

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

DAVID W. HARRISON,

Appellant.

Case No.: 08-0331
(Discretionary Appeal)

On appeal from the Madison County
Court of Appeals
Twelfth Appellate District
Case No. CA 2006-08-028

MERIT BRIEF OF APPELLANT DAVID W. HARRISON

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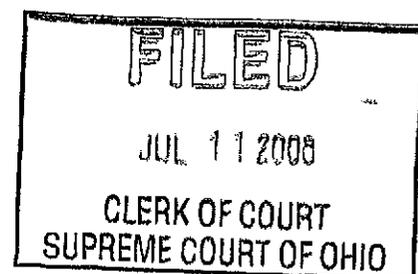


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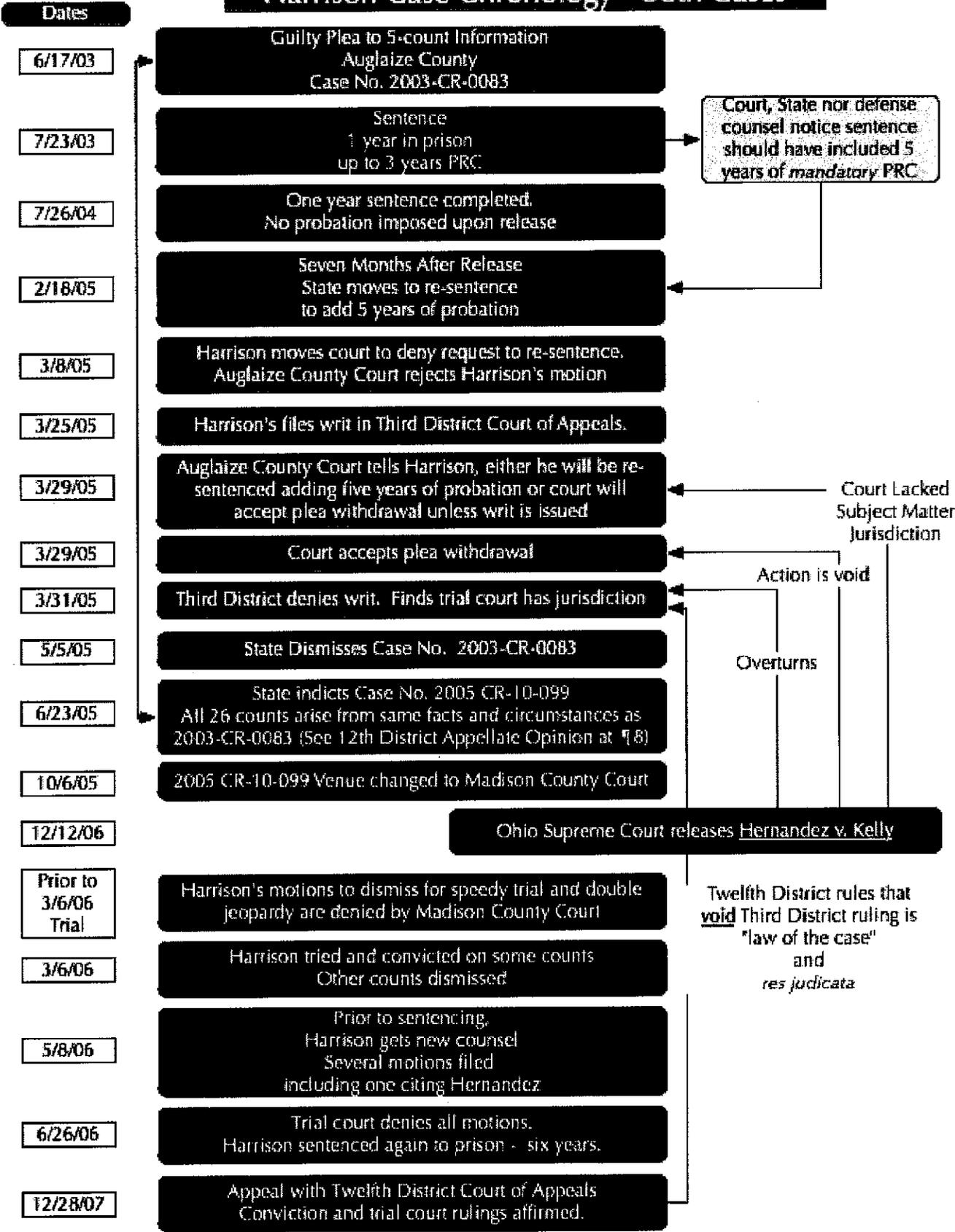
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STATEMENT OF THE FACTS

This case has an admittedly convoluted history. The graphical chart of the case history on page v is included for the court's convenience and is critical to understanding the unusual legal posture of Appellant's case.

Employees of the Wapakoneta Police Department found a tape recorder in a women's restroom. Appellant, an employee of the Police Department, admitted placing the device there. An office and home search was executed related to the investigation of the tape recorder incident. From seized computers, digital evidence items were recovered.

On June 17, 2003 Appellant plead guilty to a five (5) count information in case no. 2003-CR-83 and was sentenced in Auglaize County in the Third Appellate District. (Appendix I). In exchange for that plea, any other charges from the same set of facts and circumstances were dismissed and the State agreed not to bring any additional charges. He was imprisoned for twelve (12) months, serving his entire sentence. His sentence as stated by the trial court included up to three (3) years of post release control (hereinafter referred to as "PRC"). That portion of his sentence was error that neither the court nor either party noticed at the time. By statute, he should have been sentenced to a mandatory five (5) years PRC. Ohio Rev. Code §2907.323; Ohio Rev. Code §2967.28(B). Neither party appealed Appellant's sentence. He was released from prison without imposition of PRC. Seven (7) months after the expiration of his sentence, the State moved to re-sentence him. Appellant opposed that motion arguing the court lacked subject matter jurisdiction to re-sentence or perform any other function. The trial court denied that motion. (Appendix H).

Harrison filed a writ of prohibition with the Third District Court of Appeals to stop the Auglaize County Common Pleas Court from re-sentencing him. The Third District denied the

writ finding the trial court had jurisdiction to re-sentence him even though his journalized sentence had expired. (Appendix E). All of this occurred prior to this Court's publication of its opinion in the Hernandez case. At Appellant's attempted re-sentencing, the trial court offered him two (2) choices – be re-sentenced adding five (5) years of probation to his, then, expired sentence or the court offered to accept the withdrawal of Appellant's plea to the information and he could attempt to work out another plea with the then assigned county prosecutor to resolve the matter. Appellant had never before approached the court in an attempt to withdraw his plea. Until the court declared it would re-sentence Appellant, he never considered withdrawing his plea as he had already served all his time and his journalized sentence had expired. The court accepted Appellant's plea withdrawal. The Attorney General's office wrestled control of Appellant's case from the local county prosecutor. It assigned a competent and aggressive prosecutor, Scott Longo, to his case. All deals were off. Instead of working out a renewed plea to resolve the matter, Longo seized the opportunity to re-imprison Appellant by dismissing Appellant's case no. 2003-CR-83.

On June 23, 2005 Longo had the appellant indicted for twenty-six (26) felonies arising from the same set of facts supporting the five (5) count information in case no. 2005 CR-10-099. The court granted Appellant's motion for change of venue to Madison County in the Twelfth Appellate District. Harrison filed motions to dismiss citing Double Jeopardy and Speedy Trial violations which were denied. After a trial in March of 2006, Appellant was convicted as to counts 1-3 and 8-22. The court dismissed all other counts. (Appendix C).

Following his conviction, but prior to his sentence, Appellant retained new counsel. New counsel identified the issue contained in this court's decision of January 12, 2006 in Hernandez. Based upon that issue and others, several motions were filed in the trial court prior to Harrison's

sentencing. All were denied. At no time following this court's decision in Hernandez of January 12, 2006, did Longo or any other state attorney inform the Madison County trial court of this court's decision and its potential impact on Appellant's case. This is despite the fact that the State was a party to Hernandez.

A judgment entry of sentence and opinion was filed on August 15, 2006 to which Appellant timely appealed. (Exhibit pg. v.). The Twelfth District Court of Appeals affirmed Appellant's conviction and sentence. State v. Harrison, 2007-Ohio-7078 (Appendix B). Appellant timely filed a notice of appeal on February 11, 2008 with this Honorable Court accompanied by a Memorandum in Support of Jurisdiction for which this Court granted jurisdiction as to all five (5) propositions of law.

ARGUMENT

Proposition of Law I:

In light of this Court's rule in Hernandez, once a defendant's sentence has expired, a trial court violates a defendant's Due Process rights by stating it will re-sentence that defendant unless he withdraws his previous tendered guilty plea to a charge the sentence for which has expired.

This court released its decision in Hernandez v. Kelly, 108 Ohio St.3d 395 (2006) on January 12, 2006. (See Chronology on p. v herein). The Hernandez rule is retroactive to the enactment of the sentencing statute. Hernandez v. Kelly, 108 Ohio St.3d 395 (2006).

The trial court that offered Appellant either a re-sentencing (an improper and void exercise of a court's jurisdiction under Hernandez) or a plea withdrawal. This offer posed an unconstitutional choice violating Appellant's Due Process rights. The court unconstitutionally imposed and exercised its jurisdiction, where it had none, (See, Hernandez) extracting a plea withdrawal Appellant did not want to obtain. Without that plea withdrawal, Longo could not have indicted Appellant in case no. 2005 CR-10-099 as it would have violated Appellant's Double Jeopardy rights and violated the plea agreement (i.e., contract) the State and Appellant agreed to resolving case no. 2003-CR-0083 with the plea to the five (5) count bill of information.

Proposition of Law II:

In light of this Court's rule in Hernandez, once a defendant's sentence has expired, a trial court does not have jurisdiction to accept a plea withdrawal by the defendant in the case related to the expired sentence and any such purported acceptance is void.

Expanding on the rule in Hernandez, "Subject matter jurisdiction cannot be waived and where judicial tribunals have no jurisdiction of the subject matter, their proceedings are absolutely void." State ex rel. Tubbs Jones v. Suster, 84 Ohio St.3d 70 (1998). Appellant's plea withdrawal was void. Id.; see also, Hernandez.

As this Court held in Suster, a trial court does not have endless jurisdiction governing the conduct of a citizen whose sentence has expired. While the rule in Hernandez was narrowly stated relating only to re-sentencing, it left open the opportunity for courts to exercise jurisdiction to perform other acts or mandate other conduct by defendants aside from the Hernandez prohibition on re-sentencing. Despite the prohibition on re-sentencing announced in Hernandez, the Madison County Court and the twelfth appellate district court held that a court does not have jurisdiction to accept an appellant's plea withdrawal after the expiration of that appellant's journalized sentence. The trial court and appellate courts' rulings are inconsistent with this Court's ruling in Hernandez and Suster.

Proposition of Law III:

A defendant's Double Jeopardy rights are violated by a trial on charges arising from the same set of facts and circumstances as a case in which the defendant plead guilty to an information in exchange for dismissal of all remaining charges and served his complete sentence.

An accused has the right to know when the accusations against him are at an end and not have a hanging sword of justice hovering over his neck and be unable to determine when his case has been finally adjudicated. It is unusual justice to receive a sentence and then more than a week later be hauled in and presented again, and again faced with a new trip to a penal institution. The administration of justice requires careful, considerate, deliberate determinate and final decision. Common to all systems of jurisprudence is the maxim that there be a finality to judicial proceedings. [Citation omitted.] 'That no one shall be put in jeopardy twice for the same offense is a universal maxim, thought worthy to be incorporated, to a certain extent, into the constitution of the United States; and that an acquittal or conviction by a court having jurisdiction, on a sufficient indictment or information, is in all cases [whatsoever] a bar, is equally clear.' [Citation omitted.] * * * If questions once tried and determined could be again agitated, at the option of the parties, one main object of any administration of justice would be defeated. The function of courts is to settle controversies according to law. The object of settlement is secured by the principle of finality of judgments.

State of Ohio v. James, No. WD-85-59 (June 13, 1986, Wood Co., Ohio).

The chronology of events in the chart on p. v is undisputed. At every stage of this proceeding, journal entries exist and were presented to the court documenting each procedural step. Appellant served a year in prison in case no. 2003-CR-0083 in exchange for an agreement by the State to drop all other charges relating to the events described above. The State's subsequent indictment of Appellant in case no. 2005-CR-10-099 related exclusively to events arising from the same facts and circumstances as those involved in the plea to the information in case no. 2003-CR-0083. The trial court's purported acceptance of Appellant's plea withdrawal is void. See, Hernandez; see also, Suster. In light of the plea withdrawal being void, Appellant's second case (indictment, conviction and sentence) in case no. 2005-CR-10-099 was a violation of his Double Jeopardy rights. The State violated the plea agreement it originally reached with Appellant in case no. 2003-CR-0083 by indicting him on charges in case no. 2005-CR-10-099 that were foregone in exchange for Appellants's original plea and serving of the one (1) year sentence. His indictment, conviction and sentence in case no. 2005-CR-10-099 should be reversed by this Court with direction to the trial court to dismiss the case as well as accompanied by an order that Appellant be immediately released from prison.

Proposition of Law IV:

A 2005 court of appeals decision as to a trial court's jurisdiction to re-sentence a defendant whose journalized sentence had expired, voided by this court in Hernandez, cannot still remain the "law of the case" or res judicata for a defendant in 2007 arguing an improper exercise of jurisdiction by that same trial court pursuant to the 2006 rule announced in Hernandez.

The Twelfth District in affirming Appellant's conviction and sentence, held that the Third District's jurisdictional ruling in 2005 is, nonetheless, "law of the case" and res judicata defeating Appellant's jurisdictional arguments in 2007. The Twelfth District was informed by

Appellant in his brief that the Third District's ruling, pre-Hernandez, was no bad law as its holding was opposite of Hernandez. Despite the fact that the Third District's ruling is now clearly bad law, the Twelfth District did not rule on Appellant's jurisdictional arguments deferring to the Third District's pre-Hernandez ruling using both the "law of the case" and res judicata premise.

The trial court in Appellant's first case had no jurisdiction to re-sentence him nor accept his plea withdrawal. See, Hernandez; see also, Suster. The Third District's 2005 ruling is no longer good law. Id. The 2005 decision by the Third District court of appeals cannot be controlling in 2007 on the Twelfth District Court of Appeals as either "law of the case" or res judicata as the Twelfth District Court of Appeals held. (Appendix B).

Of necessity, this court periodically issues rulings overturning appellate court decisions. The Twelfth District's reliance on the voided Third District ruling sets a dangerous precedent available to other appellate courts to circumvent this Court's authority. The Twelfth District relied upon, as controlling, the Third District's voided decision on Appellant's writ pre-Hernandez. It essentially identified as stare decisis a voided prior ruling of another appellate court enabling it to ignore the application of Hernandez. The record of Appellant's case now has two (2) court of appeals decisions contrary to Hernandez. One was entered prior to the publication of Hernandez and one after. The Third District has a rationale for its contrary finding as Hernandez had not yet been published. The Twelfth District was bound by Hernandez and avoided its application here by deferring to the now void 2005 ruling by the Third District Court of Appeals.

Proposition of Law V:

A charged citizen does not receive effective assistance of counsel in a computer related child pornography case when counsel admits he is technologically uneducated and inexperienced making numerous affirmative mistakes or omissions supporting his ignorance about the critical technological issues of his client's case.

The technology era in child pornography and importuning cases has been upon us for years. The key U.S. Supreme Court decision spurring a wave of technological defenses to child pornography cases dates from 2002 – nearly six (6) years ago. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Criminal defense of cases involving evidence derived from, landing on, extracted from or included in a computer or other similar digital media alleged to be contraband child pornographic images requires more education and experience than merely having tried 20 years of other criminal cases. Few if any law schools, still today, offer classes in how computers work, the Internet's structure and process, digital image creation, manipulation and transmission or how technology impacts traditional criminal defense issues such as 4th, 5th and 6th amendment challenges. This criminal case represents, merely, one (1) of hundreds (100+) occurring within Ohio each year involving lawyers with no or insufficient technological abilities and knowledge accepting retainers from clients in cases where sophisticated technological knowledge is vital.

Mere criminal defense experience does not prepare counsel to properly defend these technology focused criminal cases. This fact is evident in Appellant's case by the complete absence of what are becoming standard pre-trial motions by effective counsel in these cases, especially in Ohio. This Court itself has handled two (2) significant cases in the past twenty-four (24) months involving child pornography prosecutions. It knows well that these issues are not run-of-the-mill legal issues associated with other criminal cases. These issues are unique to this

area of the law and heavily dependent on counsel's sophisticated knowledge of computers and associated technology. Appellant's trial, occurring in 2007, is devoid of any motion or argument relating to either of the central or peripheral issues in those cases. This omission underlines the ineffective representation Appellant received. Below are just some of examples of the ineffectiveness of counsel due to his admitted technological ignorance.

A. Failure to seek Farid's exclusion or challenge his unscientific methodology

Effective counsel in child pornography cases knows that the State's digital imaging expert in the trial of this matter, Hany Farid, has been exposed as a fraud in prior cases. In addition, his methodology has never been subjected to outside testing or verification of any kind. In Appellant's case, counsel was so ineffective, he failed to notice that Farid did not testify the items depicted an actual minor at all as required under the statute. The government expert whom replaced the debunked government expert, Farid in a notable federal case, conceded that Farid's visual examination methodology is unreliable. U.S. v. Frabizio, 2006 WL 2384836 (August 11, 2006, D.Mass.).

The Frabizio court characterized Farid's approach and that of other government experts as "eyeballing the evidence" Id. at 5; "[A] technique [that] has never been tested, its error rate is unknown and therefore does not support a finding of reliability." Id. at 11; "[His] technique [is not] general[ly] accept[ed]." Id. at 12.

Farid provided no name for his method. He provided no error rate. Counsel never asked for either. It is possible he is wrong in his detection of alterations 50% of the time, 75% of the time or more. No treatises were presented regarding "eyeballing the evidence" as the Frabizio court termed it. Farid admitted to "guessing" during his testimony. (TR. pg. 1000.). Trial counsel failed to object to that testimony. Farid had no knowledge of the history of any of the

indicted items. (TR. pg. 1017.). Counsel admitted in the midst of cross-examining the Farid that he “barely knew” how to turn a computer on. (TR. pg. 1026.). Such an admission does not engender confidence a client is effectively represented in a technology-reliant criminal case. There is no means by which trial counsel could have effectively represented Appellant when he was beebly inept at cross examining the State’s key technological witness.

Effective trial counsel in Appellant’s case would have known to challenge Farid’s method leading to his exclusion as a witness as he was voluntarily excluded in Frabizio. A proper cross-examination of Farid resulted in his voluntary withdrawal as a government witness in Frabizio. Farid admitted misleading the court during his Daubert hearing testimony. Effective counsel would have dispatched his unscientific and unreliable methodology and impeached Farid on his deceit in Frabizio. His exclusion would have left the state without a means of authentication of its key evidence. The issue of the authentication of the image evidence itself is also something counsel neglected to challenge with an appropriate motion in limine which has been filed in many of these cases nationwide.

Farid’s testimony was grounded in such squishy non-conclusions about authenticity typified by this one: “Does it exhibit any signs of having been manipulated? And if the answer is no, then you're left with no other conclusion other than it is probably authentic.” (TR. pg. 983.).

Throughout Farid’s entire testimony, trial counsel failed to note that he only distinguished the indicted items from computer generated images. Farid neglected to distinguish the evidence he testified he was “guessing” about from digital images of real persons that may have been altered. Counsel failed to note the up to 30% error in Farid’s most advanced computer program to make this distinction. He was not asked, nor cross-examined, on how he could tell

by visual examination that the items had or had not been the result of altering digital images that were originally something different.

All of trial counsel's remaining errors are all rooted in his admitted ignorance about technology, computers, digital images and the like – essentially the entirety of the critical evidence and expert testimony on both sides in Appellant's case.

B. State witness permitted to testify as expert without being qualified

Witness Corrigan was permitted to testify to a range of content reserved for experts in computer forensics. The court was not asked and did not find him to be qualified as an expert witness in anything. Trial counsel completely neglected to insist that this witness be qualified as an expert prior to offering conclusions or testimony based upon his claimed technological skills. It was de facto ineffective assistance of counsel for failing to insist Corrigan either be qualified or be excluded. Instead, trial counsel permitted damaging testimony on computer forensics from a non-expert.

C. Misuse of computer forensics expert

Trial counsel unsuccessfully attempted to misuse Appellant's computer forensics expert as a digital imaging expert signifying his ignorance of what either expert does. That misuse of Appellant's computer forensics expert exposed that witness to impeachment the State revealed on cross-examination severely damaging Appellant's case.

Trial counsel's choice of computer forensics expert is further evidence of his ineffectiveness. Appellant's computer forensics expert has in the past claimed he is the designated computer forensics expert "for the 11th district court of appeals." Of course, the Eleventh District Court of Appeals has no such expert in its employ by contract or otherwise and has never had such an expert. This is not merely a hindsight analysis of choosing an effective

expert. It demonstrates counsel inability to distinguish a legitimate expert from others.

D. Failure to use qualified digital imaging expert

In Ohio v. Brady, 2007-Ohio-1779, the court found that the inability to use such an expert resulted in an unfair trial mandating dismissal. Id. The record of this case is that trial counsel did not even attempt to secure a qualified digital imaging expert. However, even had counsel attempted to obtain such an expert, he would not have been able to obtain one given the ever present threat of federal prosecution of such experts for performing necessary trial preparation tasks.

E. Motion to Dismiss – Fair Trial

Counsel failed to file a motion to dismiss Appellant's case for a Fair Trial violation. This Court is currently considering the identical argument, successful at both the trial and appellate levels in State v. Brady, 07-0742. It was also successful at obtaining a dismissal in a case in Delaware County. State v. Lescalleet, 06 CR I 06 0287 (Delaware Co., Ohio). Failure to file a motion that has resulted in the dismissal of identical charges is de facto ineffective assistance of counsel.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests this Court issue the following orders:

1. Reversal of Appellant's conviction and an order to the Madison County Common Pleas Court that Appellant's case be dismissed citing double jeopardy violations;
2. Immediate release of Appellant from prison;
3. That neither the Auglaize County Common Pleas Court nor the Madison County Common Pleas Court retain any jurisdiction over Appellant for any matters relating to either the now dismissed case no. 2003-CR-0083 nor case no. 2005-CR-10-099, respectively, which this Court has ordered dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Merit Brief of Appellant has been served via ordinary U.S. Mail, postage prepaid, this 11th day of July, 2008 upon the following Counsel for Appellee:

Scott A. Longo,
Special Prosecuting Attorney
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A handwritten signature in black ink that reads "Dean Boland". The signature is written in a cursive, flowing style.

Dean Boland (0065693)
COUNSEL FOR APPELLANT,
DAVID W. HARRISON

APPENDIX

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STATE OF OHIO

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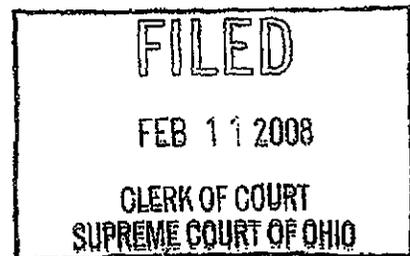
NOTICE OF APPEAL

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THE STATE OF OHIO



Appellant David Harrison hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Madison County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals case no. 2006-08-028, on December 28, 2007.

This case involves a felony conviction, raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been served via ordinary U.S. Mail, postage prepaid, this 11th day of February, 2008 upon the following:

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Dean Boland (0065693)

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

DAVID L. HARRISON,

Defendant-Appellant.

CASE NO. CA2006-08-028

OPINION
12/28/2007

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 2005CR-10-099

Scott A. Longo, Special Prosecuting Attorney, Auglaize County, 30 East Broad Street, 14th Floor, Columbus, OH 43215, for plaintiff-appellee

Dean M. Boland, 18123 Sloane Avenue, Lakewood, OH 44107, for defendant-appellant

POWELL, J.

{11} Defendant-appellant, David L. Harrison, appeals his conviction in the Madison County Court of Common Pleas on multiple charges arising out of his compilation of digital images portraying nude minors, including minors engaged in various sexual acts. For the reasons set forth below, we affirm appellant's conviction.

{12} The present case is the derivative of a previous criminal case in Auglaize County involving appellant. On June 17, 2003, appellant was charged under a six-count bill of information in Auglaize County Court of Common Pleas case number 03-CR-083. The

charges were filed after the Wapakoneta Police Department discovered a running tape recorder in a women's locker room, which was later identified as belonging to appellant, the chief of police at the time. Appellant resigned following the discovery of the tape recorder. A subsequent investigation, including a search of appellant's office and home, resulted in the discovery of a number of digital images portraying child pornography. Such images were contained on appellant's home, office and laptop computers, as well as a floppy disk found in appellant's office.

{13} The charges filed against appellant in case number 03-CR-083 included the following: one second-degree misdemeanor count of obstructing official business, in violation of R.C. 2921.31(A); three fifth-degree felony counts of unauthorized use of a computer, in violation of R.C. 2913.04(B); one fourth-degree felony count of pandering obscenity involving a minor, in violation of R.C. 2907.321(A)(5); and one fifth-degree felony count of pandering obscenity, in violation of R.C. 2907.32(A)(5).

{14} After accepting appellant's pleas of guilty to all such charges, the trial court sentenced appellant to a total of one year in prison, as well as a discretionary three-year period of postrelease control. Neither party appealed the trial court's judgment.

{15} During his term of incarceration, appellant petitioned the trial court for judicial release, which the trial court denied on November 12, 2003. The trial court, however, modified appellant's sentence to allow him to serve the remainder of his incarceration in the Auglaize County Jail, rather than the Department of Corrections, due to safety concerns. Appellant thereafter served the remainder of his prison term and was released from jail. Appellant, however, was not placed on postrelease control by the Adult Parole Authority ("APA") at that time.

{16} On February 18, 2005, the state moved to resentencing appellant because the court had erroneously sentenced him to discretionary rather than mandatory postrelease

control.¹ The trial court granted the state's motion, and scheduled a resentencing hearing for March 29, 2005. On March 25, 2005, appellant filed a complaint for a writ of prohibition with the Third District Court of Appeals, arguing the trial court lacked jurisdiction to resentence him because his journalized sentence had been completed. The Third District denied appellant's complaint on March 31, 2005, finding the trial court did not "patently and unambiguously" lack jurisdiction to resentence him, and that appellant possessed adequate legal remedies. *Harrison v. Steele*, Auglaize App. No. 2-05-14, 2005-Ohio-1608, ¶6.

{17} Accordingly, the trial court held a resentencing hearing on March 29, 2005, during which it allowed appellant to withdraw his guilty plea. The state subsequently dismissed the case without prejudice on May 5, 2005.

{18} On June 23, 2005, an Auglaize County grand jury issued a 23-count indictment based upon the incident giving rise to appellant's prosecution in case number 03-CR-083, charging appellant with the following offenses: two fifth-degree felony counts of unauthorized use of a computer, in violation of R.C. 2913.04(B); one third-degree felony count of theft in office, in violation of R.C. 2921.41(A)(1); one fourth-degree felony count of criminal trespass, in violation of R.C. 2911.21(A)(1)/(2); three fifth-degree felony counts of pandering obscenity, in violation of R.C. 2907.32(A)(1); 15 second-degree felony counts of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1); and one third-degree felony count of tampering with evidence, in violation of R.C. 2921.12(A)(1).

{19} Appellant was granted a change of venue to Madison County, and

1. Appellant was convicted of one fourth-degree felony count of pandering obscenity involving a minor, in violation of R.C. 2907.321(A)(5) and one fifth-degree felony count of pandering obscenity, in violation of R.C. 2907.32(A)(5). R.C. 2967.28(A)(3) provides that "a violation of a section contained in Chapter 2907 of the Revised Code that is a felony" constitutes a "[f]elony sex offense." Pursuant to R.C. 2967.28(B), "[e]ach sentence to a prison term for * * * a felony sex offense * * * shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. * * * [A] period of post-release control required by this division * * * shall be * * *: (1) * * * for a felony sex offense, five years * * *."

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subsequently entered pleas of not guilty to all charges. A jury trial commenced on March 6, 2006, at the conclusion of which appellant was found guilty of 18 of the 23 counts set forth in the indictment, including illegal use of a minor in nudity-oriented material or performance.² On May 5, 2006, appellant filed a motion to dismiss, alleging his prosecution was barred by double jeopardy principles. The Madison County trial court denied appellant's motion as untimely and for want of proof on June 26, 2006. Appellant was later sentenced to six years in prison, and designated a sexually-oriented offender.

{¶10} Appellant now appeals his conviction, advancing ten assignments of error.

{¶11} Assignment of Error No. 1:

{¶12} "THE COURT ERRED DENYING [APPELLANT'S] MOTION TO DISMISS[.]"

{¶13} Appellant advances three arguments in support of his first assignment of error that the trial court erred in denying his postconviction motion to dismiss. First, appellant contends the Auglaize County Common Pleas Court in case number 03-CR-083 lacked subject-matter jurisdiction to permit him to withdraw his guilty plea after his journalized sentence had been completed. Accordingly, appellant argues his original guilty plea remained in effect such that his prosecution in this case violated double jeopardy principles. Second, appellant contends the trial court erred in denying his motion to dismiss, wherein appellant raised said double jeopardy argument, as untimely and for want of proof. Appellant also argues that even if the motion to dismiss was untimely, the alleged double jeopardy violation in this case constitutes plain error that can be remedied on appeal. Third, appellant contends that if his motion to dismiss was untimely, resulting in a waiver of his double jeopardy argument, his trial counsel was ineffective for failing to timely raise the defense. We find appellant's arguments without merit.

2. The other offenses of which appellant was convicted are not specifically addressed in this opinion.

{¶14} As this court has previously held, "jeopardy attaches upon acceptance of a guilty plea." *State v. Strange* (1990), 70 Ohio App.3d 338, 340; *State v. Turpin* (Dec. 31, 1986), Warren App. No. CA86-02-014, at 9-10. See, also, *United States v. Cruz* (C.A.1, 1983), 709 F.2d 111, 112-113; *United States v. Hecht* (C.A.3, 1981), 638 F.2d 651, 657; *United States v. Sanchez* (C.A.5, 1980), 609 F.2d 761, 762. Here, the parties do not dispute that the Auglaize County trial court permitted appellant to withdraw his previously-entered guilty plea to all charges in the six-count bill of information in case number 03-CR-083 on March 29, 2005. This plea withdrawal effectively removed any jeopardy that attached with the court's acceptance of appellant's guilty plea, and as a result, appellant's arguments in this case premised upon double jeopardy are without merit." See *Strange*. See, also, *United States ex rel. Betts v. County Court for LaCrosse County, Branch II* (C.A.7, 1974), 496 F.2d 1156, 1157.

{¶15} Moreover, appellant's arguments challenging the propriety of the Auglaize County trial court's acceptance of appellant's plea withdrawal, including any argument concerning the court's jurisdiction to hold a resentencing hearing on the matter of postrelease control, are not properly before this court. This court has not been provided with a transcript of any of the proceedings in Auglaize County Court of Common Pleas case number 03-CR-083, and therefore, must presume the validity of the lower court's proceedings. See *State v. Pirpich*, Warren App. No. CA2006-07-083, 2007-Ohio-6745, ¶16. Further, the Third District Court of Appeals denied appellant's complaint for a writ of prohibition, wherein appellant raised the jurisdictional issue concerning resentencing, on March 31, 2005. *Harrison*, 2005-Ohio-1608. Neither party appealed the Third Appellate District's decision, or the Auglaize County trial court's decision permitting appellant to withdraw his guilty plea during the resentencing hearing. As a result, the jurisdictional issue concerning the resentencing hearing is barred by principles of res judicata and the law of the case doctrine. See *State v.*

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Martin, Montgomery App. No. 21697, 2007-Ohio-3585, ¶3; *State v. Griffin*, Montgomery App. No. 21578, 2007-Ohio-2099, ¶12; *State v. White* (Oct. 17, 1991), Clark App. No. 2787, *2.

{¶16} Based upon the foregoing, we find the trial court did not err in denying appellant's motion to dismiss for want of proof because appellant has no proof of double jeopardy. For this reason there also can be no ineffective assistance of counsel for failing to timely file the motion, because there is no prejudice. See *Strickland v. Washington* (1984) 466 U.S. 668, 687, 104 S.Ct. 2052.

{¶17} As to the timeliness of the motion, the decision to grant or deny an untimely motion pursuant to Crim.R. 12 is a matter within the trial court's discretion. *State v. Linnik*, Madison App. No. CA2004-06-015, 2006-Ohio-880, ¶33-34; *State v. Burkhardt* (Jan. 24, 1996), Summit App. No. 17223, 1996 WL 28167 at *2. We find no abuse of discretion in denying the motion on the basis it was untimely filed.

{¶18} Appellant's first assignment of error is therefore overruled.

{¶19} Assignment of Error No. 2:

{¶20} "THE COURT ERRED DENYING [APPELLANT'S] MOTION TO DISMISS FOR SPEEDY TRIAL VIOLATION[.]"

{¶21} In his second assignment of error, appellant argues the trial court erred in denying his motion to dismiss on the basis his prosecution in this case violated his speedy trial rights. This court, however, has previously held that "[i]n order to challenge a charged offense on * * * speedy trial grounds, a defendant must file a motion to dismiss prior to trial." *State v. Grant*, Butler App. No. CA2003-05-114, 2004-Ohio-2810, ¶9, citing Crim.R. 12(C)(1). A defendant's failure to do so waives the speedy trial defense. *Id.*, citing Crim.R. 12(H).

{¶22} Moreover, the decision to grant an untimely motion pursuant to Crim.R. 12 is a matter within the trial court's discretion. *State v. Linnik*, 2006-Ohio-880, ¶33-34; *State v. Burkhardt*, 1996 WL 28167 at *2. An appellate court will not reverse a trial court's decision

concerning such matters absent an abuse of discretion. *Linnik* at ¶34. "[A]n abuse of discretion 'connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Id.*, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶23} In this case, the record demonstrates that appellant failed to challenge his indictment and prosecution through a pretrial motion to dismiss. Rather, the record indicates appellant requested a dismissal of this case on speedy trial grounds in one sentence of his untimely postconviction motion to dismiss. The motion had no argument or citation to supporting law.³ Such motion was filed on May 5, 2006, several weeks after the jury found appellant guilty of 18 of 23 counts set forth in the indictment. As the record demonstrates that appellant offered the trial court no justification for the delay in raising the speedy trial issue, we find no abuse of discretion in the trial court's decision to deny the motion as untimely pursuant to Crim.R. 12. Accordingly, we find appellant has waived the right to challenge the alleged error concerning speedy trial on appeal. *Id.* See, also, *State v. Hafer*, Warren App. No. CA2005-05-061, 2006-Ohio-2140, ¶¶45-46. Appellant's second assignment of error is therefore overruled.

{¶24} Assignment of Error No. 3:

{¶25} "COURT (SIC) ERRED PERMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL SPECULATIVE TESTIMONY[.]"

{¶26} In his third assignment of error, appellant argues the trial court erred in permitting the testimony of police dispatcher, Denise Kohler, concerning her discovery of a running tape recorder in the women's locker room of the police department. Appellant contends such testimony was irrelevant and unfairly prejudicial, and therefore, should have

3. We note that appellant has similarly failed to provide any argument or legal authority in support of his speedy trial challenge on appeal.

been excluded pursuant to Evid.R. 403.

{¶27} "Trial courts have broad discretion in determining the relevance or irrelevance of evidence." *State v. Sanders*, 92 Ohio St.3d 245, 259, 2001-Ohio-189. In addition, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶107. "Evid.R. 403 speaks in terms of unfair prejudice. Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant. It is only the latter that Evid.R. 403 prohibits." *Id.*, quoting *State v. Wright* (1990), 48 Ohio St.3d 5, 8.

{¶28} Here, the record indicates that Kohler testified regarding her discovery of the subject tape recorder in the women's locker, which was later found to belong to appellant. Such discovery prompted the subsequent investigation into appellant's alleged illegal activities at work giving rise to the charges in this case. Accordingly, we cannot say that the trial court abused its discretion in admitting such testimony as relevant to the underlying charges in this case. Moreover, we note that appellant has failed to demonstrate any prejudice resulting from the alleged error in the admission of such testimony, in light of the other evidence presented at trial. Accordingly, we find no error in the trial court's decision admitting the testimony of Denise Kohler. Appellant's third assignment of error is therefore overruled.

{¶29} Assignment of Error No. 4:

{¶30} "THE SEXUAL OFFENDER CLASSIFICATION STATUTE IS UNCONSTITUTIONAL[.]"

{¶31} In his fourth assignment of error, appellant argues R.C. 2950.09 is unconstitutional pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, because it requires judicial fact-finding before the imposition of a sentence. Appellant argues that because the sexual offender hearing pursuant to this section occurs "prior to or during

sentencing," exposing a trial judge to "inadmissible evidence and testimony," the procedure "violates the spirit of the *Foster* decision."

{¶32} In *Foster*, the Ohio Supreme Court held that certain statutory provisions requiring judicial fact-finding before the imposition of a greater than minimum sentence violated a defendant's Sixth Amendment right to a trial by jury. *Id.* at ¶82-83. As R.C. 2950.09 is civil in nature, rather than punitive, however, *Foster* is inapplicable to such legislation. *State v. Cook*, 83 Ohio St.3d 404, 417, 1998-Ohio-291. In addition, contrary to appellant's assertion, R.C. 2950.09 does not require judicial fact-finding before a court may impose a greater than minimum sentence pursuant to R.C. 2929.14 and R.C. 2929.19. Accordingly, we find appellant's argument as to the constitutionality of R.C. 2950.09 without merit. Appellant's fourth assignment of error is therefore overruled.

{¶33} Assignment of Error No. 5:

{¶34} "COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND THE COURT ERRED IN ADMITTING TESTIMONY WITHOUT PROPER AUTHENTICATION[.]"

{¶35} Assignment of Error No. 6:

{¶36} "INEFFECTIVE ASSISTANCE OF COUNSEL"

{¶37} Assignment of Error No 7:

{¶38} "COUNSEL WAS INEFFECTIVE (SIC) FAILING TO FILE SEVERAL PRE-TRIAL MOTIONS SUBSTANTIALLY AFFECTING [APPELLANT'S] CONSTITUTIONAL RIGHTS[.]"

{¶39} In his fifth, sixth and seventh assignments of error, appellant argues his trial counsel was ineffective in failing to object to the state's presentation of digital photographs and electronic mail, and in failing to file various pretrial motions to dismiss. As the same legal standard applies to all such claims, we address them together.

{¶40} To establish a claim for ineffective assistance of counsel, a defendant must

demonstrate his trial counsel was deficient, and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

{¶41} In evaluating a claim for ineffective assistance of counsel, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158. Significantly, Ohio courts have found that "decisions regarding what stipulations should be made, what evidence is to be introduced, what objections should be made, and what pretrial motions should be filed, primarily involve trial strategy and tactics." *State v. Cline*, Franklin App. No. 05AP-869, 2006-Ohio-4782, ¶22, citing *State v. Edwards* (1997), 119 Ohio App.3d 106.

{¶42} "When reviewing whether an appellant has met [his] burden, we need not determine whether counsel's performance was deficient before examining whether there was prejudice to the defense. If it is clear that the defense was not prejudiced by a claimed error, a court should dispose of an ineffectiveness claim on the basis of lack of sufficient prejudice." *State v. Steele*, Butler App. No. CA2003-11-276, 2005-Ohio-943, ¶89, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 143.

Admission of Photographs and E-mail

{¶43} Appellant first contends his trial counsel was ineffective in failing to object to the admission of unauthenticated digital images. In so arguing, appellant contends the testimony of the state's expert, Dr. Hany Farid, was insufficient to authenticate the digital images

offered by the state, and that such testimony concerning the photographs should have been excluded pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786.

{¶44} As an initial matter, the admission of evidence, including photographic evidence, is a matter within the trial court's sound discretion. *State v. Bettis*, Butler App. No. CA2004-02-034, 2005-Ohio-2917, ¶28, citing *State v. Cook*, 149 Ohio App.3d 422, 2002-Ohio-4812, ¶22. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). Pursuant to Evid.R. 901(B)(9), "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result" is one example of authentication conforming to the requirements of the rule. *Id.* at ¶26.

{¶45} To properly authenticate photographs, the proponent need only produce testimony from someone with knowledge to state that the photographs represent a fair and accurate depiction of the actual item at the time the picture was taken. *Id.* at ¶27. "Triers of fact are still capable of distinguishing between real and virtual images, and admissibility remains within the province of the sound discretion of the trial judge." *Id.*; *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, ¶50; 52, 53.

{¶46} In this case, the state presented the testimony of Lee Lerussi and Allan Buxton to identify the photographs recovered from appellant's office and laptop computers, as well as a floppy disk found in appellant's office. These witnesses also detailed how and from where such images were retrieved. As this court found in *Bettis*, such testimony was sufficient to properly authenticate the photographs in question. Accordingly, defense counsel was not ineffective in failing to object to the admission of such photographs on this basis.

{¶47} We note that counsel also appears to argue that Dr. Farid's testimony regarding

the photographs in question was insufficient to authenticate the photographs because his methodology in determining whether the images depicted real children or were computer generated was unreliable. Based upon our conclusion concerning the authentication of such photographic evidence, however, we find appellant has failed to demonstrate prejudice resulting from his trial counsel's alleged failure to challenge Dr. Farid's methodology on cross-examination. "Once evidence is properly admitted, the trier of fact decides the proper weight." *Cook*, 2002-Ohio-4812 at ¶27. As stated, the photographs were properly authenticated and admitted upon the testimony of Lerussi and Buxton. Accordingly, we find appellant's first argument regarding ineffective assistance of counsel without merit.

{¶48} Appellant next contends his trial counsel was ineffective in failing to object to the admission of various printed electronic mail ("e-mail") allegedly created by appellant, on the basis the state failed to authenticate the same. Such a speculative contention that these emails "could have been" altered is insufficient to support a finding that counsel was ineffective in failing to object on this basis. See *Strickland*, 466 U.S. at 690, 693. See, also, *State v. Gillingham*, Montgomery App. No. 20671, 2006-Ohio-5758, ¶64 (finding that "vague" general assertions of ineffective assistance of counsel are insufficient to "overcome the presumption of competence that trial counsel enjoys"). Moreover, as previously stated, appellant has failed to demonstrate that the photographs contained within the suspect e-mail would not have been admitted otherwise, and therefore, has failed to demonstrate prejudice resulting from any alleged deficiency of trial counsel in this regard. Accordingly, we find appellant's ineffectiveness claim as to this issue without merit.

{¶49} Appellant also contends his trial counsel was ineffective in failing to raise the issue that appellant could not be found to "possess" photographs found in the unallocated

space of his computer.⁴ As well-established under Ohio law, however, possession may be proven by circumstantial evidence. See *State v. Jenks* (1991), 61 Ohio St.3d 259, 272. Here, the state presented evidence that a number of the photographs recovered were found in unallocated space of appellant's computers, providing an inference that appellant had possessed the material in question. See *id.* In addition, appellant has failed to demonstrate any prejudice resulting from this alleged failure, as we have already found the photographs in question were properly authenticated and admitted at trial.

{150} Finally, appellant contends that trial counsel was ineffective in failing to object to testimony of state witness, Lee Lerussi, that " * * * technology does not exist today to create a * * * computer-generated individual," as well as testimony of Joe Corrigan concerning his analysis of appellant's office computer. In addition, appellant argues trial counsel was ineffective in attempting to use his own computer forensics expert as a digital imaging expert, and in failing to employ the services of a digital imaging expert. Appellant, however, has failed to set forth anything more than unsupported conclusions in support of these alleged errors to overcome the presumption that counsel's conduct at trial fell within the wide range of reasonable professional assistance or trial strategy. See *Cline*, 2006-Ohio-4782 at ¶22. Moreover, appellant has failed to demonstrate any prejudice resulting from counsel's alleged deficiencies. Accordingly, we find appellant's ineffectiveness claim based upon these issues without merit.

Pretrial Motions

{151} Appellant next contends his trial counsel was ineffective in failing to file various pretrial motions. First, appellant argues counsel was ineffective in failing to file motions to dismiss on the bases that R.C. 2907.322 and 2907.323 are unconstitutionally overbroad, and

4. "Unallocated" space, as used by the state's witnesses at trial, refers to the location in which a deleted item is stored on a hard drive.

that R.C. 2907.323 is vague. Appellant argues that "real" child pornography is indistinguishable from virtual child pornography and thus is within the ambit of these statutory provisions. We find such contentions without merit, however, as these statutory provisions have recently been upheld on such challenges. See *Tooley*, 2007-Ohio-3698. See, also, *Osborne v. Ohio* (1990), 495 U.S. 103, 110 S.Ct. 1691. Other Ohio courts have similarly found that trial counsel is not ineffective in failing to raise constitutional arguments concerning these statutes, as such statutes "do not prohibit virtual child pornography, only pornography produced by the use of real children." See *State v. Jackson*, Stark App. No. 2005-CA-00182, 2006-Ohio-1922, ¶31, quoting *State v. Eichorn*, Morrow App. No. 02-CA-953, 2003-Ohio-3415. Appellant's ineffective assistance of counsel argument as to these issues is therefore without merit.

{¶52} Second, appellant argues trial counsel was ineffective in failing to file a motion to dismiss on the basis he was denied a fair trial. Specifically, appellant argues he could not employ the assistance of experts in his defense because such experts would face potential federal charges prohibiting the possession of child pornography by participating in his defense. We find such contention without merit because the record is devoid of facts in support of this argument. Accordingly, appellant's ineffectiveness argument based upon this issue is purely speculative, and without merit.

{¶53} Third, appellant argues counsel was ineffective in failing to file a motion to dismiss on the basis R.C. 2907.323 violates the prohibition against ex post facto laws. "The ex post facto prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham* (1981), 450 U.S. 24, 28, 101 S.Ct. 960. "[T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring

before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29. As R.C. 2907.323 was in effect in its present form at the time of appellant's conduct giving rise to the charges in this case, such statute does not violate ex post fact principles. See R.C. 2907.323, (eff. Jul. 1, 1996). Accordingly, we find appellant's ineffectiveness claim based upon this issue without merit.

{¶54} Fourth, appellant argues counsel was ineffective in failing to file a motion in limine concerning the authentication of digital image evidence. As stated, however, we find such contention without merit, as the material in question was properly authenticated where the state presented testimony of investigators identifying the evidence recovered from appellant's computer and media. See *Bettis*, 2005-Ohio-2917 at ¶¶29-31. Accordingly, we find appellant's ineffectiveness claim as to this issue without merit.

{¶55} Fifth, appellant contends counsel was ineffective in failing to file motions to dismiss on the basis R.C. 2907.323⁵ unconstitutionally infringes on the right to privacy and private thought. Appellant, however, has failed to support these arguments with any applicable legal authority that would indicate a motion raising such challenges would have been meritorious at trial. "[A]cts of the General Assembly enjoy a strong presumption of constitutionality * * * and will be upheld unless proven beyond a reasonable doubt to be clearly unconstitutional." *Toofey*, 2007-Ohio-3698 at ¶29. *Id.* Moreover, "[a] statute will be invalidated as overbroad only when its overbreadth has been shown by the defendant to be substantial." *Id.* at ¶30.

{¶56} Notably, the statutory section appellant alleges is unconstitutionally overbroad has previously been held constitutional on similar grounds. See *Osborne*, 495 U.S. 103. In

5. We note that appellant, in this assignment of error, refers to a different subsection than that under which he was convicted in this case. Appellant was convicted of violating R.C. 2907.323(A)(1), rather than R.C. 2907.323(A)(3).

Osborne, for instance, the United States Supreme Court held that an overbreadth challenge that the statute criminalizes "an intolerable range of constitutionally protected conduct," failed because the statute, as construed by the Ohio Supreme Court, "plainly survives overbreadth scrutiny. * * * [T]he statute prohibits 'the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.' By limiting the statute's operation in this manner, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children." *Id.* at 112-114.

{¶157} Under Ohio law, it is well-established that trial counsel's failure to raise meritless issues does not constitute ineffective assistance of counsel. *State v. Hill*, 75 Ohio St.3d 195, 211, 1996-Ohio-222. Because appellant has failed to demonstrate the statute at issue is unconstitutional beyond a reasonable doubt, we find appellant's argument that counsel was ineffective in failing to raise this issue without merit.

{¶158} Finally, appellant argues counsel was ineffective in failing to object to the trial court's jury instruction regarding the mental state of recklessness. The Ohio Supreme Court has held, however, that recklessness is the mental state required to establish a violation of R.C. 2907.323(A)(1). See *Tooley*, 2007-Ohio-3698 at ¶37. The state is not required to prove that a defendant knew a particular image depicts real children rather than computer generated images of children to establish recklessness under the statute. See *id.* at ¶39-40. Accordingly, we find appellant's trial counsel was not ineffective in failing to object to the jury instruction in question.

{¶159} Based upon the foregoing, we find appellant's fifth, sixth and seventh assignments of error without merit, and overrule the same accordingly.

{¶60} Assignment of Error No. 8:

{¶61} "VIOLATION OF 5TH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION"

{¶62} In his eighth assignment of error, appellant argues the trial court violated his Fifth Amendment right against self-incrimination when it ruled that the state was permitted to use appellant's deposition testimony from a civil case on cross-examination if appellant chose to testify at trial. Prior statements by a defendant are admissible during a criminal trial if they were voluntarily made and are relevant. *State v. Niesz* (1994), Stark App. No. CA-9231, 1994 WL 728127, at *3; *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602; *Colorado v. Spring* (1987), 479 U.S. 564, 572, 107 S.Ct. 851. See, also, Evid.R. 801(D)(2). Here, however, the record indicates that appellant neither took the witness stand in his own defense nor was compelled to do so during his criminal trial, and therefore, that his deposition testimony was not introduced at trial or made known to the jury. As a result, we find no error concerning this issue. Appellant's eighth assignment of error is therefore overruled.

{¶63} Assignment of Error No. 9:

{¶64} "THE STATE'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE KNOWING MENTAL STATE IN R.C. 2907.323[.]"

{¶65} In his ninth assignment of error, appellant argues the state failed to provide sufficient evidence to establish the requisite mental state under R.C. 2907.323. Specifically, appellant contends the state failed to prove he had knowledge that the images in question depicted "actual" minors. We disagree.

{¶66} In resolving questions concerning the sufficiency of the evidence to support a criminal conviction, the relevant inquiry is whether, after reviewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Bettis*, 2005-Ohio-2917 at ¶7.

{¶67} R.C. 2907.323(A)(1) provides, in relevant part, that "[n]o person shall * * * [p]hotograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity * * *."

{¶68} "Because R.C. 2907.323 does not specify any degree of culpability, the degree of culpability required to commit the offense is recklessness." *Tooley*, 2007-Ohio-3698 at ¶37, citing *State v. Young* (1988), 37 Ohio St.3d 249, 253. Pursuant to R.C. 2901.22(C), "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶69} To establish recklessness, the state must demonstrate a defendant had "notice of the character of the material possessed," which may be proven through circumstantial evidence. *Bettis* at ¶12, 16. Such evidence may include "the Internet search terms the defendant employed to find the child pornography, the text on the website where the pornography was found, the file names and titles of the images, as well as whether an identifiable victim is portrayed, and any technological information regarding the images themselves." *Tooley* at ¶39-40.

{¶70} Here, the state presented evidence of appellant's home, office, and laptop computers, as well as a disk recovered from appellant's office, and the information recovered from these devices. As an initial matter, Lee Lerussi and Allan Buxton testified as to their analyses of the seized computers, indicating they were able to establish that appellant owned both the laptop and home computers. With respect to the office computer, Lerussi testified that his analysis indicated appellant was the exclusive user of such device. He further

indicated that the floppy disk retrieved from appellant's office was labeled, "chief's memo template."

{¶71} In addition, the record indicates that the state presented evidence of images depicting child pornography recovered from the computers and floppy disk in question. Lee Lerussi, for example, identified at trial a number of images depicting nude minors, as well as minors engaged in an array of sexual activity, that he recovered from appellant's laptop computer and floppy disk. Similarly, Allan Buxton identified numerous images depicting nude minors and minors engaged in sexual acts, that he recovered from appellant's home computer.

{¶72} The state also presented evidence at trial concerning the internet search history recovered from appellant's computers, indicating that appellant had specifically searched for these types of images. Such history included, for example, searches for "teeniemovies.com;" "girlsifound.com;" "sorority-teens.com;" "cheergirls.com;" "all-schoolgirls.com;" "freshlolita.com;" "free child porn pix;" "the real kiddie porn sites;" and others.

{¶73} Nothing in the record suggests that appellant searched for virtual child pornography, or that the digital images in question did not depict actual minors. Rather, appellant advances only speculative contentions that because of technological advances, he could not differentiate images of real children from computer generated images of children. Moreover, we note that this court has reviewed the images in question, as the jury did in this case, and finds that a reasonable trier of fact could conclude real children are portrayed.

{¶74} Accordingly, after reviewing the evidence in a light most favorable to the state, we find a rational trier of fact could conclude that appellant recklessly possessed the material in question, beyond a reasonable doubt. Appellant's ninth assignment of error is therefore overruled.

{¶75} Assignment of Error No. 10:

{¶76} "[APPELLANT] WAS DEPRIVED OF STATUTORY DEFENSE[.]"

{¶77} In his final assignment of error, appellant argues he was deprived of the statutory defense provided under R.C. 2907.323(A)(3)(a)⁶ because such defense requires an admission of the underlying conduct. Appellant contends such an admission would lead to a guilt finding under overlapping federal offenses that do not recognize the defense. As an initial matter, the record indicates that appellant was indicted for multiple counts of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1). This section sets forth different defenses than those cited by appellant.⁷ Nevertheless, our review of the record demonstrates that appellant did not attempt to assert any such defenses in this case, nor did he raise this argument at trial. As such, we find appellant's argument does not present a justiciable issue. See *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 38 (Douglas, J., concurring in part and dissenting in part, explaining that "[f]or a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties"), citing *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97-98; and *Williams v. Akron* (1978), 54 Ohio St.2d 136, 144-146. Accordingly, appellant's tenth assignment of error is

6. This section provides an exception to liability where "one of the following applies: (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance. (b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred." (Emphasis added.)

7. This section provides an exception to liability where "both of the following apply: (a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance; (b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used." (Emphasis added.)

overruled.

{¶78} Judgment affirmed.

YOUNG, P.J. and WALSH, J., concur.

[Cite as *State v. Harrison*, 2007-Ohio-7078.]

IN THE COURT OF COMMON PLEAS
MADISON COUNTY, OHIO

STATE OF OHIO

Plaintiff

vs.

DAVID L. HARRISON

Defendant

CASE NO: 05-CR 10-099

JUDGMENT ENTRY OF SENTENCE

FILED
COMMON PLEAS COURT
AUG 15 A 10:35
MARIE PARKS
CLERK OF COURT
MADISON CO. OHIO

On March 13, 2006, the Defendant, David L. Harrison, was found guilty of the offenses contained in Counts 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 of the Indictment, by a jury. The offenses in each count are as follows:

Count 1: Unauthorized Use of Property, in violation of O.R.C. § 2913.04 (B), a felony of the fifth degree.

Count 2: Unauthorized Use of Property, in violation of O.R.C. § 2913.04 (B), a felony of the fifth degree.

Count 3: Theft in Office, in violation of O.R.C. § 2921.41 (A)(1), a felony of the fifth degree.

Count 8: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 9: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 10: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 11: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 12: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 13: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 14: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 15: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 16: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 17: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 18: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 19: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 20: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 21: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Count 22: Illegal Use of a Minor in Nudity Oriented Material, in violation of O.R.C. § 2907.323 (A)(1), a felony of the second degree.

Thereafter, the matter was referred to the Adult Probation Department for a pre-sentence investigation, a report which has been delivered to the Court and has been reviewed.

On August 4, 2006, the Defendant, with counsel, appeared before the Court for sentencing and for sexual predator classification. Prior to proceeding to the classification and sentencing, the Defendant made four (4) oral motions before the Court. First, the Defendant moved this Court to reconsider its prior Motion to Dismiss, which had been filed post-trial and post-verdict. The Court denied the prior Motion to Dismiss and overruled the motion to reconsider.

Second, the Defendant moved this Court to declare O.R.C. § 2950.09, the sexual predator classification hearing process, to be unconstitutional based upon the Ohio Supreme Court's decision in *Foster*. The Court overruled the motion stating that *Foster* applied to criminal cases and sentencing, while the predator classification hearing was a civil proceeding.

Third, the Defendant moved this Court for a stay of the proceedings until the Ohio Supreme Court had ruled upon his Writ of Prohibition, which had been filed a week prior. The Court overruled the motion for a stay in the proceedings, citing that the Ohio Supreme Court had not issued a stay and therefore there was nothing preventing the Court from imposing a sentence.

Finally, the Defendant moved this court to find O.R.C. § 2907.323 as unconstitutional. The Court found that the motion was unfounded and that the statute was not unconstitutional as it applied to the facts in this case.

After hearing arguments on the Defendant's motions, the Court proceeded to take testimony and evidence from the State and the Defendant as to the sexual predator classification, which has been journalized in a separate entry.

After taking testimony as to the sexual predator classification, the Court inquired of the Defendant if he had any statement he wished to make in mitigation. The Defendant did speak on his own behalf. Additionally, the Defendant's wife, Vicky Harrison, also presented sworn testimony to the Court on behalf of her husband. The Court reviewed the pre-sentence report and heard statements in mitigation presented by the Defendant and his counsel. After considering all of the facts and the sentencing factors contained in O.R.C. §2929.12, the Court's reasons for imposing sentence are as follows:

- 1) The offenses are more serious than that normally constituting the offense;
- 2) The Defendant held a public office and position of trust in the community, that of Chief of Police of Wapakoneta, Ohio;
- 3) The Defendant's occupation obliged him to prevent the offense and bring others committing it to justice.
- 4) As to Counts 9 and 10, the Defendant's occupation was used facilitate the offense, where the Defendant had access to those images used in the James Benvenuto prosecution. The State's expert made it clear that the images were manipulated and some of the indicted images were from sources used by Benvenuto but not downloaded by him.
- 5) There are no substantial factors that mitigate the Defendant's conduct.
- 6) Despite the facts that Defendant had no prior criminal history, no current substance abuse overlay and that the 2003 psycho-sexual assessment found Defendant to be a low-moderate risk of re-offending, the Court finds that Defendant does pose a risk of recidivism in that Defendant will not admit or deny the offenses to which he was convicted nor does the Court find that the Defendant shows any genuine remorse for his conduct.
- 7) A prison sanction is commensurate with and not demeaning to the seriousness of the Defendant's conduct and its impact upon the victims.
- 8) A prison sentence is consistent with sentences imposed for similar crimes committed by similar offenders. The Court further finds that there was insufficient evidence to overcome the presumption of imprisonment as to Counts 8-22, which are all felonies of the second degree.
- 9) A prison sentence is necessary to punish the offender and protect the public from future crime by the Defendant and others.
- 10) The Defendant is not amenable to community control sanctions.

Based upon the foregoing, IT IS ORDERED that the Defendant be and is sentenced to a term of 12 months in the Department of Rehabilitation and Correction on Count 1, to run consecutive to Count 3; to a term of 12 months in the Department of Rehabilitation and Correction on Count 2, to run consecutive to Count 3; to a term of 12 months in the Department of Rehabilitation and Correction on Count 3, to run concurrent to Counts 8-22; to a term of 6 years each for Counts 8-22, to run concurrent to each other and Count 3 for an aggregate term of six-years incarceration; As to Counts 1-3, the Defendant is subject to 3 years Post Release Control under the supervision of the Adult Parole Authority, to run concurrent with each other; As to Counts 8-22, the Defendant is subject to a mandatory term of 5 years Post Release Control under the supervision of the Adult Parole Authority, to run concurrent with each other and Counts 1-3; that the Defendant pay the costs of prosecution in the amount of \$ 3,284.76 for which judgment and execution is awarded; and that the Defendant be conveyed to the institution according to the law.

If you violate a Post Release Control Sanction established by the Parole Board or the Adult Parole Authority, all of the following apply:

The Adult Parole Authority or Parole Board may impose a more restrictive sanction.

The Parole Board may increase the duration of the Post Release Control subject to a specified maximum.

The more restrictive sanction that the Parole Board may impose consists of a prison term, provided that the prison term cannot exceed nine months and the maximum cumulative prison term so imposed for all violations during the period of Post Release Control cannot exceed one-half of the stated prison term originally imposed upon you.

If the violation of the sanction is a new felony, you may be prosecuted for the new felony and, in addition to any sentence you receive for the felony, the Court may impose a prison term of the greater of one year or the time remaining on post-release control, in addition to any other prison term imposed for the offense.

Ohio Revised Code § 2901.07 requires adult offenders convicted of any felony and certain qualifying misdemeanors to provide a DNA sample for inclusion into the State DNA database. The statute is retroactive. It applies to all offenders convicted of a qualifying offense and who are, on or after May 16, 2005, in prison, serving a sentence in a jail or CBCF, are on probation, community control, parole, post release control, or transitional control, or have pleaded guilty to a qualifying offense and are under any other type of supervised release under the control of a Probation Department or the Adult Parole Authority, i.e., diversion or intervention in lieu of conviction.

The Defendant has been convicted of a qualifying offense and is required to submit a DNA sample. The collection procedure is minimally invasive and will take only a few moments to complete. The Defendant is hereby ordered to submit to a DNA collection at the date and time to be specified by the Department of Rehabilitation and Correction.

The Defendant is given 12 days jail time credit.

IT IS SO ORDERED.



JUDGE ROBERT D. NICHOLS

**Cc: Scott Longo, Special Prosecuting Atty.
Dean Boland, Atty. for Defendant
Ohio Department of Rehabilitation and Correction
Sheriff
Court Administrator
Probation Department**

I HEREBY CERTIFY THAT THIS
IS A TRUE COPY OF THE
ORIGINAL ON FILE
MARIE PARKS
CLERK OF COURTS
BY Marie Parks

IN THE COURT OF COMMON PLEAS, MADISON COUNTY, OHIO

JUN 26 PM 1:21
COURT

State of Ohio,

Plaintiff,

Case No. 2005CR-10-099

-vs-

David L. Harrison,

ENTRY

Defendant.

On March 13, 2006, Defendant was convicted by jury of multiple counts of theft related offenses and illegal use of a minor in nudity oriented materials. The sentencing hearing was subsequently vacated when Defendant raised the issues of double jeopardy and lack of jurisdiction by motion to dismiss on May 5, 2006. Defendant's motion came on for hearing before the court on May 26, 2006. Defendant asked for and was granted time to submit a post-trial motion on the possible relevance of State v. Beasley (1984), 14 Ohio St.3d 74, to the case sub judice. Upon consideration of the issues raised, the Court finds the Defendant's motion not well taken and it is hereby overruled in whole and each particular.

The first ground for dismissal Defendant raises is lack of jurisdiction. Jurisdictional issues can be raised at any time during the case or on appeal. Notwithstanding the arguments Defendant raises based on Hernandez v. Kelly (2006), 108 Ohio St.3d 395, the court finds that Hernandez has no application to the facts of this case. Any alleged jurisdictional defect in Auglaize county in the first case against Defendant there, would not affect the jurisdiction of this court which was conferred by the subsequent twenty-three count indictment. Hernandez would arguably apply to block the Auglaize county court from re-sentencing in the original case after

expiration of Defendant's sentence to impose the five years of post-release control, but that case has been dismissed and the Defendant was allowed to withdraw his plea. The court is not persuaded that defendant was coerced into withdrawing his plea, which restored to him the panoply of constitutional protections attendant a new trial. Moreover, there is no requirement that a withdrawal of a guilty plea be made knowingly, intelligently and voluntarily, as the initial plea of guilty must be.

As to the double jeopardy argument, the State is correct in its assertion that such motion must be raised pre-trial under Crim. R. 12, and if not then it is waived under Crim. R. 12(H). Double jeopardy is a defense which must be raised in the trial court, and does not go to the court's jurisdiction but rather to sentence and judgment. Foran v. Maxwell (1962), 173 Ohio St. 561, 563. Furthermore, double jeopardy must be plead and proven by facts. At the hearing on the motion to dismiss, no facts were offered by the defendant, no witnesses testified, no documents were introduced into evidence. It is well settled that to prove the defense of double jeopardy a defendant must establish that (1) there was a former prosecution in the same state for the same offense; (2) the same person was in jeopardy in the first prosecution; (3) the parties are identical in the two prosecutions; and (4) the particular offense on the prosecution of which the jeopardy attached was such an offense as to constitute a bar. 26 Ohio Jurisprudence 3d §740.

Beyond the issue of timeliness, the Court is troubled by the lack of factual predicate for the assertion of the motion. We have before us no certified copies of the bill of information under which the Defendant was apparently convicted in Auglaize county, no certified copies of any of the records from that case, no testimony from the defendant or anyone else as to what took place in that former proceeding. Moreover, given the unique and complex procedure of the case, the defendant would be required to explain what affect the withdrawal of his previously

entered guilty pleas, the subsequent dismissal of that case against him, and the entering of an arguably void sentence would have upon his claim for double jeopardy. The court is presently spared the necessity of sorting through these complex issues due to the failure of timeliness and proof on the part of the defendant. Certainly the defendant was aware at the time the twenty-three count indictment was returned, then transferred to this court pursuant to a motion for change of venue, that he might have a colorable claim to the defense of double jeopardy. It should have been raised at the beginning of the trial in this court. Instead Defendant chose to go forward on the merits of the case, and so waived his objection.

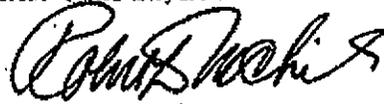
Defendant's motion to dismiss is overruled.

4th 24
11th

Defendant is ordered to appear before this court on the 11 day of August, 2006, at 9:30 a.m. for sentencing.

Judgment entered accordingly.

Enter: June 22, 2006



JUDGE

Entry cc:

Scott Longo
Dean Boland
Court Administrator

LIBRARY
IS AN
GRAND...

THIS

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CLERK OF COURT
by Chanda S. Henry

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

AUGLAIZE COUNTY

DAVID L. HARRISON

RELATOR

CASE NO. 2-05-14

v.

JUDGE CHARLES D. STEELE, ET AL.

**JOURNAL
ENTRY**

RESPONDENTS

This cause comes before the court on relator's complaint for writ of prohibition and motions to stay resentencing and to amend complaint, and upon respondents' motion to dismiss.

Initially, the court finds that the motion to amend complaint is well taken and the complaint shall be amended to reflect the proper names and addresses of respondents.

The complaint seeks an order prohibiting respondent, presiding judge in relator's criminal case, from conducting a "resentencing hearing" on Tuesday, March 29, 2005. It is alleged that relator was convicted and sentenced, fully served the imposed term of incarceration, and was ordered to appear for "resentencing" for the purpose of correcting two uncontested mistakes in respondent's notification of

**AUGLAIZE COUNTY
COURT OF APPEALS
FILED
MR 31 2005**

postrelease control. It is also appears that relator was never placed on postrelease control by the Ohio Parole Board, apparently, because he was permitted to serve the end of his sentence in the Auglaize County Jail.

A writ of prohibition is an extraordinary writ issued by a higher court to a lower court or tribunal to prevent usurpation or exercise of judicial powers or functions for which the lower court or tribunal lacks jurisdiction. *State ex rel. Winnefeld v. Butler Cty. Ct. of Common Pleas* (1953), 159 Ohio St. 225.

In order to be entitled to a writ of prohibition, relator must establish that: (1) respondent is about to exercise judicial or quasi-judicial power, (2) the exercise of such power is unauthorized by law, and (3) denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335. It is well settled that prohibition will only lie where an inferior court patently and unambiguously lacks jurisdiction over the cause. *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97. Prohibition will not lie to prevent an anticipated erroneous judgment. *State ex rel. Heimann v. George* (1972), 45 Ohio St.2d 231.

Upon consideration of same the court finds that a writ of prohibition will not issue in this matter as it is not clear that respondent "patently and unambiguously"

lacks jurisdiction over the cause. Furthermore, there clearly exists an adequate remedy in the ordinary course of law. See *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70.

Respondent, as trial court in relator's criminal case, clearly has jurisdiction over matters relating to further proceedings in the action. Although it is unclear whether respondent may properly vacate the sentence it previously imposed, pursuant to *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, and without an appeal by the State, that question is not before this court. Rather, such questions relate only to an anticipated erroneous judgment.

Moreover, other than bare allegation, relator makes no showing that a "resentencing judgment" would not be subject to review on appeal pursuant to R.C. 2505.02. To the contrary, relator may seek to stay execution of the judgment and raise any error or irregularity in the re-sentencing order on appeal. For this reason, we find that relator has an adequate remedy in the ordinary course of law. See *State ex rel. Jackson v. Miller* (1998), 83 Ohio St.3d 451.

Accordingly, the complaint fails to state a claim upon which relief by writ of prohibition can be granted and the motion to dismiss is well taken. The motion to stay resentencing is denied.

It is therefore **ORDERED, ADJUDGED and DECREED** that the complaint for writ of prohibition be, and hereby is, dismissed at the costs of relator for which judgment is hereby rendered.

Robert R. Lyffe

Thomas J. Bryant

[Signature]

JUDGES

DATED: March 30, 2005
/jlr

IN THE COMMON PLEAS COURT
AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

2005 MAY -5 AM 10:44

SUE ELLEN KOHLER
CLERK OF COURTS

State of Ohio : Case No.: 2003CR 0083

Plaintiff :

vs. :

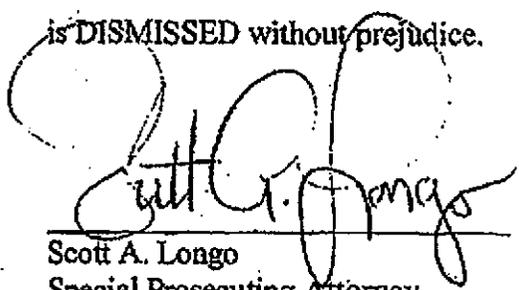
ENTRY OF DISMISSAL
{Criminal Rule 48 (A)}

David L. Harrison :

Defendant :

This day came the Appointed Special Prosecuting Attorney on behalf of the State of Ohio, and in open court, with leave of Court entered a dismissal on the above Bill of Information.

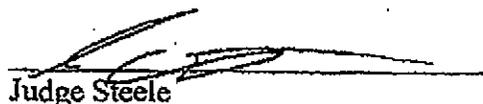
It is therefore ORDERED that the above captioned case, be and the same hereby is DISMISSED without prejudice.



Scott A. Longo
Special Prosecuting Attorney

00411230

cc: Prosecuting Attorney



Judge Steele

VOL 89 PAGE 241

CLERK TO FURNISH COPY TO
COUNSEL OF RECORD AND
UNREPRESENTED PARTIES

IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

2005 MAR 29 PM 2:44

CLERK OF COURTS

STATE OF OHIO * CASE NO: 2003-CR-83
Plaintiff, *
-VS- * JOURNAL ENTRY
DAVID HARRISON *
Defendant. *

This matter came on for re-sentencing, whereupon, the Court GRANTED Defendant leave to withdraw his previously entered guilty pleas on all Counts of the Bill of Information. The Defendant then chose to withdraw his previously entered guilty pleas.

Upon consideration of Bond, the Court set a FIVE THOUSAND DOLLARS (\$5,000.00) Unsecured Personal Surety Bond with the following conditions:

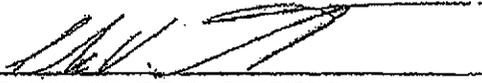
1. The Defendant shall neither consume nor possess any alcoholic beverages or substances of abuse;
2. The Defendant shall not visit or be present on any premises where alcoholic beverages or substances of abuse are served or present;
3. The Defendant shall be subject to testing of his breath, hair, blood or urine at the request of any law enforcement officer, which request may be made at any time during the pendency of this action. Failure to submit to a bodily substance test as requested by any Law Enforcement Officer shall be grounds for revocation of bond. Said testing shall be at the expense of the Defendant;
4. The Defendant shall contact his attorney once each week.

This matter will be set for Telephonic Pre-Trial hearing to be held on April 13, 2005 at 10:15 a.m., with the Prosecuting Attorney to initiate said telephonic hearing.

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The Clerk of Courts shall cause a copy of this Journal Entry to be served on Attorney Norman L. Sirak, 75 Public Square, Suite 800, Cleveland, Ohio 44113 by Regular U.S. Mail, the Auglaize County Sheriff and the Prosecuting Attorney by hand delivering the same.

IT IS SO ORDERED.



JUDGE CHARLES D. STEELE
Sitting by Assignment

State of Ohio, Auglaize County, SS. I, Sue Ellen Kohler, Clerk of the Court of Common Pleas within and for said County, hereby certify that the foregoing is a true and correct copy of the original record on file in this office. In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wapakoneta, Ohio. this <u>3RD</u> day of <u>OCTOBER 2006</u> SUE ELLEN KOHLER, CLERK OF COURT. By: <u>[Signature]</u> Deputy Clerk

IN THE COURT OF COMMON PLEAS OF AUGLAIZE COUNTY, OHIO
2005 MAR 23 PM 2:33

STATE OF OHIO
Plaintiff

SCOTT ALLEN HANLON
CLERK OF COURTS

vs.

CASE NO. 2003-CR- 83
ENTRY

DAVID L. HARRISON
Defendant,

This matter comes on upon the State of Ohio's Motion to Re-Sentence Defendant to a Five Year Term of Mandatory Post Release Control and Orders on Implementation of Said Post Release Control, and the Memoranda of the parties.

On June 17, 2003, at the defendant's arraignment on a Bill of Information the defendant entered a plea of guilty to one count of Obstructing Official Business in violation of R.C. 2921.31(A), a misdemeanor of the 2nd degree; three counts of Unauthorized Use of a Computer, each in violation of R.C. 2913.04(B), each a felony of the 5th degree; one count of Pandering Obscenity Involving a Minor in violation of R.C. 2907.321(A)(5), a felony of the 4th degree; and one count of Pandering Obscenity, in violation of R.C. 2907.32(a)(5), a felony of the 5th degree.

During the guilty plea dialogue the court erroneously advised the defendant that as part of his sentence for these offenses he may receive up to three years of post release control after release from prison. In fact, the court should have advised the defendant that the violations of R.C. 2907.321(A)(5) and R.C. 2907.32(A)(5) would result in a mandatory imposition of five years of post release control upon release from prison. Neither the State of Ohio nor the defendant objected to or otherwise pointed out to the court the erroneous statement regarding the mandatory imposition of five years of post release control.

On July 31, 2003, the defendant's sentencing hearing was held. The court sentenced the defendant to be incarcerated with the Department of Corrections for 90 days for Count I, 6 months for Counts II, III, and IV, 12 months for Count V, and 11 months for Count VI, all terms to run concurrently.

The court also again erroneously informed the defendant that as part of his sentence he may be given up to three years of post release control upon his release from prison. In fact, the court should have sentenced the defendant to five years of post release control upon release from prison for violations of R.C. 2907.321(A)(5) and R.C. 2907.32(A)(5). Neither the State of Ohio nor the

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There is a conflict within this state as to the proper disposition when the sentencing court fails to properly advise an offender about post release control. Nevertheless, that conflict is not in play here as the statutory mandatory term of post release control supersedes any argument relating to the viability of a remand for resentencing. R.C. 2967.28(B)(1) states that each sentence for a felony sex offense shall contain a five-year period of post release control. Because the court, and the Parole Authority for that matter, has no discretion to avoid the imposition of post release control in this case, any order other than a resentencing would constitute an attempt to render the statutory mandatory term of five years of post release control a nullity. See (State v. Harris, 2003 WL 760156 (Ohio App. 8 Dist.) 2003-Ohio-1003).

The court, therefore, orders this matter set for resentencing in accordance with the requirements of R.C. 2967.28 (B).

The court further will grant the defendant leave prior to the resentencing hearing to withdraw his pleas of guilty to Counts V and VI since the court erroneously informed the defendant of the terms of post release control for those counts during the guilty plea dialogue.

So Ordered.

Dated: March 22, 2005


Charles D. Steele, Judge

Copy to:

Prosecuting Attorney
Attorney for Defendant

State of Ohio, Auglaize County, SS.
I, Sue Ellen Kottler, Clerk of the Court of Common Pleas within and for said County, hereby certify that the foregoing is a true and correct copy of the original record on file in this office.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wapakoneta, Ohio, this 3RD day of OCTOBER 2006

SUE ELLEN KOTTLER, CLERK OF COURT
By: [Signature] Deputy Clerk

COL 88 * 785



IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED
03 JUL 31 PM 2:55
SUE ELLEN
CLERK OF COURTS

STATE OF OHIO
Plaintiff

vs.

DAVID L. HARRISON
Defendant

*
*
*
*
*
*
*
*
*
*

Case No. 2003-CR-83

JOURNAL ENTRY --
ORDERS ON SENTENCE

On July 31, 2003, Defendant's Sentencing Hearing was held pursuant to Ohio Revised Code §2929.19. Defense Attorney Thomas R. Kuhn and Todd Kohlreiser and Attorney Lawrence S. Huffman and Craig Gottschalk. Special Prosecuting Attorneys were present. Defendant was afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any Victim Impact Statement and Pre-Sentence Report prepared, and information and letters submitted by the Defendant to be considered in mitigation of his punishment, as well as the principles and purposes of sentencing under Ohio Revised Code §2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code §2929.12.

The Court finds that pursuant to R.C. §2929.13(B):

- The Defendant held a public office or position of trust and the offense related to that office or position and the Defendant's position facilitated the offense.

The Court finds the Defendant has been convicted of BILL OF INFORMATION--COUNT I--OBSTRUCTING OFFICIAL BUSINESS, a violation of Ohio Revised Code §2921.31(A), a MISDEMEANOR of the 2ND degree; BILL OF INFORMATION--COUNTS II, III & IV--UNAUTHORIZED USE OF A COMPUTER, violations of Ohio Revised Code §2913.04(B), FELONIES of the 5TH degree; BILL OF INFORMATION--COUNT V--PANDERING OBSCENITY INVOLVING A MINOR, a violation of Ohio Revised Code §2907.321(A)(5), a FELONY of the 4TH degree and BILL OF INFORMATION--COUNT VI--PANDERING OBSCENITY, a violation of Ohio Revised Code §2907.32(A)(5), a FELONY of the 5TH degree.

It is the sentence of the Court that the Defendant be incarcerated with the Department of Rehabilitation and Corrections, Orient, Ohio,

BILL OF INFORMATION--COUNT I - for a term of NINETY (90)
DAYS.

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BILL OF INFORMATION—COUNT II—for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

BILL OF INFORMATION—COUNT III—for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

BILL OF INFORMATION—COUNT IV—for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

BILL OF INFORMATION—COUNT V—for a term of TWELVE (12) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

BILL OF INFORMATION—COUNT VI—for a term of ELEVEN (11) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

The above sentences shall run CONCURRENTLY for a total prison sentence of TWELVE (12) MONTHS.

The Court having engaged in the analysis required in Revised Code Section 2929.14(B) finds that the shortest prison terms possible in Counts Five and Six would demean the seriousness of the offenses, and will not adequately protect the public from future crime by the offender or others.

The Court has further notified the Defendant that Post Release Control is OPTIONAL in this case for THREE (3) years, as well as the consequences for violating conditions of Post Release Control imposed by the Parole Board under Ohio Revised Code §2967.28. The Defendant is ORDERED to serve as part of this sentence any term of Post Release Control imposed by the Parole Board, and any prison term for violation of that Post Release Control.

The Defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction. Credit for -0- days is granted as of this date along with future custody days while the Defendant awaits transportation to the appropriate State institution. The Defendant is ORDERED to pay costs of prosecution

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and any fees permitted pursuant to R.C. §2929.18(A)(4) through the Office of the Clerk of Courts.

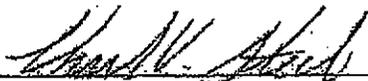
The Court does advise the Defendant of the following:

- a) That the Defendant has a right to appeal;
- b) That if the Defendant is unable to pay the cost of an appeal, the Defendant has the right to appeal without payment;
- c) That if the Defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;
- d) That if the Defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;
- e) That the Defendant has a right to have a notice of appeal timely filed on his behalf.

Costs assessed to the Defendant. Judgment for costs.

The Clerk of Courts shall cause a copy of this Journal Entry to be served on Attorney Thomas R. Kuhn, 973 W. North Street, Lima, Ohio 45805 and Special Prosecutor Lawrence S. Huffman, 127-129 N. Pierce Street, P.O. Box 546, Lima, Ohio 45802-0546 by Regular U.S. Mail, and a copy on the Auglaize County Sheriff; the Ohio Adult Parole Authority by hand delivering the same, and a copy upon the Warden of the Corrections Reception Center, Orient, Ohio and to the Defendant by Personal Service by the Auglaize County Sheriff. The Court further ORDERS that a copy of the Pre-Sentence Investigation Report, sealed by the Court, be served upon the Warden together with said copy of this Entry, in accordance with law.

IT IS SO ORDERED.



JUDGE CHARLES D. STEELE
Sitting by Assignment

State of Ohio, Auglaize County, SS. I, Sue Ellen Kohler, Clerk of the Court of Common Pleas within and for said County, hereby certify that the foregoing is a true and correct copy of the original record on file in this office. In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wapakoneta, Ohio, this <u>28th</u> day of <u>JULY 2006</u> SUE ELLEN KOHLER, CLERK OF COURT <i>Sue Ellen Kohler</i> Deputy Clerk

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