

IN THE SUPREME COURT OF OHIO
2009

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

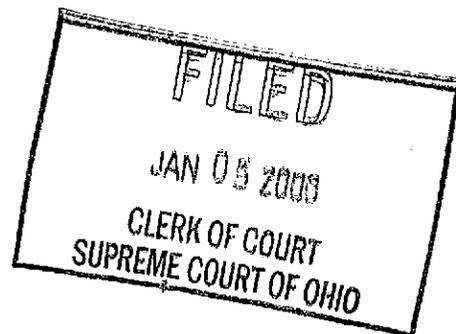
**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING DEFENDANT'S
MOTION TO SUPPLEMENT THE RECORD**

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**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING DEFENDANT'S
MOTION TO SUPPLEMENT THE RECORD**

Defendant's December 31, 2008, motion to "supplement" the record unwittingly confirms the point that the State has been making ever since its memorandum opposing jurisdiction. The appellate record has never shown that the excused juror was the "sole dissenter," neither in the Court of Appeals nor in this Court. Now, after the briefing is completed, defendant has finally noticed the problem. But, now, it is too late to correct that problem, and the defense improperly seeks to correct the problem through inadmissible statements in a self-serving defense lawyer affidavit. For the following reasons, defendant's flawed motion to supplement the record should be denied.

A.

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 responded in its merit brief by pointing out that there is zero support in the appellate record for that assertion. The State had made the same point in its memorandum opposing jurisdiction.

In response to the State's merit brief, defendant 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, which was several months after the filing of the judgment of conviction that was appealed to the Court of Appeals. Defendant contended in the reply brief here that the affidavit supports his claim that the excused juror was the "sole dissenter." See

Defendant's Reply Brief, at 2 & n. 1.

The problem was 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 judgment of conviction was filed on October 5, 2006, and well after the appellate record was transmitted to the Court of Appeals on December 14, 2006, and well after the appellate record was supplemented on April 10, 2007. Defendant never attempted to supplement the appellate record with the Simmons 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.

Because the Simmons affidavit was not a part of the appellate record in the Court of Appeals and the appellate record in this Court, the State on December 23, 2008, filed a motion to strike the affidavit and the parts of the reply brief that were based on the affidavit.

Defendant has now filed on December 31, 2008, a memorandum opposing the motion to strike and a largely-repetitious motion to supplement the record. The State hereby responds to the motion to supplement the record.

B.

The motion to supplement the record represents a significant concession. The State in its merit brief had urged defendant to cite whatever part of the appellate record that would support his contention (and Judge Whiteside's contention in dissent below)

that the excused juror was the “sole dissenter.” In response, he cited no part of the appellate record and instead attached the Simmons affidavit. By conceding that the Simmons affidavit is not a part of the current appellate record in this Court, he is effectively conceding that it was not a part of the same appellate record that was before the Court of Appeals at the time it ruled.

Thus, Judge Whiteside had no appellate-record support for his “sole dissenter” contention in dissent, and, equally so, defendant had no appellate-record support when he repeated the “sole dissenter” claim in his merit brief here and then in his reply brief.

In the absence of appellate-record support, defendant has repeatedly erred in making the “sole dissenter” claim. 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.

C.

Now, after the briefing has been concluded, defendant seeks to add the Simmons affidavit to the appellate record, even though it was never considered by the Court of Appeals. But this Court has recognized that “[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 Appeals 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.

D.

Defendant contends that S.Ct.Prac.R. V authorizes the transmission of all original papers from the Court of Appeals and the trial court, and he further contends that the Simmons affidavit is transmittable under this rule. But this reading of Rule V is incorrect for at least three reasons.

1.

First, the structure of Ohio's appellate system depends on appellate courts reviewing specified judgments, and a unilateral defense affidavit filed several months after the judgment being appealed should form no part of the appellate record in review of that judgment. Necessarily, the Simmons affidavit was not before the trial court at the time it made its rulings and rendered judgment, and therefore it should provide no basis for reversal of that judgment on direct appeal. As stated in *Ishmail*: "Since a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings." *Ishmail*, 54 Ohio St.2d at 405. "[T]he reviewing court may consider only that which was considered by the trial court and nothing more." *Id.* at 405 (quoting another case).

2.

Defendant's proposed reading of S.Ct.Prac.R. V also would violate this Court's long-standing *Ishmail* doctrine, which prevents the addition of new material to the

appellate record. This Court is reviewing the correctness of the Court of Appeals' decision, and that court did not have the Simmons affidavit before it. *Ishmail* would clearly be violated if new material were submitted here that was never submitted to the Court of Appeals.

This Court has cited and followed *Ishmail* dozens of times, most recently in the *Siroki* case in March 2006. In *Siroki* itself, this Court criticized the appellant for attaching a new affidavit to its merit brief, much like what has occurred here. This Court cited *Ishmail* in concluding that "appellants' reliance on a new affidavit attached to their merit brief in support of their appeal is misplaced." *Siroki*, at ¶ 20.

This Court has treated *Ishmail* as a "bedrock principle" of Ohio appellate practice. As stated in *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13:

[A] bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial. In *State v. Ishmail* (1978), 54 Ohio St.2d 402, we reversed the judgment of a court of appeals that had considered, in an appeal from a postconviction proceeding, a transcript that was not before the trial court in the proceeding that was appealed. In *Ishmail*, we declared: "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." *Id.* at paragraph one of the syllabus. We have consistently enforced this holding. See, e.g., *State v. Dixon*, 101 Ohio St.3d 328, 2004 Ohio 1585, P62; *State v. Thomas*, 97 Ohio St.3d 309, 2002 Ohio 6624, P50. (Some parallel citations omitted)

In the present case, the Simmons affidavit was never before the trial court in the proceedings leading to the judgment of conviction, nor was the Simmons affidavit before the Court of Appeals in the direct appeal from that judgment. Simmons'

affidavit regarding what the jury foreman purportedly said was not a part of “the record of the proceedings at trial” and “was not before the trial court in the proceeding that was appealed.” *Morgan*, at ¶ 13.

Inasmuch as S.Ct.Prac.R. V does not expressly or implicitly seek to overturn the long-standing, bedrock doctrine of *Ishmail*, it is apparent that *Ishmail* remains good law in this Court. The rule should not be construed to allow supplementation of a self-serving affidavit that is violative of *Ishmail*.

3.

A third important point is that the Simmons affidavit was submitted as part of the post-conviction petition and was only tendered for that purpose, not for the purpose of settling the appellate record for direct appeal. 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, and a post-judgment, self-serving affidavit by a party’s counsel has never been thought to “settle the record” for purposes of appeal.

As the State argued below, and as the State argued in its brief here, the Appellate Rules approve of four ways in which a record of proceedings can be properly brought up to the appellate court. First, the official court reporter’s transcript is the chief means by which trial court proceedings are recorded and then transmitted to the appellate court. See App.R. 9(B). Second, if there is no transcript available, the appellant prior to transmission of the record can tender a proposed statement of the evidence or proceedings, at which point the appellee can serve objections, and the trial court then settles the record. See App.R. 9(C). Third, before transmission of the

record, the parties can agree to a statement of the case, which is subject to approval by the trial court and then will be included in the appellate record. See App.R. 9(D).

Fourth, if any difference arises as to whether the record truly discloses what occurred in the trial court, or if something material is omitted from the record by error or accident, the trial court can settle and correct the record. See App.R. 9(E).

The need for an *official* record is important. The rule can be seen as presuming the accuracy of an official court reporter's certified verbatim rendition of a proceeding. But no such presumption attends any other type of rendition. Appellate Rules 9(C), (D), and (E) generally require trial court approval to make a rendition official. See *King v. Plaster* (1991), 71 Ohio App.3d 360, 362. The determinations of the trial court under App.R. 9 "are its responsibility and its authority," see *State v. Dickard* (1983), 10 Ohio App.3d 293, 295, not the authority of the parties. If a party submits an unapproved statement of the case, that statement must be disregarded. *Id.* at 295. The trial judge has the responsibility, duty, and authority to determine the accuracy and truthfulness of the proposed statement of proceedings and to make the statement conform to the truth. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 81-82.

In the present case, the trial court has never approved the Simmons affidavit as an accurate rendition of events, and defendant has never asked for such approval in an effort to settle the record.

The lack of an adequate and full appellate record falls on the shoulders of the defense. A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio

St.2d 197, 199. “[T]here must be sufficient basis in the record * * * upon which the court can *decide* that error.” *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338, 342 (emphasis sic).

Moreover, these are *Appellate* Rule procedures that should be employed in the Court of Appeals before the case ever reaches this Court. The failure to use these procedures operates as a waiver of issues related to the adequacy of the appellate record, as this Court will not ordinarily consider issues that were not raised in the Court of Appeals. *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph two of the syllabus, death penalty vacated (1978), 438 U.S. 911. This Court has recognized the importance of using App.R. 9 procedures, and the failure to use such procedures is held against the defendant-appellant. *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, ¶ 98 (“he has not even attempted to reconstruct what occurred in an effort to show prejudice. See App.R. 9(B) and (E)”); *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 213 (“Frazier has not attempted to reconstruct what the trial court discussed with the jury in an effort to show prejudice. See App.R. 9(B) and (E)”). It is too late now for defendant to “supplement” the record with an unofficial, never-approved rendition of events.

E.

The portion of the Simmons affidavit relied on by defendant is also 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. *Schiebel*, 55 Ohio St.3d at 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 * * *.”

F.

Since the supplementation of the record with the Simmons affidavit would violate the *Ishmail* doctrine, would violate App.R. 9 procedures for settling the record, and would violate Evid.R. 606(B), defendant resorts to an ad hominem attack against undersigned counsel, contending that undersigned counsel is attempting to mislead the Court. This contention is wrong in several respects.

Post-judgment statements made in an affidavit by a *party’s lawyer* do not settle the appellate record and do not place the lawyer’s assertions of fact beyond dispute or beyond the proper procedures required to settle the record. In many ways, the Simmons

affidavit represents a series of self-serving rationalizations, and undersigned counsel is not required to buy those rationalizations hook, line, and sinker. In fact, not even the Simmons affidavit supports the defense contention that the juror was the “sole dissenter.” It refers to the juror as a “dissenting juror,” but the affidavit does not indicate whether she was the “sole dissenter.”

In addition, there are several reasons to doubt the accuracy and veracity of Simmons’ contentions.

First, Simmons’ claim that “juror number three” was the excused juror and that “juror number three” was a “dissenting juror” *is contradicted by the current appellate record*. The transcript shows that alternate juror Thaler became juror number *six*, not juror number three. (T. 1510-11) Was the jury foreman confused? Is Simmons confused? This basic confusion about the relevant juror’s number is reason enough to doubt the accuracy of the self-serving Simmons affidavit.

Second, the veracity of the affidavit is in doubt because, three weeks after the guilty verdicts, Simmons made a series of statements regarding what had occurred. He never referred to any talk he had with the jury foreman. Indeed, Simmons made statements to the court at that time that he had not wanted to question the juror at the time of excusal about whether she was the juror referenced in the jury’s last question. (T. 1525-26) The unmistakable impression left by Simmons’ remarks three weeks after the verdicts is that it was unknown whether the excused juror was a “dissenter”, and yet Simmons’ affidavit claims that the jury foreman informed him shortly after the verdicts.

Third, the Simmons affidavit is questionable in contending that Simmons would have sought voir dire of the juror before her dismissal, would have requested a mistrial, and never would have agreed to the juror's dismissal. Simmons' claimed vehemence on these points is entirely inconsistent with his actual conduct at the trial, in which Simmons never objected to the excusal of the juror, never objected to the substitution of the alternate, and then, three weeks later, raised an untimely objection merely to "the process" of the judge's ex parte meeting with the juror.

Fourth, it is highly suspicious that the Simmons affidavit does not present the jury foreman's purported comments in the form of verbatim quotation. The term "dissenting juror" is very likely Simmons' own gloss, not what the jury foreman actually would have said. It is unclear whether the jury even had had a vote yet at the time of the jury question so that "Juror Number Three" might be characterized as a "dissenting juror." And, regardless of how the excused juror had proceeded until then, the juror would have been required to follow the court's instructions, and the court rightly instructed the jury that there is no corroboration requirement in order to vote for conviction. See State's Brief, at 26 n.3.

Finally, it is significant that defendant does not seek to supplement the record with another affidavit that had been attached to the post-conviction petition. That affidavit was presented as the affidavit of the excused female juror, and not even that affidavit claimed that the juror was the "sole dissenter." The affidavit does not characterize the juror's views and does not claim that she was the juror who believed that corroboration was absolutely required. Indeed, according to this juror's affidavit,

the jurors on Friday afternoon, September 8, 2006, “were split” and “a number of the jurors still had some questions to be answered.”

In seeking supplementation of the record with the Simmons affidavit, but not the affidavit from the juror herself, the defense is engaging in some fairly-obvious cherry-picking. Perhaps the defense realizes that the juror affidavit would clearly be barred by Evid.R. 606(B) in major respects. But, if that is the reason for not seeking supplementation of the juror affidavit, then the defense should not be seeking supplementation of the record with the Simmons affidavit either.

In the final analysis, given all of the confusing and questionable features of the self-serving Simmons affidavit, undersigned counsel is acting the fullest good faith in doubting the accuracy and veracity of the Simmons affidavit. Undersigned counsel is not misleading the Court, but, rather, making arguments consistent with the limited appellate record available here.

G.

Finally, defendant errs in claiming in his motion that the State did not “ever challenge the fact that [the] dismissed juror was the sole dissenter in the Court of Appeals or at oral argument.” There was no need to dispute any “sole dissenter” claim in the Court of Appeals because the defense *conceded* that the record did not show what views the juror held.

The defense conceded on pages 26-27 of its initial appellate brief that “the record does not reflect whether or not Juror Number Three was the juror referenced in the jury’s final two questions * * *.” At footnote 3 on page 8 of the defense reply brief,

the defense also contended that the record did not “necessarily support” any assumptions regarding what the split of the jury was. The defense contended that it was incorrect to assume that “there was an eleven to one split for conviction,” since “[t]here could also have been other minority or undecided jurors * * *.” And on page 4 of the defense supplemental brief, the defense contended that, in light of the jury’s last question, “at least one” juror was not comfortable making a guilty verdict.

As these comments show, the defense itself had conceded that the views of the excused juror were unknown and that the split of the jury was unknown as well. The defense simply was not making a “sole dissenter” claim in the Court of Appeals.

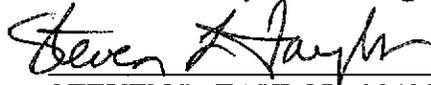
Even so, the State *did* point out in its initial appellate brief at page 28 that “there is no indication that the excused juror would have voted different than the alternate juror.” Since the defense had not made the “sole dissenter” claim in its too-late comments three weeks after the guilty verdicts in the trial court, and since the defense was not making that claim in its briefing in the Court of Appeals, there was no need for the State to brief the “sole dissenter” issue further.

Defendant’s “sole dissenter claim arises from Judge Whiteside’s dissent, which, as stated earlier, entirely lacked appellate record support, and which the State has been disputing ever since.

The motion to "supplement" the record should be denied.

Respectfully submitted,

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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 5th day of Jan., 2009, to William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215, counsel for defendant.



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