

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :  
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 : SUPREME COURT CASE NO. 2008-0045  
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 PLAINTIFF-APPELLANT :  
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 - vs - :  
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 SONNY HATFIELD :  
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 :  
 DEFENDANT-APPELLEE :

APPEAL FROM THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

MEMORANDUM IN OPPOSITION OF JURISDICTION AND IN FAVOR OF CROSS APPEAL

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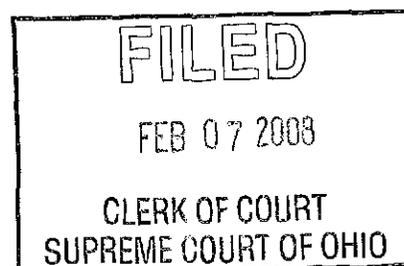


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## STATEMENT OF THE CASE

### Procedural Posture

In the Court of Appeals below, Appellee raised thirteen assignments of error. In its decision of December 31, 2007, the court ruled in Appellee's favor on four of them, ruled against him on five and found four others to be moot. See State v. Hatfield at page 35-36, paragraph 178. One of these was Assignment of Error Number Six in which the trial court refused to admit the investigative report and curriculum vitae of defense expert Douglas Heard. Counsel argued that doing so violated Appellee's Constitutional right under the Fifth Amendment to due process of law and his Sixth Amendment right to compulsory process. In support of his argument, counsel cited Holmes v. South Carolina, 547 US (2006) which held that a court may not use an arbitrary rule or law that limits a criminal defendant's right to present a meaningful defense. Holmes v. South Carolina, 547 US (2006).

Another Assignment of Error that was declared moot was Assignment of Error Ten which involved a challenge to the following remarks made by Ashtabula County Prosecutor Thomas Sartini during rebuttal arguments, to wit:

If we didn't think we could prove this case beyond a reasonable doubt, ladies and gentlemen, I wouldn't be here.

TP at 553.

Defense counsel argued that these remarks violated Appellee's rights because they went beyond the discretion that is given a prosecutor to comment upon the evidence and amounted to the assertion of personal knowledge backed by professional reputation. See State v. Smith, 14 OS 3d 13 (1984).

In Assignment of Error Twelve, Counsel argued that the cumulative effect of a number of errors deprived Appellee of his Constitutional right to a fair trial. See State v. Demarco, 31 OS 3d 191

(1985). Counsel argued that this was the case even if some of the errors were harmless. See *State v. Madrigal*, 87 OS 3d 378 (2000).

ARGUMENTS AGAINST GRANTING LEAVE FOR APPEAL

FIRST PROPOSITION OF LAW

EVIDENCE OF DRIVING SUSPENSIONS THAT HAD EXPIRED PRIOR TO THE DATE THAT DEFENDANT-APPELLEE HAD AN ACCIDENT WITH SHARON KINGSTON WASN'T RELEVANT TO ANY OF THE ISSUES THAT WERE INVOLVED IN THE CASE THAT HE WAS ON TRIAL FOR AND ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGERS OF UNFAIR PREJUDICE, OF CONFUSION OF THE ISSUES AND OF MISLEADING THE JURY THAT HEARD THIS CASE.

Under the ORE, relevant evidence is generally admissible at trial unless otherwise provided by law. ORE 402. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is consequence to the determination of the action more probable or less probable than it would be without the evidence. ORE 401.

In the trial court below, the State of Ohio had to prove that Defendant-Appellee's driving privileges were suspended on February 24, 2004 to get a conviction of either offense that he was indicted on. Counsel had indicated that he was willing to stipulate that he was. TP at 9. However, over Defense Counsel's objection, Ashtabula County Prosecutor Thomas Sartini was permitted to prove more than that. He was allowed to introduce Defendant-Appellee's record of driving suspensions. TP at 11-12, 423-29. The suspensions were many in number and almost all of them had expired long before he had an accident with Sharon Kingston on February 24, 2004. For example, there was a school drop out suspension from May 22, 1996 to January 31, 1998 when Appellee was a minor. There was a random suspension from July 20, 2001 to October 18, 2001, a noncompliance suspension from August 3, 2001 to August 13, 2001 and a drug suspension from August 3, 2001 to

January 30, 2003.<sup>1</sup> See TP at 9, 418-21, State's Exhibit J.

The State was permitted to use the evidence because it went to the issue of recklessness. T at 11-12. However, it did not introduce proof that Defendant-Appellee drove a vehicle while under suspension except on the day of the accident in this case or that he had an automobile accident while under suspension. Counsel submits that the evidence had nothing to do with recklessness and had more to do with the character of his client. Mr. Sartini even argued as such in his closing when he said:

This isn't a failure to pay a parking ticket. This is a person who drives without a license and doesn't care.

TP at 531-32.

Therefore, it made nothing of consequence to the outcome of this case except that Appellant is a careless, shiftless person with no regards to the feelings of anyone on the road. That is character evidence and that's not admissible at trial unless the defense counsel makes it an issue. ORE 404 (A)(1).

Even if this evidence was relevant, it was still not admissible if its probative value was substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. ORE 403 (A). Counsel submits that because the evidence had more to do with character than it did with recklessness, its probative value was substantially outweighed by all three of these considerations. In other words, this was overkill.

Accordingly, counsel submits that what the evidence did was make a case where the State had

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<sup>1</sup> The State of Ohio redacted mention that this was a drug suspension when the evidence went to the jury.

to prove that Defendant-Appellee did something with a specific mental state of mind, negligence or recklessness and turned it into one of strict liability. The State in effect was able to argue that a person who drives a car, with a record like this, is per se reckless. That is not the law. Therefore, this evidence should not have been admitted.

The Appellate court below agreed with counsel for Defendant-Appellee's arguments on this issue. Its opinion on this issue rested upon *Old Chief v. U.S.*, 519 US 172 (1997). In *Old Chief*, the U.S. Supreme Court reversed a Defendant's conviction for a Federal weapons violation which required proof of a prior felony conviction. The accused offered to stipulate that he had a prior conviction but the Assistant District Attorney who tried the case refused to accept it. Instead, the government was allowed to introduce the judgement and commitment to prison in addition to the accused's prior felony conviction.

The Supreme Court held the probative value of the prosecutor's evidence was substantially outweighed by the danger of unfair prejudice under Federal Rules of Evidence 403. *Old Chief v. U.S.*, 519 US at 191. Thus, as the Appellate court noted below, *Old Chief* bars evidence of prior convictions offered solely to prove an accused's status as a convicted criminal.

Accordingly, the Appellate court found that *Old Chief*'s holding was controlling and that Appellee's rights were violated when the trial court allowed the State of Ohio to use his record of driving suspensions against him. *State v. Hatfield* at pages 26-27, paragraphs 145-146, 148. The Appellant's memorandum in support of jurisdiction does not cite a case that deals with this issue better or even stands for the proposition that a prosecutor can use an accused's record of driving suspensions against him in this manner in a trial for a violation of Revised Code (hereinafter R.C.) 2903.06 (A)(2)(a).

The State also did not argue harmless error in its brief on this issue in the Appellate court below. Moreover, counsel adds that this and other errors that the Appellate court didn't even rule on tainted Appellee's trial so significantly that this court cannot find that he would have been convicted anyway.

Therefore, counsel would assert that the Appellate court acted properly.

SECOND PROPOSITION OF LAW

BLOOD EVIDENCE THAT WAS OBTAINED FROM A DEFENDANT AT LEAST FOUR HOURS AFTER HE WAS THOUGHT TO HAVE BEEN INVOLVED IN A FATAL AUTOMOBILE ACCIDENT AND ADMISSIONS OF COCAINE ABUSE ARE INADMISSABLE IN A PROSECUTION FOR A VIOLATION OF R.C. 2903.06 (A)(2)(a) WITHOUT AN EXPERT TO CONNECT IT TO HIS STATE OF MIND.

On February 24, 2004, Appellee consumed seven to eight lines of cocaine between 12:00 a.m. and 6:00 a.m.. TP at 306-07. He then went home and slept roughly seven and a half hours. He then got behind the wheel of his Ford Explorer some time some time after 5:00 p.m.. See TP at 305-07. See also State Exhibit W. It was alleged that he went through a stop sign on Plymouth Rd. and collided with a Honda driven by Sharon Kingston in the vicinity of Beck and Harold Rd. in Plymouth Township, Ohio and took her life. TP at 314, 369-70.

At 9:29 p.m. and 10:06 p.m. that day, at least four hours after the accident, two samples of blood were removed from Appellee at Ashtabula County Medical Center after he admitted to his cocaine use. TP at 260, 285. Those samples were analyzed and cocaine and/or cocaine metabolites were found in both. TP at 409-11. However, the State of Ohio didn't produce one expert witness to show that Appellee's cocaine use had anything or could have had anything to do with his perceptions and actions as a driver at the time of his accident. In fact, the State didn't know what, if any, impact this stuff had to do with the accident and admitted as much when Prosecutor Thomas Sartini told the jury:

You can draw, ladies and gentlemen, the inferences that you want to draw about what was in Sonny Hatfield's bloodstream four and a half hours earlier than the crash occurred...and whether that contributes to your determination of whether Sonny Hatfield was acting recklessly by operating a motor vehicle that day, in that condition.

TP at 531.

Appellee was indicted and convicted of a violation of R.C. 2903.06 (A)(2)(a) which required the State to prove that he recklessly caused the death of Sharon Kingston. At trial the State had to prove beyond a reasonable doubt that 'with needless indifference to the consequences, Appellee perversely disregarded a known risk that his conduct was likely to cause a certain result or likely to be of a certain nature'. See R.C. 2901.22 (C).

So what was the known risk, that Appellee should have been aware of when he got on the road roughly seven and a half hours after using cocaine for the last time. How, if any way, did the cocaine and its metabolites in his blood that was taken roughly four hours after his accident impair his judgement?

That's what bothered the Appellate court below and why it ruled in favor of Appellee on this issue. It felt that the effects of cocaine on Appellee's judgement in this case was something that only an expert could testify to in coming to that conclusion it said:

The average juror does not possess the pharmacological and/or biochemical knowledge to formulate a reliable opinion regarding the lasting effects of cocaine on a user's body.

State v. Hatfield, at page 30, paragraph 156. This issue in the context of a prosecution for R.C. 2903.06 (A)(2)(a) was not involved in any of the cases cited by the Appellant in her memorandum in support of jurisdiction. This court has previously held that an expert witness may be necessary where the State of Ohio has to prove that an accused was impaired by the results of a blood test. Newark v. Lucas, 40 OS 3d 100 (1988). Newark involved the admission of the results of a blood test in an OMVI prosecution to show proof of impairment.

Of course, Appellee was not alleged to have been under the influence of drugs and he was not indicted under R.C. 2903.06 (A)(1)(a) which would have required the State to prove he was beyond a

reasonable doubt when he had an accident with Sharon Kingston on February 24, 2004. However, the court in Newark required an expert witness to tie the blood results to the Defendant's driving because his ability to perceive, make judgements, coordinate movements, and safely operate a vehicle were at issue to the prosecution. Newark v. Lucas at 104.

Counsel thus submits that the Appellate court made the proper rulings on this issue. Moreover, counsel adds that it was consistent with what this court previously held in Newark v. Lucas.

THIRD PROPOSITION OF LAW

THE PROPER REMEDY FOR THE ERRORS THAT THE APPELLATE COURT RULED ON IN APPELLEE'S FAVOR WAS TO HAVE HIS CASE REVERSED AND REMANDED FOR A NEW TRIAL.

The Appellate court below reversed Appellee's conviction for essentially three reasons.

However, the proper remedy for two of them was to have the case remanded for a new trial. Counsel submits that that's why the court didn't direct the trial court below to just pick one of the two things that Appellee was convicted of and enter a guilty finding as to it as Appellant's counsel directs.

ARGUMENTS IN FAVOR OF CROSS APPEAL

A SPECIAL JURY INSTRUCTION WAS DELIVERED IMMEDIATELY AFTER THE DEFENSE RESTED ITS CASE. THAT INFORMED A JURY THAT THE ADVOCATE WHO USES AN EXPERT WITNESS MUST ESTABLISH THE UNDERLYING FACTS THAT HE BASES HIS OPINION ON BY A PREPONDERANCE OF THE EVIDENCE VIOLATES AN ACCUSED'S FIFTH AMENDMENT RIGHTS WHEN AN EXPERT WITNESS WHO TESTIFIES ON HIS BEHALF BASES HIS OPINION UPON A CONVERSATION THAT HE HAD WITH HIM AND THE ACCUSED EXERCISES HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY.

Under the Constitution, the accused cannot be compelled to be a witness against himself. U.S. Constitution, Amendment V. Accordingly, the Supreme Court has held that a trial judge and a prosecutor may not comment upon an accused's exercise of that right when he does not take the stand at trial. *Griffin v. California*, 380 US 609 (1965).

In the trial court below, defense expert witness Douglas Heard gave a professional opinion as to the cause of the accident between Appellee-Cross Appellant and Sharon Kingston that differed from the State's. TP at 490-92. Much of his opinion was based upon an interview that he had with Appellee. TP at 492. The Defense rested shortly after he finished his testimony. Appellee-Cross Appellant exercised his Constitutional Right not to testify.

Prior to the time that Mr. Heard took the stand and off the record, Ashtabula Common Pleas Court Judge Gary Leo Yost informed defense counsel that he may give a special instruction to the jury to disregard all or some part of his testimony should Appellee-Cross Appellant not testify. See TP at 461. Defense Counsel tried to get the Court to say what it would do and did not receive a definitive answer after a heated discussion. See TP at 461-71. In response, the defense introduced an Appellate Exhibit that put the Court on notice that Appellee-Cross Appellant wanted to call Mr. Heard as a

witness, that he didn't wish to testify and that he was aware that there was a risk that went with that decision. See Defense Appellant Exhibit 1. Found also in Appendix. See TP at 470.

Accordingly, almost immediately after Mr. Heard testified and the Defense rested and sometime prior to closing argument, Judge Yost gave the following special instruction to the jury after first advising it that the accused didn't have to take the stand:

...on the other hand there is an expert witness who has testified in this case that he considered certain things that the Defendant told him that are not otherwise in evidence.

In evaluating the opinion of any expert witness, you must consider whether the facts on which the expert based their opinion have been established by, at least, a preponderance of the evidence.

Therefore, in deciding the weight to give to the expert opinion, you may consider the extent to which the opinion is based on facts that have not been put into evidence. However, you must be careful to limit this consideration to the evaluation of the opinion of the expert. You must not consider this in any way as suppressing any inference of guilt of the Defendant.

TP at 524-25.

Counsel submits that even though the Court told the jury that Appellee-Cross Appellant didn't have to testify and it told the jury that it couldn't infer guilt from the instruction, the instruction was still an unjustified comment on the exercise of his rights not to be a witness at all. It was also an unwarranted comment upon the exercise of his exercise of his Sixth Amendment Rights to call witnesses on his behalf.

Appellee-Cross Appellant had no obligation to testify in support of any defense that was argued on his behalf. Accordingly, any comment from the bench about any defense that he doesn't back up through his own testimony is a violation of his Fifth Amendment Rights. *State of Ohio v. Buckland*, 1987 WL 7170 (5<sup>th</sup> Dist., 1987) (Comment from the bench upon accused's failure to testify in support of alibi defense). Counsel also submits that the instruction requiring the defense to back up anything

that a witness says on Appellee-Cross Appellant's behalf by a preponderance of the evidence violated his due process rights because it in effect told the jury that he had to prove himself innocent by that level of proof independently of the State's obligation to prove him guilty. See Mullaney v. Wilbur, 421 US 684 (1975). In Mullaney the Supreme Court held that requiring an accused to prove an element of his defense (in that case heat of passion to reduce a murder charge to manslaughter) by a preponderance of the evidence violated his rights to due process of law. It found that doing so was an unconstitutional shifting of the burden of going forward from the State to prove the accused guilty beyond a reasonable doubt to the defense to prove him innocent. See Mullaney, at 421 US at 702-03.

The Appellate court below saw nothing wrong with this instruction. It felt that it was an appropriate instruction upon an expert witness' reliance upon facts that are not in evidence. It felt that it was also instruction as to the weight to give to expert testimony. See State v. Hatfield pages 21-22, paragraph 131.

In addition, it held that instruction (which was delivered again at the close of all evidence) did not violate Appellee-Cross Appellant's rights because the jury was also instructed that he was presumed innocent, that his guilt had to be proven beyond a reasonable doubt and that he didn't have to take the stand, etc. Id at page 21, paragraph 131.

Counsel submits that the instruction might have been appropriate in a civil case. That's why and how it is found in Ohio Jury Instructions. See 4 OJI Section 405.51 (3). However, counsel submits it has no place in a criminal case where the burden of proof is upon the State to establish guilt beyond a reasonable doubt, the defense has no burden to prove anything and the accused doesn't have to take the stand and no comment may be made about that.

Counsel submits that when the trial court gave that instruction immediately after the defense

rested and Appellee-Cross Appellant exercised his right not to testify it muddled the burdens of proof in this case notwithstanding what it said in its instructions to the jury. It also made at least a strongly implied comment on Appellee-Cross Appellant's exercise of his right no to take the stand.

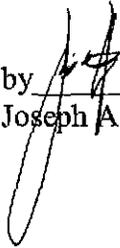
Therefore, counsel feels that the trial court abused its discretion and the Appeals court below did not properly apply the law on this issue. So it should be reviewed further.

## CONCLUSION

Appellee's counsel argues for all of the reasons argued herein that the Court of Appeals below applied the law properly when it reversed Appellee's conviction. Therefore, he urges this court to not accept jurisdiction of this case as counsel for Appellant argues in her Memorandum in Support of Jurisdiction.

In the alternative, counsel asks that this court remand this case back to the Appellate court for determination of the four assignments of error that it didn't resolve. This way it can make a more comprehensive decision on whether to accept this case or affirm the court's reversal of Appellee's conviction. Counsel brings to this court's attention that one of those unresolved issues was a cumulative error argument which may have some relevance given that counsel for Appellant has now raised a harmless error issue in response to one of the Appellate court's holdings. Should this court assume jurisdiction of the case, counsel submits for the reasons argued herein, that it also accept jurisdiction of his cross appeal.

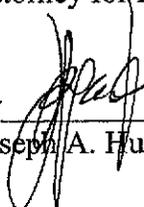
Ashtabula County Public Defender, Inc.  
Attorney for Defendant-Appellant

by   
\_\_\_\_\_  
Joseph A. Humpolick, Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing personally delivered to the office of Thomas L. Sartini, Ashtabula County Prosecutor, 25 W. Jefferson St., Courthouse, Jefferson, Ohio, on this the 11<sup>th</sup> day of February, 2008.

Ashtabula County Public Defender, Inc.  
Attorney for Defendant-Appellant

by   
\_\_\_\_\_  
Joseph A. Humpolick, Attorney