

IN THE SUPREME COURT OF OHIO

09-1340

STATE OF OHIO,

Plaintiff-Appellee

-vs-

JOSHUA E. HUSBAND,

Defendant-Appellant

: On Appeal from the Franklin
: County Court of Appeals,
: Tenth Appellate District
:
: Court of Appeals
: Case No. 08AP-917
:
:

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JOSHUA E. HUSBAND

Richard A. Termuhlen 0023238
Asst. Prosecuting Attorney
373 S. High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3555

Counsel for Plaintiff-Appellee

Dennis Pusateri 0017727
492 City Park Avenue
Columbus, Ohio 43215
(614) 628-0100

Counsel for Defendant-Appellant

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assistance in enforcement of attendance, if counsel has reason
to believe that the witness has material favorable testimony to
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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST, INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND REQUIRES LEAVE OF COURT IN A FELONY CASE

This Honorable Court has never addressed the responsibility of a trial judge to enforce the procurement the presence of a properly served defense witness. Nor has it addressed the difference between the compulsory process clause contained in the United States Constitution's Sixth Amendment and that set forth in the Ohio Constitution at Article I, Section 10. This case presents an opportunity to do both, and Defendant-Appellant respectfully submits that, in his case, the two issues are inextricably related.

The federal constitution compulsory process guarantees an accused to "have compulsory process *for obtaining witnesses in his favor* (emphasis added)," while the Ohio constitution gives him the right to "*meet the witnesses face to face*, and to have compulsory process to *procure the attendance* of witnesses in his behalf." (Emphases added.)

Compulsory process is without question a fundamental right, as evidenced by its application to the states through the due process clause of the Fourteenth Amendment. *Washington v. Texas* (1967), 385 U.S. 14. Even so, compulsory process has been a relatively ignored stepchild of constitutional criminal due process protections.

It is one of the rote recitations of Crim.R. 11(C), representing a right waived by a criminal defendant who pleads guilty or no contest. But, as will be shown below in discussions in support of Mr. Husband's Propositions of Law, this Court has conducted only one handful of substantive discussions of compulsory process in the last two decades, and none of them, nor any other Ohio case, discusses the duty of the trial court in conjunction with enforcement of protections under the clause.

Defense counsel in every corner of this state, including the undersigned, have wondered, upon the filing of some subpoenas, whether they would actually get to present the testimony of the witness. The defense lacks the tools available to the prosecution for “compelling” the attendance of witnesses. Even if the defendant has his own investigator, which this defendant did not, that investigator does not possess the authority to arrest pursuant to a *capias*, or, in the case of a confidential informant, to use the standard “CI agreement” to get the confidential informant to court.

Without some guidance from this Court as to their responsibilities, trial judges will, as did the judge in the instant case, issue a *capias* upon a witness’ non-appearance, and have no idea whether an arrest and conveyance will actually occur. In fact, particularly in large jurisdictions with thousands of warrants on file, there is every reason to believe that nothing will be done during the short life of a trial.

Without actual procurement of the witness, or reasonable and authoritative attempts at same, a subpoena is a worthless slip of paper and compulsory process is an illusionary right.

This Court should grant review of Mr. Husband’s propositions of law in order to clarify what a criminal defendant, and opposing counsels, may expect the reach of compulsory process to be, and what a trial judge must do to satisfy those expectations in a constitutionally acceptable way.

STATEMENT OF THE CASE

Joshua E. Husband was indicted by the Franklin County Grand Jury for several counts related to a cocaine sale that he made to an undercover police officer, David Barrick. Four counts of endangering children were dismissed by the court, and the jury acquitted him of tampering with evidence and possession of cocaine. He was convicted of one count of trafficking in cocaine in violation of R.C. 2925.03, a felony of the third degree, and a three-year firearm specification.

On June 16, 2008, Mr. Holschuch was sentenced to the minimum term of one year, plus three years' mandatory additional incarceration for the firearm specification. He perfected an appeal to the Tenth District Court of appeals, raising three Assignments of Error as follows:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DEPRIVING DEFENDANT-APPELLANT OF HIS RIGHT TO COMPULSORY PROCESS BY VIRTUE OF ITS FAILURE TO ENFORCE A PROPERLY SERVED SUBPEONA, AND BY FAILING TO REQUIRE THE STATE TO ACT TO BRING THE WITNESS TO COURT.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY FAILING TO CHARGE THE JURY WITH A MISSING WITNESS INSTRUCTION.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DEPRIVING DEFENDANT APPELLANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

By opinion and judgment entry of June 18, 2009, the Court of Appeals overruled the Assignments of Error and affirmed Mr. Husband's conviction and sentence. It is from that judgment that Mr. Husband seeks the jurisdiction of this Court.

STATEMENT OF FACTS

As the Court of Appeals wrote below:

“According to appellant, on December 28, 2005, Randy Holschuh, a friend of appellant’s, came to his home. Holschuh told appellant that he needed money, so he was going to sell cocaine to his boss. However, Holschuh, did not want his boss to know that he was going to keep the profits, so he asked appellant to pose as the dealer, with Holschuh supplying the drugs.”

[The court omitted Appellant’s testimony that he did not use cocaine, nor sell it himself prior to the instant transaction; that he did not want to be involved; and that Holschuh had to beg for half an hour, to convince him, with many sad reasons he desperately needed the money. Appellant relied at trial on the affirmative defense of entrapment.]

“On December 29, 2005, Holschuh and his brother came to appellant’s home. Holschuh left and then returned to the house with an undercover police detective, David Barrick, who was posing as Holschuh’s boss. Appellant handled a gun while Barrick was in the home. Barrick paid \$750 in marked bills, took the cocaine and soon left appellant’s home. Barrick tried to arrange another drug transaction for January 3, 2006, but was unable to do so.” (Appellant refused.)

The remainder of the Court of Appeals’ factual recitation dealt with alleged facts supporting charges either dismissed by the trial court pursuant to Crim.R. 29(A) or upon which the jury acquitted Appellant. None of the evidence actually presented by the prosecution dealt with the entrapment elements of enticement and predisposition, inasmuch as Det. Barrick had nothing to add in that regard.

The record reveals clearly that the defense knew that Randy Holschuh was the confidential informant, and though the State refused to name him prior to trial or present testimony regarding his

identity, Appellant served him with a subpoena to appear and testify. It was also clear that he expected Holschuh to corroborate his version of how the transaction was set in place.

Holschuh did not appear pursuant to his subpoena. The trial judge issued a *capias* for his arrest, and in approximately 20 hours that intervened between the issuance and the submission of the case to the jury, Holschuh was not taken into custody. There was no indication that any effort was put into the execution of the *capias*. The prosecutor told the court and counsel that he would have Det. Barrick look into Holschuh's whereabouts, but never followed up. Defense counsel acquiesced in the judge's decision to proceed to argument, charge and deliberations.

The trial court charged the jury on the affirmative defense of entrapment. After approximately eight hours of deliberation over two days, the jury convicted Mr. Husband of the lone count of trafficking, including the firearm specification. The trial court immediately proceeded to sentence Mr. Husband, who had no criminal record, to the minimum term of imprisonment of four years. Appeal bond was later granted.

Proposition of Law No. 1: Compulsory process guarantees require a trial judge to take reasonable steps to enforce the attendance of a properly subpoenaed defense witness.¹

There are few modern cases in which this court has addressed the substance and meaning of the right of compulsory process as guaranteed in both the Ohio and United States Constitutions.

A line of cases addresses the right as it pertains to the presentation of witnesses who claim or will claim, wholly or partially, the Fifth Amendment privilege against self-incrimination. See *State v. Kirk* (1995), 72 Ohio St.3d 564, 651 N.E.2d 981, and *Columbus v. Cooper* (1990), 49 Ohio St.3d 42, 550 N.E.2d 937. [See also *State v. Ellis* (1991), 62 Ohio St.3d 106, 579 N.E.2d 701, which issued a summary reversal on the basis of *Cooper*.]

State v. Brooks (1989), 44 Ohio St.3d 185, 542 N.E.2d 636, determined that no compulsory process violation exists if the putative witness is not under subpoena and no proffer is made. *State v. Swann* (2008), 119 Ohio St.3d 552 held that Evid.R. 804(B)(3), if properly applied, could sometimes overcome compulsory and due process issues.

The general topic of a trial judge's obligation to enforce attendance did gain a 1983 footnote. In *State v. Davis* (1983), 6 Ohio St.3d 772, 456 N.E.2d 772 (fn. 2), it was determined that the appellant did not seriously pursue or argue the issue of whether a trial judge must do "everything in (his or her) power" to procure the presence of a subpoenaed defense witness.

Lastly, by Appellant's search, is *State v. Brown* (1992), 64 Ohio St.3d 649, 597 N.E.2d 510, the only decision of this Court that bears any resemblance to the issues raised here. It is the only case

¹ It should be noted that the Court of Appeals disposed of Mr. Husband's compulsory process arguments without addressing them directly. Rather, it held that he could not raise the issues by virtue of the "invited error" doctrine, in that defense counsel did not request additional time in which to locate Mr. Holschuh and procure his attendance.

in which the compulsory and due process issues pertain to the acquisition of the testimony of a confidential informant. The opinion begins as follows:

This case involves a narrow issue: whether a criminal defendant has a constitutional right to compulsory process over a potential witness who he believes acted as an informant in his case, and whose testimony, he asserts, would be relevant and aid in his defense.

The question was ultimately answered in the affirmative, but the *Brown* opinion answers only part of the question raised by this Proposition of Law.

Brown involved the quashing of a defense subpoena for the person it believed was the confidential informant. After observing that “few rights are more fundamental than the right of an accused to present witnesses in his behalf,” *Id.* at 652, the opinion reaffirms an earlier holding that “when the degree of participation of the informant is such that the informant virtually becomes a state’s witness, the balance swings in favor of requiring disclosure of the informant’s identity.” *Id.* at 652, citing *State v. Williams* (1983), 4 Ohio St.3d 74, 76, 446 N.E.2d 779, 781.

Is the quashing of a subpoena any different than failing to take steps to effectuate the order contained therein? Did Mr. Brown’s trial judge deprive Mr. Brown of important defense testimony any less so than did the trial judge’s – and prosecutor’s – failure to do anything to aid in the execution of the *capias* deprive Mr. Husband of his important defense testimony? Appellant contends not.

Unlike the fact pattern in *Brown*, no recording was made of the meeting in the instant case, or of any of the telephone calls that the detective and the confidential informant made to the defendant prior or subsequent thereto. Therefore, the entire case rested on the credibility of the defendant. And with entrapment being an affirmative defense, the burden of proof was on him.

There were only two versions of the facts: either Mr. Husband was a drug dealer, or he was entrapped into being one. The undercover officer had no way of knowing whether Mr. Husband's assertions that he was not a drug dealer were true or not. There were no other arrests or convictions, and the officer's investigative linking produced no information about him, even in the way of rumor.

The importance of compulsory process, and its attendant right to present a defense, was recognized by this Court in *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E. 2d 1138, in which the legal issue was one of compulsory process and the practical factual issue was the defendant's credibility. A witness who was in attendance was excluded as a discovery sanction, and it was noted that that witness' testimony, if believed, may have resulted in the defendant's acquittal, causing this Court to affirm the Court of Appeals' reversal of Mr. Papadelis' conviction. Mr. Husband makes the same claim here: that Holschuh's corroboration of his testimony would have resolved the credibility issue in his favor and would likely have resulted in an acquittal.

Though counsel did not act to preserve his client's rights on this issue, Mr. Husband submits that it survives plain error analysis pursuant to Crim.R. 52(B) and *State v. Waddell* (1996), 75 Ohio St.3d 163, 661 N.E.2d 1043.

Randy Holschuh was indisputably a critical defense witness. Once the *capias* for his arrest was issued, Appellant and his counsel were powerless over further events. The court and the prosecutor were not. If the right to compulsory process has any real meaning, this Court must place some responsibility for acquisition of the body of the witness on one or both of the two government entities that possess such power.

Proposition of Law No. 2: The mere issuance of a *capias* for a defense witness in a criminal case, without more, does not necessarily satisfy state and federal constitutional rights to compulsory process.

Appellant incorporates the arguments contained in Proposition of Law No. 1 as if fully rewritten herein. In addition:

In the case of a non-appearing defense witness, a *capias* is supposed to be the vehicle used to back up the government's commitment and obligation to use its powers to procure the defendant's subpoenaed witnesses. But there is nothing "compulsory" about the process if there is, in reality, no "compulsion" to attend.

A criminal defendant must be accorded a *meaningful* opportunity to present a *complete* defense. *Washington v. Texas, supra; California v. Trombetta*, 467 U.S. 479 (1984). Otherwise, a defendant is deprived of the basic right to force the government's case to "survive the crucible of meaningful adversarial testing. *United States v. Cronin*, 466 U.S. 648 (1984).

Issuance of a warrant to arrest a witness should be the mere first step in enforcing the right to compulsory process. Some sort of balancing test would be appropriate, in which the trial court could consider factors such as: (1) the importance of the witness to the defense case; (2) the potential delay, if any, that might result from efforts to locate and arrest the witness, and the affect such delay may have on (a) the service term of the jury; (b) the court's other obligations; and (c) the respective tactics and strategy of both parties, to the extent they can be disclosed, *in camera* if necessary; (3) what information is available relative to the witness's whereabouts as it affects the realistic possibility of finding the witness; and (4) other factors affecting the fairness of the trial and the administration of justice.

Proposition of Law No. 3: The compulsory process clause of the Ohio Constitution imposes upon a trial judge a higher duty than does that of the United States Constitution to enforce the actual attendance of a properly subpoenaed defense witness.

Appellant incorporates the arguments contained in Propositions of Law Nos. 1 and 2 as if fully rewritten herein. In addition:

As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, State courts are unrestricted in according greater civil liberties and protections to individuals and groups.
Arnold v. Cleveland (1993), 67 Ohio St.3d 35.

The compulsory process clauses of the Ohio Constitution and the United States Constitution vary significantly in their language, and, Mr. Husband contends, their meaning.

The federal constitution compulsory process guarantees an accused to “have compulsory process *for obtaining witnesses in his favor* (emphasis added),” while the Ohio constitution gives him the right to “*meet the witnesses face to face*, and to have compulsory process to *procure the attendance* of witnesses in his behalf.” (Emphases added.)

The addition of the phrase “face to face” is evidence of the special importance the authors placed on this particular guarantee. More important is the phrase “procure the attendance.”

This is what Appellant wanted at his trial but could not accomplish himself: the attendance of the witness.

Proposition of Law No. 4: It is constitutionally ineffective for defense counsel to fail to either ask for a continuance or for assistance in enforcement of attendance, if counsel has reason to believe that the witness has material favorable testimony to offer.

Defense counsel failed to press upon the court to make efforts to procure the subpoenaed witness, and, indeed, acquiesced in the submission of the case to the jury without request for a recess in order that that be accomplished. The record further demonstrates that he only attempted to subpoena the witness the Friday before trial commenced on Monday, when he had known of him for quite some time. He therefore failed to preserve Mr. Husband's compulsory process rights as set forth in the first three Propositions of Law above.

Defense counsel's failure to engage either the court or the clerk to obtain the presence and testimony of Randy Holschuh – the confidential informant – absolutely cannot be attributed to trial tactics. By his own admission, counsel had not interviewed, nor met, seen or spoken with Mr. Holschuh. His secretary served the subpoena.

Counsel could not possibly have had a reason to believe that Holschuh's story would contradict that of his client. Counsel permitted the defendant to testify, and it certainly cannot be presumed that counsel knowingly suborned perjury when he put his client on the witness stand.

Counsel therefore knowingly and unnecessarily gave up on the acquisition of the most important – indeed, the only – witness the defense could possibly offer, one whom he had to know would likely tip the credibility balance in the defendant's favor.

These failures fall below the quality standard established in *Strickland v. Washington* (1984), 466 U.S. 668, and just as clearly prejudiced Mr. Husband. See *State v. Biggers* (1997), 118 Ohio App.3d 788, 694 N.E.2d 108, in which the failure of counsel to take steps to produce an important

witness contributed to a finding of ineffective assistance.

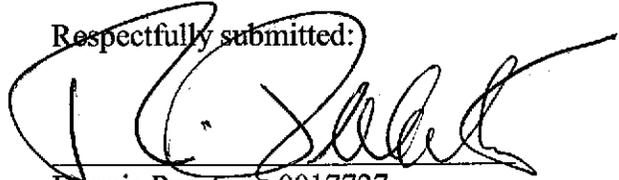
Failure to press for the witness had no potential benefit to the defendant, and great potential harm which ultimately came to fruition in the form of a conviction. Presenting the witness was critical, and if counsel had a tactical reason for not so attempting, it is indiscernible, and was clearly and entirely a mistake which cannot be presumed competent.

Most tactical decisions of trial counsel can be defended. This one cannot.

CONCLUSION

For the foregoing reasons, Joshua E. Husband prays that this Court grant him its jurisdiction and reverse the judgment of the Court of Appeals with an order to remand this case to the trial court for a new trial at which his rights to compulsory process and the effective assistance of counsel can be afforded him.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Dennis Pusateri', written over a horizontal line.

Dennis Pusateri 0017727

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served upon Richard A. Termuhlen, Esq., Asst. Prosecuting Attorney, 373 S. High Street, 13th Floor, by ordinary U.S. Mail this 23rd day of July, 2009.

A handwritten signature in black ink, appearing to read "Dennis Pusateri", written over a horizontal line.

Dennis Pusateri

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO OHIO
2009 JUN 22 AM 10:00
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellee,

v

Joshua E Husband,

Defendant-Appellant.

No. 08AP-917
(C P C No 08CR-09-6854)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 18, 2009, appellant's three assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

BROWN, KLATT & McGRATH, JJ.



Judge Susan Brown

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY

2009 JUN 18 PM 1:33
CLERK OF COURTS

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 08AP-917
 : (C.P.C. No. 06CR-09-6654)
 v. :
 : (REGULAR CALENDAR)
 Joshua E. Husband, :
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 18, 2009

*Ron O'Brien, Prosecuting Attorney, Richard A. Termuhlen,
and Barbara A. Farnbacher, for appellee.*

Dennis Pusateri, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Joshua E. Husband, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of trafficking in cocaine with specification, in violation of R.C. 2925.03, a third-degree felony.

{¶2} According to appellant, on December 28, 2005, Randy Holschuh, a friend of appellant's, came to his home. Holschuh told appellant that he needed money, so he was going to sell cocaine to his boss. However, Holschuh did not want his boss to know that

he was going to keep the profits, so he asked appellant to pose as the dealer, with Holschuh supplying the drugs.

{¶3} On December 29, 2005, Holschuh and his brother came to appellant's home. Holschuh left and then returned to the house with an undercover police detective, David Barrick, who was posing as Holschuh's boss. Appellant handled a gun while Barrick was in the home. Barrick paid appellant \$750 in marked bills, took the cocaine, and soon left appellant's home. During the transaction, a child ran into the room, and appellant's wife retrieved the child. Throughout the proceedings, the state referred to the person with whom Barrick went to the house with as a "confidential informant," but did not reveal Holschuh as the confidential informant.

{¶4} Barrick tried to arrange another drug transaction for January 3, 2006, but was unable to do so. On the same day, Barrick executed a search warrant on appellant's home, at which time he found no drugs or marked money, but found a gun. Pursuant to a consent search at another address, to which appellant had traveled during police surveillance on January 3, 2006, police found the digital scale appellant used on December 29, 2005, cocaine, marijuana, and a Palm Pilot.

{¶5} On September 1, 2006, appellant was indicted for trafficking in cocaine with firearm specification; possession of cocaine with firearm specification; tampering with evidence; and four counts of endangering children. The trafficking in cocaine charge was alleged to have occurred on December 29, 2005, while the remaining counts were alleged to have occurred on January 3, 2006. Appellant filed motions to disclose the identity of the confidential informant and to suppress evidence seized during the execution of the search warrant, both of which were denied prior to trial.

{¶6} A trial commenced September 9, 2008. At the close of the state's case, appellant moved to dismiss the four counts of endangering children, and the trial court granted the motion. The remaining charges were submitted to a jury, which found appellant not guilty of the possession of cocaine and tampering with evidence charges, but guilty of trafficking in cocaine with firearm specification. The trial court immediately held a sentencing hearing and imposed a one-year prison term for the trafficking in cocaine conviction and three years for the firearm specification, to be served consecutively, for a total sentence of four years. The trial court journalized the judgment on September 16, 2008. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] THE TRIAL COURT ERRED BY DEPRIVING DEFENDANT-APPELLANT OF HIS RIGHT TO COMPULSORY PROCESS BY VIRTUE OF ITS FAILURE TO ENFORCE A PROPERLY SERVED SUBP[OE]NA, AND BY FAILING TO REQUIRE THE STATE TO ACT TO BRING THE WITNESS TO COURT.

[II.] THE TRIAL COURT ERRED BY FAILING TO CHARGE THE JURY WITH A MISSING WITNESS INSTRUCTION[.]

[III.] THE TRIAL COURT ERRED IN DEPRIVING DEFENDANT-APPELLANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL[.]

{¶7} Appellant first argues that the trial court erred when it failed to enforce a properly served subpoena, and by failing to require the state to act to bring a witness to court. Specifically, appellant contends he was denied compulsory process and due process because the trial court did not take any action to assure that Holschuh appeared pursuant to a valid subpoena. We disagree. Initially, we note that, despite appellant's claim that "no one actually did anything" to see that Holschuh appeared at trial, the trial

court did take several actions toward securing his attendance. The trial court personally signed a subpoena for the attendance of Holschuh, and that subpoena was served on Holschuh. The trial court also subsequently signed an arrest warrant for Holschuh, which was returned unexecuted.

{¶8} Notwithstanding, appellant's assignment of error must be overruled. Even if the trial court erred, a party is not permitted to take advantage of an error that the party invited or induced. *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, citing *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus. This rule is generally referred to as the "invited error doctrine." Here, after Holschuh failed to appear, pursuant to the court signed subpoena, appellant's counsel asked that the trial court issue an arrest warrant, which it did. After appellant testified at trial, and Holschuh failed to appear as appellant's next witness, the following discussion took place:

[APPELLANT'S COUNSEL]: I have no further witnesses other than Mr. Holschuh. However, I understand that the second-week jurors – and just in the grand scheme of things, we can't leave this case open forever hoping that Mr. Holschuh will be picked up by the Franklin County Sheriff's Department or the Columbus Police Department. Therefore, I am willing to rest my case at this time, subject to the admission of my exhibits and subject to the possible arrest of Mr. Holschuh, should he get arrested prior to starting closing arguments, basically.

If he gets arrested prior to starting closing arguments, I would like the opportunity to have him brought in the courtroom - outside of the view of the jury so that the Court, the prosecutor, and myself could voir dire Mr. Holschuh, because I know we all have sort [sic] of questions about his materialness and his actual role. I believe it's still the State's official position that Mr. Holschuh is – they are neither confirming nor denying that he is the confidential informant at this time.

[THE COURT]: *** I suspect that he would not be a very credible witness for anybody from what I've heard so far, so I'm not going to hold up the trial for him. But, you know, we are going to take time – a long break now to prepare the instructions and the verdict forms. And, of course, if they get him in the meantime, we would do as [appellant's counsel] requested, bring him in, put him under oath, ask him what he's going to say.

(Tr. 308-10.) After appellant's exhibits were admitted into evidence, appellant's counsel then rested his case, and appellant never raised the issue again.

{¶9} It is clear from the above that appellant's counsel agreed that, if Holschuh did not appear prior to the start of closing arguments, appellant would rest his case. Appellant's counsel explicitly conceded to the trial court that the case could not be indefinitely delayed while waiting for Holschuh to be located and/or arrested. It is also clear that the trial court did everything appellant's counsel requested in order to secure Holschuh's appearance. Appellant's counsel requested that the trial court sign a subpoena for Holschuh's attendance, which it did, and appellant's counsel then requested that the trial court issue an arrest warrant for Holschuh, which it also did. Appellant failed to request that the trial court or state do anything further, and then agreed to rest his case if Holschuh was not apprehended prior to closing arguments. Any error in the trial court's failure to further attempt to secure the attendance of Holschuh was invited by appellant. Therefore, appellant's first assignment of error is overruled.

{¶10} Appellant argues in his second assignment of error that the trial court erred when it failed to charge the jury with a missing witness instruction. Appellant contends Holschuh was a key witness for the state, he did not testify for the state, and the trial court did not give an explanation for his absence. Appellant claims that the trial court should

have instructed the jury that it could draw an adverse inference where a witness is favorable to a party in the litigation and does not appear and testify. Appellant cites to *Silveous v. Rensch* (1969), 20 Ohio St.2d 82, in support of his argument. In *Silveous*, the Ohio Supreme Court held:

A special instruction prior to argument, stating that when it appears a litigant knows of the existence of a material witness, and such witness is within the control of the litigant whose interest would naturally be to produce him, and without satisfactory explanation he fails to do so, the jury may draw an inference that the testimony would not be favorable to him, is error where the jury is not also instructed regarding the facts to be considered in determining what evidence a litigant would naturally produce at trial.

Id. at paragraph one of the syllabus.

{¶11} Thus, the two requirements which must be met for a missing witness instruction are: (1) the witness in question must be within the particular power of a party to produce, and (2) the testimony of that witness would elucidate the transaction. *State v. Melhado*, 10th Dist. No. 02AP-458, 2003-Ohio-4763, ¶51; *State v. Long* (Sept. 27, 1984), 10th Dist. No. 83AP-444. If the testimony of the missing witnesses would have been merely cumulative, then the witness would not naturally be produced by the state, and the requested instruction would not be appropriate. *Silveous*.

{¶12} Here, we first note that appellant failed to request a missing witness instruction. The failure to request a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. However, we find no error here, plain or otherwise. This court's decision in *Long* is instructive and involves similar circumstances as in the present case. In *Long*, the defendant engaged in a drug

transaction with police officers. The sale was arranged by an informant at the behest of the police as a means to "work off" the informant's previous charges. An officer, who was posing as the buyer, carried the drugs to the hotel room where the transaction was to occur. The defendant never touched the drugs. When the terms of the sale were arranged, either the officer or the informant removed money from a bag and passed it and a calculator to the defendant.

{¶13} At trial, the defendant in *Long* denied accepting either the money or the calculator, claiming that his refusal to touch the drugs, money, and calculator was intended to give to the others the impression that he was not associated with the transaction. The defendant testified that the informant had asked the defendant to accompany him as protection during a "scam" sale to the officer. The defendant denied any actual participation in the sale of drugs, stating that he was merely a dupe for the informant. The informant was subpoenaed by the defendant, but did not appear in court.

{¶14} On appeal of his conviction, the defendant in *Long* argued that the trial court erred by refusing to give a requested missing witness instruction. We rejected the defendant's argument. We found appellant failed to clearly show that the missing witness was within the particular power of the state at the time of trial, merely because, 11 months earlier, he had been a police informant. Thus, the first requirement for the requested missing witness instruction was not fulfilled. We further found that the issue of whether the informant's testimony would elucidate the transaction was open to debate. If the informant's testimony would have been merely cumulative to that of the arresting officers, then it would not naturally be produced by the state, and the requested instruction would not be appropriate.

{¶15} We also concluded in *Long* that, had the defendant succeeded in making a defense of entrapment, the informant's testimony could have been important to such a theory. In that case, the court's failure to give the requested instruction might indeed have been error. However, we found that, even so, it was doubtful that such an error would have been grounds for reversal because the defendant failed to show that the outcome of trial would have been different as he did not successfully raise the defense of entrapment.

{¶16} Here, as in *Long*, there is no evidence in the record that Holschuh was within the particular power of the state to produce. The trial took place nearly three years after the incident. There was no evidence that the state knew where to find Holschuh at the time of trial. The prosecutor stated he did not know Holschuh and had never met or spoken to him. The prosecutor did offer to telephone Detective Barrick during trial and ask Barrick to contact Holschuh, but there is no evidence in the record whether the prosecutor ever actually spoke with Barrick or whether Barrick took any action or even knew Holschuh's whereabouts. We cannot presume that the prosecutor or police would know where to find a witness merely because the witness was an informant many months prior to trial. See *Long* (merely because witness had been a police informant 11 months earlier does not establish that the witness was within the particular power of the state at the time of trial). Although appellant argues that Barrick had worked with the informant for several weeks before the transaction, entered into a written agreement with the informant, and possessed public and private data about the informant, even assuming Holschuh was the informant, these facts do not demonstrate that Holschuh was within the particular power of the state to locate at the time of trial. Rather, from the evidence in the record, it appears that only appellant knew Holschuh's whereabouts around the time of trial, as the

secretary of appellant's counsel personally served Holschuh with the first subpoena. Thus, the first requirement for the requested missing witness instruction was not fulfilled.

{¶17} Furthermore, as in *Long*, the issue of whether Holschuh's testimony would elucidate the transaction was open to debate. If Holschuh's testimony would have been merely cumulative to that of the arresting officers, then Holschuh would not naturally be produced by the state, and the requested instruction would not be appropriate. Although appellant claimed that Holschuh would testify consistent with appellant's testimony, and Holschuh's testimony could be important to appellant's entrapment defense, there was simply no evidence that Holschuh would testify in this respect. Neither appellant's counsel nor the prosecutor had ever communicated with Holschuh. The trial court also stated that it had no evidence to suggest that Holschuh's testimony would be relevant to appellant's entrapment defense. Thus, appellant also did not fulfill the second requirement for a missing witness instruction. Therefore, for these reasons, we find the trial court did not err in failing to issue a missing witness instruction. Appellant's second assignment of error is overruled.

{¶18} Appellant argues in his third assignment of error that he was deprived of effective assistance of trial counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

"counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

{¶19} An attorney properly licensed in Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶20} Here, appellant asserts his trial counsel was ineffective in three respects. Appellant first asserts his counsel was ineffective when he did not request a longer continuance in order to have the court's *capias* executed. However, appellant has failed to establish either requirement under *Strickland*. Appellant has not shown that his counsel's performance was deficient. Appellant fails to cite any support for the proposition that a competent attorney would have moved for a longer continuance under these circumstances. As reasoned by appellant's counsel, as a practical matter, the case could not be continued indefinitely while waiting for Holschuh to be arrested, which may well have never happened. Furthermore, even if appellant's counsel should have requested a longer continuance, appellant has failed to demonstrate that, were it not for counsel's errors, the result of the trial probably would have been different. Appellant cannot show that a longer continuance would have necessarily resulted in the arrest of

Holschuh. Also, as discussed above, appellant has not shown that Holschuh's testimony would have resulted in a different outcome. Therefore, we cannot find appellant's counsel was deficient in this respect.

{¶21} Appellant next asserts his trial counsel was ineffective for failing to request a missing witness instruction. However, as we have already found with respect to appellant's second assignment of error, that the trial court did not err in failing to issue a missing witness instruction, appellant's counsel was not ineffective in failing to request such.

{¶22} Appellant next asserts his trial counsel was ineffective for failing to object to Detective Barrick's testimony that he had been told by the informant that appellant was a narcotics trafficker. Appellant claims his counsel's ineffectiveness was exacerbated when his counsel began a line of questioning into the same subject matter upon cross-examination. We disagree with appellant's contentions. The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. *State v. Holloway* (1988), 38 Ohio St.3d 239, 244. Because objections tend to disrupt the flow of a trial, and are considered technical and bothersome by the fact finder, competent counsel may reasonably hesitate to object in the jury's presence. *State v. Campbell*, 69 Ohio St.3d 38, 53, 1994-Ohio-492.

{¶23} Here, as pointed out by the state, appellant's counsel may have failed to object to Barrick's testimony that he had been told by the informant that appellant was a narcotics trafficker because such an objection would have been ineffective. The jury had to presume that appellant had come to the attention of the police as a drug dealer in some manner. Whether it was the confidential informant or some other person who

informed the police of such is of little relevance, and any prejudicial effect would be highly speculative. In fact, as pointed out by the state, that an unnamed, unidentified informant provided the information to the police may have held less influence with the jury than if, for instance, another police officer would have been the one who prompted the police to investigate appellant.

{¶24} Further, that appellant's counsel briefly revisited the issue on cross-examination may have been trial strategy. On cross-examination, appellant's counsel questioned Barrick regarding the warrant submitted to the judge to search appellant's home. Appellant's counsel then pointed out that, in the very first paragraph of the warrant submitted to the judge, Barrick declared that a confidential informant had informed him that appellant was selling drugs. Appellant's counsel may have pointed this fact out to show the jury that the judge had no additional grounds to issue the warrant beyond the same unsubstantiated claims of this unnamed, unidentified informant. Also, as mentioned above, the jury may have questioned the reliability and credibility of an unnamed, unidentified informant. For these reasons, we cannot find that appellant's trial counsel provided ineffective assistance in any of the claimed instances. Appellant's third assignment of error is overruled.

{¶25} Accordingly, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
