

ORIGINAL

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,)	Case No. 2009-1619
)	
Plaintiff-Appellant,)	On Appeal from the Summit
-vs-)	County Court of Appeals,
)	Ninth Appellate District
DENNY F. ROSS,)	
)	Summit County Court of Appeals
Defendant-Appellee.)	Case No. 21906

MEMORANDUM OF *AMICUS CURIAE*, OHIO PROSECUTING ATTORNEYS
ASSOCIATION, IN SUPPORT OF JURISDICTION

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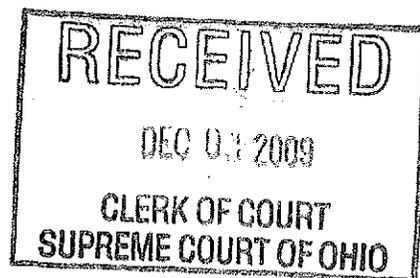
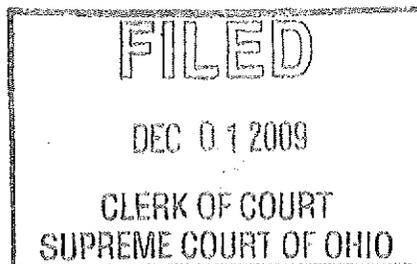


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The Ohio Prosecuting Attorneys Association, OPAA, is an association of county prosecutors in the 88 counties of the State of Ohio. In this matter, the OPAA supports Appellant's, the State of Ohio's Memorandum in Support of Jurisdiction and urges this Honorable Court to grant jurisdiction. This is a case of public and great general interest in that the Ninth District Court of Appeals has created a precedent which would allow a trial court judge to grant acquittal to a criminal defendant at any point after conviction, thus, undermining the purpose of Crim. R. 29.

The Ninth District Court of Appeals did not adhere to the time limits prescribed in Crim. R. 29(C) for granting a motion for acquittal and granted appellee's motion for reconsideration outside of the fourteen day time period set forth in Crim. R. 29(C). The Court ignored Crim. R. 45(B), which clearly states that the time for taking action under Crim. R. 29 may not be extended. Crim. R. 45(B).

If allowed to stand, the decision of the Ninth District Court of Appeals would put a strain on judicial resources and delay the final disposition in criminal cases. "[A]s time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past." *United States v. Gupta* (C.A. 11, 2004), 363 F.3d 1169, 1174 citing *United States v. Smith*, 331 U.S. 469, 67 S.Ct. 1330.

Moreover, the decision of the Ninth District Court of Appeals conflicts with Ohio's Rules

of Criminal Procedure. The Court based its decision on Crim. R. 57(B), which allowed the Court to look to the Ohio Rules of Civil Procedure after reasoning that no existing rule of criminal procedure controlled reconsideration of a Crim. R. 29(C) motion. This holding clearly ignored Crim R. 45(B), which prohibits extension of time for any action under Crim. R. 29. Therefore, the OPAA urges this Honorable Court to accept jurisdiction in this matter.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the OPAA adopts the statement of the case and facts as presented by the Appellant the State of Ohio.

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 UNENFORCEABLE.

Amicus Curiae, the OPAA contend that the Ninth District Court of Appeals erred in upholding the trial court’s reconsideration of appellee’s motion for acquittal outside of the time limits prescribed by Crim. R. 29. Specifically, the Ninth District Court of Appeals failed to take into consideration the plain language of Crim R, 45(B), which clearly excludes any enlargement

of time with respect to Crim. R. 29 motions.

Crim. R. 29(C) provides:

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period.

In the present case, appellee filed a renewed judgment of acquittal motion in compliance with Crim. R. 29 on November 9, 2000. *State v. Ross*, 9th Dist. App. No. 21906 at ¶4, 2009-Ohio3561. The trial court denied this motion on September 10, 2003. *Id.* at ¶ 6. Appellee then began to raise “supplemental” arguments for granting him judgment of acquittal. On November 6, 2003, appellee filed a Supplemental Motion in Support of Renewed Motion for Judgment of Acquittal Pursuant to Ohio Crim. Rule 29 and on November 26, 2003, appellee filed a Second Supplemental Memorandum in Support of Renewed Motion for Judgment of Acquittal Pursuant to Ohio Crim. Rule 29. *Id.* at ¶7. On December 22, 2003, the trial court granted appellee’s “supplemental” motions for judgment of acquittal. This action is clearly contrary to the time constraints set forth in Crim. R. 29(C).

In *Carlisle v. United States*, 517 U.S. 416, 116 S.Ct. 1460, the Supreme Court of the United States held that “[t]he District Court had no authority to grant petitioner’s motion for judgment of acquittal filed one day outside the Rule 29(c) time limit.” *Id.* at syllabus. In *Carlisle*, after a jury reached a guilty verdict and was discharged Carlisle filed a Motion for Judgment of Acquittal Pursuant to Federal of Criminal Procedure 29(c). *Id.* at 418. Federal Rule of Criminal Procedure 29(c) provides that a judgment of acquittal may be made or renewed

within seven days of the jury being discharged or within a time frame fixed by the court. *Id.* Carlisle filed his motion one day outside of the seven day time limit. *Id.* The District Court denied Carlisle's motion then, at a later date, reversed its ruling. *Id.* The Sixth Circuit Court of Appeals reversed the decision of the District Court, finding that a district court does not have jurisdiction to grant an untimely motion for judgment of acquittal. *Id.* at 418. The Supreme Court of the United States upheld the decision of the Sixth Circuit finding that "[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 425.

The holding of *Carlisle* should be applied to the case at bar. "Crim. R. 29(A) and Fed. R. Crim. P. 29 are virtually identical." *State v. Bridgeman* (1978), 55 Ohio St.2d, 261, 264, 381 N.E.2d 184. Crim. R. 29(C) and Fed. Crim. R. 29(C) are also similar. The only difference being a 14 day time period to move for judgment of acquittal in Crim R. 29(C) versus a seven day time period in Fed. Crim. R. 29(C). *Carlilse* also applies in cases such as the present case where a motion for judgment of acquittal is untimely filed after a mistrial has been declared and the jury discharged. See, *United States v. Patel* (N.D. Ill, 2002), 2002 WL 31236298.

Appellee's "supplemental" motions cannot relate back to his original timely filed motion. In *United States v. Gupta* (C.A. 11, 2004), 363 F.3d 1169, a case similar to appellee's, the defendants filed motions to reconsider the district court's earlier denials of their motions for judgment of acquittal one year after denial. *Id.* at 1172. The district court granted these motions. *Id.* The Eleventh Circuit Court of Appeals found that the district court was without jurisdiction

to reconsider its denial of the earlier motions for judgment of acquittal. *Id.* The court held that “motions to reconsider or renew Rule 29 or 33 motions are not permissible if they are filed outside the seven-day post-verdict period or outside an extension granted during that seven-day period.” *Id.* at 1176.

In the present case, the trial court lacked jurisdiction to grant appellee’s motions to reconsider judgment of acquittal outside of the time period set forth in Crim. R. 29(C). The Ninth District Court of Appeals reasoned that Crim. R. 57(B) allows the trial court to look to the Ohio Rules of Civil Procedure since no rule of criminal procedure exists concerning the reconsideration of a Crim. R. 29(C) motion. The Court found that Civ. R. 54(B) allows for reconsideration of interlocutory orders, therefore, the trial court was permitted to reconsider appellee’s motion for judgment of acquittal. *Ross* at ¶ 17. This reasoning is obviously flawed, as Crim. R. 45(B) specifically prohibits the reconsideration of a Crim. R. 29 motion.

Crim. R. 45(B) provides:

When 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 the 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.

This statute makes it clear that the trial court did not have the power to extend time or reconsider appellee’s Crim. R. 29 motion for judgment of acquittal. The language of Crim. R. 45(B) clearly excludes Crim. R. 29 from the enlargement of time provisions. It appears the

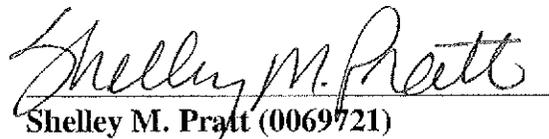
legislature intended to limit the time period during which a trial court can consider a Crim. R. 29 motion. Crim. R. 29 is the controlling rule of criminal procedure. The Ninth district Court of Appeals erred in applying Crim. R. 57(B) to the present case.

CONCLUSION

For the foregoing reasons, the OPAA respectfully requests this Honorable Court to accept jurisdiction over this case and overturn the decision of the Ninth District Court of Appeals.

Respectfully submitted,

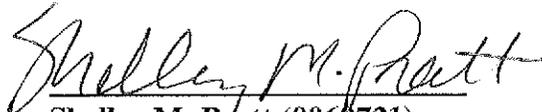
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction has been served via ordinary U.S. Mail, postage prepaid, this 30th day of November, 2009, upon WILLIAM D. MASON, Cuyahoga County Prosecutor and MATTHEW E. MEYER, Assistant Prosecuting Attorney 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 and LAWRENCE J. WHITNEY, ESQ., 137 South Main Street, Suite 201, Akron, Ohio 44308.


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