IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO.: 2009-0330
PLAINTIFF-APPELLANT	:	ON APPEAL FROM THE COURT OF APPEALS, SIXTH APPELLATE DISTRICT, OTTAWA COUNTY, OHIO CASE NO.: OT-07-046
V.	:	
SCOTT A. SPEER,	:	
DEFENDANT-APPELLEE	:	

DEFENDANT-APPELLEE'S MEMORANDUM IN RESPONSE

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STATEMENT OF APPELLEE PURSUANT TO SUPREME COURT RULE OF PRACTICE III(2)(B)(1)

The claims raised by the State of Ohio and the three Amici parties do not implicate

1. Substantial constitutional questions;
2. Legal principles for which leave to appeal should be granted and/or;
3. Legal issues of great public interest.

The Sixth District Court of Appeals correctly identified the appropriate standard of review and rules of law. It properly applied the governing legal principles to this fact intensive and case specific decision. No sweeping rule of law was announced. This unanimous decision was narrowly tailored and is jurisprudentially unassailable.

While this case did receive some media coverage, the case did not raise substantial legal issues. Rather, the media coverage was due in pertinent part to the Defendant's socio economic and other personal factors. The State's present appeal does not warrant the exercise of this Honorable Court's jurisdiction.

While many appeals raise novel fact patterns, few are amenable to Supreme Court review. The Sixth District Court of Appeals exercised significant restraint in resolving this matter pursuant to a practical case by case analysis.

There are potential factual hypotheticals which may be presented within the field of cause challenges. But not every low hanging fruit should be picked. This case presents no issue of law for this Court to clarify. It is a case which may be resolved through application of fact to existing law.

STATEMENT OF FACTS

"*Houston...we have a problem*", Apollo 13 (1995).

This case is not about hearing impairment. Instead, it is about whether a trial judge unreasonably denied a Defendant his "day" in Court. The trial judge herein ignored several red flags and an unambiguous warning by the juror in question. The juror quite succinctly admitted that she could never perform her duties in this specific criminal case (i.e. evaluating a 911 call).

All of the jurors' comments occurred during voir dire. Despite these obvious warnings, the trial judge ignored common sense and reason in seating this juror. The Trial Court therefore erred in accommodating rather than disqualifying this juror.

RED FLAGS

1. The juror acknowledged being at risk to miss information if anyone (counsel or witnesses) turned sideways or covered their mouth. (Tr. p. 66, lines 10-12; 154 and 176).

2. Moreover, the juror in question became confused twice during voir dire examination.

A. The Trial Court asked:

> Q) "Did they find the person who did it?"
> A) "I am not, but somehow they found my name and asked me to be in Court at the end of the month."
> (Tr. P. 65)

B. The Court further inquired:

Q) "And you drive the boat yourself?"
A) "I am sorry, what?"
(TR. P. 78)

THE ADMISSION

The colloquies with this juror did not improve. The Juror in question unambiguously admitted she would not be able to hear audio testimony.

C. Q) (by the Prosecutor) "If there is an audio tape then –
A) (by the Juror) "— then I will have a problem."
(Tr. p. 145-146)

All of these discussions occurred in open court during the course of voir dire. It was unreasonable under these facts not to disqualify the juror. The juror further explained her hearing impairment by indicating TV was a problem but "if somebody has close captioning then I can read off of it. I can do that. (Tr. p. 146, lines 3-8).

The Court well knew the 911 call would be played. The Trial Court was specifically warned by the Prosecutor (Tr. p. 145-146), then by Defense Counsel (Tr. p. 154-155, 176) and finally, the State's previously filed exhibit list revealed that the 911 call would be played. (See Exhibit Entry 76). It is therefore incorrect for either the State or the Amici parties to suggest that there was no evidence that the juror could not "fully participate" as a juror at the time of the challenge for cause. To the contrary, there was clear, unambiguous evidence of the juror's inability to competently evaluate key evidence.

The Sixth District Court of Appeals did not engage in unlawful discrimination as argued in the Amici brief. The Appellate Court had no qualms about permitting hearing impaired jurors to serve in either civil or criminal cases where the nature of the case and

evidence permitted. Neither does appellee suggest that hearing impaired jurors may not serve in criminal cases. They should however, be stricken when a Court is forced to choose between a juror's full participation and something less. The issue before the Appellate Court was case specific, fact intensive and a matter of common sense. Where recklessness is an element and the tape recording is material, a juror must be able to evaluate volume, tone, speech patterns, hesitations, inflections, slurred speech, and other audio cues which may defy transcription.

Neither did the Sixth District Court of Appeals issue an opinion which will prevent hearing impaired jurors in the future from serving. The court made a specific factual finding of prejudice in this case. The Court explained:

"We expressly note that in other cases, where the evidence involves only the bare meaning of the words, a juror's hearing impairment might have little or no prejudicial effect on his or her ability to effectively evaluate the evidence. If any doubt exists that a juror can adequately and completely perceive and evaluate all the evidence, whether because of a physical impairment, mental capabilities, or other reason that would interfere with the performance of a juror's duties, the trial court must excuse that juror for cause. Therefore, we conclude that the trial court abused its discretion in denying appellant's challenge for cause, and that error was prejudicial to appellant's receiving a fair trial." (Opinion p. 11).

Finally, the materiality of the 911 call can not be questioned. The Prosecutor highlighted his opening statement with a lengthy description of the 911 emergency audio tape recording. (Tr. P. 203-205). The first witness, Jennifer Mansor, was called to authenticate the 911 call (Tr. p. 224). The first exhibit offered was the 911 call audio

tape recording. (Tr. p. 230). Officer Parkinson testified Appellee's speech was just as "slurred" as on the 911 call. (Tr. p. 546, lines 13-15).

The Prosecutor again highlighted the 911 call in closing labeling it the "beef" of its case. (Tr. p. 1208). Jurors were encouraged to look beyond the mere words on the audio recording and to consider the "calm tone" of Appellee's voice and his "demeanor" on the 911 tape. (Tr. p. 204). Finally, a specific request from the jurors indicated, "Can we have the written transcript of 911 call for juror number one? Thanks." (Tr. p. 1301). That transcript, unfortunately, was not prepared prior to the return of the verdict. (Tr. p. 1314-1315, 1319).

ARGUMENT IN RESPONSE TO PROPOSITIONS OF LAW

The State of Ohio advanced the following Proposition of Law: During voir dire, a trial court does not abuse its discretion for declining to remove a hearing impaired juror for cause if the evidence available, to the Court, supports its good faith belief that the potential juror's hearing impairment can be reasonably accommodated.

I. Response to Proposition of Law:

No reasonable fact finder would attempt to accommodate a hearing impaired juror who has previously admitted her inability to fully participate and evaluate critical evidence.

While the Rules of Superintendance for the Courts of Ohio do encourage jury service and reasonable accommodation for physically handicapped jurors, a juror's ability to serve is always limited by a criminal Defendant's right to a fair trial. *Irwin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639 (1961). Further, accommodations must never jeopardize that fundamental right. Fair trials require twelve competent jurors, each able to perceive and evaluate all the material evidence, see *Peters v. Kiff*, 407 U.S. 493, 501 (1972).

The admission "I will have a problem" (with audio tape recordings) precluded the juror from being able to fully participate in the critical evaluation of the 911 call. This inability eliminated the need for the Trial Court to reasonably accommodate a hearing impaired juror. Nothing further needed to be said. The Trial Court's duty was clear: disqualification. Said inability to evaluate the Defendant's voice, tone, volume, pitch, hesitations, stutters, slurred speech, inflections and other audio cues denied the Defendant his due process rights to a fair trial with twelve competent jurors. See *Harleysville Mut. Ins. Co. v. Santora*, 3 Ohio App. 257 (1982).

The Trial Court was squarely presented with a conflict between a juror's right to serve and a Defendant's right to a fair trial. The Court chose unwisely and sided with the juror. In doing so, the Court did not operate in good faith and its choice was not reasonable. The Court ignored the obvious.

The Amici Groups proposed the following Proposition of Law: A juror with a hearing impairment should not be dismissed for cause unless there is evidence at the time of the challenge indicating the juror cannot fully participate and afford the Defendant a fair trial.

II. Response to Proposition of Law:

There was clear and unambiguous evidence that the juror would not be able to fully participate and evaluate the 911 call. This denied Defendant-Appellee a fair trial.

No reasonable fact finder, could conclude, that the inability to hear the 911 call would not be prejudicial to the Defendant. This happened in voir dire, not during the trial. At the time of the challenge the Court well knew that an accommodation providing the juror with real-time display would not improve her ability to hear audio cues.

The Trial Court had actual knowledge during the voir dire that audio recordings would be presented (Tr. p. 145-146, 154, 176 and Exhibit 76) and chose to ignore it. When the juror admitted her "problem" the Court was duty bound to remove her. When the defense attorney unequivocally said "I am sure some of the evidence is going to be tape recorded". (Tr. p. 155, lines 11-12). It was time to disqualify the juror in question.

The Trial Court had actual knowledge that the juror in question would not be able to evaluate a key piece of evidence. The issue of the Appellee's alleged recklessness could not be adequately evaluated without being able to hear the 911 call made

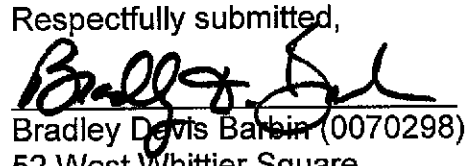
contemporaneously to the alleged criminal act. Physically moving a juror forward in her seat did not improve her ability to hear the tape. Neither did allowing the juror to read a real time display transcription of the tape. The juror simply was physically unable to perform her duties as a "trier of fact". By her own account, the juror was unable to "hear" the tape. Therefore, inflections, pauses, volume changes, pitch and tonal changes, candences, pace, nuances, emotion or the lack thereof, slurred speech or other voice patterns were lost. This juror was also prevented by her disability from being able to evaluate background noises like the wind, wave and or storm. See *Harleysville Mut. Ins. Co v. Santora*, 3 Ohio App. 257 (1982) (recognizing that a transcript alone could not capture or preserve nuance, voice, tone, emphasis, evasion, faltering or emotion as an audio recording could).

Failing to disqualify a juror who is unable to evaluate audio cues on the single most important piece of evidence was per se unreasonable. The Trial Court abused its discretion in trying to accommodate the juror once she admitted her "problem". Striking the juror for cause was the only reasonable remedy contrary to the Trial Court's position in the Motion for New Trial. The relevant statute, Ohio Revised Code 2945.25(O) provided the Court with legal authority to excuse the juror. Any arguments to the contrary are specious.

CONCLUSION

A juror's right to serve should never jeopardize a criminal defendant's right to a fair trial. Liberty and due process are the fundamental bulwarks of our criminal justice system. A trial court acts unreasonably when it attempts to accommodate a juror who admits to being unable to perform her duties. The juror's admission that "I will have a problem" is unambiguous. Common sense and well settled law dictated the Sixth District Court of Appeals unanimous decision. This Honorable Court should refuse jurisdiction because the Sixth District Court of Appeals decision was thoughtful, fact intensive, case specific and did not involve questions of constitutional proportion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Response was sent by regular United States mail this 13th day of March, 2009, to the following:

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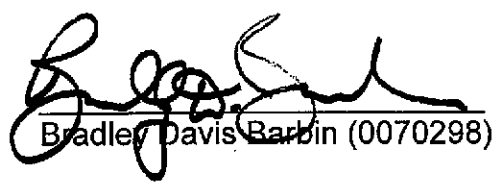

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