

ORIGINAL

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 09-0825

STATE OF OHIO

Appellant

**On Appeal From The Summit
County Court of Appeals
Ninth Appellate District
Court Of Appeals Case No. 24369**

v.

SALLY A. MASSIEN

Appellee

**REPLY BRIEF OF APPELLANT
STATE OF OHIO**

SHERRI BEVAN WALSH
Prosecuting Attorney

RICHARD S. KASAY (*Counsel of Record*)
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2800
Fax (330) 643-2137
Email: kasay@prosecutor.summitoh.net
Reg. No. 0013952

COUNSEL FOR APPELLANT, STATE OF OHIO

KAREN H. BROUSE (*Counsel of Record*)
Brouse Law Office
1013 Portage Trail
Suite 7
Cuyahoga Falls, Ohio 44221
(330) 928-7878
Reg. No. 0074809

COUNSEL FOR APPELLEE, SALLY A. MASSIEN

FILED
NOV 09 2009
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
NOV 09 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF AUTHORITIES.....	III
STATEMENT OF FACTS	1
ARGUMENT:	
<u>PROPOSITION OF LAW 1.</u>	
A POSITION OF TRUST UNDER R.C. 2929.13(b)(1)(d) INCLUDES PERSONS HOLDING PUBLIC OR PRIVATE POSITIONS.	2
<u>PROPOSITION OF LAW 2.</u>	
A NURSE WITH ACCESS TO NARCOTIC DRUGS AT HER PLACE OF EMPLOYMENT HOLDS A POSITION OF TRUST UNDER R.C. 2929.13(B)(1)(d) AND IF IN THE COURSE OF HER EMPLOYMENT SHE STEALS THOSE DRUGS SHE IS INELIGIBLE FOR INTERVENTION IN LIEU OF CONVICTION UNDER R.C. 2951.041(B)(1).....	2
CONCLUSION	3
PROOF OF SERVICE	4
APPENDIX	<u>Appx. Page</u>
<u>CONSTITUTIONAL PROVISIONS; STATUTES:</u>	
R.C. 2945.67.....	A-1
App.R. 5.....	A-2

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE(S)</u>
<i>State v. Brewer</i> (Nov. 24, 2000), 1 st Dist. App. No. C-000148, 2000 WL 1732335.....	2
<i>State v. Condon</i> , 152 Ohio App.3d 629, 203-Ohio-2335.....	2
 <u>CONSTITUTIONAL PROVISIONS; STATUTES:</u>	
R.C. 2945.67.....	1
App.R. 5.....	1

STATEMENT OF FACTS

Massien apparently does not understand the State's appeal rights and so has left the erroneous impression that the Ninth District erred in hearing the appeal by her statement at page 2 of her Brief that the State failed to file a timely appeal but that the court of appeals granted the State leave to appeal. The State filed a motion for leave to appeal that was timely under App.R. 5(C). The State did not have an appeal as of right under R.C. 2945.67(A).

PROPOSITIONS OF LAW 1 AND 2

PROPOSITION OF LAW 1

A POSITION OF TRUST UNDER R.C. 2929.13(b)(1)(d) INCLUDES PERSONS HOLDING PUBLIC OR PRIVATE POSITIONS.

PROPOSITION OF LAW 2

A NURSE WITH ACCESS TO NARCOTIC DRUGS AT HER PLACE OF EMPLOYMENT HOLDS A POSITION OF TRUST UNDER R.C. 2929.13(B)(1)(d) AND IF IN THE COURSE OF HER EMPLOYMENT SHE STEALS THOSE DRUGS SHE IS INELIGIBLE FOR INTERVENTION IN LIEU OF CONVICTION UNDER R.C. 2951.041(B)(1).

LAW AND ARGUMENT

The State is not contending that a waitress who steals from her employer is ineligible for ILC; nor would the State contend that a parent is ineligible solely by reason of being a parent. The better view is that a position of trust when held by a private person is one “traditionally thought to invoke a special relationship of trust – such as a doctor, lawyer, or accountant.” *State v. Condon*, 152 Ohio App.3d 629, 203-Ohio-2335, ¶104; See *State v. Brewer* (Nov. 24, 2000), 1st Dist. App. No. C-000148, 2000 WL 1732335, *2.

The State contends that a person such as Massien, a private nurse with access to narcotic drugs at her place of employment and who steals the drugs while on duty holds a position of trust and since the offense was committed while Massien was acting in her position of trust she should have been ineligible for ILC.

CONCLUSION

Based on the foregoing arguments, Appellant State of Ohio respectfully requests that the judgment of the Ninth District Court of Appeals be reversed.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney

Richard S. Kasay 1st Ind.

RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue
Akron, Ohio 44308
(330) 643-2800
Fax (330) 643 2137
Email kasay@prosecutor.summitoh.net
Reg. No. 0013952

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was sent by regular U.S. Mail to Attorney Karen H. Brouse, Brouse Law Office, 1013 Portage Trail, Suite 7, Cuyahoga Falls, Ohio 44221, on the 5th day of November, 2009.

A handwritten signature in black ink that reads "Richard S. Kasay" followed by a date "11/5/09". The signature is written in a cursive style.

RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division

APPENDIX

the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant.

(D)(1) Motion by defendant for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C)

When leave is sought from the court of appeals for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C), a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the reason why the consecutive sentences exceed the maximum prison term allowed. The motion shall be accompanied by a copy of the judgment and order stating the sentences imposed and stating the offense of which movant was found guilty or to which movant pled guilty. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the notice of appeal and a copy of the motion to the clerk of the court of appeals who shall serve the notice of appeal and the motion upon the prosecuting attorney.

(D)(2) Leave to appeal consecutive sentences incorporated into appeal as of right

When a criminal defendant has filed a notice of appeal pursuant to App. R. 4, the defendant may elect to incorporate in defendant's initial appellate brief an assignment of error pursuant to R.C. 2953.08(C), and this assignment of error shall be deemed to constitute a timely motion for leave to appeal pursuant to R.C. 2953.08(C).

(E) Determination of the motion

Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(F) Order and procedure following determination

Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. If the motion for leave to appeal is overruled, except as to motions for leave to appeal filed by the prosecution, the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. If the motion is sustained and leave to appeal is granted, the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

CREDIT(S)

(Adopted eff. 7-1-71; amended eff. 7-1-88, 7-1-92, 7-1-94, 7-1-96, 7-1-03)

App. R. Rule 5

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Appellate Procedure

Title II. Appeals from Judgments and Orders of Court of Record

App R 5 Appeals by leave of court

(A) Motion by defendant for delayed appeal.

(1) After the expiration of the thirty day period provided by App. R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

(a) Criminal proceedings;

(b) Delinquency proceedings; and

(c) Serious youthful offender proceedings.

(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and shall file a copy of the notice of the appeal in the court of appeals. The movant also shall furnish an additional copy of the notice of appeal and a copy of the motion for leave to appeal to the clerk of the court of appeals who shall serve the notice of appeal and the motions upon the prosecuting attorney.

(B) Motion to reopen appellate proceedings.

If a federal court grants a conditional writ of habeas corpus upon a claim that a defendant's constitutional rights were violated during state appellate proceedings terminated by a final judgment, a motion filed by the defendant or on behalf of the state to reopen the appellate proceedings may be granted by leave of the court of appeals that entered the judgment. The motion shall be filed with the clerk of the court of appeals within forty-five days after the conditional writ is granted. A certified copy of the conditional writ and any supporting opinion shall be filed with the motion. The clerk shall serve a copy of a defendant's motion on the prosecuting attorney.

(C) Motion by prosecution for leave to appeal

When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion, the movant shall file with

R.C. § 2945.67

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2945. Trial (Refs & Annos)
Bill of Exceptions

2945.67 When prosecutor may appeal; when public defender to oppose

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general may appeal, in accordance with section 2953.08 of the Revised Code, a sentence imposed upon a person who is convicted of or pleads guilty to a felony.

(B) In any proceeding brought pursuant to division (A) of this section, the court, in accordance with Chapter 120. of the Revised Code, shall appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive the person's right to counsel.

CREDIT(S)

(1995 S 2, eff. 7-1-96; 1978 H 1168, eff. 11-1-78)