

*IN THE SUPREME COURT OF OHIO*

**STATE OF OHIO**

*Plaintiff-Appellant*

--vs--

**REGINALD GARDNER, JR.**

*Defendant-Appellee*

CASE NUMBER: **2007-0375**

ON APPEAL FROM THE MONTGOMERY  
COUNTY COURT OF APPEALS,  
SECOND APPELLATE DISTRICT

COURT OF APPEALS NO. **21357**

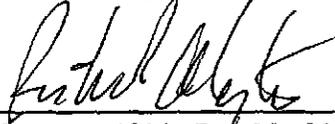
---

**DEFENDANT-APPELLEE'S MOTIONS: FOR STAY IN LOWER COURT  
PROCEEDINGS AND FOR EXPEDITED DECISION**

---

***COUNSEL FOR DEFENDANT-APPELLEE***

*RICHARD A. NYSTROM, JD, PhD*



---

**Richard A. Nystrom** (Ohio Reg No **0040615**), Counsel of Record  
1502 Liberty Tower  
120 West Second Street  
Dayton, Ohio 45402  
937/ 223-1011

***COUNSEL FOR PLAINTIFF-APPELLANT***

*MATHIAS H. HECK, JR.*

PROSECUTING ATTORNEY FOR MONTGOMERY COUNTY

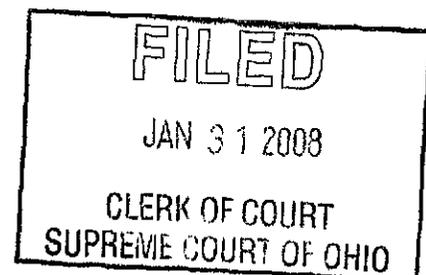
By: **R. Lynn Nothstine** (Ohio Reg No **0061560**), Counsel of Record

P.O. Box 972

301 West Third Street, Suite 500

Dayton OH 45422

937/225-4117



**STATE OF OHIO vs. REGINALD GARDNER, JR.**

SUPREME COURT CASE NUMBER: **2007-0375**

MONTGOMERY COUNTY COURT OF COMMON PLEAS CASE NO. **2005-CR-1785/2**

---

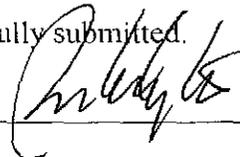
**DEFENDANT-APPELLEE'S MOTIONS:**

**FOR STAY IN LOWER COURT PROCEEDINGS AND  
FOR EXPEDITED DECISION**

NOW COMES DEFENDANT-APPELLEE REGINALD GARDNER, JR., to move this Court for an Order to stay all trial court proceedings pending final resolution of the issues now pending in the Supreme Court of Ohio pursuant to the explanations outlined in the attached Memorandum in Support.

DEFENDANT-APPELLEE REGINALD GARDNER, JR., also moves this Court for an expedited decision to avoid potential prejudice to Defendant Ohio pursuant to the explanations outlined in the attached Memorandum in Support. Neither request will prejudice or compromise the interests of the State.

Respectfully submitted,



Richard A. Nystrom, Ohio Registration 0040615

*COUNSEL FOR DEFENDANT-APPELLEE*

---

---

## MEMORANDUM IN SUPPORT

---

DEFENDANT-APPELLEE REGINALD GARDNER, JR., seeks a stay in all proceedings in the trial court concerning his case. There are legal issues concerning jury instructions now pending in the Supreme Court of Ohio but not yet resolved. As documented by the Decision and Order of the Common Pleas Court of Montgomery County, the trial court, (copy attached), that court intends to proceed with a new trial pursuant to the remand from the Second District Court of Appeals, the local appellate court. But, after the Court of Appeals reversed and remanded this case to the trial court for a new trial based on alleged errors in jury instructions, the Ohio Supreme Court accepted jurisdiction to review the issues. Oral argument was held on 23 January 2008.

In the meantime, the trial court has order Gardner to stand for a new trial beginning 4 February 2008. Neither the State nor Defendant are prepared to try this matter at this time because of the uncertainties that exist. Both parties were under the assumption, perhaps wrong, that with jurisdiction resting in the Supreme Court, the stay was automatic and did not seek one earlier. *See, e.g., State v. Simmans* (1970), 21 Ohio St.2d 258, 264 (copy attached).

Consequently, Defendant-Appellee Gardner now seeks a stay in the proceedings in the Montgomery County Court of Common Pleas pending decision by the Supreme Court.

DEFENDANT-APPELLEE REGINALD GARDNER, JR., also seeks an expedited decision from the Ohio Supreme Court. An expedited decision will benefit both Gardner and, as noted above, the eagerness of the trial court.

The State sought Supreme Court review of the reversal of the common jury trial by the Second District for both Reginald Gardner and for Turell Justice, Gardner's co-defendant. While

the Supreme Court accepted jurisdiction of Gardner's case, it declined jurisdiction of Justice's. Subsequently, Justice avoided a second trial by pleading to a lesser offense (the firearm specification was dropped) and received a concomitant lesser sentence of three years. He will be released from prison on or about 8 May 2008. In order to preserve the opportunity for Gardner to receive similar treatment and not to be prejudiced by remaining in prison beyond that date should a favorable decision—that he receive a new trial—be forthcoming from the Supreme Court, Gardner requests an expedited decision in this matter.

Respectfully submitted,



---

Richard A. Nystrom, Ohio Registration 0040615

*COUNSEL FOR DEFENDANT-APPELLEE*

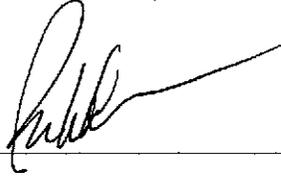
120 West Second Street, Suite 1502

Dayton, Ohio 45402

(937) 223-1011

---

CERTIFICATE OF SERVICE: A copy of the foregoing Motion was delivered to **R. Lynn Nothstine, John M. Scott, Jr., Leon Diadone, and Carley Ingram**, Assistant Prosecuting Attorneys for Montgomery County, 301 West Third Street, Suite 500, Dayton OH 45422; and **Hon. Jeffrey E. Froelich**, Montgomery County Court of Common Pleas, 41 N. Perry Street, Dayton OH 45422, on this 30<sup>th</sup> day of January 2008.



Richard A. Nystrom

---

FILED  
COURT OF COMMON PLEAS  
2008 JAN 29 PM 3:25  
MONTGOMERY CO. OHIO  
1

*In the Common Pleas Court of Montgomery County, Ohio*

STATE OF OHIO,	:	Case No. 05-CR-1785/2
	:	
Plaintiff,	:	Judge Jeffrey E. Froelich
	:	
-vs-	:	<u>DECISION, ORDER AND ENTRY</u>
	:	<u>DENYING DEFENDANT'S MOTION</u>
REGINALD GARDNER,	:	<u>TO VACATE TRIAL DATE AND</u>
	:	<u>DENYING STATE'S MOTION TO</u>
Defendant.	:	<u>VACATE TRIAL DATE, ORDER</u>
	:	<u>SETTING BOND</u>

The Defendant entered pleas of not guilty in May 2005, to three felony charges, one of which included a firearm specification. The Defendant was unable to post bond and has remained in custody since that time. In October of 2005, the Defendant was found not guilty by a jury of two counts, but guilty of one of the charges and the specification. In November, he was sentenced to three years on the underlying charge and three years for the firearm specification. The Defendant was transferred to the Department of Rehabilitation and Corrections. The Defendant filed a Notice of Appeal on November 10, 2005.

On January 19, 2007, the Court of Appeals reversed the conviction and remanded the case to the trial court for "proceedings consistent with this opinion." *State v. Gardner*, Montgomery App. No. 21357, 2007-Ohio-182. On March 5, 2007, the State filed a Notice of Appeal with the Supreme Court which accepted the case on June 8, 2007. *State v. Gardner*, 114 Ohio St. 3d 1409, 2007-Ohio-2632.

The case of the co-Defendant, Terrell Justice, was also reversed and remanded. The Supreme Court did not accept jurisdiction and the Defendant subsequently entered a plea of guilty to an agreement that dismissed the firearm specification and the Defendant was sentenced to three years imprisonment, with credit for time served.

The Defendant's one-count felony case is set for trial on February 5, 2008. Both the State and the Defendant have requested that the case be continued until such time as the Supreme Court resolves the issue before it, although the Defendant has personally letters to the Court asking that he be sent to prison or that his case be tried.

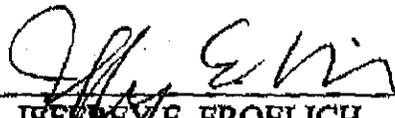
The trial court's sentence is suspended and cannot be executed (i.e., the Defendant cannot be delivered to the prison) since there is a pending appeal by the State in the Supreme Court. R.C. 2953.09(A)(2)(a). Moreover, while the Defendant was previously transferred to prison, he has been returned to the county jail where he remains; the Department of Rehabilitation and Corrections will not accept the Defendant since his conviction has been reversed. R.C. 2953.13. Although the Defendant is in the local jail and the case has been remanded for trial, the State argues, citing *State v. Stimmans* (1970), 21 Ohio St. 2d 258, that during the appeal to the Supreme Court, the remand itself is automatically stayed and there is nothing legally pending with the trial court and it has no jurisdiction to try the case, to accept a guilty or no contest plea, or to even set bail

It appears that the Defendant cannot serve his sentence, cannot be tried or enter a plea, and cannot have bond set; moreover, throughout this status, the speedy trial statute has no effect. The Defendant currently has over two years in custody. If the Court of Appeals' decision is ultimately reversed by the Supreme Court, the six-year sentence would be reinstated; if the

Court of Appeals' decision is affirmed by the Supreme Court, the case would be retried, and if the Defendant is convicted, he could be sentenced to the same term of years; if he is retried and acquitted, he would be released. The legal limbo created by this situation cannot be resolved by guessing about the future, potentially to the detriment of the Defendant.

The case was remanded to this court. Neither party has sought a stay pursuant to, without limitation, Supreme Court Rules of Practice Rule II or XIV. The Motions to Continue or to Vacate the Trial Date are DENIED.

APPROVED:

  
HON. JEFFREY E. FROELICH

**COPIES (by regular mail and fax):**

JOHN M. SCOTT, JR., Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, 301 West Third Street, Fifth Floor, Dayton, Ohio, 45422 (937)225-5757

CARLEY J. INGRAM, Assistant Prosecuting Attorney, Appellate Division, Montgomery County Prosecutor's Office, 301 West Third Street, Fifth Floor, Dayton, Ohio, 45422 (937)225-4117

RICHARD A. NYSTROM, Attorney for Defendant, 120 West Second Street, Suite 1502, Dayton, Ohio, 45402 (937)223-1011

CASEFLOW SERVICES

LOIS TIPTON, Bailiff (937)225-4440; [tiptonl@montcourt.org](mailto:tiptonl@montcourt.org)

FILED  
COURT OF COMMON PLEAS

2008 JAN 24 PM 3:06

GREGORY A. ENGLISH  
CLERK OF COURTS  
MONTGOMERY CO. OHIO

4

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CRIMINAL DIVISION**

**STATE OF OHIO**

**CASE NO. 05-CR-1785/2**

Plaintiff

vs.

**REGINALD GARDNER**

**MOTION TO VACATE  
THE TRIAL DATE**

Defendant

The State of Ohio asks the Court to vacate the trial date of February 4,  
2008.

Respectfully submitted,

**MATHIAS H. HECK, JR.**  
PROSECUTING ATTORNEY

By: 

CARLEY J. INGRAM  
REG. NO. 0020084  
Assistant Prosecuting Attorney  
Appellate Division  
301 W. Third Street, 5<sup>th</sup> Floor  
Dayton, Ohio 45422  
(937) 225-4117

ATTORNEY FOR STATE OF OHIO,  
PLAINTIFF

## MEMORANDUM

This case, which was remanded from the Court of Appeals, is currently set for trial on February 4, 2004. The State has appealed the judgment of the Court of Appeals to the Supreme Court of Ohio, which heard argument on January 23, 2008. Because the State has appealed the adverse judgment of the court of appeals to the Supreme Court of Ohio, the judgment of the court of appeals is automatically stayed. *State v. Simmans* (1970), 21 Ohio St.2d 258, 257 N.E.2d 344. And because the judgment is stayed, this court has no authority to proceed.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was sent by regular U.S. mail this 27 day of January, 2008, to Defendant: Richard A. Nystrom, 120 West Second Street, Suite 1502, Dayton, OH 45402.



---

CARLEY J. INGRAM

REG. NO. 0020084

Assistant Prosecuting Attorney

THE STATE OF OHIO, APPELLANT, V. SIMMANS, APPELLEE.

[Cite as State v. Simmans (1970), 21 Ohio St.2d 258]

Criminal law-Indictment employing words of statute describing offense-Sufficient to support conviction, when-No bill of particulars-No objection to sufficiency of indictment before submission to jury-Conviction-Reversal and discharge of defendant-Appeal by state-Personal jurisdiction over defendant.

An indictment which employs fully the words of the statute describing the offense will support the conviction of the accused where no bill of particulars is requested or where no objection to the sufficiency of the indictment is interposed before submission of the case to a jury. (Kennedy v. State, 34 Ohio St. 310 , overruled.)

(No. 69-419 - Decided March 25, 1970.)

APPEAL from the Court of Appeals for Lucas County upon the allowance of a motion by the state for leave to appeal.

Defendant (appellee here) pleaded not guilty to a four-count indictment alleging four separate violations in Ottawa County of R.C. 2911.01,(fn1). The cause was tried to a jury which found him guilty on all four counts. He was sentenced to imprisonment pursuant to R.C. 2911.01, but was released on bond pending his appeal to the Court of Appeals for Lucas County. (A motion for change of venue had been granted and the cause removed to the Court of Common Pleas of Lucas County.)

The Court of Appeals held that the indictment was defective (State v. Simmans, 18 Ohio App.2d 143) and discharged the defendant, who was thereupon released from his bond and technical custody.

Mr. Lowell S. Petersen, prosecuting attorney, for appellant.

Mr. Kent R. Minshall, for appellee.

SCHNEIDER, J.

Each count of the indictment was framed in the following language, so far as is material to the issue here:

"\* \* \* Edward N. Simmans \* \* \* at the County of Ottawa \* \* \* did, by false pretense and with intent to defraud, procure the signature of another as maker to a check, the value of said instrument being \$60 or more, to-wit: \* \* \* [a more specific description of the offense is here set forth] \* \* \* contrary to Section 2911.01 of the Revised Code of Ohio \* \* \*."

That section sets forth three separate and distinct offenses, the transgression of any one of which constitutes justification for the imposition of the penalty herein provided. The offense material to this case is that "[n]o person shall, by false pretense and with intent to defraud \* \* \* procure the signature of

another as maker \* \* \* to a \* \* \* check \* \* \*."

"In an indictment \* \* \* charging an offense, each count shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged." R.C. 2941.05. See, also, R.C. 2941.06, outlining a form of indictment, and R.C. 2941.07, specifying forms which may be used in charging offenses, although no form is stated therein for the offense with which we are concerned.

However, "[i]t is sufficient in an indictment \* \* \* where it is necessary to allege an intent to defraud, to allege that the accused did the act with intent to defraud, without alleging an intent to defraud a particular person or corporation \* \* \*." R.C. 2941.19.

We reverse the judgment of the lower court and reinstate the judgment of conviction.

---

**Page 261**

It is eminently clear to us that the indictment employed to the letter the language of the statute which is sufficient to give the accused notice of the offense of which he is charged without the additional language appearing after the word "to-wit," which we find unnecessary to consider. Cf. *Dillingham v. State*, 5 Ohio St. 280 , which antedated the predecessors of the aforementioned statutes. Cf., also, *State v. Ross*, 12 Ohio St.2d 37 , where a necessary element of an offense had been superimposed upon the language of the statute by prior judicial interpretation and the objection to the sufficiency of the indictment was raised by demurrer thereto.

Moreover, the accused had notice of every element of the offense, the burden of proof of which would be imposed upon the state at his trial. The phrase "by false pretense" was notice that the state had assumed the burden of proving that the accused made a false representation of an existing fact or past event, knowing it to be false at the time he made it. The phrase "intent to defraud" was a signal that the state would be required, and would attempt, to prove that it was the intention of the accused that the false representation be acted upon by the party to whom it would be proven to have been made. The word "procure" was a warning that the state would offer proof to show that the false pretense was, in fact, relied and acted upon. Finally, venue was alleged.

Thus, all the essential elements of a crime defined by R.C. 2911.01, were included in the indictment. If detailed specifications of the various counts were insufficient or absent, defendant's recourse was to request a bill of particulars pursuant to R.C. 2941.07(fn2). This, he failed to do.

At no time or place during the entire proceedings, neither in the trial court, the appellate court, nor in this court, has the defendant complained that the state failed

---

**Page 262**

to prove each element of the crime charged or that the proof offered failed to support one or more of those elements. Indeed, it was in the Court of Appeals that he raised, for the first time, the insufficiency of the indictment. Were it not for *State v. Cimpritz*, 158 Ohio St. 490 (to recede from which a majority of this court is not inclined), and *Kennedy v. State*, 34 Ohio St. 310 , defendant ought to have the judgment of conviction against him restored on the ground that he waived the insufficiency of the indictment. See, for example, *State v. Glaros*, 170 Ohio St. 471 , and opinion of Taft, C.J., in *State v. Wozniack*, 172 Ohio St. 517 . 523.

Cimpritz is distinguishable in that words denoting the elements of malice and force, which are essential to the crime for which the defendant therein was convicted, were missing, as was, presumably, the proof of those elements. On the other hand, Kennedy, decided in 1877 is representative of the sophistry of an era in which the courts were yet unable to break cleanly from the centuries-old tradition of common-law pleading. Another example is Hagar v. State, 35 Ohio St. 268 , in which an indictment for breaking and entering a storeroom was held defective because the statute under which it was drawn contained only the word storehouse.

The indictment in Kennedy was meticulous in its particularity and overwhelming in its prolixity, both of which proved self-defeating. Although it accused the defendant of "falsely pretending" that a voucher (and the debt which it purported to evidence) was true and that, "with the intent, then and there, and thereby to defraud," defendant "did procure" the signature of the maker of the check, the court held that an additional allegation that the maker "paid said \* \* \* [false debt] by delivering [emphasis supplied] to said George B. Kennedy a check" negated the other averments. Finally, the court said: "If the indictment had contained the averment that Kennedy, by means of the false pretenses, obtained the check from House, with intent to defraud, it would have been sufficient; but it contains no

---

**Page 263**

such averment." The last statement clearly shows that the court misread the indictment before it.

Six years later, in Tarbox v. State (1883), 38 Ohio St. 581 , Longworth, J., added to the confusion of Kennedy by attempting (at page 583) to explain it: "In other words, there was no false pretense made for the purpose of obtaining a check, but, on the contrary, with intent to obtain a payment in cash \* \* \*. This case [Kennedy] \* \* \* is, if correctly decided, an authoritative decision against \* \* \* (Tarbox's claim)." (Emphasis supplied.)

A majority of this court shares Judge Longworth's doubts about Kennedy to the extent that it should be, and so is, overruled.

Defendant raises two further issues which properly arise for the first time in this court by reason of the appeal of the state. He proposes that the state "has no right of appeal under R.C. 2953.02-2953.13, from an adverse decision in a criminal proceeding, and is deprived of further jurisdiction over the person of the defendant." This proposal ignores R.C. 2953.14, which provides that "[w]henver a court superior to the trial court renders judgment adverse to the state in a criminal case or proceeding, the state, through \* \* \* the prosecuting attorney \* \* \* may institute an appeal to reverse such judgment in the next higher court." (Emphasis supplied.) State v. Huntsman, 18 Ohio St.2d 206 , treats only of the right of appeal from a judgment adverse to the state by the trial court.

Defendant further proposes that "[a]n appeal by the state under R.C. 2953.14, after reversal and discharge of the defendant is solely for purposes of clarification of the law, and the reviewing court has no personal jurisdiction over the defendant unless the mandate of the Court of Appeals to the Court of Common Pleas is stayed by an order from the Supreme Court to the appellate court pending appeal to the Supreme Court by the state." It is conceded that no order by this court staying the judgment of the Court of Appeals herein was sought or issued. It was unnecessary.

---

**Page 264**

Appeals by the state in a criminal proceeding from a court superior to the trial court to the next higher court are governed by R.C. 2505.01, et seq. R.C. 2505.09, provides that "[n]o appeal shall operate as a stay of execution except as provided in Sections \* \* \* 2505.12 of the Revised Code, until a supersedeas bond is executed by the appellant \* \* \*." R.C. 2505.12, in turn, excuses the execution of the

bond required by R.C. 2505.09, by "[a]ny public officer of the state or of any of its political subdivisions suing or sued solely in his representative capacity as such officer."

The correct propositions which emerge from the foregoing review of the statutes are: (1) The appeal to this court is by the state, through the prosecuting attorney, to reverse a judgment adverse to it in a criminal proceeding, pursuant to Section 2953.14, Revised Code; and (2) that judgment is automatically stayed without bond given by, or a specific request of, the prosecuting attorney, who is a public officer of a political subdivision of the state properly prosecuting the appeal ("suing") in his representative capacity as such officer. Cf. R.C. 2953.09, governing appeals by the accused. *State v. Huntsman*, supra ( 18 Ohio St.2d 206 ).

The mere fact that defendant is at liberty through a misapprehension of the law by the lower courts or its clerks, or even by the prosecuting attorney in this case, does not divest this court of jurisdiction of the appeal or of the defendant. The conclusions stated in *State v. Aspell*, 5 Ohio App.2d 230, and relied upon by the defendant, are disapproved. The defendant is amenable to process by the state to resecure custody over him at any time.

Judgment reversed.

TAFT, C.J., COLE, O'NEILL, HERBERT, DUNCAN and CORRIGAN, JJ., concur.

COLE, J., of the Third Appellate District, sitting for MATTHIAS, J.

---

Footnotes:

1 Section 2911.01, Revised Code:

"No person shall, by false pretense and with intent to defraud, obtain anything of value or procure the signature of another as maker, indorser, or guarantor to a bond, bill, receipt, promissory note, draft, check, or other evidence of indebtedness or sell, barter, or dispose of a bond, bill, receipt, promissory note, draft, or check or offer to do so, knowing the signature of the maker, indorser, or guarantor thereof, to have been obtained by false pretense.

\* \* \*

"Whoever violates this section shall be imprisoned not less than one nor more than three years if the value of the property or instrument so procured, sold, bartered, or disposed of, or offered to be sold, bartered, or disposed of, is sixty dollars or more. \* \* \*

"If said value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both."

2 This section, as well as R.C. 2941.05 and 2941.06, was introduced to our Code in 1929 (113 Ohio Laws 123, 163, 164). R.C. 2941.19, was re-codified in the same sweeping revisions of our criminal procedure.

---

Lawriter Corporation. All rights reserved.

The Casemaker Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license