

IN THE SUPREME COURT OF OHIO

State of Ohio

On Appeal from the Athens County
Court of Appeals, Fourth Appellate District

Appellee

v.

Ronald Clark,

Case No. 08-0154

Appellant

Appellate No. 07CA9

MEMORANDUM IN RESPONSE OF APPELLEE, STATE OF OHIO

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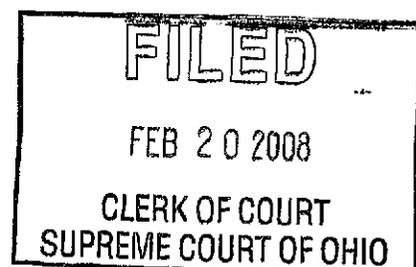


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EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.

This court should decline jurisdiction because the case presents no legal issue that is either part of the case or that this court has not already decided. Attempting to create a conflict and to create an unresolved legal issue, appellant misinterprets the holdings of three cases: the lower appellate court opinion in the instant case; the First District Court of Appeals opinion in *State v. Jarvis* (Feb. 5, 1999), Hamilton App. No. C-980210, 1999 Ohio App LEXIS 294; and this court's opinion in *State v. Deal* (1969) 17 Ohio St.2d 17.

The issue of whether a trial court should differentiate between retained and appointed counsel when deciding what a trial court should do when a defendant complains about retained counsel is not present in the instant case. Appellant says at page 2 of his memorandum "The Fourth District expressly held that a retained attorney who allegedly failed to secure alibi witnesses should be held to a lower standard merely because Mr. Clark's family paid his bill****" Appellant is wrong. Appellant quotes the lower court's quoting other cases as follows: "*Deal and its progeny only impose a duty upon a trial court to inquire on the record about complaints a defendant has raised regarding his appointed counsel, not retained counsel,*"(memo. P.2). The lower court, however, certainly did not "expressly" adopt the quoted language as its holding. Although citing the quoted language with apparent approval, the trial court, Appellee respectfully submits, did not adopt the language as its holding even implicitly. Rather, the court implicitly found that the trial court had complied with whatever duty it had "to inquire on the record about complaints a defendant has raised" as "the trial court patiently listened to Clark before and after the jury selection to explain the problems he had with

his counsel as indicated by several exchanges between the court and Clark regarding Clark's counsel." (See court's opinion, p. 5).

Appellant says that *Deal* "requires" the trial court to ask defense counsel why he is declining to call alibi witnesses. Appellant is wrong. This court in *State v. Deal* held that under the circumstances of *Deal*, the trial court was required to inquire into the complaint and to see that the record contained an adequate investigation of the complaint. Nowhere in *State v. Deal* does this court say that a trial judge must ask appointed counsel why counsel is declining to call alibi witnesses; this court merely observes that doing so would have made a sufficient record to allow a reviewing court to judge the propriety of the trial court's rulings.

In these circumstances, we think it was the trial court's duty to put its own investigation of such an objection into the record, and thus prevent the appellant from being deprived of review on the matter. In other words, before continuing with the trial the court should have made it clear in the record whether the appellant's action was an arbitrary failure to go forward or a legitimate claim of inadequate representation.

Such a record could have been made if the court had asked appellant's trial counsel why he had not filed notice of alibi or subpoenaed appellant's alleged witnesses. The right to counsel is important enough that in a situation such as this a reviewing court should have sufficient information in the record to determine whether a claim of inadequate counsel is justified.

State v. Deal, 17 Ohio St. 2d 17, 19-20 (Ohio 1969)

The opinion, Appellee respectfully suggests, allows for other ways, besides asking defense counsel why he does not want to call the witnesses, of making a record sufficient for a reviewing court to determine whether the trial court has properly exercised its discretion,.

The third case that appellant misrepresents is the fourth district appellate case of *State v. Jarvis* (Feb. 5, 1999), Hamilton app. No. C-980210, 1999 Ohio Spp. LEXIS 294.

Appellant claims that case is in conflict with the instant case, because, according to

appellant, that case “held” that *Deal* applies whether counsel is retained or appointed. On the contrary, the difference, if any, between appointed and retained counsel was never at issue in *Jarvis*. That case involved appointed counsel and every case upon which it relied, including *State v. Deal*, involved appointed counsel. When the court in *Jarvis* quoted from the cases upon which the court relied, the fourth district court simply omitted the words “indigent” and “court-appointed” because the terms were irrelevant to the issues before the court. Omitting qualifiers does not broaden the “holding” of a case to all cases, even those that are different from the case before the court. A case addressing *Deal* and duties owed to a defendant who complains about appointed counsel holds nothing at all about whether a defendant’s having retained counsel would have made any difference to the outcome of the case.

The instant case likewise fails to raise the issue of whether a court must inquire into a defendant’s dissatisfaction with retained counsel as well as appointed counsel because the appellate court decided the case not based on that distinction but based on the inquiry the trial court conducted. To be a “holding,” the rule of law must determine the outcome of the case. Language unnecessary to the outcome of the case is dicta. Had the trial court in the instant case intended a distinction between appointed and retained counsel to be dispositive, the court would have no reason to discuss the issue further. The appellate court, however, went on to discuss the trial court’s inquiry into the defendant’s complaint.

If this court seeks to explore whatever duty a trial court has to inquire into a defendant’s dissatisfaction with retained counsel, when the defendant, on the day of trial, attempts to dismiss his second retained counsel for the same reason the defendant

dismissed his first retained counsel, to wit: counsel refused to call alibi witnesses the defendant wanted called, the instant case is a poor vehicle. Rather than being “identical,” to *State v. Deal*, as appellant claims, *Deal* and the instant case are alike in one way only; in both cases, the defendants claimed their attorneys had refused to call some witnesses the defendants wished to call. Even that similarity is not total, as counsel in the instant case called one of three alibi witnesses appellant wanted called.

There is no conflict between the instant case and any other case because the point upon which appellant claims the conflict exists was unnecessary for the decision. "Questions certified should have actually arisen and should be necessarily involved in the court's ruling or decision." *Pincelli v. Ohio Bridge Corp.* (1966), 5 Ohio St.2d 41, 44.

The worst representation appellant makes, however, regards the issue of whether the trial court should have ordered a psychological exam. Appellant quotes from a dissent by Justice Marshall from an order denying a petition for certiorari and calls it a “holding.” There is no federal standard on when a psychological examination is necessary and, therefore, there is no conflict.

Other issues appellant seeks to raise have either already been decided by this court or are insignificant.

STATEMENT OF THE CASE AND FACTS

Forty-three year old Ronald Clark was charged with three counts of unlawful sexual conduct with a minor, to wit: fifteen-year-old Lisa Lyons, on or about February 16, 2006 through and including March 21, 2006. They talked on the phone several times a day and Lori’s sister, Lisa Lyons, and Lori’s friend, Laura Giffin, saw them together.

On three separate days, appellant inserted a finger into the vagina of Lori Lyons, once at a park, once at Laurie Giffin's house and once at the Chauncey baseball diamond. At the baseball diamond, Laurie Giffin, saw appellant's hand inside Lori pants.

Initially represented by a "Mr. Tyack," (first name unspecified), appellant fired him because he refused to present alibi witnesses. Appellant hired Mr. Van Gander. Two days before trial, Mr. Gander filed a motion asking that his client be evaluated to determine whether he was competent to stand trial. Although the court did not order a psychological examination, the court held a hearing at which appellant presented evidence that he had been "ranting" and "raving." At the hearing, appellant ranted and raved at the judge that his rights were being denied and that his indictment should be dismissed because he had not had a preliminary hearing and other legally insignificant reasons. The trial court found appellant competent to stand trial.

Two days later, on the morning of trial, appellant sought to discharge Mr. Gander. He was upset with Mr. Gander because Mr. Gander told him that the plea agreement offered by the prosecution was a good one and advised him to accept it, and because Mr. Gander declined to call appellant's mother and brother as alibi witnesses. Appellant also wanted Joanne Wolfe called as an alibi witness. Mr. Gander intended to call Joanne Wolfe, although she had not been designated an "alibi" witness, and the court said it would allow her to testify. Among other interesting legal concepts, Appellant instructed the court that he had a "right" to hire three attorneys. Mr. Gander said he had been representing appellant and trying to do a good job. The court denied appellant's request. The trial proceeded, with Mr. Gander fully participating.

The jury found the defendant guilty of all three charges and the court sentenced him to four years on each count to run consecutively.

ARGUMENT IS SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I. When a trial court decides to allow a defense attorney to present an alibi witness despite counsel's having failed to file a timely notice of alibi, the court has no duty to inquire into counsel's reasons for failing to file the notice in a timely fashion.

The defendant said he wanted to call as alibi witnesses, his mother, his brother, and Joanne Wolfe. Apparently, defense counsel had disclosed Ms. Wolfe as a witness, but had failed to designate her as an "alibi" witness. In fact, she was not an "alibi" witness in the usual sense because, as is so often true in cases involving sex against minors, the victim was uncertain of the dates of the three acts of sexual conduct. The court allowed Ms. Wolfe to testify. Counsel did not ask the court to allow the defendant's mother and brother to testify. Appellant asks this court to establish guidelines for dealing with difficult clients. However, each case is different and must depend upon the discretion of the trial court. If the trial court provides a record sufficient for a reviewing court to determine whether the defendant received a fair trial, that is enough. A procedure exists for determining if matters not obvious from the record caused a defendant to receive ineffective assistance of counsel; that procedure is a postconviction petition.

Suggesting that the court should have allowed appellant to hire another attorney and go to trial that morning is disingenuous. No attorney was present and ready to

represent appellant. No attorney would have been willing to go to trial without preparation. Appellant did not want to represent himself.

Appellant's first proposition of law presents no issue warranting further review.

Proposition of Law No. II: When it is obvious from the record that a defendant's complaint about retained or appointed counsel's refusal to call alibi witnesses is insignificant because counsel does call one of three alibi witnesses; the crime with which the defendant is charged is such that alibi as a defense is unhelpful; and the record reveals extensive investigation of the case by defense counsel, the court has made a sufficient record to judge the defendant's complaint and there is no duty on a trial court to specifically ask counsel why counsel chose not to call the witnesses.

This court in, *State v. Deal*, *supra* limited its holding to the facts of that case, saying at 19, "We reverse because, in the circumstances of this case, it was the duty of the trial court to see that the record contained an adequate investigation of appellant's complaint." The syllabus paragraph is likewise specific to the facts of *Deal*.

Where, during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with assigned counsel participating if the complaint is not substantiated or is unreasonable.

The issue that *Deal* requires a trial court and reviewing courts to address is "whether the appellant's action was an arbitrary failure to go forward or a legitimate claim of inadequate representation."

In the instant case, it is pellucid from the record that counsel's representation of appellant was not only adequate but exemplary. When appellant was not "ranting and raving" and "wanting counsel to file motions claiming defendant's civil rights had been denied," appellant obviously discussed the case with defense counsel, because Mr. Gander knew all about the case. He exploited every tiny inconsistency in the state's evidence. The victim claimed she did not smoke; Mr. Gander called witnesses who said she did (which the court allowed despite Evid. R. 608.). Mr. Gander argued to the jury that Lori's testimony about the circumstances under which Lori said appellant assaulted her, (such as were they inside a dugout or above it; was Lori's friend inside her house or outside it; and was another friend standing beside Lori and appellant or farther away), differed from the state's other witnesses. Mr. Gander produced evidence that appellant worked daily in Columbus during the three month period of time in question and that he came home to Joanne Wolfe between 5:00 p.m. and 7:00 p.m. during much of that time, when Lori said the offenses occurred in mid afternoon after she got out of school. Mr. Gander also offered the testimony of Ms. Wolfe that Lori telephoned appellant many times and he hung up on her; Lori said those calls were short because her phone malfunctioned.

Cases involving sexual conduct with minors are difficult both to prosecute and to defend. As usually happens in these cases, the crime was reported long after it occurred. Lori was uncertain of the dates on which the three offenses occurred. In cases such as these, alibi witnesses are unhelpful.

The instant case is different from *State v. Deal*, which involved a bank robbery on a specific date. Moreover, in *Deal*, defense counsel declined to participate in the case.

He called no witnesses and waived closing argument. Therefore, in *Deal*, not only is there no record of why defense counsel chose not to call the witnesses but there was nothing from which the court could judge how good a job defense counsel had done. In the instant case, despite the near impossibility of providing an alibi for an uncertain date, counsel tried by calling Ms. Wolfe. He impeached the state's witnesses on every possible detail.

In a heated moment, Mr. Ganders said words to the effect that with appellant saying bad things about Mr. Gander, he, Mr. Gander did not want to help him. This troubled the dissenting judge because he feared the defendant would think defense counsel did not want to help him. First the defendant's subjective opinion of counsel's motivation is irrelevant. A defendant is unentitled to a "meaningful relationship" with his attorney. *Morris v. Slappy*, (1983), 461 U.S. 1. Second regardless of what Mr. Gander said, Mr. Gander performed admirably under the circumstances. Finally, the defendant already thought that he knew more than anyone else. Nothing would have satisfied him.

As appellant points out, this court has already held in *State v. Hester* (1976), 45 Ohio St. 2d 71, that defendants are entitled to the effective assistance of retained counsel and established a standard for determining whether retained counsel provided effective assistance. Although the standard is phrased differently, it is essentially the same standard that applies to appointed counsel. Although the appellate court below remarked that *Deal* was inapplicable to retained counsel, that statement does not form the basis for the decision. The court's inquiry, under the circumstances of the instant case, was sufficient to satisfy any duty the court owed to the defendant to inquire into his dissatisfaction with his counsel. As appellant fails to raise ineffective assistance of

counsel as an assignment of error below and fails to raise it now, Appellee assumes that appellant knows he received effective assistance of counsel. There is no conflict to resolve.

Appellant's second proposition of law warrants no further review.

Proposition of Law III: A trial court may but is not required to order a competency examination under R.C. 2945.371 if the court has reason to believe the examination necessary.

This court in *State v. Chapin* (1981), 67 Ohio St. 2d 437, recognized that former R.C. 2945.37 permitted the court within its discretion to order a psychological examination. R.C. 2945.371, on this issue, is the same; it says the court "may" order an examination.

Appellant is attempting to create a conflict where none exists. On page 6 of his petition, appellant says "But the United States Supreme Court has held that "[i]t is settled that, if evidence available to a trial judge raises a bona fide doubt regarding a defendant's ability to understand and participate in the proceedings against him, the judge has an obligation to order an examination to assess his competency..." *Porter v. McKaskie* (1984), 466 U. S. 984,985, citing *Drope v. Missouri* (1975), 420 U.S. 162, and *Pate v. Robinson* (1966), 383 U.S. 375." However, the quoted language, rather than being a "holding," is a quote from an opinion dissenting from a denial of certiorari. Moreover, the cited cases did not hold what the dissenting justice said was "settled" either. In fact, the United States Supreme Court in *Drope v. Missouri* specifically said that there was no

constitutionally mandated standard. The "bona fide doubt" language comes from an Illinois statute, one of many the court discussed.

The United States Supreme Court in *Droppe v. Missouri* said the following: at 171-173

Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S., at 402.

In *Pate v. Robinson*, 383 U.S. 375 (1966), we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. Although in *Robinson* we noted that Illinois "jealously [guarded] this right," *id.*, at 385, we held that the failure of the state courts to invoke the statutory procedures deprived Robinson of the inquiry into the issue of his competence to stand trial to which, on the facts of the case, we concluded he was constitutionally entitled. The Court did not hold that the procedure prescribed by Ill. Rev. Stat., c. 38, § 104-2 (1963), was constitutionally mandated, although central to its discussion was the conclusion that the statutory procedure, if followed, was constitutionally adequate. See, e. g., *United States v. Knohl*, 379 F.2d 427, 434-435 (CA2), cert. denied, 389 U.S. 973 (1967); *United States ex rel. Evans v. LaVallee*, 446 F.2d 782, 785-786 (CA2 1971), cert. denied, 404 U.S. 1020 (1972). Nor did the Court prescribe a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure. Rather, it noted [**114] that [173] under the Illinois statute a hearing was required where the evidence raised a "bona fide doubt" as to a defendant's competence, and the Court concluded "that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue."

Although a defendant has a constitutional right to be brought to trial only if he is capable of understanding the procedure and assisting in his defense, the federal constitution prescribes no specific method by which competency must be determined. In Ohio, it has always been within the discretion of a trial court, as it is within the discretion of all trial courts, to determine whether the defendant is competent. Under R. C. section

2945.371, it is within the discretion of the trial court to decide whether to order psychological examination.

Upon appellant's request made two days before trial was to start, the court held a competency hearing and found nothing to suggest even the possibility of incompetence. Appellant is arrogant and manipulative; criminals often are. Such persons are always shocked when the behavior that has always worked to get them what they want fails to work on judges. A defendant cannot render himself incompetent by refusing to cooperate. Moreover, appellant obviously had cooperated with his counsel, as counsel was well-versed in the case. It is obvious that the information Mr. Gander used to impeach Lori Lyons and contradict her testimony came from appellant.

Appellant's third proposition of law presents no issue warranting further review.

Proposition of Law IV: Applying State v. Foster (2006) 109 Ohio St.3d 1 to offenses committed after February 27, 2006, is permissible under the ex post facto clause and the due process clause.

The defendant in *State v. Foster*, supra made the same argument that appellant makes, that he was required to be sentenced to the minimum, and this court rejected that argument. A defendant who commits his crime after *Foster* has even less reason to expect that he will receive a minimum sentence.

Appellant's fourth proposition of law presents no issue warranting further review.

Proposition of Law V: A defendant who is unaffected by a statute on a subject other than the first amendment cannot challenge the statute's constitutionality

Appellant lacks standing to challenge the constitutionality of Am. Sub. H.B. 137, because the trial court imposed appellant's post release control. Appellant's fifth proposition of law warrants no further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. The state respectfully requests that the court decline jurisdiction.

Respectfully submitted,

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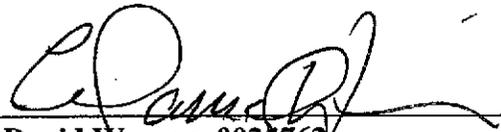


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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the forgoing was deposited into the United States mail addressed to STEPHEN P. HARDWICK, 8 East Long Street, 11th Floor, Columbus, Ohio 43215; Counsel for Defendant-Appellant, on this day, February 19, 2008.



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