

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

vs.

JOHN ROHRBAUGH,

Defendant-Appellee.

Case Nos. 2008-2249 and
2008-2127

On Appeal and Certified Conflict
from the Logan County Court of
Appeals, Third Appellate District,
Case No. 8-07-28

**The Ohio Public Defender's Motion to Strike
Notice of Appeal and Notice of Certified Conflict
and to Dismiss Both Cases**

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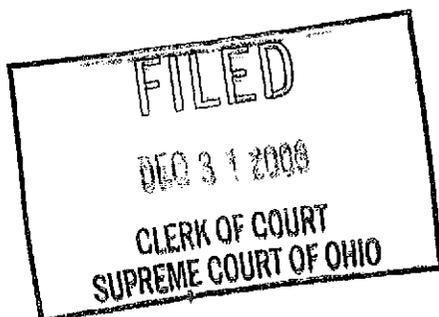
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MOTION OF THE OHIO PUBLIC DEFENDER TO STRIKE NOTICE OF APPEAL AND DISMISS CASE

I. Introduction

The Ohio Public Defender respectfully moves this Court to dismiss the State's appeal and certified conflict for its failure to serve the notice of appeal and notice of certified conflict on the Ohio Public Defender. S.Ct.Prac.R. XIV(2)(A)(3).¹ That rule requires the State to serve the Ohio Public Defender with any notice of certified conflict or notice of appeal to this Court. That rule further demands that the State record its service of the notice of appeal and/or the notice of certified conflict upon the Ohio Public Defender in an attached certificate of service. As the State's certificates of service demonstrate, the State failed to serve the Ohio Public Defender with a copies of the notices of appeal and certified conflict. See attached Exhibits 1 and 2.

As demonstrated below, the State's lack of compliance with S.Ct.Prac.R. XIV(2)(D)(1) is a recurring problem, and extension to file a response is not an adequate remedy. Because the Ohio Public Defender has an interest in this Court's adjudication of the merits of these cases, and because the Ohio Public Defender was not provided with the required service, this Court should strike the State's notice of appeal and notice of certified conflict and dismiss both cases. S.Ct.Prac.R. XIV(2)(D)(1).

II. Procedural History

A Logan County Grand Jury indicted Defendant-Appellee John Rohrbaugh on two counts of breaking and entering, two felony counts of theft, three misdemeanor counts of theft, and on one count of possession of cocaine. The subject of the present appeal, Count I

¹ "In a case involving a felony, when a county prosecutor files a notice of appeal under S.Ct.Prac.R. II or an order certifying a conflict under S.Ct.Prac.R. IV, the county prosecutor shall also serve a copy of the notice or order on the Ohio Public Defender."

(breaking and entering), was eventually amended to a charge of receiving stolen property, a violation of R.C. § 2913.51. On July 3, 2007, John Rohrbaugh pleaded guilty to receiving stolen property under Count I and to possession of cocaine under Count VIII. The trial court sentenced Rohrbaugh to 11 months in prison on each count and ordered the sentences to run concurrently. The trial court further ordered Rohrbaugh to pay restitution in the amount of \$ 4,145.81 to the victim relative to Count I, First Check Cash Advance. On direct appeal, the Third District Court of Appeals failed to rule on Rohrbaugh's asserted assignment of error, and instead applied a plain error analysis to determine that the trial court had no authority to amend Count I, to which Rohrbaugh pleaded guilty. Thus, the court of appeals remanded Rohrbaugh's case back to the trial court with instructions to vacate Rohrbaugh's guilty plea. *State v. Rohrbaugh*, Logan App. No. 8-07-28, 2008-Ohio-4781, at ¶ 25.

The State filed a discretionary appeal to this Court, and a motion to certify a conflict with the court of appeals. The court of appeals certified the conflict, and the State filed a notice of certified conflict with this Court on November 19, 2008. The State failed to serve either notice on the Ohio Public Defender as required by S. Ct. Prac. R. XIV(2)(A)(3).

The deadline by which the Ohio Public Defender could have filed a memorandum in opposition to the State's memorandum in support of jurisdiction had long since passed before the Ohio Public Defender became aware of this case. Indeed, the Ohio Public Defender only recently discovered this case.

III. Argument

1. Lack of compliance with Rule XIV(2)(A)(3) is a recurring problem.

Dismissal is the appropriate remedy in this case because the State's failure to effect service of its notices of appeal and certified conflict on the Ohio Public Defender as required is a significant and recurring problem. For instance, as far back as 2002, the Ohio Public Defender sought to enforce this rule through dismissal, after discovering that this Court had accepted jurisdiction over a case in which the defendant-appellee had never been made aware. That case was briefed and argued, despite the defendant-appellee having not been made aware of its pendency. This Court heard oral arguments in that case before the Ohio Public Defender discovered it was pending. *State v. Martello*, 96 Ohio St.3d 1482, 2002-Ohio-4448 (counsel appointed and leave to file an appellee's brief allowed); 96 Ohio St.3d 1509, 2002-Ohio-4950 (second oral argument granted). In addition, earlier this year, this Court granted the Ohio Public Defender leave to file an amicus brief out-of-rule in a pending felony appeal where the State failed to comply with the rule. *State v. Sanchez*, 118 Ohio St.3d 1528, 2008-Ohio-3627.

2. Less drastic steps have not proven effective.

The Ohio Public Defender has taken less formal and less drastic steps in order to make county prosecutors aware of their mandated duty under that rule. In some instances where this Court had accepted a State's felony appeal, and service of the notice of appeal had not been provided to the Ohio Public Defender, a supervising attorney from the Office of the Ohio Public Defender contacted the offending county prosecutor by telephone to request service in future cases. Earlier this year, Assistant State Public Defender Stephen P. Hardwick spoke over the telephone with an elected county prosecutor who, at upon request,

said that he would use a listserv for prosecutors to remind them of the requirements of the rule. Attorneys with the Office of the Ohio Public Defender have also pursued informal measures with many of the county prosecutors who typically serve as opposing counsel on state appeals. Yet violations persist and the State therefore shows no commitment to remedying this type of violation. The instant case is an ideal case for this Court to use to send a message to county prosecutors all over Ohio that they must comply with the rule, because here the lack of notice prejudiced the Ohio Public Defender.

3. Enforcement of the rule helps the Ohio Public Defender ensure that this Court has before it all the necessary information and arguments required to decide felony appeals.

The rule requiring service upon the Ohio Public Defender has no function if it cannot be enforced. This Court recognized the Ohio Public Defender's unique role in informing this Court of the perspective of indigent defendants when it required prosecutors to provide service of its notices of appeal and certified conflicts to the Ohio Public Defender.

S.Ct.Prac.R. XIV(2)(A)(3). Further, because many court appointments end once the state court of appeals enters judgment in a case, the Ohio Public Defender must strive to ensure that this Court has the perspective of effective counsel at all stage of review of a felony appeal.

The Ohio Public Defender takes its role seriously. When it receives a notice of certified conflict or appeal from a prosecutor, the Ohio Public Defender conducts a supervisory-level review of the case to determine whether the defendant has counsel, and whether the case contains legal issues that warrant amicus assistance. The State short-circuits that procedure each time it fails to comply with the express rule. By routinely failing to serve notices of appeal and certified conflicts upon the Ohio Public Defender, as

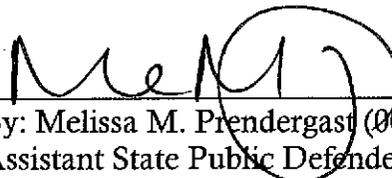
required under this Court's practice rules, county prosecutors are tempting this Court to condone their negligence of this Court's own rules. In order to ensure compliance with court rules in future felony appeals, this Court should strike the State's notices of appeal and certified conflict and dismiss both cases, and thereby give effect to this Court's expectations of the standards of practice.

IV. Conclusion

This Court should enforce its rules of practice, and specifically this Court should enforce this rule requiring service of State felony appeals and certified conflicts on the Ohio Public Defender. For all the foregoing reasons, and to ensure that county prosecutors understand that compliance with this Court's rules is not optional, the Court should strike the State's notices of appeal and certified conflict and dismiss both cases. No more effective message can be communicated.

Respectfully submitted,

Office of the Ohio Public Defender

A handwritten signature in black ink, appearing to read "Melissa M. Prendergast", is written over a horizontal line. The signature is cursive and somewhat stylized.

By: Melissa M. Prendergast (0075482)
Assistant State Public Defender

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CERTIFICATE OF SERVICE

I certify that on December 31, 2008, a copy of the foregoing **The Ohio Public Defender's Motion to Strike Notice of Appeal and Notice of Certified Conflict and to Dismiss Both Cases** was served via regular U.S. Mail to Eric C. Stewart, Chief Assistant Prosecutor, 117 E. Columbus Avenue, Suite 200, Bellefontaine, Ohio 43311, and to Marc S. Triplett, Counsel for Defendant-Appellee, John Rohrbaugh, 332 S. Main Street, Bellefontaine, Ohio 43311.



Melissa M. Prendergast (0075482)
Assistant State Public Defender

#291215

of originally-charged count of aggravated robbery was error on grounds that petitioner's conduct by pleading guilty while represented by counsel constituted a waiver of his right to a corrected indictment). Accordingly, the Eighth District implicitly found that a plain error analysis does not apply when the parties agree to amend the indictment, even when the amendment changes the name and identity of the charge.

CONCLUSION

The Appellant, State of Ohio, respectfully request this Court to grant discretionary appeal. A decision from the Supreme Court will resolve an issue left over from *State v. Colon* and give guidance to the State, Defense Counsel, and the Trial Courts in the plea bargaining process.

Respectfully submitted,

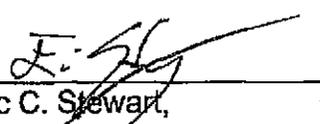
GERALD L. HEATON
Logan County Prosecuting Attorney

By:


Eric C. Stewart, Reg. No 0071094
Chief Assistant Prosecutor
117 Columbus Ave. E.
Bellefontaine, Ohio 43311
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CERTIFICATE OF SERVICE

This is to certify that a copy of this Memorandum was served upon Marc S. Triplett, Attorney at Law, 332 S. Main St., Bellefontaine, Ohio 43311, by first class mail on this 31st day of October, 2008.


Eric C. Stewart,
Chief Assistant Prosecutor

NOTICE OF CERTIFIED CONFLICT

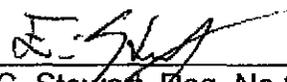
Pursuant to S.Ct. Prac. R. IV., §1, Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Logan County Court of Appeals, Third Appellate District, entered in *State v. Rohrbaugh*, case number 8-07-28 on November 13, 2008.

The Third Appellate District has certified this case to be in conflict with *State v. Robinson*, 8th Dist. No. 90411, 2008-Ohio-3972. Attached is a copy of the court of appeals order certifying a conflict and copies of the conflicting court of appeals opinions.

Respectfully submitted,

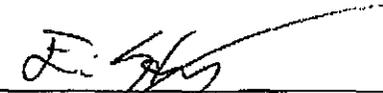
GERALD L. HEATON
Logan County Prosecuting Attorney

By:


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Chief Assistant Prosecutor
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PROOF OF SERVICE

This is to certify that a copy of this Notice of Certified Conflict was served upon Attorney Marc S. Triplett, Counsel for Appellee, by placing it in the box provided for such service in the Common Pleas Court of Logan County, Ohio on November 17, 2008.


Eric C. Stewart,
Chief Assistant Prosecutor