

IN THE OHIO SUPREME COURT

10-0145 ORIGINAL

STATE OF OHIO

SUPREME COURT NO _____

APPELLEE,

-VS-

ON APPEAL FROM THE LAWRENCE COUNTY
COURT OF APPEALS FOURTH DISTRICT
CASE NUMBER 09CA-8

MR. LESHAWN NICKELSON

APPELLANT.

NOTICE OF APPEAL OF APPELLANT LESHAWN NICKELSON
ACTING IN PRO SE

MR. LESHAWN NICKELSON 598-117
CHILlicothe CORRECTIONAL INST APPELLANT
POST OFFICE BOX 5500
CHILlicothe, OHIO 45601

RECEIVED
JAN 25 2010
CLERK OF COURT
SUPREME COURT OF OHIO

MR. BRIGHAM ANDERSON *20174*
PROSECUTING ATTORNEY
LAWRENCE COUNTY COURT HOUSE APPELLEE
ONE VETERAN'S SQUARE
IRONTON, OHIO 45638

FILED
JAN 25 2010
CLERK OF COURT
SUPREME COURT OF OHIO

STATE OF OHIO

APPELLEE,

SUPREME COURT NO _____

-VS-

MR LESHAWN NICKELSON

ON APPEAL FROM THE LAWRENCE COUNTY

APPELLANT

COURT OF APPEALS FOURTH DISTRICT

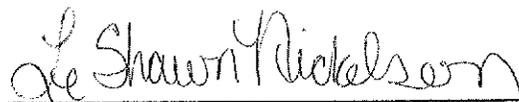
CASE NUMBER 09CA-8

NOTICE OF APPEAL

NOW COMES, THE APPELLANT, LESHAWN NICKELSON HEREBY GIVES NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO FROM THE JUDGMENT OF THE LAWRENCE COUNTY COURT OF APPEALS FOURTH APPELLATE DISTRICT, ENTERED IN COURT OF APPEALS CASE NUMBER 09CV=8 ON DECEMBER 15, 2009.

THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND INVOLVES A FELONY, AND IS OF PUBLIC OR GREAT GENERAL INTEREST.

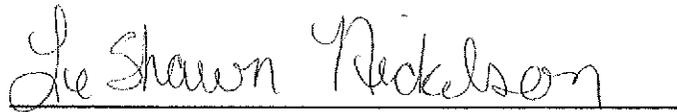
RESPECTFULLY SUBMITTED BY



LESHAWN NICKELSON ACTING IN PRO SE

CERTIFICATE OF SERVICE

I LESHAWN NICKELSON, DO HEREBY CERTIFY THAT A TRUE COPY OF THE FOREGOING MOTIONS WERE SENT AND SERVED UPON BRIGHAM ANDERSON, LAWRENCE COUNTY ASSISTANT PROSECUTING ATTORNEY, AT THE LAWRENCE COUNTY COURTHOUSE, 1 VETERAN'S SQUARE, IRONTON, OHIO 45638


LESHAWN NICKELSON ACTING IN PRO SE

STATE OF OHIO

PLAINTIFF,

-VS-

LESHAWN NICKELSON

DEFENDANT-APPELLANT.

CASE NO _____

ON APPEAL FROM THE LAWRENCE COUNTY
COURT OF APPEALS FOURTH APPELLATE
COURT DISTRICT CASE NUMBER 09CA-8

MEMORANDUM IN SUPPORT OF JURISDICTION OF THE
APPELLANT LESHAWN NICKELSON

THIS POR SE APPEAL IS BRINGING BROUGHT UPON BY AN UNSKILLED KNOWLEDGE OF APPELLANT, THIS IS A CLAIMED APPEAL OF RIGHT BECAUSE APPELLANT'S CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE AND DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS AND ARTICLE 1 SECTION 10 and 16 OF THE OHIO CONSTITUTION WERE VIOLATED BY (1) TRIAL COUNSEL'S FAILURE TO REVEAL EXCULPATORY EVIDENCE BEFORE THE DEFENDANT ENTERED HIS PLEA, AND TRIAL COURTS DENIAL OF A PRE-SENTENCE MOTION 32.1 WHEN GENUINE CONSTITUTIONAL AND DUE PROCESS RIGHTS WERE VIOLATED.

STATEMENT OF THE CASE AND THE FACTS

APPELLANT WAS CHARGED IN A TEN COUNT INDICTMENT WITH DRUGS RELATED CRIMES.

ON OCTOBER 26, 2005 THE DEFENDANT ENTERED INTO A PLEA DEAL, BASED ON THE CONSTITUTIONALLY DEFECTIVE ADVICE OF HIS TRIAL COUNSEL, TO COUNTS (7) AND (9) OF THE INDICTMENT.

BEFORE THE DEFENDANT ENTERED INTO A PLEA DEAL EXCULPATORY EVIDENCE WAS WITHHELD FROM THE DEFENDANT BY BOTH THE PROSECUTOR, AND THE COUNSEL FOR THE DEFENSE.

THE DEFENDANT'S PLEA WAS NOT MADE KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY UNDER THE CIRCUMSTANCES, AND SHOULD HAVE BEEN ALLOWED TO BE WITHDRAWN.

ON JANUARY 28, 2009 THE DEFENDANT FILED A PRE-SENTENCE MOTION UNDER CRIMINAL PROCEDURE RULE 32.1

ON FEBRUARY 2, 2009 THE COURT RULED ON THE MOTION WITHOUT A FULL AND FAIR HEARING, WHICH LED UP TO THIS .

ARGUMENT

- 1) FIRST ASSIGNMENT OF ERROR MR. NICKELSON WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

TRIAL COUNSEL NEVER EXPLAINED THE ELEMENTS OR NATURE OF THE CHARGES BECAUSE COUNT (7) STATES THE AMOUNT ALLEGED TO HAVE BEEN SOLD IN ACCORDANCE WITH THE BILL OF PARTICULARS HAS 4.48 GRAMS AND FILED FOR ON SEPTEMBER 2, 2005 AND THE DISCOVERY BCI & I HAS 4.58 GRAMS AND IS DATED SEPTEMBER 8, 2005.

THE TRANSCRIPTS OF OCTOBER 26, 2005 CONTRADICTS THIS **ON PAGE 6 LINE 11-12** THE DEFENDANT PLEA WAS THEREFORE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE. SEE BOYKIN-VS-ALABAMA 395 U.S. 238, 242-244, 89 S.CT. 1709, 23 L.Ed.2d 274.

THE TRIAL COUNSEL NEVER REVEALED THE WEIGHT OF THE DRUGS TO THE DEFENDANT BECAUSE THE BILL OF PARTICULARS WAS FILED FOR 9-2-2005 AND THE BCI & LAB REPORT DATE 9-08-2005 THIS WAS CLEARLY IMPROPER AS A CHARGE. WHEN A DEFENDANT PLEADS GUILTY TO A CRIME WITHOUT HAVING BEEN INFORMED OF THE ELEMENTS THIS STANDARD IS NOT MET AND THE PLEA IS INVALID. SEE THE CASE OF HENDERSON-VS-MORGAN 426 U.S. 639, 49 L.Ed.2d 108, 96 S.Ct 2253.

COUNSEL FAILED TO REVEAL THAT SOMEONE ELSE PLEAD TO THIS CHARGE/CASE IN A HEARING ON OCTOBER 19, 2005. LORDDAZVON McINTOSH PLEADED GUILTY, AND WAS SENTENCED FOR R.C. 2925.03 (A)(2)(C)(4)(E). TRAFFICING COUNT FOUR OF THE INDICTMENT, THE SAME OFFENSE AS COUNT NINE ON THE DEFENDANT'S INDICTMENT BEFORE THE DEFENDANT PLEADED ON COUNT NINE THIS EXCULPATORY EVIDENCE WAS NOT SHARED WITH DEFENDANT.

BRADY-VS-MARYLAND 373 U.S. 83, 86-88, 83 S.CT 1194, 10 L.Ed.2d 215.

REQUIRES DISCLOSURE OF EXCULPATORY EVIDENCE.(TRANSCRIPT 2-2-09 PAGE 5 LINES 5-9) THE TRIAL COURT RECORDS JOURNAL, AND COURT DOCUMENTS SUPPORT THIS CLAIM, THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER HIS PLEA ON COUNT (9).

IN THE BILL OF PARTICULARS FILED FOR ON SEPTEMBER 2, 2005 FOR CASE

NUMBER 05-CR-155 PAGE 4 HAS IN COUNT (9) THAT A SEARCH WARRANT WAS EXECUTED YET, THE RECORDS CONTRADICT THE PROSECUTOR'S FRAUDULENT STATEMENT CONCERNING A SEARCH WARRANT BEING EXECUTED (TRANSCRIPT 2-2-09 PAGE 8 LINE 18-20)

IN STRICKLAND-VS-WASHINGTON 466 U.S. 668, 686, 104 S.CT 2052, 80 L.Ed 2d 274 PAGE 2060.

THE SIXTH AMENDMENT IMPOSES ON COUNSEL A DUTY TO INVESTIGATE, BECAUSE REASONABLY EFFECTIVE ASSISTANCE MUST BE BASED ON PROFESSIONAL DECISIONS, AND INFORMED LEGAL CHOICES CAN BE MADE ONLY AFTER INVESTIGATION OF OPTIONS. ON OCTOBER 20, 2005 A JUDGMENT ENTRY PLEA HEARING SET FOR OCTOBER 26, 2005 ATTORNEY WAS APPOINTED ON OCTOBER 13, 2005, AND THE BILL OF PARTICULARS WAS MAILED ON OCTOBER 21, 2005 TO ATTORNEY MR. MICHAEL MEARAN OFFICE.

ONCE COUNSEL RECIEVED THE BILL OF PARTICULARS HE HAD A DUTY TO FILE A MOTION TO SUPPRESS THE ILLEGAL AND WARRANTLESS SEARCH. COUNSEL'S ERROR WAS SO SERIOUS THAT HE CLEARLY FAILED TO FUNCTION AS AN ATTORNEY GUARANTEED BY THE **SIXTH AMENDMENT**.

ATTORNEY NEVER SHARED EXCULPATORY EVIDENCE CONCERNING THE WEIGHT OF THE DRUGS
ATTORNEY NEVER SHARED EXCULPATORY EVIDENCE OF LORDDAZVON McINTOSH, PLEA.
ATTORNEY NEVER FILED A MOTION TO SUPPRESS, THE PHYSICAL EVIDENCE OF THIS WAS NOT RECIEVED UNTIL 3-31-2009

THIS PERFORMANCE PREJUDICED THE DEFENDANT AND DEPRIVED HIM OF A FAIR TRIAL. APPELLANT ADDRESSES THIS IN HIS MERIT BRIEF FILED IN THE COURT OF APPEALS ON JUNE 25, 2009 HOWEVER, THE DISTRICT COURT NEVER ADDRESSED THESE CONSTITUTIONAL VIOLATIONS.

EVIDENCE SUPPORTING THIS CLAIM IS PAGE 6,7, AND 8 OF MERIT BRIEF, TRANSCRIPTS OF OCTOBER 26, 2005 PAGE 6 UNDERLINED 11-12.

BILL OF PARTICULARS PAGE 3, McINTOSH JUDGMENT ENTRY, AND THE BCT & LAB REPORT BILL OF PARTICULARS PAGE 4)

2) THE TRIAL COURT ABUSED IT'S DISCRETION IN DENYING THE MOTION TO WITHDRAW GUILTY PLEA AS BEING UNTIMELY.

THE TRIAL COURT OR DISTRICT COURT NEVER ADDRESSED THE MERIT ON THE DEFENDANT'S 32.1 MOTION EVEN THOUGH ISSUE'S CONCERNING CONSTITUTIONAL VIOLATIONS SHOWING THAT THE DEFENDANT'S PLEA WAS NOT VOLUNTARILY ENTERED, THE COURT EXPRESSED THE ISSUE'S AFTER A GUILTY PLEA WAS UNTIMELY (FEBRUARY 2, 2009) TRANSCRIPT PAGE 8 LINES 1-5)

THE DEFENDANT WAS UNINFORMED ABOUT THE ELEMENTS AND NATURE OF THE CHARGE IN COUNT (7)(OCTOBER 26, 2005 TRANSCRIPT PAGE 6 LINES 11-12). SEE BILL OF PARTICULARS PAGE 3....DISCOVERY BCI & I LABORATORY REPORT NUMBER 05-14149.

HENDERSON-VS-MORGAN 426 U.S. 637, 49 L.Ed.2d 108, 96 S.CT 2253 .

ON COUNT (9)

THE DEFENDANT DID NOT HAVE ADEQUATE INFORMATION TO KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER HIS GUILTY PLEA BUT, HE ENTERED IT IN THE ABSENCE OF WITHHELD EVIDENCE (BRADY-VS-MARYLAND 373 U.S. 83, 86-88, 83 S.CT 1194 10 L.Ed.2d 215.

(FEBRUARY 2, 2009 TRANSCRIPTS PAGE 4 LINES 11-16) (FEBRUARY 2, 2009 PAGE 5 LINES 5-9) THE APPELLANT ADDRESSED THESE ISSUE'S IN THE APPELLANT'S SUPPLEMENTAL BRIEF FILED ON JULY 9, 2009. THERE WAS CLEARLY A REASONABLE AND LEGITIMATE BASIS FOR THE WITHDRAWAL OF THE PLEA.

THE DISTRICT COURT NEVER ADDRESSED THE ISSUE. EVIDENCE SUPPORTING THIS CLAIM IS PAGE 3 AND 4 OF THE SUPPLEMENTED BRIEF UNDERLINED.

TRANSCRIPT 8 FEBRUARY 2, 2009 HEARING.

3) THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S CRIMINAL PROCEDURE RULE 32.1 MOTION TO WITHDRAW HIS GUILTY PLEA WITHOUT FIRST CONDUCTING A HEARING.

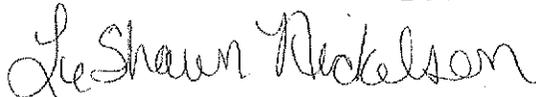
BEFORE THE TRIAL COURT READ THE MOTION ON THE RECORDS THE APPELLANT REQUESTED HIS ATTORNEY FILE A SUPPLEMENTARY MOTION TO WITHDRAW THE PLEA

(TRANSCRIPT OF HEARING FEBRUARY 2, 2009 PAGE 3 LINE 9-11) AT NO TIME DID ATTORNEY HELP WITH A DEFENSE IN THIS MATTER. THE PRE-SENTENCE MOTION WAS READ FOR THE RECORD, AND THE MERITS NEVER ADDRESSED. CLEARLY NOT THIS IS NOT THE REQUIREMENT THAT THE SUPREME COURT ADDRESSED IN XIE, STATE-VS-XIE (1992) 62 OHIO ST.3d 521..... IN THIS CASE COUNSEL FILING A SUPPLIMENTARY BRIEF WAS ESSENTIAL TO INSURE THAT THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED. EVIDENCE SUPPORTING THIS CLAIM IS (TRANSCRIPT OF 2-2-09 PAGE 3 LINES 9-11).

CONCLUSION

FOR ALL THE ABOVE REASONS DISCUSSED THIS CASE INVOLVED MATTERS OF PUBLIC AND IS ONE OF GREAT GENERAL INTEREST AND RAISES SEVERAL SUBSTANTIAL CONSTITUTIONAL QUESTIONS, THEREFORE, APPELLANT RESPECTFULLY REQUEST THE COURT TO ACCEPT JURISDICTION IN THIS CASE SO THAT IMPORTANT ISSUE'S PRESENTED WILL BE REVIEWED ON THE MERITS.

RESPECTFULLY SUBMITTED BY



LESHAWN NICKELSON ACTING IN PRO SE

CERTIFICATE OF SERVICE

I HEREBY CERTIFTY THAT A COPY OF THE FOREGOING MEMORANDUM IN SUPPORT OF JURISDICTION HAS BEEN SENT BY REGULAR UNITED STATES MAIL, TO BRIGHAM ANDERSON, LAWRENCE COUNTY COURTHOUSE, ONE VETERAN'S SQUARE, IRONTON, OHIO 45638, ON THIS 20 DAY OF JANUARY 2010

SIGNED BY

FIRST ASSIGNMENT OF ERROR:

MR NICKELSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

ARGUMENT

Mr Nickelson's Trial Counsel was ineffective in advising the Appellant to enter into a Plea Agreement with the State on a defective indictment.

Because the Indictment and Bill of Particulars did not properly charge a predicate offense to support the charge of trafficking as defined in O.R.C § 2925.03(A)(1)(C)(4)(D), a felony of the second degree, the indictment was void.

Trial Counsel never explained the elements or nature of the charges because Count 7 states the amount alleged to have been sold in accordance with the Bill of Particulars has 4.48 grams and BCI & I has 4.58 grams. (EXHIBITS A & B). (October 26th, 2005, TT Pages 6&7).

On page 6, it clearly shows, (equals OR exceeds five grams but is less than 10 grams).

Because O.R.C Statute 2925.03(A)(1)(c)(4)(c) making this a Third Degree Felony. Henderson v. U.S 426 at 645 at FN 13. " Real Notice of the true nature of the charge against him".

Attorney Michael Mearan was appointed Counsel on October 13th, 2005. Counsel failed to discuss the facts of the case with Appellant. The Docket Sheet has a judgement entry for a plea hearing set for October 20th, 2005. Yet the Trial Counsel had not communicated this to the Appellant.

A right to Counsel is a right to effective assistance. Strickland v Washington (1984), 466 U.S 668, 686 104 S.Ct 2052, 80 L.Ed 274.

Because of the errorneous advice of Trial Attorney, who with threats and promises, advised the Appellant to plead guilty to Trafficking

under Count 9 of the indictment.

However, Counsel failed to disclose that Co-Defendant Lorddazvon McIntosh, in a hearing on October of 2005 and another Co-Defendant, Zachary Miller, Case No: 05 CR 163, pleaded to possession of approximately 16.73 grams of crack cocaine and trafficking the same 16.73 grams of crack cocaine.

The evidence used to secure Co-Defendants' convictions were the same evidence used in Appellant's case (EXHIBIT C).

The Trial Attorney allowed the Lawrence County Prosecutor's Office to use contradictory theories to secure the conviction of multiple Defendants thus violating the Appellant's rights to DUE PROCESS.

In Bradshaw v. Stumpf 545 U.S 175, 125 S.Ct 2398, the Supreme Court of the United States reversed and remanded because of inconsistent theories. Also see Payne v. U.S 78 F 3d 343, 345(8th Cir 1996). It states in part : The system is poorly served when a prosecutor the State's own instrument of justice, stacks the deck in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to FAIRNESS and the search for TRUTH". (Exhibit D1-D2, E1-E2)

In Strickland v. Washington (1984), 466 U.S 668, 686, 104 S.Ct 2052, 80 L.Ed 2d 274 page 2060, "The Court agreed that the Sixth Amendment imposes on Counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options".

Had the Trial Attorney investigated the case at bar, the information concerning where exactly the drugs were found, whether in the Appellant's residence or outside would have been clear.

Furthermore, Appellant was not clear about the enhancement, because

no children lived in the household. The Police entered the Residence at about 5 AM on the 4th of August. If children lived in the household, they would surely have been present at such a time.

Appellant was advised by Counsel to keep quiet and allow him to work out a deal that would allow the Defendant to get some kind of a drug treatment program, without fully explaining the charges.

Trial Counsel's failure to prepare and present an adequate defense prejudiced the Defendant, because of the illegal and warrantless search, the evidence gained from it should have been suppressed. Had the Trial Counsel performed his essential duties, the outcome would have been different. Licensed Attorneys are presumed to be competent, however, Counsel in the Case at Bar disregarded information by not filing for Discovery or any other Pre Trial Motions.

All Pre Trial Motions except as provided in CRIM. R 7(E) and 16(F) shall be made within THIRTY FIVE days after arraignment or SEVEN days before trial whichever is earlier.

Due to the Constitutionally Defective Advice of Trial Counsel, the Appellant hereby submits that his plea was not knowingly and intelligently made. See Tollet v. Henderson, 411 U.S 258, 267, 36 L.Ed 2d 235, 93 S.Ct 1603 (1973). The basic tenets of due process requires that a guilty plea be made "knowingly, intelligently and voluntarily". See State v. Engle (1996) 74 Ohio St 3d 525, 527, 660 N.E 2d 450. Failure on any of these points "renders enforcement of the plea unconstitutional under both the United States and Ohio Constitutions.

Justice Stevens wrote: " Serious questions are raised when the Sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens."

In this case there were THREE PEOPLE.

The Court should reverse and remand this case.

1 DEFENDANT: Yes sir.

2 COURT: Alright, I just like to make sure. I know you
3 have a very capable lawyer, but I want to make sure
4 that you're, if you had any questions, that we get
5 them addressed.

6 DEFENDANT: Okay.

7 COURT: Alright. Count 7 reads as follows sir. LeShawn
8 R. Nickelson, on or about August the 3rd, 2005, at
9 Lawrence County Ohio did knowingly sell or offer to
10 sell crack cocaine, a schedule two controlled
11 substance in an amount which equals or exceeds five
12 grams, but is less than ten grams. And the
13 controlled substance involved being cocaine or a
14 compound mixture, preparation or substance
15 containing cocaine. And said act occurred within
16 the vicinity of a juvenile or school. In violation
17 of Ohio Revised Code Section 2925.03.A.1C4D. It's
18 called trafficking in crack cocaine a felony of the
19 second degree. The maximum potential penalty the
20 court could impose for violation of the felony of
21 the second degree, eight years incarceration in the

Page Three
State v. LeShawn R. Nickelson
Bill of Particulars
05-CR-155

of 1.25 grams to a police officer for the sum of \$150.00 which was paid to the Defendant with marked "buy" money.

Said act by the Defendant is in violation of Ohio Revised Code Section 2925.03 (A)(1)(C)(4)(c), Trafficking in (Crack) Cocaine, a fourth degree felony.

COUNT SIX

On August 2, 2005, in Lawrence County, Ohio, the Defendant herein did, knowingly sell crack cocaine, a schedule II controlled substance in the amount which equals 0.93 grams to a police officer for the sum of \$150.00 which was paid to the Defendant using marked "buy" money.

Defendant's actions are in violation of Ohio Revised Code Section 2925.03 (A)(1)(C)(4)(c), Trafficking in (Crack) Cocaine, a fourth degree felony.

COUNT SEVEN

On August 3, 2005, at Lawrence County, Ohio, the Defendant, LeShawn R. Nickelson, did knowingly sell crack cocaine in the amount of 4.48 grams to an agent of the Lawrence Drug Task Force for the sum of \$495.00, which was paid to the Defendant with marked "buy" money. This transaction occurred within 1000 feet of the Lawrence County Early Childhood Center which is located at 1749 co. Rd. 1, South Point, Ohio 45680.

The actions of the Defendant herein are in violation of Ohio Revised Code Section 2925.03 (A)(1)(C)(4)(d), Trafficking in (Crack) Cocaine, a second degree felony.

Page Two
State v. Lord-Dazvon D. McIntosh
Judgment Entry
05-CR-156

Trafficking in (Crack) Cocaine, a fifth degree felony; Count Two, a violation of Ohio Revised Code Section 2925.03 (A)(1)(C)(4)(a), Trafficking in (Crack) Cocaine, a fourth degree felony; Count Three, a violation of Ohio Revised Code Section 2925.11 (A)(C)(4)(d), Possession of (Crack) Cocaine, a second degree felony; Count Four, a violation of Ohio Revised Code Section 2925.03 (A)(2)(C)(4)(e), Trafficking in (Crack) Cocaine, a first degree felony, and Count Five, a violation of Ohio Revised Code Section 2923.24 (A)(B)(3)(C),^F Possessing Criminal Tools, a fifth degree felony. The Court accepted said pleas.

The Court advised the Defendant that if sentenced to a term of imprisonment for a felony of the first or second degree, for a felony sex offense or for a felony of the third degree during the commission of which the Defendant caused or threatened to cause physical harm to a person, post release control is mandatory, and the Defendant will be supervised under post release control upon release from prison.

Further, for a felony of the first degree or a felony sex offense, the mandatory period of post release control is five years; for a felony of the second or third degree that is not a felony sex offense, the mandatory period of post release control is three years.

The Court further advised Defendant that if sentenced to a term of imprisonment for a felony of the third, fourth or fifth degree that is not subject to Section 2929.19 (B)(3)(c), post release control is discretionary and the Court notified Defendant that he or she may be supervised under post release control for up to three years upon release from prison.



Attorney General
Jim Petro

Bureau of Criminal Identification and Investigation

Laboratory Report

To: Lawrence County Sheriff's Office
Det. David Marcum
115 South Fifth Street
Ironton, OH 45638

BCI&I Laboratory Number: 05-14150

Date: September 13, 2005

Agency Case Number: D-05-08-04-01

Offense: Drug Trafficking

Subject(s): Leshawn Nichelson, Lord-Dazvon Delenny McIntosh, Cynthia Cranston, Zachary M. Miller

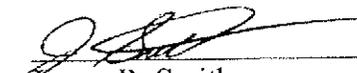
Victim(s): State of Ohio

Submitted on August 09, 2005 by Det. Aaron Bollinger:

1. Plastic bag containing a plastic bag containing an off-white solid substance.
2. Plastic bag containing a plastic bag containing an off-white solid substance.
3. Plastic bag containing a black plastic scale with residue, a white plastic bottle containing a white powder, and a package of plastic bags.

Findings

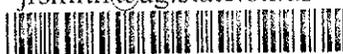
1. An off-white solid substance - 4.61g - found to contain Cocaine base (Crack Cocaine).
2. An off-white solid substance - 12.12g - found to contain Cocaine base (Crack Cocaine).
- 3.1. A black plastic scale with residue - less than one tenth of a gram - found to contain Cocaine base (Crack Cocaine).
- 3.2. A white plastic bottle containing a white powder - 9.03g - no controlled substance found.


James R. Smith

Forensic Scientist

740 845-2628

jrsmith@ag.state.oh.us



Please address inquiries to the office indicated, using the BCI&I case number.

BCI & I-Bowling Green Office
1616 E. Wooster St.-18
Bowling Green, OH 43402
Phone:(419)353-5603

BCI & I-London Office
P.O. Box 365
London, OH 43140
Phone:(740)845-2000

BCI & I-Richfield Office
4055 Highlander Pkwy. Suite A
Richfield, OH 44286
Phone:(330)659-4600

COUNT EIGHT

On August 4, 2005, at Lawrence County, Ohio, the Defendant, LeShawn R. Nickelson, did possess or have under his control a Samsung cellular phone with charger, which is commonly used for criminal purposes and the circumstances indicated that the item was intended for use in the commission of felony drug offenses. Said act is in violation of Ohio Revised Code Section 2923.24 (A)(B)(3)C, Possessing Criminal Tools, a fifth degree felony.

COUNT NINE

The Defendant, LeShawn R. Nickelson, on August 4, 2005, at Lawrence County, Ohio, did knowingly prepare for shipment or distribution approximately 16.73 grams of crack cocaine, or had reasonable cause to believe that the crack cocaine was intended for sale or resale by himself or by another person. The crack cocaine was located at the Defendant's residence at 403 Fourth Street East, Apt. #5, South Point, Ohio while a search warrant was being executed. Further, the act occurred in the vicinity of a child and is in violation of Ohio Revised Code Section 2925.03 (A)(2)(C)(4)(e), Trafficking in (Crack) Cocaine, a first degree felony.

COUNT TEN

On August 4, 2005, at Lawrence County, Ohio, the Defendant, LeShawn R. Nickelson, did knowingly possess approximately 16.73 grams of crack cocaine. The crack cocaine was located at the Defendant's residence at 403 Fourth Street East, Apt. #5, South Point, Ohio, while a search warrant was being executed.

question to be answered by the Trial Court is "whether there is a reasonable and legitimate basis for the withdrawal of the plea", and the ultimate question to be answered by the Court of Appeals is whether the Trial Court abused its discretion in making this determination. Xie, 62 Ohio St. 3d 527.

In this case, Defendant, Nickelson DID MAKE and file a formal motion to withdraw his plea. In his motion he set out specific reasons and causes for his withdrawal. (Transcript of hearing, Feb 2nd, 2009 Pages 3 - 8).

Defendant prayed on the following grounds; 1) Appellant's Fourth Amendment rights. 2) Promises made to Appellant concerning the receiving of drug treatment. 3) Ineffective Assistance of Trial Counsel. Trial Counsel was on the case for only two weeks and never explained the elements or nature of the charges. Appellant was under the impression that he was going to receive drug treatment.

As Appellant expressed in open court on Feb 2nd. "Ohio Revised Code Section 2925.03(A)(2)(C))4)(e), trafficking in crack cocaine, as charged under count nine was a SINGLE OFFENSE. In GROOSE, the Eighth Circuit Court of Appeals found reversible error when in separate trials, two Defendants were separately convicted of the same murder, through the prosecution's use of "diametrically opposed" statements by key witness. The Court held that the State was forbidden from using irreconcilable theories to secure convictions in the prosecution for offenses arising out of the same event. Groose, 205 F 3d at 1049.

In this case, the prosecution used the statement on Aug 4th, 2005 of Appellant and Co-Defendant Zachary Miller, inconsistent contradictory statements on Sept 22nd, 2005. The State and the Trial Attorney concealed from the Appellant the fact that Co-Defendant, Lorddazvon McIntosh, had pleaded and taken responsibility for trafficking the 16.73 grams of crack cocaine that was located at the Appellant's residence at 403 Fourth St. East, Apt # 5, South Point, Ohio. Furthermore, Mr Nickeson's fingerprints were not on the plastic bag that the controlled substance was in.

2925.03 A. 1C4D and 2925.03 A. 1C4C. The actual weight of the controlled substance was never explained to the Defendant by the Trial Attorney. Crim. R. 32(A)(1).

The Court of Appeals, Kline, J, held that a Defendant's motion was not subject to timeliness, concerning a Crim. R 32.1 motion. See State v Rathburn N.E 2d, 2002 WL 31846328 Ohio 4 Dist.

The Appeal Court kindly reverse the decision of the Trial Court. Transcript of hearing, Feb 2, 2009, Pages 7 - 8, P 17-21 and P 1-5.

Please note that it's four different St Joseph Hospitals in Lexington, Ky. Transcript of hearing, Feb 2, 2009, Pages 24, P 5-10.

SECOND ASSIGNMENT OF ERROR:

Argument:

In State v Brown, supra at 65 citing State v Adams 103 Ohio St 3d, 508, 2004-Ohio-5845, 817 N.E 2d 29. "To establish ineffective assistance of Counsel for failure to pursue a motion to suppress, a Defendant must prove that there was a basis to suppress the evidence in question".

The basis for suppression in this case was the lack of probable cause for a warrantless search. The Fourth Amendment to the US Constitution guarantees the rights of the people "to be secure in their persons, houses, papers and effects against unreasonable searches and seizure. Katz v U.S (1967), 389 U.S 347. A Court must suppress evidence obtained without a warrant in a criminal prosecution unless the State is able to establish an exception to the warrant requirement.

In the Case at Bar, there was no affidavit for a search warrant in the answer to the discovery or update to discovery. Furthermore, Appellant wrote to the Lawrence County Muncipal Court and their reply was filed on 6/24/09. NO SEARCH WARRANT WAS EVER ISSUED.

The warrantless entry into Apt # 5, 403 Fourht St. East, South Point, Ohio was without permission and was not justified by exigent circumstances and was thus ILLEGAL. (Exhibit A, B & C).

1 motion, you've set forth your points of law that you
2 are arguing very well but yet at the same time the
3 issues after a guilty plea on the two counts which
4 you have pled guilty to on October 26th, 2005, are
5 untimely and the court would deny that motion. The
6 court would also look to the other pro sec motions
7 that you've filed on or about October 26 which is a
8 motion to dismiss this case against you for an
9 illegal search and says that was number one and
10 number two that the defendant was in another state
11 being held on felony charges punishable up to twenty
12 years in prison. Number three you said the
13 defendant wishes not to waste any more time in the
14 State of Ohio and Lawrence County's time and money,
15 money in this matter. And number four it says that
16 you are non, that the case is non-violent. Number
17 five lack of evidence. And your conclusion in
18 relief is that the fourth amendment grants one the
19 right to be secure against persons and unreasonable
20 searches and seizures. And that, that motion
21 doesn't have a case number on that. Are you filing

1 removed as his counsel. And like I say, I am
2 completely unable to communicate with him in regards
3 to that case Your Honor.

4 COURT: Mr. Nickelson, what's your reasons as to why you
5 want Mr. Morford removed as counsel?

6 DEFENDANT: Your Honor, Mr. Morford first and foremost
7 and I'm asking him to explain to me the situation in
8 this matter and he had and he's telling me. I sent
9 him over here last weekend and I asked Mr. Morford
10 to file a supplementary brief on this matter to with
11 draw my plea sir on the 05 case.

12 Court: Court has that. Do you have a copy of that Mr.
13 Anderson?

14 ANDERSON: No sir, I don't believe I do.

15 DEFENDANT: I sent to the Clerk of Courts. I still have
16 a copy over there at the jail sir.

17 COURT: Well let's address your motion to withdraw your
18 plea first and foremost. I have a copy of it and
19 I'll read it for the record, how's that? It says now
20 comes defendant LeShawn Nickelson pro sec to
21 respectfully ask the court to dismiss the case

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

2009 OCT 15 AM 10:42

MAILED
APPELLATE COURT
LAWRENCE COUNTY

STATE OF OHIO, :
 Plaintiff-Appellee, : Case No. 09CA8
 vs. :
 LeSHAWN R. NICKELSON, : DECISION AND JUDGMENT ENTRY
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Michael A. Davenport, Lambert & McWhorter, 215 South Fourth Street, Ironton, Ohio 45638
 LeShawn R. Nickelson, #598-117, C.C.I. P.O. Box 5500, Chillicothe, Ohio 45601, Pro Se

COUNSEL FOR APPELLEE: J.B. Collier, Jr., Lawrence County Prosecuting Attorney, and Brigham M. Anderson, Lawrence County Assistant Prosecuting Attorney, Lawrence County Courthouse, 1 Veteran's Square, Ironton Ohio 45638

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. LeShawn R. Nickelson, defendant below and appellant herein, pled guilty to (1) one count of trafficking in crack cocaine in violation of R.C. 2925.03(A) (1) & (C)(4)(d); and (2) one count of trafficking in

crack cocaine in violation of R.C. 2925.03(A)(2) & (C)(4)(e).

Appellant's counsel advised this Court that he has reviewed the record and can discern no meritorious claim on appeal. Thus, pursuant to Anders v. California (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, counsel requests, and we hereby grant, leave to withdraw. Although appellate counsel assigns no potential errors for review, appellant's pro se brief and supplemental pro se brief set forth the following assignments of error:

FIRST ASSIGNMENT OF ERROR:

"THE DEFENDANT, APPELLANT MR[.] NICKELSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

SECOND ASSIGNMENT OF ERROR:

"THE COURT OF COMMON PLEAS, LAWRENCE COUNTY, OHIO, COMMITTED REVERSIBLE ERROR BY ALLOWING ILLEGAL EVIDENCE SUBMITTED THAT SHOULD HAVE BEEN SUPPRESSED."

THIRD ASSIGNMENT OF ERROR:

"THE DELAY BETWEEN THE PLEA BARGAIN AND THE SENTENCING WAS UNREASONABLE [AND] ATTRIBUTABLE SOLELY TO THE PROSECUTION, WARRANTING VACATION OF THE SENTENCE."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S CRIMINAL PROCEDURE RULE 32.1 MOTION TO WITHDRAW HIS GUILTY PLEA WITHOUT FIRST CONDUCTING A HEARING."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN THE PROSECUTOR FAILED TO COMPLY WITH THE PLEA AGREEMENT BY

NOT ALLOWING THE DEFENDANT TO WITHDRAW HIS PLEA."

SIXTH ASSIGNMENT OF ERROR:

"[THE] TRIAL COURT ABUSED ITS DISCRETION IN DENYING MOTION TO WITHDRAW GUILTY PLEA AS UNTIMELY."

On August 24, 2005, the Lawrence County Grand Jury returned an indictment charging appellant with nine counts of trafficking and one count of possession of criminal tools. Appellant agreed to plead guilty to two counts of the indictment in exchange for the dismissal of eight counts. At the October 25, 2005 hearing the trial court accepted and scheduled the sentencing hearing for November 9, 2005. Appellant, however, did not appear for sentencing.¹

Several years later, appellant was finally apprehended. On January 28, 2009, he filed a pro se motion and sought to withdraw his guilty pleas from three years earlier. The trial court overruled his motion and sentenced appellant to serve seven years imprisonment on one count and eight years on the other, with the sentences to be served consecutively. This appeal followed.

I

Appellant asserts in his first assignment of error that he received constitutionally ineffective assistance from his trial

¹The record reveals that appellant was indicted for the failure to appear for sentencing in this case. That case (No. 05-CR-255) was later dismissed nolle prosequi.

counsel. Our analysis of this argument begins with the premise that defendants have a right to counsel, including a right to the effective assistance from counsel. McCann v. Richardson (1970), 397 U.S. 759, 770, 25 L.Ed.2d 763, 90 S.Ct. 1441; State v. Lytle (Mar. 10, 1997), Ross App. No. 96CA2182; State v. Doles (Sep. 18, 1991), Ross App. No. 1660. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient, and (2) such performance prejudiced the defense and deprived him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed .2d 674, 104 S.Ct. 2052; also see State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. Goff (1998), 82 Ohio St.3d 123, 139, 694 N.E.2d 916.

Appellant claims that counsel was constitutionally ineffective because he advised him to accept a plea agreement rather than challenge what appellant claims is a defective indictment and a weak case for the prosecution. We are not persuaded.

First, the fact that counsel negotiated a plea agreement that resulted in the dismissal of eight of ten counts contained in the indictment hardly lends itself to a deficient performance claim. Second, we find no merit to the assertion that the indictment was defective. Finally, any evaluation concerning the strengths or weaknesses of the prosecution's case is a question

of trial strategy or tactics, and such matters are not generally reviewed for ineffective assistance claims. See State v. Burkhart, Washington App. No. 08CA22, 2009-Ohio-1847, at ¶27; State v. Lytle, Ross App. No. 06CA2916, 2007-Ohio-3545, at ¶5.

For all these reasons, we hereby overrule appellant's first assignment of error.

II

Appellant asserts in his second assignment of error that the trial court erred by "allowing illegal evidence . . . that should have been suppressed." This is obviously without merit. First, as there was no actual trial, the court did not "allow" any evidence - illegal or otherwise. Second, we find no motion to suppress evidence and, consequently, nothing appears in the record to support the assertion that "evidence" should have been suppressed. Finally, even if certain evidence should have been suppressed, and the trial court failed to do so, appellant's guilty pleas constitute a complete admission of guilt and waiver of his right to challenge evidence that arguably should have been suppressed. See Crim.R. 11(B)(1); State v. Jackson, Belmont App. No. 07BE7, 2008-Ohio-3341, at ¶12; State v. Truax, Belmont App. No. 06BE66, 2007-Ohio-4993, at ¶3.

For all these reasons, we hereby overrule appellant's second assignment of error.

III

Appellant asserts in his third assignment of error that his sentence should be vacated because "40 months elapsed" between entry of his guilty plea and his sentencing. Although we find no clear explanation in the record as to what caused this delay, the fact that appellant was indicted for the failure to appear seems to suggest the delay was caused, at least in part, by appellant's flight from Lawrence County. A defendant cannot avoid sentencing merely by fleeing the jurisdiction for three years. Moreover, appellant cites no authority to support his argument that the court somehow lost jurisdiction over his case.

For these reasons, we hereby overrule appellant's third assignment of error.

IV

We jointly consider the three remaining assignments of error that assert, for various reasons, that the trial court erred by overruling his pro se motion to withdraw his previous guilty pleas. For the following reasons, we find that none of those arguments are persuasive.

Appellant contends that the trial court erred by not conducting a hearing on his pre-sentence motion to withdraw his guilty pleas. He is correct, as an abstract proposition of law, that such a hearing must be held. State v. Xie (1992), 62 Ohio St.3d 521, 584 N.E.2d 715, at paragraph two of the syllabus. However, nothing in either Xie or Crim.R. 32.1 describe the

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extent of the required hearing. The only definitive guidance the Ohio Supreme Court has given is that the hearing must be sufficient to determine whether there exists a "reasonable and legitimate basis for the withdrawal of the plea." Id. at 527.

In this case, the trial court reviewed the merits of appellant's pro se motion during the sentencing hearing. We believe that in the case at bar, that was sufficient to comply with the Ohio Supreme Court's mandate.

First, nothing in Ohio law requires a separate evidentiary hearing in every case when a defendant seeks to withdraw a guilty plea. State v. Brewer (Feb. 16, 2001), Erie App. No. E-00-3; State v. Mosby (Sep. 18, 2000), Butler App. No. CA2000-04-59. The scope of a hearing on a Crim.R. 32.1 motion need only reflect the substantive merits of the motion. State v. McDaniel, Cuyahoga App. No. 89001, 2007-Ohio-5441, at ¶12.

Here, appellant's motion is not a model of clarity but, from our review, he appears to advance two reasons why the trial court should have permitted him to withdraw his pleas. First, in August, 2005 the "Lawrence County Drug Task Force" had him released from jail "for 45 minutes to 2 hours each day" to help authorities arrange "drug deals" with other traffickers. Appellant claims that a drug task force attorney informed him that he "would receive drug rehabilitation and some probation do [sic] to his cooperation."

However, in a filing titled "Proceeding on Plea of Guilty," appellant answered affirmatively to questions that he understood that he could be sentenced to a penal institution and that he was promised that he would be released from a penal institution at a certain date in the future. This last representation, in particular, belies his claim that he thought he would not be imprisoned. A transcript of the October 26, 2005 change of plea hearing also reveals that appellant acknowledged that he could receive maximum prison terms for the two offenses for which he pled guilty.

Appellant's second argument for the withdrawal of his pleas is that he was "rush[ed] through the court proceeding" without counsel even so much as filing a "motion to suppress, a motion for bill of particulars, a motion for discovery, a motion in limine, a motion for summary judgment, a motion for literacy or competency." However, (1) nothing appears in the record to indicate a motion to suppress was warranted; (2) demands for discovery and bill of particulars were filed on September 2, 2005; (3) a motion in limine is directed at trial proceedings and, thus, would not have been filed at this stage of the case; (4) motions for summary judgment apply to civil proceedings, not criminal; and, (5) finally the fact that appellant filed his own pro se motion to withdrawal his guilty plea leads to the conclusion that no basis exists for a motion to determine either

literacy or competency.

In view of the meritless bases asserted to support the withdrawal of the plea, we believe that the nature of the trial court's hearing was entirely appropriate. We further note that the court also engaged in an extended colloquy with appellant on the motion and asked if appellant wanted to add more or elaborate on his arguments. In an analogous case, our colleagues in the Eleventh District found that a trial court conducted an "adequate" hearing for purposes of Crim.R. 32.1 when, during a sentencing hearing, the judge engaged in a discussion with the defendant on the merits of his pro se motion, even asking the defendant if he wanted to add anything further. State v. Curd, Lake App. No. 2003-L-030, 2004-Ohio-7222, at ¶¶123-124. We find that reasoning persuasive and likewise conclude that the trial court complied with the Xie hearing requirements.

Appellant also claims the trial court should have allowed him to withdraw his guilty plea because the appellee failed to comply with its end of the bargain (i.e. recommended a ten year sentence rather than the four year sentence originally agreed upon). Again, we find no merit to this claim.

First, the transcript of the October 26, 2005 change of plea hearing clearly reveals that the trial court informed appellant that, if he did not return in two weeks for sentencing, the terms of the agreement were no longer binding. The fact remains that

appellant breached the terms of the plea agreement by failing to appear for sentencing.

Appellant also argues that the trial court erred by overruling his Crim.R. 32.1 motion on the merits. We disagree. As noted above, the record refuted the grounds set forth in appellant's pro se motion. Further, as the trial court aptly noted, the issues raised in the motion all occurred before he entered into the plea agreement. Appellant failed to raise them then and cannot be heard to complain about them more than three years later.

It is also well-settled that the decision to grant, or deny, a Crim.R. 32.1 motion is committed to the trial court's sound discretion and will not be reversed absent an abuse of that discretion. Xie, supra at paragraph two of the syllabus; State v. Smith (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus. An abuse of discretion is more than either an error of law or judgment; rather, it implies the trial court's attitude was unreasonable, arbitrary or unconscionable. State v. Clark (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331, 335; State v. Moreland (1990), 50 Ohio St.3d 58, 61, 552 N.E.2d 894, 898. In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254; In re Jane Doe 1 (1991), 57 Ohio St.3d

135, 137-138, 566 N.E.2d 1181. To establish an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will, but perversity of will; not the exercise of judgment, but defiance of judgment; and not the exercise of reason, but, instead, passion or bias. Vaught v. Cleveland Clinic Found., 98 Ohio St.3d 485, 787 N.E.2d 631, 2003-Ohio-2181, ¶13; Nakoff v. Fairview Gen. Hosp. (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1.

We readily agree with the trial court that the issues set forth in appellant's motion to withdraw his guilty pleas should have been raised prior to his change of plea. Raising them three years later, after he absconded from the area, and without any evidence to support his allegations, make them appear contrived solely for the purpose of trying to escape the effects of his guilty plea. In any event, we find no error, let alone an abuse of discretion, in the trial court's decision to deny appellant's Crim.R. 32.1 motion. For all these reasons, we overrule appellant's fourth, fifth and sixth assignments of error.

Having reviewed the record for potential errors, as well as the errors appellant assigned and argued in his pro se brief, and in light of appellate counsel having found no meritorious argument on appeal, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

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JUDGMENT ENTRY

COURT OF APPEALS

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It is ordered that the judgment be affirmed and appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

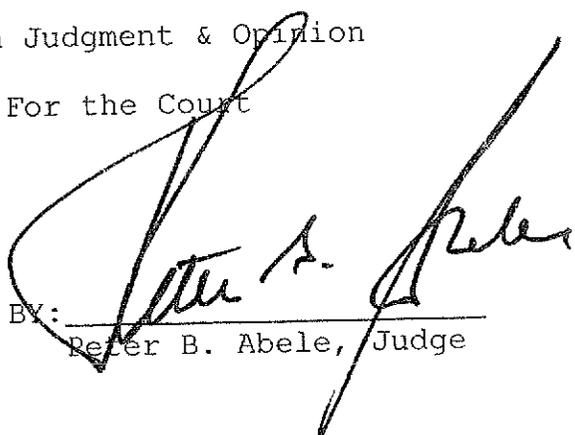
If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: 
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.