

IN THE OHIO SUPREME COURT

STATE OF OHIO,  
*Appellee*

CASE NO. 08-1849-2398

vs.

TERRANCE C. HENDERSON  
*Appellant*

On Appeal from Ashland County Court  
of Appeals, Fifth Appellate District  
Case No. 07-COA-031

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MEMORANDUM IN SUPPORT OF JURISDICTION  
BY  
TERRANCE C. HENDERSON

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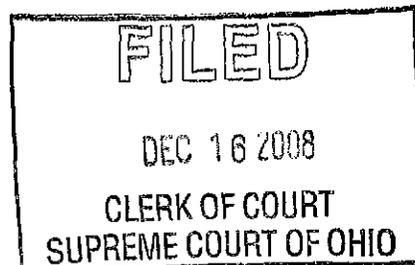
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STATEMENT OF GREAT PUBLIC INTEREST AND  
SERIOUS CONSTITUTIONAL QUESTION

The great public interest and serious constitutional question in this case arises from the continuing practice of law enforcement officers of searching a vehicle without sufficient probable cause and the continued encroachment on Fourth Amendment protections. In this case there was no justifiable reason to conduct a search of the vehicle in question. Until the arresting officer determined the the vehicle had to be towed, there simply was no way of justifying a search of the vehicle. Importantly, in this case, there was no justification for having the vehicle towed. The vehicle in question was rented. Although neither Appellant nor the passenger rented the vehicle, the officer was informed that the person whose name was on the rental agreement was a short distance away and was available to recover the vehicle.

The facts of this case establish that the search of the vehicle was nothing more than the officer acting on a hunch and that the officer abused his authority by have the vehicle towed for the sole purpose of conducting the inventory search. Such abuse of authority strikes at the very heart of the Fourth Amendment protections and requires admonishment from this Court.

Statement of Case and Facts:

In this case, Terrance Henderson, Appellant herein, was driving a vehicle which was stopped for excessive speed. Ashland County Sheriff's Deputy John Hale testified he stopped Appellant's vehicle for speeding, 68 m.p.h. in a 55 m.p.h. zone.

Once stopped, it was discovered Appellant was driving on a valid temporary permit without a licensed driver accompanying him as required. *State v. Henderson*, 2008 WL 4408594, at P. 3. While Appellant did have one passenger with him, the passenger's license had been suspended. Once Deputy Hale discovered that the passenger's license was suspended, he decided to have the vehicle towed and conducted an inventory search in which a large duffel bag

containing marijuana was discovered in the trunk of the vehicle.

On direct appeal Appellant challenged, among other things, the search of the vehicle. The Fifth Appellate District Court reasoned, however, that “[B]ecause there was not a licensed driver at the stop, it was unquestioned that Deputy Hale had to secure and/or impound the vehicle.” March 9, 2007 Tr. at 16. Deputy Hale further decided removal of vehicle was proper because of the high traffic volume on the highway. *Id.* at 17.

Following the Fifth Appellate District Court’s decision in *State v. Henderson*, 2008 WL 4408594, Appellant filed for reconsideration with respect to the search of the vehicle in light of Ohio Revised Code, section 4511.68. Appellant further requested reconsideration with respect to the Appellate Court’s assessment of the manifest weight of evidence issue raised on direct appeal.

On November 25, 2008, the Fifth Appellate District Court denied reconsideration of both issues. This Claimed Appeal of Right now follows.

#### PROPOSITION OF LAW No. I

WHEN A TRIAL COURT FAILED TO SUPPRESS EVIDENCE  
OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT  
ON THE BASIS OF A FAULTY DETERMINATION OF THE  
FACTS, APPELLANT WAS DENIED DUE PROCESS  
PROTECTIONS OF THE FOURTEENTH AMENDMENT OF  
THE UNITED STATES CONSTITUTION

#### SUPPORTING ARGUMENT:

Appellant challenged the illegal search of the vehicle he was driving at the trial court and on direct appeal. The trial court determined Appellant lacked standing to challenge the search, however, when addressing this issue on direct appeal the Fifth Appellate District Court concluded otherwise stating:

Under the very strict interpretation of the facts sub judice, we find appellant had standing to challenge the search. Appellant's possession may have been contractually unauthorized, but *this was a civil wrong, not a criminal wrong.* *Id.* at {¶ 30}

(emphasis added)

Accordingly, the only question related to the illegal search turns on whether the officer conducting the search of the vehicle was authorized to do so under the totality of the circumstances in this case. The Appellate Court addressed this issue and concluded that; “[B]ecause there was not a licensed driver at the stop, it was unquestioned that Deputy Hale had to secure and/or impound the vehicle.” *Id.* at {¶ 32}. Appellant’s motion for reconsideration addressed whether it was in fact, “unquestionable” that Deputy Hale had to secure and/or impound the vehicle in light of Ohio Revised Code, section 4511.68. Appellant asserts it was not.

Ohio Revised Code, section 4511.68 states:

- (A) No person shall stand or park a trackless trolley or vehicle, except when necessary to avoid conflict with other traffic or to comply with sections 4511.01 to 4511.78, 4511.99, and 4513.01 to 4513.37 of the Revised Code, or while obeying the directions of a police officer or a traffic control device, in any of the following places:

The statute lists sixteen violation, only one of which is applicable to the facts of the instant case. Sub-section (16) makes it a minor misdemeanor for parking “*on the roadway portion of a freeway, expressway, or thruway.*” (emphasis added). Notwithstanding Appellant’s assertions in his motion for reconsideration, and the fact that this issues was not considered by the reviewing court on direct appeal, the Appellate Court denied reconsideration.

Not only is the decision of the Fifth Appellate District Court in direct conflict with Ohio Revised Code, section 4511.68, it is also in direct conflict with *State v. Ramos*, 155 Ohio App.3d 396, 801 N.E.2d 523, Ohio App. 2 Dist., (2003). In *Ramos*, the Second Appellate District Court addressed an identical situation with respect to the stopping of a vehicle with no licensed driver.

In *Ramos*, the state emphasized that after the citation was issued, Ramos would not have been free to go, because her driver's license had expired. Significantly, Sgt. Luebers, (the officer that initiated the stop), testified that “*the vehicle could be left on the berm for up to 48 hours and Ramos could have asked a licensed driver pick it up*, or, alternatively, Ramos could have had her vehicle towed.” *Ramos* at 402. Regardless of which option was chosen, Sgt. Luebers typically would have taken the driver and passengers to a safe location to make the necessary telephone calls. He indicated that he would have taken these steps after the traffic citations were written. *Id.* at 403.

What is clear from the decision in *Ramos* is that, contrary to the decision of the Fifth Appellate Court in this case, the lack of a licensed driver did not automatically require Deputy Hale to secure and/or impound the vehicle. It thus follows that an inventory search was neither appropriate nor required. Deputy Hale himself testified that there was nothing unusual or suspicious about the stop. Accordingly, the Fifth Appellate District’s reasoning is not supported by the record and conflicts with the decisions of at least one other District Court.

This Court has held that the Fourth Amendment of the United States Constitution requires that an inventory search of a vehicle “must be conducted in good faith and in accordance with reasonable standardized procedure(s) or established routine.” *State v. Hathman* (1992), 65 Ohio St.3d 403, paragraph one of the syllabus, following *Florida v. Wells* (1990), 495 U.S. 1, 109 L.Ed.2d 1. Conversely, a search conducted with investigatory intent, such as in this case, and which is not conducted in the manner of an inventory search, does not constitute an “inventory search” and may not be used as a pretext to conduct a warrantless evidentiary search. *State v. Caponi* (1984), 12 Ohio St.3d 302, syllabus, certiorari denied (1985), 469 U.S. 1209, 84 L.Ed.2d 324.

The Fifth Appellate District Courts decision is in conflict with this Court, the Second Appellate District and the statutory provisions cited in Appellant's reconsideration motion. This Court is urged to accept jurisdiction of this case to resolve the issue and establish a clear directive under the specific circumstances addressed herein.

PROPOSITION OF LAW No. II

WHEN A STATE CONVICTION IS AGAINST THE MANIFEST  
WEIGHT OF EVIDENCE AND THE REVIEWING COURT  
RELIES ON ERRONEOUS FACTS TO AFFIRMS THE  
CONVICTION, APPELLANT IS DENIED DUE PROCESS OF  
LAW AS GUARANTEED BY THE FOURTEENTH  
AMENDMENT TO THE UNITED STATES CONSTITUTION

SUPPORTING FACTS:

When a defendant challenges the sufficiency of evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis sic.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573. A verdict can be against the manifest weight of the evidence even though legally sufficient evidence supports it. *State v. Robinson* (1955), 162 Ohio St. 486, 55 O.O. 388, 124 N.E.2d 148."

"Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546, whereas the '[w]eight of the evidence concerns the "inclination of the *greater amount of credible evidence, offered in a trial*, to support one side of the issue rather than the other.'" (Emphasis sic.) *Id.* at 387, 678 N.E.2d at 546." *Smith*, 80 Ohio St.3d at 113, 684 N.E.2d at 691.

As set forth in Appellant's motion for reconsideration, the Appellate Court cited three alleged facts which constituted sufficient evidence to support the elements of the charged offense. Specifically, that (1) Appellant had a large sum of cash on his person; (2) that Appellant's finger print was found on one of the plastic bags containing marijuana; and (3) that Appellate admitted his knowledge of the marijuana in a taped telephone conversation from the county jail.

Consideration of the above factors by the Appellate Court was flawed for two reasons. First, the evidence was either inadmissible as a matter of law or violated the Fourteenth Amendment's Due Process Clause, and second, the factual basis of the three consideration relied upon was not supported by the trial court record.

A. A Large Sum of Cash:

With respect to the "large sum of cash" Appellant had on his person, there was no evidence introduced at trial concerning the cash or indication that this cash was in any way connected to the drugs found in the vehicle Appellate was driving. Conversely, trial counsel successfully argued the admissibility of the money in question. The trial court issues a ruling excluding the money in Appellant's possession finding the the money had nothing to do with the charged offense. The reviewing court's reliance on the money in question, as a determining factor to deny a manifest weight of evidence argument, is an abuse of the reviewing court's discretion.

The term abuse of discretion connotes more than an error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Smith*, Franklin App. No. 03AP-1157, 2004-Ohio-4786, at ¶ 10, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. An abuse of discretion involves far more than a difference in opinion. The term discretion itself involves the idea of

choice, of an exercise of the will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. See, *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, certiorari denied (1985), 472 U.S. 1032, 105 S.Ct. 3514, rehearing denied (1985), 473 U.S. 927, 106 S.Ct. 19.

The reviewing court’s use of evidence specifically excluded by the trial court in this case meets the definition of ‘abuse’ as outlined above. Additionally, use of that evidence as proof of Appellant’s involvement is unjust and constitutes a denial of due process. Because this evidence was ruled inadmissible by the trial court, there was clearly an abuse of discretion in using such unadmitted evidence in reviewing any issue raised on direct appeal.

**B. Fingerprint:**

With respect to the fingerprint, it must first be noted that the fingerprint found was not a complete fingerprint. The print was only a partial fingerprint. Significantly, there is conflicting testimony which rendered this fingerprints evidentiary value of no significance. Specifically, Andrew McClelland, Forensic Scientist, testified for the State with respect to the fingerprint. On cross examination, Andrew McClelland was asked whether he could state positively that the partial fingerprint found belonged to Appellant. Mr. McClelland stated he could not. (Tr. Cross Examination of Andrew McClelland).<sup>1</sup>

The standard for admission of expert testimony is well established by the Rules of Evidence and the seminal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,

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<sup>1</sup> Although requested on lone from this Court and on numerous occasions from counsel, Appellant was never provided a copy of the trial transcript on lone from either this Court or counsel, and therefore cannot cite the specific page of the transcripts.

113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Daubert* makes clear that a trial court may admit expert testimony only after the trial judge ensures that the expert's testimony "both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597.

In this case, the State's own expert testified that he could not conclusively state that the partial fingerprint belonged to Appellant. Accordingly, this evidence lacks the necessary foundation to establish guilt. The reviewing Court's statement that "Appellant's finger print was found on one of the plastic bags containing marijuana," is not supported by the record and cannot form a basis for denial of a manifest weight of evidence challenge.

C. Appellate Admitted His Knowledge of the Marijuana:

With respect to the allegation that Appellate admitted his knowledge of the marijuana in a taped telephone conversation, this assertion is simply not true. While this Court recitation of the actually words spoken are very much correct, *i.e.*, "how bad is it" and "not bad at all, just five," those words without evidence of their proper context have literally no meaning at all.

For this Court to draw such an inference from those words without any foundation of the circumstances surrounding the conversation constitutes an abuse of discretion because it "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Smith*, Franklin App. No. 03AP-1157, 2004-Ohio-4786, at ¶ 10, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

This is a text book example of thwarting the adversarial process and allowing a finding of guilt on the basis of facts that are simply not in evidence. This Court should accept jurisdiction of this case and address the issues raised herein. Such review is necessary to avoid a manifest injustice, and to protect the due process requirement of both the Ohio and the United States.

### PROPOSITION OF LAW No. III

APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTIONAL WHEN HE WAS DENIED A COPY OF THE TRIAL COURT TRANSCRIPTS TO PREPARE HIS PRO SE CHALLENGES TO HIS CRIMINAL CONVICTION

#### SUPPORTING ARGUMENT:

The case that generally governs the provision of free transcripts to indigent petitioners in collateral proceedings is *Lane v. Brown*, 372 U.S. 477 (1963). In *Lane*, the Court instructed as follows:

In *Griffin v. Illinois*, 351 U.S. 12, the Court held that a State with an appellate system which made available trial transcripts to those who could afford them was constitutionally required to provide “means of affording adequate and effective appellate review to indigent defendants.” *Id.*, at 20. “Destitute defendants,” the Court held, “must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.” *Id.*, at 19. In *Burns v. Ohio*, 360 U.S. 252, involving a \$20 fee for filing a motion for leave to appeal a felony conviction to the Supreme Court of Ohio, this Court reaffirmed the *Griffin* doctrine, saying that “once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. \* \* \* This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.” *Id.*, at 257. In *Smith v. Bennett*, 365 U.S. 708, the Court made clear that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings. “Respecting the State’s grant of a right to test their detention,” the Court said, “the Fourteenth Amendment weighs the interests

of rich and poor criminals in equal scale, and its hand extends as far to each.” *Id.*, at 714. In *Eskridge v. Washington Prison Board*, 357 U.S. 214, the Court held invalid a provision of Washington's criminal appellate system which conferred upon the trial judge the power to withhold a trial transcript from an indigent upon the finding that “justice would not be promoted \* \* \* in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein.” *Id.*, at 215. There it was said that “(t)he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript.” *Id.*, at 216.

In this case, Appellant sought a copy of his trial court transcripts **on lone** to file an Application to Reopen Direct Appeal pursuant to Ohio Rules of Appellate Procedure 26(B). By Rule, an applicant seeking to file such application is required to provide the reviewing Court with all pertinent portions of the record available to him.

In *State v. McNeill*, 83 Ohio St.3d 457, 700 N.E.2d 613, this Court was asked to determine whether his failure to attach portions of the record to his application for reopening direct appeal foreclosed review of the issues presented. McNeill argued that the record was unavailable to him. His sole excuse was that, when he filed the application, the record was in the custody of the Ohio Supreme Court. However, the question is not who had custody of the record, but whether it was “available to the applicant.” *Id.* The Ohio Supreme Court ultimately denied relief stating:

App.R. 26(B)(2)(e) places the responsibility squarely upon the applicant to provide the court of appeals with such portions of the record as are available to him. McNeill has not shown that the record was unavailable to him; hence, he was required to attach a copy to his application. As he failed to do so, his application was properly denied. *Id.* at 614.

In this case, Appellant sought a copy of the transcripts while they were still in the possession of the reviewing Court from direct appeal. Appellant specifically requested that he be provided a copy **on lone** to prepare a *pro se* 26(B) application. The Appellate Court denied this request stating “[A] review of this court’s docket reveals a transcript was already prepared at the county’s expense.” (Judgment Entry P. 2).

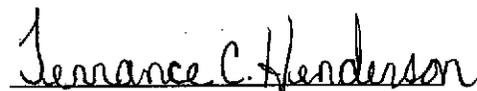
The decision from the reviewing Court is absurd. It was well understood that the transcripts had already been prepared once at the county’s expense. Appellant specifically informed the Appellate Court that they were currently in possession of the transcripts in question.

Appellant has sought the transcripts through counsel, through the reviewing court and even through this Court’s disciplinary counsel, all unsuccessfully. Accordingly, his Fourteenth Amendment rights have been violated, and relief is appropriate.

#### CONCLUSION

For all of the above reasons Appellant requests that this Court accept jurisdiction of this case and resolve the issues presented herein.

Respectfully submitted,



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Appellant pro se

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing *Memorandum in Support of Jurisdiction* was sent, via Regular U.S. Mail, to counsel for Appellee, Ramona Rogers, Ashland County Prosecutor, at Orange Tree Square, Suite 307, Ashland, Ohio 44805, on this 9<sup>th</sup> day of December, 2008.

By: Terrance C. Henderson

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Defendant-Appellant pro se

FILED APPEALS COURT  
IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

2008 NOV 25 AM 11:08

ANNETTE SHAW  
CLERK OF COURTS  
ASHLAND, OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

TERRANCE C. HENDERSON

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 07-COA-031

This matter is before this court upon several motions filed by appellant.

First, appellant requests leave to file a motion for reconsideration instanter. Upon review, we find said motion to be well taken and hereby grant same.

Appellant's motion for reconsideration challenges this court's decision entered September 26, 2008. Appellant requests this court reconsider its decision on Assignments of Error II and III. Assignment of Error II dealt with the trial court's denial of his motion to suppress and Assignment of Error III dealt with manifest weight of the evidence on his conviction for marijuana possession. Appellee joins in the motion for reconsideration as to Assignment of Error II, challenging this court's decision on the issue of appellant's "standing" to challenge the inventory search of the vehicle.

The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *Matthews v. Matthews* (1981), 5 Ohio App.3d 140.

JM # CA-1

Upon review, we do not find an obvious error or an issue that was not considered or was not fully considered.

The motion for reconsideration is denied.

Appellant has also filed a motion to obtain a copy of his transcripts for his App.R. 26(B) motion to reopen direct appeal. A review of this court's docket reveals a transcript was already prepared at the county's expense. Upon review, we find said motion not to be well taken and hereby deny same.

Lastly, appellant has filed a motion for extension of time to file an application to reopen his direct appeal pursuant to App.R. 26(B). Upon review, we find said motion to be well taken and hereby grant same. Appellant has sixty days from the date of this entry to file his App.R. 26(B) application to reopen his direct appeal.

SO ORDERED.

Kulaf Farman  
William B. Holman  
W. Sean G.

JUDGES

JM # CA-2