights and has diligently pursued these rights thereafter.

Appellant was entitled to assigned counsel at every stage of the proceedings through appeal as of right and did not effectively waive his right to an appeal or counsel in open court or otherwise. **Gentry**, supra. In **Gentry**, the Court of Appeals held that where, (as here) a

defendant is not appointed counsel to timely appeal and asserts so in a delayed appeal motion, as well as requesting the appointment of counsel by the appellate court, the court of appeals then has an affirmative duty to appoint counsel to proceed with the appeal to determine the merits thereof. Citing **State v. Sims**, supra.

Absence of evidence in the record upon which it could be determined that an indigent defendant knowingly and intelligently waived his right of direct appeal and his right to court-appointed counsel for that direct appeal, prior to the expiration of the time in which such an appeal could of been taken, it was error for the Court of Appeals to dismiss the motion for leave to file a delayed appeal without making such factual determinations. **Sims**, supra. And to dismiss the motion for leave to appeal without appointing counsel to prosecute the appeal and determine whether the appeal contained merit, deprived the defendant of the right to effective assistance of counsel guaranteed by the due process and equal protection clause of the Fourteenth Amendment. **Evitts v. Lucey** (1985) 469 U.S. 387 (citing **Ross v. Moffitt** (1974) 417 U.S. 608-609). See also **Entsminger v. Iowa** (1967) 386 U.S. 748; **Griffin-Douglas**, supra.

The decision to grant or deny a motion for leave to appeal pursuant to Ohio App. R. 5(A) is within the discretion of the appellate court, however, it is an abuse of that discretion for an appellate court to deny leave to appeal when appellant set forth sufficient reasons of ineffective assistance of counsel for not timely filing an appeal; the failure of the trial court to appoint counsel to timely file an appeal; and the fact that no waiver of appeal or counsel exist and, no evidence to the contrary was presented and, the court of appeals failed in its duty to appoint counsel to determine if the appeal had

merit.

An abuse of discretion can mean more than merely arbitrary or capricious conduct, it may mean that the court failed to apply the correct legal principles to a situation if, thereby the litigant is prejudiced. **State v. Virgi** (1948) 84 Ohio App. 15, (citing **State v. Shafer** (1942) 71 Ohio App. 1). A decision not based upon a sound reasoning process is an abuse of discretion. **Proctor & Gamble v. Stoneham** (2000) 140 Ohio App.3d 260.

In this case the First District Court of Appeal did not apply the correct legal principles, nor did it base its decision upon any reasoning process let alone sound reason and, the decision of the appellate court prejudiced the Appellant by denying his due process; the right to an appeal as of right and the effective assistance of counsel on appeal. Therefore this Court should accept jurisdiction to decide and firmly establish the correct legal process in delayed appeal applications and/or in the alternative to prevent a manifest miscarriage of justice in this case.

PROPOSITION OF LAW NO. II

THE FAILURE OF TRIAL COUNSEL TO TIMELY FILE A NOTICE OF DIRECT APPEAL IS A VIOLATION OF THE SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL.

LAW AND ARGUMENT

Under the **Strickland v. Washington** (1984) 499 U.S. 668, standard the failure of Appellant's counsel to file a timely notice of appeal on his behalf is presumed, falling far below an objective standard of reasonableness, where counsel's performance was deficient when he failed to ensure that his client was fully informed of his appellate rights or failed to file a timely notice of appeal. **Pennsylvania v. Finley** (1987) 481 U.S. 551.

In **Roe v. Flores-Ortega**, supra, the Court held that counsel had

a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think that either a rational defendant would want to appeal or this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

In *Ludwig v. United States* 162 F.3d 456-459 (6th Cir. 1998) the Court added that the prejudice component of the *Strickland* analysis is inapplicable because prejudice is presumed:

A lawyer's failure to file a requested appeal at the behest of a defendant is particularly problematic because it does not merely deprive the defendant of effective assistance of counsel, it deprives him of the assistance of counsel altogether. Thus, the failure to perfect a direct appeal when requested by the defendant violates the Sixth Amendment without regard to the probability of success on appeal. *Id.*

Therefore, trial counsel was ineffective for not ensuring that Appellant was fully informed of his appellate rights and for not filing a timely notice of appeal and, this Court should accept jurisdiction to apply the higher court rulings to Ohio and prevent any further miscarriages of justice and constitutional violations.

PROPOSITION OF LAW NO. III

WHERE THE TRIAL COURT ERRED AND FAILED TO ESTABLISH SUBJECT MATTER JURISDICTION WHEN IT IMPOSED CONSECUTIVE SENTENCES THAT EXCEEDED THE STATUTORY MAXIMUM IN THE ABSENCE OF NOTICE AND OPPORTUNITY TO DEFEND AGAINST ADDITIONAL ELEMENTS; THE ABSENCE OF FINDINGS BY JURY; AND THE LOWERING OF THE PROSECUTIONS BURDEN OF PROOF, VIOLATING THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHT OF THE DEFENDANT.

LAW AND ARGUMENT

In this case, Appellant claims that the trial court erred when it failed to establish subject matter jurisdiction and proceeded to sentence him to consecutive sentences that exceeded the statutory maximum based upon elements that were neither alleged in the charging instrument or found beyond a reasonable doubt by a jury or admitted to by the

defendant, lowering the prosecutions burden of proof and preventing him from defending against these added elements used to enhance his sentence. **Blakely v. Washington** (2004) 542 U.S. 296, **State v. Foster** 109 Ohio St.3d 1.

Due process requires at a minimum, Notice and Opportunity to be heard **LaChance v. Erickson** (1998) 522 U.S. 262, the Fifth and Sixth Amendments require that any facts used to enhance a sentence in a criminal case beyond the statutory maximum must be set forth in the charging instrument and proven to a jury beyond a reasonable doubt. **Apprendi v. New Jersey** (2000) 530 U.S. 466, **Blakely v. Washington** (2004) 542 U.S. 296, **Washington v. Recuenco** (2006) 126 S. Ct. 2546, **Cunningham v. Claifornia** (2007) 127 S.Ct. 856.

The result of the failure to allege the additional elements, (removing subject matter jurisdiction) or require them to be proven beyond a reasonable doubt is tantamount to insufficient evidence, requiring relief and barring any redetermination of the issue. **Jackson v. Virginia** (1979) 443 U.S. 307, **Tibbs v. Florida** (1982) 457 U.S 31.

In **Blakely**, the U.S. Supreme Court determined that a sentencing court may not impose consecutive sentences or exceed the statutory maximum based upon elements which were not admitted to by the defendant or found by a jury, as it constitutes a violation of the defendant's right to trial by jury. A holding that was recently affirmed as unconstitutional by this Court in **State v. Foster**, supra. As such the judicial findings used to impose consecutive sentences and enhance Appellant's sentence above the statutory maximum are unconstitutional and thereby making Appellant's sentence "void", giving this Court inherent jurisdiction to correct the manifest injustice created by the trial court. Reversal or correction pursuant to O.R.C. §2953.08 is required.

CONCLUSION

The Appellant was denied his Statutory and Constitutional right to a meaningful and effective appeal process, to appeal his judgment of conviction and sentence. The Appellant was unlawfully given an excessive consecutive sentence that exceeded the statutory concurrent terms based upon judicial fact findings, violating his constitutional right to notice, jury trial and burdens of proof.

Therefore, Appellant's sentence should be reduced to a single three year sentence with a consecutive three year firearm specification or remanded back to the First District Court of Appeals for the appointment of counsel to prosecute the appeal and determination of the issues.

Respectfully submitted,

Chris Smith

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Lebanon, Ohio 45036-0056

Appellant, in pro se

SERVICE

I certify that a true copy of the foregoing was sent via regular U.S. Mail to the office of the Hamilton County Prosecutor at 230 E. Ninth St., Cincinnati, Ohio on this 9 day of December, 2007.

Christopher Smith

Christopher Smith
Appellant, in pro se

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

APPEAL NO. C-070728
TRIAL NO. B-0501249

Appellee,

vs.

ENTRY OVERRULING MOTION
FOR LEAVE TO APPEAL

CHRISTOPHER SMITH,

Appellant.

This cause came on to be considered upon the *pro se* motion of the appellant for leave to file a delayed appeal and upon the memorandum in opposition.

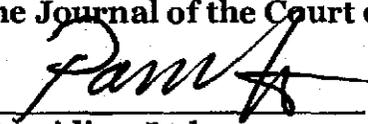
The Court finds that the motion is not well taken and is overruled as the appellant has failed to provide sufficient reasons for failure to perfect an appeal as of right.

Further, all other pending motions are overruled as being moot.

To The Clerk:

Enter upon the Journal of the Court on OCT 31 2007 per order of the Court.

By: _____


Presiding Judge

(Copies sent to all counsel)