

ORIGINAL

IN THE SUPREME COURT
OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

Supreme Court Case No. 2009-0925

vs.

On Appeal from the Greene County
Court of Appeals, Second District

NATHAN CURTIS
Defendant-Appellant.

Court of Appeals Case No. 2009CA0018

**MEMORANDUM OF APPELLEE - STATE OF OHIO IN OPPOSITION OF
JURISDICTION**

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APPELLANT, NATHAN CURTIS, PRO SE

FILED
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STATEMENT OF THE CASE AND OF THE FACTS

The State of Ohio prepared to present the following evidence at trial in this case:

On August 4, 2006, Ronald Wakefield was in front of 814 E. Second Street, Xenia, Greene County, Ohio when Brittany Blair drove up in a red Dodge Intrepid. Blair's passenger was the Defendant, Nathan Curtis. The Defendant got out of the Dodge and accused Wakefield of stealing his marijuana. Wakefield advised that he did not have the Defendant's marijuana. The Defendant then displayed a handgun and told Wakefield to get in the vehicle or he would shoot him. A witness observed the Defendant with a gun in his right hand, pointing at Wakefield, and the Defendant was pushing Wakefield with his left hand. The victim got into the car, as ordered, and Blair drove all to an area on S.R. 42, south of Xenia. During this time, the victim reported that Defendant kept telling him, "You've got thirty minutes to take me to my weed or I'll blow your knee out." The Defendant also hit Wakefield in the back of the head, behind his left ear, with the gun. Near Krepps Road, Blair turned the vehicle around and pulled off of the right side of the roadway. The Defendant told Wakefield to get out of the car. Wakefield got out and started to walk away from the car. At this point, Curtis exited the vehicle and shot 4 to 5 shots at Wakefield's legs, striking him once in each leg. The victim stumbled across the roadway into the southbound traffic and started walking north in the southbound lane. A truck driver witnessed this incident, and began approaching the victim, when the Defendant and Blair fled the scene at a high rate of speed. The victim was then transported by ambulance to Miami Valley Hospital in Dayton for treatment. Wakefield survived and was able to positively identify both Curtis and Blair.

Based upon the foregoing, the Defendant was indicted for one count of Felonious Assault, a violation of R.C. 2903.11(A)(2) and a felony of the second degree, with a 3 year firearm specification; one count of Kidnaping, a violation of R.C. 2905.01(A)(3) and a felony of the first

degree, with a 3 year firearm specification; one count of Aggravated Assault, a violation of R.C. 2903.12(A)(1) and a felony of the fourth degree, with a 3 year firearm specification; and one count of Abduction, a violation of R.C. 2905.02(A)(2) and a felony of the third degree, with a 3 year firearm specification.

After zealous plea negotiations by trial counsel, Jay Adams, the Defendant was finally able to enter an agreement with the State. The plea agreement provided that in exchange for the Defendant pleading as charged to one count of Felonious Assault and as amended to one count of Attempted Kidnaping, the remaining counts and firearm specifications would be dismissed. Further, the Defendant agreed to enter into a contract with the State and work with the ACE Task Force. The contract provided that the Defendant would work under the supervision of the Task Force to make multiple purchases of illicit drugs from at least three separate individuals supplying drugs to the Greene County area. In exchange for his cooperation with the Task Force, the State would recommend a sentence of four years with a recommendation of judicial release after serving at least 12 months.

According to the post-conviction testimony of Detective Bruce May, Director of the ACE Task Force, the Defendant did not complete the contract with the Task Force. After the Defendant breached the plea agreement, the Court imposed a sentence of eight years on each count, to be served consecutively, for a total sentence of 16 years.

The Defendant filed both a direct appeal of his conviction, which was later dismissed on his own motion, and a joint "Motion to Vacate Plea and for Post Conviction Relief in October of 2007. The Defendant alleged the ineffective assistance of his trial counsel rendered his plea involuntary. Attached to this motion was the Defendant's sworn affidavit that reads at ¶ 5, "I don't remember anyone ever informing me I faced up to 16 years on this plea and If (sic) knew that I would never

have pled guilty". The State filed s separate memorandum in response to each issue and the Court held a hearing on both a motion to withdraw a guilty plea, pursuant to Criminal R. 32, and on the petition for post-conviction relief. At the hearing, the Defendant presented his own testimony and that of friend Tiffany Caldwell. The State presented the testimony of trial attorney Jay Adams and Detective Bruce May.

The trial court held that it was clear that paragraph 10 of the plea form the Defendant executed on July 9, 2007 advises the Defendant in writing that the maximum punishment the law would provide is 16 years of imprisonment. The trial court also found that is specifically remembers advising the Defendant of this maximum sentence when he entered his plea. The trial court found that the Defendant was not credible, and therefore there was insufficient evidence to allow the Defendant to withdraw his plea or find that trial counsel was ineffective. The Defendant, through counsel, timely appealed this decision of the trial court to Court of Appeals of Ohio, Second Appellate District on March 26, 2008. The Appellate Court affirmed the decision of the trial court October 31, 2008. The Defendant, through counsel, timely appealed to this Court to accept jurisdiction in his case, which was denied March 25, 2009.

Without any other decisions issued from the trial court, the Defendant, pro se, filed a Motion for Leave to File a Delayed Appeal in the Second District Court of Appeals, arguing that his appellate counsel was ineffective for failing to preserve his right to direct appeal and that the Defendant was never made aware of his right to file a direct appeal. In April of 2009, the Second Appellate District dismissed the motion for leave to file a delayed appeal on the basis that Curtis failed to show good cause that would justify permitting a delayed appeal. The Defendant is now asking this Court to accept jurisdiction not only to reverse the denial of the delayed appeal, but he is also arguing the merits of that appeal. The State submits that the appellate court properly

denied the Defendant's motion to file a delayed direct appeal and this Court should not accept jurisdiction.

ARGUMENT

PROPOSITION OF LAW NO. 1:

AN APPELLATE COURT PROPERLY DENIES A DEFENDANT'S MOTION FOR LEAVE TO FILE A DELAYED APPEAL WHERE THE DEFENDANT FAILS TO DEMONSTRATE GOOD CAUSE THAT WOULD JUSTIFY A DELAYED APPEAL.

This Court should not accept jurisdiction to review the Defendant's convictions for Felonious Assault and Attempted Kidnaping because there is no constitutional question presented or one of great general interest. Indeed, this appeal turns on the determination of the appellate court as to whether the Defendant demonstrated good cause as to why he should be permitted to file a delayed direct appeal. Pursuant to App. R. 5(A), after the expiration of the 30 day period provided by App. R. 4(A), an appeal may be taken by a defendant with leave of the court to which the appeal is taken in only criminal proceedings; delinquency proceedings; and serious youthful offender proceedings, and said motion shall set forth the reasons for the failure to perfect an appeal as of right. Under App. R. 5(E), the motion shall be determined by the court on the documents filed without formal hearing. Under Ohio law, a decision to grant or deny a motion for leave to file a delayed appeal is solely within the discretion of the appellate court. *State v. Massie*, 4th App. Dist. No. 05CA2, 2005-Ohio-1053, ¶ 4, qtg. *State v. McGahan* (1949), 86 Ohio App. 283.

In the instant case, the Defendant asserts the lack of the effectiveness of his trial counsel as his basis for filing a delayed appeal, but he bases the majority of his argument on testimony offered during his hearing on his post-conviction motion, which is a civil matter and is not eligible for a delayed appeal under App. R. 5. Also, the trial court's decision on his post-conviction motion was appealed to the Second Appellate District and

was affirmed, and to this Court, which declined jurisdiction.

Further, if the Defendant is solely seeking to reopen his direct appeal, his arguments are based on matters outside the record of the plea and sentencing hearing, so a direct appeal is an inappropriate vehicle for his arguments, and they must be addressed through a petition for post-conviction relief. Finally, the Defendant claims that he was unaware of his right to file a direct appeal, but this contention is belied by the record, as the Defendant did in fact file a notice of appeal in his direct case, which was later withdrawn. Obviously, after appellate counsel became more familiar with the facts of the Defendant's case, it appears he correctly determined that because the Defendant's complaints could only be substantiated by matters outside the record, the Defendant's better strategy was a motion to withdraw his guilty plea and a petition for post-conviction.

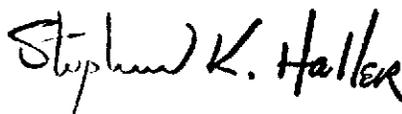
Clearly, the Second Appellate District Court properly denied the Defendant's motion for delayed appeal and this Court must deny jurisdiction.

CONCLUSION

Based upon the foregoing, the Defendant's propositions of law are entirely without merit. Accordingly, this Court must decline to accept jurisdiction and dismiss the instant appeal.

Respectfully submitted,

OFFICE OF THE GREENE COUNTY
PROSECUTING ATTORNEY



By: _____
Stephen K. Haller (0009172)
Prosecuting Attorney

By:  _____
Elizabeth A. Ellis (0074332)
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I here by certify that a copy of the foregoing has been sent to Nathan L. Curtis, Inmate #558-451, Ross Correctional Institution, 16149 St. Rt. 104, PO Box 7010, Chillicothe, Ohio 45601 by regular U. S. Mail the date same as filed of record above.

A handwritten signature in cursive script, reading "Elizabeth Ellis", is written over a horizontal line.