

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMES M. CLINE,

Defendant-Appellant,

On Appeal from the Champaign

County Court of Appeals,
Second Appellate District

Court of Appeals Case No.
2007 CA 02

FILED
APR 21 2009
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION FOR DELAYED APPEAL OF APPELLANT JAMES M. CLINE

JAMES M. CLINE
Inmate No. 418-660
Southern Ohio Correctional Facility
P.O. Box 45699
Lucasville, Ohio 43140
(330) 898-0820

DEFENDANT-APPELLANT, PRO SE

NICK A SELVAGGION #0055607
Champaign County Prosecuting Attorney
Scott D. Schockling #0062949 (COUNSEL OF RECORD)
200 North Main Street
Urbana, Ohio 43078
(937) 484-1901
E-MAIL: sdsccpo@ctcn.Net

COUNSEL FOR APPELLEE, STATE OF OHIO

RECEIVED
APR 21 2009
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
APR 01 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Memorandum in Support of
Delayed Appeal

Now comes the Defendant-Appellant, James Cline, Pro Se and hereby moves this Court for leave to appeal Judgment entered in the above captioned < Appeal and Dist. Case no: 07-CA-02 > case where decision was rendered on April 18, 2008. And, a copy of the decision was not tendered by Appellate Attorney Crews, nor the Second District until Mr. Cline filed a writ of mandamus with the Ohio Supreme Court ordering the Second District to comply, by sending a copy of their decision to James Cline. < See exhibits A thru G >

The reason for the delay of timely filing is not the responsibility of Mr. Cline. As the exhibits will show Mr. Cline had made several inquiries and files this delayed Appeal under 45 days of this Court's decision OF MANDAMUS 2008-1825.

Foremost, appellant submits that his rights to the effective assistance of Appellate counsel includes the obligation of counsel to provide him with timely notice of the appellate decision issue in the case < Smith v Dept. of Ohio Rehab & Corr. 463 F3d 426 (6th Cir 2006) > my counsel and the Appellate Court failed to tender a copy of the 2nd Dist, Apr. 18 decision until forced to do so by this court by way of MANDAMUS.

See Also < Paris vs Turner, No. 97-4129, 1999 WL 357815 (6th Cir 1999) >
See Also State vs Fox 70 NE2d 1253 my 26(B), and Ohio Supreme appeal would have been timely had it not been for Counsel of Appellate Court.

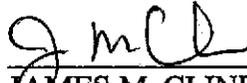
James M. Cline
JAMES M. CLINE, Pro Se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 3, 30, 2008, a copy of the foregoing Motion for Delayed Appeal of Appellant James M. Cline was mailed via regular first class mail, to:

NICK A SELVAGGION #0055607
Champaign County Prosecuting Attorney
Scott D. Schockling #0062949 (COUNSEL OF RECORD)
200 North Main Street
Urbana, Ohio 43078
(937) 484-1901
E-MAIL: sdsccpo@ctcn.Net

COUNSEL FOR APPELLEE,
STATE OF OHIO



JAMES M. CLINE
Inmate No. 418-660
DEFENDANT-APPELLANT,
PRO SE

In The Supreme Court of Ohio
Affidavit of Verity

State of Ohio,
Plaintiff-Appellee,

vs

James Cline,
Defendant - Appellant.

Case no _____

Appeal (2nd Dist) Case no: 07-GA-02

Trial court CO-CR-163

State of Ohio
County of Scioto:

I, James M. Cline, affiant herein, after being duly cautioned and sworn, do hereby depose and attest that the following is true and correct to the best of my knowledge and belief:

- 1) That I have personal knowledge of the facts stated herein, and I am competent to testify as to the truth of same;
- 2) I am defendant-Appellant in this case
- 3) I untimely filed my 26(B) as I untimely file this appeal - because it took a mandamus action to get copies of Apr. 18, '08 decision of case 07-GA-02.
- 4) I have no decision of 26(B) decision but, expect it, and leave this blank to fill in Exhibit H
- 5) Had I timely received 2nd Dist. Apr. 18 decision I'd have timely filed my 26(B), and Ohio Supreme Appeal.
- 6) I have good cause to believe that my due process rights to notice of the decision and an opportunity to appeal the decision was violated by the failure of the court and counsel to forward a copy of the decision to me upon ruling there of.

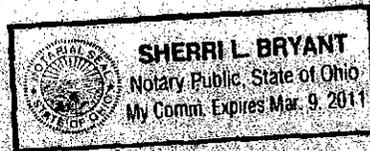
7) I am submitting the instant notice of appeal and motion for leave to file a delayed appeal within 45 days of my receiving notice of the court of appeals decision and, therefore I believe it is in the interests of justice that this appeal is deemed timely or leave is granted to file a delayed appeal forthwith.

~~and~~ further Affiant Sayeth Naught.

J m cline

Jane M. Cline, Prose

Sworn to, affirmed and subscribed in my presence
this day of 31, Dec 2008




Notary Public

Commission Expires:

3/9/11

Attorney Virginia Crews
7501 Paragon Rd.
Dayton, Ohio 45459

July 26, 2008

A

Ms. Crews:

I, James M. Cline #418-660 have been imploring you since April 22nd, 2008 to inform my of the status of the second dist. court of appeals case number 07-~~CB~~-02 State VS Cline.

You have failed to respond to any correspondance. You have insulted ~~my~~ in doing this, and as a result some of my correspondance was rather harsh. (I effectively appologized for my harshness.)

My life has (SUDDENLY) changed. I have figured out why I ate my life away -- due to eating all my emotions away. I have met a woman through the mail who "LOVE'S" me, and may very soon also be in love with me well enough to marry me. And, this changes my whole perspective on any emotional bearing I have for this case, or the participants in this case. You see, if this woman desires me as much as I desire her, and marries me, I must get out of prison so that I can have the thing I've always wanted most. And, this too will be of benefit to the Court(s) as such to show no

Second Dist. Court of Appeals
Montgomery County Courthouse
5th Floor
P.O. Box 972
41 N. Perry St.
Dayton, Ohio 45422

B

July 31, 2008

Dear Court Administrator:

I am writing to inquire the STATUS of case 07-CA-02 State VS Cline. My Appeal Attorney, Ms. Virginia Crews has not replied to any of my correspondance, nor accepted calls from me nor my family. I have no idea what is happening, nor what has happened in my case.

The only thing that I am aware of is what I have been personally working on; my post-conviction. My post-conviction is still active, and still pending a decision.

In conclusion, please reply to this request for information.

Thank you.

My address info: James M. Cline #418-660
S.O.C.F. <12 -42>
P.O. Box 45699
Lucasville, Ohio 45699

Sincerely,

A
7/31/08

IN THE SUPREME COURT OF OHIO

JAMES M. CLINE
SOCF (L2-42)
P.O. BOX 45699
LUCASVILLE, OHIO 45699

Original Action in Mandamus

RELATOR,

08-1825

VS.

SECOND APPELLATE DISTRICT
COURT JUDGES
JAMES A. BROGAN
WILLIAM H. WOLFF, JR.
MIKE FAIN
THOMAS J. GRADY
MARY E. DONOVAN
41 NORTH PERRY STREET
DAYTON, OHIO 45422
(937)-225-4464
RESPONDENTS.

COMPLAINT FOR A WRIT OF MANDAMUS

James M. Cline (PRO SE COUNSEL)
SOCF
P.O. BOX 45699
LUCASVILLE, OHIO 45699

COUNSEL FOR RELATOR, JAMES M. CLINE

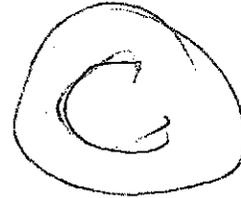
(COUNSEL UNKNOWN)

COUNSEL FOR RESPONDENTS, (UNKNOWN)

RECEIVED

IN THE OHIO SUPREME COURT OF OHIO

STATE OF OHIO, ex rel, : APPEALS CASE NO: 07-CA-02
: :
JAMES M. CLINE, RELATOR, : TRIAL CASE NO: 2000-CR-163
: :
VS. : :
: :
SECOND APPELLATE DISTRICT : :
JUDGES, : :
RESPONDANT. : :

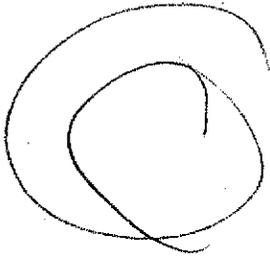


PETITION FOR WRIT OF MANDAMUS

Comes now James M. Cline, acting in Pro Se capacity and humbly asks this court to grant his petition for writ of mandamus pursuant to R.C. 2731.01 et seq. in regards to his demand's that 'information' or the result's of any 'decision' for his appeal case 07-CA-02 be provided forthwith. An direct appeal was filed with the Second District Corut in (approximately) February, 2007. To my understanding a decision is already posted to computer with a decision date of April 18, 2008, yet neither the Second District nor my appeal attorney, Ms. Virginia Crews has furnished me with aforementioned 'final notice' of it's decision. I am presently incarcerated at SOCF in Lucasville, Ohio. I am aware that before ANY FURTHER APPEALS ACTIONS can be undertaken that a copy of the ORIGINAL 'FINAL NOTICE' DECISION must accompany any notice of appeal that I should file. And, as such as the Second District

PROOF OF SERVICE

I certify that a copy of the foregoing motioo for writ of mandums was sent to the 2nd appellate dist. judges this 2nd day of Sept 2008.



Jm Cline
James M. Cline, Pro Se

C

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL,	:	APPEALS CASE NO: 07-CA-02
JAMES M. CLINE, RELATOR,	:	TRIAL CASE NO: <u>2000-CR-163</u>
	:	
VS.	:	
2ND APPELLATED DIST. JUDGES,	:	
RESPONDANT.	:	

ORDER FOR ALLOWANCE

Comes now James M.Cline, in ProSe and humbly asks this Court for an order for allowance of the writ of mandamus with regards to obtaining a copy of the 2nd district court's decision of appeal case 07-CA-02.

Respectfully Submitted,

Jm Cline

James M. Cline, Pro Se

PROOF OF SERVICE

I certify that a copy of the foregoing motion was sent to 2nd appellate district court at P.O. Box 972, 41 N. Perry St., Dayton, Ohio 45422 5th floor this 2nd day of Sept 2008.

Jm Cline

James M. Cline, Pro Se

C

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL,	:	APPEAL CASE NO. <u>07-CA-02</u>
JAMES M. CLINE, RELATOR	:	CASE NO. <u>2000-CR-163</u>
	:	
VS.	:	
	:	
2ND APPELLATE DIST. JUDGES,	:	
RESPONDANT.	:	

SUMMONS

Comes now, James M. Cline, and humbly asks the Clerk of the Ohio Supreme Court to cause tot be served upon the 2nd Appellate District Judges a copy of the 'original' filing for petition for writ of mandamus, along with any other documents deemed needed.

Respectfully Submitted,

Jm Cline

 James M. Cline, Pro Se

C

AFFIDAVIT OF VERITY

I, James M. Cline, state the following is true:

- 1.) That I am the RELATOR in the captioned case.
- 2.) That aside from a 'potential' appeal to the 2nd district of my post-conviction denial dated July 28, 2008 there are NO other civil actions pending on case 2000-CR-163 (the trial court case).
- 3.) That I am presently seeking a copy of the final notice decision from the 2nd district court.
- 4.) That I am entitled to a copy of this decision.
- 5.) That the 2nd district is the ONLY ONE in authority with the power to give an answer to appeal case 07-CA-02. See Stanley v. Cook, 66 NE2d 207.
- 6.) I am in indigent, see affidavit of indigency.

Pursuant to R.C. 2731.01 et seq. this affidavit has been made.

Jm Cline
AFFIANT, James M. Cline

Sworn to, or affirmed, and subscribed in my presence this 2nd day of September, 2008.

[Signature]
Notary Public



Jeremy Oppy
Notary Public, State of Ohio
My Commission Expires 8/18/10

My commission expires: _____

Court of Appeals of Ohio



JUDGES

JAMES A. BROGAN, DAYTON
WILLIAM H. WOLFF, JR., DAYTON
MIKE FAIN, DAYTON
THOMAS J. GRADY, SPRINGFIELD
MARY E. DONOVAN, DAYTON

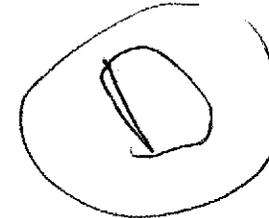
SECOND APPELLATE DISTRICT
41 NORTH PERRY STREET
DAYTON, OHIO 45422-2170
(937) 225-4464
1-800-608-4652
FAX NO. (937) 496-7724

COUNTIES

CHAMPAIGN
CLARK
DARKE
GREENE
MIAMI
MONTGOMERY

RONALD E. MOUNT, Esq.
COURT ADMINISTRATOR

October 6, 2008



VIA UNITED PARCEL SERVICE

Kristina D. Frost
Clerk of Courts
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215-3431

Re: *James M. Cline v. Second Appellate District Court Judges, et al.*
Supreme Court Case No. 08-1825

Dear Ms. Frost:

Please find enclosed the original and twelve copies of the "Motion to Dismiss on Behalf of Respondents, Second District Court of Appeals and Judges." Please file this document in the above-referenced case.

Furthermore, pursuant to S.Ct.Prac.R. VIII(5)(B), I am enclosing an additional copy of the above-referenced motion. Please date-stamp this copy and return it to the court of appeals in the enclosed self-addressed, postage-paid envelope.

Thank you for your assistance.

Sincerely,

FILED

APR 18 2008

EDWARD L. PRESTON

CHAMPAIGN COUNTY OHIO

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

C.A. CASE NO. 07CA02

vs.

T.C. CASE NO. 00CR163

JAMES M. CLINE

Defendant-Appellant

Exhibit E

OPINION

Rendered on the 18th day of April, 2008.

Nick A. Selvaggio, Pros. Attorney, Scott D. Schockling, Atty. Reg. No. 00556097, Asst. Pros. Attorney, 200 North Main Street, Urbana, OH 43078

Virginia L. Crews, Atty. Reg. No. 0077837, 7501 Paragon Road, Dayton, OH 45459

GRADY, J. Judge of common pleas and the recorder, along with the

Defendant, James Cline, appeals from his convictions and

{¶ 2} The facts of this case were set forth in our earlier opinion, *State v. Cline*, Champaign App. No. 2002-CA-05, 2003-Ohio-4712, as follows:

{¶ 3} "{¶ 4} In the past Cline was convicted of harassing women who had declined to pursue relationships with him, and the trial court ordered probation. However, his probation was later revoked, and Cline was sent to prison. After his release, Cline embarked upon a series of actions that resulted in the charges contained in the two indictments involved in this case.

{¶ 4} "{¶ 5} Between December, 1999, and the beginning of 2000, Cline met Robin Rabook, Betty Jean Smith, and Sonja Risner in internet chat rooms. After several dates with each of the three women, they declined further contact with him. As a result, Cline began to harass the women by e-mail and by telephone, at all hours of the day and night. In an apparent attempt to take revenge against the three women, Cline used his knowledge of computers and the internet, along with the women's personal information, to create havoc in their

women to others.

{¶ 5} "{¶ 6} Cline also stalked Sonja. In September, 2000, Cline solicited the assistance of another woman whom he met on the internet to burn down the house where Sonja lived. That woman, Gina White, warned Sonja of sabotage to her car, and a mechanic found a mothball in the gas tank. Cline also began an intensive program of telephone harassment of Sonja. He called her repeatedly at home, and after she changed her number, he called her at work. He then began to call people all over Urbana trying to get Sonja's new phone number. Cline also ordered magazine subscriptions in her name, caused deliveries to be made to her home, advised realtors that she wanted to sell her home, and arranged to have her car towed. Cline gave Sonja's work number to many people, encouraging them to call her there. During a two-month period, Cline made over 3,000 phone calls.

{¶ 6} "{¶ 7} While Cline was in jail in Indiana awaiting extradition to Ohio, he began writing Sonja's personal information and physical description in books in the jail, and

charged in Champaign County in indictments filed on September 21, 2000 and May 17, 2001 with eighty-six counts, including telecommunications harassment, conspiracy to commit aggravated arson, criminal mischief, intimidation of a crime witness/victim, menacing by stalking, and unauthorized use of a computer. Following a jury trial in January 2002, Defendant was convicted of four counts of unauthorized use of a computer, two counts of menacing by stalking, two counts of conspiracy to commit aggravated arson, one count of criminal mischief, one count of intimidation of a crime witness/victim, and sixty-six counts of telecommunications harassment. The trial court sentenced Defendant to prison terms totaling sixty-seven and one-half years.

{¶ 8} On direct appeal we reversed Defendant's convictions and remanded this matter for a new trial because Defendant had not executed a written waiver of his right to counsel in accordance with Crim.R. 44(C) prior to representing himself at trial. *State v. Cline*, Champaign App. No. 2002-CA-05, 2003-Ohio-4712. We also reversed one of Defendant's convictions

v. *Cline*, 103 Ohio St.3d 471, 2004-Ohio-5701. On remand from the Supreme Court, we concluded that the trial court did not substantially comply with Crim.R. 44(C)'s requirements for waiver of counsel, and we remanded this matter for a new trial. *State v. Cline*, 164 Ohio App.3d 228, 2005-Ohio-5779.

{¶ 9} In August 2006, prior to the commencement of Defendant's new trial, the State indicted Defendant on an additional two hundred and fifty-five counts of telecommunications harassment. Following a second jury trial in November 2006, Defendant was found guilty of four counts of unauthorized use of a computer, two counts of conspiracy to commit aggravated arson, one count of menacing by stalking, one count of criminal mischief, one count of intimidation of a crime witness/victim, and one hundred seventy-six counts of telecommunications harassment. The trial court sentenced Defendant to prison terms totaling fifty-eight and one-half years.

{¶ 10} Defendant timely appealed to this court from his convictions and sentences.

{¶ 12} Defendant argues that the two hundred fifty-five additional telecommunications harassment for which he was indicted in Case No. 2000-CR-163, after he had successfully appealed his convictions in Case No. 2002-CA-051, violated his rights to due process and a fair trial because those later charges were a product of prosecutorial vindictiveness. Defendant claims that the procedural history and sequence of events in this case suggest a reasonable likelihood of vindictiveness that creates a presumption of vindictiveness in this case. *Thigpen v. Roberts* (1984), 468 U.S. 27, 30, 104 S.Ct. 2916, 82 L.Ed.2d 23; *Blackledge v. Perry* (1974), 417 U.S. 21, 27-28, 94 S.Ct. 2098, 40 L.Ed.2d 628. Defendant further claims that the State has failed to rebut that presumption of vindictiveness.

{¶ 13} In *State v. Bradley*, Champaign App. No. 06CA31, 2007-Ohio-6583, this court observed:

{¶ 14} "{¶ 9} A rebuttable presumption of vindictiveness may arise when a trial court imposes a harsher sentence upon reconviction after a defendant has successfully appealed his

conviction. *Blackledge v. Perry, supra; Thigpen v. Roberts, supra.* With respect to post appeal increases by the prosecutor in the number or severity of the charges, the presumption arises when the sequence of events in the case poses a danger that the State might be retaliating against the accused for lawfully attacking his conviction and suggests a realistic likelihood of vindictiveness. *Blackledge; Thigpen.*"

{¶ 15} Defendant was originally indicted on May 17, 2001 in Case No. 2000-CR-163 on seventy-four counts of telecommunications harassment, R.C. 2917.21(B). Following Defendant's first jury trial in January 2002, Defendant was found guilty of sixty-six counts of telecommunications harassment. We subsequently reversed Defendant's convictions and remanded the matter for a new trial. See: *State v. Cline*, Champaign App. No. 2002-CA-05, 2003-Ohio-4712; and *State v. Cline*, 164 Ohio App.3d 228, 2005-Ohio-5779. Prior to Defendant's retrial, on August 17, 2006 the State indicted Defendant on an additional two hundred and fifty-five counts of telecommunications harassment. Following Defendant's

his claim of vindictive prosecution because Defendant never filed a motion to dismiss the additional telecommunications harassment charges on that basis after the State indicted him on those charges, and he never raised the vindictive prosecution/retaliation by the State issue in the trial court.

We agree.

{¶ 17} Defects in the institution of the prosecution and/or in the indictment must be raised before trial or they are waived. Crim.R. 12(C), (H). As a general rule, an appellate court will not consider any error the trial court committed which a complaining party could have called to the trial court's attention, but did not, at a time when the error could have been avoided or corrected by the trial court. *State v. Childs* (1968), 14 Ohio St.2d 56; *State v. Awan* (1986), 22 Ohio St.3d 120; *State v. Williams* (1977), 51 Ohio St.2d 112.

{¶ 18} Having failed to either file a pretrial motion to dismiss the additional telecommunications harassment charges on the grounds that they were the product of vindictive prosecution/retaliation by the State for Defendant's

{¶ 19} Even were we to assume for the sake of argument that Defendant preserved the issue for appellate review, and that the procedural history and sequence of events in this case supports a likelihood of vindictiveness with respect to the additional telecommunications harassment charges, the State has presented evidence sufficient to rebut any presumption of vindictiveness that arises from its decision to bring the additional charges following Defendant's successful appeal.

{¶ 20} Defendant was originally charged with seventy-four counts of telecommunications harassment. Several of those counts encompassed more than one telecommunication (phone call). While preparing for Defendant's second trial, the prosecutor discovered that grouping together several telecommunications into a single count, as several counts in the original indictment did, could make the indictment defective for duplicity; that is, by joining two or more distinct offenses into a single count. *United States v. Murray* (C.A. 2, 1980), 618 F.2d 892, 896. To avoid such problems, acts capable of being charged as separate offenses

of telecommunications harassment, *State v. Stanley*, Franklin App No. 06AP-65, 2006-Ohio-4632, the prosecutor split those counts that had included more than one telecommunication and charged each separate telecommunication as a separate offense in its own separate count, which resulted in the additional telecommunications charges in counts 86-340.

{¶ 22} We conclude that the reason offered by the State for why it brought the additional two hundred and fifty-five telecommunications harassment charges only after Defendant had successfully appealed his original convictions and won a reversal and a new trial, an explanation the State offered on the record in its motion for joinder of the offenses for trial, reasonably rebuts any presumption of vindictiveness that might otherwise arise from the sequence of events in this case. Defendant has not demonstrated vindictive prosecution/retaliation by the State.

{¶ 23} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 24} "THE TRIAL COURT ERRED BECAUSE APPELLANT'S

intimidation of a crime witness/victim, and telecommunications harassment are against the manifest weight of the evidence.

{¶ 26} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 27} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶ 28} In order to find that a manifest miscarriage of justice occurred, an appellate court must conclude that a guilty verdict is "against," that is, contrary to, the

{¶ 29} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (August 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 30} "[b]ecause the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *Id.*, at p. 4.

{¶ 31} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network, cable service, cable system, telecommunications device, telecommunications service, or information service without the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, computer network, cable service, cable system, telecommunications device, telecommunications service, or information service or other person authorized to give consent."

{¶ 34} In counts one, three, four and five Defendant was charged with accessing the Yahoo internet accounts of Robin Rabook, Betty Smith and Sonja Risner, without their consent, and changing their passwords to those accounts and using those accounts to send unauthorized messages.

{¶ 35} Robin Rabook testified at trial that she briefly dated Defendant after she met him on the Internet. Rabook shared some of her sensitive personal identification information with Defendant. After their relationship ended,

weekend that Defendant and Rabook had spent together, showing Rabook in various stages of undress. After March 2000, Rabook did not use or give anyone else permission to use her previous e-mail account, but on June 10, 2000, the account was used to send a vulgar message to Urbana resident Sonja Risner.

{¶ 36} Zanesville, Ohio resident Betty Smith was intimately involved with Defendant for a period of time after she met him on the Internet. At that time, Smith maintained two Internet accounts. After Smith's relationship with Defendant deteriorated, she was unable to access her Internet accounts because her password had been changed. In addition, Defendant created new accounts for Smith and used those to impersonate Smith and lure men to her home for the purpose of sexual activity. On June 26, 2000, Smith's Internet accounts were used to send vulgar messages to Urbana resident Sonja Risner. Smith testified that she did not send any messages to Risner.

{¶ 37} Sonja Risner testified that she became intimately involved with Defendant after meeting him in an Internet chat room. At that time, Risner had several Internet accounts.

figure. Risner's password for the account had also been changed. Risner never gave Defendant permission to access that account.

{¶ 38} The jury could reasonably conclude from this evidence that Defendant violated R.C. 2913.04(B) because he accessed the Internet accounts created by Rabook, Smith and Risner without their permission. Defendant nevertheless complains that the guilty verdicts are against the manifest weight of the evidence because venue in Champaign County was not proper. Defendant points out that there is no evidence that he directly accessed the personal computer of any of the three victims, Rabook, Smith or Risner, while their computers were located in Champaign County. Rather, Defendant accessed Internet accounts provided by a California based company, Yahoo, which were used by the three victims, and Defendant accessed those accounts using his own computer which is located in Montgomery County. Thus, Defendant claims that he accessed computer networks based in California, and therefore venue in Champaign County was improper. We disagree.

matter, and in the territory of which the offense or any element of the offense was committed.

{¶ 41} ** * *

{¶ 42} "(H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:

{¶ 43} "(1) The offenses involved the same victim, or victims of the same type or from the same group.

{¶ 44} "(2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.

{¶ 45} "(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

{¶ 48} "(6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination.

{¶ 49} "(I) (1) When the offense involves a computer, computer system, computer network, telecommunication, telecommuni-cations device, telecommunications service, or information service, the offender may be tried in any jurisdiction containing any location of the computer, computer system, or computer network of the victim of the offense, in any jurisdiction from which or into which, as part of the offense, any writing, data, or image is disseminated or transmitted by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommuni-cations service, or information service, or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense."

{¶ 50} Defendant's misuse of Rabook's, Smith's, and Risner's Internet accounts was part of a course of continuing criminal conduct involving the same or a similar modus

objective furtherance of the same purpose or objective, the harassment and intimidation of Rabook, Smith and Risner, and especially Risner, who lives in Champaign County. R.C. 2901.12(H)(3). Furthermore, these offenses involved computers and computer networks and the dissemination of data and information using those networks to Sonja Risner, a Champaign County resident. R.C. 2901.12(I). Pursuant to R.C. 2901.12, Champaign County was a proper venue for the unauthorized use of a computer charges in this case. The guilty verdicts are not contrary to the evidence presented by the State.

Conspiracy to Commit Aggravated Arson

{¶ 51} In counts seven and eight Defendant was charged with conspiracy to commit aggravated arson, R.C. 2923.01(A), 2909.02(A), in that he planned with another person, Gina White, to burn down the home of Sonja Risner. Defendant argues that the guilty verdicts are against the manifest weight of the evidence because there is scant evidence to prove that Defendant either solicited another person to commit aggravated arson or that one of the alleged conspirators

or facilitate the commission of aggravated murder, murder, kidnaping, compelling prostitution, promoting prostitution, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, engaging in a pattern of corrupt activity, corrupting another with drugs, a felony drug trafficking, manufacturing, processing, or possession offense, theft of drugs, or illegal processing of drug documents, the commission of a felony offense of unauthorized use of a vehicle, illegally transmitting multiple commercial electronic mail messages or unauthorized access of a computer in violation of section 2923.421 of the Revised Code, or the commission of a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, shall do either of the following:

{¶ 54} "(1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;

{¶ 55} "(2) Agree with another person or persons that one

conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.

{¶ 57} * * *

{¶ 58} "(F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when the offenses are the subject of the same agreement or continuous conspiratorial relationship." (Emphasis supplied).

{¶ 59} R.C. 2909.02(A) provides:

{¶ 60} "(A) No person, by means of fire or explosion, shall knowingly do any of the following:

{¶ 61} "(1) Create a substantial risk of serious physical harm to any person other than the offender;

{¶ 62} "(2) Cause physical harm to any occupied structure;

{¶ 63} "(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk

conspirators in furtherance of the conspiracy that manifests the actor's purpose or intent that the object of the conspiracy should be carried out or completed. *State v. Risner* (1991), 73 Ohio App.3d 19, 23.

{¶ 65} Gina White testified at trial that after she met Defendant on the Internet, he unexpectedly appeared at her residence in West Virginia in September 2000. Defendant said he wanted White or some other person to burn Sonja Risner's house down and kill her by pouring gasoline around the foundation of the home and setting it on fire. Defendant showed White a photograph of Risner, explained where she lived, and wrote Risner's address on a piece of paper. Defendant asked White to help him find people who would be willing to commit this act. Defendant said the person committing the arson would be paid. After leaving White's home, Defendant subsequently called White and asked her whether she had found anyone to burn down Risner's home.

{¶ 66} The jury could reasonably find from this evidence, beyond a reasonable doubt, that Defendant was guilty of

instead informed Risner and contacted police, does not lessen Defendant's criminal liability. *State v. Marian* (1980), 62 Ohio St.2d 250. The guilty verdicts are not contrary to the evidence presented by the State.

{¶ 67} Defendant nevertheless argues that, pursuant to R.C. 2923.01(F), he should have been convicted of only one count of conspiracy because both of the conspiracy offenses are the object of the same agreement or continuous conspiratorial relationship. The trial court obviously agreed, because it merged counts seven and eight for sentencing purposes and Defendant was effectively sentenced only on one count of conspiracy to commit aggravated arson, count seven. However, because R.C. 2923.01(F) bars multiple convictions, Defendant's conviction on count eight will be reversed and vacated. That relief does not affect the sentence the court imposed.

Criminal Mischief

{¶ 68} In count nine Defendant was charged with Criminal mischief, R.C. 2909.07(A)(1), on evidence that he tampered with Sonja Risner's automobile. Defendant argues that the

Risner's vehicle.

{¶ 69} R.C. 2909.07(A)(1) provides:

{¶ 70} "(A) No person shall:

{¶ 71} "(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another."

{¶ 72} Ohio's complicity statute, R.C. 2923.03, provides in relevant part:

{¶ 73} "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶ 74} "(1) Solicit or procure another to commit the offense;

{¶ 75} "(2) Aid or abet another in committing the offense;

{¶ 76} "(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

{¶ 77} "(4) Cause an innocent or irresponsible person to commit the offense.

{¶ 80} "(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶ 81} Sonja Risner testified at trial that Gina White told her during a phone conversation that Defendant had put mothballs in her vehicle. Risner took her vehicle to a mechanic who discovered the gas cap was missing and that there were mothballs in the neck of the gas tank. The fuel filler door was accessible only from inside Risner's vehicle, and the mechanic found scratches on the driver's window. Even though Risner did not discuss any of this with Defendant, he sent Risner an e-mail asking her if she had purchased a new gas cap. Gina White testified at trial that while Defendant was at her home in West Virginia he admitted that he had hired someone to tamper with Risner's gas tank.

{¶ 82} The jury could reasonably conclude from this testimony that Defendant improperly tampered with Sonja

{¶ 83} In count ten Defendant was charged with intimidation of a crime victim, Sonja Risner, in violation of R.C. 2921.04(B), because he knowingly and by unlawful threat of harm attempted to influence, intimidate or hinder Risner in filing or the prosecution of criminal charges. Defendant argues that the guilty verdict is against the manifest weight of the evidence, inasmuch as the State's evidence regarding letters found in Defendant's Wayne County, Indiana, jail cell does not support the charge because those letters were never mailed, and the only other evidence supporting this charge related to Risner's name and address found written in library books available to inmates at the Wayne County, Indiana, jail.

{¶ 84} R.C. 2921.04(B) provides:

{¶ 85} "(B) No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or

Sewell obtained Risner's address and other information about her from Defendant. Defendant wrote this information in a library book that Sewell had given Defendant. The information written in the library book not only included Risner's name and address but also indicated that Risner is a "whore." Sonja Risner testified that she received unwanted correspondence from at least two inmates who were at the Wayne County jail.

{¶ 87} Deputy Randy Wright of the Wayne County Sheriff's Office testified regarding his investigation of the letters sent to Sonja Risner by inmates in the Wayne County jail. The jail makes library books from a Richmond, Indiana public library available to its inmates. Several books in the jail's library were found to contain information about Risner and Betty Smith. These books were found in three jail cells, including those of Defendant and Kenosis Sewell. During a search of Defendant's jail cell, five letters addressed to Sonja Risner and an envelope with Risner's address was also found. A sixth letter addressed to a man named Jason was also

statement that Defendant would get some guns and kill Risner.

{¶ 88} The jury could reasonably conclude from this evidence, beyond a reasonable doubt, that Defendant wrote information about Risner in library books at the Wayne County, Indiana, jail as part of a campaign to get other inmates to contact Risner, that some of them did, and that Defendant composed letters addressed to Risner and other people in which Defendant threatened to harm Risner and urged others to do likewise. This evidence demonstrates that Defendant knowingly and by unlawful threat of harm attempted to influence, intimidate or hinder Risner in the filing or prosecution of criminal charges. The guilty verdict is not contrary to the evidence presented by the State, and the credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury, to determine.

DeHass.

Telecommunications Harassment

{¶ 89} Defendant was found guilty of one hundred and seventy-six counts of telecommunications harassment, R.C.

against the manifest weight of the evidence because there is little direct evidence that Defendant made those telecommunications, and in many instances the witnesses who received the calls could not identify the caller and were not in any event harassed or annoyed by those calls.

{¶ 90} R.C. 2917.21(B) provides:

{¶ 91} "No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person."

{¶ 92} The gravamen of the offense of telecommunications harassment is not whether the person who received the call was in fact threatened, harassed or annoyed by the call, but rather whether the purpose of the person who made the call was to abuse, threaten or harass the person called. *State v. Bonifas* (1993), 91 Ohio App.3d 208. If a defendant's purpose or intent in making the call cannot be proved by direct evidence, it may be established by circumstantial evidence; the facts and circumstances surrounding the call. *State v.*

testified that Defendant has a cellular telephone account with Cincinnati Bell. Several victims in this case reported objectionable phone calls they received to Urbana police. Foltz's testimony demonstrates that those calls originated from Defendant's cell phone. Foltz testified that between November 2, 2000 and December 2, 2000, 3,820 telephone calls were placed from Defendant's cell phone to Urbana area phone numbers, an average of one hundred and twenty-three calls a day. It can reasonably be inferred from this evidence that Defendant was the source of the phone calls.

{¶ 94} Sonja Risner testified about e-mails she received from Defendant containing sexual, vulgar, and obscene references. Defendant ordered magazine subscriptions and other items for Risner without her consent, using personal information he obtained from Risner. Defendant also contacted several businesses in Champaign County, purportedly on Risner's behalf, including two realtors, an exterminator, an insurance agent and a towing company. Those entities solicited Risner's business as a result of Defendant's

whereabouts and learn her new telephone number. Defendant also telephoned several people who knew Risner and various Urbana officials, and gave them information about Risner, including allegations that she was promiscuous and a prostitute. Defendant made numerous phone calls to Chris Ropp, Risner's future husband, and Ronald Ropp, Risner's future father-in-law, telling them that Risner was a "whore" and that something bad was going to happen to her. Defendant suggests that the calls to Chris Ropp should have been combined with the calls to Ronald Ropp and considered as but one offense because Chris lived in his father's home, which has one phone line, and all of the calls were made to that one phone number. We reject such a contention because each call to each recipient constitutes a separate offense under R.C. 2917.21(B).

{¶ 96} The jury could reasonably conclude from this evidence that Defendant's purpose in making the phone calls was to abuse, harass or threaten Sonja Risner and others who knew her, which violates R.C. 2917.21(B). The guilty verdicts

witnesses, or that a manifest miscarriage of justice occurred.

Defendant's convictions are therefore not against the manifest weight of the evidence. However, because R.C. 2923.01(F) prohibits Defendant's multiple convictions for conspiracy to commit aggravated arson, his conviction for the charge in count eight will be reversed and vacated.

{¶ 98} Defendant's second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

{¶ 99} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY SENTENCING APPELLANT TO A DISPROPORTIONATE SENTENCE."

FOURTH ASSIGNMENT OF ERROR

{¶ 100} "THE TRIAL COURT ERRED BY IMPOSING A SENTENCE UPON APPELLANT IN VIOLATION OF THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION."

{¶ 101} These related assignments of error raise the same issue: whether Defendant's punishment is disproportionate to the offenses he committed.

total aggregate sentence of fifty-eight and one-half years, is grossly disproportionate to the crimes he committed. Defendant points out that, given his age (39), his fifty-eight and one-half year sentence is for practical purposes a life sentence, and that out of the one hundred and eighty-five counts he was found guilty of committing, one hundred and eighty of those, including all of the telecommunications harassment charges and the four unauthorized use of a computer charges, are low level felonies of the fifth degree.

{¶ 103} In his fourth assignment of error, Defendant argues that his punishment is so grossly disproportionate to the crimes he committed that it violates the Eighth Amendment's cruel and unusual punishment clause.

{¶ 104} The record of the November 14, 2006 sentencing hearing amply demonstrates that the trial court considered the purposes and principles of felony sentencing, R.C. 2929.11, and the seriousness and recidivism factors in R.C. 2929.12. The court also considered the nature and magnitude of Defendant's offenses, his complete lack of remorse, and his

R.C. 2929.14(A).

{¶ 105} After *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the appellate court's standard of review when examining felony sentences is an abuse of discretion. *State v. Slone*, Greene App. No. 2005CA79, 2007-Ohio-130. That standard connotes more than a mere error of law or judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151. Ordinarily, a trial court does not abuse its discretion when it imposes a sentence within the permissible range authorized by R.C. 2929.14(A). *State v. Cowan*, 167 Ohio App.3d 233, 2006-Ohio-3191, at ¶22.

{¶ 106} With respect to proportionality and consistency in felony sentencing, R.C. 2929.11(B) states that sentence shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." This provision does not mandate specific findings. Rather, it sets forth

court by offering a basis on which to compare his sentence with both sentences in more serious crimes and with the sentences imposed upon similarly situated defendants charged with similar crimes.

{¶ 107} Nevertheless, the trial court did discuss the issue of proportionality during sentencing. The trial court indicated that it was aware of a number of other cases involving telephone harassment, and that none of those other cases even remotely approach the magnitude of Defendant's criminal conduct in this case, which the court characterized as "staggering and mind boggling." The court considered the manner in which Defendant spoke about the victims, the wide circulation given to that, and the fact that this conduct was often accompanied by threats against the victims. The court noted that the sheer magnitude of Defendant's conduct makes this case unique. For example, in a one month period Defendant placed over 3,800 phone calls, an average of nearly 130 calls per day. The trial court observed that when one considers all the facts and circumstances, it is difficult to

complete lack of any remorse on Defendant's part, and Defendant's history of criminal convictions which includes a pattern of criminal conduct strikingly similar to his conduct in the present case, we cannot find that Defendant's sentence is grossly disproportionate to the offenses he committed, given the need to (1) punish Defendant and (2) protect the public from future crime by Defendant. R.C. 2929.11(A). No abuse of discretion by the trial court has been demonstrated.

{¶ 109} Defendant also complains that the sentences imposed violate his Sixth Amendment rights per *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. Defendant has forfeited his right to argue a *Blakely* issue on appeal because he failed to raise that objection at the time of sentencing. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642; *State v. Dixon*, Montgomery App. No. 21796, 2008-Ohio-184. Even so, the record does not demonstrate a violation of Defendant's Sixth Amendment rights.

{¶ 110} The Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution

moral sense of the community. *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68; *State v. McConnell*, Montgomery App. No. 19993, 2004-Ohio-4263.

{¶ 111} We cannot find that Defendant's fifty-eight and one-half year sentence is shocking to the moral sense of the community, given the magnitude and heinous nature of his offenses, which we have already discussed. Defendant harassed three women after they terminated intimate relationships with him. In particular, Defendant terrorized Sonja Risner by stalking her, tampering with her motor vehicle, plotting to burn down her house, and threatening her life. Defendant systematically engaged in a pattern of sadistic criminal conduct designed to harass and intimidate Risner. Even after Defendant was arrested in Wayne County, Indiana, he encouraged inmates at the county jail to contact Risner, and several of them did so.

{¶ 112} Defendant's harassment campaign included not only Risner but also people who knew her. Defendant left obscene telephone messages for people simply because they knew

Moreover, Defendant previously engaged in similar conduct in relation to another victim in Montgomery County.

{¶ 113} In short, Defendant sought to emotionally destroy Sonja Risner, and given the magnitude and far-reaching nature of his criminal conduct and its effects on Risner and her family and friends, it cannot be said that Defendant's sentence is so grossly disproportionate to his offenses that it shocks the moral sense of the community and constitutes cruel and unusual punishment.

{¶ 114} Defendant's third and fourth assignments of error are overruled.

FIFTH ASSIGNMENT OF ERROR

{¶ 115} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE TERMS OF INCARCERATION BY FAILING TO MAKE REQUIRED FINDINGS AND STATEMENTS REQUIRED PURSUANT TO O.R.C.2929.14 AND 2929.19."

{¶ 116} Defendant argues that the trial court failed to make the findings necessary to impose consecutive sentences as required by R.C. 2929.14(E)(4), and further failed to

in fact make the statutory findings required for imposing more than minimum sentences, R.C. 2929.14(B)(1) and (2), maximum sentences, R.C. 2929.14(C), and consecutive sentences, R.C. 2929.14(E)(4), and articulated its reasons for those sentences. R.C. 2929.19(B)(2).

{¶ 118} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-956, the Ohio Supreme Court, applying the rule of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, declared R.C. 2929.14(B), (C), (E)(4) and R.C. 2929.19(B)(2) unconstitutional and severed those provisions from the remainder of the sentencing statutes. The Court stated that trial courts have full discretion to impose any sentence within the applicable statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences.

Id. at Syllabus ¶7. *Foster* applies to cases that were on direct appeal or still pending in the trial court when *Foster* was decided. *State v. Dunn*, Montgomery App. No. 21553, 2007-Ohio-1666, at ¶10.

of this matter for a new trial in Defendant's direct appeal. Therefore, *Foster* applies to this case. However, as we noted above, because Defendant's sentences were imposed after *Blakely* was decided and Defendant failed to raise a *Blakely* objection when his sentences were imposed, he has forfeited any *Foster* error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642.

{¶ 120} Defendant's fifth assignment of error is overruled.

Conclusion

{¶ 121} Having sustained the second assignment of error, in part, we will reverse and vacate Defendant's conviction and sentence for the conspiracy to commit aggravated arson offense charged in count eight of the indictment. The second assignment of error is otherwise overruled. The remaining assignments of error are overruled, and with respect to them, the judgment of the trial court will be affirmed.

Scott D. Schockling, Esq.
Virginia L. Crews, Esq.
Hon. Roger B. Wilson

FILED

Copies mailed to:

APR 18 2008

Scott D. Schmeling
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STATE OF OHIO 3078

EDWARD L. PASTOR
CLERK OF COURT OF APPEALS

Virg. Plaintiff-Appellee
7501 Paragon Road
Wayton, OH 45459

C.A. CASE NO. 07CA02

T.C. CASE NO. 00CR163

JAMES M. CLINE Wilson
200 North Main Street
Urban Defendant-Appellant

FINAL ENTRY

(E)

Pursuant to the opinion of this court rendered on the
18th day of April, 2008, the Defendant's
conviction and sentence for conspiracy to commit aggravated
arson (Count Eight) is Reversed and Vacated. In all other
respects, the judgment of the trial court is Affirmed. Costs
are to be paid as follows: 50% by Appellant and 50% by
Appellee.

5-29-2012

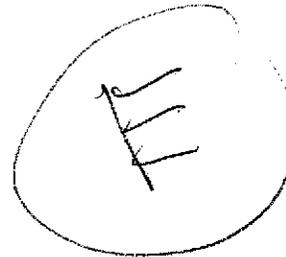

WILLIAM H. WOLFF, JR. PRESIDING JUDGE

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AIS. pg. 262

The Supreme Court of Ohio

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DEC 03 2008

CLERK OF COURT
SUPREME COURT OF OHIO

James M. Cline

Case No. 2008-1825

v.

IN MANDAMUS

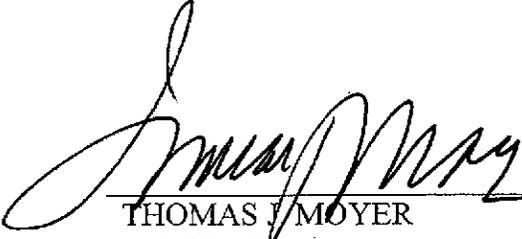
Second Appellate District Court Judges
James A. Brogan, William H. Wolff, Jr.,
Mike Fain, Thomas J. Grady, and Mary
Donovan

ENTRY

(E)

This cause originated in this Court on the filing of a complaint for a writ of mandamus. Upon consideration of respondents' motion to dismiss,

It is ordered by the Court that the motion to dismiss is granted. Accordingly, this cause is dismissed.


THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS, CHAMPAIGN COUNTY, OHIO

STATE OF OHIO,

*

Plaintiff,

*

Case #2000-CR-0163

-VS-

*

JAMES M. CLINE,

*

Journal Entry

Defendant.

*

* * * * *

This case was considered by the Court on the State's motion filed on August 29, 2008, to correct journal entry of judgment conviction and sentence filed November (sic) 21, 2006.

The Court has reviewed the transcript of the sentencing hearing. The Court ordered, at sentencing, that the property be forfeited. A copy of the pertinent pages is attached.

Under the authority of Criminal Rule 36, the sentencing entry filed December 21, 2006 is amended, and all property is forfeited.

Defendant to pay costs.

ROGER B. WILSON
JUDGE

CLERK OF COURT
CHAMPAIGN COUNTY, OHIO

2008 SEP 25 AM 8:

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1 nothing.

E/k

2 THE COURT: Thank you. That will be all
3 then.

4 Do you need to speak with your client?

5 MR. MOONEY: I would like to speak with
6 him before he goes back to Tri-County Jail, Your Honor.
7 Yes.

8 THE COURT: You may do so.

9 MR. SELVAGGIO: Judge, I'm sorry. There
10 is one other thing.

11 With regard to disposition of the
12 property, we would ask that that be forfeited to the
13 Urbana Police Division.

14 THE COURT: Thank you. Did the Defense
15 wish to take a position on that? He has asked for
16 forfeiture of the property.

17 MR. MOONEY: No. Well, I'm sure my client
18 would object to that. He would like not only to have
19 it preserved until such time as his appellate rights
20 have been exhausted. Also I don't personally believe
21 this to be an issue, but Mr. Cline would like to make
22 sure he's given jail time credit for the time he's been

6/K

1 THE COURT: Thank you.

2 The property is ordered forfeited, but
3 it's to be maintained until the appellate process is
4 complete.

5 Jail time credit will be calculated.
6 There is also prison time credit and both of those will
7 be included in the sentencing entry. We have not
8 calculated it, but he'll receive it for all the time
9 he's served here.

10 Does your client wish to speak?

11 MR. MOONEY: I think he does.

12 DEFENDANT CLINE: Are you going to say on
13 the record to instruct Mr. Mooney to file the notice of
14 appeal?

15 MR. MOONEY: I have mentioned that the
16 Court already has done that.

17 THE COURT: I have done that.

18 DEFENDANT CLINE: Okay.

19 THE COURT: He has the responsibility for
20 timely filing the notice of appeal that you have
21 requested. Carry on.

22 MR. MOONEY: Thank you, Your Honor. 28

Exhibit H

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 07CA02

vs. : T.C. CASE NO. 00CR163

JAMES M. CLINE :

Defendant-Appellant :

DECISION AND ENTRY

Rendered on the 5th day of February, 2009.

PER CURIAM:

This matter is before the court on an App.R. 26(B) application to reopen his appeal on a claim of ineffective assistance of appellate counsel filed by Defendant-Appellant, James Cline, pro se.

An application to reopen must contain "[o]ne or more assignments of error or arguments in support of assignments of

Exhibit H

The requirements imposed by App.R. 26(B)(1)(c) correspond to the deficient performance and prejudice elements that an ineffective assistance of counsel claim involves. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Biros* (2001), 93 Ohio St.3d 250. An application filed pursuant to App.R. 26(B) must show a colorable claim for relief in those respects in order to be granted.

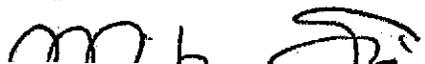
The application that Cline filed wholly fails to satisfy App.R. 26(B)(1)(c). Cline refers to unidentified "newly discovered evidence," which, being newly-discovered, could not have been a basis for relief in the prior appeal, and to "case law to overturn conviction," which is likewise unidentified. The application is Denied.

Cline's motion for an extension of time to file a reply memorandum is overruled.

So Ordered.



JAMES A. BROGAN, JUDGE



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Urbana, OH 43078

The Supreme Court of Ohio

OFFICE OF THE CLERK

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
THOMAS J. MOYER

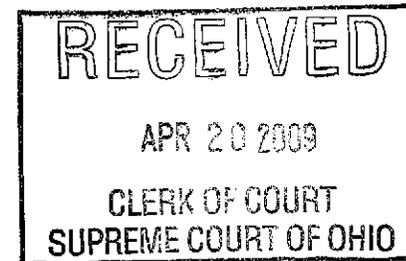
CLERK OF THE COURT
KRISTINA D. FROST

JUSTICES
PAUL E. PFEIFER
EVELYN LUNDBERG STRATTON
MAUREEN O'CONNOR
TERRENCE O'DONNELL
JUDITH ANN LANZINGER
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TELEPHONE 614.387.9530
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www.supremecourt.ohio.gov

April 2, 2009

James M. Cline 418-660
Southern Ohio Correctional Facility
P.O. Box 45699
Lucasville, OH 45699



Dear Mr. Cline:

The enclosed documents were not filed and are being returned because your affidavit of indigency does not meet the requirements of the Rules of Practice of the Supreme Court of Ohio. Rule XV, Section 3 states that the affidavit of indigency shall be executed within six months prior to being filed in the Supreme Court. The affidavit of indigency you submitted was notarized on September 2, 2008. Therefore, it could not be accepted for filing after March 2, 2009.

Additionally, you did not include the court of appeals opinion that accompanies the April 18, 2008 judgment you are appealing. Pursuant to Rule II, Section 2(A)(4)(a), a copy of both the opinion and judgment entry must be attached to a motion for delayed appeal.

You may correct the above-noted items and resubmit your documents for filing. Enclosed with this letter is a blank affidavit of indigency that will meet the requirements for filing if you state the reasons you can not afford the filing fee and have it notarized. For additional guidance, please refer to the copy of the Rules of Practice of the Supreme Court of Ohio on file with your institution's library.