

IN THE SUPREME COURT OF OHIO

JEFFREY C. KEITH,

Appellant,

v.

DAVID BOBBY, WARDEN,

Appellee.

Case No. 07-1982

On Appeal from the
Portage County Court of Appeals
Eleventh Appellate District,

Court of Appeals
Case No. 2007-P-0027

MERIT BRIEF OF APPELLEE, DAVID BOBBY

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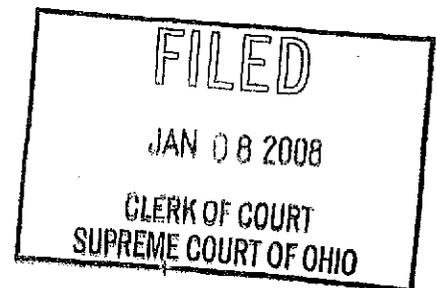


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INTRODUCTION

Petitioner-Appellant Jeffrey C. Keith (“Keith”) filed a petition for a writ of habeas corpus in which he claimed that he was entitled to immediate release from confinement because the assignment of the sentencing judges who presided over his three criminal trials was improper. He also argued that various witnesses who testified against him committed perjury and fabricated evidence.

A habeas corpus proceeding is not the proper vehicle to challenge alleged errors that occur during the course of a criminal conviction or sentencing. If a sentencing judge is improperly assigned to a case, that is a procedural error that renders a conviction voidable on direct appeal. However, the improper assignment of a judge does not render a conviction void, and the error is not subject to attack in a collateral proceeding. Rather, unless the judgment is set aside in a direct appeal, it remains in full force and effect and cannot be attacked collaterally. Further, allegations of perjury during the course of a criminal trial cannot be raised in a habeas corpus action.

The court below properly found that Keith’s habeas petition failed to state a claim on which relief could be granted and dismissed it on that basis.

STATEMENT OF THE CASE AND FACTS

Keith was convicted of several offenses in three separate trials in the Cuyahoga County Court of Common Pleas. In 1995, he was convicted of five counts of arson and one count of grand theft of a motor vehicle, Case No. 316724. Two years later, a second case against him secured convictions for three counts of theft, one count of Medicaid fraud, one count of securing writings by deception, one count of forgery, and one count of uttering a forged document, Case No. 333972. Finally in 1999, Keith was convicted in a third trial of two counts of uttering a forged document, one count of attempted aggravated theft, one count of tampering with evidence, one count of grand theft of a motor vehicle, and one count of forgery, Case No. 350831. He was ordered to serve an indefinite sentence of five to fifteen years, and definite sentences of twenty-five years and six months. He is currently incarcerated at the Trumbull Correctional Institution, located in Trumbull County, Ohio, where he is serving those sentences. Respondent-Appellee is the Warden at that institution.

The sentencing entries for all three cases are attached to Keith's habeas petition. (Pages 3, 5 and 6 of the Appendix) They indicate that Judge Daniel Gaul sentenced him in Case No. 316724. Judge Joseph Cirigliano sentenced him in Case Nos. 333972 and 350831. All three cases were affirmed on appeal. State v. Keith (March 13, 1997), Cuyahoga App. No. 69267, 1997 Ohio App. LEXIS 914, copy attached, affirmed the convictions in Case No. 316724; State v. Keith (October 22, 1998), Cuyahoga App. No. 72275, 1998 Ohio App. LEXIS 4990, copy attached, affirmed the convictions in Case No. 333972; State v. Keith (August 17, 2000), Cuyahoga App. Nos. 76469, 76479 and 76610, 2000 Ohio App. LEXIS 3757, copy attached, affirmed the convictions in Case

No. 350831. Keith did not raise a challenge to the sentencing judge's authority to sentence him in any of those three appeals. There is no indication that Keith objected to the authority of the sentencing judges in the trial court.

In January 2002, Keith filed a request for leave to file a motion for new trial in Case No. 316724. Although Judge Daniel Gaul had presided over the first trial against Keith in that case, Visiting Judge Joseph E. Cirigliano, who had presided over the second and third trials against Keith in Case Nos. 333972 and 350831, denied Keith leave to file the motion for new trial. Keith appealed this determination, and the appellate court held that Judge Cirigliano's judgment on Keith's motion for leave was improper, as he was not Keith's original sentencing judge for Case No. 316724. State v. Keith, Cuyahoga App. No. 81125, 2002 Ohio 7250, 2002 Ohio App. LEXIS 7090, copy attached to Keith's habeas petition, p. 7 of Appendix.

In 2003, Keith filed a mandamus complaint seeking to compel rulings on various motions. In that mandamus action, he challenged the improper assignment of the judges to his criminal cases. His complaint was denied, and this Court affirmed, stating that he had an adequate remedy via direct appeal to challenge the improper assignment of judges to his cases. State ex rel. Keith v. McMonagle, 106 Ohio St.3d 61, 2005 Ohio 3669, ¶7.

On April 25, 2007, Keith filed the habeas petition that is the subject of this appeal in the Portage County Court of Appeals, Eleventh Appellate District. He claimed that he was entitled to immediate release from confinement because the sentencing judges were not properly assigned to his cases and because various witnesses had lied during the course of his criminal trial. He argued that the 2002 decision of the Cuyahoga County

Court of Appeals which vacated Judge Cirigiliano's denial of his motion for leave to file a motion for a new trial effectively voided his underlying convictions.

Appellee Warden filed a motion to dismiss on the basis that Keith's claims are not cognizable in a habeas corpus action and, thus, he failed to state a claim on which relief could be granted. On September 28, 2007, the court granted the Warden's motion to dismiss. In granting the motion, the court held that the 2002 decision of the Cuyahoga County Court of Appeals did not void Keith's underlying convictions. Rather, the ruling was expressly limited to the decision denying Keith's motion for leave to file a motion for a new trial.

The case is now before this Court pursuant to Keith's appeal.

ARGUMENT

Proposition of Law No. 1:

Appellant's claims are not cognizable in a habeas corpus proceeding.

Habeas corpus is an extraordinary remedy and normally is appropriate only when there is no alternative legal remedy. State ex rel. Jackson v. McFaul, 73 Ohio St.3d 185, 1995 Ohio 228. In the context of a criminal conviction, habeas corpus normally may be used only to challenge the jurisdiction of the sentencing court.¹ Wireman v. Ohio Adult Parole Authority (1988), 38 Ohio St.3d 322, 528 N.E.2d 173.

Habeas corpus may not be used as a substitute for other forms of action, such as direct appeal, post-conviction relief or mandamus. Adams v. Humphreys (1986), 27 Ohio St.3d 43, 43, 500 N.E.2d 1373; Beard v. Williams Cty. Dept. of Social Services (1984), 12 Ohio St.3d 40, 42, 465 N.E.2d 397; Walker v. Maxwell (1965), 1 Ohio St.2d 136,137, 205 N.E.2d 394. The Ohio Supreme Court, in State ex rel. Jackson v. McFaul, 73 Ohio St.3d 185, 186, 1995 Ohio 228, held as follows:

[H]abeas corpus will lie in certain extraordinary circumstances where there is an unlawful restraint of a person's liberty . . . but only where there is no adequate legal remedy, e.g., appeal or post-conviction relief.

The existence of an alternative remedy is enough to remove a petitioner's allegations from habeas consideration, whether the remedy is still available or not, as long as the petitioner could have taken advantage of it previously. See Luna v. Russell, 70 Ohio St.3d 561, 562, 1994 Ohio 264; State v. Perry (1967), 10 Ohio St.2d 175, 181,

¹ The sentencing court (the Cuyahoga County Court of Common Pleas) had jurisdiction over Keith's cases pursuant to R. C. 2931.03, which gives the courts of common pleas jurisdiction over criminal offenses that occur in their respective counties.

226 N.E.2d 104. Habeas corpus is not a substitute for appeal. Cornell v. Schotten, 69 Ohio St.3d 466, 467, 1994 Ohio 74.

Most errors that occur in criminal proceedings can be challenged on direct appeal. If a direct appeal is or was available, relief in habeas corpus is not available. Davie v. Edwards (1997), 80 Ohio St.3d 170, 171, 685 N.E.2d 228. As long as the petitioner had adequate legal remedies for the issues of which he complains through direct appeal and petitions for post-conviction relief, the issues may not be addressed in a petition for habeas corpus. Cornell v. Schotten, 69 Ohio St.3d 46, 1994 Ohio 74.

Habeas corpus is not the proper mode of redress where the petitioner has been convicted of a criminal offense and sentenced to imprisonment by a court of competent jurisdiction; if errors or irregularities have occurred in the proceedings or sentence, a writ of error, i.e., appeal, is the proper remedy. Ex Parte VanHagan (1874), 25 Ohio St. 426 at syllabus paragraph 2; see also Burch v. Morris (1986), 25 Ohio St.3d 18, 19, 494 N.E.2d 1137 (citing VanHagan). In Walker v. Maxwell (1965), 1 Ohio St.2d 136, 137-8, 205 N.E.2d 394, the court stated as follows:

The General Assembly has provided an adequate post-conviction remedy by appeal for the review of alleged errors in the conviction of an accused, and, once a conviction is had, prior irregularities merge into the judgment and must be raised by appeal. The validity of such judgment cannot be questioned by collateral attack. State v. Wozniak, 172 Ohio St. 517; and Perry v. Maxwell, Warden, 175 Ohio St. 369. This remedy is available to all persons as a matter or right within 30 days after conviction and by motion for leave to appeal at any time. Where an accused has failed to pursue his appeal within the statutory period for appeals as a matter or right, he had available to him the motion for leave to appeal. This is not an empty right. If the accused can show reasonable grounds for his delay in pursuing his appeal as a matter of right within the statutory period or if the failure to grant such appeal would result in a clear miscarriage of justice, to deny such motion would constitute an abuse of discretion.

That habeas corpus is not the proper remedy after conviction for the review of errors or irregularities has been pointed out many times.

“Habeas corpus ‘is not and never was a postconviction remedy for the review of errors or irregularities of an accused’s conviction or for a retrial of the guilt or innocence of an accused.’” Bellman v. Jago (1988), 38 Ohio St.3d 55, 56, 526 N.E.2d 308.

Under the doctrine of res judicata, a convicted defendant is barred from litigating, in a collateral proceeding, any claim which either was raised or which could have been raised at his trial or in his direct appeal. State v. Perry (1967), 10 Ohio St.2d 175, 182, 226 N.E.2d 104; State v. Szefcyk, 77 Ohio St.3d 93, 1996 Ohio 337. Keith could have raised his challenge to the sentencing judge’s authority in a direct appeal. Whether or not he did so, his claims cannot be heard in this habeas action. If another remedy exists or existed at one time, habeas relief should not be granted. Luna v. Russell, 70 Ohio St.3d 561, 1994 Ohio 264. In State ex rel. Raglin v. Brigano, 82 Ohio St.3d 410, 1998 Ohio 222, the Court held that Petitioner’s attack on the validity of his indictment should have been raised in his direct appeal, thus he was not entitled to habeas relief. In other words, whether the opportunity for direct appeal still exists or not, as long as the petitioner could have taken advantage of it, habeas corpus is not an appropriate remedy.

Keith’s claims are not cognizable in this habeas corpus action.

Proposition of Law No. 2:

Claims challenging the authority of the sentencing judge are not cognizable in a habeas corpus proceeding.

Even if the sentencing judge acted without authority, this particular claim is not cognizable in habeas corpus, but should be brought in a direct appeal. In Berger v.

Berger (1981), 3 Ohio App.3d 125, 443 N.E.2d 1375, overruled in part,² Brickman & Sons, Inc. v. Nat'l City Bank, 106 Ohio St. 3d 30, 2005 Ohio 3559, 830 N.E.2d 1151, 2005 Ohio LEXIS 1604 (2005), the court stated as follows:

We hold that where the record fails to show proper reassignments of the case to the judges making those rulings, they are voidable and must be vacated on a timely motion or appeal by a party that has not waived his objection to such irregularity.

Berger, at 125. Berger relied on Bowman v. Alvis (1950), 88 Ohio App. 229, 96 N.E.2d 605, in which the court held that if there was error in substituting one judge for another, such substitution did not go to the jurisdiction of the trial court or render the judgment void. Review of the judgment should have been sought by writ of error (appeal) and a remedy by habeas corpus was not available. Bowman, at 235-6. This principle of the Berger decision was cited approvingly by this Court in In re Disqualification of Cirigliano, State v. Ross, 105 Ohio St. 3d 1223, 2004 Ohio 7352:

Any party objecting to a reassignment must raise that objection at the first opportunity to do so. If the party has knowledge of the transfer with sufficient time to object before the new judge takes any action, that party waives any objection to the transfer by failing to raise that issue on the record before the action is taken. If the party first learns about the transfer after action is taken by the new judge, the party waives any objection to the transfer by failing to raise that issue within a reasonable time thereafter.

Ross, at 1128, citing Berger, at 131.

² The part of Berger that was overruled was its requirement that the administrative judge state a reason for transferring a case from one judge to another in the entry reassigning a case. This Court held that nothing in the Rules of Superintendence requires the administrative judge to state the reason for reassignment in the journal entry, and to the extent that Berger attempts to add a requirement to the Rules of Superintendence, it is overruled. Brickman, p. 34.

Similarly, in State v. Archer, 11th Dist. No. 2002-P-0053, 2003 Ohio 2233, 2003 Ohio App. LEXIS 2074, copy attached, the Eleventh District held that the right of a de facto officer, *i.e.*, a judge, to hold office may not be questioned in a collateral proceeding to which he is not a party. The court went on to note that since the defendant failed to object to the judge's authority at the trial court level, he had waived any possible error. Archer, at ¶¶14, 17. In State v. Pecina (1992), 76 Ohio App.3d 775, 603 N.E.2d 363, the court held that the defendant-appellant had waived his right to challenge the authority of the sentencing judge by his failure to make a timely objection prior to sentencing.

Keith's petition does not indicate that he objected to the authority of the sentencing judge prior to sentencing. However, even if he had not waived his objection, Berger clearly states that any ruling made by a judge who acted without authority is voidable on appeal and, therefore, cannot be attacked in a collateral proceeding such as habeas corpus. A voidable judgment may be attacked by way of direct appeal from the judgment. However, a judgment, even though voidable, cannot be attacked collaterally and remains in full force and effect. State ex rel. Leshner v. Kainrad (1981), 64 Ohio St.2d 68; State v. Perry (1967), 10 Ohio St.2d 175; Eisenberg v. Peyton (1978), 56 Ohio App.2d 144, 381 N.E.2d 1136.

In Clark v. Wilson (July 28, 2000), 11th Dist. No. 2000-T-0063, 2000 Ohio App. LEXIS 3400, copy attached, the petitioner filed a habeas action in which he claimed that his conviction should be declared void because the judge who sentenced him was not properly assigned to his case. The court dismissed his petition finding that he did not state a viable ground for habeas relief:

In regard to this specific argument, this court would readily agree that that, as a general proposition, the failure to transfer an action properly

from the original judge to a new judge constitutes a procedural error which deprives the new judge of any authority to proceed in the case. ***

Nevertheless, although petitioner's allegations are sufficient to make a prima facie showing that a procedural error may have occurred in the underlying case, we do not agree with petitioner's contention concerning the effect of that alleged error. The courts of this state have consistently held that the failure to transfer a case properly does not affect a court's jurisdiction over a case. Accordingly, such an error does not render any ensuing judgment in the case void, but only has the effect of rendering any subsequent judgment voidable. See, e.g., State v. Pecina (1992), 76 Ohio App.3d 775, 778, 603 N.E.2d 363.

The distinction between "void" and "voidable" is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. *** Given this distinction, it has been held that the lack of a proper transferal judgment can be waived if a timely objection is not made. ***

Before a writ of habeas corpus can lie, the petitioner generally must be able to show that the trial court in the underlying criminal action lacked jurisdiction. *** In the instant action, petitioner's own allegations indicate that he will be unable to prove this element because the lack of a transferal judgment is not a jurisdictional error. Moreover, since the failure to transfer the underlying case properly could have been contested in an appeal from the conviction, a writ of habeas corpus will also not lie in this instance because petitioner had an adequate legal remedy. ***

As an aside, this court would note that some courts of this state have expressly held that the failure to follow the correct procedure for transferring a case can rise to the level of a due process violation if there is an additional showing of bad faith, fraud, or an improper reason for the transfer of the matter. *** However, we would emphasize that the merits of a possible violation of due process cannot be litigated in a habeas corpus action because the criminal defendant has an adequate legal remedy through a petition for postconviction relief. ***

Clark, at *3-6 (citations omitted). Several Ohio Appellate Districts have cited approvingly to Clark's distinction between a void and avoidable judgment. Novak v. Gansheimer, 11th Dist. No. 2003-A-0023, 2003 Ohio 5428, 2003 Ohio App. LEXIS 4860, copy attached; State ex rel. Mike v. Warden, 11th Dist. No. 2002-T-0153, 2003 Ohio

2237, 2003 Ohio App. LEXIS 2073, copy attached; State ex rel. Sautter v. Grey, 5th Dist. No. 06-CA-6, 2007 Ohio 1831, 2007 Ohio LEXIS 2808, at *21; Evans v. Ohio, 10th Dist. No. 02AP-736, 2003 Ohio 959, 2003 Ohio App. LEXIS 906, at *6; State v. Montgomery, 6th Dist. No. No. H-02-039, 2003 Ohio 4095, 2003 Ohio App. LEXIS 3652, at *4.

Keith's claim should have been raised in a direct appeal and cannot be reviewed in a habeas corpus proceeding.

Proposition of Law No. 3:

The Cuyahoga County Court of Appeals did not declare Appellant's convictions void.

Keith claims the judgments of his convictions were adjudicated void. (Keith's Brief, p. 31) That is not correct.

In State v. Keith, Cuyahoga App. No. 81125, 2002 Ohio 7250, 2002 Ohio App. LEXIS 7090 (copy attached to Keith's petition), the case was before the court pursuant to Keith's appeal from Judge Cirigliano's order granting the state's motion to dismiss his motion for a new trial. The appellate court found that the judge, who was not properly assigned to the case, had no authority to grant the state's motion to dismiss. An order issued by a judge without authority to act can be attacked on appeal; that is what happened. Keith properly attacked the judge's authority to grant the state's motion to dismiss in a direct appeal from the judge's order.

However, the court did not find that the underlying criminal convictions were void. In fact, the court noted that Keith's convictions had been affirmed on appeal and went on to discuss the appeal that was pending before it. State v. Keith, ¶2.

As the court below indicated, the holding in that appeal was intended only to vacate the decision on Keith's motion for leave to request a new trial, not to void the entire underlying conviction. The wording of the opinion readily indicates that the appeal in question stemmed solely from the judgment overruling the motion for leave. The validity of the underlying conviction was not before the court. In fact, the opinion noted that the sentencing judgment had been the subject of a prior appeal and that the validity of the conviction had been upheld.

Proposition of Law No. 4:

Appellant unsuccessfully litigated his claim that the sentencing judges were not properly assigned to his case in a mandamus action; he cannot relitigate it in this habeas corpus action.

Keith challenged the improper assignment of Judges Gaul and Cirigliano to his criminal cases in a mandamus action filed in 2003. His mandamus complaint was denied, and the decision was affirmed by this Court who stated as follows:

Moreover, he has or had an adequate remedy by appeal from these ruling to raise his claim that Judge Gaul and Judge Cirigliano were improperly assigned to his criminal cases. See State ex rel. Key v. Spicer (2001), 91 Ohio St.3d 469, 2001 Ohio 98, 746 N.E.2d 1119 ("a claim of improper assignment of a judge can generally be adequately raised by way of appeal"); State ex rel. Berger v. McMonagle (1983), 6 Ohio St.3d 28, 30, 6OBR 50, 451 N.E.2d 225 (mandamus and prohibition are not substitutes for appeal to contest alleged improper assignment of judge).

State ex rel. Keith v. McMonagle, 106 Ohio St.3d 61, 2005 Ohio 3669, ¶7.

Keith has already litigated his claim that the judges were improperly assigned to his criminal cases and has already been told that because he had an adequate alternative legal remedy of a direct appeal, he cannot bring the claim in an action for an extraordinary remedy such as mandamus (or habeas corpus).

Since this Court has already stated that Keith's claim cannot be raised in an action for an extraordinary remedy, the doctrine of res judicata bars litigation of the same claim in a subsequent petition for another extraordinary remedy.

Proposition of Law No. 5:

Allegations of perjury by a witness cannot be raised in a habeas corpus proceeding.

Keith claims various witnesses committed perjury at his trial and before the grant jury. Allegations of perjured testimony cannot be raised in habeas corpus. Bozsik v. Hudson, 110 Ohio St.3d 245, 2006 Ohio 4356, citing Williamson v. Williams, 103 Ohio St.3d 25, 2004 Ohio 4111.

Proposition of Law No. 6:

Appellant's habeas petition failed to state a claim upon which relief could be granted and was properly dismissed on that basis by the court below.

In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. O'Brien v. University Community Tenants Union, Inc. (1975), 42 Ohio St.2d 242.

Keith's habeas petition claimed that he was entitled to immediate release from confinement because the sentencing judges were improperly assigned to his criminal cases and because witnesses lied during his trial and grand jury proceedings. He can prove no set of facts that would entitle him to relief in this action because the claims cannot be reviewed in a habeas corpus action.

The lower court's dismissal of the petition on that basis was correct and should be affirmed.

Proposition of Law No. 7:

A writ of procedendo provides an appropriate remedy for Appellant to seek rulings from the Cuyahoga County Court of Common Pleas on his motions for new trials and other post-conviction proceedings.

Keith argues that no court in the Cuyahoga County Court of Common Pleas has ruled on his leave request to file a motion for a new trial since 2002. The court below correctly suggested that Keith pursue a writ of procedendo to compel the Cuyahoga County Court of Common Pleas to rule on his motions for new trial.

“A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment.” State ex rel. Weiss v. Hoover, 84 Ohio St.3d 530, 532, 1999 Ohio 422. “Consequently, a writ of procedendo will issue to require a court to proceed to final judgment if the court has erroneously stayed the proceeding.” State ex rel. Watkins v. Eighth Dist. Court of Appeals, 82 Ohio St.3d 532, 535, 1998 Ohio 190.

This Court has refused to allow an inmate to request relief by habeas corpus when a writ of procedendo would suffice in Bozsik v. Hudson, 110 Ohio St.3d 245, 2006 Ohio 4356. Similar to the proceedings here, the petitioner in Bozsik filed for a writ of habeas corpus partly due to the failure of the trial court to rule on his motion for new trial. Id. at 246. This Court, however, refused to grant the writ – “procedendo -- not habeas corpus -- is the appropriate writ when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment.” Id. at 246.

Keith believes that a writ of procedendo would not result in an adequate remedy of law. (Brief, p. 26). As an initial matter, Keith is misstating the rule. A writ of procedendo is issued on the basis of whether there is no adequate remedy of law – not if

the writ itself provides the adequate remedy. See State ex rel. Sherrills v. Common Pleas, 72 Ohio St. 3d 461, 462, 1995 Ohio 26 (“A writ of procedendo will not issue unless the relator establishes a clear legal right to that relief and that there is no adequate remedy at law”).

Regardless of this error, his arguments on the merits cannot stand. As Keith cites, “[i]n order for an alternate remedy to be considered adequate, the remedy must be complete, beneficial, and speedy.” State ex rel. Miley v. Parrott, 77 Ohio St. 3d 64, 67, 1996 Ohio 350. He asserts that the Cuyahoga County Court of Common Pleas relinquished its authority to hear the case, and thus the remedy is not complete. (Brief, p. 27). This is false. The evidence that Keith cites in his appendix provides no indication that Presiding Judge Nancy R. McDonnell of the Court of Common Pleas removed the court’s jurisdiction. (Brief, Appx. 117). Instead, it asks the Judicial Court Services division of this Court to inform it if it assigns a visiting judge to Keith’s case. (Brief, Appx. 117).

Keith also argues that a writ of procedendo will not create a beneficial result. He believes that because Judge Cirigliano ruled on several motions in the proceedings in Case No. 316724, a single writ will not grant beneficial relief. (Brief, p. 27). As argued previously, the Eighth District Appellate Court’s decision that invalidated the authority of Judge Cirigliano is limited only to his decision not to grant leave for Keith to file a motion for new trial. It has no application to any other pleadings in this matter.

Finally, Keith states that a writ of procedendo will not be speedy, declaring that “filing a writ of procedendo in the Eighth District would suffer the same fate as the writ of mandamus action,” as if the two can be conflated. “A writ of mandamus will generally

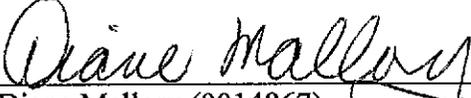
not issue to compel a court to release its decisions promptly.” State ex rel. Luna v. Huffman (1996), 74 Ohio St. 3d 486, 488, 659 N.E.2d 1279. The actions in the prior proceedings, involving a different writ, provides no indication on the potential speed in which a writ of procedendo could be granted now.

CONCLUSION

For the foregoing reasons, this decision of the court below should be affirmed.

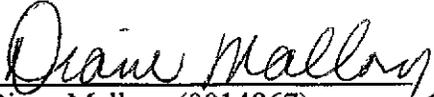
Respectfully submitted,

Marc Dann
Attorney General of Ohio


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150 East Gay Street, 16th Floor
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(614) 644-7233

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by regular, first-class mail to Jeffrey C. Keith, #334-054, Petitioner, Trumbull Correctional Institution, 5701 Burnett Road, Leavittsburg, Ohio 44430, on the 8th day of January, 2008.


Diane Mallory (0014867)

APPENDIX

PETER CLARK, Petitioner, - vs - JULIUS WILSON, WARDEN, Respondent.
CASE NO. 2000-T-0063

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY

2000 Ohio App. LEXIS 3400

July 28, 2000, Decided

DISPOSITION: [*1] Petition dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner sought a writ of habeas corpus after pleading guilty in the Summit County Court of Common Pleas (Ohio) to attempted trafficking in marijuana. Respondent moved to dismiss.

OVERVIEW: Petitioner pled guilty to attempted trafficking in marijuana. The judge who accepted the plea had not been properly assigned to the case. Upon learning that he could be subject to deportation, petitioner sought habeas corpus relief, contending that he should have been advised of the possibility of deportation before entering his plea and that the judge had no authority to accept the plea. The court granted respondent's motion to dismiss the petition because lack of a transferal judgment and alleged error in the acceptance of the guilty plea did not raise jurisdictional issues. Moreover, petitioner had adequate legal remedies available and failed to take advantage of them.

OUTCOME: The court granted respondent's motion to dismiss because no jurisdictional issue was raised by lack of a transferal judgment or by allegation of error in the acceptance of the guilty plea. Petitioner had adequate legal remedies available as to both grounds asserted.

CORE TERMS: habeas corpus, guilty plea, plea hearing, postconviction, sentencing, legal remedy, transferal, viable, trafficking, marijuana, underlying case, voidable, void, declared void, prison, adequate remedy, procedural error, jurisdictional, contested, withdraw, ensuing, petitioner asserts, deportation, convicted, knowingly, assigned

LexisNexis(R) Headnotes

Civil Procedure: Judicial Officers: Judges: General Overview

Civil Procedure: Judgments: Relief From Judgment: Void Judgments

Governments: Courts: Judges

[HN1] As a general proposition, the failure to transfer an action properly from the original judge to a new judge constitutes a procedural error which deprives the new judge of any authority to proceed in the case. In the absence of a formal transferal judgment, only the original judge has the authority to act in the matter. Nevertheless, the failure to transfer a case properly does not affect a court's jurisdiction over a case. Accordingly, such an error does not render any ensuing judgment in the case void, but only has the effect of rendering any subsequent judgment voidable. The distinction between "void" and "voidable" is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. Given this distinction, the lack of a proper transferal judgment can be waived if a timely objection is not made.

Criminal Law & Procedure: Habeas Corpus: Cognizable Issues: General Overview

[HN2] Before a writ of habeas corpus can lie, the petitioner generally must be able to show that the trial court in the underlying criminal action lacked jurisdiction.

Criminal Law & Procedure: Habeas Corpus: Exhaustion of Remedies: General Overview

[HN3] A writ of habeas corpus will not lie where petitioner has an adequate legal remedy.

Criminal Law & Procedure: Habeas Corpus: Cognizable Issues: Due Process

[HN4] The failure to follow the correct procedure for transferring a case can rise to the level of a due process violation if there is an additional showing of bad faith, fraud, or an improper reason for the transfer of the matter. However, the merits of a possible violation of due process cannot be litigated in a habeas corpus action because the criminal defendant has an adequate legal remedy through a petition for postconviction relief.

Criminal Law & Procedure: Preliminary Proceedings:
Entry of Pleas: Changes & Withdrawals
Criminal Law & Procedure: Guilty Pleas: General
Overview

Criminal Law & Procedure: Habeas Corpus: Exhaustion
of Remedies: General Overview

[HN5] An alleged error in the acceptance of a guilty plea cannot form the basis of a viable claim in habeas corpus. An error in the taking of a guilty plea is not deemed jurisdictional in nature. Moreover, the petitioner in such a situation has an adequate legal remedy because he can contest the issue in an appeal, a motion to withdraw the plea, or a petition for postconviction relief.

Criminal Law & Procedure: Guilty Pleas: General
Overview

Criminal Law & Procedure: Habeas Corpus: Exhaustion
of Remedies: General Overview

[HN6] The fact that a defendant has failed to take advantage of his other legal remedies in a timely manner does not mean that he lacks an "adequate remedy" for purposes of an action in habeas corpus.

COUNSEL: PETER CLARK, pro se, Leavittsburg, OH,
(Petitioner).

BETTY D. MONTGOMERY, ATTORNEY
GENERAL, DIANE MALLORY, ASSISTANT
ATTORNEY GENERAL, Columbus, OH, (For
Respondent).

JUDGES: HON. JUDITH A. CHRISTLEY, P.J., HON.
ROBERT A. NADER, J., HON. WILLIAM M.
O'NEILL, J.

OPINION

Original Action for Writ of Habeas Corpus

PER CURIAM

This action in habeas corpus is presently before this court for final consideration of respondent's motion to dismiss, filed on May 22, 2000. As the primary basis for his motion, respondent, Julius Wilson, submits that the petition in this matter does not state a viable claim in habeas corpus because petitioner, Peter Clark, has an adequate remedy at law. For the following reasons, we conclude that the motion to dismiss has merit.

Respondent is the warden of the Trumbull Correctional Institution, a state prison located in Leavittsburg, Ohio. Petitioner is an inmate in that facility, having previously been convicted in the Summit County Court of Common

Pleas of attempted trafficking in marijuana. In now seeking his immediate release from the prison, petitioner asserts that the underlying conviction should[*2] be declared void because: (1) he was sentenced by a trial judge who was never properly assigned to his case; and (2) his decision to enter a plea of guilty was not made knowingly and voluntarily.

Petitioner's claim for relief is predicated upon the following allegations. In March 1998, the Summit County Grand Jury indicted petitioner on one count of engaging in a pattern of corrupt activity and one count of trafficking in marijuana. When he was initially arraigned on the charges, petitioner entered a plea of not guilty. This plea was accepted by Judge Ted Schneiderman, a sitting member of the Summit County Court of Common Pleas. During the ensuing two months, Judge Schneiderman continued to act as the trial judge in petitioner's case.

In June 1998, petitioner chose to plead guilty to one count of attempted trafficking in marijuana; accordingly, a plea hearing was held in lieu of a trial. This hearing was conducted by Richard D. Kennedy, a retired judge from Columbiana County. Prior to presiding over this proceeding, Judge Kennedy had not been involved in the case in any manner. Moreover, no judgment entry had been issued in the matter substituting Judge Kennedy for Judge Schneiderman.

[*3] During the plea hearing, Judge Kennedy questioned petitioner as to whether he was aware of the various ramifications of entering a guilty plea. However, as part of their colloquy, Judge Kennedy never informed petitioner that his conviction in this case could lead to his deportation from the United States. Despite this, near the conclusion of the plea hearing, Judge Kennedy accepted petitioner's guilty plea.

A separate hearing on sentencing was held approximately one month later. Based upon the evidence presented during this proceeding, Judge Kennedy issued a judgment sentencing petitioner to a definite term of two years. Still, notwithstanding the finality of the sentencing judgment, no separate judgment had ever been rendered reassigning the case to Judge Kennedy.

Attempting to build upon the foregoing allegations, petitioner asserts in the instant action that he is entitled to a writ of habeas corpus for two reasons. First, he contends that Judge Kennedy did not have any authority to sentence him because Judge Kennedy was never properly assigned to the underlying case. Based on this contention, petitioner further argues that the sentencing judgment should be declared void.

In[*4] regard to this specific argument, this court would readily agree that, [HN1] as a general proposition, the failure to transfer an action properly from the original judge to a new judge constitutes a procedural error which deprives the new judge of any authority to proceed in the case. In *State v. Swalcy*, 1998 Ohio App. LEXIS 5990 (Dec. 11, 1998), Portage App. No. 97-P-0075, unreported, we concluded that, in the absence of a formal transferal judgment, only the original judge has the authority to act in the matter.

Nevertheless, although petitioner's allegations are sufficient to make a prima facie showing that a procedural error may have occurred in the underlying case, we do not agree with petitioner's contention concerning the effect of that alleged error. The courts of this state have consistently held that the failure to transfer a case properly does not affect a court's jurisdiction over a case. Accordingly, such an error does not render any ensuing judgment in the case void, but only has the effect of rendering any subsequent judgment voidable. See, e.g., *State v. Pecina* (1992), 76 Ohio App. 3d 775, 778, 603 N.E.2d 363.

The distinction between "void" and "voidable" is crucial. If a[*5] judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. See 62 Ohio Jurisprudence 3d (1985) 468-469, Judgments, Sections 131-132. Given this distinction, it has been held that the lack of a proper transferal judgment can be waived if a timely objection is not made. *Swalcy*.

[HN2] Before a writ of habeas corpus can lie, the petitioner generally must be able to show that the trial court in the underlying criminal action lacked jurisdiction. *Luna v. Russell* (1994), 70 Ohio St. 3d 561, 639 N.E.2d 1168. In the instant action, petitioner's own allegations indicate that he will be unable to prove this element because the lack of a transferal judgment is not a jurisdictional error. Moreover, since the failure to transfer the underlying case properly could have been contested in an appeal from the conviction, [HN3] a writ of habeas corpus will also not lie in this instance because petitioner had an adequate legal remedy. See *Norris v. Konteh*, 1999 Ohio App. LEXIS 1691 (Apr. 16, 1999), Trumbull [*6] App. No. 98-T-0030, unreported.

As an aside, this court would note that some courts of this state have expressly held that [HN4] the failure to follow the correct procedure for transferring a case can rise to the level of a due process violation if there is an additional showing of bad faith, fraud, or an improper

reason for the transfer of the matter. See *White v. County of Summit*, 2000 Ohio App. LEXIS 2365 (June 7, 2000), Summit App. No. 19793, unreported. However, we would emphasize that the merits of a possible violation of due process can not be litigated in a habeas corpus action because the criminal defendant has an adequate legal remedy through a petition for postconviction relief. See *In re Fisher* (1974), 39 Ohio St. 2d 71, 74-75, 313 N.E.2d 851.

Pursuant to the foregoing analysis, this court concludes that, even when petitioner's allegations concerning the transferal issue are construed in a manner most favorable to him, they are insufficient to state a viable basis for a habeas corpus claim. Therefore, the first basis of petitioner's claim in this matter lacks merit.

Under the second basis of his claim, petitioner argues that the sentencing judgment in his criminal case should be[*7] declared void because Judge Kennedy erred in accepting his guilty plea. Petitioner asserts that his plea was not made knowingly because Judge Kennedy failed to inform him during the plea hearing that, since he was not a citizen of the United States, he could face possible deportation as a result of being convicted of attempted trafficking in marijuana.

As to this argument, this court would simply note that the Supreme Court of Ohio has expressly held that [HN5] an alleged error in the acceptance of a guilty plea cannot form the basis of a viable claim in habeas corpus. *Douglas v. Money* (1999), 85 Ohio St. 3d 348, 708 N.E.2d 697. Again, the grounds for this holding are twofold. First, an error in the taking of a guilty plea is not deemed jurisdictional in nature. *Harman v. Konteh*, 1998 Ohio App. LEXIS 992 (Mar. 13, 1998), Trumbull App. No. 98-T-0021, unreported. Second, the petitioner in such a situation had an adequate legal remedy because he could have contested the issue in an appeal, a motion to withdraw the plea, or a petition for postconviction relief. *Douglas*.

In responding to the motion to dismiss, petitioner maintains that it would be futile for him to submit a motion to withdraw[*8] or a postconviction petition at this time because neither could be ruled upon prior to the completion of his prison term. In relation to the remedy of postconviction relief, petitioner further maintains that he has missed the time limit for filing such a petition. In addition, as to the remedy of a direct appeal, he contends that he could not have raised the plea issue on appeal because certain matters pertaining to the issue would not have been contained in the appellate record.

In regard to petitioner's first two points, we would merely state that we have held that [HN6] the fact that a

defendant has failed to take advantage of his other legal remedies in a timely manner does not mean that he lacks an "adequate remedy" for purposes of an action in habeas corpus. *Norris, supra*. As to his third point, we would merely indicate that if all of the pertinent facts concerning his guilty plea were not in the transcript of the plea hearing, the appropriate remedy in that instance would have been a petition for postconviction relief.

Pursuant to the foregoing discussion, this court holds that neither of the two bases asserted in the instant petition state viable grounds for a habeas corpus[*9] claim. Thus, respondent's motion to dismiss is granted. It is the order of this court that petitioner's habeas corpus petition is hereby dismissed.

PRESIDING JUDGE JUDITH A. CHRISTLEY

JUDGE ROBERT A. NADER

JUDGE WILLIAM M. O'NEILL

Charles R. Evans, Plaintiff-Appellant, v. The Ohio Supreme Court et al., Defendants-Appellees.
No. 02AP-736

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

2003 Ohio 959; 2003 Ohio App. LEXIS 906

March 4, 2003, Rendered

SUBSEQUENT HISTORY: Appeal denied by *Evans v. Ohio Supreme Court*, 99 Ohio St. 3d 1454, 2003 Ohio 3396, 790 N.E.2d 1218, 2003 Ohio LEXIS 1753 (2003) US Supreme Court certiorari denied by *Evans v. Supreme Court of Ohio*, 2004 U.S. LEXIS 363 (U.S., Jan. 12, 2004)

PRIOR HISTORY: [**1] APPEAL from the Ohio Court of Claims.

DISPOSITION: Trial court's judgment was affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant husband filed a complaint in the Ohio Court of Claims against appellee supreme court, alleging, inter alia, that the chief justice of the supreme court negligently assigned a temporary judge. The temporary judge found the husband in contempt during divorce proceedings. The trial court entered summary judgment and disposed of other motions in favor of the supreme court. The husband appealed.

OVERVIEW: The temporary judge was not given an oath on his temporary assignment to the domestic relations court. The appellate court ruled that this omission was not a basis for a collateral negligence action against the State. The domestic relations court had subject matter jurisdiction over the divorce, and jurisdiction over the parties in that case. The husband's claim that the judge assigned to his case lacked authority because he was not given an oath did not allege a jurisdictional error. Even if there was a problem with the oath, the judgments rendered by the temporary judge were not void but voidable. An erroneous exercise of jurisdiction needed to be raised through direct appeal in the underlying case, but the husband did not appeal in the underlying case. If a judgment was voidable, it had the effect of a proper legal order unless its propriety was successfully challenged through a direct attack on the merits. Because the husband's action rested on his unsuccessful claim that the temporary judge lacked

judicial immunity, disposition of this assignment of error rendered his other assignments of error moot.

OUTCOME: The judgment was affirmed.

CORE TERMS: summary judgment, void, assignment of error, oath of office, assigned, voidable, appointment, domestic relations, divorce, judicial immunity, judicial authority, direct appeal, moving party, administered, irregularity, temporarily, non-moving, appointed, genuine, temporary, judicial capacity, active duty, cross-motion, contempt, jurist, moot, sit

LexisNexis(R) Headnotes

Civil Procedure: Summary Judgment: Motions for Summary Judgment: General Overview

Civil Procedure: Summary Judgment: Standards: Appropriateness

Civil Procedure: Summary Judgment: Standards: Materiality

[HN1] Pursuant to *Ohio R. Civ. P. 56(C)*, summary judgment may be granted if a court determines that there is no genuine issue as to any material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.

Civil Procedure: Summary Judgment: Burdens of Production & Proof: Movants

[HN2] A motion for summary judgment forces the non-moving party to produce evidence on any issue for which that party bears the burden of production, and for which the moving party has met its initial burden.

Civil Procedure: Summary Judgment: Evidence

Civil Procedure: Summary Judgment: Standards: General Overview

[HN3] The issue presented by a motion for summary judgment is not the weight of the evidence, but, whether,

there is sufficient evidence of the character and quality set forth in *Ohio R. Civ. P. 56* to show the existence or non-existence of genuine issues of fact.

Governments: State & Territorial Governments:
Employees & Officials
[HN4] See *Ohio Const. art. XV, § 7*.

Governments: Courts: Judges
Governments: State & Territorial Governments:
Employees & Officials
[HN5] See *Ohio Rev. Code Ann. § 3.23*.

Civil Procedure: Jurisdiction: Subject Matter
Jurisdiction: Jurisdiction Over Actions: General
Overview
Torts: Public Entity Liability: Immunity: General
Overview
[HN6] Challenges involving an erroneous exercise of jurisdiction must be raised through direct appeal in the underlying case.

Civil Procedure: Jurisdiction: Subject Matter
Jurisdiction: Jurisdiction Over Actions: General
Overview
Civil Procedure: Judgments: General Overview
[HN7] The failure to transfer a case properly does not affect a court's jurisdiction over a case. Accordingly, such an error does not render any ensuing judgment in the case void, but only has the effect of rendering any subsequent judgment voidable.

Civil Procedure: Judgments: Relief From Judgment:
Void Judgments
[HN8] The distinction between "void" and "voidable" is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits.

Civil Procedure: Judicial Officers: Judges: General
Overview
Civil Procedure: Judgments: Relief From Judgment:
Void Judgments
[HN9] Voidable judgments may only be challenged on direct appeal.

COUNSEL: Charles R. Evans, Pro se.

Jim Petro, Attorney General, and Peggy W. Corn, for appellees.

JUDGES: BOWMAN, J. BRYANT and LAZARUS, JJ., concur.

OPINION BY: BOWMAN

OPINION

(ACCELERATED CALENDAR)

DECISION

BOWMAN, J.

[*P1] Plaintiff-appellant, Charles R. Evans, appeals from a judgment of the Ohio Court of Claims which granted summary judgment and disposed of other motions in favor of defendant-appellee, the Ohio Supreme Court.

[*P2] Appellant filed a complaint in the Court of Claims alleging, inter alia, that the Chief Justice of the Ohio Supreme Court negligently assigned Judge Stephen A. Yarbrough to temporarily sit as judge in the Franklin County Court of Common Pleas, Division of Domestic Relations. Appellant's cause arose out of Judge Yarbrough's finding of contempt against appellant during divorce proceedings in December 2000. It is undisputed that appellant did not appeal from either the finding of contempt or the final divorce decree.

[*P3] In its June 10, 2002 decision, the trial court rejected appellant's claims that the actions of the chief justice were not protected by judicial immunity, and[*P2] that Judge Yarbrough was required to take an oath of office immediately prior to presiding as a judge on temporary assignment. The court additionally found that it lacked the jurisdiction to review specific judgments made by Judge Yarbrough but, rather, could only address whether he was acting in his judicial capacity. The court also denied appellant's motion for leave to supplement his summary judgment motion.

[*P4] Appellant now assigns five errors:

[*P5] "I. The trial court erred when it asserted that Chief Justice Moyer was acting in his judicial capacity and not in his administrative capacity pursuant to the appointment/assignment of former judges to active duty.

[*P6] "II. The trial court erred when it denied Mr. Evans' motion to supplement discovery pursuant to Mr. Evans' memorandum contra to the Supreme Court of Ohio's motion for summary judgment and cross-motion for summary judgment where defendant's admissions were filed one day prior to the trial court's journal entry granting the Supreme Court of Ohio's motion for summary judgment.

[*P7] "III. Trial Judge Fred Shoemaker had an absolute economic conflict of interest pursuant to his employment by the[*3] Supreme Court of Ohio and upon appointment/assignment by Chief Justice Moyer to sit in judgment on a case where defendant was his direct employer.

[*P8] "IV. The trial court erred when it granted defendant's motion for summary judgment where Mr. Evans filed affidavit evidence of an independent witness on an issue that Mr. Evans bears burden to produce at trial.

[*P9] "V. The trial court erred when it denied Mr. Evans' cross-motion for summary judgment where the express state and federal constitutional prerequisite of an oath of office is mandatory and cannot be waived by or for any elected jurist or an eligible former jurist appointed/assigned to active status by the Chief Justice of the Supreme Court of Ohio."

[*P10] For the reasons which follow, we affirm the judgment of the trial court, albeit on a different basis.

[*P11] [HN1] Pursuant to *Civ.R. 56(C)*, summary judgment may be granted if a court determines that there is no genuine issue as to any material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion and, viewing the evidence most[*4] strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc. (1977)*, 50 Ohio St.2d 317, 364 N.E.2d 267. [HN2] A motion for summary judgment forces the non-moving party to produce evidence on any issue for which that party bears the burden of production, and for which the moving party has met its initial burden. *Dresher v. Burt (1996)*, 75 Ohio St.3d 280, 1996 Ohio 107, 662 N.E.2d 264. [HN3] The issue presented by a motion for summary judgment is not the weight of the evidence, but, whether, there is sufficient evidence of the character and quality set forth in *Civ.R. 56* to show the existence or non-existence of genuine issues of fact. *Sterling v. Penn Traffic Co. (1998)*, 129 Ohio App.3d 809, 812, 719 N.E.2d 82.

[*P12] Appellant's fifth assignment of error is dispositive and will be addressed first. Appellant argues that the trial court erred in concluding that Judge Yarbrough was not required to have been given an additional oath of office upon his assignment to active duty. Appellant claims the lack of this oath deprived Judge Yarbrough of his judicial[*5] immunity and is grounds for a negligence claim against the state.

[*P13] *Section 7, Article XV of the Ohio Constitution* provides: [HN4] "Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office." *R.C. 3.23* provides that [HN5] "the oath of office of each judge of a court of record shall be to support the constitution of the United States and the constitution of this state, to administer justice without respect to persons, and faithfully and impartially to discharge and perform all the duties incumbent on him as such judge, according to the best of his ability and understanding."

[*P14] The parties do not dispute that Judge Yarbrough was not administered an oath upon his temporary assignment to the domestic relations court. Assuming without deciding that the oath taken by Judge Yarbrough at the beginning of his term of service had expired and that he was required to take an additional oath upon being temporarily assigned, such omission cannot be a basis for a collateral negligence[*6] action against the state. [HN6] Challenges involving an erroneous exercise of jurisdiction must be raised through direct appeal in the underlying case. *State v. Wilfong (Mar. 16, 2001)*, Clark App. No. 2000- CA-75, 2001 Ohio App. LEXIS 1195, citing *In the Matter of Waite (1991)*, 188 Mich. App. 189, 200, 468 N.W.2d 912. In *Clark v. Wilson (July 28, 2000)*, Trumbull App. No. 2000- T-0063, 2000 Ohio App. LEXIS 3400, an inmate petitioned for a writ of habeas corpus on the grounds that he had been sentenced by a trial judge who was never properly assigned to his case. In denying the writ, the Eleventh District Court of Appeals stated:

[*P15] " * * * The courts of this state have consistently held that [HN7] the failure to transfer a case properly does not affect a court's jurisdiction over a case. Accordingly, such an error does not render any ensuing judgment in the case void, but only has the effect of rendering any subsequent judgment voidable. See, e.g., *State v. Pecina (1992)*, 76 Ohio App.3d 775, 778, 603 N.E.2d 363, * * * .

[*P16] [HN8] "The distinction between 'void' and 'voidable' is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. [*7] Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. * * *" (Emphasis sic.)

[*P17] There was no question that the Franklin County Common Pleas Court, Division of Domestic Relations, had subject matter jurisdiction over appellant's divorce,

and jurisdiction over the parties in that case. The lack of either of these types of jurisdiction might have produced a void judgment. Appellant's assertion that the particular judge assigned to his case lacked judicial authority because he was not given an oath does not allege a jurisdictional error. Even if an additional oath should have been administered, the judgments rendered by Judge Yarbrough were not void but voidable. [HN9] Voidable judgments may only be challenged on direct appeal. Any irregularity in Judge Yarbrough's appointment does not render his judicial actions void. See *Demereaux v. State* (1930), 35 Ohio App. 418, 422, 172 N.E. 551; *Williams v. Banner Buick, Inc.* (1989), 60 Ohio App.3d 128, 134, 574 N.E.2d 579.

[*P18] Appellant has cited several cases[**8] from other states which he claims support his argument that Judge Yarbrough acted without judicial authority. However, we find these cases unpersuasive, either because they are factually dissimilar or because they

interpret incongruent statutes. Moreover, none of these cases stand for the concept that the state can be liable in damages for an irregularity in the assignment or appointment of a judicial officer. Appellant's fifth assignment of error is overruled.

[*P19] Because appellant's action against the Ohio Supreme Court rests upon his unsuccessful claim that Judge Yarbrough lacked judicial immunity, our disposition of his fifth assignment of error renders his other assignments of error moot.

[*P20] Based upon the foregoing, appellant's first, second, third and fourth assignments of error are overruled as moot, appellant's fifth assignment of error is overruled, and the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

BRYANT and LAZARUS, JJ., concur.

WILLIAM NOVAK, Petitioner, - vs - RICHARD GANSHEIMER, ASWARDEN, LAKE ERIE CORRECTIONAL
INSTITUTION, et al., Respondents.
CASE NO. 2003-A-0023

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, ASHTABULA COUNTY

2003 Ohio 5428; 2003 Ohio App. LEXIS 4860

October 10, 2003, Decided

PRIOR HISTORY: [**1] Original Action for a Writ of Habeas Corpus.

DISPOSITION: Petition dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner inmate filed a petition for writ of habeas corpus, where the inmate had been convicted of four counts of intimidation and four accompanying specifications that the inmate had assaulted a police officer during the course of each event.

OVERVIEW: In his petition, the inmate asserted errors in the grand jury procedure, he challenged the validity and sufficiency of the indictment papers, and he alleged denial of his right to a speedy trial, his right to effective assistance of trial counsel, and his rights under the Fourth Amendment. The inmate had an adequate legal remedy for these issues, because these issues could have been asserted in a direct appeal from the conviction. As a result, these issues did not state viable bases for a writ of habeas corpus. Furthermore, these arguments did not directly relate to the trial court's jurisdiction to proceed in the matter as was required by *Ohio Rev. Code Ann. § 2725.05*. The inmate also argued that he was never properly served with the indictment. This did not state a viable claim, as the inmate appeared before the trial court and fully participated in the trial. The inmate alleged that the conviction was void, because the trial judge who presided over his trial was never properly appointed to the case. Such an error only made the conviction voidable. As a result, the conviction could only be challenged in a direct appeal.

OUTCOME: The petition was dismissed.

CORE TERMS: habeas corpus, viable, indictment, grand jury, prisoner's, direct appeal, issuance, sentencing, trial counsel, criminal proceeding, able to prove, speedy trial, foreman, prison, petitioner's arguments, petitioner contends, underlying case, declared void, true bill,

properly served, legal remedy, personal jurisdiction, sufficient to state, sua sponte, jurisdictional, appointed, favorable, presided, incarceration, specifications

LexisNexis(R) Headnotes

Civil Procedure: Pleading & Practice: Defenses, Demurrers, & Objections: Failures to State Claims
Criminal Law & Procedure: Habeas Corpus: Cognizable Issues: General Overview

Criminal Law & Procedure: Habeas Corpus: Procedure: Pretrial Dismissals

[HN1] In order for a prisoner to be entitled to a writ of habeas corpus, he must be able to prove that his conviction was rendered by a trial court which acted beyond the scope of its jurisdiction. *Ohio Rev. Code Ann. § 2725.05*. Accordingly, if a prisoner does not allege that a trial court committed a jurisdictional error in the underlying action, his habeas corpus claim will be subject to dismissal for failure to raise a viable claim for relief. Furthermore, the dismissal of a habeas corpus claim will also be warranted under *Ohio R. Civ. P. 12(B)(6)* when there exists an adequate legal remedy through which the prisoner can litigate the issues raised in his petition.

Criminal Law & Procedure: Grand Juries: Procedures: Return of Indictments: Procedural Requirements
Criminal Law & Procedure: Habeas Corpus: Cognizable Issues: General Overview

[HN2] In light of the basic requirements for the writ of habeas corpus, the Supreme Court of Ohio has consistently held that alleged errors in the grand jury process cannot form the basis of a viable habeas corpus claim.

Constitutional Law: Bill of Rights: Fundamental Rights: Criminal Process: Assistance of Counsel

Criminal Law & Procedure: Pretrial Motions: Speedy Trial: General Overview

Criminal Law & Procedure: Pretrial Motions: Suppression of Evidence

[HN3] In the context of cognizable issues for habeas corpus review, the basic analysis which the Ohio Supreme Court has employed in regard to alleged "grand jury" errors has been extended to other types of errors which can occur throughout a criminal proceeding. Specifically, the courts of Ohio have concluded that the following types of alleged errors cannot form the predicate of a viable habeas corpus claim because such errors either are nonjurisdictional in nature or should be litigated in a direct appeal from the conviction: alleged errors concerning the validity or sufficiency of the indictment, alleged errors concerning a defendant's right to a speedy trial, alleged errors concerning a defendant's right to effective assistance of trial counsel, and alleged errors concerning the suppression of evidence.

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: General Overview

Criminal Law & Procedure: Jurisdiction & Venue: Jurisdiction

Criminal Law & Procedure: Habeas Corpus: Procedure: Filing of Petition: Jurisdiction

[HN4] A complete lack of personal jurisdiction would normally constitute a viable basis for a habeas corpus claim. However, in previously considering the issue of defective service in the context of a habeas corpus action, the Court of Appeals of Ohio, 11th Appellate District, Ashtabula County, has held that such an allegation is not sufficient to state a viable claim when a prisoner also admits in his petition that he made an appearance before the trial court and fully participated in the trial.

Criminal Law & Procedure: Habeas Corpus: Cognizable Issues: General Overview

[HN5] Although the lack of a proper order transferring a case to a new judge could constitute prejudicial error, such an error can only have the effect of making the resulting conviction voidable. As a result, the conviction cannot be subject to a collateral attack in a habeas corpus action; instead, its validity can be challenged only in a direct appeal.

Civil Procedure: Pleading & Practice: Defenses, Demurrers, & Objections: Failures to State Claims

Criminal Law & Procedure: Habeas Corpus: Cognizable Issues: General Overview

Criminal Law & Procedure: Habeas Corpus: Procedure: Pretrial Dismissals

[HN6] Since an action in habeas corpus is considered civil in nature, a habeas corpus petition can be dismissed under *Ohio R. Civ. P. 12(B)(6)*. In considering whether such a petition states a viable claim for relief, a court must determine if the nature of the allegations in the petition are such that, even when those allegations are construed in a manner most favorable to the petitioner, he will not be able to prove any set of facts under which he

would be entitled to a writ. In applying the foregoing standard for an *Ohio R. Civ. P. 12(B)(6)* analysis, a court can consider the basic allegations in the petition itself and any materials attached to the petition. Finally, pursuant to *Ohio Rev. Code Ann. § 2725.05*, a court in a habeas corpus proceeding has the authority to engage in a sufficiency analysis without benefit of a motion to dismiss; i.e., a court can dismiss a habeas corpus petition sua sponte if its initial review of the petition shows beyond a reasonable doubt that a viable claim for the writ has not been stated.

COUNSEL: William Novak, Pro se, Conneaut, OH (Petitioner).

Jim Petro, Attorney General, and Bruce D. Horrigan, Assistant Attorney General, Cleveland, OH (For Respondent, Richard Gansheimer).

Reginald Wilkinson, Pro se, Columbus, OH (Respondent, Director of the Ohio Department of Rehabilitation and Corrections).

JUDGES: DONALD R. FORD, P.J., JUDITH A. CHRISTLEY, J., WILLIAM M. O'NEILL, J. concur.

OPINION

PER CURIAM OPINION

PER CURIAM

[*P1] This case is a habeas corpus action in which petitioner, William Novak, is seeking his immediate release from the Lake Erie Correctional Institution. As the basis for his habeas corpus claim, petitioner contends that numerous errors took place in his trial which deprived the trial court in the underlying criminal proceeding of jurisdiction to enter his conviction. For the following reasons, this court concludes that petitioner has failed to state a viable claim for the requested relief.

[*P2] Petitioner's present incarceration in the state prison is predicated upon an August 2000 conviction in the Cuyahoga County Court of Common Pleas. As part of its sentencing judgment, the trial court indicated that the [**2]jury had found petitioner guilty of four counts of intimidation and four accompanying specifications that he had assaulted a police officer during the course of each offense. The trial court then sentenced him to a definite term of four years on each count, with the terms to be served concurrently.

[*P3] In bringing the instant action, petitioner has filed a habeas corpus petition which is approximately seventy

pages in length. In addition, petitioner has submitted to this court two supplemental pleadings in support of his habeas corpus claim. A review of these three pleadings indicates that they contain repetitive arguments in relation to approximately twelve basic issues. Furthermore, our review indicates that his petition contains considerable "boilerplate" argumentation which pertains only tangentially to the facts of his case.

[*P4] Despite the verbose nature of the habeas corpus petition, this court has been able to discern that it is petitioner's contention that his conviction must be declared void because: (1) his right against an illegal search and seizure was violated prior to his arrest; (2) certain errors occurred during the grand jury process; (3) the foreman for the grand jury[*3] failed to sign the indictment papers and did not write the words "a true bill" on them; (4) the indictment papers were not signed by the clerk of courts, did not have a proper seal, and were not properly dated to show when they were filed; (5) the trial court never issued a judgment entry stating that it had received and reviewed the indictment papers; (6) the indictment papers did not charge petitioner with an offense recognizable under Ohio law; (7) his statutory right to a speedy trial was violated; (8) he was denied his right to effective assistance of trial counsel; (9) he was never served with summons on the indictment papers; (10) the judge who presided over his trial was never properly appointed to the case; (11) the trial court never rendered a proper finding of guilty in the case; and (12) the trial court never issued proper commitment papers against him.

[*P5] As a general proposition, [HN1] in order for a prisoner to be entitled to a writ of habeas corpus, he must be able to prove that his conviction was rendered by a trial court which acted beyond the scope of its jurisdiction. See *R.C. 2725.05*; *Wireman v. Ohio Adult Parole Auth.* (1988), 38 Ohio St.3d 322, 528 N.E.2d 173.[*4] Accordingly, if a prisoner does not allege that the trial court committed a jurisdictional error in the underlying action, his habeas corpus claim will be subject to dismissal for failure to raise a viable claim for relief. *Schrock v. Gansheimer* (May 24, 2002), 11th Dist. No. 2002-A-0003, 2002 Ohio App. LEXIS 2488. Furthermore, the dismissal of a habeas corpus claim will also be warranted under *Civ.R. 12(B)(6)* when there exists an adequate legal remedy through which the prisoner can litigate the issues raised in his petition. See, generally, *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591, 1994 Ohio 208, 635 N.E.2d 26.

[HN2] [*P6] In light of the foregoing basic requirements for the writ, the Supreme Court of Ohio has consistently held that alleged errors in the grand jury process cannot form the basis of a viable habeas corpus

claim. For example, in *Thornton v. Russell* (1998), 82 Ohio St.3d 93, 1998 Ohio 268, 694 N.E.2d 464, the court concluded that the alleged failure of the grand jury foreman to sign the indictment was insufficient to state a proper claim because such an error would not deprive the trial court of jurisdiction over the criminal case. See, also, [*5] *Malone v. Lane* (2002), 96 Ohio St.3d 415, 2002 Ohio 4908, 775 N.E.2d 527, in which it was held that a cognizable claim in habeas corpus could not be based on the assertion that the foreman had not endorsed the indictment as a true bill, and *State ex rel. Beaver v. Konteh* (1998), 83 Ohio St.3d 519, 1998 Ohio 295, 700 N.E.2d 1256, in which it was held that a writ would not lie solely upon the allegation that there had been errors in the grand jury selection process.

[HN3] [*P7] The basic analysis which the Supreme Court has employed in regard to alleged "grand jury" errors has been extended to other types of errors which can occur throughout a criminal proceeding. Specifically, the courts of this state have concluded that the following types of alleged errors cannot form the predicate of a viable habeas corpus claim because such errors either are nonjurisdictional in nature or should be litigated in a direct appeal from the conviction: *Luna v. Russell* (1994), 70 Ohio St.3d 561, 1994 Ohio 264, 639 N.E.2d 1168 (alleged errors concerning the validity or sufficiency of the indictment); *Travis v. Bagley* (2001), 92 Ohio St.3d 322, 2001 Ohio 198, 750 N.E.2d 166 (alleged error concerning the defendant's[*6] right to a speedy trial); *Brown v. Leonard* (1999), 86 Ohio St.3d 593, 1999 Ohio 214, 716 N.E.2d 183 (alleged error concerning the defendant's right to effective assistance of trial counsel); and *Saffell v. Carter* (Dec. 20, 2001), 4th Dist. No. 01CA2761, 2001 Ohio 2633, 2001 Ohio App. LEXIS 5944 (alleged error concerning the suppression of evidence).

[*P8] Of the twelve basic arguments petitioner has raised in the instant action, the viability of his first eight arguments would be controlled by the foregoing precedent. That is, in regard to petitioner's arguments concerning the entire grand jury procedure, the validity and sufficiency of the indictment papers, his right to a speedy trial, his right to effective assistance of trial counsel, and his rights under the *Fourth Amendment*, this court concludes that these arguments raise issues which petitioner could have asserted in a direct appeal from his conviction; thus, since he had an adequate legal remedy in relation to these issues, these arguments do not state viable bases for a writ of habeas corpus. Furthermore, we would emphasize that petitioner's first eight arguments do not assert issues which directly relate to[*7] the jurisdiction of the trial court in the underlying case to proceed in the matter.

[*P9] As to the remaining four arguments raised by petitioner, this court would indicate that, although the issues asserted in these arguments have not been reviewed by the courts of his state as extensively as the issues in the first eight arguments, our review of the limited precedent again supports the conclusion that petitioner has failed to assert any viable claim for relief. First, in regard to petitioner's argument that he was never properly served with the indictment, we would begin our analysis by noting that [HN4] a complete lack of personal jurisdiction would normally constitute a viable basis for a habeas corpus claim. However, in previously considering the issue of defective service in the context of a habeas corpus action, this court has held that such an allegation is not sufficient to state a viable claim when the prisoner also admits in his petition that he made an appearance before the trial court and fully participated in the trial. *State ex rel. Russell v. Dunlap* (July 25, 1997), 11th Dist. No. 97-L-115, 1997 Ohio App. LEXIS 3196. The basis for our Russell holding was[**8] that the prisoner's own allegations showed that, despite the defect in service, the trial court still had acquired personal jurisdiction over him prior to the issuance of the conviction.

[*P10] In the instant action, petitioner has attached to his habeas corpus petition a copy of the docket from the underlying criminal action. A review of the docket shows that, on December 10, 1999, the trial court issued a judgment in which it indicated that petitioner had been advised of his constitutional rights in open court and had waived the reading of the indictment to him. The docket further shows that, throughout the ensuing criminal proceeding, petitioner filed a multitude of pro se motions before the trial court. Finally, the docket readily indicates that, on July 10, 2000, the trial court stated in a new judgment that petitioner had been present in court when his trial began.

[*P11] In light of the foregoing, it is evident that petitioner's own materials support the conclusion that, even if he was never properly served with the indictment papers, he still submitted to the jurisdiction of the trial court by both appearing and participating in the proceeding. Thus, since the trial court had personal[**9] jurisdiction over petitioner prior to the issuance of the conviction, petitioner's sole remedy would have been to assert the "service" issue in his direct appeal from the conviction. Russell.

[*P12] As was noted above, petitioner contends under his tenth basic argument that his conviction must be declared void because the judge who presided over his trial was never properly appointed to the case. As to this point, this court would merely note that we have previously rejected this type of allegation as a viable

grounds for a habeas corpus claim. In *Clark v. Wilson* (July 28, 2000), 11th Dist. No. 2000-T-0063, 2000 Ohio App. LEXIS 3400, we stated that, [HN5] although the lack of a proper order transferring a case to new judge could constitute prejudicial error, such an error can only have the effect of making the resulting conviction voidable. As a result, the conviction cannot be subject to a collateral attack in a habeas corpus action; instead, its validity can be challenged only in a direct appeal.

[*P13] Under his eleventh basic argument, petitioner asserts that the trial court in the underlying case never issued a proper finding of guilty. However, our review of the trial docket[**10] indicates that, on July 11, 2000, the trial court issued a judgment in which it stated that the jury had found petitioner guilty of all four charges and the specifications. Furthermore, our review of the sentencing judgment, a copy of which is also attached to the habeas corpus petition, demonstrates that the trial court restated the jury verdict at that time. Based upon the foregoing, this court concludes that, even if we assume for the sake of petitioner's eleventh argument that the lack of a proper guilty finding would constitute a jurisdictional error, his own allegations establish that a sufficient finding was made in this instance.

[*P14] Under his final basic argument, petitioner maintains that the trial court did not ever issue proper commitment papers against him. In regard to this issue, we would indicate that, as part of the sentencing judgment, the trial court expressly delineated the offenses of which petitioner had been convicted and the extent of the sentence which he would be required to serve. Therefore, because the sentencing judgment contained the necessary information to warrant petitioner's incarceration in a state prison, we hold that his own allegations support the[**11] conclusion that the trial court satisfied its duty as to the issuance of proper commitment papers.

[*P15] In relation to the dismissal of a habeas corpus petition for failure to state a viable claim, this court recently stated:

[HN6] [*P16] "Since an action in habeas corpus is considered civil in nature, a habeas corpus petition can be dismissed under *Civ.R. 12(B)(6)*. In considering whether such a petition states a viable claim for relief, a court must determine if the nature of the allegations in the petition are such that, even when those allegations are construed in a manner most favorable to the petitioner, he will not be able to prove any set of facts under which he would be entitled to a writ. See, generally, *State ex rel. Smith v. Enlow* (July 20, 2001), 11th Dist. No. 2000-P-0131, 2001 Ohio App. LEXIS 3282, at *3. In applying the foregoing standard for a *Civ.R. 12(B)(6)* analysis, a

court can consider the basic allegations in the petition itself and any materials attached to the petition. *Brewer v. Gansheimer* (Oct. 5, 2001), 11th Dist. No. 2001-A-0045, 2001 Ohio 4305, 2001 Ohio App. LEXIS 4516, at *3. Finally, pursuant to R.C. 2725.05 [**12], a court in a habeas corpus proceeding has the authority to engage in a sufficiency analysis without benefit of a motion to dismiss; i.e., a court can dismiss a habeas corpus petition sua sponte if its initial review of the petition shows beyond a reasonable doubt that a viable claim for the writ has not been stated. *Tillis*, 2003 Ohio 1097, at P14." *State ex rel. Peoples v. Warden of T.C.I.*, 11th Dist. No. 2003-T-0087, 2003 Ohio 4106, at P7.

[*P17] Applying the foregoing precedent to the instant petition, this court holds that the dismissal of this case is warranted under *Civ.R. 12(B)(6)*. That is, we conclude that none of the twelve basic arguments asserted by petitioner are sufficient to state a viable basis for the issuance of a writ. Even when petitioner's allegations in support of his twelve arguments are construed in a manner most favorable to him, they still readily show that he will not be able to prove a set of facts under which he would be entitled to be released from prison.

[*P18] Accordingly, it is the sua sponte order of this court that petitioner's entire habeas corpus petition is hereby dismissed.

DONALD R. FORD, P.J., JUDITH A. CHRISTLEY,
[**13] J., WILLIAM M. O'NEILL, J. concur.

STATE OF OHIO, Plaintiff-Appellee vs - DAVID A. ARCHER, Defendant-Appellant.
CASE NO. 2002-P-0053

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, PORTAGE COUNTY

2003 Ohio 2233; 2003 Ohio App. LEXIS 2074

May 2, 2003, Decided

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Archer*, 2003 Ohio LEXIS 2340 (Ohio, Sept. 10, 2003)

PRIOR HISTORY: [**1] Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. R 02 TRC 1663 S.

DISPOSITION: Trial court's judgment was affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed from a judgment of the Portage County Municipal Court, Kent Division (Ohio), which found him guilty, upon a plea of no contest, to a first offense violation of *Ohio Rev. Code Ann. § 4511.19(A)(6)* for operating a vehicle with a prohibited breath alcohol content.

OVERVIEW: Defendant was arrested and charged, and he pleaded not guilty. His motion to suppress evidence obtained as a result of the traffic stop, wherein he challenged the validity of the stop, the arrest, and the admissibility of the breath test results, was denied. Thereafter, defendant changed his plea and was found guilty. On appeal, the court held that the trial court judge had sufficient authority to hear the motion to suppress because his appointment as an acting judge was proper. Additionally, the court noted that any challenge to his authority was not questionable in defendant's collateral proceeding. The court also found that the records certifying that the testing equipment was in proper working order constituted sufficient authentication pursuant to *Ohio R. Evid. 902(4)*, where they were certified by the law enforcement agency's custodian of records.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: assignments of error, municipal, suppress, certificate, testing, breath test, radio frequency, custodian, certification, de facto, failed to prove,

substantial compliance, properly authenticated, contest, alcohol, breath, jail, test results, admissibility, complying, assigned, recorded, tickets, void, hear

LexisNexis(R) Headnotes

Civil Procedure: Appeals: Reviewability: Adverse Determinations

Governments: Courts: Judges

[HN1] The right of a de facto officer to hold office may not be questioned in a collateral proceeding to which he is not a party. Thus, the issue of whether the appointment of an acting judge is unlawful is not reviewable upon an appeal from an adverse judgment rendered in a different underlying action.

Evidence: Authentication: General Overview

Evidence: Scientific Evidence: Sobriety Tests

[HN2] See *Ohio Admin. Code § 3701-53-04(A)*.

Criminal Law & Procedure: Criminal Offenses: Vehicular Crimes: Driving Under the Influence: Blood Alcohol & Field Sobriety: Admissibility

Evidence: Authentication: General Overview

Evidence: Scientific Evidence: Sobriety Tests

[HN3] The State's failure to substantially comply with testing requirements is grounds to exclude the results of a breath test.

Evidence: Authentication: General Overview

Evidence: Scientific Evidence: Sobriety Tests

[HN4] See *Ohio Admin. Code § 3701-53-04(A)(2)*.

Evidence: Authentication: Self-Authentication

Evidence: Hearsay: Exceptions: Public Records: General Overview

[HN5] See *Ohio R. Evid. 902(4)*.

COUNSEL: Victor V. Viguicci, Portage County Prosecutor and Pamela J. Holder, Assistant Prosecutor, Ravenna, OH (For Plaintiff-Appellee).

Brent L. English, Cleveland, OH (For Defendant-Appellant).

JUDGES: CYNTHIA WESTCOTT RICE, J. JUDITH A. CHRISTLEY, J., concurs, DIANE V. GRENDALL, J., concurs in judgment only.

OPINION BY: CYNTHIA WESTCOTT RICE

OPINION

CYNTHIA WESTCOTT RICE, J.

[*P1] This is an accelerated appeal of the judgment of the Portage County Municipal Court which, upon a plea of no contest, found appellant, David A. Archer ("Archer"), guilty of a first offense violation of R.C. 4511.19(A)(6).

[*P2] On January 27, 2002, Archer was arrested and charged with operating a vehicle with a prohibited breath alcohol content. Archer entered a plea of not guilty and moved to suppress evidence obtained as a result of the traffic stop. Archer's motion challenged the validity of the stop, arrest, and the admissibility of the results of his breath test. The trial court denied Archer's motion to suppress.

[*P3] Subsequently, Archer withdrew his not guilty plea and[*P2] entered a plea of no contest. The trial court found Archer guilty of a first offense violation of R.C. 4511.19(A)(6). The trial court sentenced Archer to 180 days in jail and fined him \$450.00. The trial court suspended 173 days and \$200.00 provided Archer completed "the D.U.I. School." We have stayed execution of the jail time and fine pending this appeal.

[*P4] Archer appeals his conviction raising three assignments of error:

[*P5] "[1.] The acting judge who heard the motion to suppress had no colorable authority to serve as a de facto municipal judge. Accordingly, the decision he rendered was void.

[*P6] "[2.] The State failed to prove substantial compliance with the radio frequency interference checks required by O.A.C. § 3701-53-04(A). Accordingly, the acting judge erred in concluding the results of the chemical test using the BAC DataMaster should not be suppressed.

[*P7] "[3.] The State likewise failed to prove with competent evidence the validity of the target value for checking the BAC DataMaster."

[*P8] In his first assignment of error Archer argues that Judge Perry G. Dickinson lacked authority to hear Archer's[*P3] motion to suppress because he was not properly appointed as an acting judge. Therefore, Archer contends the trial court's decision is void. We disagree.

[*P9] The record on appeal includes a Certificate of Assignment which reads:

[*P10] "The Honorable Perry George Dickinson[,] a retired judge of the Portage County Municipal Court, Kent, is assigned effective January 15, 2002 to preside in the Portage County Municipal Court, Ravenna, for the months of March and April 2002 and to conclude any proceedings in which he participated that are pending at the end of that period."

[*P11] Chief Justice Moyer signed the Certificate, which was filed on February 20, 2002. Therefore, the record shows that Judge Dickinson was properly assigned to the municipal court.

[*P12] Even were the record devoid of the Certificate, Archer's argument would still fail. We were presented with the same argument in *State v. Shearer* (Sept. 30, 1994), 11th Dist. No. 93-P-0052, 1994 Ohio App. LEXIS 4439. There we stated:

[*P13] "Appellant does not challenge the jurisdiction of the court, but the status of Acting Judge Berger, i.e., whether it was proper to appoint an acting judge to hear the case[*P4] instead of a duly elected and qualified judge. * * *"

[HN1] [*P14] "'The right of a de facto officer to hold office may not be questioned in a collateral proceeding to which he is not a party. *Stiess v. State* (1921), 103 Ohio St. 33, 41-42, 132 N.E. 85 * * *. *State ex rel. Sowell v. Lovinger* (1983), 6 Ohio St.3d 21, 23, 6 Ohio B. 18, 450 N.E.2d 1176, quoting *State v. Staten* (1971), 25 Ohio St.2d 107, 110, 267 N.E.2d 122. (Citation omitted.)"

[*P15] "Thus, the issue of whether the appointment of an acting judge is unlawful 'would not be reviewable upon an appeal from an adverse judgment rendered in the underlying action.' *Lovinger at 23*. See, also, *WSOS Community Action Comm., Inc. v. Bessman* (Aug. 20, 1993), *Sandusky App. No. S-93-2*, 1993 Ohio App. LEXIS 3997, unreported." Id. at 2-3."

[*P16] Therefore, Archer may not challenge Judge Dickinson's authority in the instant case.

[*P17] Also, Archer failed to object to Judge Dickinson's authority at the trial court level. Therefore,

he has waived any possible error. See, Id. quoting *Williams v. Banner Buick, Inc. (1989)*, 60 Ohio App.3d 128, 134, 574 N.E.2d 579.

[*P18] Archer's first assignment of error is without merit.

[**5] [*P19] Archer's second and third assignments of error challenge the trial court's refusal to suppress the test results obtained from the BAC DataMaster. Therefore, we address these assignments of error together.

[*P20] Appellant first argues that the State failed to present properly authenticated documents to establish that a proper radio frequency interference ("RFI") test had been conducted as required by *O.A.C. 3701-53-04(A)*. This section provides:

[HN2] [*P21] "A senior operator shall perform an instrument check on approved evidence breath testing instruments and a radio frequency interference (RFI) check no less frequently than once every seven days in accordance with the appropriate instrument checklist for the instrument being used. The instrument check may be performed anytime up to one hundred and ninety-two hours after the last instrument check."

[HN3] [*P22] The State's failure to substantially comply with testing requirements is grounds to exclude the results of a breath test. *State v. Hominsky (1995)*, 107 Ohio App.3d 787, 669 N.E.2d 523.

[*P23] The State maintains that Exhibits G and I n1 established substantial compliance with the testing[**6] requirements. Archer contends that these documents were not properly authenticated and, therefore, the trial court should have granted his motion to suppress evidence of his breath test.

-----Footnotes-----
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n1 Exhibit G is a two-page document. The first is a BAC DataMaster Instrument Check Form dated January 27, 2002. The second page consists of two BAC DataMaster Evidence Tickets showing printouts of test results for tests conducted on January 27, 2002 at 07:17. Exhibit I is also a two page document. The first page is a BAC DataMaster Instrument Check Form dated January 20, 2002. The second consists of two BAC DataMaster Evidence tickets showing printouts of tests conducted on January 20, 2002 at 00:34.

-----End Footnotes-----

[*P24] Likewise, Archer argues that the State failed to comply with the testing requirements of *O.A.C. 3701-53-04(A)(2)*. This subsection provides in relevant part, [HN4] "An instrument shall be checked using an instrument check solution containing ethyl alcohol approved by the director of health." Archer [**7] contends that the State failed to establish that the director of health approved the solution used to test the BAC DataMaster. The State contends that Exhibit E, a Batch or Lot Certificate, established compliance with *O.A.C. 3701-53-04(A)(2)*.

[*P25] Each exhibit we have referenced contained a certification from the Ohio State Highway Patrol Records Custodian certifying that the exhibit was a "true and accurate copy of the original record which is in my custody." Archer contends that this certification, standing alone, is insufficient to authenticate the exhibits. We disagree.

[*P26] *Evid. R. 902* provides that:

[HN5] [*P27] "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

[*P28] " * * *

[*P29] "(4) Certified copies of public records

[*P30] "A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), [**8] or (3) of this rule or complying with any law of a jurisdiction, state or federal, or rule prescribed by the Supreme Court of Ohio."

[*P31] This court has held that records such as Exhibits E, G, and I, are self-authenticating under *Evid. R. 902(4)* when certified by the law enforcement agency's custodian of records. See, e.g. *State v. McCardel* (Sept. 28, 2001), 11th Dist. No. 2000-P-0092, 2001 Ohio App. LEXIS 4432; *State v. Flauto* (Dec. 23, 1994), 11th Dist. No. 93-P-0073, 1994 Ohio App. LEXIS 5863; *State v. Starkey*

(Sept. 25, 1998), 11th Dist. No. 97-P-0098, 1998 Ohio App. LEXIS 4530. Therefore, Archer's second and third assignments of error or without merit.

[*P32] For the foregoing reasons the judgment of the Portage County Municipal Court, Kent Division, is affirmed.

JUDITH A. CHRISTLEY, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.

STATE OF OHIO, Plaintiff-Appellee -vs- JEFFREY KEITH, Defendant-Appellant
NO. 69267

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1997 Ohio App. LEXIS 914

March 13, 1997, DATE OF ANNOUNCEMENT OF DECISION

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas. Case No. CR-316724.

DISPOSITION: JUDGMENT: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed from his convictions by the Court of Common Pleas (Ohio) for arson and grand theft.

OVERVIEW: Defendant was convicted on five counts of arson and one count of grand theft in connection with actions he took against his former live-in girlfriend and those who offered support to her. On appeal, the court affirmed and held that the trial court did not err in admitting evidence of other acts such as throwing a brick through the window of a home where his former girlfriend was staying, forcing his former girlfriend to have an abortion, forcing her to offer her children for adoption, and threatening to beat a subsequent girlfriend. Where the key issue was the identity of the perpetrator of a string of seven crimes for which defendant denied any involvement, the evidence of brick throwing and threats was admissible to show defendant's modus operandi or a pattern of terrorism to achieve his ends. Evidence relating to the forced abortion and adoption, though not inextricably related to the charged crimes, was relevant to show the lengths to which defendant would go in his obsessive attempts to dictate every aspect of his former girlfriend's life. The trial court's chastising of defense counsel did not deny defendant a fair trial as the trial court's actions were evenhanded.

OUTCOME: The defendant's convictions for arson and grand theft were affirmed.

CORE TERMS: defense counsel, brick, arson, admissible, prejudicial, hearsay, sentence, leaflet, window, redirect, harmless, intentionally, street, fire department, line of questioning, modus operandi, cross-examination, declarant's, abortion, episode, bias, apartment, assistance of counsel, involvement, sentencing, motive, door, probative value, ineffective, theft

LexisNexis(R) Headnotes

Evidence: Relevance: Prior Acts, Crimes & Wrongs [HN1] *Ohio Rev. Code § 2945.59* permits the showing of other acts when such other acts tend to show certain things, e.g., motive and intent, as identified in the statute. If such other acts do in fact tend to show any of those things they are admissible notwithstanding they may not be like or similar to the crime charged.

Evidence: Relevance: Prior Acts, Crimes & Wrongs [HN2] Evidence of other acts may prove identity by establishing a modus operandi applicable to the crime with which a defendant is charged. Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under *Ohio R. Evid. 404(B)*. Other acts may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense. While the other acts need not be the same as or similar to the crime charged, the acts should show a modus operandi identifiable with the defendant.

Evidence: Procedural Considerations: Circumstantial & Direct Evidence

Evidence: Procedural Considerations: Preliminary Questions: Admissibility of Evidence: General Overview

Evidence: Relevance: General Overview

[HN3] Relevant evidence that is admissible is not limited to merely direct evidence establishing a claim or defense. Circumstantial evidence as it relates to the probative value of other evidence in the case can also be of consequence to the action.

Criminal Law & Procedure: Appeals: Reviewability: Preservation for Review: General Overview

Criminal Law & Procedure: Appeals: Standards of Review: Harmless & Invited Errors: Evidence

[HN4] A reviewing court may overlook an error where the admissible evidence comprises overwhelming proof of a defendant's guilt. When a claim of harmless error is raised, the appellate court must read the record and decide the probable impact of the error on the minds of the average jury. The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Civil Procedure: Judicial Officers: Judges: Discretion

Criminal Law & Procedure: Interrogation: General Overview

Evidence: Testimony: Examination: General Overview

[HN5] A trial judge has broad discretion to preclude repetitive and unduly harassing interrogation.

Evidence: Hearsay: Exceptions: Spontaneous Statements: Criminal Trials

Evidence: Hearsay: Exceptions: Spontaneous Statements: Elements

[HN6] The admission of a declaration as an excited utterance is not precluded by questioning which facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and does not destroy the domination of the nervous excitement over the declarant's reflective faculties.

Evidence: Hearsay: Rule Components: General Overview

[HN7] Not all out-of-court statements are hearsay. Statements offered to explain a police officer's investigation are not hearsay.

Evidence: Procedural Considerations: Exclusion & Preservation by Prosecutor

[HN8] The admission or exclusion of relevant evidence rests solely within the sound discretion of the trial court. A trial court enjoys broad discretion in admitting evidence and will be reversed only for an abuse of that discretion whereby the defendant suffers material prejudice.

Criminal Law & Procedure: Counsel: Effective Assistance: Tests

Criminal Law & Procedure: Counsel: Effective Assistance: Trials

Criminal Law & Procedure: Appeals: Standards of Review: General Overview

[HN9] In order to prevail on an ineffective assistance of counsel claim, an appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial would have been different. Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel. To justify a finding of ineffective assistance of counsel, the appellant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Prejudice from defective representation sufficient to justify reversal conviction exists only where the result of a trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel.

Criminal Law & Procedure: Counsel: Effective Assistance: General Overview

Criminal Law & Procedure: Appeals: Deferential Review: Ineffective Assistance

Legal Ethics: General Overview

[HN10] A properly licensed attorney is presumed competent. A court must presume that a properly licensed attorney has executed his legal duties in an ethical and competent manner. A court must also accord deference to defense counsel's decisions as made prior to and during the course of any legal proceedings and cannot examine the strategic decisions of trial or appellate counsel through hindsight.

Evidence: Testimony: Lay Witnesses: Opinion Testimony: Helpfulness

Evidence: Testimony: Lay Witnesses: Opinion Testimony: Personal Perceptions

Evidence: Testimony: Lay Witnesses: Personal Knowledge

[HN11] *Ohio R. Evid. 701* allows a lay witness to give opinion testimony where it is rationally related to the witness' perception and is helpful to clarify the witness' testimony or determination of a fact in issue. This means that the witness must have firsthand knowledge of the subject of his testimony and the opinion must be one that a rational person would form on the basis of the observed facts and the testimony must aid the trier of fact in understanding the testimony of the witness or in determining a fact issue.

Criminal Law & Procedure: Sentencing: Guidelines
Criminal Law & Procedure: Sentencing: Presentence
Reports

[HN12] A silent record raises the presumption that a trial court considered the factors contained in the sentencing guidelines of *Ohio Rev. Code § 2929.12*.

Criminal Law & Procedure: Trials: Judicial Discretion
Criminal Law & Procedure: Sentencing: Departures
Criminal Law & Procedure: Sentencing: Guidelines
[HN13] See *Ohio Rev. Code § 2929.12(C)*.

COUNSEL: APPEARANCES:

For Plaintiff-Appellee: STEPHANIE TUBBS JONES, Cuyahoga County Prosecutor, A. STEVEN DEVER, Assistant, MICHAEL P. DONNELLY, Assistant Prosecuting Attorneys, 1200 Ontario Street, Cleveland, Ohio 44113.

For Defendant-Appellant: DAVID L. DOUGHTEN, ESQ., 4403 St. Clair Avenue, N.E., Cleveland, Ohio 44103.

JUDGES: JAMES M. PORTER, PRESIDING JUDGE. O'DONNELL, J., CONCURS. TIMOTHY E. McMONAGLE, J., CONCURS IN JUDGMENT ONLY.

OPINION BY: JAMES M. PORTER

OPINION

JOURNAL ENTRY AND OPINION

JAMES M. PORTER, P.J.,

Defendant-appellant Jeffrey Keith appeals from his conviction following a jury trial on five counts of arson (*R.C. 2909.03*) and one count of grand theft (*R.C. 2913.02*) occurring in 1992. These charges related to his ongoing attempts to win back his former live-in girlfriend by isolating her from friends offering support to her. Defendant contends the trial court erred: in allowing prejudicial "other acts," hearsay and other irrelevant evidence[*2] before the jury; by prejudicially interfering in the conduct of the trial and showing bias towards the defendant; and abusing its discretion in sentencing without considering mitigating factors. The defendant also claims he was deprived of effective assistance of counsel in violation of his constitutional guarantees. We find no reversible error and affirm for the reasons hereinafter stated.

The State contended that the arson crimes arose out of an obsessive and abusive relationship that defendant, a

practicing attorney, had with a woman named Jamie Baker. The State had no direct or physical evidence linking the defendant to the torching of various automobiles of friends close to Ms. Baker. It had to rely principally on circumstantial evidence and admissions by defendant to third persons. The State offered proof that Ms. Baker terminated her tumultuous off-and-on again relationship with defendant in early 1992 and with her three children moved out of his home; that a history of stalking and physical and psychological abuse followed, designed to convince Ms. Baker to come back to defendant; this culminated in a series of mysterious fires in which her friends' cars were destroyed or[*3] damaged. Forty-one witnesses testified at trial which extended from May 30 to June 9, 1995 and produced 2,792 pages of transcript.

Jamie Baker, mother of three small children and an admitted alcoholic, met defendant in 1988 when she was a follower of a local country-western band, Pony Express, which defendant managed. She began dating him in 1989 while she was on welfare. Her divorce from John Baker, who was in prison, became final in October 1989. From February to September 1990, Baker and her children moved in and lived with defendant on West 116th Street in Cleveland while he supplied all their necessities. However, she testified that he became extremely controlling and possessive by locking her and the children in the house, forbidding her former social contacts, and preventing her from visiting her mother and sister.

She and the children moved out and stayed with her ex-sister-in-law, Lisa Baker, and her husband Bruce Tithecott on West 104th Street for about two months. Keith came and begged her to come back, offering her an engagement ring. In November of 1990, Baker and the children moved back with Keith, this time in his house on Elbur Avenue in Lakewood. Things were peaceful[*4] for a time until January 1991. At that time, Keith learned that Ms. Baker had secretly visited her ex-husband in prison, became angry and beat her. After that beating, Baker "walked on eggshells" and kept the house and children in line to please defendant.

She and Keith began planning to have a child and she became pregnant in the summer of 1991. They were undecided about having the child and visited several abortion clinics. She had an ultrasound and discovered that she was carrying a little girl. Keith wanted a son and forced her to have an abortion in November of 1991. Following the abortion, their relationship deteriorated and defendant continued to visit verbal and physical abuse on defendant, even threatening to douse her with gasoline and set her afire.

In January 1992, according to her testimony, Ms. Baker's ex-husband, John Baker, was released from prison and she decided to end her relationship with the defendant and move out. With the assistance of her best friend, Michelle Kolman, while defendant was away, she moved out of defendant's home with her three small children and temporarily stayed at a Catholic Charities shelter for the homeless for a period of two weeks.

[*5] From the shelter, Ms. Baker moved into a rental property on Westlake Avenue in Lakewood that she shared with a friend named Sherry. This property was owned by a friend of her mother. While living there, she began observing the defendant driving up and down the street numerous times. Eventually, defendant discovered Ms. Baker's location, approached her and pleaded with her to come back to him. Ms. Baker refused. The defendant returned to the Westlake address on several occasions, requesting that Ms. Baker come back to him. The defendant's appeals were unsuccessful.

Shortly thereafter, printed leaflets were mysteriously circulated to neighbors on West lake Avenue claiming the occupants of Ms. Baker's residence were drug users. Ms. Baker, her exhusband John and her ex-brother-in-law, Bruce Tithecott, went to the neighbors to explain the untruthfulness of these leaflets.

In the early hours of April 9, 1992, a brick with a copy of the same mysterious leaflets attached came crashing through the foyer window of the Westlake Avenue home. At around the same time, a softball was thrown through a window on Brockley Avenue, two streets away, where Lisa Baker lived. The police were called. The[*6] defendant's van was observed by the police with its lights off parked on the wrong side of Westlake Avenue shortly before receiving a dispatch concerning the shattered windows. Jeffrey Keith was pulled over and denied knowing anyone on Westlake Avenue or even being on the street. No leaflets or bricks were found in Keith's van.

Pursuant to a detective's request, the defendant came to the Lakewood Police Department the next day. After some evasive denials, the defendant, when asked whether he threw the brick, responded that, if he did, his mind was not right. He offered to pay the damage. Ms. Baker did not press charges against the defendant and the matter was dropped.

Ms. Baker stayed at the Westlake address until August 1992 when she was being evicted. Sherry, her co-tenant, moved out earlier after her tires were slashed twice. Bruce Tithecott, Ms. Baker's ex-brother-in-law (formerly married to Lisa Baker) allowed her and the children to stay with him at his home in Cleveland on St. Mark Avenue for a brief period in mid-summer of 1992 prior

to her eviction from the Westlake address. Mr. Tithecott testified that he observed the defendant drive up and down his street on more than[*7] 25 occasions while Ms. Baker and her children stayed with him. He also observed the defendant approach and yell at Ms. Baker.

At three o'clock in the morning on July 29, 1992, Tithecott awoke to sirens, looked out the window and saw his automobile, parked in the driveway, being consumed by flames. This same auto had been the subject of an attempted theft a few days earlier when Tithecott surprised the thief stripping his steering column. The thief escaped through neighbors' backyards and Tithecott made a police report of the incident. A few days later the fire erupted, destroying his automobile. This was determined by the Cleveland Fire Department Investigative Unit to have been intentionally set. Tithecott's St. Mark neighbors had also received leaflets containing allegations of drug use at his home. Tithecott testified that he called the defendant on the phone and asked why he was trying to destroy his life. The defendant laughed stating he was going to do what he wanted and to stay out of his way.

By August 1992, Ms. Baker had moved in with her best friend, Michelle Kolman, who was renting on West Boulevard in Cleveland. It was there on August 23rd, that another intentionally[*8] set fire occurred, totally destroying the garage on the property. This incident caused Ms. Baker to move yet again to Midtown Towers in Parma where she occupied an apartment with her children.

In the fall of 1992, Ms. Baker began to date a man named David May. May would allow Ms. Baker to use his truck to drive to work at the Tick Tock Tavern in Cleveland where she was a waitress. She obtained this job through the help of Michelle Kolman, who also worked there. During this time, Ms. Baker observed the defendant following her as she drove May's truck to and from work. She also observed him in her apartment lobby in Parma looking at the building directory.

On the evening of October 18, 1992, a dishwasher at the Tick Tock ran into the restaurant to tell Baker that her boyfriend's truck was on fire. The fire department extinguished the fire and determined it to be intentionally set.

Three nights later, on October 21, 1992, in the parking lot of the Tick Tock, the car of Michelle Kolman had the window shattered and an ignited road flare was tossed into her back seat. Once again the fire department was called to extinguish the intentionally set fire which did minor damage.

Ms. Kolman[*9] had the window to her car repaired during the week following the incident at the tavern. However, on October 29, 1992, the same car was stolen from her West Blvd. home. The car was discovered on a desolate stretch of road on Train Avenue totally destroyed by fire. An investigation by the fire department determined that the fire was incendiary in origin and that some type of accelerant was involved.

Ms. Kolman obtained a rental car after the theft and destruction of her automobile. However, on November 21, 1992, the rental car was intentionally set on fire in the early morning hours across from the Tick Tock Tavern. Ms. Kolman had left the car parked there while she spent the night at Ms. Baker's apartment in Parma. The fire department determined this fire was also intentionally set. Ms. Baker told the fire department that these fires were caused by defendant, but was told they had no hard evidence linking the defendant to the crimes.

In December 1992, according to Baker, Keith came to her Parma apartment and begged her to come back. She agreed if he left her family and friends alone. She and the children moved back in with Keith on Elbur Avenue in Lakewood in January 1993. She and[*10] her children stayed with defendant until October 28, 1993. During that period she testified to an episode where she was trying to put her two sons up for adoption with defendant's encouragement. She also testified to numerous beatings and finally left defendant for good with the covert assistance of the police and a social worker. She first went to Genesis, a battered women's shelter in Elyria and finally to Sandusky where she lived at the time of trial. There was testimony of various witnesses as to defendant's efforts to track her down at the shelter. Defendant hired a private investigator to locate her in Sandusky.

Three witnesses testified at trial as to the defendant's personal statements incriminating himself in these fires. Beth Farage is the daughter of Edward Farage who in 1993 served as president of the Cleveland American Middle East Organization (CAMEO). The defendant served as first vice president of CAMEO. Ms. Farage, mother of three children, had separated from her husband and began dating the defendant, unknown to her father, from August 1993 through the early months of 1994. The defendant confided to Ms. Farage the specific details of his role in having the fires set[*11] against Jamie Baker and her friends. He did this, according to what he told Ms. Farage, in order to let everyone know he was boss and to get Jamie Baker back. Ms. Farage went to the Cleveland police with her father after Keith struck her on October 7, 1994 and told them of his involvement in the fires.

Edward Farage also testified. He considered the defendant to be his closest ally and best friend during the time they served as officials in the CAMEO organization. He testified that defendant confided to him that he had caused property to be burned as a means of intimidation and to get Jamie Baker back in his life. He reported this to the Cleveland police when he took his daughter to complain of defendant's attack. At that point, Lt. Dan Kovacic of the Fire Investigation Unit revived the arson investigation which led to defendant's indictment in December 1994.

Ms. Kerri Mikula was a close friend of the defendant from 1984 or 1985. Her testimony was the most explicit and damaging to the defense. (Tr. 1696-1738). She moved to Toledo in November 1988 where she worked as a nurse for UPS. In April 1989 a fire in the next door apartment destroyed her apartment and she lost everything. She[*12] returned to the Cleveland area in 1990. Her relationship with Keith was revived in 1991 on a "platonic" basis because he was involved with Jamie Baker. Prior to her appearance at trial, she had never met any of the victims, nor did she have any association with other witnesses to whom the defendant had confided his fire activities.

Ms. Mikula testified that Keith was obsessed with getting Baker back. She was driving around with him when he was trying to locate Jamie Baker's boyfriend's truck during the time Ms. Baker was living in Parma. Ms. Mikula testified that the defendant showed her the leaflets in his briefcase which were circulated in Lakewood which he explained would be used to destroy anybody who associated with Ms. Baker. Keith bought tickets to a Bruce Springsteen concert and wanted to stay the night with her because he needed an alibi. It was the night of the August 23, 1992 West Blvd. garage fire. He also told her he had the autos burned at the Tick Tock Tavern and how surprised he was at the victim's ability to replace the burned autos. Ms. Mikula also testified to her knowledge of the failed attempt to steal Mr. Tithecott's car and its subsequent burning. Keith tried[*13] to get her to use her UPS job to deliver an empty gasoline can to Ms. Baker's Parma apartment. She refused. The defendant told Mikula he had hired individuals he knew from the Arab community to carry out the fires which cost the defendant up to \$5,000 per fire.

The State also presented evidence of a fire which destroyed the Pony Express passenger bus on September 1, 1993, which the owner's son attributed to defendant Keith who had been fired a year earlier.

The defendant testified on his own behalf and denied playing any role in the arsons. He expressed affection for Ms. Baker and her children to whom he had played the

role of father. He stated he did not think he was in town when the fires occurred. His testimony recounted his generous and affectionate interest and care for Ms. Baker and her children. He testified to his suspicions of a conspiracy against him which involved the Arab community, Lt. Kovacic and Mayor White leading to his indictment.

The defendant denied throwing the brick through Ms. Baker's window in April 1992, or any involvement in the fires. He admitted to lying under oath in a civil deposition given just months before his trial. The defense also presented the[*14] testimony of other witnesses who, for the most part, presented character evidence in favor of the defendant or against the character of Ms. Baker.

The defense presented the testimony of Tammy Kalvalege of Erie Pennsylvania, an alibi witness and girlfriend of defendant. She testified that defendant lived in Erie during 1992 and that on the critical dates when the fires occurred, she was on short trips with her children and defendant at various vacation spots from which she kept mementoes.

The jury found the defendant not guilty of count one (West Blvd. garage fire) and count eight (Pony Express bus fire), and guilty of five arson counts and one grand theft count. On June 14, 1995, the trial court sentenced the defendant to serve two years and a \$5,000 fine on each of the arson counts. The court also sentenced him to serve a term of five years to fifteen years for count seven, arson with damage in excess of \$10,000 (Kolman's rental car) along with a \$ 7,500 fine. All terms are to be served consecutively to each other.

A timely appeal ensued. The assignments of error will be considered in the order asserted.

I. THE TRIAL COURT ERRED BY ALLOWING PREJUDICIAL OTHER ACTS EVIDENCE[*15] TO BE INTRODUCED TO THE JURY.

The defendant contends that prejudicial and improper other acts testimony was presented to the jury which tended to portray the defendant as a bad person likely to commit the arson crimes with which he was charged.

In *State v. Gumm* (1995), 73 Ohio St. 3d 413, 426, 653 N.E.2d 253, the Supreme Court recently summarized the following general principles regarding other acts evidence:

Evid.R. 404(B) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *R.C. 2945.59* states: "In any criminal case in which the defendant's motive or intent *** or system in doing an act is material, any acts of the defendant which tend to show his motive or intent *** or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." In *State [*16] v. Flonnory* (1972), 31 Ohio St. 2d 124, 126, 60 Ohio Op. 2d 95, 96-97, 285 N.E.2d 726, 729, this court noted that [HN1] *R.C. 2945.59* permits the showing of "other acts" when such other acts "tend to show" certain things, e.g., motive and intent, as identified in the statute. "If such other acts do in fact 'tend to show' any of those things they are admissible notwithstanding they may not be 'like' or 'similar' to the crime charged." *Id.*

The first alleged error was the admission of testimony relating to the brick through the window of Ms. Baker's residence on Westlake Avenue on April 9, 1992 at 1:00 a.m. (Tr. 573, 882).

The trial court denied a defense motion in limine to exclude this evidence from the trial. Shortly after the brick incident occurred, the defendant was observed by a Lakewood policeman stopped in his van on the wrong side of Westlake Avenue with the lights off. He later admitted to a Lakewood detective that he was despondent, not in his right mind if he did it, and offered to pay for the damage. (Tr. 792-93).

The second alleged error relates to Ms. Baker's testimony describing her relationship with the defendant in which she was forced by the defendant to [*17]have a mid-term abortion of an unwanted female fetus. Baker further testified that the defendant wanted a son and that if Baker did not go through with the abortion she would be beaten. (Tr. 859-66).

The State also, over objection, introduced a document purporting to indicate that the defendant represented Ms. Baker in a forced adoption plan in Juvenile Court. (Tr. 1125-27). The defendant contends that whether Ms. Baker sought to give up her children had no bearing on the present case and this evidence placed defendant in a bad light.

Michelle Kolman was permitted to testify that the defendant allegedly told her that he could have John Baker, Jamie Baker's ex-husband, and Ms. Kolman's son's father put in jail by planting cocaine in their cars. (Tr. 1166).

On redirect testimony of Michelle Kolman, the prosecutor brought up her alleged discussion with the defendant in which he indicated threats made against Ms. Baker such as an assassin shooting her in her head and leaving the country. These rumors regarding the bullet through the head came from Ms. Baker to Ms. Kolman. (Tr. 1260, 1264).

Beth Farage testified about defendant threatening to beat her like he had beaten Jamie Baker. [*18] (Tr. 1294). She also testified that the defendant had attempted to have people pressure her father to drop charges. (Tr. 1407).

Ms. Mikula testified that defendant was left a house in Parma owned by Ann Lisky, an elderly woman, who passed away. (Tr. 1729). The defendant apparently asked for a limiting instruction on other acts, and one was given by the trial court in its final instructions to the jury without objection. (Tr. 2771).

The case below involved a string of seven crimes impacting Ms. Baker and innocent third parties close to her over an eight month period in 1992. The stalking by driving up and down Jamie Baker's street, the tracking her down when she moved, the repeated contacts to resume the relationship, the leaflets, the brick incident, and finally the arsons and theft represented a measured and escalating modus operandi, whereby defendant sought to isolate Ms. Baker from her friends and compel her to return to him. The identity of the perpetrator of this string of crimes was the key issue in this case. The defendant at trial denied any involvement in the crimes.

The Supreme Court recently described when other acts are admissible to show modus operandi in [*19] *State v. Lowe* (1994), 69 Ohio St. 3d 527, 531, 634 N.E.2d 616 as follows:

[HN2] Other acts may also prove identity by establishing a modus operandi applicable to the crime with which a defendant is charged. "Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under *Evid.R. 404(B)*." *State v. Jamison* (1990), 49 Ohio St. 3d 182, 552 N.E.2d 180, syllabus. "Other acts' may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense." *State v. Smith* (1990), 49 Ohio St. 3d 137, 141,

551 N.E.2d 190, 194. While we held in *Jamison* that "the other acts need not be the same as or similar to the crime charged," *Jamison*, syllabus, the acts should show a modus operandi identifiable with the defendant. *State v. Hutton* (1990), 53 Ohio St. 3d 36, 40, 559 N.E.2d 432, 438.

The State's case was largely built on circumstantial evidence plus his admissions to establish defendant's link to the arson crimes. Therefore, the brick incident and the defendant's acknowledgment of guilt there for[*20] were properly admissible to show a predicate relationship illustrating defendant's modus operandi or pattern of terrorism to achieve his ends. When defendant's stalking, personal entreaties, leaflets and brick did not work, and he got caught in the brick episode, he escalated the terror indirectly by hiring third parties to set fires to her friends' cars. A review of the record shows that the trial court instructed the jury without objection on the limited nature of other acts evidence. (Tr. 2771). Further, when viewed in the context of the totality of the evidence in conjunction with the curative instruction, we cannot say that the other acts evidence was so prejudicial as to deny the defendant a fair trial. *State v. Simko* (1994), 71 Ohio St. 3d 483, 491, 644 N.E.2d 345.

We cannot, however, agree that the evidence of the abortion and the forced adoption episodes fit into the admissibility exception of other acts. These events which arose during defendant's live-in relationship with Baker do not, in our judgment, fall within an exception under *Evid.R. 404(B)* and are certainly not inextricably related to the arsons or part of a modus operandi. Defendant contends this testimony was not relevant[*21] and highly prejudicial. The testimony was offered to show the extent of defendant's activities to control and dominate Ms. Baker. Even if relevant, defendant argues that the probative value of the testimony about the incidents was substantially outweighed by its prejudicial nature.

Evid.R. 403 (A) provides: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury." However, the determination of the admission or exclusion of evidence is within the discretion of the trial court and will not be reversed without abuse of discretion. *State v. Kinley* (1995), 72 Ohio St. 3d 491, 497, 651 N.E.2d 419; *State v. Combs* (1991) 62 Ohio St. 3d 278, 284, 581 N.E.2d 1071; *Rigby v. Lake Cty.* (1991), 58 Ohio St. 3d 269, 271, 569 N.E.2d 1056; *State v. Sage* (1987), 31 Ohio St. 3d 173, 180, 510 N.E.2d 343.

We find the evidence was relevant in that it showed the lengths to which the defendant would go in his obsessive attempts to dictate every aspect of Ms. Baker's life. [HN3] Relevant evidence that is admissible is not limited to merely direct evidence establishing a claim or defense. Circumstantial evidence as it relates to the probative[*22] value of other evidence in the case can also be of consequence to the action. *State v. Moore (1988)*, 40 Ohio St. 3d 63, 65, 531 N.E.2d 691. While the evidence was part of the account detailing defendant's obsessive domination of Ms. Baker and was relevant to that end, we recognize that it is a close question whether its probative value was outweighed by its prejudicial nature.

Jamie Baker's direct testimony detailing the abortion in November 1991, the events leading up to it and the aftermath was received without any objection to this line of questioning or without a motion to strike. (Tr. 859-66). Baker's testimony respecting the adoption proceedings in which Keith participated was also given without objection or a motion to strike. (Tr. 926-40). Ordinarily, a party will not be heard on appeal to claim error in the admission of evidence where no objection is made or error preserved. *Evid.R. 103 (A) (1)*. Furthermore, we are satisfied that defense counsel may have made a deliberate strategic choice not to object to these lines of questioning because it portrayed Baker in an unflattering light as a mother willing to abort a child and give her own children up for adoption. As the cross-examination[*23] revealed, she was held up as an object of scorn rather than pity. (Tr. 1036-45; 1097-1101). In other words, this testimony cut both ways - against both Baker and Keith. We will not second guess the wisdom of what may be defense counsel's strategic choices in such circumstances.

The so-called "other acts" evidence of which defendant complains do not furnish grounds for reversal. Michelle Kolman's testimony that defendant told her he could get John Baker (Jamie Baker's ex-husband) and Ms. Kolman's son's father put in jail by planting cocaine in their cars (Tr. 1166) were threats by a party-opponent and continuing evidence of his plan or scheme to do away with anybody who got in his way. The redirect of Ms. Kolman about defendant's statements to Jamie Baker that he could hire an assassin to put a bullet in her head likewise showed his plan and scheme to control her - if he could not have her, nobody could. (Tr. 1269).

Beth Farrage's testimony about Keith attacking her at the My Place restaurant (Tr. 1294) was relevant background as to why she finally went to her father, and then the police and told them about the attack and Keith's involvement in the fires. His statements to Ms. Farrage[*24] (Tr. 1407) about bringing pressure on other

people to have her father drop the charges were "evidence of threats or intimidation of witnesses reflect[ing] a consciousness of guilt and [are] admissible as admission by conduct." *State v. Soke (1995)*, 105 Ohio App. 3d 226, 250, 663 N.E.2d 986.

The evidence elicited by the prosecution from Ms. Mikula on redirect (Tr. 1789-90) suggesting defendant defrauded widow Ann Liskey by getting her house from her estate was clearly irrelevant but not developed at any length or impact on direct testimony. (Tr. 1729). The defense opened this line of inquiry further by reference to a deposition Ms. Mikula had given in a civil case involving the matter. (Tr. 1784-89).

In any event, we find the admission of the evidence to be harmless. In order to hold error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *Chapman v. California (1967)*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824; *State v. Lytle (1976)*, 48 Ohio St. 2d 391, 358 N.E.2d 623. [HN4] A reviewing court may overlook an error where the admissible evidence comprises "overwhelming" proof of a defendant's guilt. *State v. Williams (1983)*, 6 Ohio St. 3d 281, 290, 452 N.E.2d 1323. When a claim of harmless error[*25] is raised, the appellate court must read the record and decide the probable impact of the error on the minds of the average jury. *Harrington v. California (1974)*, 395 U.S. 250, 254, 23 L. Ed. 2d 284, 89 S. Ct. 1726. In *Delaware v. Van Arsdall (1986)*, 475 U.S. 673, 681, 89 L. Ed. 2d 674, 106 S. Ct. 1431, the United States Supreme Court wrote:

The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *** and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

See, also, *Jackson v. Howell (1993)*, 86 Ohio App. 3d 497, 501, 621 N.E.2d 573; *State v. Adams (1991)*, 74 Ohio App. 3d 140, 145, 598 N.E.2d 719.

The overwhelming nature of the admissible evidence against defendant would easily establish that he was guilty as charged. The jury heard the testimony of numerous witnesses tying defendant to the crimes both by his direct admissions and compelling circumstantial evidence which is as probative as direct evidence. *State v. Jenks (1991)*, 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph one of syllabus. It is extremely unlikely that the evidence of which[*26] defendant complains in this assignment of error contributed materially to defendant's convictions. Any claimed error was harmless beyond a reasonable doubt.

Assignment of Error I is overruled.

II. THE TRIAL COURT'S INTERFERENCE IN THE CONDUCT OF THIS TRIAL DEPRIVED THE APPELLANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Defendant complains that the trial judge interfered in the conduct of the trial and demonstrated a bias, a favoritism for the State's case or disrespect for defense counsel which deprived the defendant of a fair trial. The defendant raises twenty-seven separate rulings and/or comments that he claims were erroneous and unfair.

It is axiomatic that the trial judge may not "assume the role of an advocate and should not conduct himself so as to give the jury an impression of his feelings." *Jenkins v. Clark* (1982), 7 Ohio App. 3d 93, 97-98, 454 N.E.2d 541. In a jury trial, "the court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously indicate to the jury its opinion on the evidence or on the credibility of a witness." *State ex rel. Wise v. Chand* (1970), 21 Ohio St. 2d 113, 256 N.E.2d 613, paragraph three of the syllabus. [*27]

In this case, forty-one witnesses testified and over 2,600 pages of transcript were made of the trial proceedings. *Evid.R. 611* requires that:

the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as (1) to make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) to protect witnesses from harassment or undue embarrassment.

In the present case, the defendant argues the trial court failed to appear impartial; on numerous opportunities he chastised defense counsel in front of the jury; did not make similar remarks to the prosecutor; and the unfairness and lack of even-handedness in his rulings were obvious. We disagree.

The majority of rulings to which defendant refers were evidence of the court's impatience with what it viewed as dwelling on irrelevant or marginal testimony or exceeding the scope of recross. (Tr. 1012, 1204, 1221, 1235, 1247, 1250, 1251, 1415, 1416, 1881, 1901, 1946-49, 2276, 2347, 2376, 2379) . The court's chidings to

"move along" or ask "relevant questions," sometimes with unnecessary editorializing, represented[*28] an effort to keep the testimony on relevant subject matter and did not exhibit a favoritism or bias for the State's case. Indeed, on numerous occasions the court brought counsel for both sides to the sidebar, thereby avoiding rulings which reflected unfavorably on either party.

There were some episodes closer to the line as one would expect in detailing Keith's numerous episodes with various women. Overall, we do not detect from a reading of the record an indiscrete preference for the State's case by the trial court, or disapproval of the defense's efforts. Indeed, from a full review of the record, we find that the court gave considerable latitude to the defense counsel's efforts to project the well-meaning and generous nature of defendant while portraying Jamie Baker as an unfit, alcoholic and welfare mother who was a shameless and amoral opportunist taking advantage of the defendant. The sordid life styles of many of the State's witnesses were dragged out in considerable detail on cross-examination and the court tried to prevent repetitious questioning. [HNS] "A trial judge has broad discretion 'to preclude repetitive and unduly harassing interrogation.'" *State v. Green* (1993), 66[*29] Ohio St. 3d 141, 147, 609 N.E.2d 1253.

In any event, in the court's charge, the jury was instructed to disregard any comment or conduct that may be considered as an indication of the court's view of the case and to decide the case based upon the evidence and to make their findings with intelligence and impartiality without sympathy, bias or prejudice. (Tr. 2775-76). "A jury is presumed to follow the instructions, including curative instructions, given by a judge." *State v. Garner* (1995), 74 Ohio St. 3d 49, 59, 656 N.E.2d 623.

Assignment of Error II is overruled.

III. THE TRIAL COURT ERRED BY CONTINUALLY ALLOWING INTO EVIDENCE HEARSAY STATEMENTS THAT WERE NOT ALLOWABLE UNDER THE RULES OF EVIDENCE.

Defendant argues that the court erroneously allowed several hearsay statements into evidence which prejudiced defendant and prevented him from cross-examining the out-of-court declarants or exercising his constitutional right to confront his accusers. The State contends these statements were authorized by exceptions to the hearsay rule or were invited by the defendant's opening the door. The State contends that statements to police or fire personnel were excepted under *Evid. R. 803(2)*, the excited utterance[*30] exception: A statement

relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." As stated in *State v. Simko* (1994), 71 Ohio St. 3d 483, 490, 644 N.E.2d 345: [HN6] "The admission of a declaration as an excited utterance is not precluded by questioning which: *** (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties."

Detective Daniel Moran of the Cleveland Fire Department testified to a conversation with Michelle Kolman which implicated defendant while on the scene of her car fire at the Tick Tock. Michelle Kolman was described as frightened, scared and shaking during her statement. (Tr. 490-94). She was still under the influence of a traumatic event. The trial court was correct in allowing the statement into evidence pursuant to *Evid.R. 803(2)*.

The same was true of Lakewood policeman Robert Moher's testimony as to Jamie Baker's statements blaming defendant at the scene of the brick throwing/vandalism incident. Ms. Baker was described as upset, visibly shaken [*31] and nervous. (Tr. 575-76).

Lt. Roger Maple also testified to statements made by Jeff Bogusz, an associate of defendant's with the Pony Express band, while on the scene of the bus fire. (Tr. 669). Maple described Mr. Bogusz' demeanor as upset. These statements also come within the scope of the excited utterance exception (*Evid.R. 803(2)*) and were within the trial court's discretion.

On cross-examination, defense counsel asked the officer in detail what Mr. Bogusz said about possible suspects of the crime. On redirect, the prosecution followed up this line of questioning and asked the witness to elaborate as to what Mr. Bogusz said. (Tr. 682-87). It was proper for the prosecution to completely explore a line of questioning initiated by the defendant. *State v. Miller* (1988), 56 Ohio App. 3d 130, 565 N.E.2d 840; *State v. Croom* (Jan. 18, 1996), 1996 Ohio App. LEXIS 103, Cuyahoga App. No. 67135, unreported. While defendant did not open the door to this line of questioning, he did expand the inquiry significantly. A party is not entitled to take advantage of an error which he or she invites or induces. *State v. Barnett* (1990), 67 Ohio App. 3d 760, 769, 588 N.E.2d 887; *State v. Woodruff* (1983), 10 Ohio App. 3d 326, 327, 462 N.E.2d 457. The impact of [*32] this testimony was questionable since the jury found defendant not guilty of the Pony Express bus fire.

[HN7] Not all out-of-court statements are hearsay. Statements offered to explain a police officer's investigation are not hearsay. *State v. Thomas* (1980), 61 Ohio St. 2d 223, 232, 400 N.E.2d 401; *State v. Ray* (June 7, 1990), 1990 Ohio App. LEXIS 2241, Cuyahoga App. No. 57120, unreported.

Jamie Baker, on redirect, was permitted to identify court records (State's Ex. 26), listing defendant as attorney of record in the adoption proceedings. The defendant opened the door to this line of questioning by presenting court records as Defense Exs. A and B, and having the witness read certain portions of the document. The defendant's attorney continued to cross-examine the witness concerning the adoption records (Tr. 1097-98), including the issue as to whether defendant represented Ms. Baker. (Tr. 1103). Having opened the door to a broader inquiry, defendant cannot challenge the prosecution's use of similar evidence on redirect. *State v. Lang* (1995), 102 Ohio App. 3d 243, 254, 656 N.E.2d 1358; *State v. Banks* (1991), 71 Ohio App. 3d 214, 219, 593 N.E.2d 346; *State v. Hartford* (1984), 21 Ohio App. 3d 29, 30, 486 N.E.2d 131. There was no error in allowing the State to redirect[*33] under these circumstances.

Michelle Kolman was questioned on cross-examination as to a statement she made to Nationwide Insurance about her car loss by fire. (Tr. 1246). On redirect, the prosecution was permitted to allow the witness to detail the complete statements that she made. (Tr. 1260-61). The trial court ruled that defense counsel opened the door to this line of questioning. (Tr. 1260). We agree. There was no error in allowing the scope of examination within the trial court's discretion. The witness was also permitted to testify to conversations she had with the defendant in which he acknowledged his arson activities. These statements are not hearsay and were admissions against interest by the defendant pursuant to *Evid.R. 801(D) (2)*.

Detective Kovacic was permitted to testify as to a conversation with Jamie Baker in September 1993. (Tr. 1810). The hearsay statements were permitted because Ms. Baker had already testified and they were offered pursuant to *Evid.R. 801(D)(1)(b)* as a prior consistent statement. The State was attempting to rebut a charge of fabrication or improper influence that was raised by defense counsel during the cross-examination of Ms. Baker. (Tr. 970-77). [*34] There was no error in permitting this re-direct to rehabilitate the witness.

In any event, all the hearsay declarants testified at the trial and were vigorously cross-examined, as to their statements. Defendant cannot claim that he was denied the right to confront and cross-examine witnesses against

him. Furthermore, it is harmless error where, as in the case here, the declarants were present in court as witnesses and were accorded the opportunity to deny having made the statements. *State v. Tomlinson (1986)*, 33 Ohio App. 3d 278, 515 N.E.2d 963; *State v. Bidinost (June 17, 1993)*, 1993 Ohio App. LEXIS 3097, Cuyahoga App. No. 62925, unreported. See, also, *State v. Williams (1988)*, 38 Ohio St. 3d 346, 350, 528 N.E.2d 910 (error in admission of hearsay statement harmless beyond a reasonable doubt where contents of statement largely cumulative of testimony of other witnesses); *State v. Sorrels (1991)*, 71 Ohio App. 3d 162, 165, 593 N.E.2d 313.

Defendant's Assignment of Error III is overruled.

IV. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO CONSIDER PREJUDICIALLY IRRELEVANT EVIDENCE.

Defendant cites two instances of testimony which he claims were prejudicially irrelevant. [HN8] The admission or exclusion of relevant evidence rests solely within[*35] the sound discretion of the trial court. *State v. Sage (1987)*, 31 Ohio St. 3d 173, 510 N.E.2d 343. A trial court enjoys broad discretion in admitting evidence and will be reversed only for an abuse of that discretion whereby the defendant suffers material prejudice. *Shimola v. Cleveland (1992)*, 89 Ohio App. 3d 505, 511, 625 N.E.2d 626; *State v. Williams (1982)*, 7 Ohio App. 3d 160, 454 N.E.2d 1334.

Defendant contends Bruce Tithecott's testimony (Tr. 730) as to why he felt he was in the defendant's way was irrelevant and prejudicial. In the summer of 1992, following the incident where a brick was thrown through her window, Ms. Baker and her children moved in with Tithecott, her ex-brother-in-law on St. Mark Avenue for a brief period. The defendant was observed on more than 25 occasions driving up and down the street. After these occurrences, Tithecott's car was tampered with, then set on fire in his driveway on July 29, 1992.

Defendant objects specifically to Tithecott's testimony that he believed the defendant felt Tithecott was "in his way" because "he was helping Jamie." The evidence came in before objection was belatedly made. It was overruled. No motion to strike was made. (Tr. 730).

This evidence was relevant, but[*36] was of slight, if any, prejudicial effect. It was probative both as to identity and defendant's motive in ordering the intentionally set fires. Tithecott was getting in Keith's

way and his car was destroyed as a warning to him for harboring Baker.

Defendant also cites Beth Farage's testimony that the defendant had an affair with her while she was married as irrelevant and prejudicial. Ms. Farage testified to the defendant's admissions to her about having ordered the fires. (Tr. 1297). Her testimony as to dating the defendant while she was separated from her husband and going through the process of a divorce was relevant testimony for the jury to understand how she became a confidante to receive the admissions. It was the defense on cross-examination that characterized the relationship as adulterous. (Tr. 1346). Ms. Farage's testimony concerning her brief relationship with the defendant was relevant to place her incriminating testimony in context. The trial court was within its sound discretion in allowing it to be heard.

Assignment of Error IV is overruled.

V. THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

We find no merit to this assignment of[*37] error.

The test we must apply to allegations of ineffective assistance of counsel was recently set forth in *State v. Carter (1995)*, 72 Ohio St. 3d 545, 557-58, 651 N.E.2d 965:

The standard by which we review claims of ineffective assistance of counsel is well established. Pursuant to *Strickland v. Washington (1984)*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693, [HN9] in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial would have been different. Accord *State v. Bradley (1989)*, 42 Ohio St. 3d 136, 538 N.E.2d 373; *State v. Combs, supra*. Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel. To justify a finding of ineffective assistance of counsel, the appellant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland at 689, 104[*38] S. Ct. at 2065, 80 L. Ed. 2d at 694-695; State v. Wickline (1990)*, 50 Ohio St. 3d 114, 126, 552 N.E.2d 913, 925. Prejudice from defective representation sufficient to justify reversal conviction exists only where the result of

a trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel. *Lockhart v. Fretwell* 91993), 506 U.S. 364, 113 S. Ct. 838, 842-843, 122 L. Ed. 2d 180, 189-191.

[HN10] A properly licensed attorney, as the defendant retained at his trial, is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299, 209 N.E.2d 164; *State v. Williams* (1969), 19 Ohio App. 2d 234, 250 N.E.2d 907. A court must presume that a properly licensed attorney has executed his legal duties in an ethical and competent manner in conjunction with the Strickland test. A court must also accord deference to defense counsel's decisions as made prior to and during the course of any legal proceedings and cannot examine the strategic decisions of trial or appellate counsel through hindsight.

The defendant cites defense counsel's failure to object to Tithecott's, Ms. Baker's and Michelle Kolman's testimony as to their belief that the defendant was the[*39] cause of fires as evidence of his ineffectiveness.

In regards to the testimony of Tithecott and Baker, a review of the record reveals that their "opinion" was contained in a response to the State's question as to what these individuals told the police investigating the crimes committed against them. On its face, this is clearly not an objectionable question. In regards to Michelle Kolman's "opinion," this was given when the State questioned her in response to her statement that she was afraid to be associated with Ms. Baker. When asked why, Ms. Kolman replied, "I was afraid from the threats Jeffrey had made and it was happening [intentionally set fires] to everyone around her." (Tr. 1193).

[HN11] *Evid.R. 701* allows a lay witness to give opinion testimony where it is rationally related to the witness' perception and is helpful to clarify the witness' testimony or determination of a fact in issue. *State v. Webb* (1994), 70 Ohio St. 3d 325, 333, 638 N.E.2d 1023; *State v. Stout* (1987), 42 Ohio App. 3d 38, 42, 536 N.E.2d 42. This means that "the witness must have firsthand knowledge of the subject of his testimony and the opinion must be one that a rational person would form on the basis of the observed facts" and the[*40] "testimony must aid the trier of fact in understanding the testimony of the witness or in determining a fact issue." *Lee v. Baldwin* (1987), 35 Ohio App. 3d 47, 49, 519 N.E.2d 662.

Even assuming defense counsel could have prevented this testimony by objection, defendant fails to show that this testimony materially prejudiced the defense to the

extent that there exists a reasonable probability that had he objected, the outcome of the trial would have been different. That these three witnesses believed the defendant committed the fires was self-evident from their role as State witnesses and their relationships with the defendant prior to the fires being set. At no time during their testimony did these three witnesses state their opinion was based on direct knowledge or the defendant's admissions to his role in the fires. This testimony was provided by other witnesses who were adequately cross-examined by defense counsel as to their credibility.

Defendant itemizes numerous instances where he contends defense counsel should have objected to testimony and did not. Many of these episodes have been previously addressed in this opinion. Others really go to the issue of relevance, admission under *Evid.R. [*41] 404(B)* as evidence of a plan or modus operandi or whether the probative value is outweighed by prejudice. *Evid.R. 403*. These kind of rulings are obviously made in the exercise of the trial judge's discretion and only subject to reversal on an abuse of discretion standard. The failure to object is therefore not ineffective assistance of counsel if an objection would be pointless or overruled. Further, defendant has suffered no prejudice if the evidence is merely cumulative or was introduced through other witnesses, i.e., the failure to object was harmless error.

Defendant is mistaken that evidence of defendant's abusive relationship with Ms. Baker (beatings, threats, intimidation, isolation, coercion) "had nothing to do with the issue of whether appellant started the fires." His control, domination and obsession with Ms. Baker, supported by numerous witnesses, was the essential predicate for his motive in starting the fires. That evidence was clearly relevant.

As previously noted, defendant's treatment of Ms. Farrage (their affair, his restrictions on her personal conduct and their altercation) were relevant background information for how she acquired his admissions and what caused [*42] her to go to the police.

The testimony of Jamie Baker's ex-sister-in-law, Lisa Baker, that she was afraid of defendant, saw the brick with the leaflet and saw defendant strike Jamie was all part of the story of control and obsession. Ed Farrage's testimony ("lecture") on defendant's breach of trust was not objected to and was merely cumulative in that the acts were detailed in his other evidence.

We have reviewed the other assorted episodes asserted to display ineffective assistance of counsel and find that they do not amount to such deficiencies, if any, as would warrant reversal.

The three most important witnesses in the State's case-in-chief against the defendant were Edward Farage, Beth Farage and Kerri Mikula. These three witnesses actually tied the defendant to the fires through his own admissions. All three were subjected to vigorous cross-examination by defense counsel as to their credibility. (Tr. 969-1121, 1342-1395, 1552-1578). Defense counsel called 16 witnesses on behalf of the defendant, many attesting to his generosity and character.

Defendant took the stand on his own behalf. He took the opportunity to deny his involvement in the fires. He testified at length to[*43] what he perceived as biases held by the State's witnesses. (Tr. 2322-2443).

Defendant has not shown that defense counsel's performance fell below the standard imposed by *Strickland, supra*, where there exists a reasonable probability that were it not for defense counsel's alleged errors, the result of the trial would have been different. From a review of the whole record, it may be said that defense counsel performed capably in defending a very difficult case in which, in its totality, overwhelming evidence pointed to defendant's involvement in numerous arsons. Once the fires had their effect, Jamie Baker returned to him and the fires stopped.

Assignment of Error V is overruled.

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A SENTENCE WITHOUT CONSIDERING MITIGATION FACTORS MANDATED BY *R.C. 2929.12*.

At trial, the jury found the defendant guilty of five separate felonies of the third degree as well as one aggravated felony of the second degree. The defendant's systematic terrorization by fire affected multiple victims on separate occasions. The fact that a licensed attorney would have instigated such acts of violence, intimidation and terror among such a wide[*44] group of people over a substantial period of time understandably aroused the trial court's righteous indignation.

Defendant contends the trial court's expression outrage at the defendant's behavior indicated a lack of consideration of mitigation factors and therefore amounted to an abuse of discretion in imposing sentence. There is no evidence to show that the trial court did not consider the statutory guidelines. (*R.C. 2929.12(C)*). Although those factors must be considered, they clearly state they "do not control the court's discretion" to sentence within the limits of the law.

State v. Adams (1988), 37 Ohio St. 3d 295, 525 N.E.2d 1361, paragraph three of syllabus, holds that a [HN12] "silent record raises the presumption that a trial court considered the factors contained in *R.C. 2929.12*."

In *Adams*, as in the case at bar, the defendant never requested a presentence report nor did he object to its absence at sentencing. The Supreme Court recognized that ordering a presentence report lies within the sound discretion of the trial court. "Absent a request for a presentence report in accordance with *Crim.R. 32.2*, no grounds for appeal will lie based on a failure to order the report, except under the[*45] most exigent of circumstances." *Adams* paragraph four of syllabus. With the wealth of information before the trial court, we find no such circumstances here nor an abuse of discretion.

In imposing the maximum sentences in the present case, the court is presumed to have considered the following mitigation factors pursuant to [HN13] *R.C. 2929.12(C)*:

(C) The following do not control the court's discretion, but shall be considered in favor of imposing a shorter minimum term of imprisonment for a felony for which an indefinite term of imprisonment is imposed:

(1) The offense neither caused nor threatened serious physical harm to persons or property, or the offender did not contemplate that it would do so;

(2) The offense was the result of circumstances unlikely to recur;

(3) The victim of the offense induced or facilitated it;

(4) There are substantial grounds tending to excuse or justify the offense, though failing to establish a defense;

(5) The offender acted under strong provocation;

(6) The offender has no history of prior delinquency; or criminal activity, or has led a law-abiding life for a substantial time before commission of the present offense;

(7) The offender is likely[*46] to respond quickly to correctional or rehabilitative treatment.

Even a cursory review of these mitigation factors reveals that the defendant had little hope of benefiting from their terms. His convictions justified the jury's conclusion that Keith set upon a deliberate and calculated

plan to destroy the property of a group of people whose sole offense was offering shelter or support to a threatened woman and her children; defendant's personal satisfaction from such obsessive conduct was unjustified by any standards of civilized behavior; his prior history of abusive treatment and brick throwing vandalism does not suggest a clean record; and the repetitive nature of the offenses and the testimony of certain witnesses that it was all "a game" to him established a perverse criminal mentality. The court was justified in determining that defendant was not likely to respond quickly to rehabilitative treatment given his past history and defendant's single exhibition of remorse that he was "extremely sorry about this entire situation. (Tr. 2798).

R.C. 2929.12 and *2929.13* place no obligation on the trial court to state on the record its analysis of factors favoring a longer or shorter sentence. [*47]The statute specifically states in addition that the factors do not control the trial court's discretion. The trial court's sentence fell within the legal limits of its discretion as to each offense as well as its specification that the sentences be served consecutively pursuant to *R.C. 2929.41*. We find no abuse of discretion.

Defendant further argues in his last assignment of error that the trial court became personally involved with the case and was unable to objectively follow the law in sentencing procedures." More specifically, defendant claims the trial court was biased.

A trial judge is presumed not to be biased or prejudiced and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity. *State v. Wagner (1992)*, 80 Ohio App. 3d 88, 93, 608 N.E.2d 852. Moreover, absent extraordinary circumstances, an allegation of judicial bias must be raised at the earliest available opportunity. See *In re Disqualification of Pepple (1989)*, 47 Ohio St. 3d 606, 546 N.E.2d 1298; *Tari v. State (1927)*, 117 Ohio St. 481, 159 N.E. 594, paragraph two of syllabus. This was not done until after the sentencing on this appeal.

Nevertheless, we do find that certain remarks by the trial court following [*48]sentencing were intemperate and inappropriate and are not to be condoned by this Court. The sentencing judge must ever be mindful that he or she is administering a just sentence given the circumstances presented and not venting a personal spleen. However, we cannot say that those comments standing alone, against an otherwise fair record, rise to

the level of judicial bias. Accordingly, as we cannot discern any prejudice to defendant as a result of any action or remark on the part of the trial court, defendant's argument is not well taken.

For the foregoing reasons, we conclude the trial court did not abuse its discretion in imposing the maximum penalties.

Assignment of Error VI is overruled.

Judgment affirmed.

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

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate[*49] pursuant to *Rule 27 of the Rules of Appellate Procedure*.

O'DONNELL, J., CONCURS.

TIMOTHY E. McMONAGLE J., CONCURS

IN JUDGMENT ONLY.

JAMES M. PORTER

PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; *Loc.App.R. 27*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S.Ct.Prac.R. II, Section 2(A)(1)*.

STATE OF OHIO, Plaintiff-appellee vs. JEFFREY C. KEITH, Defendant-appellant
No. 72275

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1998 Ohio App. LEXIS 4990

October 22, 1998, Date of Announcement of Decision

PRIOR HISTORY: [*1] **CHARACTER OF PROCEEDINGS:** Criminal appeal from Court of Common Pleas. Case No. CR-333972.

DISPOSITION: JUDGMENT: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed the judgment from the Cuyahoga County Court of Common Pleas (Ohio), which convicted him of three counts of theft, one count of Medicaid fraud, one count of securing writings by deception, one count of forgery, and one count of uttering a forged document.

OVERVIEW: The charges against defendant arose as a result of his having induced a 92-year-old woman to sign a power of attorney that granted defendant the authority to sell and convey her property, draw checks and make deposits on her bank accounts, sign all papers necessary for medical treatment, and pay all expenses as defendant saw fit. After having her sign the power of attorney, defendant withdrew the entire amount that was in her savings account, lied about her assets on a Medicaid application, and sold her real estate. Defendant was convicted as charged, and the court affirmed the convictions. There was evidence that supported the position that defendant purposefully obtained the woman's signature on the power of attorney in order to deprive her of her money and property. Based on all of the evidence, any rational trier of fact could have found the essential elements of the offenses proven beyond a reasonable doubt. The trial court did not err by refusing to instruct the jury on the durable power of attorney under *Ohio Rev. Code Ann. § 1337.13* because it did not apply, as the woman's was fully competent at the time defendant committed the acts constituting the offenses charged.

OUTCOME: The court affirmed defendant's conviction for three counts of theft, one count of Medicaid fraud, one count of securing writings by deception, one count of forgery, and one count of uttering a forged document.

CORE TERMS: power of attorney, signature, deed, assignments of error, health care, nursing home, purchase agreement, forgery, forged, theft, judgment of acquittal, attorney in fact, deception, legal work, contacted, prepare, jury verdict, fiduciary duty, reasonable doubt, reasonable minds, refusing to instruct, attending physician, announcement, indictment, uttering, manifest, durable, neighborhood, ratification, appearing

LexisNexis(R) Headnotes

Criminal Law & Procedure: Trials: Motions for Acquittal
Criminal Law & Procedure: Witnesses: Credibility
Criminal Law & Procedure: Appeals: Standards of Review: Substantial Evidence

[HN1] Pursuant to *Ohio R. Crim. P. 29(A)*, a trial court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. In considering a motion for judgment of acquittal, the appellate court shall consider the evidence in a light most favorable to the appellee. On review, the appellate court may not reverse the judgment of the trial court as being against the manifest weight of the evidence if, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. In making such a determination, it is not the appellate court's role to weigh the evidence or judge the credibility of the witnesses.

Evidence: Procedural Considerations: Rulings on Evidence

Evidence: Scientific Evidence: Handwriting

Evidence: Testimony: Experts: General Overview

[HN2] Under *Ohio R. Evid. 702*, an expert may be qualified by knowledge, skill, experience, training, or education to give an opinion which will assist the jury to understand the evidence and determine a fact at issue. Handwriting analysis is a proper subject of expert testimony. As with most matters concerning expert

testimony, decisions to admit or prohibit such testimony are committed to the sound discretion of the trial court.

Civil Procedure: Trials: Jury Trials: Jury Instructions: Requests for Instructions

Criminal Law & Procedure: Jury Instructions: Requests to Charge

Estate, Gift & Trust Law: Powers of Attorney: Durable Powers

[HN3] Requested jury instructions need only be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction.

Estate, Gift & Trust Law: Powers of Attorney: Durable Powers

Healthcare Law: Treatment: End-of-Life Decisions: Advance Directives

[HN4] *Ohio Rev. Code Ann. § 1337.13* states: (A)(1) An attorney in fact under a durable power of attorney for health care shall make health care decisions for the principal only if the instrument substantially complies with *Ohio Rev. Code Ann. § 1337.12* and specifically authorizes the attorney in fact to make health care decisions for the principal, and only if the attending physician of the principal determines that he has lost the capacity to make informed health care decisions for himself. Except as otherwise provided in divisions (B) to (F) of this section and subject to any specific limitations in the instrument, the attorney in fact may make health care decisions for the principal to the same extent as the principal could make those decisions for himself if he had the capacity to do so. Except as otherwise provided in divisions (B) to (F) of this section, in exercising his authority, the attorney in fact shall act consistently with the desires of the principal or, if the desires of the principal are unknown, shall act in the best interest of the principal.

COUNSEL: For plaintiff-appellee: STEPHANIE TUBBS JONES, ESQ., Cuyahoga County Prosecutor, STEVE W. CANFIL, ESQ., Assistant County Prosecutor, Cleveland, OH.

For defendant-appellant: JOHN J. GILL, ESQ., Cleveland, OH.

JUDGES: CHARLES D. ABOOD, J. WILLIAM H. VICTOR, P.J., EDWARD J. MAHONEY, J., CONCUR.

OPINION BY: CHARLES D. ABOOD

OPINION

JOURNAL ENTRY AND OPINION

CHARLES D. ABOOD, J.:

This is an appeal from a judgment of the Cuyahoga County Court of Common Pleas which, following a jury verdict, found appellant Jeffrey Keith guilty of three counts of theft, one count of Medicaid fraud, one count of securing writings by deception, one count of forgery and one count of uttering a forged document. In support of his appeal, appellant sets forth the following assignments of error:

ASSIGNMENT OF ERROR NO. I

THE JURY'S VERDICT OF GUILTY ON ALL COUNTS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION(S) FOR ACQUITTAL ON EACH COUNT OF THE INDICTMENT PURSUANT TO *CRIMINAL RULE 29* ON THE GROUNDS[*2] THAT THE EVIDENCE PRESENTED WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT APPELLANT AS CHARGED

ASSIGNMENT OF ERROR NO. III

IT WAS ERROR FOR THE TRIAL COURT TO ALLOW THE STATE'S FORENSIC EXPERT WITNESS' TESTIMONY AND HIS WRITTEN FINDINGS TO BE CONSIDERED BY THE JURY

ASSIGNMENT OF ERROR NO. IV

IT WAS ERROR FOR THE TRIAL COURT NOT TO CHARGE THE JURY WITH *SECTION 1337.01 ET SEQ. OF THE REVISED CODE*.

The facts that are relevant to the issues raised on appeal were established by the testimony of nineteen witnesses over seven days of trial. In early 1991, Elizabeth Fuchs, then ninety-two years of age, contacted appellant, whom she knew from having been raised in her neighborhood, because she thought she wanted to write a new will. Nothing became of the will at the time, but on May 3, 1991, appellant went to Fuchs' house and asked her to accompany him to his bank. While there, he presented her with "a bunch of papers" for her signature. Among those papers was a power of attorney that granted appellant the authority to sell and convey Fuchs' real and personal property, draw checks and make deposits on her

bank accounts, sign all papers necessary for medical treatment and[*3] admission to an extended care nursing facility, and pay all expenses as appellant saw fit. When Fuchs questioned why she had to sign the papers, appellant never gave her a real answer and ultimately told her that if she signed the documents, he would give her a "milkshake."

In February 1992, Fuchs was hospitalized for ten days after she fell and broke her hip. Her personal physician, David Eberlien, M.D., testified that at the time of her admission to the hospital, Fuchs had full possession of her faculties. At the end of her hospital stay, Fuchs agreed to go to a nursing home on Eberlien's representation that she would stay there only until she could walk again and then she would return to her home. At the time, Eberlien met appellant and learned from him that Fuchs had entrusted the management of her finances and possessions to him.

On February 24, 1992, appellant went to Fuchs' bank and withdrew the entire \$31,156.17 that was in her savings account and caused the money to be deposited into an account in his name, claiming that it was payment for legal services he had rendered to Fuchs over the years. At about the same time appellant used his power of attorney to make arrangements[*4] to have Fuchs stay at a nursing home.

Frankie Hart, an eligibility specialist for the Department of Human Services, testified that applicants for Medicaid assistance must verify their need by meeting certain eligibility requirements. Chief among those requirements is that the applicant have no more than \$1,500 in assets. To show the need for Medicaid assistance, the applicant must list any assets disposed of during the preceding two and one-half years. Appellant, using his power of attorney, filed Fuchs' Medicaid application. In that application, he failed to list the transfer of the \$31,156.13 he claimed he took as attorney fees. Hart testified that that amount should have been listed in the Medicaid application.

In March of 1992, appellant contracted with a friend, David Renick, to purchase Fuchs' house and its contents for a purchase price of \$25,000. The state presented evidence from Betty Long, an appraiser who worked for a company that performed property valuations for Cuyahoga County, that current selling prices for comparable houses in Fuchs' neighborhood led her to conclude that appellant's price was far too low for the property. Long compared comparable properties[*5] in Fuchs' neighborhood and appraised Fuchs' house at \$49,199.

Appellant retained the services of a friend, attorney Judith Lehnowsky, to prepare a purchase agreement and deed for the property. Lehnowsky, who normally charged \$50 to prepare a deed, admitted receiving \$3,300 to prepare the purchase agreement and deed. She could not specifically recall why she charged so much, but speculated that she did so because she was involved in preparing income tax returns for clients and did not have time to do other work. She thought if she set an exorbitant price, appellant would find another attorney to prepare the deed.

The deed, notarized by appellant, bears Fuchs' signature and that of two witnesses: Edward Witt, a friend of appellant and Renick's boss, and Christine Dezo, who some witnesses thought was appellant's wife or girlfriend, but who appellant characterized as his "daughter," despite admitting they were not really related. The witness portion of the deed states the year as 1992, but contains no specific date. Appellant's signature as notary is dated April 6, 1992. Renick testified that he was not present when Fuchs signed the deed.

Witt said he had had no prior discussions[*6] with appellant about witnessing the deed before appellant came to his place of employment and, while Dezo and an elderly woman remained in the car, showed Witt the deed and asked him to sign it. Appellant told Witt that the signature on the deed was that of Elizabeth Fuchs who was the elderly woman in the car. Witt admitted he did not witness Fuchs' signature and never met her. When asked why he agreed to sign his name as a witness to Fuchs' signature when he admitted he did not actually see her sign the deed, Witt said he signed his name as a witness based on his friendship with appellant and his knowledge that appellant was a lawyer.

Shortly after Renick took possession of Fuchs' house, Fuchs' long-time friend and neighbor, Dorothy Ruddy, saw men moving things into Fuchs' house. This surprised her because she knew Fuchs intended to return to her house after her convalescence. Ruddy telephoned appellant and learned that he sold the house without putting it on the market. Appellant said the property sold quickly, so he did not tell anyone, including Fuchs, about the sale. When Ruddy asked appellant when he planned to tell Fuchs about the sale, he told her it was not up to him, that[*7] he would leave it up to a social worker at the nursing home.

When Fuchs later learned appellant sold her house, she asked Ruddy if she could find a wedding ring and some photographs that had been in the house. These items were turned over to Fuchs. Fuchs also testified that she hid a total of \$9,000 in the house - \$4,500 under the dining

room furniture and \$4,500 in a cookie box. Renick said he did not find any cash in the house.

In late 1994, Fuchs spoke with Roberta Knoepp, the new director of social service at Fuchs' nursing home. Knoepp characterized Fuchs' condition as surprising for a woman her age, saying Fuchs was alert, oriented, and had excellent long and short-term memory. In her conversation with Fuchs, Knoepp learned Fuchs had some concerns about the power of attorney and that her house and possessions had been taken. Knoepp suggested that Fuchs revoke the power of attorney, but Fuchs refused to do so because she was frightened. After trying as many as thirty times to have Fuchs revoke the power of attorney, Knoepp finally succeeded. On September 21, 1995, appellant's attorney received Fuchs' certified letter informing appellant that his power of attorney had been[*8] revoked. Knoepp then contacted the Cuyahoga County Prosecutor's office and told them appellant had taken Fuchs' house, money, and possessions.

David Doughten, an attorney formerly hired to represent appellant in this matter, testified that shortly before trial, appellant had delivered to his attorneys photo copies of two letters which he claimed to be a ratification of the power of attorney and a ratification of the house purchase agreement. The documents were significant to appellant's defense because his attorneys were trying to find evidence that would verify the existence of appellant's power of attorney. The defense produced both letters to the state the day after receiving them.

Almost immediately, Doughten became uneasy about both letters and contacted Phillip Bouffard, an expert in document examination, to assess their authenticity.

As it happened, the state had previously retained Bouffard to examine the documents. Bouffard found the signatures on the documents were identical, a physical impossibility. Both signatures contained the exact same hyphenation appearing beneath the signature, yet the separate letters had been typed using different fonts, so the hyphenation should[*9] not have matched. Bouffard theorized that at least one of the signatures had been photocopied and transposed onto another document. Because he did not have original copies of either document, he could not rule out the possibility that both were forgeries.

After receiving Bouffard's conclusions, defense counsel obtained their own analysis of the documents. The defense expert found subtle differences from Bouffard's conclusions, but agreed with Bouffard's ultimate conclusion that Fuchs' signature had been forged on the documents. As a result of these findings, both Doughten

and his co-counsel were permitted to withdraw from representing appellant on grounds that they would likely be called to give testimony at trial.

Witt testified that appellant contacted him about one month before trial. Witt said he and appellant had totally different recollections of what transpired when Witt signed the deed. Appellant told Witt he recalled picking Witt up and driving him out to a nursing home where he witnessed Fuchs' signature. Witt said appellant's version was "inaccurate" and he would not testify to appellant's recollection of events.

Appellant testified and told the jury that in addition[*10] to his law degree, he had a master's degree in social work. He said he began doing legal work for Fuchs in 1985 and often consulted with her about possible placement in a nursing home. In May 1991, after extensive discussion with Fuchs, he prepared a will and a power of attorney. Fuchs signed both documents at her bank, witnessed by the bank manager and a bank employee. Shortly after Fuchs' fall, but before her transfer to the nursing home, appellant consummated the sale of Fuchs' house and closed her savings account. He admitted taking all the proceeds for his personal benefit. Appellant claimed Fuchs owed him that sum for past legal work he performed for her, yet he could not substantiate his legal fees through billing records and admitted that some of that legal work consisted of driving Fuchs on errands. For that work, he charged his standard fee of \$150 per hour. Despite characterizing his work for Fuchs as legal work, appellant admitted he did not report any of those fees on his tax returns, nor did he list his occupation as "attorney."

Appellant admitted the documents purporting to be Fuchs' ratification of the power of attorney and the purchase agreement were fabrications. [*11] He further admitted lying under oath during a deposition in another legal proceeding against him.

Appellant defended the sales price of Fuchs' home by describing its poor condition and the amount of work needed to make it habitable. He claimed he asked Renick to obtain two different appraisals on the house in order to justify the purchase price, but knew Renick did not obtain any appraisals other than that required by the bank writing Renick's mortgage.

Appellant also defended the amount of money he paid attorney Lehnowsky for preparing the purchase agreement and deed, claiming her outstanding reputation justified her fee.

At the conclusion of the trial, the jury found appellant guilty on all seven counts of the indictment. The court

then entered judgment on the verdict and found appellant guilty of theft of the \$31,156.17 from the bank account, theft of the money that Fuchs had left in the house, theft of the real property, Medicaid fraud, securing writings by deception, forgery as to the deed and uttering the forged deed.

Appellant's first and second assignments are interrelated in that they depend in part on the validity of the power of attorney signed by Fuchs. Appellant [*12] contends that the acts he performed were authorized by the power of attorney, that the power of attorney constitutes a complete defense to all the charged crimes and, therefore, the court should have granted his *Crim.R. 29(A)* motion for judgment of acquittal at the close of the state's case and that the jury verdict of guilt on all counts is against the manifest weight of the evidence. The state maintains that the power of attorney is not a defense to the charged offenses because appellant invalidly obtained the power of attorney and, even if that were not the case, appellant exceeded the scope of the power of attorney by breaching his fiduciary duty to Fuchs.

The trial court's standard for granting a motion for a judgment of acquittal is set forth in *State v. Bridgeman (1978)*, 55 Ohio St. 2d 261, 381 N.E.2d 184, in which the syllabus states:

[HN1] "Pursuant to *Crim.R. 29(A)*, a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

In considering a motion for judgment of acquittal, the reviewing court [*13] shall consider the evidence in a light most favorable to the appellee. *Jackson v. Virginia (1979)*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781; *State v. Fyffe (1990)*, 67 Ohio App. 3d 608, 613, 588 N.E.2d 137.

On review, this court may not reverse the judgment of the trial court as being against the manifest weight of the evidence if, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the offense of assault proven beyond a reasonable doubt. *State v. Jenks (1991)*, 61 Ohio St. 3d 259, 574 N.E.2d 492. In making such a determination, it is not our role to weigh the evidence or judge the credibility of the witnesses. *State v. Clay (1973)*, 34 Ohio St. 2d 250, 298 N.E.2d 137.

As to the power of attorney, there was clearly evidence presented to the jury that supported the state's position

that appellant purposefully obtained Fuchs' signature on the power of attorney in order to deprive Fuchs of her money and property so that he could exert control over them. Although Fuchs' signature on the power of attorney is undisputed, the state presented evidence to show that Fuchs did not understand[*14] what she had signed and that appellant did not explain the "bunch of papers" to her.

This court has reviewed all the evidence that was before the trial court and upon consideration thereof and the law finds that at the conclusion of the state's case reasonable minds could reach different conclusions as to whether a) on the three counts of theft appellant knowingly obtained control over Fuchs' property either without valid consent being given by her or in a manner that was beyond the scope of any express or implied consent that was given by her, *R.C. 2913.02*; b) on the count of obtaining writings by deception appellant caused Fuchs' to execute the power of attorney, the purchase agreement for her house and the deed to the house by deception, *R.C. 2913.43(A)*; c) on the count of Medicaid fraud appellant knowingly made a false statement for use in obtaining Medicaid benefits, *R.C. 2913.40(B)*; and d) on the counts of forgery and uttering, appellant forged Fuchs' signature on the deed and thereafter uttered that forged signature, *R.C. 2913.31*.

This court finds further that when considering all of the evidence that was before the trial court and the law, any rational trier of fact could[*15] have found the essential elements of all of the above offenses proven beyond a reasonable doubt.

Accordingly, appellant's first and second assignments of error are found not well taken.

In his third assignment of error, appellant argues that the court abused its discretion by permitting the state's forensic expert, Phillip Bouffard, to testify that signatures appearing on letters by Fuchs purporting to ratify the power of attorney and attorney fees were fabrications. On direct examination, Bouffard concluded that at least one of the signatures appearing on those documents had to be a forgery since both signatures were identical. On cross-examination, Bouffard conceded that observations in his report regarding "the downward extender" on the letter "Z" in Fuchs' first name were incorrect, and he withdrew the portion of this report that stated otherwise. Because of this concession, appellant maintains the court should have stricken all of Bouffard's testimony.

[HN2] Under *Evid.R. 702*, an expert may be qualified by knowledge, skill, experience, training, or education to give an opinion which will assist the jury to understand the evidence and determine a fact at issue. *State v.*

Wogenstahl [*16](1996), 75 Ohio St. 3d 344, 362, 662 N.E.2d 311. Handwriting analysis is a proper subject of expert testimony. See *State v. Loza* (1994), 71 Ohio St. 3d 61, 76-77, 641 N.E.2d 1082. As with most matters concerning expert testimony, decisions to admit or prohibit such testimony are committed to the sound discretion of the trial court. See *State v. Williams* (1996), 74 Ohio St. 3d 569, 576, 660 N.E.2d 724.

The court did not abuse its discretion by permitting the jury to consider Bouffard's testimony because the withdrawn portion of his report did not affect his ultimate conclusion that the signatures were forgeries. Bouffard's request to withdraw a portion of his report went to the weight of the evidence, not its admissibility. *Lainhart v. Southern Ohio Fabricators, Inc.* (1990), 61 Ohio App. 3d 432, 435, 572 N.E.2d 846. In any event, appellant admitted both exhibits were totally fabricated documents, so his argument is harmless at worst. Accordingly, we find the third assignment of error is not well-taken.

In his fourth assignment of error, appellant asserts that the court erred by refusing to instruct the jury that *R.C. 1337.13*, dealing with a durable power of attorney for health[*17] care, provided an absolute defense to all charges in the indictment.

The court gave the following jury instruction on fiduciary duty:

What is a power of attorney. A power of attorney maybe [sic] defined as a written authorization to an agent to perform specified acts on behalf of his principal. It is an agency created by a formal instrument in writing and for most purposes is not required although certain acts must be authorized by such written power. Under a power of attorney or when a power of attorney is exercised you are instructed that a fiduciary relationship exists between the principal, Mrs. Fuchs, and in this case and [sic] the agent under the power of attorney, Mr. Keith, in this case.

The fiduciary relationship imposes a duty on the agent that the agent within the limits of the agency deal fairly and honestly with his principal and imposes the responsibility to disclose any conflicts between the principal's interest and the agent's interest, which might make the agent act in his own best interest at the expense or the detriment of the principal.

Appellant's argument lacks merit for two reasons. First, as appellant concedes, *R.C. 1337.13* did not come[*18] into effect until October 1991, after the date Fuchs signed the power of attorney. He cannot claim protection

under a statute that did not exist at the time the power of attorney arose.

Second, even if *R.C. 1337.13* had been in effect, the court did not err by refusing to instruct the jury on the durable power of attorney since it had no application under the facts of the case. [HN3] Requested jury instructions need only be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St. 3d 585, 591, 575 N.E.2d 828, quoting Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed. 1991) 860, Section 36:2.

[HN4] *R.C. 1337.13* states:

(A)(1) An attorney in fact under a durable power of attorney for health care shall make health care decisions for the principal only if the instrument substantially complies with *section 1337.12 of the Revised Code* and specifically authorizes the attorney in fact to make health care decisions for the principal, and only if the attending physician of the principal determines that he has lost the capacity to make informed [*19] health care decisions for himself. Except as otherwise provided in divisions (B) to (F) of this section and subject to any specific limitations in the instrument, the attorney in fact may make health care decisions for the principal to the same extent as the principal could make those decisions for himself if he had the capacity to do so. Except as otherwise provided in divisions (B) to (F) of this section, in exercising his authority, the attorney in fact shall act consistently with the desires of the principal or, if the desires of the principal are unknown, shall act in the best interest of the principal. (emphasis added).

R.C. 1337.13 (A) has no application to this case since it relates to health care decisions only and applies only in the event the "attending physician for the principal determines that he has lost the capacity to make informed health care decisions for himself." The evidence showed Fuchs' attending physician found her fully competent at the time appellant committed the acts constituting the offenses in this case. As a matter of law, *R.C. 1337.13* could not apply. The court properly instructed the jury in general terms on fiduciary duty. Accordingly, this[*20] court finds that the court did not err by refusing to instruct the jury on *R.C. 1337.13* and appellant's fourth assignment of error is without merit.

Upon consideration whereof, this court finds that substantial justice has been done the party complaining,

and the judgment of the Cuyahoga County Court of Common Pleas is affirmed.

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

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

WILLIAM H. VICTOR, P.J.

EDWARD J. MAHONEY, J., CONCUR.

CHARLES D. ABOOD

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless [*21]a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also *S. Ct. Prac.R. II, Section 2(A)(1)*.

STATE OF OHIO, Plaintiff-Appellee vs. JEFFREY C. KEITH, Defendant-Appellant
NOS. 76469, 76479 & 76610

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2000 Ohio App. LEXIS 3757

August 17, 2000, Date of Announcement of Decision

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDING: Criminal appeals from Common Pleas Court. Case No. CR-350831.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant sought review of his forgery and uttering convictions in Cuyahoga County (Ohio) Court of Common Pleas, claiming ratification was a defense, insufficient evidence supported the convictions, and trial judge failed to give a mistake of fact instruction.

OVERVIEW: Appellant, an attorney, was convicted of various forgery-related crimes for forging a will and signatures on check to beneficiaries. The court affirmed his convictions. Even though appellant was in an agency-like relationship with decedent and beneficiaries, he could still be convicted of forgery even where the decedent ratified his act. Appellant uttered, or possessed with the purpose to utter, checks to beneficiaries that he knew had forged signatures. Any evidence of ratification was irrelevant to the criminal prosecution. Sufficient evidence supported the uttering charges. Appellant's girlfriend testified appellant told her he planned to "strike it rich," admitted he manufactured a fraudulent will and actually showed her the document. A handwriting expert testified the will was typed on a typewriter used by appellant. Mistake of fact instruction was properly denied where beneficiaries testified appellant did not have permission to forge their names on checks or use funds to finance litigation.

OUTCOME: Convictions affirmed because ratification was not a defense, sufficient evidence supported the convictions, and mistake of fact instruction was properly denied where beneficiaries testified appellant did not have permission to forge their names on checks.

CORE TERMS: assignments of error, forgery, forged, ratification, beneficiary, uttering, jury instructions, trier

of fact, girlfriend, manifest, probate, mistake of fact, closing argument, stand trial, necessitated, announcement, continuance, prosecutor, complains, signature, jury to convict, time limit, time period, wrongful death, judicial notice, exclusion of evidence, sound discretion, sufficient evidence, reasonable inferences, statutory requirement

LexisNexis(R) Headnotes

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

Criminal Law & Procedure: Appeals: Standards of Review: General Overview

Evidence: Procedural Considerations: Exclusion & Preservation by Prosecutor

[HN1] The admission or exclusion of evidence rests within the sound discretion of the trial court. Therefore, an appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. A reviewing court should not substitute its judgment for that of the trial court.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Forgery: Elements

[HN2] A person may be convicted of forgery even where the person whose name was forged ratified the act. Ratification may relieve civil liabilities to others on the instrument, but it cannot affect the rights of the state.

Criminal Law & Procedure: Appeals: Remands & Remittiturs

Criminal Law & Procedure: Appeals: Standards of Review: General Overview

Evidence: Procedural Considerations: Weight & Sufficiency

[HN3] *Ohio Const. art. IV, § 3(B)(3)* authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an

appellate court has the authority and the duty to weigh the evidence and determine whether the findings of the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial.

Criminal Law & Procedure: Double Jeopardy: Double Jeopardy Protection: Acquittals

Criminal Law & Procedure: Appeals: Standards of Review: Substantial Evidence

Evidence: Procedural Considerations: Weight & Sufficiency

[HN4] The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. Unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal; i.e., invocation of the double jeopardy clause as a bar to relitigation.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Forgery: General Overview

Criminal Law & Procedure: Appeals: Standards of Review: Substantial Evidence

Evidence: Procedural Considerations: Weight & Sufficiency

[HN5] In determining if the judgment is against the manifest weight of the evidence the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Moreover, it is important to note that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. Hence, the court must accord due deference to those determinations made by the trier of fact.

Civil Procedure: Trials: Jury Trials: Jury Instructions: General Overview

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

Civil Procedure: Appeals: Standards of Review: Substantial Evidence: Sufficiency of Evidence

[HN6] Ohio law is clear that it is within the sound discretion of the trial court to determine whether sufficient evidence was presented to require a jury instruction. Once again, a reviewing court will not substitute its judgment for that of the trial court absent an abuse of discretion.

Criminal Law & Procedure: Trials: Closing Arguments: Fair Comment & Fair Response

Criminal Law & Procedure: Appeals: Reversible Errors: General Overview

Legal Ethics: Prosecutorial Conduct

[HN7] The standard in Ohio for a prosecutor's conduct to constitute reversible error is that it must deprive the defendant of a fair trial. Specifically concerning comments made during closing argument, a prosecutor is afforded wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom.

Criminal Law & Procedure: Pretrial Motions: Speedy Trial: Statutory Right

[HN8] The time limit in which to bring a felony charge to trial is 270 days after the accused's arrest. *Ohio Rev. Code Ann. § 2945.71(C)(2)*. This time limit can only be extended by specifically defined statutory exceptions.

Criminal Law & Procedure: Pretrial Motions: Speedy Trial: Statutory Right

[HN9] See *Ohio Rev. Code Ann. § 2945.72*.

COUNSEL: For plaintiff-appellee: William D. Mason, Esq., Cuyahoga County Prosecutor, BY: Kimberly Mahaney, Esq., Assistant County Prosecutor, Cleveland, Ohio.

For defendant-appellant: Michael L. Wolpert, Esq., JEROME SILVER & ASSOCIATES, Cleveland, Ohio. Jeffrey C. Keith, Pro Se, Grafton, Ohio.

JUDGES: MICHAEL J. CORRIGAN, JUDGE, TERRENCE O'DONNELL, P.J., and TIMOTHY E. McMONAGLE, J., CONCUR.

OPINION BY: MICHAEL J. CORRIGAN

OPINION

JOURNAL ENTRY and OPINION

MICHAEL J. CORRIGAN, J.:

Defendant-appellant, Jeffrey C. Keith, (hereinafter "Keith") appeals the judgment of the trial court wherein the jury returned a verdict of guilty on five of the nine counts before them. For the following reasons, Keith's appeal is not well taken.

Keith, an attorney at all relevant times, was indicted for his involvement with Christine Deszo and her family. Keith had dated Ms. Deszo on and off for over 13 years. Throughout their relationship, Keith never lived with nor became engaged or married to Ms. Deszo. Keith never adopted any of her three children. He also "dated" five

other women during this time period. [*2] Ms. Deszo did sign a power of attorney to Keith in 1990 when she suffered a heart attack and triple by-pass surgery.

Almost a year after the relationship had ended, Ms. Deszo's son, Joe Deszo, was electrocuted while swimming by a dock at Put-in-Bay during the summer of 1993. Keith immediately took control of the legalities of the situation including representing the estate in a wrongful death suit and applying for the death proceeds on two separate life insurance policies.

The beneficiaries never received the checks from the life insurance companies. Keith took both checks and forged the beneficiaries' names without their permission. Keith then deposited the proceeds in his bank account. Keith claimed the monies were deposited in his account to finance the expenses of the wrongful death suit. During this time, Keith also disclosed to the Deszo family that he had discovered Joe Deszo's Will in his safety deposit box which happened to name Keith as a one-half beneficiary of the estate.

Dr. Phillip Bouffard, a renowned handwriting expert, testified that the signatures on the back of the insurance checks belonged to Keith. The expert also opined that the Will in question had been typed[*3] on Keith's typewriter and that Joe Deszo's signature on the document was a forgery. Further, one of Keith's girlfriends testified that within days of Joe Deszo's death, Keith was talking about "making it big" and disclosed his plan to back-date a fake Will.

Keith raises six assignments of error from the trial proceedings.

The first and fifth assignments of error have common issues of law and fact and shall be considered jointly. The first assignment of error states:

I. THE TRIAL COURT ERRED IN LIMITING THE DEFENDANT'S CASE IN CHIEF REGARDING FINANCIAL AFFAIRS AMONG THE PARTIES.

The fifth assignment of error states:

V. THE TRIAL COURT ERRED IN FAILING TO GIVE EFFECT TO ITS INITIAL GRANT OF JUDICIAL NOTICE.

These assignments of error basically involve the trial court's decisions to limit or exclude evidence. The

standard for such is well defined in Ohio. " [HN1] The admission or exclusion of evidence rests within the sound discretion of the trial court." *State v. Jacks (1989)*, 63 Ohio App. 3d 200, 207, 578 N.E.2d 512. Therefore, "an appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the[*4] lower court abused its discretion." *State v. Finnerty (1989)*, 45 Ohio St. 3d 104, 107, 543 N.E.2d 1233. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. A reviewing court should not substitute its judgment for that of the trial court. See, generally, *State v. Jenkins (1984)*, 15 Ohio St. 3d 164, 473 N.E.2d 264. *Finnerty*, 45 Ohio St. 3d at 107-108.

In the first assignment of error, Keith complains that he was prevented from eliciting testimony about the agency-like relationship that existed between him and the Deszos. Keith argues that this testimony would have lead to "further acquittals". This argument taken to its logical conclusion means that the beneficiaries of the insurance proceeds would have condoned the forgery had they known Keith intended to forge their names. The law in Ohio on subsequent ratification of offenses is quite clear. In *State v. Huggins, 1989 Ohio App. LEXIS 242* (Jan. 24, 1989), Washington County App. No. 87 CA 11, unreported, the court held that [HN2] a person may be convicted of forgery even where the person whose name was forged ratified the act. The court reasoned that ratification may[*5] relieve civil liabilities to others on the instrument, but it cannot affect the rights of the state. *1989 Ohio App. LEXIS 242* at *9. Under the facts herein, the crimes were committed and complete when Keith uttered or possessed with purpose to utter, the checks which he knew were forged. Once the crime was committed, it was beyond the power of any private person to bar prosecution or conviction for the crime. *1989 Ohio App. LEXIS 242* at *4.

Keith also alleges the trial court erred by initially granting judicial notice relative to the probate agreement and subsequently disallowing any reference to Probate or Court of Appeals proceedings by granting the state's motion in limine. The same rationale holds true for this alleged error as it did for the previous argument. Any evidence of ratification, via probate agreement or otherwise, is irrelevant to a criminal prosecution. *Huggins, 1989 Ohio App. LEXIS 242* at *8.

Accordingly, any testimony or probate documents regarding a long-standing ratification agreement with the complaining witnesses to act on their behalf was irrelevant to forgery and uttering charges. These assignments of error are without merit.

The second assignment of error states:

II. THE TRIAL COURT ERRED[*6] IN NOT SETTING ASIDE UNSUPPORTED VERDICTS.

Under this assignment of error Keith argues that since there was insufficient proofs of facts for a jury to convict on forgery, the related offense of uttering should have been converted to an acquittal. [HN3] *Article IV, Section 3(B)(3) of the Ohio Constitution* authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and the duty to weigh the evidence and determine whether the findings of * * * the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. City of Cleveland (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.*

[HN4] The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. The United States Supreme Court recognized these distinctions in *Tibbs v. Florida (1982), 457 U.S. 31, 72 L. Ed. 2d 652, 102 S. Ct. 2211*, where the Court held that[*7] unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal; i.e., invocation of the double jeopardy clause as a bar to relitigation. *Id. at 43.*

Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin (1983), 20 Ohio App. 3d 172, 485 N.E.2d 717*, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated:

There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. [HN5] The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

Moreover, it is important to note that the weight[*8] of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass*

(1967), 10 Ohio St. 2d 230, 227 N.E.2d 212. Hence, we must accord due deference to those determinations made by the trier of fact.

In the instant case, there was sufficient circumstantial and direct evidence for the jury to convict on uttering charges, regardless of their finding on the forgery counts. Under *R.C. 2913.31(A)(3)* no person, with the purpose to defraud, shall "utter any writing that the person knows to have been forged." There is no statutory requirement that the person making use of the forged document (uttering) must also be found to be the forger of said document.

Factually, there was direct testimony from Keith's girlfriend that Keith told her he planned to "strike it rich" relating to Joe Deszo's tragic death. Keith admitted to his girlfriend that he manufactured a fraudulent Will and actually showed her the document. There was testimony from a handwriting expert that the signatures were forged by Keith and that his typewriter was used to type the Will. Circumstantially, Keith would not have been entitled to any[*9] of the wrongful death proceeds without being named as a beneficiary in Joe Deszo's Will. Reviewing this type of evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of uttering proven beyond a reasonable doubt. There was sufficient evidence that Keith knew or should have known he was presenting a forged Will.

The third assignment of error states:

III. THE TRIAL COURT ERRED IN FAILING TO GIVE SUFFICIENT JURY INSTRUCTIONS.

While somewhat convoluted in his brief, it seems that Keith is arguing that the jury instructions were insufficient in that they failed to instruct on consent, mistake of fact, and character evidence. [HN6] Ohio law is clear that it is within the sound discretion of the trial court to determine whether sufficient evidence was presented to require a jury instruction. *State v. Wolons (1984), 44 Ohio St. 3d 64, 541 N.E.2d 443.* Once again, a reviewing court will not substitute its judgment for that of the trial court absent an abuse of discretion. *Jenkins, supra.*

As to the lack of a mistake of fact and consent jury instruction, the record is quite[*10] clear that no such evidence was presented at trial to justify a jury instruction on these defenses. In fact, the opposite is true. The testimony from two different beneficiaries testified that Keith did not have permission to forge their name on the insurance checks or use the funds to finance

litigation. Keith makes no references to the record to support his argument. As enunciated earlier, ratification is not a defense to forgery. *Huggins, supra*. Since evidence of ratification is irrelevant to any of the elements of the crimes Keith was charged, it was totally proper for the trial court not to instruct the jury on the defenses of consent and mistake of fact.

Lastly, Keith complains that the trial court should have given an instruction about character evidence not being admissible to show propensity to commit an offense. A review of the record clearly shows that Keith himself opened the door regarding his relationship with a witness/former girlfriend. The state even objected to Keith's testimony at trial to "save this witness from himself". A defendant cannot claim error as to the "fruits of his own inquiry". *State v. Sierra, 1981 Ohio App. LEXIS 13502* (July 30, 1981), Cuyahoga App. Nos. 42829, 42829, 42951, [*11] unreported. Accordingly, this assignment of error is without merit.

The fourth assignment of error states:

IV. THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER PREJUDICIAL COMMENTS IN CLOSING ARGUMENT.

[HN7] The standard in Ohio for a prosecutor's conduct to constitute reversible error is that it must deprive the defendant of a fair trial. *State v. Apanovitch (1993), 33 Ohio St. 3d 19, 24, 514 N.E.2d 394*. Specifically concerning comments made during closing argument, a prosecutor is afforded wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom. *State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492; State v. Stephens (1970), 24 Ohio St. 2d 76, 82, 263 N.E.2d 773*.

The only closing argument comments Keith complains of in his brief are that the prosecutor alluded to him being incarcerated, that he lengthened the trial with numerous witnesses, and that his representation of the wrongful death lawsuit was less than zealous. Once again the record is abundantly clear that Keith himself elicited testimony from witnesses relative to his incarceration and actually waived[*12] his constitutional right when questioned by the court whether he wanted to continue with that line of questioning. The comments regarding the number of witnesses and Keith's lawyering skills in the civil case were proper under *Jenks, supra*, and require no further analysis.

The sixth assignment of error states:

VI. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL.

This assignment of error, like the others, is without merit because the record is quite clear that Keith himself facilitated most of the delays. Keith requested several trial continuances over the state's objections and filed numerous pre-trial motions. In addition, a psychiatric evaluation was conducted to determine if Keith was competent to stand trial.

[HN8] The time limit in which to bring a felony charge to trial is 270 days after the accused's arrest. *R.C.2945.71(C)(2)*. This time limit can only be extended by specifically defined statutory exceptions. [HN9] *R.C.2945.72* spells out these exceptions as follows:

The time within which an accused must be brought to trial, or, in the case of felony, to preliminary[*13] hearing and trial, may be extended only by the following:

(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

(C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;

(D) Any period of delay occasioned by the neglect or improper act of the accused;

(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

(G) Any period during[*14] which trial is stayed pursuant to an express statutory requirement, or pursuant

to an order of another court competent to issue such order;

(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion;

(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending.

A review of the trial court's docket in this case reveals that several of the provisions extending the time in which an accused must be brought to trial were utilized by the parties. The psychiatric evaluation and Keith's numerous pre-trial motions tolled the statutory time period proscribed for a speedy trial in *R.C. 2945.71(C)(2)*.

All assignments of error having been considered and ruled upon, the judgment of the trial court is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's [*15]conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MICHAEL J. CORRIGAN

JUDGE

TERRENCE O'DONNELL, P.J., and

TIMOTHY E. McMONAGLE, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac. R. II, Section 2(A)(1)*.

State of Ohio, Appellee v. Angela Montgomery, Appellant
Court of Appeals No. H-02-039

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, HURON COUNTY

2003 Ohio 4095; 2003 Ohio App. LEXIS 3652

August 1, 2003, Decided

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Montgomery*, 100 Ohio St. 3d 1508, 2003 Ohio 6161, 799 N.E.2d 187, 2003 Ohio LEXIS 3243 (Ohio, Nov. 26, 2003)

PRIOR HISTORY: [**1] Trial Court No. CRI-02-381.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant pled guilty to two counts of non-support in violation of *Ohio Rev. Code Ann. § 2919.21(B)*, both fifth degree felonies. Other charges were dismissed. The Huron County Court of Common Pleas (Ohio) sentenced defendant to 60 days in jail and five years of community control. The trial court then denied defendant's motions for a new trial, to withdraw plea, and to stay execution of sentence. Defendant appealed.

OVERVIEW: Defendant argued that the trial court erred in denying her motions and in finding her guilty of violating of *Ohio Rev. Code Ann. § 2919.21(B)* since the underlying child support order in her divorce case did not contain a child support calculation worksheet. Defendant claimed that the child support order was void and, thus, could not have been the basis of a criminal non-support action. The appellate court agreed that the trial court erred in the original divorce by not including a child support worksheet. However, there was no question that the trial court had subject matter jurisdiction over defendant's divorce and jurisdiction over the parties. Defendant's assertion regarding the lack of a child support computation work sheet did not allege a jurisdictional error. Thus, the stipulated judgment entry was not void but voidable. As a voidable judgment, it had the effect of a proper order unless it was successfully challenged through a direct attack. Defendant did not collaterally attack the support order until after she was sentenced, and the trial court properly denied her motion for new trial and to withdraw her guilty plea.

OUTCOME: The judgment was affirmed.

CORE TERMS: withdraw, void, child support, voidable, non-support, computation, plea of guilty, support order, new trial, assignment of error, void judgment, subject matter jurisdiction, sentenced, violating, worksheet, sentence, guilty plea, work sheet, imposition of sentence, manifest injustice, voidable judgment, inclusion, collaterally, notice

LexisNexis(R) Headnotes

Criminal Law & Procedure: Preliminary Proceedings: Entry of Pleas: Changes & Withdrawals
Criminal Law & Procedure: Guilty Pleas: Changes & Withdrawals
Criminal Law & Procedure: Sentencing: Suspension
[HN1] See *Ohio R. Crim. P. 32.1*.

Criminal Law & Procedure: Preliminary Proceedings: Entry of Pleas: Changes & Withdrawals
Criminal Law & Procedure: Guilty Pleas: Changes & Withdrawals
[HN2] A defendant who seeks to withdraw a plea of guilty after the imposition of sentence must establish the existence of manifest injustice.

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Actions: General Overview
Civil Procedure: Judgments: Relief From Judgment: Void Judgments
[HN3] A judgment rendered by a court without subject matter jurisdiction is void ab initio. A void judgment may be challenged at any time.

Civil Procedure: Judgments: Relief From Judgment: Void Judgments
[HN4] Although a void judgment may be subject to collateral attack, a judgment that is merely voidable is not.

Civil Procedure: Judgments: Relief From Judgment:
Void Judgments

[HN5] A voidable judgment is one rendered by a court having jurisdiction and although seemingly valid, is irregular and erroneous.

Civil Procedure: Judgments: Relief From Judgment:
Void Judgments

[HN6] A voidable judgment is subject to direct appeal, *Ohio Rev. Code Ann. § 2505.03(A)*, *Ohio Const. art. IV, § 3(B)(2)*, and to the provisions of *Ohio R. Civ. P. 60(B)*. A *Ohio R. Civ. P. 60(B)* application for relief must be made to the trial court that rendered the judgment from which relief is sought.

Civil Procedure: Judgments: Relief From Judgment:
Void Judgments

[HN7] The distinction between "void" and "voidable" is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits.

Civil Procedure: Jurisdiction: Subject Matter
Jurisdiction: Jurisdiction Over Actions: General
Overview

Family Law: Child Support: Jurisdiction: Subject Matter
Jurisdiction

Family Law: Marital Termination & Spousal Support:
Dissolution & Divorce: Jurisdiction: General Overview

[HN8] A lack of personal or subject matter jurisdiction produces a void judgment.

COUNSEL: Russell Leffler, Huron County Prosecuting
Attorney, and Daniel F. Sallerson, Assistant Prosecuting
Attorney, for appellee.

John D. Baird, for appellant.

JUDGES: Peter M. Handwork, P.J., Richard W.
Knepper, J., Judith Ann Lanzinger, J., CONCUR.

OPINION BY: Peter M. Handwork

OPINION

DECISION AND JUDGMENT ENTRY

HANDWORK, P. J.

[*P1] This is an appeal from a judgment of the Huron County Court of Common Pleas that sentenced appellant, Angela Montgomery, to a term of incarceration for non-

support. For the reasons stated herein, this court affirms the judgment of the trial court.

[*P2] The following facts are relevant to this appeal. On February 26, 2001, appellant was indicted on eight counts of non-support, four counts in violation of *R.C. 2919.21(B)* and four counts in violation of *R.C. 2919.21(A)(2)*. Appellant was arrested on April 26, 2002, and entered a plea of not guilty. Counsel was appointed. On June 24, 2002, appellant entered a plea of guilty to two counts of non-support in violation of *R.C. 2919.21(B)*, both fifth degree felonies; in[*P2] exchange for her plea, the remaining six counts were dismissed. On July 30, 2002, the trial court sentenced appellant to 60 days in the Huron County jail and five years of community control.

[*P3] On August 23, 2002, new counsel for appellant filed a notice of appearance as well as a motion for a new trial, a motion to withdraw plea and a motion to stay execution of sentence. Hearings on these motions were held on August 26 and 28, 2002. On August 30, 2002, the trial court denied appellant's motions. Appellant filed a timely notice of appeal and assigns the following as error:

[*P4] "The trial court committed substantial, prejudicial and reversible error in denying Appellant's Motion for a New Trial and Motion To Withdraw Plea, and in its finding Appellant guilty of violating of *R.C. 2919.21(B)*."

[*P5] In her assignment of error, appellant argues that the trial court erred in denying her motion for a new trial and motion to withdraw plea and in finding her guilty of violating of *R.C. 2919.21(B)* because the underlying child support order, entered in 1994, did not contain a child support calculation worksheet. Appellant[*P3] asserts that this child support order is void and, therefore, cannot be the basis of a criminal action for non-support. Although this court agrees with appellant that the trial court erred in not including a child support computation work sheet as part of the record as required by *R.C. 3113.215(D)(2)* and *Marker v. Grimm (1992)*, 65 Ohio St.3d 139, 601 N.E.2d 496, paragraph one of the syllabus, this court finds no merit in this assignment of error.

[*P6] *Crim.R. 32.1* provides:

[*P7] [HN1] "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." In applying *Crim.R. 32.1*, the Ohio

Supreme Court held in *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one the syllabus, that [HN2] a defendant who seeks to withdraw a plea of guilty after the imposition of sentence must establish the existence of manifest injustice.

[*P8] Although appellant argues that the underlying child support [**4]order is void, this court disagrees. The difference between a void and a voidable order is at the crux of this appeal. [HN3] A judgment rendered by a court without subject matter jurisdiction is void ab initio. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph one of the syllabus. A void judgment may be challenged at any time. *State v. Wilson* (1995), 73 Ohio St.3d 40, 45-46, 1995 Ohio 217, 652 N.E.2d 196. [HN4] Although a void judgment may be subject to collateral attack, a judgment that is merely voidable is not.

[*P9] [HN5] A voidable judgment is one rendered by a court having jurisdiction and although seemingly valid, is irregular and erroneous. *Black's Law Dictionary* (7 Ed.1999) 848. [HN6] A voidable judgment is subject to direct appeal, *R.C. 2505.03(A), Article IV, Section 3(B)(2), Ohio Constitution*, and to the provisions of *Civ.R. 60(B)*. A *Civ.R. 60(B)* application for relief must be made to the trial court that rendered the judgment from which relief is sought. As the Eleventh District Court of Appeals noted in *Clark v. Wilson* (July 28, 2000), Trumbull App. No. 2000-T-0063, 2000 Ohio App. LEXIS 3400:

[*P10] [HN7] "The distinction between 'void' and 'voidable'[**5] is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. ***"

[*P11] There was no question that the trial court had subject matter jurisdiction over appellant's divorce and jurisdiction over the parties. [HN8] The lack of personal or subject matter jurisdiction would have produced a void judgment. Appellant's assertion regarding the lack of a child support computation work sheet does not allege a jurisdictional error. Thus, the stipulated judgment entry is not void but voidable. A timely appeal of the March 28, 1994 entry would have addressed and resolved the issue of the lack of a child support computation worksheet. However, appellant did not appeal n1 . Instead, appellant waited until August 23,

2002, after she was sentenced following her guilty plea to two counts of non-support, to file her motions which collaterally attack the underlying child support order.

-----Footnotes-----

n1 One Ohio appellate court has found waiver of any error in the trial court's adoption of the parties' agreement without the inclusion of a child support computation worksheet when the party failed to appeal the lack of its inclusion. See *Cozzone v. Keglovic* (Jan. 24, 2001), 9th Dist. No. 19951, 2001 Ohio App. LEXIS 174, fn. 1, overruled on other grounds, *Bender v. Bender* (July 18, 2001), 9th Dist. No. 20157, 2001 Ohio App. LEXIS 3212.

-----End Footnotes-----

[**6] [*P12] Upon a thorough review of the record in this case and the application of the above law, this court concludes that appellant has failed to establish the existence of manifest injustice and that the trial court did not abuse its discretion in denying appellant's motion for a new trial and post-sentence motion to withdraw her guilty plea and in finding her guilty of violating of *R.C. 2919.21(B)*.

[*P13] Accordingly, appellant's assignment of error is found not well-taken.

[*P14] On consideration whereof, this court affirms the judgment of the Huron County Court of Common Pleas. It is ordered that appellant pay court costs for this appeal.

JUDGMENT AFFIRMED.

Peter M. Handwork, P.J.

Richard W. Knepper, J.

Judith Ann Lanzinger, J.

CONCUR.

STATE ex rel. PHILIP MIKE, Petitioner, - vs - WARDEN OF TRUMBULL CORRECTIONAL INST., Respondent.
CASE NO. 2002-T-0153

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY

2003 Ohio 2237; 2003 Ohio App. LEXIS 2073

May 2, 2003, Decided

DISPOSITION: [**1] Writ of habeas corpus denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner inmate was found guilty of one count of voluntary manslaughter and one count of aggravated robbery. He was sentenced to consecutive terms of nine years and eight years on the respective counts. The inmate filed an original action for a writ of habeas corpus. Respondent warden filed a motion for summary judgment.

OVERVIEW: The inmate argued that, although an indictment was returned against him, he was never properly arraigned. The warden argued that the inmate was not entitled to be released from prison because the trial record in the underlying criminal case showed that the trial court had jurisdiction to enter the conviction against him. The appellate court held that (1) there were no factual disputes concerning any issue pertaining to the trial court's jurisdiction because the transcript of the second proceeding demonstrated that the inmate was properly arraigned on the pending charges at that time where the transcript showed that the inmate's counsel stated that his client had received the indictment, understood the pending charges, and wished to plead not guilty; (2) the nature of the evidentiary materials were such that, even when the materials were construed in a manner which was most favorable to the inmate, a reasonable person could reach a conclusion only in favor of the warden; and (3) the warden had demonstrated that the trial court had jurisdiction as a matter of law. Thus, the warden was entitled to prevail on the inmate's entire habeas corpus claim.

OUTCOME: The warden's motion for summary judgment was granted. Judgment was rendered in favor of the warden as to the entire habeas corpus petition. The writ was denied.

CORE TERMS: indictment, summary judgment, arraignment, underlying case, evidentiary, factual disputes, arraigned, habeas corpus, criminal case, habeas

corpus, officially, bail, initial burden, moving party, common pleas, declared void, factual issues, opposing party, pending charges, pertaining, deposition, controvert, favorable, deprived, remember, coverage, genuine, deprive, wished, timing

LexisNexis(R) Headnotes

Civil Procedure: Summary Judgment: Standards: Genuine Disputes

[HN1] In order for a moving party to be entitled to summary judgment, he must be able to show, *inter alia*, that there are no genuine factual disputes remaining to be tried in the case.

Civil Procedure: Summary Judgment: Burdens of Production & Proof: Movants

Civil Procedure: Summary Judgment: Opposition: General Overview

Civil Procedure: Summary Judgment: Supporting Materials: General Overview

[HN2] At the beginning of a summary judgment exercise, the moving party has the initial burden of presenting, or referring the court to, evidentiary materials which demonstrate the absence of a genuine factual dispute. If the moving party is able to satisfy his initial burden, then the opposing party can successfully avoid summary judgment only by submitting a response which presents, or refers to, conflicting evidentiary materials. *Ohio R. Civ. P. 56(E)*. In addition, when a court reviews the parties' respective evidentiary materials for the purpose of deciding whether there is a factual dispute, it must construe those materials in a manner most favorable to the opposing party.

Criminal Law & Procedure: Accusatory Instruments: Indictments

Criminal Law & Procedure: Preliminary Proceedings: Arraignments: General Overview

[HN3] Although *Ohio Rev. Code Ann. § 2941.49* provides that a defendant cannot be arraigned on an indictment until one day after the service of the document, *Ohio R. Crim. P. 10(A)* states that the

arraignment of any defendant can happen at any time after a copy of the indictment has been given to him. In noting the clear conflict between the statute and the rule, the Ninth Appellate District has concluded that the one-day requirement of *Ohio Rev. Code Ann. § 2941.49* was not intended to afford a defendant a substantive right. Based on this, the Ninth Appellate District has further concluded that *Ohio R. Crim. P. 10(A)* is controlling over *Ohio Rev. Code Ann. § 2941.49* because both set forth a mere procedural requirement.

Criminal Law & Procedure: Appeals: Records on Appeal
Governments: Courts: Court Records

[HN4] *Ohio R. Crim. P. 22* states that all proceedings in "serious" criminal cases must be recorded.

Criminal Law & Procedure: Preliminary Proceedings:
Arraignments: General Overview

[HN5] Although *Ohio R. Crim. P. 55* requires that a criminal appearance docket be maintained, it does not impose any specific duty on a trial court to render a judgment concerning an arraignment.

Civil Procedure: Judicial Officers: Judges: General
Overview

Criminal Law & Procedure: Jurisdiction & Venue:
Jurisdiction

Governments: Courts: Judges

[HN6] The failure to transfer an action from the original judge to the new judge can deprive the latter judge of the authority to go forward in the matter. However, this type of error only renders the resulting conviction voidable; as a result, the allegation of such an error is legally insufficient to state a viable claim in habeas corpus because the failure to issue a transfer judgment is a mere procedural error which can be contested only in a direct appeal from the resulting conviction.

Criminal Law & Procedure: Habeas Corpus: Procedure:
General Overview

[HN7] The petitioner in a habeas corpus action will be granted the writ only if he can establish that his conviction should be declared void because the trial court lacked jurisdiction.

COUNSEL: Philip Mike, Pro se, Leavittsburg, OH
(Petitioner).

Jim Petro, Attorney General, and Bruce D. Horrigan,
Assistant Attorney General, Cleveland, OH (For
Respondent).

JUDGES: DONALD R. FORD, P.J., WILLIAM M.
O'NEILL, J., CYNTHIA WESTCOTT RICE, J., concur.

OPINION

Original Action for a Writ of Habeas Corpus.

PER CURIAM

[*P1] The instant action in habeas corpus is presently before this court for final consideration of the summary judgment motion of respondent, Julius Wilson, Warden of the Trumbull Correctional Institution. As the primary grounds for his motion, respondent maintains that petitioner, Philip Mike, is not entitled to be released from prison because the trial record in the underlying criminal case shows that the trial court had jurisdiction to enter the conviction against him. For the following reasons, we hold that the motion for summary judgment has merit.

[*P2] Petitioner's present incarceration at the Trumbull Correctional Institution is based upon an August 2001 judgment of the Trumbull County Court of Common Pleas. As part of that judgment, the trial court indicated that, after the completion of a five-day bench trial, petitioner had been found guilty of one[*2] count of voluntary manslaughter and one count of aggravated robbery. Upon considering the relevant sentencing factors, the trial court then sentenced petitioner to consecutive terms of nine years and eight years on the respective counts.

[*P3] In bringing the instant action, petitioner asserted that his sentence under the foregoing conviction must be declared void because the trial court's jurisdiction was not properly invoked at the beginning of the underlying case. Specifically, he contended in his habeas corpus petition that, although an indictment was returned against him at the outset of the matter, he was never properly arraigned on the three original charges. According to petitioner, the initial procedure in the matter was flawed because the trial court conducted his arraignment before the indictment was returned by the grand jury.

[*P4] In support of his basic legal contentions, petitioner alleged in his petition that the following events occurred in the underlying case: (1) on February 24, 2000, he was arrested in Trumbull County and taken before the trial court for an oral hearing; (2) at the conclusion of this hearing, the trial court issued a judgment which contained the words "arraignment[*3] form" in its caption; (3) this judgment stated that petitioner had been indicted for aggravated murder, had entered a plea of not guilty during the hearing, and had been denied bail; (4) six days later, the grand jury issued the indictment upon which he was ultimately tried; and (5) the trial court never held a second hearing to arraign him on the charges as set forth in the indictment.

[*P5] In addition to the foregoing allegations, petitioner attached to his petition copies of various documents pertaining to the criminal case. These documents include the indictment, the "arraignment" judgment, and other judgments rendered by the trial court throughout the proceeding.

[*P6] In now moving for summary judgment regarding the entire habeas corpus petition, respondent maintains that the trial record in the criminal case does not support petitioner's allegation as to the failure of the trial court to hold a second hearing after the issuance of the indictment. Specifically, respondent submits that, two days following the return of the indictment, the trial court held a second oral hearing in which petitioner was arraigned on the three original charges. Based upon this, respondent contends that: (1) [*4] despite the wording of the "arraignment" judgment to which petitioner cites, the first oral hearing in the underlying case was simply a preliminary hearing at which his bail was set; and (2) the trial court had jurisdiction to go forward in the underlying case.

[*P7] In support of the foregoing, respondent has attached to his motion a copy of a transcript of a proceeding held in the underlying criminal case. Our review of this document indicates that it contains a certification by the court reporter stating that the transcript sets forth a true and accurate description of the proceedings held on March 3, 2000. Our review further indicates that, during this proceeding, petitioner's trial attorney stated to the trial court that petitioner had received a copy of the indictment, understood the nature of the three charges, and wished to enter a plea of not guilty at that time. In addition, the transcript shows that the trial court accepted this plea and reset his bail at \$1,000,000.

[*P8] In his written response to the summary judgment motion, petitioner does not expressly dispute the fact that a second oral hearing was held before the trial court after the indictment against him had been issued. [*5] Similarly, petitioner does not contest the authenticity of the transcript attached to respondent's motion, and does not question whether that transcript provides a true and accurate account of what transpired during the second oral hearing. Instead, he simply maintains in an affidavit accompanying his response that he does not recall attending the post-indictment hearing. Furthermore, he argues that, even though he was arraigned during the second hearing, the trial court still committed certain errors which deprived it of jurisdiction to go forward in the matter.

[*P9] In regard to the factual issues raised by respondent's motion for summary judgment, this court

would begin our analysis by noting that, [HN1] in order for a moving party to be entitled to summary judgment, he must be able to show, inter alia, that there are no genuine factual disputes remaining to be tried in the case. *Lager v. Pittman* (2000), 140 Ohio App.3d 227, 234-235, 746 N.E.2d 1199. [HN2] At the beginning of a summary judgment exercise, the moving party has the initial burden of presenting, or referring the court to, evidentiary materials which demonstrate the absence of a genuine factual dispute. See, generally, [*6] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264. If the moving party is able to satisfy his initial burden, then the opposing party can successfully avoid summary judgment only by submitting a response which presents, or refers to, conflicting evidentiary materials. See *Civ.R. 56(E)*; *Monaco v. Red Fox Gun Club, Inc.* (Dec. 28, 2001), 11th Dist. No. 2000-P-0064, 2001 Ohio 4040, 2001 Ohio App. LEXIS 6008, at * 9-10. In addition, when a court reviews the parties' respective evidentiary materials for the purpose of deciding whether there is a factual dispute, it must construe those materials in a manner most favorable to the opposing party. *Aglinsky v. Cleveland Builders Supply Co.* (1990), 68 Ohio App.3d 810, 815, 589 N.E.2d 1365, 7 Anderson's Ohio App. Cas. 257.

[*P10] In the instant action, petitioner's entire claim for the writ of habeas corpus was based upon the factual allegation that the trial court never held a second hearing to arraign him officially on the indictment. In moving for summary judgment on the entire claim, respondent presented evidentiary materials which tended to disprove petitioner's basic allegation; i.e., the materials tended to show[*7] that a second hearing had been held two days after the indictment had been returned. Thus, since respondent satisfied his initial burden in the summary judgment exercise, petitioner had an obligation to create a factual dispute in regard to the "hearing" issue. However, in attempting to satisfy this obligation, petitioner only stated in his evidentiary materials that he could not remember that second hearing.

[*P11] In considering statements similar to the averment petitioner has made in his affidavit, the courts of this state have concluded that such a statement is insufficient to raise a factual dispute in the context of a summary judgment exercise. For example, in *Brown v. Westfield Natl. Ins. Co.* (Mar. 31, 1999), 6th Dist. No. L-98-1256, 1999 Ohio App. LEXIS 1378, the primary factual question was whether the plaintiff had rejected an offer of uninsured/underinsured motorist coverage at the time the insurance policy was signed. In moving for summary judgment, the defendant submitted an affidavit in which its employee averred that the plaintiff had declined the company's offer to include such coverage in the policy. In his response to the summary judgment

motion, the plaintiff[**8] could only refer to his statement in his prior deposition that he could not remember the conversation he had had with the employee. Based on this, the Sixth Appellate District affirmed the granting of summary judgment against the plaintiff because the statement in his deposition was not sufficient to controvert the employee's averment and create a factual dispute on the question. See, also, *Maxwell v. Mark's Supply* (1997), 117 Ohio App.3d 834, 691 N.E.2d 757.

[*P12] Pursuant to the foregoing authority, petitioner's statement that he cannot recall the second hearing before the trial court does not directly controvert respondent's evidentiary materials on that factual issue. Accordingly, this court must conclude that a second hearing was held in the underlying case after the indictment had been returned against petitioner. Furthermore, our review of the transcript of that second proceeding readily demonstrates that petitioner was properly arraigned on the pending charges at that time. As was noted above, the transcript shows that petitioner's trial counsel stated to the trial court that his client had received the indictment, that his client understood the pending charges, [**9] and that his client wished to plead not guilty. Thus, since petitioner was represented by trial counsel at the second hearing and waived his right to have the indictment read in open court, his arraignment was in accordance with *Crim.R. 10*.

[*P13] In turn, this means that, in spite of the fact that the judgment the trial court rendered following the first hearing contained the words "arraignment form" in its caption, petitioner was not officially arraigned on the indictment at that time. Instead, the evidentiary materials before this court indicate that the primary purpose for the first hearing was merely to decide whether petitioner should be granted bail until the action went forward. Although petitioner did enter a plea of not guilty during the first hearing, that plea pertained to a complaint the Trumbull County Prosecutor had filed against him. That initial plea was subsequently rendered moot when petitioner entered a new plea in regard to the indictment during the second hearing.

[*P14] Notwithstanding the fact that he was properly arraigned on the indictment in the underlying case, petitioner maintains in his response to the motion for summary judgment that the trial court committed three[**10] errors which deprived it of jurisdiction to go forward. First, he argues that the trial court violated the requirements of *R.C. 2941.49* by arraigning him within twenty-four hours of the service of the indictment. Second, he contends that the court erred in not issuing a new judgment concerning his arraignment after the second hearing. Third, petitioner asserts that the trial

judge who presided over his trial was never officially assigned to the case.

[*P15] In regard to petitioner's first argument, this court would note that, [HN3] although *R.C. 2941.49* provides that a defendant cannot be arraigned on an indictment until one day after the service of the document, *Crim.R. 10(A)* states that the arraignment of any defendant can happen at any time after a copy of the indictment has been given to him. In noting the clear conflict between the statute and the rule, the Ninth Appellate District has concluded that the one-day requirement of *R.C. 2941.49* was not intended to afford a defendant a substantive right. Based on this, the Ninth Appellate District has further concluded that *Crim.R. 10(A)* is controlling over *R.C. 2941.49*[**11] because both set forth a mere procedural requirement. See *State v. Heyden* (1992), 81 Ohio App.3d 272, 610 N.E.2d 1067.

[*P16] In the instant action, petitioner has admitted that service of the indictment upon him was completed prior to his arraignment before the trial court. As a result, his own assertions show that the requirements of *Crim.R. 10(A)* were met in the underlying case. In light of these circumstances, it follows that, even if this court assumes for the sake of this argument that the failure to comply with the timing requirements of *Crim.R. 10(A)* can form the basis of viable claim in habeas corpus, petitioner has not shown that the trial court committed any error in relation to the timing of his arraignment.

[*P17] Under petitioner's second "extra" argument, he maintains that, pursuant to *Crim.R. 22 and 55*, the trial court was obligated to issue a new "arraignment" judgment at the conclusion of the second hearing. As to this point, this court would indicate that our review of both rules fails to show that the trial court had such an obligation. *Crim.R. 22* simply [HN4] states that all proceedings in "serious" criminal cases must be recorded; since respondent has been able[**12] to produce a transcript of petitioner's arraignment, it is clear that this rule was satisfied in this instance. Similarly, [HN5] although *Crim.R. 55* requires that a criminal appearance docket be maintained, it does not impose any specific duty on a trial court to render a judgment concerning an arraignment. Therefore, even if we again were to assume for the sake of argument that the failure to render a particular judgment could deprive a trial court of jurisdiction, petitioner has failed to demonstrate that such a duty even existed in this instance.

[*P18] Finally, under his third "extra" argument, petitioner contends that the trial judge in the underlying case lacked jurisdiction to hear the matter because the case was never officially transferred to him from another common pleas judge. In relation to this argument, this

court would note that we have previously held that [HN6] the failure to transfer an action from the original judge to the new judge can deprive the latter judge of the authority to go forward in the matter. See *Clark v. Wilson* (July 28, 2000), 11th Dist. No. 2000-T-0063, 2000 Ohio App. LEXIS 3400. However, in *Clark*, we further held that this type of error only[**13] renders the resulting conviction voidable; as a result, the allegation of such an error is legally insufficient to state a viable claim in habeas corpus because the failure to issue a transferal judgment is a mere procedural error which can be contested only in a direct appeal from the resulting conviction. Accordingly, pursuant to the *Clark* precedent, petitioner cannot predicate his request for a writ of habeas corpus solely upon the assertions in his third argument.

[*P19] As this court has held on many prior occasions, [HN7] the petitioner in a habeas corpus action will be granted the writ only if he can establish that his conviction should be declared void because the trial court lacked jurisdiction. See *State ex rel. Dothard v. Warden*, 11th Dist. No. 2002-T-0145, 2003 Ohio 325, 2003 Ohio

App. LEXIS 348. After considering respondent's summary judgment motion in the instant case, this court holds that: (1) there are no factual disputes concerning any issue pertaining to the jurisdiction of the trial court in the underlying case; (2) the nature of the evidentiary materials are such that, even when the materials are construed in a manner which is most favorable to petitioner, [**14] a reasonable person could reach a conclusion only in favor of respondent; and (3) respondent has demonstrated that, under the undisputed facts, the trial court in the underlying case had jurisdiction, as a matter of law. Thus, because respondent has satisfied the three requirements for summary judgment under *Civ.R. 56*, respondent is entitled to prevail on petitioner's entire habeas corpus claim.

[*P20] Therefore, pursuant to the foregoing discussion, respondent's motion for summary judgment is granted. It is the order of this court that judgment is rendered in favor of respondent as to the entire habeas corpus petition, and the writ is hereby denied.

DONALD R. FORD, P.J., WILLIAM M. O'NEILL, J.,
CYNTHIA WESTCOTT RICE, J., concur.

STATE OF OHIO, EX REL. ROLAND SAUTTER, ET AL., Relators -vs-HON. LAWRENCE GREY, ET AL.,
Respondents and C&DD ACQUISITIONS, LTD, ET AL., Intervening Respondents
CASE NO. 06-CA-6

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, MORROWCOUNTY

2007 Ohio 1831; 2007 Ohio App. LEXIS 1673

April 18, 2007, Date of Judgment Entry

SUBSEQUENT HISTORY: Dismissed by State ex rel. Sautter v. Gray, 2007 Ohio 5837, 2007 Ohio LEXIS 2808 (Ohio, Nov. 1, 2007)

PRIOR HISTORY: [**1] **CHARACTER OF PROCEEDING:** Original Action for Writ of Mandamus and Prohibition.

DISPOSITION: Dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Relators, county residents and taxpayers, filed an action for writs of mandamus and prohibition against respondents, a common pleas court judge, a county zoning clerk and inspector, and landfill businesses, seeking to prohibit the construction and operation of any landfills within the county. The businesses filed a motion to dismiss for lack of standing, for failure to state a claim upon which relief could be granted, and/or for summary judgment.

OVERVIEW: Relators sought to prohibit further construction and operation of county landfills. The businesses obtained options to purchase unzoned property and they applied for demolition debris facility operation licenses. After the county board of commissioners resolved to adopt county-wide zoning prohibiting landfills, the businesses sought declaratory judgment. Pursuant to a settlement, the zoning resolution was deemed void and inapplicable with respect to the businesses' land. A further settlement authorized approval of one license application and withdrawal of the other. Relators filed their action. The court found that they had standing under *R.C. § 309.13*, as the notice to the prosecutor under *R.C. § 309.12* would have been futile because his position was contrary to theirs. As the matter involved issues outside of the pleadings, summary judgment was the proper procedural vehicle. The court found that the commissioners had acted pursuant to *R.C. §§ 305.25* and *307.561*, which made the previously void settlement agreement into an effective contract. The trial

court's declaratory judgment was not void and there was an adequate remedy at law pursuant to *Civ. R. 60(B)* or by direct appeal.

OUTCOME: The court granted summary judgment to respondents and dismissed the proceeding.

CORE TERMS: zoning, settlement agreement, void, declaratory judgment action, demolition, debris, voidable, summary judgment, townships, license, subject-matter, settlement, licensure, original action, adequate remedy, county-wide, landfill, matter jurisdiction, county prosecutor, county commissioners, roll call, mandamus, parcel, election, ordinary course of law, writs of mandamus, writ of prohibition, failure to comply, declaratory judgment, particular case

LexisNexis(R) Headnotes

Environmental Law: Solid Wastes: Permits: General Overview

[HN1] On July 1, 2005, Ohio state legislation became effective which placed a six-month moratorium on the licensure of new construction of demolition debris facilities in Ohio. On December 23, 2005, H.B. 397, Gen. Assem. (Ohio 2005) became effective which modified the July 1st legislation to grandfather landfill companies who were actively in the process of seeking demolition debris operation licensure at the time of the moratorium.

Civil Procedure: Justiciability: Standing: General Overview

[HN2] Standing can be acquired by one's status as a taxpayer and conferred by statute. "Taxpayer" has been defined as any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a right of action on behalf of and for the benefit of the public. A taxpayer action may be maintained by a party in a private capacity to enforce the right of the public to the performance of a public duty.

Civil Procedure: Justiciability: Standing: General Overview

Governments: Local Governments: Employees & Officials

[HN3] Statutorily, *R.C. § 309.12* confers authority on a county prosecutor to bring suit on behalf of the public to prevent the execution of a contract entered in contravention of the law. Additionally, pursuant to *R.C. § 309.13*, a taxpayer has standing to pursue the same action when the taxpayer's aim is to benefit the county public as if the suit had been brought by the prosecuting attorney. However, pursuant to *§ 309.13*, standing is not conferred until the taxpayer shows that the prosecuting attorney has been contacted in writing, has been requested to act on the public's behalf, and has failed to act. These threshold requirements may be deemed waived if the circumstances indicate that it would have been "unavailing" or "futile" for the taxpayer to have made the initial request of the prosecutor.

Civil Procedure: Pleading & Practice: Defenses, Demurrers, & Objections: Failures to State Claims

Civil Procedure: Pretrial Judgments: Judgment on the Pleadings

[HN4] A motion to dismiss for failure to state a claim upon which relief may be granted pursuant to *Civ. R. 12(B)(6)*, and a motion for judgment on the pleadings pursuant to *Rule 12(C)* may be granted where no material factual issues exist. However, it is axiomatic that a motion for judgment on the pleadings is restricted solely to the allegations contained in those pleadings. Furthermore, for purposes of the motion all factual allegations in the complaint are deemed admitted and all reasonable inferences are made in favor of the nonmoving party.

Civil Procedure: Summary Judgment: Standards: General Overview

[HN5] *Civ. R. 56(C)* provides that before summary judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.

Civil Procedure: Remedies: Writs: Common Law Writs: Mandamus

Evidence: Procedural Considerations: Burdens of Proof: Allocation

[HN6] In order to be entitled to the issuance of a writ of mandamus, a relator must demonstrate: (1) a clear legal right to the relief prayed for; (2) a clear legal duty on the respondent's part to perform the act; and, (3) that there

exists no plain and adequate remedy in the ordinary course of law. Mandamus may not be used to collaterally attack a judgment of an inferior court unless the court was without jurisdiction to render the judgment.

Civil Procedure: Remedies: Writs: Common Law Writs: Prohibition

Evidence: Procedural Considerations: Burdens of Proof: Allocation

[HN7] In order for a writ of prohibition to issue, a relator must prove that: (1) a lower court is about to exercise judicial authority; (2) the exercise of authority is not authorized by law; and, (3) the relator has no other adequate remedy in the ordinary course of law if a writ of prohibition is denied. A writ of prohibition, regarding the unauthorized exercise of judicial power, will only be granted where the judicial officer's lack of subject-matter jurisdiction is patent and unambiguous. Where an inferior court patently and unambiguously lacks jurisdiction over the cause, prohibition will lie both to prevent the future unauthorized exercise of jurisdiction and to correct the results of prior actions taken without jurisdiction.

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Actions: General Overview

Civil Procedure: Remedies: Writs: Common Law Writs: Mandamus

Civil Procedure: Remedies: Writs: Common Law Writs: Prohibition

[HN8] Absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own geographic jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy at law by appeal. Neither mandamus nor prohibition will issue if the party seeking extraordinary relief has an adequate remedy in the ordinary course of law. Jurisdiction has been described as "a word of many, too many, meanings." Because the term "jurisdiction" is used in various contexts and often is not properly clarified, misinterpretation and confusion has resulted.

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Actions: General Overview

[HN9] Because subject-matter jurisdiction goes to the power of a court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. A distinction exists between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises subject-matter jurisdiction once conferred upon it.

Civil Procedure: Jurisdiction: Subject Matter
Jurisdiction: Jurisdiction Over Actions: General
Overview

[HN10] Distinguishing between subject-matter jurisdiction and jurisdiction over a particular case is important because it is only where a trial court lacks subject matter jurisdiction that its judgment is void; lack of subject matter jurisdiction over the particular case merely renders the judgment voidable. Jurisdiction over the particular case, as the term implies, involves the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction.

Civil Procedure: Jurisdiction: Subject Matter
Jurisdiction: Jurisdiction Over Actions: General
Overview

Civil Procedure: Judgments: Relief From Judgment:
Void Judgments

[HN11] A void judgment is one rendered by a court lacking subject-matter jurisdiction or the authority to act. A voidable judgment, on the other hand, is a judgment rendered by a court having jurisdiction/authority and, although seemingly valid, is irregular and erroneous.

Civil Procedure: Jurisdiction: Subject Matter
Jurisdiction: Jurisdiction Over Actions: General
Overview

Civil Procedure: Judgments: Relief From Judgment:
General Overview

Civil Procedure: Appeals: Appellate Jurisdiction:
General Overview

[HN12] A voidable judgment is one rendered by a court having jurisdiction and although seemingly valid, is irregular and erroneous. Black's Law Dictionary 848 (7th ed. 1999). A voidable judgment is subject to direct appeal, *R.C. § 2505.03(A)*, Ohio Const. art. IV, § 3(B)(2), and to the provisions of *Civ. R. 60(B)*. A *Rule 60(B)* application for relief must be made to a trial court that rendered the judgment from which relief is sought.

Civil Procedure: Jurisdiction: Subject Matter
Jurisdiction: Jurisdiction Over Actions: General
Overview

Civil Procedure: Judgments: Relief From Judgment:
Void Judgments

[HN13] The distinction between "void" and "voidable" judgment is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the "exercise of jurisdiction"

as distinguished from the want of jurisdiction in the first instance.

Governments: Local Governments: Administrative
Boards

[HN14] R.C. §§ 305.25 and 307.561 set forth the procedure that a board of county commissioners must follow to execute a binding contract or settlement agreement.

Governments: Local Governments: Administrative
Boards

[HN15] See *R.C. § 305.25*.

Governments: Local Governments: Administrative
Boards

[HN16] Where a contract has been entered into by a county without compliance with R.C. § 305.25, it is clear the contract is completely void and not merely voidable.

Governments: Local Governments: Claims By & Against
Real Property Law: Zoning & Land Use: General
Overview

[HN17] See *R.C. § 307.561*.

COUNSEL: For Relators: CURTIS E. KISSINGER,
Cincinnati, OH.

For Respondents Hon. Lawrence Grey, et al.: TOM C.
ELKIN, Assistant Prosecuting Attorney, Mount Gilead,
OH.

For Intervening Respondents: MAX E. RAYLE, Bowling
Green, OH.

JUDGES: Hon. W. Scott Gwin, P.J., Hon. Sheila G.
Farmer, J., Hon. John W. Wise, J. By: Farmer, J., Gwin,
P.J. and Wise, J. concur.

OPINION BY: Sheila G. Farmer

OPINION

Farmer, J.

[*P1] This matter came before the Court on an original action for Writs of Mandamus and Prohibition filed by Relators, Roland Sautter and Edward Sickmiller, against Respondents, Judge Lawrence Grey, the Morrow County Zoning Clerk, the Morrow County Zoning Inspector, and Intervening Respondents, C&DD Acquisitions, Ltd., Washington Environmental, Ltd, and Harmony Environmental, Ltd. The matter is currently before the Court for consideration of Intervening Respondent's motion to dismiss for lack of standing and failure to state

a claim upon which relief may be granted, and/or for summary judgment. Relators filed a response in opposition.

[*P2] Relators in this action are taxpayers[**2] and residents of Morrow County. Relators and other members of the Commission for Zoning Against Landfills have been actively opposing the construction of new demolition debris landfill sites in Ohio. In this instance, Relators are seeking to prohibit the construction and operation of any landfills within Morrow County.

[*P3] Respondents C&DD Acquisitions, Ltd. ("C&DD") is a limited liability company formed for the purpose of licensing, constructing and operating demolition debris facilities. C&DD is the entity which owns Harmony Environmental, Ltd. ("Harmony Environmental") and Washington Environmental, Ltd. ("Washington Environmental"). Respondents Eckert and Milligan are Morrow County zoning officials. Respondent Judge Lawrence Grey is a retired Judge who sits by assignment in the Morrow County Common Pleas Court.

[*P4] The pertinent history which led to this original action is as follows. In 2001, C&DD began investigating potentially suitable parcels of land within the un-zoned townships of Morrow County for the specific purpose of making applications to locate and license new construction and demolition debris facilities. During the investigations, C&DD spent substantial[**3] amounts of time and money to conduct evaluations of state statutory and administrative regulation requirements, soil types, aquifer designations and locations, and flood plain locations in preparation for both the location and application for licensure of two facilities. In June and July of 2003, C&DD's subsidiaries, Harmony Environmental and Washington Environmental obtained options to purchase un-zoned property in Harmony and Washington Townships.

[*P5] After obtaining the options to purchase, both Harmony Environmental and Washington Environmental filed applications with the Morrow County Health Board (MCH Board) for demolition debris facility operation licenses. Harmony Environmental filed its application on August 11, 2003 and Washington Environmental filed its application on August 18, 2003.

[*P6] On August 20, 2003, the Morrow County Commissioners passed a resolution entitled "Resolution Adopting Zoning and Ordering an Election". Essentially, the Board of Commissioners enacted a resolution adopting a previously submitted 1990 zoning plan and asked the Morrow County Board of Elections to resubmit the zoning plan to the voters for county-wide approval in

the November 4, 2003, general[**4] election. n1 At the November 4, 2003, general election, 6 out of 15 townships, including Harmony and Washington Townships, voted to approve county-wide zoning and prohibit the construction and operation of demolition debris facilities. On November 17, 2003, the Board of Commissioners adopted a resolution to "grandfather zoning issues" until December 3, 2003, in the six (6) townships that adopted the zoning resolution.

-----Footnotes-----

n1 County-wide zoning had been first placed on the May 8, 1990, primary ballot for Morrow County. The original Zoning plan was only ratified by Gilead Township.

-----End Footnotes-----

[*P7] In response to the Commissioners' resolution to adopt county-wide zoning prohibiting landfills, on August 24, 2004, C&DD, Harmony Environmental and Washington Environmental filed a declaratory judgment action in the Morrow County Court of Common Pleas against the Morrow County Board of Commissioners, Olen Jackson, Don Staley, Jean McClintock and Jean McClintock individually. n2 Judge Lawrence Grey presided over the matter by[**5] assignment. In the declaratory judgment action, the demolition debris companies sought to have the county-wide zoning regulations declared invalid in their entirety or inapplicable to the C&DD's parcels pursuant to alleged statutory defects in the zoning enactment, at common law and on constitutional grounds.

-----Footnotes-----

n2 C&DD Acquisitions, Ltd. et al. v. Morrow County Board of Commissioners, et al. v. Morrow County Court of Common Pleas, Case Number 2004-CV-00275.

-----End Footnotes-----

[*P8] Meanwhile, on February 27, 2004, after conducting an evidentiary hearing, the MCH Board denied both Harmony Environmental's and Washington Environmental's applications for operating licenses. Harmony Environmental and Washington Environmental subsequently appealed the MCH Board decision to the Environmental Review Appeals Commission (ERAC). On November 18, 2004, the ERAC vacated the decision of the MCH Board. On December 16, 2004, the MCH Board appealed the ERAC decision to the 10th District Court of Appeals. On June 23, 2005, upon appeal, the 10th[*6] District Court of Appeals affirmed the ERAC decision and the application was again remanded for further review before the MCH Board.

[*P9] [HN1] On July 1, 2005, state legislation became effective which placed a 6-month moratorium on the licensure of new construction of demolition debris facilities in Ohio. On December 23, 2005, H.B. 397 became effective which modified the July 1st legislation to grandfather landfill companies who were actively in the process of seeking demolition debris operation licensure at the time of the moratorium. Upon review, on February 6, 2006, the Environmental Protection Agency (EPA) determined that the Harmony Environmental operation license application and the Washington Environmental operation license application qualified for the "grandfather provision" of H.B. 397 and instructed the MCH Board to continue with the application process with a view to either grant or deny the license after the 6-month moratorium had expired. On February 24, 2006, the MCH Board appealed the EPA decision to the ERAC.

[*P10] In July of 2005, counsel for the Board of Commissioners initiated settlement discussions to resolve the declaratory judgment litigation. Between [**7] July and November of 2005, numerous written communications were exchanged in an effort to reach a resolution. On November 7, 2005, the three commissioners met at a regularly scheduled public board meeting to discuss the terms of a proposed settlement agreement. Also present were the Board's privately retained counsel and the Morrow County Prosecutor. After a discussion, and by individual roll call vote, the three commissioners unanimously approved and assented to the proposed settlement. Upon the advice of both private counsel and the Morrow County Prosecutor, the approval of the three Commissioners was not formally documented by resolution. The Commissioners further

designated Commissioner Jackson to represent the Board and appear before the trial court to execute the settlement agreement. That same date, Commissioner Jackson appeared in open court, verified his authority to act pursuant to the vote of the Board, approved the resolution and signed the agreed settlement entry on behalf of the Board of Commissioners.

[*P11] On November 7, 2005, by judgment entry, Judge Grey adopted and approved the settlement and granted declaratory judgment in favor of the C&DD, Harmony Environmental[**8] and Washington Environmental. Pursuant to the parties' settlement agreement, Judge Grey held that the Morrow County zoning resolution was void and inapplicable as to the Harmony and Washington Township parcels. Specifically, Judge Grey found that the zoning resolution was void and inapplicable as being in conflict with the general law of Ohio as contained in *Chapter 3714 of the Ohio Revised Code*. Judge Grey also held that since the companies held vested interests in the properties prior to the enactment of the zoning resolution, the zoning resolutions were void as being contrary to the provisions of the Ohio Constitution. Judge Grey's final decision was neither vacated nor appealed.

[*P12] On April 17, 2006, in the appeal pending before the ERAC, the MCH Board and C&DD reached a settlement agreement whereby the MCH Board agreed to approve a demolition debris operating license for Washington Environmental solely, and in return, C&DD agreed to withdraw the Harmony Environmental operating license application for further consideration. The parties further prepared an agreed consent entry to amend the declaratory judgment decision entered by Judge Grey to exclude the Harmony Township[**9] parcel. To date, the agreed consent entry has not been adopted and incorporated by the Morrow County Court of Common Pleas in the declaratory judgment action.

[*P13] On May 4, 2006, Relators filed this original action. It appears that C&DD's settlement of the declaratory judgment action with the Commissioners, the trial court's grant of declaratory judgment, and the settlement agreement with the MCH Board granting licensure approval, precipitated the filing of Relators' writ petition. In the writ Petition, Relators further argue that the Commissioners' settlement agreement in the declaratory judgment action is unlawful and void for failure to comply with the statutory mandates provided for in *Chapters 305, and 307 of the Ohio Revised Code*. Finally, Relators argue, that the settlement agreement for licensure approval by the MCH Board seeks to reaffirm an otherwise unlawful and void act. Relators, therefore, move this Court for writs of mandamus and prohibition, to compel the trial court to vacate what they claim to be a

void declaratory judgment, prohibit the trial court from adopting and incorporating further settlement agreements by the parties as to future operating licensure,**10] and compel the zoning clerk to enforce the existing zoning regulations by prohibiting any demolition debris facilities in Morrow County.

[*P14] On May 31, 2006, the Morrow County Commissioners passed resolution 06-R-0349, captioned, "A Resolution to Document the Assent to and to Ratify the Judgment Entry in the Matter of C&DD Acquisitions, Ltd., et al. v. Morrow County Board of Commissioners, et al." By resolution, the Commissioners officially adopted the roll call decision of November 7, 2005, to enter into a settlement agreement in the declaratory judgment action before Judge Grey.

[*P15] The matters presently before this Court include: (1) Intervening Respondents' motion to dismiss for Relators' alleged lack of standing; (2) Intervening Respondent's motion to dismiss pursuant to *Civ.R.12(B)(6)*, and *Civ.R.12(C)*; and (3) in the alternative Intervening Respondent's motion for summary judgment.

[*P16] Initially, Intervening Respondents argue that the writ petition should be dismissed for lack of standing and failure to comply with *R.C. 309.13*. In response, Relators argue that they have taxpayer**11] standing and that complete compliance with *R.C. 309.13* would have amounted to a "vain act". We agree.

[*P17] [HN2] Standing can be acquired by one's status as a taxpayer and conferred by statute. *State, ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 254, 2006 Ohio 3677, 853 N.E.2d 263. The Ohio Supreme Court has defined "taxpayer" as "any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a right of action on behalf of and for the benefit of the public." *State ex rel. Nimon v Springdale* (1966), 6 Ohio St. 2d 1, 215 N.E.2d 592, paragraph two of syllabus. A taxpayer action may be maintained by a party in a private capacity to enforce the right of the public to the performance of a public duty. *State ex rel. Nimon v Springdale*, 6 Ohio St. 2d at 4.

[*P18] [HN3] Statutorily, *R.C. 309.12* confers authority on the county prosecutor to bring suit on behalf of the public to prevent the execution of a contract entered in contravention of the law. Additionally, pursuant to *R.C. 309.13*, a taxpayer has standing to pursue the same action when**12] the taxpayer's aim is to benefit the county public as if the suit had been brought by the prosecuting attorney. However, pursuant to *R.C. 309.13*, standing is not conferred until the taxpayer shows that the prosecuting attorney has been

contacted in writing, has been requested to act on the public's behalf, and has failed to act. These threshold requirements may be deemed waived if the circumstances indicate that it would have been "unavailing" or "futile" for the taxpayer to have made the initial request of the prosecutor. See, *State ex rel. White v. City of Cleveland* (1973), 34 Ohio St.2d 37, 295 N.E.2d 665, *State ex rel. Nimon v Springdale*, supra, and, *Int'l Assoc. of Firefighters Local No.136 v. City of Dayton*, 157 Ohio App.3d 236, 2004 Ohio 2728, 810 N.E.2d 457.

[*P19] In this case, by stipulation, the parties agree that Relators are taxpayers and residents of Morrow County. Relators claim to be pursuing this original action in order to protect the public interest in having the Morrow County Commissioners comply with the statutorily mandated procedures set forth in *R.C. 305* and *307* prior to entering**13] the settlement agreement. Relators also seek to compel the zoning officials to disregard what they argue is a void declaratory judgment and enforce the existing zoning regulations.

[*P20] Furthermore, the record reflects that the Morrow County Prosecutor actively participated in the declaratory judgment action settlement negotiations, appeared in court while the agreement was executed, and advised the Commissioners that a resolution to enter into the settlement agreement was not necessary. Dep. of Stanley at 50-51. The prosecutor's actions clearly indicated a position contrary to the Relators' claim and effectively showed that a written request would have been futile. For these reasons, the Court finds that Relators have exhibited taxpayer standing pursuant to *R.C. 309.13* to pursue this original action.

[*P21] [HN4] A motion to dismiss for failure to state a claim upon which relief may be granted pursuant to *Civ.R. 12 (B)(6)*, and a motion for judgment on the pleadings pursuant to *Civ.R.12(C)*, may be granted where no material factual issues exist. However, it is axiomatic that a motion for judgment on the pleadings**14] is restricted solely to the allegations contained in those pleadings. Furthermore, for purposes of the motion all factual allegations in the complaint are deemed admitted and all reasonable inferences are made in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756. *Flanagan v. Williams* (1993), 87 Ohio App.3d 768, 623 N.E.2d 185. See, also, *Nelson v. Pleasant* (1991), 73 Ohio App.3d 479, 481, 597 N.E.2d 1137; *In Estate of Heath v. Grange Mutual Casualty Company*, Delaware App. No. 02CAE05023, 2002 Ohio 5494; *Carver v. Mack*, Richland App. No. 2005CA0053, 2006 Ohio 2840.

[*P22] In this case, upon examining the matter on the face of the amended petition for writs of mandamus and

prohibition, the Court finds, that the issues before the Court, go beyond the four corners of the complaint and answer, and are therefore appropriate for review under summary judgment. Accordingly, the Court shall consider the merits of Respondent's motion for summary judgment.

[*P23] [HN5] *Civ.R. 56(C)* provides that before summary judgment may [**15] be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 1994 Ohio 172, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

[*P24] [HN6] In order to be entitled to the issuance of a writ of mandamus, the Relator must demonstrate: (1) a clear legal right to the relief prayed for; (2) a clear legal duty on the respondent's part to perform the act; and, (3) that there exists no plain and adequate remedy in the ordinary course of law. *State ex rel. Master v. Cleveland* (1996), 75 Ohio St.3d 23, 26-27, 1996 Ohio 228, 661 N.E.2d 180; *State ex rel. Harris v Rhodes* (1978), 54 Ohio St. 2d 41, 374 N.E.2d 641, citing *State ex rel. National City Bank v. Bd. of Education* (1977) 52 Ohio St.2d 81, 369 N.E.2d 1200.[**16] Mandamus may not be used to collaterally attack a judgment of an inferior court unless the court was without jurisdiction to render the judgment. See, *State ex rel. Inland Properties Co. v. Court of Appeals* (1949), 151 Ohio St. 174, 177, 84 N.E.2d 922 and *State, ex rel. Ballard v. O'Donnell* (1999), 50 Ohio St. 3d 182, 553 N.E.2d 650, paragraph two of syllabus.

[*P25] [HN7] In order for a writ of prohibition to issue, the relator must prove that: (1) the lower court is about to exercise judicial authority; (2) the exercise of authority is not authorized by law; and, (3) the relator has no other adequate remedy in the ordinary course of law if a writ of prohibition is denied. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 178, 631 N.E.2d 119. A writ of prohibition, regarding the unauthorized exercise of judicial power, will only be granted where the judicial officer's lack of subject-matter jurisdiction is patent and unambiguous. *Ohio Dept. of Adm. Serv., Office of Collective Bargaining v. State Emp. Relations Bd.* (1990), 54 Ohio St. 3d 48, 562 N.E.2d 125. Where an inferior court patently and unambiguously [**17] lacks jurisdiction over the cause, prohibition will lie both to

prevent the future unauthorized exercise of jurisdiction and to correct the results of prior actions taken without jurisdiction. *State ex rel. Goldberg v. Mahoning Cty. Probate Court* (2001), 93 Ohio St.3d 160, 162, 2001 Ohio 1297, 753 N.E.2d 192

[*P26] [HN8] Absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own geographic jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy at law by appeal. *Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm.* (1995), 74 Ohio St.3d 120, 123-124, 1995 Ohio 302, 656 N.E.2d 684, 686. Neither mandamus nor prohibition will issue if the party seeking extraordinary relief has an adequate remedy in the ordinary course of law. *State ex rel. Ahmed v. Costine*, 103 Ohio St.3d 166, 2004 Ohio 4756, 814 N.E.2d 865.

[*P27] "Jurisdiction has been described as 'a word of many, too many, meanings.'" *Pratts v. Hurley*, 102 Ohio St.3d 81, 88, 2004 Ohio 1980, 806 N.E.2d 992, quoting *United States v. Vanness* (C.A. D.C.1996), 318 U.S. App. D.C. 95, 85 F.3d 661, 663, fn. 2.[**18] Because the term "jurisdiction" is used in various contexts and often is not properly clarified, misinterpretation and confusion has resulted. *Pratts v. Hurley*, 102 Ohio St.3d at 88.

[*P28] "'Jurisdiction' means 'the courts' statutory or constitutional power to adjudicate the case.'" *Pratts v. Hurley*, 102 Ohio St.3d at 83, quoting *Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (emphasis omitted); *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87, 290 N.E.2d 841, paragraph one of the syllabus; see, also, *In re J.J.*, 111 Ohio St.3d 205, 207, 2006 Ohio 5484, 855 N.E.2d 851. The term "jurisdiction" "encompasses jurisdiction over the subject matter and over the person." *Pratts v. Hurley*, 102 Ohio St.3d at 83, citing *State v. Parker*, 95 Ohio St.3d 524, 529, 2002 Ohio 2833, 769 N.E.2d 846. (Cook, J., dissenting).

[*P29] [HN9] "Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time." *Pratts v. Hurley*, 102 Ohio St.3d at 83.[**19] citing *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860; *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 1998 Ohio 275, 701 N.E.2d 1002, reconsideration denied (1999), 84 Ohio St. 3d 1475, 704 N.E.2d 582. A distinction exists between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises subject-matter jurisdiction once conferred upon it. *Pratts v. Hurley*, 102 Ohio St.3d at 83-84.

[*P30] [HN10] Distinguishing between subject-matter jurisdiction and jurisdiction over a particular case is important "because ' '[i]t is only where the trial court lacks subject matter jurisdiction that its judgment is void; lack of subject matter jurisdiction over the particular case merely renders the judgment voidable' " " *In re J.J.*, 111 Ohio St.3d at 207, quoting *Pratts v. Hurley*, 102 Ohio St.3d at 83, quoting *State v. Parker*, 95 Ohio St.3d at 529 (Cook, J., dissenting), quoting *State v. Swiger* (1998), 125 Ohio App.3d 456, 462, 708 N.E.2d 1033. "Jurisdiction over the particular case," as the term implies, involves " '[**20] "the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction." ' " *Pratts*, 102 Ohio St.3d at 83 quoting *Swiger*, 125 Ohio App.3d at 462.

[*P31] [HN11] A void judgment is one rendered by a court lacking subject-matter jurisdiction or the authority to act. *Pratts v. Hurley*, 102 Ohio St.3d at 84; *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 14 Ohio B. 511, 471 N.E.2d 774. A voidable judgment, on the other hand, is a judgment rendered by a court having jurisdiction/authority and, although seemingly valid, is irregular and erroneous. *State v. Montgomery*, Huron App. No. H-02-039, 2003 Ohio 4095.

[*P32] [HN12] A voidable judgment is one rendered by a court having jurisdiction and although seemingly valid, is irregular and erroneous. Black's Law Dictionary (7 Ed.1999) 848. A voidable judgment is subject to direct appeal, R.C. 2505.03(A), Article IV, Section 3(B)(2), Ohio Constitution, and to the provisions of Civ.R. 60(B). A Civ.R. 60(B) application for relief must be made to the trial[**21] court that rendered the judgment from which relief is sought.

[*P33] As the Eleventh District Court of Appeals noted in *Clark v. Wilson* (July 28, 2000), *Trumbull App. No. 2000-T-0063*, 2000 Ohio App. LEXIS 3400: [HN13] "The distinction between 'void' and 'voidable' is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. * * * " "Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the 'exercise of jurisdiction' as distinguished from the want of jurisdiction in the first instance." *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 240, 1999 Ohio 99, 714 N.E.2d 867, quoting *In re Waite* (1991), 188 Mich. App. 189, 200, 468 N.W.2d 912.

[*P34] In this case, the Relator argues that the Commissioners' failure to comply with R.C. 305.25 and 307.561[**22] renders the trial court's declaratory judgment void. [HN14] Both statutes set forth the procedure the commissioners must follow to execute a binding contract or settlement agreement. *Ohio Revised Code Section 305.25* states in pertinent part as follows: [HN15] "No contract entered into by the board of county commissioners, or order made by it, shall be valid unless it has been assented to at a regular or special session of the board, and entered in the minutes of its proceedings by the county auditor or the clerk of the board." [HN16] Where a contract has been entered into by a county without compliance with this statute, it is clear the contract is completely void and not merely voidable. *Communicare, Inc. v. Wood County Board of Commissioners*, 161 Ohio App. 3d 84, 2005 Ohio 2348, 829 N.E.2d 706.

[*P35] R.C. 307.561 states in pertinent part, [HN17] "a county may settle any court action by a consent decree or court-approved settlement agreement which may include an agreement to re-zone any property involved in the action***and may also include county approval of a development plan for any property involved in the action as provided by the[**23] decree or court approved settlement agreement, provided that the court makes specific findings of fact that notice has been properly made pursuant to this section and the consent decree or court-approved settlement agreement is fair and equitable."

[*P36] In accordance with R.C. 305.25 and 307.561, the Commissioners met at a regular public session to discuss the terms of the settlement agreement. At the public session, and by verbal roll call, the commissioners unanimously assented to the terms of the settlement agreement. Thereafter the commissioners executed a formal resolution thereby complying with the statutory elements empowering them to enter into a binding settlement agreement. Upon formal resolution the previously void settlement agreement became an effective contract. Judge Grey's declaratory judgment was the final order which could have been appealed at the time of filing.

[*P37] There is no question that Judge Grey, acting on behalf of the Morrow County Court of Common Pleas, had subject matter jurisdiction over the Intervening Respondent's declaratory judgment action and the parties. Respondents' assertion[**24] that the Commissioner's failure to follow the procedures set forth in R.C. 305 and 307 may arguably make the settlement agreement void, however, these procedural deficiencies, simply makes the trial court's subsequent judgment voidable and subject to appeal or 60(B) review. Furthermore, the resolution of

the commissioners, although subsequent to the trial court's judgment, non-the-less cures the defect in the procedural requirements for the settlement agreement's execution. Accordingly, Respondents' assertion that the settlement agreement is void only serves to make the trial court's judgment voidable an issue which became moot, once the roll call vote was formalized by resolution. Thus, the trial court's grant of declaratory judgment entry is not void and Respondents, therefore, have or had an adequate remedy at law pursuant to *Civ.R.60(B)* or by direct appeal.

[*P38] For these reasons, the Court hereby finds that no genuine issue of material facts remain to be litigated, that the Intervening Respondents' are entitled to judgment as a matter of law in that it appears that reasonable minds can only come to one conclusion, and viewing the evidence in most[**25] strongly in favor of the Relators, that conclusion is to grant summary

judgment in favor of the Respondents. Accordingly, Respondents' motion for summary judgment is hereby granted as to all parties and the matter before this Court is dismissed.

[*P39] MATTER DISMISSED.

By: Farmer, J.,

Gwin, P.J. and

Wise, J. concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the Writs for Mandamus and Prohibition filed by Relators Roland Sautter and Edward Sickmiller are dismissed. Costs taxed to Relators.