

ORIGINAL

NO. 2009-1619

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO  
NO. 21906

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STATE OF OHIO,  
Plaintiff-Appellant

-vs-

DENNY ROSS,  
Defendant-Appellee

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**MEMORANDUM IN SUPPORT OF JURISDICTION**

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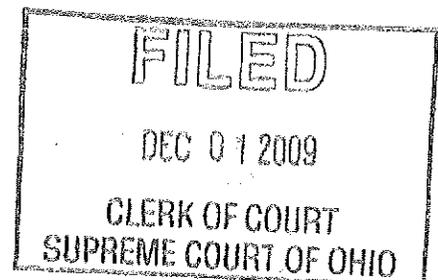
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*State v. Ross*, Summit App. No. 21906, 2009-Ohio-3591  
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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR  
GENERAL INTEREST**

Should Ohio law allow a Court of Common Pleas to reconsider the denial of a Crim. R. 29(C) motion for acquittal several months (or even years) outside of the rule's fourteen-day time limit? The Court below answered the question affirmatively, despite clear and unambiguous language in the Ohio Criminal Rules to the contrary. This precedent has profoundly negative consequences for other criminal cases throughout Ohio, and it highly warrants Supreme Court Review.

Criminal Rule 29(C) allows criminal defendants fourteen days after a jury verdict (or discharge of the jury) to file a motion for acquittal. The rule must be read in conjunction with Crim. R. 45(B), which expressly forbids a court from taking "any action" not provided for in Crim. R. 29(C). Nevertheless, the court below held that a denial of a Crim. R. 29(C) motion is an "interlocutory" ruling, subject to reconsideration at any time.

Ordinarily, the State of Ohio may not appeal from a trial court's decision to acquit a criminal defendant. In the typical case, R.C. 2945.67(A) bars the State of Ohio from seeking leave to appeal a final verdict. Generally, a valid judgment of acquittal constitutes a final verdict. *State ex rel. Yates v. Court of Appeals for Montgomery County* (1987), 32 Ohio St.3d 30, 512 N.E.2d 343. The State submits that when the Court of Common Pleas renders an acquittal far outside the express confines of Crim. R. 29(C), it acts without jurisdiction and the resulting judgment is not a verdict at all.

The United States Supreme Court reached essentially the same conclusion in *Carlisle v. United States*, (1996), 517 U.S. 416, 116 S.Ct. 1460, when it held that a district court has no authority to grant a post-verdict Crim. R. 29(c) motion for acquittal made

outside of the time limits of the rule. “A rule permitting a party to submit and prevail on an untimely motion for judgment of acquittal is ‘inconsistent’ (or not ‘consistent’) with Rule 29’s 7-day filing limit; and the question of when a motion for judgment of acquittal may be granted does not present a case ‘not provided for’ by Rule 29; and Rule 29 is the ‘controlling law’ governing this question.” *Id.*, at 517 U.S. 425, 116 S.Ct. 1460.

In this case, a successor visiting judge who did not preside over the defendant’s trial assumed control of the case after a mistrial. The visiting judge initially denied a Crim. R. 29(C) motion for acquittal that had been pending for nearly three years after the discharge of the jury. Months later, however, the visiting judge reconsidered the issue and then granted the defendant’s Crim. R. 29(C) motion for acquittal. What makes this decision especially troubling is that the visiting judge intermingled new facts that had only been recently disclosed by the State in pretrial discovery, but which had not been presented to the judge or jury in the first trial.

In sum, this case warrants Supreme Court review for multiple compelling reasons. First, the Court of Appeals misapplied very clear and unambiguous language in Crim. R. 29(C) and Crim. R. 45(B) to hold that the denial of a Crim. R. 29(C) acquittal motion is “interlocutory” and subject to reconsideration at any time. The Ohio Criminal Rules simply do not support that interpretation and the decision below should not be allowed to become precedent throughout Ohio. Second, a rule that allows for reconsideration of an order denying a Crim. R. 29(C) motion several months (or even several years) later destroys any concept of finality in criminal cases and is anathema.

The State of Ohio therefore respectfully requests that this Honorable Court accept jurisdiction of this case and hear the State’s appeal on its merits.

## STATEMENT OF THE CASE AND RELEVANT FACTS

Akron Police found 18 year-old Hannah Hill's partially nude, decomposing body in the trunk of her car on May 26, 1999. Following an investigation, the Summit County Grand Jury indicted defendant Denny Ross with murder, aggravated murder with capital specifications, rape, kidnapping, tampering with evidence, and abuse of a corpse in connection with the incident. Trial commenced on September 28, 2000 before Summit County Court of Common Pleas Judge Jane Bond.<sup>1</sup> At the close of the State's case, Judge Bond granted Ross's motion for judgment of acquittal on the kidnapping charge. After Ross rested without presenting evidence, he made a second motion for judgment of acquittal as to the remaining counts. Judge Bond denied Ross's second motion for acquittal and the jury began deliberating on October 27, 2000.

During deliberations on Saturday, September 28, 2000, Judge Bond received a note from the foreperson. Although not directly relevant for purposes of this appeal, the foreperson's note resulted in Judge Bond declaring a *sua sponte* mistrial later that day on the remaining counts. Since then, Ross has unsuccessfully challenged his retrial on double jeopardy grounds in both Ohio and federal courts. See *State v. Ross*, Summit App. No. 20890, 2002-Ohio-7317, discretionary jurisdiction declined, *State v. Ross*, 98 Ohio St.3d 1567, 2003-Ohio-2242; *Ross v. Petro* (N.D. Ohio, 2005), 382 F.Supp.2d 967; *Ross v. Petro* (C.A. 6, 2008), 515 F.3d 653, cert. declined *Ross v. Rogers* (2009), --- U.S. ---, 129 S.Ct. 906, 173 L.Ed.2d 109.<sup>2</sup>

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<sup>1</sup>For purposes of clarity, the State refers to the multiple judges serving as the "trial court" by their individual names.

<sup>2</sup>Although the facts culminating in this appeal took place in 2003, this case was not ripe for review until the Sixth Circuit U.S. Court of Appeals overturned the District Court's decision to grant Ross's writ of habeas corpus on double jeopardy grounds. The case had been stayed by the federal court since 2004.

After the mistrial, Ross filed another motion for Judgment of Acquittal pursuant to Crim. R. 29(C) on November 9, 2000. Before Judge Bond could rule on Ross's Crim. R. 29(C) motion, Ross sought and obtained Judge Bond's removal from the case as a witness in the double jeopardy litigation. *In re Disqualification of Bond*, 94 Ohio St.3d 1221, 2001-Ohio-4102. Retired Stark County Court of Common Pleas Judge Richard Reinbold briefly presided over the case before recusing himself. Retired Lorain County Court of Common Pleas Joseph Cirigliano was then assigned to the case as a visiting judge. *In re Disqualification of Cirigliano* (2004), 105 Ohio St.3d 1223, 826 N.E.2d 287, at ¶¶ 7-12.

In the interim, the newly-elected Summit County Prosecuting Attorney, Sherri Bevan Walsh, recused herself and her entire office for a conflict of interest. On the motion of Prosecuting Attorney Walsh, all of the judges of the Summit County Court of Common Pleas assigned Cuyahoga County Prosecuting Attorney William D. Mason as the special prosecutor on March 16, 2001. *Id.*, at ¶ 11.

On July 29, 2003 Ross filed a "Request to Have Remaining Motions Ruled Upon by the Court" in which he asked the court to rule upon the Motion for Judgment of Acquittal and a Motion to Perfect the Jury Verdicts filed in 2001. Judge Cirigliano conducted an unrecorded hearing in chambers Cleveland Ohio on July 30, 2003. On September 10, 2003, Judge Cirigliano issued a journal entry (1) denying Ross' Motion for Judgment of Acquittal, (2) denying Ross' Motion to Perfect Verdicts, (3) set a final pretrial on October 15, 2003, and (4) set a trial date on November 17, 2003.

Despite Judge Cirigliano's September 10, 2003 judgment, Ross filed a "Supplemental Memorandum in Support of His Motion to Perfect the Three Unanimous Verdicts of Acquittal" on September 12, 2003. On October 3, 2003, Judge Cirigliano

then issued a journal entry addressing “the Motion of Defendant filed, September 12, 2003, for this Court to reconsider its Order filed September 10, 2003.” In his October 3, 2003 journal entry, Judge Cirigliano gave the State until October 20, 2003 to respond, and “permit[ted] oral argument and a hearing on the merits of Defendant’s original Motion to Perfect Verdicts.” (October 3, 2003 journal entry). On October 22, 2003, the State filed a Brief in Opposition to Ross’s supplemental acquittal memorandum.

On November 6, 2003, Ross filed yet another brief requesting judgment of acquittal (captioned “Defendant Ross’ Supplemental Memorandum in Support of Renewed Motion for Judgment of Acquittal Pursuant to Ohio Crim. Rule 29”). On November 26, 2003, Ross again filed another brief requesting judgment of acquittal (captioned “Second Supplemental Memorandum in Support of Renewed Motion for Judgment of Acquittal Pursuant to Ohio Crim. R. 29”). In his November 6 and November 26, 2003 acquittal briefs, Ross began including argument about evidence the State had recently turned over to Ross in preparation for retrial, but which had not been presented during the first trial. Specifically, the State had disclosed potentially exculpatory new evidence that raised a question over whether bite mark evidence introduced during Ross’ first trial had been accurate.

On December 22, 2003, Judge Cirigliano issued a journal entry stating “[t]his matter comes before the Court on Defendant Denny Ross’ Motion to Reconsider the Court’s Previous Ruling.” (Dec. 22, 2003 order at 1). Judge Cirigliano’s December 22, 2003 judgment then granted Ross judgment of acquittal as to the Rape count and Aggravated Murder Specifications of the Indictment. Although the bulk of Judge Cirigliano’s December 22, 2003 judgment discussed evidence that was contained in transcripts of Ross’s first trial, Judge Cirigliano also included a discussion of the new

bite mark evidence in his ruling. “As part of his discussion of that evidence, he included a paragraph about the testimony regarding the bite mark. He then added a footnote in which he mentioned that, since the time of trial, the State had hired additional experts who concluded that the mark on Ms. Hill’s arm was not a bite mark.” *State v. Ross*, Summit App. No. 21906, 2009-Ohio-3561, at ¶ 27.

The State filed its notice of appeal on January 20, 2004. The Summit County Court of Appeals heard oral argument on April 28, 2009. On July 22, 2009, the Court of Appeals journalized its decision affirming Judge Cirigliano’s December 22, 2003 decision granting Ross’s renewed motions for acquittal on the rape count and capital specification.

On September 10, 2009, the State filed before this Honorable Court its notice of appeal from the judgment of Summit County Court of Appeals judgment, as well as a motion for leave to file delayed appeal. This Honorable Court granted the State’s motion for leave to file a delayed appeal on November 4, 2009.

### **LAW AND ARGUMENT**

PROPOSITION OF LAW: THE COURT OF COMMON PLEAS LACKS JURISDICTION TO GRANT AN UNTIMELY CRIM. R. 29(C) MOTION FOR ACQUITTAL BECAUSE CRIM. R. 45(B) BARS “ANY ACTION” NOT EXPRESSLY PROVIDED FOR BY CRIM. R. 29(C), AND ANY ORDER PURPORTING TO GRANT ACQUITTAL OUTSIDE OF THE CONFINES OF CRIM. R. 29(C) IS VOID AND UNENFORCABLE.

- 1. The State may appeal an invalid and void judgment of acquittal because the trial court lacked jurisdiction to a Crim. R. 29(C) verdict outside of the time limits of the rule.***

Ordinarily, the State of Ohio may not appeal from a trial court’s decision to acquit a criminal defendant pursuant to Crim. R. 29. In the typical case, R.C. 2945.67(A) bars the State of Ohio from seeking leave to appeal a final verdict. Generally, a valid judgment of acquittal constitutes a final verdict. *State ex rel. Yates v. Court of Appeals*

*for Montgomery County* (1987), 32 Ohio St.3d 30, 512 N.E.2d 343. As explained below, the State's appeal does not run afoul of R.C. 2945.67(A) because the trial court's judgment, rendered without jurisdiction, was not a verdict at all.

The United States Supreme Court has clearly held that a trial court has no authority to grant a post-verdict Crim. R. 29(c) motion for acquittal made outside of the time limits of the rule. *Carlisle v. United States*, (1996), 517 U.S. 416, 116 S.Ct. 1460. "A rule permitting a party to submit and prevail on an untimely motion for judgment of acquittal is 'inconsistent' (or not 'consistent') with Rule 29's 7-day filing limit; and the question of when a motion for judgment of acquittal may be granted does not present a case 'not provided for' by Rule 29; and Rule 29 is the 'controlling law' governing this question." *Id.*, at 517 U.S. 425, 116 S.Ct. 1460.

In *Carlisle*, the high court explicitly held that the trial court lacked jurisdiction to grant Crim. R. 29(c) acquittal outside of the time limits of the rule, regardless of whether the defendant made the untimely motion or the trial court moved for acquittal *sua sponte*:

Petitioner's proposed reading would create an odd system in which defense counsel could move for judgment of acquittal for only seven days after the jury's discharge, but the court's power to enter such a judgment would linger. In *United States v. Smith*, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947), we declined to read former Federal Rule of Criminal Procedure 33, which placed a 5-day limit on the making of a motion for new trial, as "permit[ting] the judge to order retrial without request and at any time," 331 U.S., at 473, 67 S.Ct., at 1332. "[I]t would be a strange rule," we said, "which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition," and such an arrangement "would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted," *id.*, at 474, 475, 67 S.Ct., at 1333, 1333. The same is true here. In addition, petitioner's reading makes a farce of subdivision (b) of Rule 29, which provides that a court may reserve decision on the motion for judgment of acquittal and decide it after submission to the jury. There would be no need for this procedure if, even without reserving, the court

had continuing power to grant judgment of acquittal on its own. In sum, even without the captions (and a fortiori with them) it is clear that subdivisions (a) and (b) of Rule 29 pertain to motions made before submission, and subdivisions (c) and (d) to motions made after discharge.

\* \* \*

As alternative authority for the District Court's action, petitioner invokes courts' "inherent supervisory power." Brief for Petitioner 9. We have recognized that federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hastings*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). Whatever the scope of this "inherent power," however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.

*Id.*, at 1464, 1466.

In its decision in this case, the court below explained that Crim. R. 29(c) and its federal counterpart were materially identical, apart from the Ohio's fourteen-day time limit (the federal rule has a seven-day window). *Ross, supra*, at ¶ 7. Given that the Ohio and Federal Crim. R. 29(c) are materially indistinguishable, it follows that *Carlisle* precludes the trial court's authority to grant a Crim. R. 29(C) motion for acquittal outside of the confines of the rule. Because the trial court in this case granted acquittal under Crim. R. 29(C) approximately three years after the mistrial, and over two months after it had already denied acquittal under Crim. R. 29(C), *Carlisle* holds that the trial court's acted without authority and its judgment should have no legal effect.

The Court of Appeals below, however, erroneously distinguished *Carlisle* on the ground that orders entered under Ohio Crim. R. 29(C) are "interlocutory" in nature, and therefore subject to reconsideration. Relying on a 2002 decision from Cuyahoga County, *State v. Abboud*, Cuyahoga App. Nos. 80318, 80325, 2002-Ohio-4437, the Court below explained its reasoning:

The situation in *Abboud* was, in all material respects, identical to that in this case. A jury found the defendant guilty of coercion and kidnapping with a gun specification. Within the time following the return of a verdict

allowed by Rule 29(C) of the Ohio Rules of Criminal Procedure, the defendant moved for acquittal. The trial court initially denied his motion, but later reconsidered and acquitted him on the gun specification. The State appealed and argued, just as it has in this case, that the trial court's order reconsidering its earlier denial of the defendant's motion for acquittal was "a nullity." The appellate court determined that, because the trial court's initial denial was an interlocutory order, it was free to reconsider and change its mind: "While motions for reconsideration are not expressly or impliedly allowed in the trial court after a final judgment, interlocutory orders are subject to motions for reconsideration.... The denial of a motion for judgment of acquittal prior to final sentencing is an interlocutory order. Accordingly, the trial court was permitted to 'revisit' the order that denied [the defendant's] motion for acquittal." *Abboud*, 2002-Ohio-4437, at ¶ 8 (citing *Pitts v. Ohio Dep't of Transp.*, 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981)).

*Ross*, *supra*, at ¶ 14. The *Abboud* decision, however, does not even mention *Carlisle*, or analyze whether the fourteen-day time limit in Crim. R. 29(C) is advisory or mandatory. Nevertheless, the court below concluded that the "interlocutory" nature of a Crim. R. 29(C) verdict meant that it was subject to reconsideration outside of the fourteen-day window contained in the rule:

{¶ 17} The Ohio Rules of Criminal Procedure neither specifically authorize nor prohibit a trial court from reconsidering interlocutory orders, regardless of whether that reconsideration is as the result of a motion or *sua sponte*. Rule 57(B) of the Ohio Rules of Criminal Procedure, however, authorizes trial courts to "look to the rules of civil procedure ... if no rule of criminal procedure exists." And, as noted by the Ohio Supreme Court in *Pitts v. Ohio Dep't of Trans.*, 67 Ohio St.2d 378, 379 n. 1, 423 N.E.2d 1105 (1981), Rule 54(B) of the Ohio Rules of Civil Procedure "allows for a reconsideration or rehearing of interlocutory orders." Accordingly, unless orders denying motions for acquittal are different from other interlocutory orders, a trial court has authority to reconsider them.

{¶ 18} As mentioned above, the State pointed out in its "Notice of Supplemental Authority" that motions for acquittal following a guilty verdict or mistrial must be filed within 14 days after the jury is discharged. That is true regardless of whether the defendant earlier moved for acquittal at the close of the State's case or at the close of all the evidence. An interlocutory order denying a motion for acquittal at the close of the State's case or at the close of all the evidence, therefore, is different from other interlocutory orders because the trial court can't reconsider them at any time until a final judgment is entered unless the defendant renews

them within 14 days after the jury is discharged. But, again, the question before this Court is not whether a trial court can reconsider a motion for acquittal that it denied during trial. Rather, the question before us is whether it can reconsider its initial denial of a timely post-mistrial motion for acquittal.

*Ross, supra*, at ¶¶ 17-18.

The State submits that the Criminal Rules themselves directly contradict the Court of Appeals' erroneous conclusion that that Rule 29(C) orders are interlocutory. The Court below omitted Crim. R. 45(B) from its opinion, which expressly bars extending the time for taking *any action* under Crim. R. 29(C). Crim.R. 45(B) states as follows:

[W]hen an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefore is made before expiration of that period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after expiration of the specified period, if the failure to act on time was the result of excusable neglect or would result in injustice to the defendant. ***The court may not extend the time for taking any action under Rule 23, Rule 29, Rule 33, and Rule 34 except to the extent and under the conditions stated in them.***

(Emphasis added). Crim. R. 45(B) couldn't be clearer. The rule expressly prohibits trial courts from acting far well outside of Crim. R. 29(C)'s fourteen-day window. The prohibition against taking "*any action*" (unless specifically stated in the rule) simply cannot be read to allow a Rule 29(C) denial to become "interlocutory" and subject to reconsideration.

In *Carlisle* itself, Justice Ginsberg used her concurring opinion to explain the identical interplay between Fed. R. Crim. Pro. 45(b) and 29(c). "Carlisle's counsel was not misled by any trial court statement or action; rather, he neglected to follow plain instructions. Rule 29(c) clearly instructs that a motion for a judgment of acquittal be

filed ‘within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.’” *Carlisle, supra*, at 436 (Ginsburg, J., concurring). “Just as clearly, Rule 45(b) excludes motions for enlargement once seven days have run.” *Id.*

Applying Criminal Rule 45(B) to these facts (and assuming it was proper for Judge Cirigliano to decide the motion three years after the mistrial), Judge Cirigliano lost jurisdiction to take any action under Crim. R. 29(C) after he denied Ross’ motion for judgment of acquittal on September 10, 2003. There is absolutely no reasonable interpretation of Crim. R. 45(B) that would make the denial of acquittal as “interlocutory” and subject to reconsideration outside of the rule.

Accordingly, the State respectfully submits that the Court of Appeals erroneously interpreted Ohio Law when it held that Crim. R. 29(C)’s fourteen-day window for entering acquittal is advisory rather than mandatory. Ohio’s criminal rules mirror the federal criminal rules, and *Carlisle* clearly holds that trial judges may not take action outside the rule. In sum, the irreconcilable discrepancy between the plain text of Crim. R. 29(C), Crim. R. 45(B), and the Court of Appeals’ judgment below makes this case worthy of Supreme Court Review.

***2. Allowing a trial court to sidestep the fourteen-day time limit for acquittal severely undermines for need for finality in criminal cases.***

The State further submits that that post-trial acquittal decisions should be decided close to the time of trial, as Crim. R. 29(C) explicitly requires, by the trial judge who heard the evidence and in whose mind the issues remain fresh. In *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95 671 N.E.2d 233, this Honorable explained the need for finality in criminal cases. “Our holding today underscores the importance of finality of

judgments of conviction. ‘Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.’ \* \* \* “It is a rule of fundamental and substantial justice \* \* \*.” ‘*Id.*, quoting *Baldwin v. Traveling Men’s Assn.* (1931), 283 U.S. 522, 525, 51 S.Ct. 517, and *Hart Steel Co. v. RR. Supply Co.* (1917), 244 U.S. 294, 299, 37 S.Ct. 506. The same public policy favoring finality of judgments is recognized in the federal courts. *Waifersong Ltd., Inc. v. Classic Music Vending* (C.A.6, 1992), 976 F.2d 290, 292. If a trial court can reopen a Crim. R. 29(c) acquittal decision months or years after the time limit for such a ruling expired, criminal cases will never be final.

It is also important that the judge who granted the Crim. R. 29(C) ruling was not the same judge who presided over the trial. Just as an appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of the witnesses and the appropriate weight to be given the evidence, the State submits that the original judge was in the best position to weigh the evidence, having been heard the evidence first-hand. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212.

An appellate court must bear in mind the trier of fact’s superior, first hand perspective in judging the demeanor and credibility of the witnesses. *State v. Drayer*, 159 Ohio App.3d 189, 2004-Ohio-6120. An appellate court is ill suited to assess witness credibility, as the demeanor and attitude of witnesses do not translate well into the written record. See *In re Wolfe* (Feb. 16, 2001), Greene App. No.2000-CA-60, 2001 WL 128884. Just as an appellate court is ill-suited to evaluate a cold-trial record in the same fashion as the fact-finder who hears the evidence, it necessarily follows that a successor judge is also generally ill-suited to the same task based on the same cold record. When,

as here, the review of trial evidence occurs years after the actual trial, the Judge Cirigliano simply did not have the same firsthand experience with the case as Judge Bond.

Indeed, in *State v. Tucker*, Cuyahoga App. No. 90799, 2008-Ohio-5746, the Eighth District Court of Appeals criticized a successor trial judge whose rulings were contingent upon an evaluation of trial testimony adduced before a predecessor court. “[T]he judge reviewing D.R.’s affidavit was not the same judge who presided at trial, so she had no opportunity to evaluate D.R.’s affidavit in the context of other trial testimony.” *Id.*, at ¶ 30. Although decided in the context of a post-conviction petition, *Tucker’s* cautionary instruction applies with equal force to the facts of this case.

In *Carlisle* itself, the high court strongly cautioned against an interpretation of Crim. R. 29(C) that would allow successor judges to revisit a predecessor’s verdicts long afterward. “[I]t would be a strange rule,” we said, “which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition,” and such an arrangement “would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted \* \* \* the same is true here.” *Carlisle, supra*, at 422, quoting *United States v. Smith* (1947), 331 U.S. 469, 67 S.Ct. 1330. Of course, as the concurring opinion in *Carlisle* notes, inmates do have other mechanisms to seek relief without resorting to improper acquittals. “It bears emphasis, finally, that the Government recognizes legal avenues still open to Carlisle to challenge the sufficiency of the evidence to warrant his conviction: on appeal (subject to “plain error” standard); and through a postconviction motion, under 28 U.S.C. § 2255, asserting ineffective assistance of counsel.” *Carlisle, supra*, at 436 (Ginsburg, J., concurring).

The “private appeals” to successor judges envisioned by *Carlisle* is no chicken-little scenario. This case is but one extreme example. In Lorain County, a successor Court of Common Pleas Judge recently reviewed verdicts rendered in a criminal case heard by his predecessor approximately fifteen years earlier, and then chose to *sua sponte* acquit the defendants. See generally, John Caniglia, *Nancy Smith, Joseph Allen acquitted by Lorain County judge in Head Start sex abuse case after serving 14 years in prison*, available for download at: [http://www.cleveland.com/crime/index.ssf/2009/06/charges\\_dismissed\\_in\\_lorain\\_he.html](http://www.cleveland.com/crime/index.ssf/2009/06/charges_dismissed_in_lorain_he.html) (last viewed November 24, 2009).

### **CONCLUSION**

This case warrants Supreme Court review for multiple compelling reasons. First, the Court of Appeals misapplied very clear and unambiguous language in Crim. R. 29(C) and Crim. R. 45(B) to hold that the denial of a Crim. R. 29(C) acquittal motion is “interlocutory” and subject to reconsideration at any time. The Ohio Criminal Rules simply do not support that interpretation and the decision below should not be allowed to become precedent. Second, a rule that allows for reconsideration of an order denying a Crim. R. 29(C) motion months or years after the fact destroys any concept of finality in criminal cases and is anathema.

The State of Ohio therefore respectfully requests that this Honorable Court accept jurisdiction of this case and hear the State's appeal on its merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 30<sup>TH</sup> day of November, 2009 to Lawrence J. Whitney, Esq., 137 South Main Street, Suite 201, Akron, Ohio 44308.



Matthew E. Meyer (0075253)  
Assistant Prosecuting Attorney

STATE OF OHIO ) COURT OF APPEALS  
 ) DANIEL M. HOFFIGAN IN THE COURT OF APPEALS  
 )ss: NINTH JUDICIAL DISTRICT  
 COUNTY OF SUMMIT ) 2009 JUL 22 AM 7:55

STATE OF OHIO ) SUMMIT COUNTY C. A. No. 21906  
 ) CLERK OF COURTS

Appellee  
 v.  
 DENNY F. ROSS  
 Appellant

APPEAL FROM JUDGMENT  
 ENTERED IN THE  
 COURT OF COMMON PLEAS  
 COUNTY OF SUMMIT, OHIO  
 CASE No. CR 1999-05-1098A

DECISION AND JOURNAL ENTRY

Dated: July 22, 2009

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DICKINSON, Judge.

INTRODUCTION

{¶1} It's now been over ten years since someone murdered Hanna Hill, put her partly-naked body in the trunk of her car, and parked that car in an Akron neighborhood. Denny Ross was indicted and tried for aggravated murder, murder, kidnapping, rape, tampering with evidence, and abuse of a corpse. His trial ended in a mistrial and confusion. Within a week following the mistrial, he moved for, among other things, acquittal on the rape charge, arguing that the State had failed to present sufficient evidence at the trial on that charge. A visiting judge, appointed after the original trial judge was removed, initially denied that motion. But upon reconsideration, he determined that the State had failed to present evidence at the trial that, if believed, could have convinced the jury beyond a reasonable doubt that Mr. Ross had raped Ms. Hill, and acquitted him on the rape charge and the resulting capital specification. The State has conceded that the question of whether there was sufficient evidence on the rape charge

presented at trial is not before us. But the issue that is before us is whether the visiting judge had authority, after having initially denied the motion for acquittal, to reconsider and grant it. We affirm because the visiting judge's initial denial was an interlocutory order and he had authority to reconsider and grant that motion at any time before final judgment.

#### WHY WE'RE STILL TALKING ABOUT THE AFTERMATH OF THE MISTRIAL

{¶2} As mentioned above, Mr. Ross was tried on charges of aggravated murder, murder, kidnapping, rape, tampering with evidence, and abuse of a corpse. That trial took place during 2000. At the close of the State's case in that trial, Mr. Ross moved for acquittal on the charges against him. The trial judge granted his motion on the kidnapping charge, but denied it on the other charges. Mr. Ross did not present any evidence in defense and renewed his motion for acquittal on the remaining charges. The trial court again denied it.

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{¶9} The State sought leave to appeal the visiting judge's order acquitting Mr. Ross on the rape charge and its' capital specification, and this Court, on March 29, 2004, granted it leave to do so. But before we could hear argument on the State's appeal, Mr. Ross filed a petition for habeas corpus in the federal district court. This Court stayed its proceedings while he pursued his federal remedies.

{¶10} The federal district court granted Mr. Ross's petition for habeas corpus. *Ross v. Petro*, 382 F. Supp. 2d 967 (N.D. Ohio 2005). On appeal, however, the United States Court of Appeals for the Sixth Circuit reversed. *Ross v. Petro*, 515 F.3d 653 (6th Cir. 2008). Mr. Ross then sought certiorari, which the United States Supreme Court denied. *Ross v. Rogers*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 906 (2009). This Court thereupon lifted its stay and held oral argument on the State's appeal from the trial court's reconsideration of Mr. Ross's renewed motion for acquittal on the rape charge against him and the resulting capital specification.

#### THE TRIAL COURT'S RECONSIDERATION OF ITS DENIAL OF MR. ROSS'S RENEWED MOTION FOR ACQUITTAL

{¶11} The State's first assignment of error is that the trial court did not have authority to reconsider its denial of Mr. Ross's renewed motion for acquittal because "a motion to reconsider is a nullity, and any order granting a motion to reconsider is a nullity." In its opening brief in this Court, which was filed in March 2004, the State correctly asserted that a motion for reconsideration of a final judgment is a nullity, without presenting any analysis of whether the visiting judge's initial denial of Mr. Ross's renewed motion for acquittal was a final judgment. It did assert, at one place in its brief, that it had relied on the trial court's "journal entry as a final

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{¶12} In fact, the trial court’s initial denial of Mr. Ross’s renewed motion for acquittal was not a final judgment. It did not, “in effect[,] determine[] the action and prevent[] a judgment.” R.C. 2505.02(B)(1). Nor did it fall within any of the other subparts of Section 2505.02(B) of the Ohio Revised Code. Rather, the trial court’s initial denial of Mr. Ross’s renewed motion for acquittal was an interlocutory order. Most of what the State said in its opening brief in support of its first assignment of error, therefore, was not helpful.

{¶13} Before Mr. Ross filed his brief in response to the State’s opening brief, the State apparently woke up and realized that its argument in support of its first assignment of error missed the point. Accordingly, purportedly under Rule 21(H) of the Ohio Rules of Appellate Procedure, it filed a document captioned “Notice of Supplemental Authority,” which addressed *State v. Abboud*, 8th Dist. Nos. 80318, 80325, 2002-Ohio-4437 and *State v. Ward*, 4th Dist. No. 03CA2, 2003-Ohio-5650.

{¶14} The situation in *Abboud* was, in all material respects, identical to that in this case. A jury found the defendant guilty of coercion and kidnapping with a gun specification. Within the time following the return of a verdict allowed by Rule 29(C) of the Ohio Rules of Criminal Procedure, the defendant moved for acquittal. The trial court initially denied his motion, but later reconsidered and acquitted him on the gun specification. The State appealed and argued, just as it has in this case, that the trial court’s order reconsidering its earlier denial of the defendant’s motion for acquittal was “a nullity.” The appellate court determined that, because

the trial court's initial denial was an interlocutory order, it was free to reconsider and change its mind: "While motions for reconsideration are not expressly or impliedly allowed in the trial court after a final judgment, interlocutory orders are subject to motions for reconsideration. . . . The denial of a motion for judgment of acquittal prior to final sentencing is an interlocutory order. Accordingly, the trial court was permitted to 'revisit' the order that denied [the defendant's] motion for acquittal." *Abboud*, 2002-Ohio-4437, at ¶8 (citing *Pitts v. Ohio Dep't of Transp.*, 67 Ohio St. 2d 378, 379 (1981)).

{¶15} In *State v. Ward*, 4th Dist. No. 03CA2, 2003-Ohio-5650, the trial court found the defendant guilty of domestic violence following a bench trial. *Id.* at ¶8. The defendant moved the court to reconsider its finding of guilt, and the trial court declined to do so. On appeal, the defendant argued that the trial court should have granted his motion for reconsideration. The State responded that the appellate court should affirm because his motion for reconsideration was not timely. In reliance upon *Abboud*, the appellate court held that the motion for reconsideration was properly before the trial court: "Prior to the final sentencing determination, a guilty verdict is not a final order. Accordingly, the trial court was permitted to reconsider its verdict." *Id.* at ¶11 (citing *State v. Abboud*, 8th Dist. Nos. 80318, 80325, 2002-Ohio-4437). On the merits, the appellate court determined that the trial court had properly denied the motion for reconsideration.

{¶16} In its "Notice of Supplemental Authority," the State argued that this Court should not follow *Abboud* because the "court's cursory analysis is flawed and does not merit reliance." It then, in a cursory manner, pointed out that the court in *Abboud* had relied upon *Pitts v. Ohio Dep't of Trans.*, 67 Ohio St. 2d 378 (1981), which was a civil case rather than a criminal case. It further pointed out that Rule 29(C) of the Ohio Rules of Criminal Procedure provides that a motion for acquittal following a mistrial must be filed within 14 days after the jury is discharged.

Neither the fact that *Pitts* is a civil case nor that a motion for acquittal must be filed 14 days after the jury is discharged addresses the question before this Court, which is whether, once a trial court has denied a motion for acquittal that was properly filed within 14 days after the jury was discharged following a mistrial, does the trial court have authority to reconsider that denial.

{¶17} The Ohio Rules of Criminal Procedure neither specifically authorize nor prohibit a trial court from reconsidering interlocutory orders, regardless of whether that reconsideration is as the result of a motion or sua sponte. Rule 57(B) of the Ohio Rules of Criminal Procedure, however, authorizes trial courts to “look to the rules of civil procedure . . . if no rule of criminal procedure exists.” And, as noted by the Ohio Supreme Court in *Pitts v. Ohio Dep’t of Trans.*, 67 Ohio St. 2d 378, 379 n.1 (1981), Rule 54(B) of the Ohio Rules of Civil Procedure “allows for a reconsideration or rehearing of interlocutory orders.” Accordingly, unless orders denying motions for acquittal are different from other interlocutory orders, a trial court has authority to reconsider them.

{¶18} As mentioned above, the State pointed out in its “Notice of Supplemental Authority” that motions for acquittal following a guilty verdict or mistrial must be filed within 14 days after the jury is discharged. That is true regardless of whether the defendant earlier moved for acquittal at the close of the State’s case or at the close of all the evidence. An interlocutory order denying a motion for acquittal at the close of the State’s case or at the close of all the evidence, therefore, is different from other interlocutory orders because the trial court can’t reconsider them at any time until a final judgment is entered unless the defendant renews them within 14 days after the jury is discharged. But, again, the question before this Court is not whether a trial court can reconsider a motion for acquittal that it denied during trial. Rather, the

question before us is whether it can reconsider its initial denial of a timely post-mistrial motion for acquittal.

{¶19} The bulk of the State's reply to Mr. Ross's appellate brief is a discussion of *United States v. Carlisle*, 517 U.S. 416 (1996), a case that the State had not mentioned in its opening brief and that Mr. Ross did not cite in his brief to this Court. By the time of the reply brief, however, according to the State, "[b]ecause *Carlisle* controls the outcome of this case, defendant Ross' arguments against this appeal have no merit." Not surprisingly, *Carlisle* does not compel a conclusion that Mr. Ross's "arguments against this appeal have no merit." In fact, to the extent it is relevant, it implicitly supports the trial court's ability to reconsider its initial denial of Mr. Ross's renewed motion for acquittal.

{¶20} *Carlisle* addressed Rule 29(c) of the Federal Rules of Criminal Procedure, which, except for providing that a motion for acquittal following a guilty verdict or mistrial must be filed within seven days instead of fourteen days, is, in all material ways, identical to Rule 29(C) of the Ohio Rules of Criminal Procedure. The defendant in *Carlisle* was convicted of conspiracy to possess with intent to distribute marijuana. He moved for acquittal one day beyond the seven days permitted under Rule 29(c). The trial court initially denied his motion, but, when the defendant appeared for sentencing, reconsidered its earlier denial and acquitted him, concluding that there was insufficient evidence to prove that he had knowingly and voluntarily joined the conspiracy. The United States Court of Appeals for the Sixth Circuit reversed, and the United States Supreme Court granted certiorari.

{¶21} The Supreme Court affirmed the Sixth Circuit's decision. It held, among other things, that "[t]here is simply no room in the text of Rule[ ] 29 . . . for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied

by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error.” *Carlisle*, 517 U.S. at 421. The Supreme Court also rejected the defendant’s argument that Rule 29(a) provides a trial court authority to sua sponte acquit a defendant after a guilty verdict.

{¶22} *Carlisle* would be persuasive authority for reversal of the trial court’s action in this case if Mr. Ross had not timely renewed his motion for acquittal following the mistrial. But he did. It, therefore, does not support the State’s position. In fact, if anything, it undercuts the State’s argument that the visiting judge acted without authority in reconsidering his initial denial of Mr. Ross’s renewed motion.

{¶23} As mentioned above, the trial court in *Carlisle* initially denied the defendant’s late motion for acquittal and reconsidered and granted it when the defendant showed up for sentencing. Neither the majority opinion nor either concurring opinion, however, includes a suggestion that, regardless of whether the trial court could have granted the defendant’s post-verdict motion for acquittal at the time it was filed, it was without authority to reconsider it once it had denied that motion. Admittedly, it is dangerous to read too much into things not said in United States Supreme Court decisions, but if such a suggestion were there, it would lend credence to the State’s position, but it is not.

{¶24} The State has further argued that, since Rule 29(C) specifically provides that a motion for acquittal may be made or renewed within 14 days following discharge of a jury, the trial court was without authority to reconsider its initial denial of Mr. Ross’s motion 1145 days following the jury’s discharge. The time limit imposed by Rule 29(C), however, only relates to when the defendant must move for acquittal. It does not relate to when the trial court must rule on that motion. In fact, as pointed out by the State, because of the previous appeal in this case,

the visiting judge's initial denial of Mr. Ross's renewed motion for acquittal did not come until 1041 days after the jury was discharged. As mentioned previously, under Rule 54(B) of the Ohio Rules of Civil Procedure, a trial court may reconsider an interlocutory order at anytime before final judgment.

{¶25} Mr. Ross timely renewed his motion for acquittal on the rape charge within 14 days after the jury was discharged. The visiting judge's initial denial of that renewed motion was an interlocutory order, which he was free to reconsider up until entry of a final judgment. Accordingly, the trial court had authority to acquit Mr. Ross of the rape charge against him and the resulting capital specification, and the State's first assignment of error is overruled.

#### THE STATE'S FRIVOLOUS SUMMARY JUDGMENT ARGUMENT

{¶26} The State's second assignment of error is that the trial court erroneously granted partial summary judgment to Mr. Ross "before the information upon which it relied had been admitted." Although the State has acknowledged that the merits of the trial court's determination that Mr. Ross was entitled to acquittal on the rape charge are not before this Court, by its second assignment of error, it has attempted to get us to review those merits.

{¶27} At the trial that ended in a mistrial, the State presented expert testimony about a supposed bite mark in the area of the underside of Ms. Hill's elbow. According to the expert, the bite mark did not match Ms. Hill's boyfriend's teeth, but Mr. Ross could not be eliminated as the "biter." In his order reconsidering and granting Mr. Ross's renewed motion for acquittal on the rape charge, the visiting judge reviewed in detail the evidence regarding the rape charge that had been presented at the trial that had ended in a mistrial. As part of his discussion of that evidence, he included a paragraph about the testimony regarding the bite mark. He then added a footnote in which he mentioned that, since the time of trial, the State had hired additional experts who

concluded that the mark on Ms. Hill's arm was not a bite mark. From that footnote, the State has argued that, in acquitting Mr. Ross on the rape charge, the visiting judge was anticipating evidence that would be submitted at the retrial and, based on that evidence, granting him summary judgment on the rape charge.

{¶28} The State has argued that summary judgment is not appropriate in a criminal case. That, of course, is true. E.g., *State v. Barsic*, 9th Dist. No. 94CA005883, 1995 WL 283770 at \*1-2 (May 10, 1995). As with most of the arguments it presented in support of its first assignment of error, however, this rule of law has nothing to do with this case. The visiting judge did not anticipate what evidence the State would or would not present at Mr. Ross's retrial, it determined that the evidence that was presented at his original trial on the rape charge was insufficient.

{¶29} In the footnote about which the State has complained, the visiting judge wrote that the State had conceded that the "bite mark" evidence "is inaccurate." He did not conclude, however, that he should not consider it in determining whether the State had presented sufficient evidence at the original trial. As is so often true of footnotes, it was an aside. Such asides should probably not be included in opinions or briefs, but it is a bad habit that the legal profession can't seem to break.

{¶30} It is clear from the concluding paragraph of the visiting judge's order granting acquittal on the rape charge, that his decision to do so was based on an analysis of the evidence that was presented at the original trial: "In sum, although the [victim] was horribly beaten, this Court cannot say after reviewing the transcript in its' entirety that such beating was done during or after the Defendant was engaged in intercourse or penetration of the victim. Based upon this evidence, the Court finds that reasonable minds can come to but one conclusion, and that is that

the State has failed to prove that the victim was subjected to unwanted sexual conduct. Therefore, the Court finds, after construing the evidence in a light most favorable to the State, that reasonable minds could not reach different conclusions as to whether each material element of rape has been proven. Therefore, the court grants the Defendant's Motion for a Criminal Rule 29 Acquittal on the indicted offense of rape and the death specification."

{¶31} Even if the visiting judge had improperly excluded the "bite mark" evidence from his analysis of the evidence presented at the original trial based on the State's acknowledgment that that evidence was inaccurate, his doing so would have been a mistake on the merits of his acquittal decision. It would not have magically turned that decision into an improper summary judgment. As the State has conceded, the merits of the visiting judge's acquittal decision are not before us.

{¶32} The trial court's order acquitting Mr. Ross on the rape charge did not grant him partial summary judgment in a criminal case. The State's second assignment of error is overruled.

#### CONCLUSION

{¶33} The State's assignments of error are overruled. The judgment of the trial court acquitting Mr. Ross on the rape charge and resulting death specification is affirmed.

Judgment affirmed.

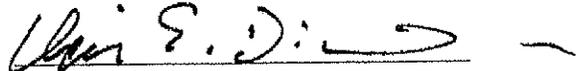
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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

  
CLAIR E. DICKINSON  
FOR THE COURT

MOORE, P. J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

LAWRENCE J. WHITNEY, attorney at law, for appellant.

WILLIAM D. MASON, Cuyahoga County special prosecutor, JOHN R. MITCHELL, and MATTHEW E. MEYER, assistant prosecuting attorneys for appellee.

NO. 09-1619

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO  
NO. 21906

STATE OF OHIO,  
Plaintiff-Appellant

-vs-

DENNY ROSS,  
Defendant-Appellee

**NOTICE OF APPEAL**

Counsel for Plaintiff-Appellant

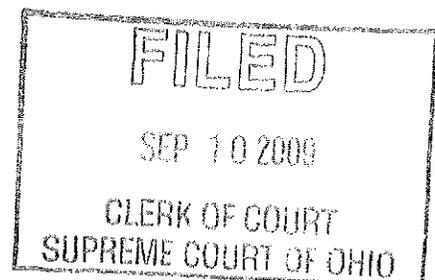
**WILLIAM D. MASON**  
Cuyahoga County Prosecutor

**MATTHEW E. MEYER (0075253)**  
Assistant Prosecuting Attorney  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113  
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Counsel for Defendant-Appellee

**LAWRENCE J. WHITNEY, ESQ.**  
137 South Main Street, Suite 201  
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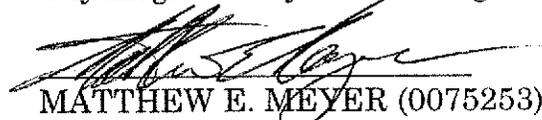
**OFFICE OF THE OHIO  
PUBLIC DEFENDER**  
250 East Broad Street, 14<sup>th</sup> Floor  
Columbus, Ohio 43215



Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Summit County, Ohio, Ninth Judicial District, journalized July 22, 2009 which affirmed the decision of the trial court.

Said cause did not originate in the Court of Appeals and involves a felony.

Respectfully submitted,  
WILLIAM D. MASON  
Cuyahoga County Prosecuting Attorney



MATTHEW E. MEYER (0075253)  
Assistant Prosecuting Attorney  
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(216) 443-7821  
(216) 698-2270 *fax*  
mmeyer@cuyahogacounty.us *email*

**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice of Appeal was sent by regular U.S. Mail this 10<sup>th</sup> day of September to Lawrence J. Whitney, Esq., 137 South Main Street, Suite 201, Akron, Ohio 44308 and the Office of the Ohio Public Defender, 250 East Broad St., 14<sup>th</sup> Floor, Columbus, Ohio 43215.



MATTHEW E. MEYER (0075253)  
Assistant Prosecuting Attorney

STATE OF OHIO  
COUNTY OF SUMMIT

COURT OF APPEALS  
) DANIEL M. MORRIGAN IN THE COURT OF APPEALS  
) ss: NINTH JUDICIAL DISTRICT  
) 2009 JUL 22 AM 7:55

STATE OF OHIO

SUMMIT COUNTY C. A. No. 21906  
CLERK OF COURTS

Appellee  
  
v.  
  
DENNY F. ROSS  
  
Appellant

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CR 1999-05-1098A

DECISION AND JOURNAL ENTRY

Dated: July 22, 2009

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DICKINSON, Judge.

INTRODUCTION

{¶1} It's now been over ten years since someone murdered Hanna Hill, put her partly-naked body in the trunk of her car, and parked that car in an Akron neighborhood. Denny Ross was indicted and tried for aggravated murder, murder, kidnapping, rape, tampering with evidence, and abuse of a corpse. His trial ended in a mistrial and confusion. Within a week following the mistrial, he moved for, among other things, acquittal on the rape charge, arguing that the State had failed to present sufficient evidence at the trial on that charge. A visiting judge, appointed after the original trial judge was removed, initially denied that motion. But upon reconsideration, he determined that the State had failed to present evidence at the trial that, if believed, could have convinced the jury beyond a reasonable doubt that Mr. Ross had raped Ms. Hill, and acquitted him on the rape charge and the resulting capital specification. The State has conceded that the question of whether there was sufficient evidence on the rape charge

presented at trial is not before us. But the issue that is before us is whether the visiting judge had authority, after having initially denied the motion for acquittal, to reconsider and grant it. We affirm because the visiting judge's initial denial was an interlocutory order and he had authority to reconsider and grant that motion at any time before final judgment.

#### WHY WE'RE STILL TALKING ABOUT THE AFTERMATH OF THE MISTRIAL

{¶2} As mentioned above, Mr. Ross was tried on charges of aggravated murder, murder, kidnapping, rape, tampering with evidence, and abuse of a corpse. That trial took place during 2000. At the close of the State's case in that trial, Mr. Ross moved for acquittal on the charges against him. The trial judge granted his motion on the kidnapping charge, but denied it on the other charges. Mr. Ross did not present any evidence in defense and renewed his motion for acquittal on the remaining charges. The trial court again denied it.

{¶3} During jury deliberations, the jury foreperson wrote the trial judge a note expressing concerns about statements and actions of one of the jurors, including that juror's reference to a polygraph test supposedly taken by Ms. Hill's boyfriend. After considering and rejecting other ways of handling the situation, the trial judge declared a mistrial and set a date on which a retrial would begin. Following her declaration of a mistrial, the trial court learned that the jury had, before the mistrial, completed verdict forms finding Mr. Ross not guilty on the aggravated murder, murder, and rape charges.

{¶4} Seven days after the trial judge journalized her declaration of a mistrial, Mr. Ross moved to bar a retrial, arguing that there had not been a manifest necessity for the mistrial. Significantly, for purposes of this appeal, at that same time, Mr. Ross renewed his motion for acquittal, arguing that the State had failed to present sufficient evidence at trial on the remaining

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THE TRIAL COURT'S RECONSIDERATION OF ITS  
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{¶13} Before Mr. Ross filed his brief in response to the State’s opening brief, the State apparently woke up and realized that its argument in support of its first assignment of error missed the point. Accordingly, purportedly under Rule 21(H) of the Ohio Rules of Appellate Procedure, it filed a document captioned “Notice of Supplemental Authority,” which addressed *State v. Abboud*, 8th Dist. Nos. 80318, 80325, 2002-Ohio-4437 and *State v. Ward*, 4th Dist. No. 03CA2, 2003-Ohio-5650.

{¶14} The situation in *Abboud* was, in all material respects, identical to that in this case. A jury found the defendant guilty of coercion and kidnapping with a gun specification. Within the time following the return of a verdict allowed by Rule 29(C) of the Ohio Rules of Criminal Procedure, the defendant moved for acquittal. The trial court initially denied his motion, but later reconsidered and acquitted him on the gun specification. The State appealed and argued, just as it has in this case, that the trial court’s order reconsidering its earlier denial of the defendant’s motion for acquittal was “a nullity.” The appellate court determined that, because

the trial court's initial denial was an interlocutory order, it was free to reconsider and change its mind: "While motions for reconsideration are not expressly or impliedly allowed in the trial court after a final judgment, interlocutory orders are subject to motions for reconsideration. . . . The denial of a motion for judgment of acquittal prior to final sentencing is an interlocutory order. Accordingly, the trial court was permitted to 'revisit' the order that denied [the defendant's] motion for acquittal." *Abboud*, 2002-Ohio-4437, at ¶8 (citing *Pitts v. Ohio Dep't of Transp.*, 67 Ohio St. 2d 378, 379 (1981)).

{¶15} In *State v. Ward*, 4th Dist. No. 03CA2, 2003-Ohio-5650, the trial court found the defendant guilty of domestic violence following a bench trial. *Id.* at ¶8. The defendant moved the court to reconsider its finding of guilt, and the trial court declined to do so. On appeal, the defendant argued that the trial court should have granted his motion for reconsideration. The State responded that the appellate court should affirm because his motion for reconsideration was not timely. In reliance upon *Abboud*, the appellate court held that the motion for reconsideration was properly before the trial court: "Prior to the final sentencing determination, a guilty verdict is not a final order. Accordingly, the trial court was permitted to reconsider its verdict." *Id.* at ¶11 (citing *State v. Abboud*, 8th Dist. Nos. 80318, 80325, 2002-Ohio-4437). On the merits, the appellate court determined that the trial court had properly denied the motion for reconsideration.

{¶16} In its "Notice of Supplemental Authority," the State argued that this Court should not follow *Abboud* because the "court's cursory analysis is flawed and does not merit reliance." It then, in a cursory manner, pointed out that the court in *Abboud* had relied upon *Pitts v. Ohio Dep't of Transp.*, 67 Ohio St. 2d 378 (1981), which was a civil case rather than a criminal case. It further pointed out that Rule 29(C) of the Ohio Rules of Criminal Procedure provides that a motion for acquittal following a mistrial must be filed within 14 days after the jury is discharged.

Neither the fact that *Pitts* is a civil case nor that a motion for acquittal must be filed 14 days after the jury is discharged addresses the question before this Court, which is whether, once a trial court has denied a motion for acquittal that was properly filed within 14 days after the jury was discharged following a mistrial, does the trial court have authority to reconsider that denial.

{¶17} The Ohio Rules of Criminal Procedure neither specifically authorize nor prohibit a trial court from reconsidering interlocutory orders, regardless of whether that reconsideration is as the result of a motion or sua sponte. Rule 57(B) of the Ohio Rules of Criminal Procedure, however, authorizes trial courts to “look to the rules of civil procedure . . . if no rule of criminal procedure exists.” And, as noted by the Ohio Supreme Court in *Pitts v. Ohio Dep’t of Trans.*, 67 Ohio St. 2d 378, 379 n.1 (1981), Rule 54(B) of the Ohio Rules of Civil Procedure “allows for a reconsideration or rehearing of interlocutory orders.” Accordingly, unless orders denying motions for acquittal are different from other interlocutory orders, a trial court has authority to reconsider them.

{¶18} As mentioned above, the State pointed out in its “Notice of Supplemental Authority” that motions for acquittal following a guilty verdict or mistrial must be filed within 14 days after the jury is discharged. That is true regardless of whether the defendant earlier moved for acquittal at the close of the State’s case or at the close of all the evidence. An interlocutory order denying a motion for acquittal at the close of the State’s case or at the close of all the evidence, therefore, is different from other interlocutory orders because the trial court can’t reconsider them at any time until a final judgment is entered unless the defendant renews them within 14 days after the jury is discharged. But, again, the question before this Court is not whether a trial court can reconsider a motion for acquittal that it denied during trial. Rather, the

question before us is whether it can reconsider its initial denial of a timely post-mistrial motion for acquittal.

{¶19} The bulk of the State's reply to Mr. Ross's appellate brief is a discussion of *United States v. Carlisle*, 517 U.S. 416 (1996), a case that the State had not mentioned in its opening brief and that Mr. Ross did not cite in his brief to this Court. By the time of the reply brief, however, according to the State, "[b]ecause *Carlisle* controls the outcome of this case, defendant Ross' arguments against this appeal have no merit." Not surprisingly, *Carlisle* does not compel a conclusion that Mr. Ross's "arguments against this appeal have no merit." In fact, to the extent it is relevant, it implicitly supports the trial court's ability to reconsider its initial denial of Mr. Ross's renewed motion for acquittal.

{¶20} *Carlisle* addressed Rule 29(c) of the Federal Rules of Criminal Procedure, which, except for providing that a motion for acquittal following a guilty verdict or mistrial must be filed within seven days instead of fourteen days, is, in all material ways, identical to Rule 29(C) of the Ohio Rules of Criminal Procedure. The defendant in *Carlisle* was convicted of conspiracy to possess with intent to distribute marijuana. He moved for acquittal one day beyond the seven days permitted under Rule 29(c). The trial court initially denied his motion, but, when the defendant appeared for sentencing, reconsidered its earlier denial and acquitted him, concluding that there was insufficient evidence to prove that he had knowingly and voluntarily joined the conspiracy. The United States Court of Appeals for the Sixth Circuit reversed, and the United States Supreme Court granted certiorari.

{¶21} The Supreme Court affirmed the Sixth Circuit's decision. It held, among other things, that "[t]here is simply no room in the text of Rule[ ] 29 . . . for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied

by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error.” *Carlisle*, 517 U.S. at 421. The Supreme Court also rejected the defendant’s argument that Rule 29(a) provides a trial court authority to sua sponte acquit a defendant after a guilty verdict.

{¶22} *Carlisle* would be persuasive authority for reversal of the trial court’s action in this case if Mr. Ross had not timely renewed his motion for acquittal following the mistrial. But he did. It, therefore, does not support the State’s position. In fact, if anything, it undercuts the State’s argument that the visiting judge acted without authority in reconsidering his initial denial of Mr. Ross’s renewed motion.

{¶23} As mentioned above, the trial court in *Carlisle* initially denied the defendant’s late motion for acquittal and reconsidered and granted it when the defendant showed up for sentencing. Neither the majority opinion nor either concurring opinion, however, includes a suggestion that, regardless of whether the trial court could have granted the defendant’s post-verdict motion for acquittal at the time it was filed, it was without authority to reconsider it once it had denied that motion. Admittedly, it is dangerous to read too much into things not said in United States Supreme Court decisions, but if such a suggestion were there, it would lend credence to the State’s position, but it is not.

{¶24} The State has further argued that, since Rule 29(C) specifically provides that a motion for acquittal may be made or renewed within 14 days following discharge of a jury, the trial court was without authority to reconsider its initial denial of Mr. Ross’s motion 1145 days following the jury’s discharge. The time limit imposed by Rule 29(C), however, only relates to when the defendant must move for acquittal. It does not relate to when the trial court must rule on that motion. In fact, as pointed out by the State, because of the previous appeal in this case,

the visiting judge's initial denial of Mr. Ross's renewed motion for acquittal did not come until 1041 days after the jury was discharged. As mentioned previously, under Rule 54(B) of the Ohio Rules of Civil Procedure, a trial court may reconsider an interlocutory order at anytime before final judgment.

{¶25} Mr. Ross timely renewed his motion for acquittal on the rape charge within 14 days after the jury was discharged. The visiting judge's initial denial of that renewed motion was an interlocutory order, which he was free to reconsider up until entry of a final judgment. Accordingly, the trial court had authority to acquit Mr. Ross of the rape charge against him and the resulting capital specification, and the State's first assignment of error is overruled.

#### THE STATE'S FRIVOLOUS SUMMARY JUDGMENT ARGUMENT

{¶26} The State's second assignment of error is that the trial court erroneously granted partial summary judgment to Mr. Ross "before the information upon which it relied had been admitted." Although the State has acknowledged that the merits of the trial court's determination that Mr. Ross was entitled to acquittal on the rape charge are not before this Court, by its second assignment of error, it has attempted to get us to review those merits.

{¶27} At the trial that ended in a mistrial, the State presented expert testimony about a supposed bite mark in the area of the underside of Ms. Hill's elbow. According to the expert, the bite mark did not match Ms. Hill's boyfriend's teeth, but Mr. Ross could not be eliminated as the "biter." In his order reconsidering and granting Mr. Ross's renewed motion for acquittal on the rape charge, the visiting judge reviewed in detail the evidence regarding the rape charge that had been presented at the trial that had ended in a mistrial. As part of his discussion of that evidence, he included a paragraph about the testimony regarding the bite mark. He then added a footnote in which he mentioned that, since the time of trial, the State had hired additional experts who

concluded that the mark on Ms. Hill's arm was not a bite mark. From that footnote, the State has argued that, in acquitting Mr. Ross on the rape charge, the visiting judge was anticipating evidence that would be submitted at the retrial and, based on that evidence, granting him summary judgment on the rape charge.

{¶28} The State has argued that summary judgment is not appropriate in a criminal case. That, of course, is true. E.g., *State v. Barsic*, 9th Dist. No. 94CA005883, 1995 WL 283770 at \*1-2 (May 10, 1995). As with most of the arguments it presented in support of its first assignment of error, however, this rule of law has nothing to do with this case. The visiting judge did not anticipate what evidence the State would or would not present at Mr. Ross's retrial, it determined that the evidence that was presented at his original trial on the rape charge was insufficient.

{¶29} In the footnote about which the State has complained, the visiting judge wrote that the State had conceded that the "bite mark" evidence "is inaccurate." He did not conclude, however, that he should not consider it in determining whether the State had presented sufficient evidence at the original trial. As is so often true of footnotes, it was an aside. Such asides should probably not be included in opinions or briefs, but it is a bad habit that the legal profession can't seem to break.

{¶30} It is clear from the concluding paragraph of the visiting judge's order granting acquittal on the rape charge, that his decision to do so was based on an analysis of the evidence that was presented at the original trial: "In sum, although the [victim] was horribly beaten, this Court cannot say after reviewing the transcript in its' entirety that such beating was done during or after the Defendant was engaged in intercourse or penetration of the victim. Based upon this evidence, the Court finds that reasonable minds can come to but one conclusion, and that is that

the State has failed to prove that the victim was subjected to unwanted sexual conduct. Therefore, the Court finds, after construing the evidence in a light most favorable to the State, that reasonable minds could not reach different conclusions as to whether each material element of rape has been proven. Therefore, the court grants the Defendant's Motion for a Criminal Rule 29 Acquittal on the indicted offense of rape and the death specification."

{¶31} Even if the visiting judge had improperly excluded the "bite mark" evidence from his analysis of the evidence presented at the original trial based on the State's acknowledgment that that evidence was inaccurate, his doing so would have been a mistake on the merits of his acquittal decision. It would not have magically turned that decision into an improper summary judgment. As the State has conceded, the merits of the visiting judge's acquittal decision are not before us.

{¶32} The trial court's order acquitting Mr. Ross on the rape charge did not grant him partial summary judgment in a criminal case. The State's second assignment of error is overruled.

#### CONCLUSION

{¶33} The State's assignments of error are overruled. The judgment of the trial court acquitting Mr. Ross on the rape charge and resulting death specification is affirmed.

Judgment affirmed.

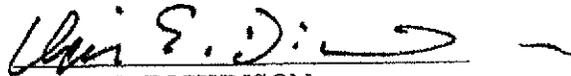
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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

  
CLAIR E. DICKINSON  
FOR THE COURT

MOORE, P. J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

LAWRENCE J. WHITNEY, attorney at law, for appellant.

WILLIAM D. MASON, Cuyahoga County special prosecutor, JOHN R. MITCHELL, and MATTHEW E. MEYER, assistant prosecuting attorneys for appellee.