

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-VS-

Gary Crockett

Defendant-Appellant,

09-1692

On appeal from the Mahoning
County Court of Appeals, 7th
Appellate District

Court of Appeals
Case Number 07-MA-223

FILED
SEP 18 2009
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT Gary Crockett

Gary Crockett #546846

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DEFENDANT-APPELLANT, PRO SE

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SUPREME COURT OF OHIO

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COUNSEL FOR APPELLEE, STATE OF OHIO

RECEIVED
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CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT Gary Crockett

The appellant hereby gives notice of appeal to the Ohio Supreme Court of Ohio from the judgment of the Mahoning County Court of Appeals, 7th Appellate District, entered in the Court of Appeals case number 07-MA-233 on June 12th, 2009.

This case raises a substantial constitutional question, involves a felony, and is one of great public or general interest.

Respectfully Submitted,

Gary Crockett 540846
- , pro se
T.C.I. P.O. Box 901
Leavittsburg, OH 44430

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Notice of Appeal and Motion for Delayed Appeal has been sent by U.S. mail to the prosecuting attorney of Mahoning County on this 12th day of August, 20009, at the following address 21 W. Boardman St. 6th Floor
Youngstown, Oh. 44503

Gary Crockett 540846
- , pro se

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-VS-

Gary Crockett

Defendant-Appellant,

CASE NO. 2006 CR1274

On appeal from the Mahoning
County Court of Appeals, 7th,
Appellate District

Court of Appeals
Case Number 07-MA-233

MOTION FOR LEAVE TO FILE A DELAYED APPEAL

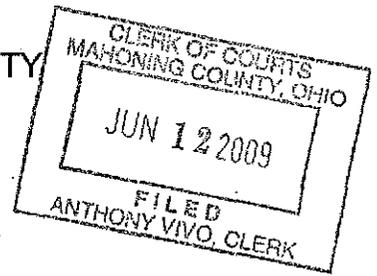
The appellant respectfully moves this Honorable Court pursuant to Ohio Supreme Court Rule II, § 2(A)(4)(a) for leave to file a delayed Notice of Appeal. this case involves a felony and more than forty-five (45) days has passed since the Court of Appeals decision was filed. the judgment being appealed was filed on June 12, 2009 and received by the appellant on the 22nd day of June, 2009. The judgment/opinion of the Court of Appeals and a affidavit in support of reasons for delay is attached.

Respectfully Submitted,

Gary Crockett 540844
- , pro se

T.C.I. P.O. Box 901
Leavittsburg, OH 44430

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT



STATE OF OHIO,)
)
 PLAINTIFF-APPELLEE,)
)
 VS.)
)
 GARY CROCKETT,)
)
 DEFENDANT-APPELLANT.)

CASE NO. 07-MA-233

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 2006CR1294

JUDGMENT:

Affirmed in part
Reversed and Remanded in part

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: June 12, 2009

[Cite as *State v. Crockett*, 2009-Ohio-2894.]
DONOFRIO, J.

{¶1} Defendant-appellant, Gary Crockett, appeals his jury-trial conviction and sentence in the Mahoning County Common Pleas Court for aggravated murder with a firearm specification. The main issues on appeal are: (1) speedy trial; (2) the trial court allowing the videotaped statement of a witness to be played before the jury as a recorded recollection under Evid.R. 803(5); and (3) the trial court's imposition of post-release control for the aggravated murder conviction.

{¶2} On November 3, 2006, Bertrum Moore, Eric Lewis, and Keith Tillis were driving around Youngstown, Ohio smoking marijuana. While traveling on Glenwood Avenue, Lewis spotted Martwain Dill in a pickup truck. Lewis phoned Crockett and directed Moore, who was driving, to drive them to Crockett's girlfriend's house to pick him up. Once there, Crockett got in the vehicle carrying an assault rifle in a black plastic trash bag and a 9mm semiautomatic handgun. Crockett gave the handgun to Lewis. Shortly thereafter, they spotted Dill in his truck again at a side street to Glenwood Avenue, Earle Street. Moore stopped the vehicle in front of Dill's truck and Crockett, Lewis, and Tillis exited the car. Crockett and Lewis opened fire on Dill while he was seated in his truck and Tillis fled the scene on foot. Dill suffered numerous gunshot wounds and perished. Police later recovered numerous assault rifle and 9mm shell casings from the scene.

{¶3} On November 21, 2006, a Mahoning County grand jury indicted Crockett and Lewis for aggravated murder with a firearm specification, Crockett for having a weapon while under disability, and Moore for complicity to aggravated murder. Crockett pleaded not guilty and the case proceeded to discovery and other pretrial matters. Crockett, Lewis, and Moore's cases eventually were ordered to be tried separately. A jury trial commenced on November 27, 2007, on Crockett's aggravated murder charge, with the having a weapon while under disability count deferred. On December 4, 2007, the jury found Crockett guilty. That same day, the state moved to dismiss the having a weapon while under disability count. On December 4, 2007, the trial court sentenced Crockett to life imprisonment with parole

eligibility after 30 years consecutive to the mandatory three years in prison for the firearm specification. This appeal followed.

{¶14} Crockett raises five assignments of error. Crockett's first assignment of error states:

{¶15} "Revised Code Section 2967.28 authorizes post-release control for felonies of the first through fifth degree. Aggravated Murder is a special felony with no level, which is sentenced under R.C. 2929.03. The trial court violated due process and committed plain error when it imposed post-release control without statutory authority to do so."

{¶16} Crockett argues that because he was convicted only of aggravated murder, a special felony, the trial court's imposition of post-release control was plain error. The state concedes this error and asks this court to simply correct the error without the need for resentencing.

{¶17} "Defendants convicted of certain classified felonies (*not including aggravated murder*) are subject to a mandatory period of postrelease control. See R.C. 2967.28(B). Postrelease control is a period of supervision that occurs after a prisoner has served his or her prison sentence and is released from incarceration, during which the individual is subject to specific sanctions with which he or she must comply. R.C. 2967.01(N). Violation of these sanctions may result in additional punishment, such as a longer period of control, more restrictions during the control period, or a prison term of up to nine months per violation, subject to a cumulative maximum of one-half of the original stated prison term. See R.C. 2967.28(F)(1) through (3). When a sentence includes mandatory postrelease control, the trial judge must inform the defendant of that fact in the plea colloquy or the plea will be vacated. See [*State v.*] *Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, paragraph two of the syllabus.

{¶18} "However, an individual sentenced for aggravated murder * * * is not subject to postrelease control, because that crime is an unclassified felony to which the postrelease-control statute does not apply. R.C. 2967.28. Instead, such a person

is either ineligible for parole or becomes eligible for parole after serving a period of 20, 25, or 30 years in prison. See R.C. 2929.03(A)(1); 2967.13(A). Parole is also a form of supervised release, but it is not merely an addition to an individual's sentence. When a person is paroled, he or she is released from confinement before the end of his or her sentence and remains in the custody of the state until the sentence expires or the Adult Parole Authority grants final release. R.C. 2967.02(C); 2967.13(E); 2967.15(A); 2967.16(C)(1). If a paroled person violates the various conditions associated with the parole, he or she may be required to serve the remainder of the original sentence; that period could be more than nine months. Ohio Adm.Code 5120:1-1-19(C)." (Emphasis added.) *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶¶35-36.

{¶9} Based on this statutory scheme, the trial court was not authorized to impose post-release control as part of Crockett's sentence. When a trial court imposes a sentence that is unauthorized by law, the sentence is unlawful. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, at ¶21. An unlawful act is not merely considered erroneous or voidable, but it is wholly unauthorized and void. *Id.* A void sentence must be vacated, placing the parties in the same position they would have been in had there been no sentence. *Id.* at ¶22. Thus, the trial court must conduct a new sentencing hearing.

{¶10} Accordingly, Crockett's first assignment of error has merit.

{¶11} Crockett's second assignment of error states:

{¶12} "Felony charges must be brought to trial within 270 days under R.C. 2945.71(C)(2). Days when the defendant is incarcerated in lieu of bail are counted as three days each. Trial counsel rendered ineffective assistance when they failed to request discharge, under R.C.[.] 2945.73(B), following four months of sua sponte continuances, in addition to other chargeable time, while the defendant was incarcerated."

{¶13} Crockett argues that 164 days of his incarceration were chargeable to the state thus violating his speedy-trial right. He maintains that two of the court's

continuances alone constituted a speedy-trial violation. Although Crockett acknowledges that there are exceptions that may extend the statutory speedy-trial time, he does not consider the court's unavailability to be a sufficient reason to schedule trial beyond the statutory try-by date. In response, the state argues that Crockett waived any speedy-trial issue by failing to raise it in a motion below. Even looking to the merits of Crockett's argument, the state maintains that numerous events tolled the speedy-trial clock so that only 21 days on the clock had elapsed.

{¶14} The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." This right was made applicable to the States by the Fourteenth Amendment. Article I, Section 10 of the Ohio Constitution also guarantees an accused the right to a speedy trial.

{¶15} Every person who is charged with an offense for which he may be deprived of his liberty or property is entitled to this fundamental right of a speedy trial. *State v. Dunlap*, 7th Dist. No. 01-CA-124, 2002-Ohio-3178, at ¶10. This is so because the right to a speedy trial "is premised upon the reality that fundamental unfairness is likely in overlong prosecutions." *State v. Anderson*, 7th Dist. No. 02-CO-30, 2003-Ohio-2557, at ¶13, quoting *Dickey v. Florida* (1970), 398 U.S. 30, 54, 90 S.Ct. 1564, 26 L.Ed.2d 26.

{¶16} Pursuant to R.C. 2945.71(C)(2), the state must bring a person charged with a felony to trial within 270 days after their arrest. If the accused is held in jail in lieu of bail on the pending charge, then each day they are held in jail counts as 3 days. R.C. 2945.71(E). This is known as the "triple-count" provision. It requires the state to bring the accused to trial within 90 days after their arrest.

{¶17} This court previously set out the standard of review for speedy trial issues in *State v. High* (2001), 143 Ohio App.3d 232, 241-242, 757 N.E.2d 1176, as follows:

{¶18} "Our standard of review of a speedy trial issue is to count the days of delay chargeable to either side and determine whether the case was tried within the

time limits set by R.C. 2945.71. *Oregon v. Kohne* (1997), 117 Ohio App.3d 179, 180, 690 N.E.2d 66, 67; *State v. DePue* (1994), 96 Ohio App.3d 513, 516, 645 N.E.2d 745, 746-747. Our review of the trial court's decision regarding a motion to dismiss based upon a violation of the speedy trial provisions involves a mixed question of law and fact. *State v. McDonald* (June 30, 1999), Mahoning App. Nos. 97 C.A. 146 and 97 C.A. 148. Due deference must be given to the trial court's findings of fact if supported by competent, credible evidence. *Id.* However, we must independently review whether the trial court properly applied the law to the facts of the case. *Id.* Furthermore, when reviewing the legal issues presented in a speedy trial claim, an appellate court must strictly construe the relevant statutes against the state. *Id.*, citing *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 708-709." See, also, *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, at ¶8.

{¶19} As the record below reveals, Crockett never brought his speedy-trial concerns to the attention of the court. This court has consistently held that a defendant's failure to file an appropriately-timed motion to dismiss on speedy-trial grounds constitutes a waiver of the issue on appeal. *State v. Trummer* (1996), 114 Ohio App.3d 456, 470-471, 683 N.E.2d 392. However, in this case, Crockett argues that his trial counsel was ineffective for failing to file such a motion. That claim necessarily fails if Crockett's speedy-trial right was never violated. Thus, this court will examine whether his speedy-trial rights were indeed violated.

Nov 27, 2006
{¶20} Crockett was arrested November 27, 2006. The date of arrest does not count in the speedy trial calculation. *State v. Lautenslager* (1996), 112 Ohio App.3d 108, 110, 677 N.E.2d 1263. Therefore, Crockett's speedy-trial clock began to run the day after his arrest, November 28, 2006. The clock ran until December 18, 2006, when he filed numerous motions, including motions for discovery and a bill of particulars. R.C. 2945.72(E) provides that the time for bringing an accused to trial may be extended by "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused[.]" The filing of a motion for bill of particulars and discovery generally tolls the speedy-trial

clock. *State v. Love*, 7th Dist. No. 02 CA 245, 2006-Ohio-1762, ¶135. Therefore the speedy-trial clock remained tolled at 21 days (November 28, 2006 through December 18, 2006).

{¶21} On December 21, 2006, Crockett's appointed counsel filed a motion to withdraw since Crockett had retained new counsel. (Docket 18). On December 27, 2006, the trial court granted the motion. (Docket 19). Crockett's new counsel did not file a notice of appearance until January 19, 2007. (Docket 20). The state argues that during the period from December 27, 2006, to January 19, 2007, Crockett was without counsel which tolled the speedy-trial clock under R.C. 2945.72(E). Crockett argues that time period was not tolled because the trial court was aware he had retained new counsel and explicitly accepted that in its December 27, 2006 judgment entry. R.C. 2945.72(C) provides that the time for bringing an accused to trial may be extended by "[a]ny period of delay necessitated by the accused's lack of counsel[.]" The state is incorrect in its assertion that the clock was tolled based on this provision. As the record demonstrates, Crockett was never without counsel. His appointed-counsel's motion to withdraw specifically states the names of Crockett's newly-retained counsel, the same counsel who filed their January 19, 2007 notice of appearance. However, the clock remained tolled because of the motions previously filed by Crockett's appointed counsel. As of December 27, 2006, when the trial court granted Crockett's appointed counsel's motion to withdraw, a reasonable amount of time had yet to pass for the state to respond to those previously filed discovery motions.

{¶22} On January 31, 2007, the case was called for trial. The trial court filed a judgment entry sustaining a joint motion to continue, noting that discovery was ongoing and resetting trial for March 7, 2007. (Docket 23). R.C. 2945.72(H) provides that the time for bringing an accused to trial may be extended by "[a]ny continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.]" And, it is well accepted that a defendant's motion to continue is a tolling event. *State v. Counts*, 170 Ohio App.3d

339, 2007-Ohio-117, 867 N.E.2d 432, at ¶58. Therefore, the speedy-trial clock remained tolled at 21 days.

{¶23} In the meantime and before the scheduled March 7, 2007 trial date, discovery continued. On February 1, 2007, a "REQUEST AND DEMAND FOR DISCOVERY NOTICE AND RECEIPT" was filed with the trial court. In the first section, Crockett's attorney makes a "request and demand" for all discovery entitled to him pursuant to Crim.R. 16 and Loc.R. 9. (Docket 22). In the next section, Crockett's attorney contemporaneously acknowledges receiving certain items in response to the aforementioned general discovery request. In the last section, the state indicates that it complied with Crockett's discovery request and proceeds to make a "request and demand" for all discovery to which it is entitled from Crockett. In other words, the state made a request for reciprocal discovery. On February 22, 2007, the state filed a supplemental discovery notice. (Docket 27). Additionally, similar "REQUEST AND DEMAND FOR DISCOVERY NOTICE AND RECEIPT" filings were made on February 22, 2007, and February 27, 2007. (Docket 28, 29).

{¶24} On March 2, 2007, the trial court continued the case until May 9, 2007, due to the court's unavailability. (Docket 32). As indicated, R.C. 2945.72(H) provides that the time for bringing an accused to trial may be extended by "any *reasonable* continuance granted other than upon the accused's own motion[.]" (Emphasis added.) Such a continuance must be reasonable in both purpose and length. *State v. Clow*, 7th Dist. No. 01-CA-70, 2002-Ohio-1564, at ¶10, citing *State v. Martin* (1978), 56 Ohio St.2d 289, 293, 10 O.O.3d 415, 417, 384 N.E.2d 239. The Supreme Court of Ohio has held "[w]hen *sua sponte* granting a continuance under R.C. 2945.72(H), the trial court must enter the order of continuance and the reasons therefor by journal entry prior to the expiration of the time limit prescribed in R.C. 2945.71 for bringing a defendant to trial." *State v. Mincy* (1982), 2 Ohio St.3d 6, 441 N.E.2d 571, syllabus. Here, the trial court stated that it was continuing the trial due to the "Court's Unavailability." Crockett contends that the court's entry about being unavailable is insufficient to show the continuance was reasonable because it does not specify why

the court was unavailable. Although not very specific, this court has deemed similar pronouncements adequate. *State v. Howard*, 7th Dist. No. 06-MA-31, 2007-Ohio-3170, at ¶23; *State v. Rupp*, 7th Dist. No. 05 MA 166, 2007-Ohio-1561, at ¶107; *State v. Davis* (June 30, 1999), 7th Dist. No. 98CA97. See, also, *State v. Niebauer*, 11th Dist. No. 2007-A-0097, 2008-Ohio-3988; *State v. Walter*, (Dec. 22, 2000) 5th Dist. No. 00CA43 (finding this reason to be reasonable and sufficient), citing *State v. Saffel* (1988), 35 Ohio St.3d 90 (noting court would be out of town during earliest available date after witness's availability); *State v. Cadwallader* (Mar. 12, 1992), 8th Dist. No. 60006 (unavailability of court sufficient). Moreover, the remainder of the record demonstrates that the continuance was reasonable in both purpose and length. At a pretrial the day before, the court noted that there was an ongoing discovery issue concerning the testing of recovered weapons that was going to be resolved by the attorneys. (Docket 31). Thereafter, the state filed supplemental discovery again on March 30, 2007 (Docket 33) and April 13, 2007 (Docket 34), and another "REQUEST AND DEMAND FOR DISCOVERY NOTICE AND RECEIPT" was filed on May 9, 2007 (Docket 36). There is no indication in the record of any reciprocal discovery provided by counsel for Crockett.

{¶25} On May 9, 2007, the trial court filed a judgment entry ordering codefendant Moore's case to be tried separately and setting Crockett's trial, along with codefendant Lewis, for July 2, 2007 "by agreement." (Docket 37). The entry also noted that the trial was being continued due to the unavailability of the court and the courtroom. As already indicated, these types of events continued to toll Crockett's speedy-trial clock, now still at 21 days.

{¶26} On July 2, 2007, Crockett's counsel moved for a continuance which the trial court granted, resetting the trial for October 15, 2007. (Docket 39, 40). In that entry and subsequent entries, it is apparent that a different trial court judge had taken over the case. "[I]t is well-established that defense counsel may request a continuance in order to obtain more time to prepare for the case without the defendant's agreement, and the defendant is bound thereby." *State v. Smith*, 2d Dist.

No.2003 CA 93, 2004-Ohio-6062, at ¶19, citing *State v. McBreen* (1978), 54 Ohio St.2d 315, 376, N.E.2d 593, syllabus.

{¶27} On October 11, 2007, the trial court held a pretrial conference. The court ordered Crockett and Lewis to be tried separately – Lewis on October 15, 2007, and Crockett on November 26, 2007. The dates were decided “after considering the trial calendar of defense counsel and the Court and the prosecutor.” (Docket 48). Thus, the speedy-trial clock continued to toll.

{¶28} Crockett’s trial began on November 27, 2007. Therefore, his speedy trial could not have elapsed more than 22 days, well within the 90-day statutory limit. As discussed, the majority of delays were attributable to the court’s unavailability and motions filed on Crockett’s behalf. Moreover, at no time did Crockett ever indicate that he was concerned that his speedy-trial right was being jeopardized and never filed a motion seeking discharge on that basis.

{¶29} Accordingly, Crockett’s second assignment of error is without merit.

{¶30} Crockett’s third assignment of error states:

{¶31} “Defendants have the fundamental right to effective assistance of counsel. An attorney who fails to impeach the State’s only identification witness with on-the-record information severely undermining his testimony is ineffective. Mr. Crockett’s counsel was ineffective for failing to argue that Keith Tillis was the shooter of the assault rifle, since he was captured on video wearing the camouflage coat that Lucretia [sic] May identified the assault rifle’s shooter as wearing.”

{¶32} As indicated earlier, Moore, Lewis, Tillis, and Crockett were driving around the southside of Youngstown looking for Dill. When they spotted his truck at the intersection of Glenwood Avenue and Earle Street, Moore stopped the vehicle in front of Dill’s, essentially stopping traffic in the northbound lane. Lacrechia May was traveling behind Moore’s vehicle when this occurred. She witnessed three of the occupants exit the vehicle. One of them tripped and fell, and ran away. The other two opened fire on Dill’s truck. She identified the person shooting the assault rifle as wearing a camouflage coat.

{¶33} Before Moore, Lewis, and Tillis began driving around, they had been at Life Skills on Market Street in Youngstown. Video surveillance cameras at the facility captured the three leaving the building, getting into Moore's vehicle, and leaving the facility. At the time Crockett's appellate counsel filed the appellate brief and before he was able to view the video, he believed that it showed that Tillis was wearing a camouflage coat. In his reply brief, Crockett's counsel states that he viewed the video and now agrees with the state that Tillis was not wearing a camouflage jacket. Consequently, Crockett's counsel withdraws this assignment of error.

{¶34} Crockett's fourth assignment of error states:

{¶35} "The rules of evidence govern admissibility. Recorded recollections are admissible under Evid.R. 803(5) only when the witness states that the recorded statements were made when the witness' memory was fresh and correctly reflect that knowledge. The trial court erred by allowing Tara Rust's recorded statement to be played for the jury, since she testified that her original statements were lies based on police threats to arrest her and remove her children."

{¶36} Thirteen days after the murder, Crockett's girlfriend, Tara Rust, was interviewed by Detective Sergeant Rick Bruno Spottleson at the Youngstown Police Department and the session was videotaped. In that interview, it was revealed that Crockett had stayed with Rust at her home on John Street in Youngstown the night before the murder. The morning of the murder, Crockett had received a phone call and left in a dark green, four-door car around 10:30 a.m. carrying an assault rifle in a black trash bag. Crockett returned in the green car 30 to 45 minutes later and told Rust to open the garage door. The car was backed into the garage and Crockett retrieved the assault rifle in the bag from the trunk. Later, Rust drove Crockett and Lewis to the east side of town where she dropped them off at Crockett's mother's home and they took the rifle with them.

{¶37} When Rust was called to testify at trial, she vacillated about what occurred the day of the murder. Concerning her statement to Detective Spottleson, she contended that she lied. She maintained that she was pressured into giving the

statement due to threats that she would be arrested and have her children taken from her. At times, she acknowledged some things in the statement were true, yet at other times other things were not. Over Crockett's objection, the trial court allowed the state to play the videotaped statement to the jury. The state had argued that the statement came within the record recollection exception to the hearsay rule.

{¶38} Crockett argues that the trial court erred in allowing the statement to be played to the jury under that exception because Rust made it clear that she had lied to the police in that interview. The state argues that it was within the trial court's discretion to determine Rust's credibility and determine if she was being truthful when she gave the statement, and that this court should not substitute its judgment for the trial court's.

{¶39} In reviewing a trial court's decision to admit or exclude evidence, an appellate court must limit its review to whether the trial court abused its discretion. *State v. Bey*, 85 Ohio St.3d 487, 490, 1999-Ohio-283, 709 N.E.2d 484. Based upon an abuse of discretion standard of review, an appellate court is not permitted to substitute its judgment for that of the trial court on evidentiary issues. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 15 OBR 311, 473 N.E.2d 264.

{¶40} Hearsay is an out-of-court statement, offered in court, to prove the truth of the matter asserted. Evid.R. 801(C). Generally, hearsay is inadmissible. Evid.R. 802. However, there are numerous exceptions to the hearsay rule. Under Ohio Evid. R. 803(5), the following may be admitted pursuant to a hearsay exception:

{¶41} "A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

{¶42} Thus, a statement is admissible under Evid.R. 803(5) where (1) the witness once had firsthand knowledge of the matter; (2) the witness made or adopted

the statement when the matter was fresh in their memory; (3) the written statement *correctly* reflects the witness's knowledge; and (4) the witness now has insufficient recollection to enable them to testify fully and accurately.

{¶143} Here, there is no debate about the first, second, and fourth requirements. The issue here concerns the third requirement – whether Rust's statement correctly reflected her knowledge of the events that occurred on the day of the murder. When asked about the videotaped statement, Rust testified as follows:

{¶144} "Q Okay. If you don't remember these things, do you have any reason to doubt that what you said on the tape is true for the most part?

{¶145} "A Yes.

{¶146} "Q You do?

{¶147} "A (Nodding head).

{¶148} "Q And why is that?

{¶149} "A Because I was pregnant and they was yelling at me, basically -- I mean, I know that they was yelling at me and things like that.

{¶150} "Q Okay. What does that have to do with the truthfulness of your statement?

{¶151} "A Because they pressured me into my statement.

{¶152} "Q They pressured you into your statement?

{¶153} "A Yes.

{¶154} "Q How did they do that?

{¶155} "A By yelling at me and saying that I know stuff that I didn't know."

(Tr. 454-455.)

{¶156} "Q Okay. But this statement you gave was just 13 days after it happened?

{¶157} "A Okay. And this is a year later and I don't remember.

{¶158} "Q Okay. Well, that's what I'm asking you. Isn't it true that your memory was better when you gave that statement to Detective Spotleson than it is today?

{1159} "A Yes.

{1160} "Q Yes. And isn't it true that what you told Detective Spotleson that day was true? Because you don't remember today. Your memory was better then. And you told him the truth.

{1161} "A No.

{1162} "Q No?

{1163} "A (Shaking head).

{1164} "Q But how do you know what the truth is if you don't remember anything?

{1165} "A I really can't tell you, but I know that all of that wasn't the truth.

{1166} "Q You know that wasn't the truth?

{1167} "A I said that I know all of it wasn't the truth.

{1168} "Q All of it --

{1169} "A I can't say that all of it wasn't the truth. But I can't remember exactly what happened.

{1170} "Q Well, then some of it was true; is that right?

{1171} "A Yes." (Tr. 463-464.)

{1172} Specifically, concerning whether Crockett had the assault rifle with him when she took him and Lewis to the east side, she testified:

{1173} "Q You remember telling them that he had the gun?

{1174} "A Uh-huh.

{1175} "Q But he didn't have the gun?

{1176} "A I remember I lied about that at the time.

{1177} "Q I can't understand you.

{1178} "A I remember that I lied about that at the time of my statement.

{1179} "Q You lied about that?

{1180} "A Uh-huh." (Tr. 472-473.)

{1181} According to Rust, her statement did not correctly reflect her knowledge of the events of that day. She testified that she was pregnant and the police had

pressured her into giving the statement. Therefore, the third requirement was not met and the statement was not admissible under the hearsay exception found in Evid.R. 803(5). Although the statement was inadmissible under Evid.R. 803(5), there may have been alternative bases for its admission. But, given the specificity at trial that the state used in identifying its purpose for playing the recorded statement, it would be improper and unfair to excuse its admission at this late date upon another rationale. Defense counsel should be apprized of the alternative bases at a time when they can object to their applicability and likewise, the trial court given the opportunity to evaluate an alternative means for admitting the recording.

{¶82} Nevertheless, any error the trial court may have committed in allowing the statement to be played could not have affected the outcome of the trial and amounted only to harmless error. While Tillis stopped short of saying that he actually witnessed Lewis and Crockett open fire on Dill, he did testify to the events leading up to and immediately before the murder. As he ran from the scene he heard gunshots. Lacreshia May, who happened upon the scene in traffic, corroborated Tillis' version of the event and explained how the other two men opened fire on the truck. Additionally, the state presented evidence that assault rifle shells retrieved from the scene matched those that had been recovered from Rust's house where Crockett had kept the rifle. In sum, Rust's statement to police concerning Crockett's possession of the assault rifle the day of the murder was duplicative. In other words, her statement aside, there was ample evidence upon which to convict Crockett.

{¶83} Accordingly, Crockett's fourth assignment of error is without merit.

{¶84} Crockett's fifth assignment of error states:

{¶85} "The rules of evidence govern admissibility of evidence. Statements are not admissible unless specifically provided for by the rules of evidence. The trial court erred in admitting prejudicial statements and information, which had the cumulative effect of denying Mr. Crockett a fair trial."

{¶86} "The cumulative error doctrine refers to a situation in which the existence of multiple errors, which may not individually require reversal, may violate a

defendant's right to a fair trial. To affirm a conviction in spite of multiple errors, we must determine that the cumulative effect of the errors is harmless beyond a reasonable doubt. The errors may be considered harmless if there is overwhelming evidence of guilt, if Appellant's substantial rights were not affected, or if there are other indicia that the errors did not contribute to the conviction." (Internal citations omitted.) *State v. Anderson*, 7th Dist. No. 03-MA-252, 2006-Ohio-4618, at ¶80.

{¶87} As discussed above, the errors Crockett alleges do not have merit. Thus, no cumulative error exists. Accordingly, Crockett's fifth assignment of error is without merit.

{¶88} The judgment of conviction is hereby affirmed and the judgment entry of sentence reversed and remanded for resentencing pursuant to the resolution of Crockett's first assignment of error.

Vukovich, P.J., concurs.

Waite, J., concurs.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)
) SS: AFFIDAVIT IN SUPPORT OF REASON FOR DELAY
MAHONING COUNTY)

I, Gary Crockett, do solemnly swear, after being duly cautioned as required by law, that the following statements are true to the best of my knowledge and beliefs. I was unable to file an appeal to this Court within forty-five days of the Court of Appeals decision for the following reasons:

When I received the decision reached by the Seventh District from Attorney Spencer Cahoon, he also sent attached, a letter stating for me not to file on my own unless I heard from him; I did not hear back from him a week before the due date. The due date was July 27, 2009. Once I finally came to the realization that I would have to do it pro se, I started to do research, which took a little time. Attached is a copy of the letter from Attorney Cahoon.

Gary Crockett
Gary Crockett #540-846
Affiant-Appellant, pro se

JACALYN A McCULLOUGH
Notary Public - State of Ohio
My Commission Expires Feb. 11, 2013

Sworn to, or affirmed, and subscribed in my presence on this 12th day of August, 2009.

Jacalyn A. McCullough
Notary Public



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TIMOTHY YOUNG
State Public Defender

June 22, 2009

Gary Crockett
#A540846
Trumbull Correctional Institution
5701 Burnett Road
P.O. Box 901
Leavittsburg, Ohio 44430-0901

Dear Mr. Crockett:

I just received the court's ruling, and enclosed is a copy of the Seventh District Court of Appeals opinion affirming your decision in part and reversing and remanding your case for a new sentencing.

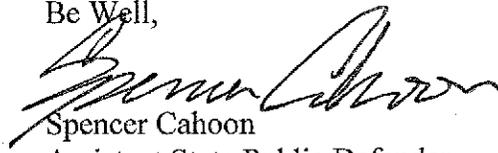
In a nutshell, we lost on the major claims that would have given you a new trial. The court agreed with your post-release control argument, and found your sentence void. Consequently, you get new sentencing hearing, which gives the opportunity to make any new sentencing arguments you may have. It also gives you a chance to present additional information, such as mitigation witnesses or new information about your progress since becoming incarcerated. Additionally, you will have the chance to address the judge and make any statement you think appropriate.

Now, I will be reviewing your case for a possible appeal on the losing issues to the Ohio Supreme Court. You have 45 days from the date the decision was filed to appeal to the Ohio Supreme Court. The decision was issued on June 12, 2009. Consequently, your appeal is due by July 27, 2009. I will plan to have my review complete in time to give you a chance to file on your own if I do not find merit to file on your behalf. Enclosed with this letter is packet of information to assist you in filing on your own, if I do not find merit to file on your behalf.

Please **DO NOT** file on your own until you hear back from me about whether I will be filing on your behalf. There is one exception, if you have not heard back from me a week before your due date, go ahead and file. The Ohio Supreme Court accepts very few cases, so my review for the Ohio Supreme Court is different than the review that goes into a direct appeal. I will also be looking at whether you might be able to succeed in the federal courts.

If you have any questions, feel free to contact me. Enclosed is a self-addressed, postage-prepaid envelope for your use. I will be in touch when I receive a decision for the court of appeals.

Be Well,

A handwritten signature in black ink, appearing to read "Spencer Cahoon", written in a cursive style.

Spencer Cahoon
Assistant State Public Defender

Encl. SASE, Opinion & Entry
#302342