

ORIGINAL

IN THE SUPREME COURT OF OHIO

CHRISTOPHER ROGERS	:	On Appeal from the Fayette
	:	County Court of Appeals,
APPELLANT,	:	Tenth District
	:	
V.	:	Court of Appeals
	:	Case No. CA2004-06-14
	:	
STATE OF OHIO	:	
	:	
APPELLEE,	:	
	:	

09-1027

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MEMORANDUM IN SUPPORT OF JURISDICTION FOR APPELLANT,  
CHRISTOPHER ROGERS

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SUPREME COURT OF OHIO

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EXPLANTATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL  
QUESTION

This matter comes before the court to determine if the 90 day rule instituted for reopening direct appeals is one that is unduly burdensome on appellant's practicing before intermediate state appellate courts.

In this matter there were three issues that current counsel believed prior counsel missed. It is a rule that can be overcome but the subjective test of what constitutes good cause requires some clarification by this court.

If Appellant is correct and the standard should be more lenient it may allow many more applications to reopen to be filed untimely. However, the focus should be on a through review of all criminal matters and not judicial economy or expediency.

Ohioans should all be concerned with whether or not a full review is had of criminal matters and whether a matter of a deadline makes the difference between review and denial.

## STATEMENT OF THE CASE AND FACTS

### *Statement of the Facts*

On January 17, 2003, appellant and Nathan Soward, along with several other friends, spent the evening together, drinking alcohol, smoking marijuana, and using cocaine. Appellant later phoned W.B., a minor, and invited him to join the group. Witnesses claim they overheard Appellant telling W.B. that “[it] was going to go down like Tupac.” W.B. and another friend, J.Y., also a minor, went to appellant's apartment where more drugs were consumed.

In the early morning hours of January 18, 2003, Soward was ready to leave and he, J.Y., and appellant departed in appellant's truck. At trial, J.Y. testified that appellant was too intoxicated to drive; consequently, J.Y. drove. While they were traveling, and without warning, J.Y. heard two gunshots, turned, and saw Soward slump over. Shocked and upset over this turn of events, he stopped the truck, got out, and climbed into the bed of the truck. He told appellant he wanted to go home and appellant started driving. A short time later appellant stopped along an isolated road, and after a few moments, J.Y. got back inside the truck and discovered that Soward's body was no longer there. Appellant testified that he was the driver and without warning, heard two shots, and saw Soward slump over. He testified that he and J.Y. then drove to an isolated area and J.Y. asked him to help move Soward's body.

The next day appellant power washed his truck and laundered his clothing, including the coat he had been wearing. W.B. washed and bleached the gun, and he and J.Y. later gave it to a drug dealer in exchange for marijuana. Appellant recounted the previous night's events to W.B., telling him that he had shot Soward in the head and

described disposing of his body. Soward's body was soon after discovered by a passersby in an isolated area of Fayette County. A few days later appellant was arrested on a probation violation and questioned about the murder. After numerous hours of questioning by police, he implicated himself in the murder and provided a written confession which stated: "The death of Nathan Sowards was caused by a gunshot fired by Chris Rogers."

*Statement of the Case*

On February 7, 2003, an indictment was filed charging the Appellant with one count of aggravated murder and one count of tampering with evidence. On May 12, 2004, a jury convicted appellant of aggravated murder and tampering with evidence for his role in the death of Nathan Soward. The trial court sentenced appellant to life in prison, with the possibility of parole in 20 years, for the aggravated murder conviction and five years in prison for tampering with evidence. The court ordered the sentences to run consecutively and also ordered appellant to pay a \$10,000 fine.

Appellant appealed both his conviction and sentence. The Twelfth District affirmed appellant's conviction, but vacated his sentence and remanded the case for resentencing on the basis that the trial court failed to notify appellant about post-release control at the sentencing hearing and failed to incorporate post-release control into the judgment entry. *State v. Rogers*, Fayette App. No. CA2004-06-014, 2005-Ohio-6693; *State v. Bezak*, 114 Ohio St.3d, 94, 868 N.E.2d 961, 2007-Ohio-3250.

On remand, the trial court held a sentencing hearing, and imposed a sentence of life in prison with the possibility of parole after 20 years for aggravated murder, and a

consecutive three-year sentence for tampering with evidence. The court imposed fines, but suspended those fines on a finding that appellant was indigent.

Appellant appealed again to the twelfth district court of appeals which denied relief on July 23, 2007.

The Ohio Supreme Court refused to hear the matter on or about December 26, 2007. 90 days from that date is March 25, 2008.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

*Proposition of law # 1*

### ***THE APPELLATE COURT ERRED IN DISMISSING THE APPLICATION PURSUANT TO APPELLATE RULE 26 AS UNTIMELY***

In this matter, Appellant was represented by the state public defender's office beginning on or about February 2, 2005 until early 2008. Prior counsel for the appellant correctly stated that he could not file an application to reopen alleging his own ineffectiveness. *See attached copy of correspondence.*

Further, the defendant's life was in danger in the prison system and it was difficult if not impossible for him to raise these issues, pro se, while those other safety issues were occurring.

New counsel was not hired until long after the expiration of the 90 day rule established in Appellate rule 26.

Counsel could not be expected to argue their own ineffectiveness. *State v. Davis* (1999), 86 Ohio St.3d 212, 214, 714 N.E.2d 384. But then, there is no right to counsel on an application to reopen. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 21-22; *Lopez v. Wilson* (C.A.6, 2005), 426 F.3d 339, 352-353. Lack of counsel cannot be accepted as good cause for the late filing of application. See *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, 833 N.E.2d 289, ¶ 8.

*Proposition of law # 2*

***APPELLANT'S CONVICTION FOR AGGRAVATED MURDER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE***

*Rule prohibiting convictions against the manifest weight of the evidence*

Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief."

*Black's Law Dictionary, 6<sup>th</sup> Edition at 1594.*

*Rule stating prior calculation and design is a necessary element of aggravated murder*

The state can prove "prior calculation and design" from the circumstances surrounding a murder in several ways: (1) evidence of a preconceived plan leading up to the murder, (2) evidence of the perpetrator's relationship with the victim, including evidence of any strains in that relationship, or (3) evidence that the murder was executed in such a manner that circumstantially proved the defendant had a preconceived plan to kill. *State v. Cassano, 96 Ohio St.3d 94, 2002-Ohio-3751.*

Prior calculation and design can be found even when the killer quickly conceived and executed the plan to kill within a few minutes. *State v. Coley (2001), 93 Ohio St.3d 253, 264.*

*Facts*

*Allegation that Appellant said "it's going to go down Tupac style."*

**Marlena Hill** claims, although she did not know to whom he was speaking, that Appellant stated, "It's gonna go down like at 2:00 o'clock tonight." *T.P. 66 of volume 6 at line 10-11.* This witness was admittedly under the influence of alcohol (Vodka). *T.P. 97 of volume 6 at lines 6-11.* Later on cross she stated, "it was going to go down like Tupac tonight." *T.P. 96 of volume 6.*

**Ashley Hook** claims, although she doesn't know to whom it was said, that Appellant stated, "it was gonna go down like Tupac tonight." *T.P. 130 of volume 6 at lines 2-5.*

*Allegation that Appellant only had three passengers as proof of premeditation*

**Marlena Hill** stated that Appellant told her that he did not want to get pulled over by riding four deep in the truck. *T.P. 70 of Volume 4 at lines 1-2*

**Ashley Hook** claims that Appellant stated he would make a second trip to take Nathan Sowards home. *T.P. 133 at lines 1-4.*

**William Bennet** states that Appellant said nothing about the thought of the decedent going with him on the trip to take the girls home. *T.P. 91 of volume 10 at lines 15-17.*

**Josh Yates** claims that Appellant stated there wasn't enough room in the truck. *T.P. 229 of volume 10 at line 20.*

*Why was the gun in the car?*

**Josh Yates** did not know that the gun was in the car. *T.P. 235 of volume 10 at lines 14-15.* Appellant stated he didn't carry the gun around with him. *T.P. 56 of Volume 11 at lines 14-16.*

*Allegation of how the murder occurred*

The only people who know what happened in the truck are Joshua Yates, Nathan Sowards and the Appellant. **Joshua Yates** stated that the Appellant just shot the decedent unexpectedly. *T.P. 235 of volume 10 at lines 2-21.*

Nathan's body is placed in a random cornfield in Fairfield County.

*Appellant's allegation*

Appellant told the jury that Josh Yates killed the decedent. *T.P. 95-96 of volume 11.*

*Analysis*

*No one can believe that a disagreement about a phone call led to murder*

Apparently, the government placed this story regarding a cell phone call to show that Appellant was enraged enough to kill Nathan Sowards. Unfortunately, the argument between Ms. Hill and Appellant dissipated long before the decedent was shot.

*No one said that it's going down Tupac style*

The government places its entire theory of premeditation on a statement allegedly overheard by Hill and Hook. One (Hill) said in court, "it's going down at two o'clock tonight." *T.P. 66 of volume 6 at line 10-11.* The other (Hook) stated it's going down like Tupac tonight. *T.P. 130 of volume 6 at lines 3-5.* Neither knew who the Appellant was talking to on the night in question.

The witnesses who testified about a grand design in the mind of the Appellant were drinking. *T.P. 97 of volume 6 at lines 6-11; T.P. 123 of volume 6 at lines 6-8.*

*Appellant's truck only sat three comfortably*

On direct, Josh Yates stated the maximum that could fit in the defendants truck was three. *T.P. 234 at lines 12-14.*

Appellant was not taking the two girls home without Nathan because of some diabolical plan to murder Nathan Sowards. He was only taking three people because that's all his truck could hold.

*The gun was in the car*

No one asked Appellant if he brought the gun into the car. While it can be presumed, there is no evidence that as a premeditated act he brought the gun to kill Nathan Sowards. No one asked the question. While someone brought the gun, it cannot be stated with certainty when or how the gun was brought to the truck. There was testimony that both Josh Yates and the decedent were looking for the gun while Appellant was driving the girl's home. *T.P 132 of Volume 10 at liens 2-18.*

*There was not enough evidence to show premeditation in this case*

It has been said that the discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

Obviously, the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

No one can state when, how, or if the gun got into the hands of the appellant. Once there two shots were fired at the decedent. There was, according to Josh Yates, no argument between the two men. However, Josh had argued with Nathan Sowards the prior evening. *T.P. 130 at lines 15-21; T.P. 131 lines 1-5.*

Prior calculation and design can be found even when the killer quickly conceived and executed the plan to kill within a few minutes. See, e.g., *State v. Palmer* (1997), 80 Ohio St.3d 543, 567-568, 687 N.E.2d 685, 706 (road-rage double homicide that quickly occurred after traffic accident); *State v. Taylor*, 78 Ohio St.3d at 20-23, 676 N.E.2d at 89-91 (chance encounter in bar between rivals for another's affections).

. Here, Appellant admittedly used cocaine, marijuana and alcohol on the evening the decedent was murdered. *T.P. 80-81 of volume 11*. It is difficult to imagine that he was developing any concrete plan to murder the decedent while under the influence of alcohol, marijuana and cocaine.

Voluntary intoxication is not an excuse for the commission of a crime. However, where a specific intent is an essential element of the crime, an accused may argue intoxication rendered him incapable of forming the necessary intent to commit the crime.

In *State v. Fox* (1981), 68 Ohio St.2d 53, the Ohio Supreme Court held evidence of intoxication may be considered to negate an intentional element of the crime, explaining: "The common law and statutory rule in American jurisprudence is that voluntary intoxication is not a defense to any crime. An exception to the general rule has developed, where specific intent is a necessary element, that if the intoxication was such as to preclude the formation of such intent, the fact of intoxication may be shown to negate this element. See 8 *A.L.R.3d* 1236, *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*.

In such a case, intoxication, although voluntary, may be considered in determining whether an act was done intentionally or with deliberation or premeditation. *State v. French* (1961), 171 Ohio St. 501, 502.

When viewing this murder through the fog of Appellant's intoxication one must realize there was no plan. This was the action of a scared, drunk teenager who for whatever reason took the life of the decedent.

Another fact is that the truck ran out of gas shortly after the murder. *T.P. 263 of volume 10 line 16-21*. If Appellant had thought this matter out, he certainly would have checked the gas gauge and ensured he had enough gas to dispose of the body after the killing. Running out of gas is more the actions of a scared teenager than a premeditated killer.

Appellant prays that this court allow this matter to be re-opened and examine this assignment of error on its merits.

***Proposition of law # 2***

***THE TRIAL COURT COMMITTED PLAIN ERROR WHEN ALLOWING DISCUSSION OF A POLYGRAPH BY THE GOVERNMENT AND VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS UNDER THE FEDERAL CONSTITUTION***

***Rule prohibiting the discussion of a polygraph***

As a general rule, results of polygraph tests are not admissible to prove the guilt or innocence of the accused because such tests have not been recognized by the scientific community as being a reliable method for determining the veracity of the examinee. *State v. Rowe* (1990), 68 Ohio App.3d 595, 609, 589 N.E.2d 394; *State v. Hegel* (1964), 9 Ohio App.2d 12, 13, 222 N.E.2d 666.

Pursuant to this general rule, some courts have also held that, in addition to the results of a polygraph test, testimony expressing either the willingness or the refusal to submit to a polygraph examination should not be admitted in evidence. *Hegel*, 9 Ohio

*App.2d at 13, 222 N.E.2d 666; State v. Smith (1960), 113 Ohio App. 461, 463-65, 178 N.E.2d 605.*

*The prosecutor asked the defendant about his willingness to take a polygraph*

The prosecutor and defendant had this exchange:

Q: Did you ever ask for a polygraph?

A: Yes I did

Q: During the interview you did?

A: Yes

Q: Did you ever ask for a polygraph after the interview?

A: Ah, yes I did

Q: And where, who did you ask that of?

A: at one time I had a public defender and uh I asked him if we could arrange one.

*T.P. 136 of volume 11 at lines 14-21;*

*T.p. 137 of volume 11 at lines 1-2.*

*Applying the plain error in this case*

The prosecutor asking the defendant about his willingness to take a polygraph test deviated from the legal rule forbidding such a question. *Hegel, 9 Ohio App.2d at 13, 222 N.E.2d 666; State v. Smith (1960), 113 Ohio App. 461, 463-65, 178 N.E.2d 605.*

This defect was obvious from the record. *T.P. 136 of volume 11 at lines 14-21; T.p. 137 of volume 11 at lines 1-2.*

The substantial right affected in this case was the Appellant's right to a fair trial guaranteed by the Sixth amendment to the Federal Constitution and Article one Section ten of the Ohio Constitution. This right was affected by the actions of the prosecutor.

The focus of an inquiry into allegations of prosecutorial misconduct is upon the fairness of the trial, not upon culpability of the prosecutor. *State v. Hill*, 75 Ohio St.3d 195, 203, 1996-Ohio-222, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78. The Ohio Supreme Court has held that prosecutorial misconduct is not grounds for error unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, 473 N.E.2d 768.

In this case the defendant has been denied a fair trial by the prosecutor introducing facts that should have never reached the jury.

***Proposition of law # 3***

***APPELLANT'S CONFESSION WAS NOT VOLUNTARY***

***Miranda and Voluntary Confessions***

***Facts in this case***

Appellant questioned whether or not he had rights contained in the fifth and sixth amendment. *T.P. 112 of transcript*. It is clear that the Appellant was not thinking clearly. *T.P 117, 120 of interrogation transcript*.

Appellant stated that he wanted a lawyer but the officers persisted in questioning him. *T.P. 5*. Appellant requested to speak with his father numerous times. *T.P. 68, 69, 78, 101, 111*.

Appellant was under severe psychological pressure to confess. This pressure was repeatedly reported to the police by Appellant. *T.P. 90, 120*.

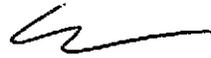
Appellant was confronted with officers stating they were not playing games anymore. *T.P. 134*. As a result he writes a statement that purportedly incriminates him.

### CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question.

The appellant requests that this court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,



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### PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent via Regular U.S. mail to the Fayette County Prosecutor this 5<sup>th</sup> day of June, 2009.



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**Appendix**

Fayette County Court of Appeals Decision, May 20, 2009.....1-4

IN THE COURT OF APPEALS FOR FAYETTE COUNTY, OHIO  
MAY 20 2009

*Evelyn A. Rantzen*  
CLERK OF COURTS

STATE OF OHIO, :  
Appellee, : CASE NO. CA2004-06-014  
- vs - :  
CHRISTOPHER ROGERS, : ENTRY  
Appellant. : DENYING APPLICATION  
: FOR REOPENING

This matter came on to be considered upon an application for reopening filed pursuant to App.R. 26(B) by counsel for appellant, Christopher Rogers, on January 23, 2009, and a memorandum in opposition filed by counsel for appellee, the state of Ohio, on January 29, 2009.

Following a jury trial, appellant was found guilty of one count each of aggravated murder and tampering with evidence. The trial court sentenced appellant on the aggravated murder charge to life imprisonment with the possibility of parole after 20 years, with a consecutive five-year prison term for tampering with evidence.

On direct appeal this court affirmed appellant's convictions, but vacated appellant's sentence and remanded the case for resentencing. *State v. Rogers*, Fayette App. No. CA2004-06-014, 2005-Ohio-6693, appeal denied 109 Ohio St.3d 1457, 2006-Ohio-2226. Appellant filed a second direct appeal after he was resentenced and this court affirmed the judgment of the lower court. See *State v. Rogers*, Fayette App. No. CA2006-09-036, 2007-Ohio-3720, appeal denied 116 Ohio St.3d 1457, 2007-Ohio-6803. Appellant now seeks to reopen the direct appeal in

Case No. CA2004-06-014.

App.R. 26(B)(1) requires that an application for reopening be filed "within ninety days from the journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." This court journalized its judgment entry in Case No. CA2004-05-014 on December 19, 2005. Thus, absent good cause for filing late, appellant's application was due on March 19, 2006.

Appellant attempts to establish good cause for his late filing by claiming: that he was represented by the state public defender's office from February 2, 2005 until early 2008 and counsel could not be expected to raise his own ineffectiveness; that appellant's life was in danger in the state prison system, making it difficult, if not impossible, to raise ineffective assistance of counsel claims; and new counsel was not hired until after the 90-day period for filing an application to reopen had expired.

It is well established that good cause for filing an application to reopen beyond the time frame permitted by App.R. 26(B) is not demonstrated simply because a party was represented by the same counsel in direct appeals to both the court of appeals and the supreme court. See *State v. Webb*, 85 Ohio St.3d 365, 1999-Ohio-274; *State v. Carter*, 70 Ohio St.3d 642, 1994-Ohio-55, certiorari denied (1995), 514 U.S. 1010, 115 S.Ct. 1328; and *State v. Patterson* (1997), 123 Ohio App.3d 237. Furthermore, continued representation by appellate counsel during resentencing or other post-appellate proceedings at the trial court level does not constitute good cause to toll the time frame established by App.R. 26(B). See, e.g., *State v. LaMar*,

102 Ohio St.3d 467, 2004-Ohio-3976.

Accepting appellant's argument that continued representation by the public defender tolled the time for filing an App.R. 26(B) application, there is no good cause to explain why it took nearly a year after the public defender's office ended its representation for an application to be filed. Good cause is not an infinite commodity and will not perpetually extend the time for filing an application. *State v. Davis*, 86 Ohio St.3d 212, 1999-Ohio-160; *State v. Fox*, 83 Ohio St.3d 514, 1998-Ohio-517.

"The 90-day requirement in the rule is 'applicable to all appellants,' and [appellant] offers no sound reason why he – unlike so many other Ohio criminal defendants – should not comply with that fundamental aspect of the rule." *State v. Farrow*, 115 Ohio St.3d 205, 2007-Ohio-4792, at ¶6 (citations omitted). Denial of an application is appropriate absent any showing of good cause for a late filing. See *State v. Mason*, 90 Ohio St.3d 66, 2000-Ohio-14. See, also, *State v. Hancock*, 108 Ohio St.3d 194, 2006-Ohio-658. Appellant's application contains no explanation of good cause for the untimely filing.

Upon due consideration of the foregoing, and it appearing to the court that appellant has failed to show good cause as to why his application was not filed in a timely manner, appellant's application for reopening is hereby DENIED. Costs are taxed to appellant.

IT IS SO ORDERED.



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H.J. Bressler, Presiding Judge



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William W. Young, Judge



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Robert P. Ringland, Judge