IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL., DANIEL P. McKINNEY,	:	
Appellant,	:	Case No. 08-1404
v.	:	On Appeal from the Defiance County Court of Appeals, Third Appellate District
DEFIANCE COUNTY COURT OF COMMON PLEAS,	:	
Appellee.	:	Court of Appeals Case No. 4-08-14

REPLY BRIEF OF APPELLANT DANIEL P. McKINNEY

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ARGUMENT IN REPLY

Appellee Defiance County Court of Common Pleas (FN1) provided service of its appellee brief as of October 10, 2008. In support of his position on those fundamental fundamental issues of law pertinent to this case, as previously raised in his brief of appellant and set forth as propositions of law thereof, the appellant presents the following argument.

Although Appellee Defiance County Court of Common Pleas (hereinafter "Appellee") concedes it has that mandatory duty to issue adequate findings of fact and conclusions of law pursuant to Ohio Revised Code Section 2953.21(G) toward Appellant McKinney's (hereinafter "McKinney") Petition to Vacate and Set Aside Judgment of Conviction and Sentence of December 17, 2004 in State v. McKinney, Case No. 03-CR-08624 (Brief of Appellant, Supp.1.), the argument of appellee fails where it now presents no adequate evidence to refute the jurisdictionally fatal trial court judgment entry of February 23, 2005 as so referenced by appellee (Brief of Appellant, Supp.24-27) (FN2) as representing adequate findings of fact and conclusions of law upon dismissal of Mckinney's post-conviction petition.

Furthermore, irrespective of the unsupported factually erroneous litany of allegations now made by appellee relevant to those unrelated issues product of previously adjudicated constitutional claims discoverable upon the face of the trial court record and thereby litigated on direct appeal, appellee instead provides no manner of coherent argument toward those substantial constitutional claims that exist, at all times material to this case, de hors the record mandating remedy of post-conviction relief under R.C. 2953.21 et seq.

FN1. The Honorable Judge Joseph N. Schmenk presided over the post-conviction proceedings at the time of the initial timely filing thereof and issuance of judgment entry of dismissal. Presently Judge Schmenk no longer sits on the bench of the Defiance County Court of Common Pleas.

FN2. For the sake of economy,appellant references that supplemental documentation provided for in his Brief of Appellant to be incorporated herein and to be read in conjunction with thereof.

Aside from failing to provide this Court that easily attainable trial court documentation by way of supplemental evidentiary support of appellee's unfounded representation that the trial court judgment entry dismissing McKinney's post-conviction petition would suffice as adequate findings of fact and conclusions of law - such as the elusive transcript of the alleged December 1, 2003 hearing on motions to compel, dismiss and suppress that the December 8, 2003 judgment entry fraudulently misrepresents (Brief of Appellant, Supp.5-6.) - appellee would instead continue on its judicially unconscionable path of smokescreen rhetoric that now undermines the integrity of Ohio judicial procedure. The clever legal drafting of appellee, as a means solely to affect obstruction of justice notwithstanding, even to date appellee would attempt to misrepresent to this Court that said December 1, 2003 motions "were denied at that hearing." (Brief of Appellee, p.7, paragraph 1.)

Again, it only stands to conventional reason that any such advanced argument would be otherwise supported by appellee supplementing this case with the December 1, 2003 hearing transcript. This especially so where the appellant has provided this Court for review of his mandamus action definitive proof by way of the trial court clerk's journal entry showing that even had said hearing actually transpired no record of the proceeding was ever transcribed (Brief of Appellant, Supp.29.) under the mandatory provisions of review pursuant to R.C. 2953.21(C). In actuality, appellee's silence and predisposition to conveniently ignore such mandatory transcript documentation to support its baseless argument may never be attributed to any foregone inadvertence, yet instead arises as that necessary component of appellee's hidden agenda to mask misrepresentations by officers of the court in an effort to evade the proper adjudication of this case by the respective jurists of this Court.

REPLY TO APPELLEE'S RESPONSE TO FIRST PROPOSITION OF LAW

FINDINGS UNDER R.C. 2953.21(G) ARE DETERMINED BY THE ULTIMATE FACTS SET FORTH IN THE LANGUAGE OF THE DOCUMENT.

Having failed to provide this Court with that determinant trial court documentation of the hearing of December 1, 2003, by way of that supplementary evidence of the hearing transcript for which the December 8, 2003 judgment entry materially misrepresents (Brief of Appellant, Supp.5-6.), nonetheless the case law appended to appellee's brief underscores the basis of law appellant's first proposition of law stands for. Most specifically, in State v. Knott, 2004 WL 231000 (Ohio App. 4 Dist.), 2004-Ohio-510, Unreported (attached Brief of Appellee), the Fourth District Court of Appeals stated:

> 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.

(Brief of Appellee, Appendix at A-16, emphasis added.)

The decision of the Fourth District Court of Appeals follows that well settled precedent of this Court holding that "the court must consider...all the files and records of the case." State v. Calhoun, 86 Ohio St.3d 279 (1999). Here where McKinney demonstrates that the trial court could have never reviewed the December 1, 2003 transcript by way of supplemental evidence that proves said misrepresented hearing was at no time transcribed for post-conviction review as R.C. 2953.21(C) mandates (Brief of Appellant, Supp.29.), appellee's argument that the court issued "a judgment entry...sufficiently detailed to permit appellate review..." (Brief of Appellee, p.10, paragraph 2.) fails as a matter of law that controls the issuance of adequate findings of fact and

conclusions of law. Consequently, appellee's attempt to rely on previous Ohio Supreme Court precedent, which holds that a sufficiently detailed judgment entry may exist as adequate findings of fact and conclusions of law, remains critically misplaced herein. State ex rel. Carrion v. Harris, 40 Ohio St.3d 19, 20 (1988); State v. Calhoun, supra, at 292.

Only where the pleadings, affidavits, files and other records show that there is no genuine issue as to any material fact, and there is no substantial constitutional issue established, may the trial court then dismiss the petition. State v. Milanovich, 42 Ohio St.2d 46 (1975). Pursuant to R.C. 2953.21(C), a trial court must consider the petition, supporting affidavits, documentary evidence, transcripts of the proceedings, and all files and records. The court may not rely upon personal memory, and must actually consider the issues raised in the petition and the context of the official records of the case. Anderson's Ohio Criminal Practice and Procedure, 9th ed. (Newark: Matthew Bender & Company, Inc., a member of the LexisNexis Group, 2003) at 492-93. As the February 23, 2005 judgment entry (Brief of Appellant, Supp.24-27.) at issue herein arose as product of material misrepresentation of appellee's personal memory, said judgment entry may not now suffice as adequate findings of fact and conclusions of law where appellee thereby abandoned its mandatory duty to actually consider the issues raised in McKinney's post-conviction petition within the context of the official records of the case.

Therefore, where there is nothing in the record to negate McKinney's constitutional claims of denial of confrontation, compulsory process, right to presence at all material stages of the trial process, and ineffective counsel, resulting in substantial prejudice, appellee thereby erred in dismissing the post-conviction petition of appellant. State v. Stewart, 122 Ohio App.3d 424, 427 (1997). Appellant's petition for post-conviction relief was accompanied

by evidence in the form of affidavits which alleged the denial of confrontation, compulsory process, and ineffective assistance of counsel and where the record contained no other evidence contradicating said affidavits, it was error to deny appellant an evidentiary on his post-conviction petition. State v. Gibson, 78 Ohio App.3d 501 (1992).

Albeit a review of the record was not necessitated by the mere filing of McKinney's post-conviction petition. Had the petition existed as baseless on its face, appellee would need not to have reviewed the record to establish whether dismissal was warranted. However, when denial of right to confrontation, compulsory process, right to presence at trial, and ineffective assistance of counsel are alleged and petition is accompanied by determinative affidavits, McKinney's post-conviction claims are not baseless on their face. Moreover, even if such claims were of a nature to not necessarily warrant a hearing on the petition but such claims do necessitate a review of the record to evaluate the merits of such claims thereof. State v. McNeill, 137 Ohio App.3d 34 (2000).

In McNeill, the Ninth District Court of Appeals held that upon evaluating post-conviction claims as to whether trial counsel erred by failing to present the witness' testimony during the mitigation phase of the trial, the court should have at least reviewed the penalty phase of the trial transcript. In adopting the rationale of the McNeill court herein, it stands as axiomatic that appellee too was required to have reviewed at least the December 1, 2003 hearing phase of the trial transcript for which the December 8, 2003 judgment entry of appellee (Brief of Appellant, Supp.5-6.) materially misrepresents. As consistent with McNeill, because appellee did not conduct such a record review, mandamus should lie to compel appellee to review said transcript and either conduct a hearing or, at least, issue adequate findings of fact and conclusions of law.

Where appellee dismissed McKinney's petition for post-conviction releif, adequate findings of fact and conclusions of law were mandatory. State v. Riggins, 88 Ohio App.3d 394 (1993). Wherefore, appellee's failure to make adequate findings of fact and conclusions of law resulted in prejudicial error to appellant. State v. Wilson, 110 Ohio App.3d 178 (1996). Given that appellee drafted the judgment entry of February 23, 2005 (Brief of Appellant, Supp.24-27), obviously absent having examined the records of the case in that the hearing for which the judgment entry of December 8, 2003 (Brief of Appellant, Supp.5-6) misrepresents was never transcribed (Brief of Appellant, Supp.29.), said judgment entry may not now be supposed as adequate findings of fact and conclusions of law. Said entry neither served to fully apprise McKinney of the reasons for the trial court's judgment, nor were made explicit enough that an appellate court could determine the basis for the judgment. State v. Clemmons, 58 Ohio App.3d 45 (1989). Consequently, mandamus would lie herein to compel appellee to issue adequate findings of fact and conclusions of law product of a review of the ultimate facts of the case that only an actual inspection of the trial court records would confer. State ex rel. Konoff v. Moon, 79 Ohio St.3d 211 (1997).

Ohio jurists remain well settled on the controlling issue of law that a mere bare recital of the evidence presented in a post-conviction case is not tantamount to findings of fact. Albright v. Hawk, 52 Ohio St. 362 (1895). Actually, a "trial court has the duty of issuing findings regarding all the ultimate facts which are determinative of the case. Feller-Olmsted Co. v. J. Ritchie & Sons, Inc. (19630, 119 Ohio App. 148, 150, 191 N.E.2d 117 (26 O.O.2d 339)." Freeman v. Westland Builders, Inc., 2 Ohio App.3d 212, 214 (1981). Given review of post-conviction proceedings, an appellate court's review of a trial court's findings of fact and conclusions of law in determining whether

the lower court properly applied the law to the facts remain conditioned upon whether the trial court determined the ultimate facts consistent with the actual evidence of the case. Id.

Moreover, findings of fact and conclusions of law "should be clear, specific and complete." Clemmons, supra, 58 Ohio App.3d at 46. The test of the adequacy of findings of fact and conclusions of law is conditioned upon "whether they are sufficiently comprehensive and pertinent to the issues to form a basis for the decision and whether they are supported by the evidence." Id. In its reliance on the aforesaid holding in Clemmons, the Second District Court of Appeals ruled that a trial court's failure to address the post-conviction claim of the petitioner that another individual was the perpetrator of the felonious assault was prejudicial error. Wilson, supra, 110 Ohio App.3d at 178.

Aside from the failure of appellee to have actually inspected the trial court record relevant to Mckinney's substantial Sixth Amendment claim to be present at all material stages of the trial process, this case too involved a critical issue of the failure of the prosecutor to timely file its response to McKinney's post-conviction petition for which the February 23, 2005 judgment entry (Brief of Appellant, Supp.24-27.) appellee argues as adequate findings of fact and conclusions of law completely fails to even remotely address. In that the State failed to timely respond to the petition, appellant thereby sought the appropriate remedy of summary judgment pursuant to R.C. 2953.21(D). (Brief of Appellant, Supp.16.) State v. Skelnar, 71 Ohio App.3d 444 (1991). Appellant was thereby entitled to summary judgment where the right thereto appeared on the face of the record. State v. Roberts, 66 Ohio App.3d 654 (1991). Therefore, where the State failed in its mandatory duty to timely respond, the entry of February 23, 2005 is not only fatal as adequate findings of fact and conclusions of law under R.C. 2953.21(G), said document of appellee fails

even as a sufficient judgment entry by merely stating that appellant's claims were barred by res judicata yet in failing to address the related motion for summary judgment. State v. Wiles, 126 Ohio App.3d 71 (1998).

Wherefore, the substantial question of law appellant's first proposition presents for determination by this Court is whether a piecemeal judgment entry, fatally absent appellee's review of the ultimate facts and records of the case, and upon having only addressed certain portions of the post-conviction petition, would thereby suffice as adequate findings of fact and conclusions of law under R.C. 2953.21(G).

REPLY TO APPELLEE'S RESPONSE TO SECOND PROPOSITION OF LAW

A MOVING PARTY IS ENTITLED TO RELIEF UNDER RULE 60(B)(3),(5) OF THE OHIO RULES OF CIVIL PROCEDURE WHERE MISREPRESENTATION BY AN OFFICER OF THE COURT RESULTS IN THE UNJUST OPERATION OF A JUDGMENT.

As discussed more fully on argument in support of second proposition of law set forth in the brief of appellant (Brief of Appellant, p.10-13.), appellant had not become aware of the February 23, 2005 judgment entry (Brief of Appellant, Supp.24-27.) dismissing his post-conviction petition until appellee submitted said entry in support of appellee's response to McKinney's petition for writ of mandamus before the appellate court below. Given that service of the judgment entry was improperly made to the Corrections Center of Northwest Ohio (Brief of Appellant, Supp.19.), where the trial court was aware that the last known address of McKinney was with the Ohio Department of Rehabilitation and Corrections as the transport order of January 31, 2005 demonstrates (Brief of Appellant, Supp.18.) shows, as well as the caption set forth in the trial court's docket sheet attached herein (Reply Brief of Appellant, Supp.30.), this violation of Rules 5(B) and 58 of the Ohio Rules of Civil Procedure resulted in the failure of appellant being made aware of the judgment entry.

On January 31, 2005, the trial court granted the motion of continuance

of the post-conviction hearing made on behalf of appellant's court-appointed counsel. (Brief of Appellant, Supp.18.) Consequently, upon the trial court's order appellant was of the belief that he would be returned to the custody of the Ohio Department of Rehabilitation and Corrections during the period of continuance of his post-conviction hearing until then being transported back to the trial court at the time of the scheduled post-conviction hearing.

As a result of appellee having submitted the February 23, 2005 judgment entry in support of its response to appellant's petition for writ of mandamus that appellant had never been previously made aware of due to improper service, on May 16, 2008 the appellate court filed its journal entry dismissing the mandamus action of appellant (Brief of Appellant, App.6-7.) a mere six (6) days after appellant's receipt of service of appellee's February 23, 2005 judgment entry. Therefore, in that the six day period prior to the May 16, 2008 ruling of the court of appeals proved insufficient time for appellant to respond to the fatal nature of said judgment entry as findings of fact and conclusions of law, appellant thereby sought relief from the appellate court decision under Civ.R. 60(B)(3)and(5).

The February 23, 2005 judgment entry materially misrepresented the nature of the proceedings amounting to fraud upon the court by officers of the court. Also, said judgment entry comprised matters not previously before the court of apppeals. Consequently, the 60(B) application of appellant demonstrated matters not previously considered by the appellate court and it was error for the court of appeals to rule "that the motion, in effect, (sought) reconsideration of the judgment." (Brief of Appellant, App.4.)

Appellant was entitled to prevail under Civ.R. 60(B)(3)and(5) where he showed that he had a meritorious claim and that circumstances arose under 60(B). GTE Automatic Elec., Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146 (1976).

Appellant pointed out to the appellate court that he was never made aware

of the February 23, 2005 judgment entry until submitted by appellee in response to appellant's mandamus action, and that he was thereby unable to fully set forth the issues relevant to the misrepresentations demonstrating said entry as insufficient under R.C. 2953.21(G) prior to the decision of the court of appeals dismissing the mandamus petition. Wherefore, appellant did not merely reiterate arguments concerning the merits of the case and which could have been otherwise raised on appeal. Doe v. Trumbull County Children Services Board, 28 Ohio St.3d 128 (1986); National Amusements, Inc. v. Springdale, 53 Ohio St.3d 60 (1990). Having showed those operative facts of fraud upon the court he was previously unable to litigate prior to decision dismissing his mandamus action, appellant was entitled to relief pursuant to Civ.R. 60(B)(3) and (5). Caruso-Ciresi, Inc. v. Lohman, 5 Ohio St.3d 64 (1983).

It is therefore untenable that having been apprised of the gravity of the misrepresentation by appellee amounting to fraud upon the court would result in a decision overruling appellant's motion for relief under 60(B). A review of said appellate court order would thereby hold for an abuse of discretion. Strack v. Pelton, 70 Ohio St.3d 172, 174 (1994). Ulterior motive, arbitrary conduct or willful disregard of appellant's rights do not alone connote abuse of discretion, yet may include failure to apply principle of law applicable to the this case where prejudice thereby results to appellant. State v. Virgi, 84 Ohio App. 15 (1948).

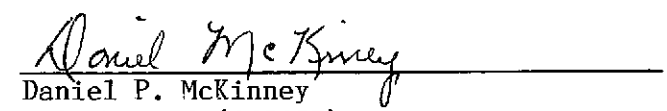
Moreover, given that the Civ.R. 60(B) motion contained allegations of operative facts warranting relief from judgment, it was an abuse of discretion where the appellate court failed to remand to take evidence to verify those facts before it ruled on appellant's motion. Kay v. Marc Glassman, Inc., 76 Ohio St.3d 18 (1996). Such action "is in accord with the underlying policies governing Civ. R. 60(B) and, in particular, the fact that Civ.R. 60(B) is a remedial

rule to be liberally construed so that the ends of justice may be served." Id., at 20.

CONCLUSION

Here, the facts alleged by McKinney's motion for relief from judgment, namely, that he received a copy of the February 23, 2005 misrepresented judgment entry only upon appellee's response to petition for writ of mandamus, and that he was thereby provided insufficient time prior to the May 16, 2008 decision of the court of appeals to thereby show the court that said entry was fatally insufficient to amount to adequate findings of fact and conclusions of law under R.C. 2953.21(G), gave rise to a meritorious claim. Consequently, in that the Febraury 23, 2005 judgment entry embraced that species of fraud which defiles the court itself, as that "fraud perpetrated by the officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication" requires, an independent review of the evidence of the record as that attached material in support of this case demonstrates represents an appropriate circumstance for vacation of the judgment vitiated by a fraud upon the court. Coulson v. Coulson, 5 Ohio St.3d 12 (1983). Therefore, it was the judicial province of the appellate court below to grant appellant's Civ.R. 60(B)(5) motion for relief from judgment where officers of the court actively participated in defrauding the court. Id. at 15.

The decision below must be reversed. A reversal will promote legislative purposes pursuant to the statutory provisions of R.C. 2953.21 and Civ.R. 60(B) and preserve the unmistakable legislative intent, which this court has uniformly supported.



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Certificate Of Service

I certify that a copy of this Reply Brief of Appellant was sent by ordinary U.S. Mail, first class postage prepaid, to counsel of record for appellee, Russell R. Herman, Assistant Pros. Atty., 607 West Third Street, Defiance, Ohio 43512 on this 17th day of October, 2008.

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CTION: CRIMINAL CASE FILED: 6/23/0:
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DATE	TYPE	DESCRIPTION 03-CR-08624 STATE V DANIEL MCKINNEY
6/23/03		TRANSCRIPT FROM MUNICIPAL COURT (CR03-653) ROBBERY (F-2), 2911.02(A)(2) COMPLAINT OF DEFIANCE CITY POLICE DEPARTMENT AFFIDAVIT FOR ARREST WARRANT, WARRANT FOR ARREST AND RETURN ID INFORMATION, WAIVER OF PRELIMINARY HEARING, JOURNAL ENTRIES, WAIVER OF EXTRADITION, NOTICES
7/07/03		FIVE COUNT INDICTMENT: CT I: ROBBERY (F-2), 2911.02(A)(2) CT II: AGGRAVATED THEFT (F-3), 2913.02(A)(1)&(4) CT III: RECEIVING STOLEN PROPERTY (F-4), 2913.51(A) CT IV: FILURE TO COMPLY WITH ORDER OR SIGNAL OF POLICE OFFICER (F-3), 2921.331(B) CT V: FAILURE TO COMPLY WITH ORDER OR SIGNAL OF POLICE OFFICER (F-4), 2921.331(B)
7/07/03		PROS ATTY'S REQUEST FOR ISSUANCE OF WARRANT. ISSUED WARRANT, W/COPY OF WARRANT AND CERT COPY OF

SUPPLEMENT
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