

IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,

Case No. 08-1012

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

DAVID B. CLINKSCALE,

Court of Appeals
Case No. 06AP-1109

Defendant-Appellant

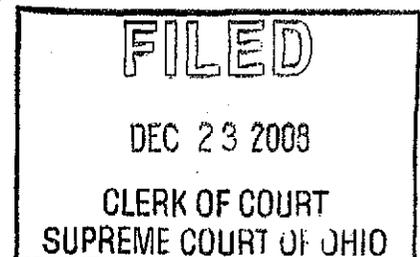
**MOTION OF PLAINTIFF-APPELLEE TO STRIKE PART OF REPLY BRIEF AND
ATTACHED AFFIDAVIT**

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**MOTION OF PLAINTIFF-APPELLEE TO STRIKE PART OF REPLY BRIEF
AND ATTACHED AFFIDAVIT**

For the reasons stated in the attached memorandum in support, plaintiff-appellee State of Ohio respectfully requests that this Court strike portions of the defense reply brief filed on December 19, 2008. The following parts should be stricken: (1) the affidavit of Gerald Simmons, attached at pages A-1, A-2, and A-3 of the appendix to the reply brief; (2) the last full paragraph of page two of the reply brief, beginning "Furthermore, it would have been * * *"; and (3) footnote one in its entirety on page two of the reply brief.

Respectfully submitted,

RON O'BRIEN
Franklin County Prosecuting Attorney



STEVEN L. TAYLOR 0043876

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MEMORANDUM IN SUPPORT

This appeal involves issues related to the trial court's excusal of a deliberating juror and the replacement of that juror with an alternate juror.

In his propositions of law here, defendant contends that the excused juror was the "sole dissenter." The State has responded by pointing out that there is zero support in the appellate record for that assertion.

In response, defendant has attached to his reply brief an affidavit of one of defendant's trial counsel, Gerald Simmons. The affidavit had been filed with

defendant's post-conviction petition in the common pleas court on June 8, 2007.

Defendant contends that the affidavit supports his claim that the excused juror was the "sole dissenter." See Defendant's Reply Brief, at 2 & n. 1. The last paragraph on page 2 of the reply brief and its accompanying footnote one are based on the Simmons affidavit.

The problem is that the Simmons affidavit was never made a part of the appellate record that was reviewed by the Tenth District and that is now before this Court. The affidavit was filed on June 8, 2007, which was well after the appellate record was transmitted to the Court of Appeals. And defendant never attempted to supplement the appellate record with the affidavit. Of course, there was no basis to transmit the affidavit to the Court of Appeals, since the Court of Appeals was addressing defendant's direct appeal, not addressing the post-conviction petition to which the affidavit was attached.

An appeal is a legal proceeding governed by a burden of proof and by strict rules governing what information can be brought before the appellate court. The defense acted improperly by attaching the Simmons affidavit to the reply brief, when that affidavit was never included in the appellate record in the Court of Appeals and when that affidavit is not a part of the appellate record here.

"A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus.

This principle applies when this Court is reviewing cases appealed from the Court of

Appeal as well. *State ex rel. Office of Montgomery County Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 20; *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, ¶ 50.

Attaching new materials to an appellate brief in this Court is improper because such materials are “outside the record, and we cannot consider them.” *State v. Campbell* (2000), 90 Ohio St.3d 320, 336-37. It is well settled that “appellate counsel cannot properly refer to facts outside the record.” *State v. Hill* (2001), 90 Ohio St.3d 571, 573.

If the appellate record had supported defendant’s “sole dissenter” contention, defendant would have cited to that part of the appellate record, rather than attaching an affidavit that was never a part of the appellate record.

Other problems attend the Simmons affidavit. Defendant does not mention that the State “dispute[d] many of the assertions in attorney Simmons’ affidavit, * * *.” State’s Motion to Dismiss Petition, filed July 16, 2007, in the trial court. A unilateral defense affidavit, proffered in adversarial post-conviction proceedings, cannot be taken as an accurate and full rendition of the record.

In addition, the portion of the affidavit relied on by defendant is inadmissible. Under Evid.R. 606(B), a juror cannot testify or provide an affidavit regarding “any matter or statement occurring during the course of the jury’s deliberations * * *.” The juror similarly cannot testify or provide an affidavit regarding “the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection

therewith.” These exclusions are categorical, and they apply regardless of whether any evidence exists aliunde. In addition, these exclusions cannot be avoided through the expedient of having another person recount hearsay statements made by the juror. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 75-76; Evid.R. 606(B) (excluding “evidence of any statement” by the juror if the juror would be precluded from testifying about such matters directly).

Simmons’ affidavit is inadmissible to the extent that it contends that the jury foreman informed him that “Juror Number Three was the dissenting juror that Question Number Three referenced.” Simmons’ affidavit is hearsay on that point and therefore inadmissible, and it violates Evid.R. 606(B) because it is hearsay from a juror that describes “any matter or statement occurring during the course of the jury’s deliberations * * *.”

Given the impropriety of attaching the Simmons affidavit to the reply brief, the State requests that such affidavit be stricken. The State also requests that the parts of the defense brief discussing the affidavit also be stricken, i.e., the last full paragraph on page two of the reply brief, and the accompanying footnote one to that paragraph.

Respectfully submitted,

RON O’BRIEN
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 23rd day of Dec., 2008, to William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215, counsel for defendant.



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