

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO EX REL.,
DANIEL P. MCKINNEY,**

CASE NO.: 08-1404

Appellant,

On Appeal from the Defiance
County Court of Appeals
Third Appellate District
Case No. 04-08-14

vs.

**DEFIANCE COUNTY COURT OF
COMMON PLEAS,**

Appellee.

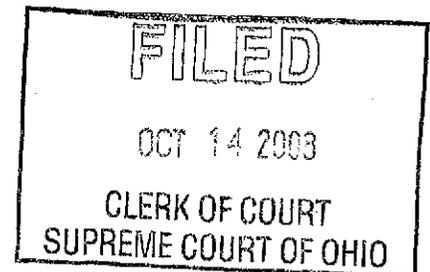
BRIEF OF THE APPELLEE DEFIANCE COUNTY COURT OF COMMON PLEAS

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STATEMENT OF FACTS

At approximately 3:45 P.M. on June 12, 2003, Donald B. Smith Jr., the Key Bank Customer Relations Manager at 414 East Second Street in Defiance, Ohio received a telephone call from an unidentified male. The caller inquired as to whether it would be possible to open an account with a large deposit of cash after regular banking hours as the caller stated that he was in the general area, but would not be able to arrive at the Bank until shortly after the regular banking hours were over. Mr. Smith asked Victoria Derrer, the bank's Relationship Manager, if she was willing to accommodate the caller's request, and informed the caller that it would be all right. At approximately 4:05 P.M., a black male wearing a business suit, fedora hat, and carrying a briefcase approached the Bank's locked rear door. Mr. Smith verbally confirmed that the man was the individual who called earlier, unlocked the door, and let him in.

Once inside the first set of doors, but before they entered a second set of doors, Mr. Smith locked the doors behind them. The man immediately became hostile and ordered Mr. Smith to unlock the doors. Mr. Smith hesitated, finding the request to be abnormal and unsettling. The man then pulled a wire from beneath his jacket lapel and exclaimed that he was wired with explosives and had an accomplice waiting outside to detonate the explosives on him if his demands were not followed. The man told Mr. Smith that he was prepared to die today.

A terrified Mr. Smith unlocked the doors as instructed, and the robber demanded that Mr. Smith take him into the vault and retrieve \$100,000.00 in cash. Mr. Smith opened the second set of doors and approached Sandra Bauer, a bank teller. With the robber in tow, Mr. Smith furtively shot Ms. Bauer a look of concern and terror as he asked for the keys to the vault, which she gave him. Mr. Smith and the robber then entered the vault.

Once inside the vault, the robber grabbed an empty coin bag he found next to a coin

counter and ordered Mr. Smith to give him the money. Mr. Smith opened the top drawer of the vault, which was filled with stacks of \$100.00 bills and \$50.00 bills, and gave all those bills to the robber. The robber then demanded the money in the next set of drawers. These drawers contained \$20.00 bills and \$10.00 bills. Again, Mr. Smith complied with the robber's demands. Included with the bills given to the robber were five (5) \$20.00 bills, which had been documented by the bank as "bait" money. The total amount of funds given to the robber was \$104,107.00, which included \$7.00 in coins, which were in the moneybag the robber picked up in the vault.

After obtaining the money, the robber told Mr. Smith to turn around and face the vault wall. Mr. Smith complied, fearing for his life. The robber then took the moneybag and began to stuff some of the bills into the briefcase he was carrying.

Victoria Derrer, who was working in her office, witnessed Mr. Smith and the unknown individual walk past her office towards the vault area, and heard the vault gate door close. Her suspicions aroused, she got up from her desk and went to the video surveillance room to see what was happening in the vault area only to discover there was no video camera in the actual vault. Meanwhile, another teller, Sharon Washington, crept over to the vault entrance and attempted to catch a glimpse of what was going on inside. The two nervous female employees did not see anyone in the public area of the vault where customers are supposed to be, and realized that they were being robbed. Ms. Washington rushed back to the drive-thru window area and called 911. The robber then exited the vault with the bank moneybag and the stolen money in his briefcase, and fled the bank. Mr. Smith exited the vault and instructed another employee to pull her "bait" money in the cash drawer to trigger the alarm.

The Defiance Police Department received the 911 call from Sharon Washington at

approximately 4:11 P.M., advising them that the Key Bank was being robbed. She described the perpetrator as a black male wearing a suit and hat, who had fled the bank's parking lot in a blue colored Buick automobile.

Officers spotted the fleeing robber a short distance from the Bank. They immediately attempted to stop the vehicle, with lights and sirens engaged. The robber, in an attempt to escape, darted into another lane almost striking the pursuing cruiser, which caused the officer to lose sight of the robber's fleeing vehicle.

Other officers joined in the pursuit, being alerted of the fleeing robber's position by citizens who were forced off the road by his erratic driving. As the pursuit continued outside the Defiance city limits at speeds approaching 110 miles per hour, the fleeing robber lost control of his vehicle as he swerved unpredictably across lanes of traffic and went into a ditch. After regaining control of the car and nearly striking several more vehicles while reentering the roadway, he continued his flight from authorities. Officers unsuccessfully tried to box him in, however, the robber evaded their efforts by swerving across lanes and attempting to ram the officers' cruisers with his automobile. As the pursuit left Defiance County and entered Paulding County, stop sticks were deployed by waiting Sheriff's Deputies, which the fleeing robber avoided by driving around them and off of the two-lane roadway.

Shortly after, the robber veered into a driveway and several officers exited their cruisers in anticipation of a foot chase. The robber, however, drove through a yard, around a home and a pond, and then re-entered the roadway, continuing the high-speed pursuit from capture.

Another officer, waiting on an adjacent road, spotted the robber's vehicle, and proceeded to hit the rear of the robber's fleeing vehicle causing it to spin out into a ditch. The robber exited the vehicle, and began to flee on foot as officers chased him. Officers pursued on foot, caught

the robber, and took him to the ground, as he would not cease resisting. The robber was handcuffed, taken into custody, read his Miranda rights, and positively identified as Daniel P. McKinney. All the money taken from the bank including the “bait” money, as well as the bank bag and briefcase were retrieved from the Defendant’s vehicle. He had with him \$104,107.00.

STATEMENT OF THE CASE

On June 12, 2003, the Defendant-Appellant, Daniel P. McKinney was apprehended and arrested by the Paulding County Sheriff’s Office. An arrest warrant was issued by the Municipal Court of Defiance, Ohio on June 12, 2003 for the arrest of the Defendant. On June 16, 2003, the Defendant had his initial appearance in the Defiance Municipal Court on the charge of *ROBBERY*, in violation of Revised Code § 2911.02(A)(2), a Felony of the Second Degree. Bond was set, and on June 18, 2003, the Defendant again appeared before the Defiance Municipal Court. He signed a written waiver of his right to a preliminary hearing, and was bound over to the Defiance County Grand Jury.

On July 7, 2003, the Defiance County Grand Jury indicted the Defendant on five (5) counts: *ROBBERY*, a Felony of the Second Degree, in violation of Revised Code § 2911.02(A)(2); *AGGRAVATED THEFT*, a Felony of the Third Degree, in violation of Revised Code § 2913.02(A)(1) & (4); *RECEIVING STOLEN PROPERTY*, a Felony of the Fourth Degree, in violation of Revised Code § 2913.51(A); *FAILURE TO COMPLY WITH ORDER OR SIGNAL OF POLICE OFFICER*, a Felony of the Third Degree in violation of Revised Code § 2921.331(C)(5)(a)(ii); and *FAILURE TO COMPLY WITH ORDER OR SIGNAL OF POLICE OFFICER*, a Felony of the Fourth Degree, in violation of Revised Code § 2921.331(C)(4).

On July 16, 2003, the Defendant appeared before the Defiance County Court of Common

Pleas for arraignment on the indictment, without counsel. The Defendant was advised of his right to appointed counsel, but stated he wished to proceed *pro se*, with the assistance of court appointed counsel to assist him in presenting his defense. The court then appointed Attorney James S. Borland, to assist the Defendant. The Defendant, acknowledged receipt of the indictment, waived his twenty-four hour notice requirement, waived the reading of the indictment in open court, stated he wished to proceed without counsel for the arraignment, and tendered pleas of Not Guilty to all counts. The matter was then scheduled for a pre-trial conference on July 31, 2003.

On July 17, 2003, Attorney Borland filed requests for a bill of particulars and for discovery on the Defendant's behalf. On July 22, 2003, the Defendant filed a *pro se* request for discovery, request for bill of particulars, request for severance of charges, and a motion to dismiss. The State's Rule 16 Discovery Compliance was filed with the court on July 30, 2003, along with the State's Bill of Particulars.

The Defendant appeared with Attorney Borland at the July 31, 2003 pre-trial conference and requested a continuance for further hearing on his Motion to Dismiss and his Request for Severance of Charges. The court advised the Defendant that his speedy trial rights would be tolled during the continuance period and the Defendant acknowledged this tolling. The court then ordered that the Defendant's motions be continued to August 13, 2003 for further hearing.

On August 13, 2003, the court overruled the Defendant's Motion to Dismiss finding that no evidentiary support was presented to hold otherwise and further, and that there were not any valid objections based on defects in the Indictment. The court also overruled the Defendant's Motion for Severance of Charges. A trial date was scheduled for September 15, 2003.

On August 14, 2003, August 26, 2003, and September 10, 2003 the State filed

Supplemental Rule 16 Discovery information. On August 16, 2003, the State received a copy of the Defendant's Motion to appoint an investigator and the Judgment Entry granting that motion.

On August 27, 2003, Mr. Borland filed a Motion to Withdraw, which was granted that same day by the court. Another pre-trial hearing was held on August 29, 2003, where the Defendant signed a waiver of counsel in open court.

On September 11, 2003, a Judgment Entry was filed with the court ordering that Defendant McKinney be dressed in "street clothes" for his appearances in court during trial. Also, a Judgment Entry was filed ordering that the Defendant be transported from the Paulding County Jail, where he was being held pending posting of any bond, to the Corrections Center of Northwest Ohio at Stryker, Ohio during the scheduled jury trial.

On September 15, 2003, the Defendant filed a Motion for Change of Venue, which after hearing, was overruled, subject to renewal if the court was unable to impanel a jury. The Defendant then orally requested a continuance of the Jury Trial, which was denied. The Defendant then requested that the court appoint another attorney, which the court did. The Defendant also signed a written waiver of speedy trial time on this date. Later, Attorney John P. Goldenetz was appointed counsel and the court vacated the scheduled trial date and scheduled a pre-trial conference for September 22, 2003.

New requests for discovery were filed on September 17, 2003, which were answered the same day, and supplemented on September 24, 2003 and November 7, 2003. A pre-trial conference was scheduled for October 9, 2003, a final pre-trial conference was scheduled for November 10, 2003 and a trial by jury was scheduled for December 8, 2003. On October 21, 2003, the State received Defendant McKinney's Request for Transcript at State Expense.

On December 1, 2003, the Defendant filed a Motion to Compel and a Motion to Dismiss,

which were denied at that hearing. The trial date remained as previously scheduled date (12/8/2003). The State filed supplemental Rule 16 Discovery Compliance on December 3, 2003.

On December 8, 2003, the court granted Attorney Goldenetz's Motion to Withdraw, filed on December 5, 2003. Thereafter, the Defendant advised the court that he wished to proceed *pro se*. After again advising the Appellant of the dangers inherent in *pro se* representation, the court granted the request and ordered that the Clerk of Courts accept *pro se* filings from the Defendant.

The Appellant then filed a Motion to Dismiss for violation of his speedy trial rights. This Motion was denied because of the previously established tolling of speedy trial time because of Defendant's actions. The Defendant then requested a continuance on his Motion to Dismiss, which the court granted after advising the Defendant that the time would not be counted against speedy trial time because of his discharge of his attorney and his desire to issue subpoenas. The court then ordered that the Jury Trial scheduled for that day be continued to January 20, 2004.

On January 6, 2004, the court overruled Defendant's Motion to Suppress that was filed by the Defendant on December 2, 2003. At this time, the court further ordered that the Clerk of Court's prepare and file subpoenas that the Defendant listed as witnesses.

On January 20, 2004, this matter came on for trial by jury. The Defendant appeared *pro se*. Prior to commencement of jury selection the Appellant filed a Challenge to Array of Petit Jurors, which was overruled. The court also overruled the Defendant's previously filed Motion for Change of Venue. During trial, the Defendant moved for two Judgments of Acquittal, which were both denied. Hearings were also held upon several Motions to Quash subpoenas, of which one was granted and the rest overruled. The jury retired on January 23, 2004, and, returned a unanimous verdict finding the Defendant guilty of all five (5) counts in the indictment.

The Defendant was sentenced on March 15, 2004, but this sentence was reversed and

remanded to the trial court, as an additional charge of *RECEIVING STOLEN PROPERTY*, relating to a stolen automobile that was utilized by the Defendant as a getaway car, was reversed based upon insufficiency of the evidence to convict on that count.

After appeals to the Third District Court of Appeals, resentencing of the Defendant occurred on January 27, 2005. The trial court sentenced him to the following sentences: *ROBBERY*, a Felony of the Second Degree, in violation of Revised Code § 2911.02(A)(2), sentenced to a term of imprisonment of eight (8) years; *AGGRAVATED THEFT*, a Felony of the Third Degree, in violation of Revised Code § 2913.02(A)(1)&(4), sentenced to a term of imprisonment of four (4) years; *FAILURE TO COMPLY WITH ORDER OR SIGNAL OF POLICE OFFICER*, a Felony of the Third Degree, in violation of Revised Code § 2921.331(B), sentenced to a term of imprisonment of five (5) years; *FAILURE TO COMPLY WITH ORDER OR SIGNAL OF POLICE OFFICER*, a Felony of the Fourth Degree, in violation of Revised Code § 2921.331(B), sentenced to a term of imprisonment of one and one-half (1½) years. The foregoing terms of imprisonment were ordered to be served CONSECUTIVELY to each other for a total cumulative term of eighteen and one-half (18½) years of imprisonment.

The Defendant-Appellant subsequently filed multiple motions, petitions, and appeals on a wide variety of issues seeking to overturn his convictions and sentences, all to no avail.

RESPONSE TO APPELLANT'S FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT'S JUDGMENT ENTRY OF FEBRUARY 23, 2005, CONSTITUTED SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Honorable Judge Joseph N. Schmenk of the Defiance County Court of Common Pleas, the Respondent on the Defendant's prior Petition for Writ of Mandamus, previously issued sufficient findings of fact and conclusions of law in response to the Defendant's Petition for Post-Conviction Relief (encaptioned: PETITION TO VACATE OR SET ASIDE JUDGMENT OF CONVICTION AND SENTENCE) that the Defendant filed on December 17, 2004, in State of Ohio vs. Daniel P. McKinney, Case No. 03-CR-08624.

On May 16, 2008, the Third District Court of Appeals determined that the above-Respondents did issue the above-Judgment Entry, and that the entry was clearly sufficient to provide any required findings of fact and conclusions of law in regards to the Defendant's Petition for Post Conviction Relief.

In State v. Knott, (2004), 2004 WL 231000, 2004-Ohio-510, NO. 03CA6, (4th App. Dist., Athens Co., Jan. 29, 2004), the Fourth District held that a trial court's detailed judgment entry setting forth its reasons for denying a post-conviction relief petition satisfied the requirement that it make findings of fact and conclusions of law before it dismiss the petition without an evidentiary hearing. Revised Code § 2953.21(C).

In Knott, the trial court did not designate its judgment entry to be findings of fact and conclusions of law, but the appellate court still found it to be sufficiently detailed to constitute findings of fact and conclusions of law.

Here, not only did the Respondent, Defiance County Court of Common Pleas issue a Judgment Entry on February 23, 2005 that was sufficiently detailed to constitute a findings of

fact and conclusions of law, but it additionally stated in said Entry that: “*the foregoing shall constitute a findings of fact and conclusions of law*”.

Designated findings of fact and conclusions of law are not required if the court issues a judgment entry that is sufficiently detailed to permit appellate review. State ex rel. Carrion v. Harris, (1988), 40 Ohio St.3d 19, 20. See also: State v. Calhoun, (1999), 86 Ohio St.3d 279, 292.

In New Haven Corner Carry Out, Inc. v. Clay Distrib. Co., (2002), 2002 WL 1299759, 2002-Ohio-2726, NO. 13-01-30, (3rd App. Dist., Seneca Co., May 28, 2002), this District held that a trial court's judgment entry which contained its findings of fact and conclusions of law was certainly adequate to provide the appellant with basis for appeal and to aid this Court in its review of this case.

Therefore, as the Appellee-Defiance County Court of Common Pleas already filed a Judgment Entry that contained within it findings of fact and conclusions of law, the Defendant's Petition for Writ of Mandamus is without merit, as previously upheld and adjudicated on review by the Third District Court of Appeals on May 16, 2008.

Wherefore, the Appellee respectfully requests that this honorable Court overrule/deny the Defendant's Petition for Writ of Mandamus, affirm the holding of the Third District Court of Appeals dismissing the Defendant's Petition for Writ of Mandamus, and overrule/deny the Defendant-Appellant's First Assignment of Error.

RESPONSE TO APPELLANT'S SECOND ASSIGNMENT OF ERROR:

CIVIL RULE 60 (B)(3) AND (5) ARE NOT APPLICABLE TO THESE PROCEEDINGS.

For his Second Assignment of Error, the Defendant-Appellant argues that Rule 60(B) of the Ohio Civil Rules of Procedure entitles him to relief from his judgments of conviction and his applicable sentences. However, as held by the Third District Court of Appeals in its Journal Entry of July 11, 2008, Civil Rule 60(B) is not a substitute for appeal and a party may not merely reargue the same contentions that were rejected in the judgment. Therefore, the Third District overruled the Defendant-Appellant's Motion for Relief from Judgment pursuant to Civil Rule 60(B).

The State argues that the opinion of the Third District is correct and concise, and should be affirmed by this reviewing court. Wherefore, the Defendant-Appellant's Second Assignment of Error should be overruled/denied in its entirety.

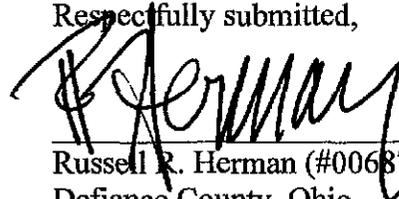
CONCLUSION

Based upon the foregoing, the Plaintiff-Appellee respectfully requests that this honorable Court affirm the decisions of the Defiance County Court of Common Pleas and find that the trial court properly issued findings of facts, and that the Third District properly dismissed the Defendant's Petition for Writ of Mandamus. Therefore, the Defendant-Appellant's First Assignment of Error should be overruled/ denied.

Furthermore, Rule 60(B) of the Ohio Rules of Civil Procedure is inapplicable to this matter. Therefore, the Defendant's Second Assignment of Error should be overruled/ denied.

Wherefore, the State-Appellee respectfully requests this Court to affirm the lower courts' orders and rulings, as well as its decisions, and proceedings, thereby overruling/denying the Defendant-Appellant's Two Assignments of Error in their entirety.

Respectfully submitted,

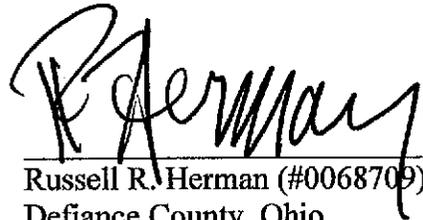


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CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of the State-Appellee was sent via ordinary U.S. Mail to Daniel P. McKinney, Inmate #A468437, Pro-Se Defendant-Appellant, C/O: The Lebanon Correctional Institution, P.O. Box 56, Lebanon, Ohio 45036, this 10th day of October, 2008.



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APPENDIX

Not Reported in N.E.2d, 2002 WL 1299759
(Ohio App. 3 Dist.), 2002 -Ohio- 2726

CHECK OHIO SUPREME COURT
RULES FOR REPORTING OF OPINIONS
AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Third District, Seneca County.
NEW HAVEN CORNER CARRY OUT,
INC., Plaintiff-Appellant,

v.

CLAY DISTRIBUTING COMPANY,
Defendant-Appellee.

No. 13-01-30.

May 28, 2002.

Service station filed action against fuel distributor seeking to invalidate distribution agreement alleging material breach and impossibility of performance, and fuel distributor filed counterclaim for failure to pay money owed under contract. The Court of Common Pleas, Seneca County, granted summary judgment for fuel distributor on service station's claim of impossibility, and following trial, entered judgment for fuel distributor on all remaining counts. Service station appealed. The Court of Appeals, Hadley, J., held that: (1) contract remained enforceable, even though, sometime during initial term of agreement, common carrier rate upon which gross profit and price term of contract were based ceased to be published; (2) trial court could adopt almost verbatim proposed findings of fact and conclusions of law submitted by fuel distributor; (3) trial court was not required to use only terms that were found in record to characterize certain evidence; (4) service station waived right to object to fuel distributor's calculation of gross profit, which precluded service station from asserting arguments with respect to price of diesel fuel, freight rates, and entitlement to share with fuel distributor shrinkage

allowance, credit card fee, and advertising fee; (5) fuel distributor did not breach contract by illegally mixing fuels provided to service station; (6) no manifest injustice occurred as result of service station's submission of entire breach of contract action to trial court, rather than jury, and thus unpreserved allegation that service station was coerced into waiving jury was not grounds for reversal; (7) two contradictory judgment amounts did not form basis for new trial, when corrected; and (8) fact that judgment entry was partially adopted from fuel distributor's proposal was not basis for new trial.

Affirmed.

West Headnotes

[1]  KeyCite Citing References for this Headnote

 343 Sales

 343IV Performance of Contract

 343IV(D) Payment of Price

 343k195 k. Excuses for Default or Delay. Most Cited Cases

No evidence supported claim that service station did not intend to be bound by contract for sale of fuel upon failure of original terms, and thus contract remained enforceable, even though, sometime during initial term of agreement, common carrier rate upon which gross profit and price term of contract were based ceased to be published, which left parties without ability to make agreed-upon price adjustments according to original terms of contract, where fuel distributor began using actual freight rate to determine price, parties operated under agreement on daily basis for many years, and parties continued to operate under agreement, even after pricing indices became unavailable.

[2]  KeyCite Citing References for this Headnote

↪ 388 Trial

↪ 388X Trial by Court

↪ 388X(B) Findings of Fact and Conclusions of Law

↪ 388k393 Preparation and Form in General

↪ 388k393(2) k. Preparation by or for Court. Most Cited Cases

Trial court could adopt almost verbatim proposed findings of fact and conclusions of law submitted by fuel distributor at conclusion of trial on service station's breach of contract claim, where service station did not show that facts or law taken up were erroneous.

[3]  KeyCite Citing References for this Headnote

↪ 388 Trial

↪ 388X Trial by Court

↪ 388X(B) Findings of Fact and Conclusions of Law

↪ 388k393 Preparation and Form in General

↪ 388k393(1) k. In General. Most Cited Cases

Trial court, in findings of fact and conclusions of law in contract dispute, was not required to use only terms that were found in record to characterize certain evidence, given that service station, which alleged breach of contract by fuel distributor, failed to show how it was in any way prejudiced by trial court's terms.

[4]  KeyCite Citing References for this Headnote

↪ 156 Estoppel

↪ 156III Equitable Estoppel

↪ 156III(F) Evidence

↪ 156k118 k. Weight and Sufficiency of Evidence. Most Cited Cases

Service station waived right to object to fuel distributor's calculation of gross profit in breach of contract action, which precluded service station from asserting arguments with respect to price of diesel fuel, freight rates, and entitlement to share with fuel distributor shrinkage allowance, credit card fee, and advertising fee, where service station's primary witness, who was also formerly president of fuel distributor, admitted that at time when calculations for gross profit were altered with respect to diesel fuel and freight rates, neither he nor anyone else at service station complained, no objection was lodged until after fuel distributor's president became involved with service station exclusively, and similar testimony was provided with regard to issues of shrinkage allowance, credit card fee, and advertising fee.

[5]  KeyCite Citing References for this Headnote

↪ 343 Sales

↪ 343IV Performance of Contract

↪ 343IV(C) Delivery and Acceptance of Goods

↪ 343k165 Quality, Fitness, and Condition of Goods

↪ 343k166 In General

↪ 343k166(1) k. In General. Most Cited Cases

Fuel distributor did not breach contract by illegally mixing fuels provided to service station, even though some of fuel distributors mixed fuels, once fuel distributor employee directed driver to mix fuels, and mixing of diesel and gasoline was illegal and once caused damage, where fuel distributor paid for damage caused by mixing gasoline and diesel, contract did not prohibit mixing, and mixing was not illegal when octane rating on tank reflected minimum octane in tanks.

[6]  KeyCite Citing References for this Headnote

↪ 30 Appeal and Error

↪ 30XVI Review

↪ 30XVI(J) Harmless Error

↪ 30XVI(J)1 In General

↪ 30k1025 Prejudice to Rights of Party as Ground of Review

↪ 30k1026 k. In General. Most Cited Cases

Service station was not entitled to relief from judgment for fuel distributor in breach of contract action, even though service station asserted quantity of errors, given that appellate court could not justify reversal by cumulative minor errors without showing of prejudice for each individual error.

[7]  KeyCite Citing References for this Headnote

↪ 30 Appeal and Error

↪ 30V Presentation and Reservation in Lower Court of Grounds of Review

↪ 30V(B) Objections and Motions, and Rulings Thereon

↪ 30k201 Mode and Conduct of Trial or Hearing

↪ 30k201(1) k. In General. Most Cited Cases

↪ 30 Appeal and Error  KeyCite Citing References for this Headnote

↪ 30XVI Review

↪ 30XVI(C) Parties Entitled to Allege Error

↪ 30k881 Estoppel to Allege Error

↪ 30k883 k. Assent to Proceeding. Most Cited Cases

No manifest injustice occurred as result of service station's submission of entire breach of contract action to trial court, rather than jury, and thus unpreserved allegation that service station was coerced into waiving jury was not grounds for reversal of judgment for fuel distributor, even though

trial court did not answer each jury interrogatory, given that parties agreed that number of questions of law needed to be decided by court before case was submitted to jury, at conclusion of trial, court stated that it would take approximately one week to resolve issues, both parties agreed on record to remove case from jury for resolution of all issues by trial court, and service station's counsel indicated that trial court did not have to answer interrogatories. Rules Civ.Proc., Rules 38, 39, 52.

[8]  KeyCite Citing References for this Headnote

↪ 275 New Trial

↪ 275II Grounds

↪ 275II(E) Irregularities or Defects in Verdict or Findings

↪ 275k61 k. Decision and Findings of Court. Most Cited Cases

Two contradictory judgment amounts in original judgment for fuel distributor in breach of contract action against service station, namely finding of \$280,050.42 in damages, and later finding of \$293,769.35 in damages, did not form basis for new trial, where trial court later corrected itself and agreed that \$280,050.42 was correct amount. Rules Civ.Proc., Rule 52.

[9]  KeyCite Citing References for this Headnote

↪ 275 New Trial

↪ 275II Grounds

↪ 275II(E) Irregularities or Defects in Verdict or Findings

↪ 275k61 k. Decision and Findings of Court. Most Cited Cases

Fact that trial court's judgment entry, including 34 pages and 176 paragraphs of findings of fact and conclusions of law, was partially adopted from fuel distributor's proposal in breach of contract action with service station, was not basis for new trial,

given that findings and conclusions were adequate to provide basis for appeal and to aid appellate court in review. Rules Civ.Proc., Rule 52.

[10]  KeyCite Citing References for this Headnote

343 Sales

343VIII Remedies of Buyer

343VIII(C) Actions for Breach of Contract

343k414 Evidence

343k415 k. Presumptions and Burden of Proof. Most Cited Cases

Service station never made prima facie case of breach of contract by fuel distributor, and thus burden never shifted to fuel distributor to rebut prima facie case. Civil Appeal from Common Pleas Court. John T. Barga, Attorney at Law, Reg. # 0018295, Tiffin, OH, for Appellant. John D. Parker, Attorney at Law, Reg. # 0025770, Sarah E. Thomas, Attorney at Law, Reg. # 0070119, Cleveland, OH, for Appellee.

OPINION

HADLEY, J.

*1 {¶ 1} The plaintiff/appellant, New Haven Corner Carryout Incorporated (“New Haven” or “the appellant”), appeals several judgments of the Seneca County Court of Common Pleas, all of which were adverse to the appellant. Based on the following, we affirm the judgment of the trial court.

{¶ 2} This case arises out of a contract dispute between the appellant, a service station, and its fuel distributor, Clay Distributing Company (“Clay” or “the appellee”). On February 1, 1990, the parties entered into a Distribution Agreement (“the agreement”), whereby Clay was to deliver gasoline and diesel fuel to New Haven for sale at the service station. Pursuant to the

agreement, the appellant is required to remit a check each day to Clay for the actual daily fuel sales registered on its pumps. Within twenty days of the end of each month, Clay must pay to New Haven one-half of the gross profit derived from the sale of diesel fuel and gasoline.

{¶ 3} George R. Paul was president of Clay from 1987 until September 1995. Just prior to 1987, Mr. Paul was the sole shareholder in Clay; however, he sold all but one of his shares to William F. Beck before becoming president. In 1990, the year the station opened, Mr. Paul acquired a fifty percent shareholder interest in New Haven, acting as a silent partner. Thus, Mr. Paul was the president of Clay and a major stockholder in New Haven at the time that the parties entered into the agreement. In fact, his signature appears on the document in his capacity as president of Clay.

{¶ 4} Mr. Paul became president of New Haven in 1996, after his resignation from Clay. He claimed that, upon examining the station's books, he found several irregularities, including a problem with Clay's computation of “gross profit.” Ultimately, New Haven filed suit against Clay seeking to invalidate the agreement. New Haven's complaint alleged material breach and impossibility of performance. Clay counterclaimed for failure to pay money owed under the contract.

{¶ 5} Clay moved for summary judgment on New Haven's claim of impossibility. New Haven also moved for summary judgment. On March 29, 2001, Clay's motion was granted and New Haven's was denied. The case then proceeded to jury trial on April 18, 2001 on the claim for material breach of contract and the cross-claim. At the trial's conclusion, the case was removed from the jury for determination of all issues by the court. On June 25, 2001, the court found for Clay on all issues.

{¶ 6} The appellant filed a Motion for New Trial on July 3, 2001, which was denied by a September 26, 2001 judgment entry. The appellant now brings this appeal, asserting three assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

{¶ 7} The trial court committed reversible error when it overruled Plaintiff's Motion for Summary Judgment and granted Defendant's Motion for Summary Judgment as to count one of Plaintiff's complaint.

*2 {¶ 8} The appellant claims that the trial court erred when it simultaneously granted the appellee's motion for summary judgment and denied the appellant's motion as to the appellant's claim of impossibility of performance. Based on the following, we disagree with the appellant.

Standard of Review for Summary Judgment

{¶ 9} In considering an appeal from the granting of a summary judgment, our review is *de novo*, giving no deference to the trial court's determination.^{FN1} Accordingly, we apply the same standard for summary judgment as did the lower court.^{FN2}

FN1. Schuch v. Rogers (1996), 113 Ohio App.3d 718, 720, 681 N.E.2d 1388.

FN2. Midwest Specialties, Inc. v. Firestone Tire & Rubber Co. (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411.

{¶ 10} Summary judgment is proper when, looking at the evidence as a whole (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence, construed most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party.^{FN3} The initial burden in a summary judgment motion lies with the movant to inform the trial court of

the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.^{FN4} Those portions of the record include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action.^{FN5}

FN3. Civ.R. 56(C); Horton v. Harwick Chemical Corp. (1995), 73 Ohio St.3d 679, 686-87, 653 N.E.2d 1196.

FN4. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264.

FN5. Civ.R. 56(C).

{¶ 11} Once the movant has satisfied this initial burden, the burden shifts to the nonmovant to set forth specific facts, in the manner prescribed by Civ.R. 56(C), indicating that a genuine issue of material fact exists for trial.^{FN6} The nonmoving party may not merely rely on the pleadings nor rest on allegations, but must set forth specific facts that indicate the existence of a triable issue.^{FN7}

FN6. Dresher v. Burt, 75 Ohio St.3d at 293, 662 N.E.2d 264.

FN7. Shaw v. J. Pollock & Co. (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.

Impossibility of Performance

[1] {¶ 12} This particular aspect of the dispute centers around the mechanism by which gross profit is determined under the agreement. In the agreement, "gross profit" is defined as the difference between the retail price and the "delivered cost" of the fuel. Also provided are definitions of "delivered cost" for both gasoline and diesel fuel. The agreement reads, in relevant part,

{¶ 13} “The delivered cost of gasoline shall be Marathon Petroleum Company's Toledo rack price plus \$.025 per gallon for a period of two years. The rate of \$.025 per gallon will be adjusted every two years to reflect a proportionate increase or decrease in the published Common Carrier Rate of Refiner's Transport of Toledo, Ohio.

{¶ 14} “The delivered cost of diesel fuel shall be Marathon Petroleum Company's Bellevue rack price plus \$.015 per gallon for a period of two years. The rate of \$.015 per gallon will be adjusted every two years to reflect a proportionate increase or decrease in the published Common Carrier Rate of Refiner's Transport of Toledo, Ohio.”

*3 {¶ 15} Around 1994, the United States Environmental Protection Agency (“EPA”) enacted regulations that classified diesel fuel into two categories based on sulfur content. The EPA regulations mandated that only low sulfur diesel fuel could be used in over-the-road vehicles, the only type of vehicles to which New Haven sells diesel fuel. Subsequent to the enactment of these regulations, in October 1994, Marathon's Bellevue facility stopped selling diesel fuel for over-the-road vehicles. Consequently, it no longer posted a price for this type of fuel. Unable to abide by the agreement's original terms, Clay began to purchase diesel fuel from Marathon's Toledo terminal, using its price for the purpose of calculating profits.

{¶ 16} Some time during the initial term of the agreement, Refiner's Transport of Toledo, Ohio went out of business. Therefore, it stopped publishing a Common Carrier Rate. This left the parties without the ability to make the agreed-upon adjustment according to the original terms of the contract. The appellee began using the actual freight rate that it incurred in order to determine “delivered cost” under the agreement.

{¶ 17} Impossibility of performance arises where, after parties enter into a contract, an unforeseen event renders impossible the performance of contractual duties of one or both of the parties.^{FN8}

Absent contrary contractual terms, either party can often avoid an agreement when governmental activity renders its performance impossible or illegal.^{FN9}
FN8. *Truetried Service Co. v. Hager* (1997), 118 Ohio App.3d 78, 87, 691 N.E.2d 1112.
FN9. *Glickman v. Coakley* (1984), 22 Ohio App.3d 49, 52, 488 N.E.2d 906; *London & Lancashire Indem. Co. of America v. Board of Comm'rs. Of Columbiana Cty.* (1923), 107 Ohio St. 51, 140 N.E. 672, syllabus.

{¶ 18} The appellant argues that the formula for determining gross profit was a material element of the agreement. Therefore, performance under the agreement became legally impossible after the passage of the EPA regulation and further when the Refiner's Transport stopped publishing a Common Carrier Rate because the agreed-upon definition of delivery cost for diesel and gasoline no longer existed. Because the federal law and the abolition of the published Common Carrier Rates were events that could not have been foreseen by the parties, the appellant urges that it be excused from performance under the agreement.

{¶ 19} The parties are in accord that the original pricing mechanisms contained in the contract have failed. However, the appellee contends that this failure does not render the agreement impossible to perform. Rather, argues the appellee, a “reasonable price” should be imposed on the parties in order to permit completion of the contract. The appellee cites *Oglebay Norton Co. v. Armco, Inc.*^{FN10} In *Oglebay*, the operator of a steel shipping company brought an action against a long-time customer for

enforcement of a contract whereby the plaintiff provided services to the defendant for shipment of steel. Both the primary and secondary pricing mechanisms in the contract had failed. Nevertheless, after a lengthy bench trial, the trial court found that the parties intended to be bound even upon such a failure and imposed what it determined to be a "reasonable price." FN10. (1990) 52 Ohio St.3d 232, 556 N.E.2d 515.

*4 {¶ 20} We agree with the appellee that *Oglebay* may permit the trial court to impose a "reasonable price" on the parties here so that the agreement could be fulfilled. However, *Oglebay* makes clear that such a disposition is only appropriate where the parties have evidenced an intent to be bound despite the failure of pricing terms. ^{FN11} "Whether parties intend[] to be bound, even upon failure of the pricing mechanisms [in a contract], is a question of fact properly resolved by the trier of fact." ^{FN12} FN11. *Id.* at 235, 556 N.E.2d 515. FN12. *Id.*, citing *Normandy Place Assoc. v. Beyer* (1982), 2 Ohio St.3d 102, 106, 443 N.E.2d 161.

{¶ 21} The appellee has presented evidence that the parties did intend to be bound even though the pricing terms failed. Specifically, the appellee notes that, as in *Oglebay*, the parties operated under the agreement on a daily basis for many years. More significantly, the parties continued to operate under the agreement even after the pricing indices became unavailable.

{¶ 22} The appellant, on the other hand, contends that when the pricing mechanisms failed, New Haven began to question the appellee about how it was calculating gross profit, but received no satisfactory explanation. Finally, in 1999, it commenced legal action to resolve the issue. However, the evidence presented by New Haven in

support of this claim reveals that these inquiries commenced only after Mr. Paul became president of New Haven in 1996. As the appellant points out, the pricing term for diesel fuel failed in October of 1994 and the freight rate for gasoline was no longer published as of 1995. This makes it clear that the parties operated under the agreement for a number of months without the benefit of the original pricing terms and without objection. Thus, the appellant fails to direct us to any evidence that, if believed, supports its claim that it did not intend to be bound upon failure of the original terms. Therefore, reasonable minds could only conclude that the appellee was entitled to summary judgment.

{¶ 23} Accordingly, the appellant's first assignment of error is not well-taken and is hereby denied.

ASSIGNMENT OF ERROR NO. II

{¶ 24} The trial court committed reversible error when it found in favor of the defendant and against the plaintiff at trial.

[2] {¶ 25} The appellant argues in this second assignment of error that the trial court's judgment in favor of the appellee was against the manifest weight of the evidence. We disagree with the appellant.

{¶ 26} The appellant takes issue with the fact that the trial court adopted "almost verbatim" the Proposed Findings of Fact and Conclusions of Law submitted by the appellee at the conclusion of trial. As the appellee points out, a trial court may properly adopt as its own a party's proposed findings of law, so long as it has thoroughly read the document to ensure that it is completely accurate in fact and law. ^{FN13} Therefore, the trial court's adoption of the appellee's findings of fact and conclusions of law is not in error unless the appellant can show that the facts or law taken up were

erroneous. Although the appellant has made no specific argument to that effect, we will address the accuracy of the court's findings in our review for manifest weight of the evidence.

FN13. *Clark v. Smith* (1998), 130 Ohio App.3d 648, 659, 720 N.E.2d 973, citing *Adkins v. Adkins* (1988), 43 Ohio App.3d 95, 539 N.E.2d 686, at paragraph three of the syllabus.

*5 {¶ 27} It is axiomatic that, in the case of a civil trial, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence.^{FN14}

Furthermore, the well-settled proposition that evaluating evidence and assessing credibility are primarily for the trier of fact^{FN15} is equally true in a bench trial because “the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.”^{FN16} Therefore, absent extreme circumstances, an appellate court will not second guess determinations of weight and credibility.

FN14. *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

FN15. *Ostendorf-Morris Co. v. Slyman* (1982), 6 Ohio App.3d 46, 47, 452 N.E.2d 1343.

FN16. *Seasons Coal Co. Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 28} The issue before the trial court was whether either of the parties materially breached the agreement. New Haven claimed that Clay's alleged breaches entitled New Haven to terminate the agreement and to receive monetary damages. Clay, on the

other hand, sought enforcement of the contract and money damages. We note at the outset that the appellant takes issue with nearly all of the trial court's 176 findings of fact and conclusions of law, which appear in the June 25, 2001 judgment entry. We will address only those findings and conclusions that pertain to the essential elements of the case.

[3] {¶ 29} A number of the issues raised by the appellant address what this Court would describe as the semantics of the trial court's judgment entry. The appellant objects to the fact that, in several places in its entry, it uses terms that are not found in the record to characterize certain evidence. The appellant fails to show how it was in any way prejudiced by this practice. Absent a showing of prejudice, we will not require the trial to use the exact language from the transcript in formulating its judgment entry.

[4] {¶ 30} New Haven argues that the trial court should not have applied the doctrine of waiver in this case to preclude it from asserting certain arguments regarding several provisions of the agreement in support its claim for breach of contract. Specifically, the trial court found that waiver applied to preclude the appellant's claim with respect to the price of diesel fuel, freight rates, and its entitlement to share with Clay the shrinkage allowance, credit card fee, and the advertising fee.

{¶ 31} Waiver is defined as a voluntary relinquishment of a known right.^{FN17}

Waiver need not be established through express statement in a contract; it may also be inferred through the acts and conduct of the parties.^{FN18} However, the party relying on implied waiver has the burden of showing by a preponderance of the evidence that a waiver, through clear and unequivocal acts or conduct, did occur.^{FN19}

FN17. *Chubb v. Bureau of Workers' Comp.* (1998), 81 Ohio St.3d 275, 278, 690 N.E.2d

1267.

FN18. *Ohio Farmers Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, syllabus.

FN19. *Id.*

{¶ 32} At trial, the appellant's primary witness, Mr. Paul, admitted on cross-examination that at the time when the calculations for gross profit were altered with respect to diesel fuel and freight rates, neither he nor anyone else at New Haven complained. In fact, no objection was lodged until after Mr. Paul stepped down as Clay's president and became involved with New Haven exclusively.

*6 {¶ 33} Similar testimony was provided with regards to the issues of shrinkage allowance, credit card fee, and the advertising fee. According to Mr. Paul, the parties have been dealing with each of these items in a particular way for a number of years. Again, the appellant objected to the practices only after Mr. Paul left Clay and became president of New Haven. Ironically, Mr. Paul also admitted that, while at Clay, he at least knew of all and possibly implemented some of the various practices about which New Haven now complains. Based on Mr. Paul's testimony alone, we conclude that, by the manifest weight of the evidence, the appellee showed that a waiver, through clear and unequivocal acts or conduct, did occur.

{¶ 34} The appellant also contends that it showed by the manifest weight of the evidence that the appellee was improperly determining "gross profit." However, because we agree with the trial court's finding that the appellant waived its right to object to the appellee's calculation of "gross profit," the propriety the formula used is irrelevant. Therefore, we need not address this argument.

[5] {¶ 35} The appellant claims that the manifest weight of the evidence shows that Clay illegally mixed gasoline of different octane ratings and that it illegally mixed diesel fuel with gasoline, thus materially breaching the agreement. We note at the outset that, regardless of the legality of these acts, there is nothing in the agreement that expressly prohibits Clay from either mixing gasoline of different octane ratings or mixing diesel fuel with gasoline. Therefore, it was not against the manifest weight of the evidence to find that neither of these acts amount to breach of contract. Moreover, the manifest weight of the evidence does not show that Clay violated any laws.

{¶ 36} There was evidence presented at trial that the some of the appellee's drivers mixed a lower octane with a higher octane fuel. In fact, Mr. Douglas Beck, President of Clay, testified that, while it was not company policy, on at least one occasion someone at Clay instructed a driver to perform this type of mixing.

{¶ 37} Mr. John Grant, a regional manager for Marathon testified briefly that combining one octane with another is illegal. There was no testimony regarding what actual law prohibited this mixing. Moreover, other testimony showed that mixing is not necessarily illegal as long as the fuel in each of the tanks meets the minimum octane rating required by law. Mr. Paul's testimony revealed that the octane rating on each of the tanks indeed reflects a minimum octane rating. The appellant could not establish the actual octane rating of the tanks before the lower octane was added to the tank. Therefore, it could not to establish that the mixing of octane levels caused the rating in the tanks to fall below the legal minimum.

{¶ 38} With regards to the mixing of diesel fuel with gasoline, no testimony

established that this practice was, in fact, illegal. Although the evidence revealed that damage was caused on one occasion when this happened, it also showed that the appellee paid these damages.

*7 [6] [X] {¶ 39} The appellant fails to show how the rest of the alleged errors it cites in support of this assignment of error affect the ultimate outcome of the case. In order for a reviewing court to justify a reversal, the record must reflect that the errors asserted prejudiced the party seeking the reversal.^{FN20} As the appellee points out, Ohio has expressly rejected the theory that cumulative minor errors warrant reversal.^{FN21} Thus, even if we determined that some of the trial court's findings were erroneous, we could not reverse based on quantity of errors alone. Rather, there must be a showing of prejudice for each individual error. Because we find that the appellant was not prejudiced by any of the court's findings, we decline to address the remaining arguments individually.

FN20. *Suchy v. Moore* (1972), 29 Ohio St.2d 99, 102, 279 N.E.2d 878.

FN21. *Nicholas v. Yellow Cab Co.* (1962), 116 Ohio App. 402, 412, 180 N.E.2d 279.

{¶ 40} Accordingly, the appellant's second assignment of error is not well-taken and is hereby overruled.

ASSIGNMENT OF ERROR NO. III

{¶ 41} The trial court committed reversible error when it overruled Plaintiff's motion for a new trial.

{¶ 42} For its final assignment of error, the appellant presents several arguments regarding why the trial court should have granted its motion for a new trial. We will address each of these arguments in turn. Certain of the appellant's arguments regarding its motion for a new trial essentially contend that the trial court erred

as a matter of law, while others raise questions about the court's weighing of evidence. Because these two types of arguments require different standards of review, we will divide them accordingly.

Asserted Errors of Law

{¶ 43} When a new trial is requested on the basis that an error of law was committed, a reviewing court does not make a determination of whether or not the trial court abused its discretion, as the trial court is not exercising discretion when reviewing a motion for a new trial on this basis.^{FN22} Thus, a reviewing court will not reverse the decision of the trial court overruling a motion for new trial when the challenged action was not error or was not prejudicial.^{FN23}

FN22. *Sanders v. Mt. Sinai Hospital* (1985), 21 Ohio App.3d 249, 487 N.E.2d 588;

Rhode v. Farmer (1970), 23 Ohio St.2d 82, 262 N.E.2d 685.

FN23. *Sanders*, supra.

[7] [X] {¶ 44} The appellant first argues that it was essentially coerced into withdrawing its jury demand and submitting the case to the trial court for determination. Civ.R. 38, which governs the right to trial by jury, reads in relevant part:

{¶ 45} “(B) Demand.

{¶ 46} “Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party. * * *

{¶ 47} “(C) Specification of issues.

{¶ 48} “In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have

demand trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within fourteen days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.”

*8 {¶ 49} Civ.R. 39, also relevant to this case, states as follows:

{¶ 50} “(A) By jury

{¶ 51} “When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist. The failure of a party or his attorney of record either to answer or appear for trial constitutes a waiver of trial by jury by such party and authorizes submission of all issues to the court.”

{¶ 52} The parties agreed throughout the proceedings in this case that a number of questions of law needed to be decided by the court before the case was submitted to a jury. At the conclusion of the trial, the court stated that it would take approximately one week to resolve these issues, due in part to the case's complexity and in part to the trial court's other commitments. This meant that the jury would be recalled after only after the court ruled on the various issues. Upon this revelation, both parties agreed on the record to remove the case from the jury for resolution of all issues by the trial court. The appellant contends that it effectively had no choice but to withdraw its jury demand and

that it only did so to avoid wasting time, money, and resources.

{¶ 53} The appellant did not raise this objection at trial, notwithstanding the fact that its counsel clearly had notice and opportunity to object at the time the issue was raised. “Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.” ^{FN24} Unless we find plain error, we must uphold the jury waiver. Plain errors constitute any “errors or defects affecting substantial rights [and] may be noticed although they were not brought to the attention of the court.” ^{FN25} To determine whether the trial court committed plain error, the reviewing court must determine whether, “but for the error, the outcome of the trial clearly would have been otherwise.” ^{FN26} Although the plain error doctrine is primarily applied in criminal cases, its application to civil cases may be necessary in “ ‘extremely rare situations * * * to prevent a manifest miscarriage of justice * * *.’ ” ^{FN27} Upon review of the record, we find that no manifest injustice occurred as a result of the decision to submit the entire case to the trial court.

^{FN24}. *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81, 679 N.E.2d 706.

^{FN25}. *Crim.R. 52(B)*.

^{FN26}. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

^{FN27}. *O'Connell v. Chesapeake & Ohio R. Co.* (1991), 58 Ohio St.3d 226, 229-30, 569 N.E.2d 889.

{¶ 54} The appellant claims that it was deprived of due process because the trial court failed to answer each and every one of the appellant's jury interrogatories. According to the appellant, it withdrew its jury demand upon the express condition that

the trial court would answer the interrogatories.

*9 ¶ 55} At the conclusion of the trial, the following conversation took place between the court and the appellant's attorney, Mr. Barga:

{¶ 56} "THE COURT: * * * * Mr. Barga had a list of questions and interrogatories. I had indicated that I would answer those * * * *. So, that we're clear, *I did not agree to answer each and every one of those questions specifically* * * * *. Is that a correct recitation of what was discussed in my office? (EMPHASIS ADDED)

{¶ 57} "MR. BARGA: Yes, I believe it is. * * * "

{¶ 58} Thus, the appellant not only failed to object to the trial court's decision not to address each of its interrogatories, its attorney affirmatively agreed to this decision on the record. The only condition to dismissing the jury that the appellant made on the record was that it be permitted to revise its exhibit 25, which contained its calculation of the monetary damages suffered by New Haven.

{¶ 59} The Ohio Rules of Civil Procedure do not require a court to answer jury interrogatories after a bench trial. In fact, pursuant to Civ.R. 52, a trial court may enter a verdict without issuing any supporting findings of fact and conclusions of law, unless requested to do so in writing by a party. Thus, there is no legal reason why the trial court should be made to answer the appellant's interrogatories. Accordingly, the appellant's contention that it is entitled to a new trial due to this issue is without merit.

[8] ¶ 60} The appellant next asserts that it is entitled to a new trial because the trial court entered two contradictory judgment amounts in its original judgment entry. Specifically, on page two of the entry, the court granted judgment for Clay against

New Haven in the amount of \$280,050.42. However, on page thirty-four of the same entry, the trial court finds damages for Clay in the amount of \$293,769.35. Later, in its Journal Entry on Plaintiff's Motion for New Trial, the trial court corrects itself, agreeing with the appellant that the amount of the judgment on page thirty-four of the judgment entry was incorrect and should have read \$280,050.42. Accordingly, we fail to see how the appellant was prejudiced by the trial court's initial error. The appellant is not entitled to a new trial based on this issue.

[9] ¶ 61} The appellant argues that the trial court's adoption of the appellee's Proposed Findings of Fact and Conclusions of Law violated Civ.R. 52, which states:

{¶ 62} "When questions of fact are tried by the court without a jury, judgment may be general * * * unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

{¶ 63} The purpose of Civ.R. 52 is "to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment." ^{FN28} In light of its purpose, while there is no precise rule regarding compliance with Civ.R. 52, the findings and conclusions must articulate an adequate basis upon which a party can mount a challenge to, and the appellate court can make a determination as to the propriety of, resolved disputed issues of fact and the trial court's application of the law. ^{FN29}
FN28. In re Adoption of Gibson (1986), 23 Ohio St.3d 170, 172, 492 N.E.2d 146, quoting *Werden v. Crawford (1982)*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424.
FN29. *Stone v. Davis (1981)*, 66 Ohio St.2d 74, 85, 419 N.E.2d 1094.

*10 ¶ 64} The trial court's judgment entry which contained its findings of fact and

conclusions of law was 34 pages long and contained 176 paragraphs, each of which constituted a separate finding. Regardless of whether these findings were partially adopted from the appellee's proposal, they are certainly adequate to provide the appellant with basis for appeal and to aid this Court in its review of this case. The appellant cannot show that it is entitled to a new trial based on this issue.

Asserted Errors of Fact

{¶ 65} Where questions of fact are involved, the decision as to whether a motion for new trial should be granted lies within the sound discretion of the trial court, and the ruling will not be reversed upon appeal absent a showing of an abuse of discretion.^{FN30} Thus, in reviewing a trial court's ruling on a motion for a new trial, an appellate court should view the evidence before it in a light favorable to the trial court's action, where the trial court's decision involves factual determinations.^{FN31} An abuse of discretion connotes more than an error of judgment; rather, it indicates that the trial court's attitude was unreasonable, unconscionable, or arbitrary.^{FN32}
FN30. *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 184, 454 N.E.2d 976.
FN31. *Sanders v. Mt. Sinai Hospital* (1985), 21 Ohio App.3d 249, 253, 487 N.E.2d 588.
FN32. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112, 616 N.E.2d 218.

[10] {¶ 66} The appellant argues that trial court should have found the appellee failed to rebut that appellant's prima facie showing of breach of contract. This argument cannot be sustained based on our previous finding that the trial court's judgment was not against the manifest weight of the evidence. The trial court did not find that the appellant established its breach of contract claim. Hence, the burden

in the case never shifted to the appellee. Therefore, the trial court did not abuse its discretion in determining that New Haven was not entitled to a new trial based on this issue.

{¶ 67} The appellant contends that the trial court abused its discretion by adopting, in large part, the appellee's Proposed Findings of Fact and Conclusions of Law, and that, consequently, it is entitled to a new trial. As we noted in the previous assignment of error, it is not improper for a trial court to adopt a party's proposed findings of fact and conclusions of law, as long as the document is reviewed to ensure that it is completely accurate.^{FN33} Because we have already reviewed the trial court's findings, we hold that the trial court did not abuse its discretion by not granting a new trial based on this issue.
FN33. *Slyman*, 6 Ohio App.3d at 47, 452 N.E.2d 1343.

{¶ 68} Based on the foregoing, the appellant's third assignment of error is not well-taken and is hereby denied.

{¶ 69} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW, P.J., and BRYANT, J., concur.

Ohio App. 3 Dist., 2002.
New Haven Corner Carry Out, Inc. v. Clay Distrib. Co.
Not Reported in N.E.2d, 2002 WL 1299759
(Ohio App. 3 Dist.), 2002 -Ohio- 2726
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Not Reported in N.E.2d, 2004 WL 231000
(Ohio App. 4 Dist.), 2004 -Ohio- 510

CHECK OHIO SUPREME COURT
RULES FOR REPORTING OF OPINIONS
AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fourth District, Athens County.
STATE of Ohio, Plaintiff-Appellee,

v.

Eric J. KNOTT, Defendant-Appellant.

No. 03CA6.

Decided Jan. 29, 2004.

Background: Petitioner moved for postconviction relief. The Common Pleas Court, Athens County, denied the petition without a hearing. Petitioner appealed.

Holdings: The Court of Appeals, Harsha, J., held that:

- (1) trial court's judgment entry setting forth its reasons for denying postconviction relief petition satisfied requirement that it make findings of fact and conclusions of law;
- (2) petitioner's attorneys were not deficient in advising him to plead guilty to aggravated murder; and
- (3) attorneys' alleged failure to properly investigate facts did not constitute ineffective assistance.

Affirmed.

West Headnotes

[1]  KeyCite Citing References for this Headnote

 110 Criminal Law

 110XXX Post-Conviction Relief

 110XXX(C) Proceedings

 110XXX(C)3 Hearing and

Determination

 110k1660 k. Findings. Most Cited Cases

Trial court's detailed judgment entry setting forth its reasons for denying postconviction relief petition satisfied requirement that it make findings of fact and conclusions of law before it dismiss petition without evidentiary hearing. R.C. § 2953.21(C).

[2]  KeyCite Citing References for this Headnote

 110 Criminal Law

 110XXXI Counsel

 110XXXI(C) Adequacy of

Representation

 110XXXI(C)2 Particular Cases and

Issues

 110k1920 k. Plea. Most Cited Cases (Formerly 110k641.13(5))

Defendant's attorneys were not deficient, for ineffective assistance purposes, in advising him to plead guilty to aggravated murder; defendant did not introduce operative facts of his innocence beyond unsupported claim, defendant gave no indication that he had any misgivings about entering negotiated plea, his belated argument of factual innocence was not credible, and defendant received benefit in form of removal of possibility of death sentence. U.S.C.A. Const. Amend. 6.

[3]  KeyCite Citing References for this Headnote

 110 Criminal Law

 110XXXI Counsel

 110XXXI(C) Adequacy of

Representation

 110XXXI(C)2 Particular Cases and

Issues

 110k1920 k. Plea. Most Cited Cases (Formerly 110k641.13(5))

Attorneys' alleged failure to properly investigate facts, prior to advising defendant to plead guilty, to determine if all elements of murder were present, did not constitute

ineffective assistance; defendant did not enter guilty pleas until more than six months after appointment of attorneys, giving him plenty of time to tell attorneys his side of story, defendant did not claim that he was prevented from telling attorneys his story, and record indicated attorneys did investigate facts. R.C. 2903.02(A).

Eric J. Knott, Chillicothe, OH, appellant pro se.

C. David Warren, Athens County Prosecuting Attorney, Thomas P. Taggart, Assistant Prosecuting Attorney, Athens, OH, for appellee.

HARSHA, J.

*1 {¶ 1} Eric Knott appeals the Athens County Common Pleas Court's judgment denying his petition for post-conviction relief without a hearing. Knott contends he received ineffective assistance of counsel because his defense attorneys advised him to plead guilty to a crime he did not commit, i.e., the aggravated murder of Ruth Malcolm. In addition, he contends he received ineffective assistance of counsel because his defense attorneys advised him to plead guilty to murder even though he did not kill the victim, Dave Malcolm, on purpose. Because Knott's petition does not contain any operative facts that would establish substantive grounds for relief, we conclude the court did not err in dismissing the petition without holding an evidentiary hearing. Accordingly, we affirm the judgment of the trial court.

{¶ 2} According to the state, an argument ensued between Knott and Dave Malcolm in September 2001. As a result of the argument, Knott shot and killed Mr. Malcolm. Knott then proceeded to Mr. Malcolm's house and enticed Ruth Malcolm to leave the house. Upon luring Mrs. Malcolm outside, Knott stabbed her multiple times, thereby causing her death.

Afterwards, Knott destroyed the rifle he had used to kill Mr. Malcolm and hid it.

{¶ 3} Two months later, the grand jury indicted Knott on one count of murder with a firearm specification, for killing Mr. Malcolm, and one count of aggravated murder with death penalty specifications, for killing Mrs. Malcolm. After the first day of trial, the state issued a bill of information charging Knott with tampering with evidence. That same day, Knott entered into a plea agreement with the state whereby he pled guilty to murder, aggravated murder, and tampering with evidence. He also stipulated to the firearm specification. In exchange for Knott's guilty pleas, the state amended the aggravated murder charge to remove the death penalty specifications. The trial court accepted Knott's guilty pleas, found him guilty of the three charges, and imposed sentence in accordance with the state's recommendation. Knott did not file an appeal.

{¶ 4} In January 2003, Knott filed a pro se petition for post-conviction relief. In his petition, Knott claimed his guilty pleas were involuntary because he received ineffective assistance of counsel. First, Knott claimed his attorneys were ineffective for advising him to plead guilty to aggravated murder even though he did not kill Mrs. Malcolm. Second, he claimed his attorneys were ineffective for advising him to plead guilty to murder when he did not purposely kill Mr. Malcolm. To support his petition, Knott attached his own affidavit, which stated that he did not kill Mrs. Malcolm. He also stated that he did not intend to kill Mr. Malcolm and that he would not have pled guilty to murder if his attorneys had explained that the state would have to prove that he purposely killed Mr. Malcolm. Finally, he indicated that he only pled guilty to the aggravated murder and murder charges

because his attorneys advised him to do so in order to avoid the death penalty.

*2 {¶ 5} The trial court dismissed Knott's petition for post-conviction relief without holding an evidentiary hearing. It issued a thorough and reasoned decision in which it concluded that Knott had failed to establish any substantive basis for his claim that he received ineffective assistance of counsel. The court found that Knott had "presented no operative facts showing that counsel's performance negatively impacted the knowing, intelligent, and voluntary nature of [his] plea." Knott now appeals the court's entry denying his petition for post-conviction relief and raises the following assignment of error: "The trial court erred to the prejudice of the Defendant/Appellant by denying him due process and effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendment when it did not hold an evidentiary hearing on the timely post-conviction petition filed by the Appellant."

{¶ 6} In his sole assignment of error, Knott argues the court erred in dismissing his petition for post-conviction relief without holding an evidentiary hearing.

[1] {¶ 7} Before we can consider Knott's assignment of error, we must address a jurisdictional issue raised by this appeal. When a court dismisses a petition for post-conviction relief without an evidentiary hearing, it must make findings of fact and conclusions of law. R.C. 2953.21(C). The time for appeal does not begin to run until the findings of fact and conclusions of law are filed. State v. Mapson (1982), 1 Ohio St.3d 217, 218-19, 438 N.E.2d 910.

{¶ 8} However, designated findings of fact and conclusions of law are not required if the court issues a judgment entry that is sufficiently detailed to permit appellate review. State ex rel. Carrion v. Harris (1988), 40 Ohio St.3d 19, 20, 530 N.E.2d

1330. See, also State v. Young (Jan. 18, 1996), Lawrence App. No. 95CA01.

Although the court in the present case did not specifically label its findings and conclusions, it issued a detailed judgment entry setting forth its reasons for denying the petition. This entry satisfies the purpose of R.C. 2953.21(C). Accordingly, we find that we have jurisdiction to hear this appeal.

{¶ 9} The post-conviction relief statute, R.C. 2953.21, provides a remedy for a collateral attack upon judgments of conviction claimed to be void or voidable under the United States or the Ohio Constitution. See R.C. 2953.21(A)(1); State v. Hatton (Aug. 4, 2000), Pickaway App. No. 00CA10. In order to prevail on a petition for post-conviction relief, the petitioner must establish that he has suffered an infringement or deprivation of his constitutional rights. R.C. 2953.21(A)(1). See, e.g. State v. Calhoun, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 10} The filing of a petition for post-conviction relief does not automatically entitle the petitioner to an evidentiary hearing. See R.C. 2953.21(C); Calhoun, 86 Ohio St.3d at 282, 714 N.E.2d 905, citing State v. Cole (1982), 2 Ohio St.3d 112, 443 N.E.2d 169. Before the trial court can grant a hearing on the petition, the court must determine "whether there are substantive grounds for relief." R.C. 2953.21(C). When making this determination, the court must consider the petition along with any supporting affidavits, documentary evidence, and all the files and records of the case. Id. If the trial court finds no substantive grounds for relief, the petition should be dismissed without a hearing. Calhoun, 86 Ohio St.3d at 282-83, 714 N.E.2d 905; State v. Jackson (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819; R.C. 2953.21(E).

*3 {¶ 11} We review a trial court's decision dismissing a petition for post-conviction relief without a hearing under a de novo standard of review. State v. Miller, Ross App. No. 01CA2614, 2002-Ohio-407; State v. Platz, Washington App. No. 00CA50, 2001-Ohio-2550. Therefore, we will conduct our own independent review of the record to determine whether Knott's petition presents substantive grounds for relief. Before doing so, however, we address an argument Knott raises concerning res judicata.

{¶ 12} In his brief, Knott argues that res judicata does not bar his ineffective assistance of counsel claim. He relies on Massaro v. United States (2003), 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714, to support his argument. However, a review of the trial court's decision shows that the court did not find Knott's claim barred by the doctrine of res judicata. Rather, the court concluded that res judicata did not bar Knott's ineffective assistance of counsel claim because it relied on evidence outside the record. We agree and proceed to review the court's decision that the petition fails to establish substantive grounds for relief.

{¶ 13} Knott pled guilty to murder, aggravated murder, and tampering with evidence. Generally, a guilty plea constitutes a complete admission of guilt and renders irrelevant constitutional violations unless they are logically inconsistent with the valid establishment of factual guilt. See Crim.R. 11(B)(1); United States v. Broce (1989), 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927; Menna v. New York (1975), 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195. A defendant may, however, challenge whether the guilty plea was knowing and voluntary. See State v. Kelley (1991), 57 Ohio St.3d 127, 566 N.E.2d 658. Here, Knott argues that his guilty pleas were not knowing, intelligent,

and voluntary due to his attorneys' ineffectiveness.

{¶ 14} In order to prove ineffective assistance of counsel in the context of a guilty plea, a defendant must demonstrate that his counsel's performance was deficient, i.e., not reasonably competent, and that he suffered prejudice as a result of his counsel's deficient performance. Hill v. Lockhart (1985), 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203; State v. Xie (1992), 62 Ohio St.3d 521, 584 N.E.2d 715. Specifically, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill, 474 U.S. at 58-59. However, there is a strong presumption that licensed attorneys provide competent representation. State v. Lott (1990), 51 Ohio St.3d 160, 174-5, 555 N.E.2d 293. Thus, Knott must offer some credible operative facts to overcome this presumption. Knott's petition is fatally defective because he has presented no credible facts to suggest that his attorneys' performance was deficient.

[2] {¶ 15} In his first argument, Knott contends his defense attorneys provided ineffective assistance by advising him to plead guilty to aggravated murder. He claims that he did not kill Mrs. Malcolm, as she was killed by Russ Abrams. Knott contends that he only pled guilty because his defense attorneys told him that the state would drop the death penalty specifications if he pled guilty to the aggravated murder and murder charges.

*4 {¶ 16} The mere fact that counsel relays an offer and recommends accepting it cannot *per se* be the basis for a successful claim of ineffective assistance. An attorney has a duty to relay offers from opposing counsel to his client. State v. Neace (Feb. 14, 1996), Scioto App. No. 95CA2353. See, also, Krahn v. Kinney (1989), 43 Ohio St.3d

103, 106, 538 N.E.2d 1058; State v. Manning (July 12, 1985), Wood App. No. WD-84-84. In addition, a criminal defense attorney has an ethical obligation to advise his client fully on whether a particular plea is desirable. See EC 7-7; State v. Lavender, Lake App. No.2000-L-049, 2001-Ohio-8790. Thus, where the defendant receives a recognizable benefit from accepting such an offer, it may be difficult for the defendant to rebut the presumption that the attorney's recommendation was sound strategy.

{¶ 17} We conclude that Knott failed to carry his burden for three primary reasons. First, a bare belated assertion of innocence is not an operative fact. Knott claims his counsel were deficient because they advised him to plead guilty when he was innocent. However, Knott must introduce some evidence, i.e., operative facts, of his innocence beyond an unsupported claim that someone else committed the murder. The fact that the victims died by different weapons, i.e., Mr. Malcolm died from gunshots while Mrs. Malcolm died from knife wounds, is not a “operative fact of Knott's innocence.” Nor is Knott's unsupported and self-serving claim of Abrams' culpability.

{¶ 18} Second, although Knott's affidavit proclaims his innocence, the trial court properly exercised its discretion in rejecting its credibility. As noted by the trial court, Calhoun, supra, recognizes the need to assess the credibility of the affiant in the context of the entire record. Here, the trial court carried out a lengthy and detailed Crim.R. 11 dialogue with Knott. The court made every effort to insure that Knott understood the charges, that he was voluntarily and knowingly entering his plea and that no undue influences or promises caused him to do so. Despite the court's compliance with Crim.R. 11, Knott gave no indication that he had any misgivings about

entering the negotiated plea. In that dialogue he specifically acknowledged that his change of plea would be a factual admission of his guilt. Moreover, he did not indicate that he was entering an “Alford plea”, i.e., admitting guilt when he was innocent in order to avoid the potential death penalty.

{¶ 19} Knott's belated argument of factual innocence is not credible. If someone else had in fact killed Ruth Malcolm, why would he not contest the issue or, at a minimum, indicate that he was waiving the opportunity to contest it only grudgingly? Given that Ruth Malcolm's murder was the only charge carrying the death penalty specification, it seems illogical he would have waived a chance to establish his factual innocence to that charge without some comment at the plea hearing. In the context of the extensive Crim.R. 11 dialogue that occurred, the trial court was justified in finding the affidavit proclaiming his innocence to be lacking in credibility. See, Calhoun, 86 Ohio St.3d 279, 714 N.E.2d 905, paragraph one of the syllabus (trial court may judge the credibility of affidavits in determining whether they represent statements of fact).

*5 {¶ 20} Finally, this is not a situation where Knott received no benefit from his plea. Knott clearly received a benefit since he no longer faced the possibility of a death sentence. Thus, trial counsel remain clothed in the presumption that they acted competently.

[3] {¶ 21} In his second argument, Knott contends his defense attorneys provided ineffective assistance by advising him to plead guilty to the murder of Mr. Malcolm. Knott does not deny that he shot Mr. Malcolm; however, he contends he did not “purposely” kill him, as is required for murder. See R.C. 2903.02(A). As the trial court noted, Knott's argument becomes somewhat confusing at this point. Knott

contends his actions constitute voluntary manslaughter, not murder. However, he also appears to argue that he killed Mr. Malcolm in self-defense, which is inconsistent with his voluntary manslaughter argument and would constitute an intentional or purposeful act. In addition, it appears Knott has confused the requirement of "prior calculation and design", which is an element of aggravated murder, with the required mental state for murder, i.e., purposely. In his petition, Knott states that he did not go to Mr. Malcolm's house to kill him; in his appellate brief, he admits killing Mr. Malcolm but denies "pre-meditation when doing it."

{¶ 22} However, the essence of Knott's argument seems to be that his attorneys advised him to plead guilty to Mr. Malcolm's murder without properly investigating the facts to determine if all the elements of murder were present. He contends his defense attorneys "never heard the entire story" but rather, advised him to plead guilty in order to avoid the death penalty. He also claims in his petition that "his * * * attorney's (sic) should have found out all the surrounding facts * * * (.)".

{¶ 23} As the trial court noted, if Knott's attorneys never heard his story, it was Knott's own fault. According to the record, Knott did not enter his guilty pleas until more than six months after his attorneys were appointed. Thus, he had plenty of time to tell his attorneys what occurred that night. Moreover, Knott does not claim that he was prevented from telling his attorneys his story. Finally, the record indicates that defense counsel demanded discovery under Crim.R. 7(E), governing a request for a bill of particulars, and Crim.R. 16, governing discovery and inspection. Thus, Knott's contention that his attorneys did not properly investigate the facts is not credible.

{¶ 24} Knott does not claim that his attorneys coerced him into pleading guilty. Rather, he claims his attorneys advised him to plead guilty to Mr. Malcolm's homicide in order to avoid the possibility of the death sentence for Mrs. Malcolm's death. Apparently, the prosecutor presented a package deal, take it or leave it, that included pleading guilty to both murders. Knott readily admits that he chose to plead guilty "to guarantee that he would not be sentenced to death." In his petition, Knott states: "Certainly in a moment of judgment concerning one's life or death, there is only one basic human instinct, survival, which is what the Petitioner chose." However, a guilty plea is not involuntary simply because it was entered to avoid the death penalty. See Brady v. United States (1970), 397 U.S. 750, 90 S.Ct. 1463, 25 L.Ed.2d 747. It appears that after entering a knowing, intelligent, and voluntary guilty plea, Knott now regrets his decision. Unfortunately, regret does not constitute a substantive ground for relief, and Knott has failed to demonstrate that he received ineffective assistance of counsel.

*6 {¶ 25} Because Knott has failed to establish any substantive grounds for relief, we conclude the court did not err in dismissing his petition without holding an evidentiary hearing. Accordingly, Knott's assignment of error has no merit and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

ABELE, J. & EVANS, J., concur in Judgment and Opinion.
Ohio App. 4 Dist., 2004.
State v. Knott
Not Reported in N.E.2d, 2004 WL 231000
(Ohio App. 4 Dist.), 2004 -Ohio- 510
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➔Civ R 60 Relief from judgment or order

(A) Clerical mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed

in these rules.

CREDIT(S)

(Adopted eff. 7-1-70)

➔2911.02 Robbery

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control;

(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

(3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

(1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

CREDIT(S)

(1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1982 H 269, § 4, eff. 7-1-83; 1982 S 199; 1972 H 511)

➔2913.02 Theft; aggravated theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person

authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree.

If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more and is less than twenty-five thousand dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is twenty-five thousand dollars or more and is less than one hundred thousand dollars, theft from an elderly person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of

the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code, provided that the suspension shall be for at least six months.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the

suspension in accordance with Chapter 4510. of the Revised Code.

CREDIT(S)

(2006 H 347, eff. 3-14-07; 2006 H 530, eff. 6-30-06; 2004 H 536, eff. 4-15-05; 2004 H 369, eff. 11-26-04; 2004 H 12, eff. 4-8-04; 2003 H 179, eff. 3-9-04; 2003 H 7, eff. 9-16-03; 1999 H 2, eff. 11-10-99; 1998 S 66, eff. 7-22-98; 1995 S 2, eff. 7-1-96; 1995 H 4, eff. 11-9-95; 1990 S 258, eff. 11-20-90; 1990 H 347; 1986 H 49; 1984 H 632; 1982 H 269, § 4, S 199; 1980 S 191; 1972 H 511)

➔2913.51 Receiving stolen property

(A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

(B) It is not a defense to a charge of receiving stolen property in violation of this section that the property was obtained by means other than through the commission of a theft offense if the property was explicitly represented to the accused person as being obtained through the commission of a theft offense.

(C) Whoever violates this section is guilty of receiving stolen property. Except as otherwise provided in this division, receiving stolen property is a misdemeanor of the first degree. If the value of the property involved is five hundred dollars or more and is less than five thousand dollars, if the property involved is any of the property listed in section 2913.71 of the Revised Code, receiving stolen property is a felony of the fifth degree. If the property involved is a motor vehicle, as defined in section 4501.01 of the Revised Code, if the property involved is a dangerous drug, as defined in section 4729.01 of the Revised Code, if the value of the property involved is

five thousand dollars or more and is less than one hundred thousand dollars, or if the property involved is a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code, receiving stolen property is a felony of the fourth degree. If the value of the property involved is one hundred thousand dollars or more, receiving stolen property is a felony of the third degree.

CREDIT(S)

(1999 S 64, eff. 10-29-99; 1998 S 66, eff. 7-22-98; 1995 S 2, eff. 7-1-96; 1995 H 4, eff. 11-9-95; 1986 H 49, eff. 6-26-86; 1983 S 210; 1982 S 199, H 269; 1980 S 191; 1972 H 511)

→2921.331 Failure to comply with order or signal of police officer

(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

(C)(1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

(2) A violation of division (A) of this section is a misdemeanor of the first degree.

(3) Except as provided in divisions (C)(4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.

(4) Except as provided in division (C)(5) of this section, a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds by proof beyond a reasonable doubt that, in committing the offense, the offender was fleeing immediately after the commission of a felony.

(5)(a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

(b) If a police officer pursues an offender who is violating division (B) of this section and division (C)(5)(a) of this section applies, the sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in sections 2929.12 and 2929.13 of the Revised Code that are required to be considered, all of the following:

(i) The duration of the pursuit;

(ii) The distance of the pursuit;

(iii) The rate of speed at which the offender operated the motor vehicle during the pursuit;

(iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit;

(v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit;

(vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required;

(vii) Whether the offender committed a moving violation during the pursuit;

(viii) The number of moving violations the offender committed during the pursuit;

(ix) Any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense.

(D) If an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.

(E) In addition to any other sanction imposed for a violation of this section, the court shall impose a class two suspension from the range specified in division (A)(2) of section 4510.02 of the Revised Code. If the offender previously has been found guilty of an offense under this section, the court shall impose a class one suspension as described in division (A)(1) of that section. The court shall not grant limited driving privileges to the offender. No judge shall suspend the first three years of suspension under a class two suspension of an offender's license, permit, or privilege required by this division on any portion of the suspension under a class one suspension of an offender's license, permit, or privilege required by this division.

(F) As used in this section:

(1) "Moving violation" has the same meaning as in section 2743.70 of the Revised Code.

(2) "Police officer" has the same meaning as in section 4511.01 of the Revised Code.

CREDIT(S)

(2002 S 123, eff. 1-1-04; 1999 H 29, eff. 10-29-99; 1989 S 49, eff. 11-3-89)

➔2953.21 Petition for postconviction relief

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to

render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner

guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the

petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by

answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case

has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I)(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this

section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

CREDIT(S)

(2006 S 262, eff. 7-11-06; 2003 S 11, eff. 10-29-03; 2001 H 94, eff. 9-5-01; 1996 S 258, eff. 10-16-96; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1994 H 571, eff. 10-6-94; 1986 H 412, eff. 3-17-87; 132 v H 742; 131 v S 383)