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MEMORANDUM IN SUPPORT OF JURISDICTION
IN THE SUPREME COURT OF OHIO

10-0467

BRIAN BALDERSON	;	
Appellant	;	ON APPEAL FROM THE
	;	RICHLAND COUNTY
vs.	;	COURT OF APPEALS
	;	FIFTH APPELLATE DISTRICT
STATE OF OHIO	;	
Appellee	;	COURT OF APPEALS
	;	CASE NO. 09-CA-0043
	;	pursuant to App. R. 26(B)

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT BRIAN BALDERSON

Submitted by:
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Mansfield, Ohio 44901

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Defendant, Appellant pro-se

Counsel for Plaintiff/Appellee

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FILED
MAR 12 2010
CLERK OF COURT SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A..... CASE PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE FACTS.....	2,3
STATEMENT OF CASE(AFFIDAVIT).....	3,4,5,6
ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW:.....	7
PROPOSITION OF LAW NO. 1.....	7,8
<u>State v. Balderson</u> 2009-CA-0043.....	7
PROPOSITION OF LAW NO. 2.....	8
<u>State v. Sanchez</u> 110 Ohio St.3d 274.....	8
<u>State v. Baker</u> 78 Ohio St.3d 108.....	9
<u>Strickland v. Washington</u> (1984) 466 U.S. 668.....	9
PROPOSITION OF LAW NO. 3.....	9
<u>Brecksville v. Cook</u> (1996)75 Ohio St.3d 53,57.....	10
CONCLUSION.....	11,12
CERTIFICATE OF SERVICE.....	12
APPENDIX	
JUDGMENT ENTRY(OPINION)	
RICHLAND COUNTY	
COURT OF APPEALS	
Case No. 2009-CA-0043(Feb. 25,2010)	
Motion to Reopen Pursuant to App.R.26(B)	

ORIGINAL

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION

This case presents substantial Constitutional issues, and is of great or public interest, and involves a felony for this Court to decide. Appellant contends that his right to effective assistance of counsel as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution were violated. But the Misrepresentation Appellant states that a different outcome would have to have prevailed.

In the present case this Honorable Court would have the ability to further clarify prior decisions on individuals rights to a speedy trial. The appellate courts ruling goes directly against prior rulings made by this Honorable Court concerning multiple indictments and speedy trial.

It is incumbent upon this Court to accept jurisdiction and to allow the Appellant to file his Merit Brief to the Court on this matter, otherwise the the constitution would be dead to all litigants, defendants, and appellants who find themselves unconstitutionally convicted in violation of speedy trial rights and resented to harsher punishment after a valid sentence has instated.

STATEMENT OF THE FACTS

The Defendant/Appellant, Appellant herein, was arrested on August 28, 2008. On September 12, 2009, Appellant was indicted on Case No.'s @008-CR-611H and 2008-CR-692H. These cases were the result of a check cashing scheme. Both of these cases were presented before the same Grand Jury on the same day and signed by the Same Grand Jury Foreman, One minute apart.

On January 7, 2009, a hearing was held on Appellant's Motion to Dismiss. This was filed by Atty. Mark Cockley, before The Hon. Judge James Henson. No decision was made at the hearing on this date.

On February 10, 2009, Appellant was served with another indictment, Case No. 2009-CR-102H.

On Febrauy 11, 2009, the next day, Appellant was brought before the court for sentencing pursuant to a plea deal that had been tendered after a proffered statement of Appellant on November 7, 2008, that the prosecutor had previously reneged on.

Appellant was sentenced to two years with the recommendation from the prosecutor for Judicial Release after six months. Appellant was also to be released that day until February 13, 2009, to get his affairs in order.

Appellant was not released until the following day because of the new indictment. Appellant was finally released one day later. Appellant then was given a report date of February 16, 2009.

STATEMENT OF THE FACTS (cont)

On February 15, 2009, Appellant was arrested when he went to the garage where he had left his belongings. Appellant was charged with Criminal Trespass Case No. 2009CRB00697. Appellant went to Mansfield Muni. Court on February 17, 2009 and was fined twenty-five dollars. That night he was released by the county jail, even though he informed them he was to be conveyed to prison.

On February 22, 2009, Appellant was arrested for falsification, Case No. 2009CRB00800. This charge was nolleed by the prosecution.

On February 25, 2009, Appellant was brought before the Hon. Judge James Henson and was resentenced to four years.

Appellant was given appeals counsel, Atty. Ryan Hoovler. Appellant was never in contact other than a couple of letters that were ignored by Hoovler. Appellant subsequently lost the appeal and filed A Motion to Re-Open Pursuant to App.R.26(B).

It is from this decision rendered February 25, 2010, that Appellant appeals. Another appeal. Case No. 2009-CA-0043 is pending in this Honorable Court.

AFFIDAVIT
STATEMENT OF THE CASE

On August 28, 2008, Appellant was arrested by the Richland County Sheriff's Dept. at a friends house. This was a follow-up from an August 21, 2008 investigation and arrest of Paul Limpach. Appellant assisted the sheriff in that arrest and was released without charges. All evidence used in this case was

ORIGINAL

AFFIDAVIT
STATEMENT OF THE CASE (cont.)

gathered at either Paula Banbury's house, sister of Limpach, a vehicle owned by Limpach, or a motel room rented to Limpach.

September 12, 2008 Appellant was indicted on Case No's 2008-CR-611H and 2008-CR-692H. Both of these case were presented to the same Grand Jury and signed by the same Grand Jury foreman. They are time-stamped one minute apart.

On November 7, 2008 a deal was struck with Appellant by and through his trial counsel Mark Cockley. Those present were Cockley, Richland County Assistant Prosecutor Joel Wise, Richland County Sheriff's Deterctive Robert Mack, and Appellant. All precedings were recorded by Det. MacK on two separate tape recorders. The deal, briefly, stated that in return for Appellant's proffered statement, Appellant would be given a two-year sentence, the prosecutor would recommend Judicial release in six months and Appellant would be granted a personal recognicents bond to get his affairs in order. Appellant was told that he would be released that day or on the following Monday. Appellant was eventually released November 12, 2008 at Approximately 4:00p.m. and told to report to the probation department. P.O. Jill Bond who usually does the bonds was not in and Appellant instead seen P.O. Joanne Kraussman who immediately hand-cuffed Appellant and returned him to the jail. Appellant only later learned that his bond had been revoked and that P.O. Kraussman was a personal friend of Paula Banbury. Appellant also learned that the prosecutor had decided to renege on the

ORIGINAL

AFFIDAVIT
STATEMENT OF THE CASE (cont.)

original plea-deal, switch prosecutors and re-indict Appellant.

On January 7, 2009, a hearing was held on Appellant's Motion to Dismiss, which was filed on December 12, 2008. Appellant was present and no decision was made at time. The Hon. Judge James Henson informed the court that he wanted to see additional case law. Appellant was never informed that there was another hearing or if any decision was made until six months later by some paperwork sent by Appeals Counsel Ryan Hoovler, (Hoovler), herein.

At the end of January, 2009, Appellant was informed by Atty Cockley that had been able to get the original plea-deal back by saying he had a copy of it. Appellant was now on his fourth prosecutor. Appellant was told that he would be sentenced on February 11, 2009.

On February 10, 2009, Appellant was re-indicted on Case No. 2009-CR-102H. On February 11, 2009 Appellant was brought before Hon. Judge Henson and sentenced to the Nov. plea deal. Appellant was told that he could have two days out to get his affairs in order. Instead of being released Appellant was held on a bond from the new indictment. Appellant was then released on February 12, 2009. Appellant was to report to the jail on February 16, 2009 to be conveyed to prison. Appellant went to Paula Banbury's garage where Appellant's clothes were supposed to be. Appellant was then arrested, February 15, 2009, for Criminal Trespass Case No. 2009CRB00697. Appellant was held in Jail until February 17, 2009 and released even though he told the jail staff he was to be conveyed to prison.

AFFIDAVIT
STATEMENT OF THE CASE (cont.)

On February 22, 2009, Appellant was picked up for falsification, Case No. 2009CRB00800. This charge was later nolledd by the prosecutor. Appellant was held until February 25, 2009, at which time The Hon. Judge Henson resentenced Appellant to four years in prison. Appellant was sent to Lorain Corr. Inst. that same day.

Appellant attempted many times via U.S. Mail to contact his Appellate Counsel, to no avail. Appellant subsequently received his decision December 8, 2009 on the Fifth Districts ruling denying Appellant's Appeal, (18 days after the Nov. 19, 2009 decision).

Appellant timely filed his direct appeal with this Hon. Court and also timely filed a Motion to Reopen pursuant to App.R.26(B). The latter being denied February 25, 2010. It is from this decision that Appellant timely files this appeal.

AFFIDAVIT

I, Brian Balderson, Being duly sworn, state that the forgoing Statement of the Case is true to the best of my knowledge.



Affiant's Signature

Sworn to and subscribed before me this 9th day of March, 2010.

Rebecca Williams
Notary Public
State Of Ohio
My Commission Expires
March 2013



Notary's Signature

ARGUMENTS OF DEFENDANT/APPELLANT BRIAN BALDERSON

PROPOSITION OF LAW NO.1

APPELLANT'S APPEAL COUNSEL NEVER SUBMITTED A RECORD TO THE APPEALS COURT AS TO APPELLANT'S TIME OF INCARCERATION FOR THE PURPOSE OF RESENTENCING.

I.

Appellant Counsel Ryan Hoovler, Hoovler herein, never submitted any proof of record of Appellant's time of incarceration to the Appeals Court, therefore leaving the Court to base their decision on an incomplete record.

In the Appeals Court decision at paragraph 26 and 27 the Court stated that;

In the present case, the original sentencing entry was journalized on February 13, 2009. Appellant was ordered to report to the Richland County Jail...February 16, 2009. Due to Appellant's activities...Appellant did not report to prison on February 16, 2009...Therefore, execution of Appellant's sentence for case Nos. 2008-CR-611H and 2008-CR-692H had not begun. Because execution of Appellant's sentence had not begun, the trial court possessed the authority to modify or change Appellant's sentence.

Clearly this decision was rendered on an incomplete record. Appellant submitted to the court a docket clearly showing that he was incarcerated in the Richland County Jail from Feb. 15, 2009 until Feb. 17, 2009, and then released by jail authorities. Appellant had only to write the Mansfield Clerk of Courts, Daniel F. Smith, to gain this evidence.

In the Courts denial of Appellants Motion to reopen the Court decides to add to its original decision. By stating that "Appellant may have been in jail, but he was being held pursuant to another charge unrelated..." the Court has made a decision without fact. In fact Appellant was being or at

the least, believed he was being held to transport to prison, This was even stated by Appellant at the hearing for the criminal trespass charge. Had Hoover contacted Appellant or made any attempt at representing Appellant this decision would not have been rendered.

II.

PROPOSITION OF LAW NO. 2

"II. APPELLANT'S COUNSEL REFUSED TO FILE INEFFECTIVE CLAIM AGAINST TRIAL COUNSEL AND ALSO REFUSED TO SUBMIT RELATIVE PARTS OF THE RECORD THAT WOULD ASSIST APPELLANT IN UNRAISED ISSUES AND ISSUES AT HAND.

The Appellate Court's decision was clearly one not thought out or researched.

Appellant submitted evidence in the form of trial court decisions and prosecutor's motion, letters to and from Hoover about his wish to raise ineffective assistance and the renege on the prosecutor's original plea deal. Trial counsel clearly argued the wrong issue on speedy trial. This courts numerous decision on speedy trial claims show that the issue was if the state knew of both charges at the time of the initial indictment. Of course they did. This is not even an argumental issue. Appellant was indicted on the same day by the same Grand Jury, the indictments signed by the same Grand Jury foreman one minute apart. The question now is how the appeals court did not follow case law and used a case such as State v. Sanchez, 110 Ohio St.3d 274, to base its decision on. This is an I.N.S. case! It is also the only case law stated in the decision.

Appellant's trial counsel stated to him that he was ineffective. Transcripts from Jan. 7, 2009 show trial counsel arguing the wrong issue. State v. Baker states;

"or the state knew of these facts at the time of the initial indictment. State v. Baker, 78 Ohio St3d.108.

Appellant could quote a hundred decisions just as this. This is also an excellent reason for this Court to accept this case. The time of the indictments in the case at bar would clearly distinguish this case law and prevent further attempts by prosecutors to use this illegal method to abrogate speedy trial rights as in the present case.

Hoovler's representation falls so far below the standard of Strickland v. Washington(1984) 466 U.S. 668, as to be laughable, except that Appellant is incarcerated because of said representation.

III.

PROPOSITION OF LAW NO. 3

"III.APPELLANT'S COUNSEL DID NOT SUBMIT A RECORD SUSTAINING HIS SPEEDY TRIAL CLAIM TO THIS COURT.

In the case at hand Hoovler did not present any valid record to the appeals court to make a decision on his speedy trial claim. Appellant submitted previously unsibmitted documents that are brought up in the transcripts but not presented by Hoovler inspite of numerous requests by Appellant. As previously stated, Appellant was reindicted the day before his sentencing. Appellant was also taking a plea agreement from a deal made AND RENEGED ON, on Nov. 7, 2008, over six months after the agreement.

The appellate court was clearly subservient to the prosecution when rendering its decision on the speedy trial claim. The courts statement of the case is read verbatim from the prosecutor's brief. No evidence from the jail or even a calendar from Hoover was presented. Appellant was indicted on September 12, 2008. The prosecutor nor the appellate court states this though this is the time from which the speedy trial clock should run. The prosecutor has a reason for omitting this because Appellant's Motion to Dismiss was filed on December 12, 2008 and the prosecutor knew that if the court would correctly count the time they would lose. That is why the prosecution uses the time that indictment is served which is irrelevant as this Court knows. Hoover, by not submitting a calendar, acquiesced to the prosecutor. Dockets that are part of the record clearly show that both case nos. 2008-CR-611H and 2008-CR-692H were prosecuted together. There is no variable in or distinction through the whole prosecution in the docket. The speedy trial time began on both cases on Sept 12, 2008. This was three for one until Dec. 12, 2008 for a total of 93 days times three, or 279 days, time was then tolled from Dec. 12, 2008 until Jan. 26, 2009, whereas Appellant receives one for one days totalling 45 days. Finally Appellant receives three for one days from Jan. 27, 2009 until sentencing on Feb. 11, 2009 for which is 15 times three for 45 days for a total of 369 days. Well passed the 270 days allowed. Citing Brecksville v. Cook(1996), 75 Ohio St.3d 53,57, the court reiterated its prior admonition "to strictly construe

the speedy trial statutes against the state." Had Hoovler presented anything close to a decent time-table perhaps the appellate court would not have been subserviant to the prosecution's false calendar.

CONCLUSION

Appellant has clearly shown the appellate court and this Honorable Court that not for Hoovler's complete ineffectiveness and failure to submit a clear record and produce relevant evidence that was always available to him, a different outcome would have occurred. This failure violates Appellant's right to effective assistance counsel guaranteed to him by the 6th and 14th Amendments to the United States Constitution, and Article I, section 10 and 16 of the Ohio Constitution. The speedy trial time-table may at one time been a mixture and hard to comprehend but no longer under O.R.C. 2945.71. Appellant has clearly shown with case law and evidence that this case was improperly handled from the start and that Appellant has been especially discriminated against by the representation, and lack thereof, of his appellate counsel Ryan Hoovler. Issues presented by Hoovler were either presented wrong or with an incomplete record. Other crucial issues, i.e. renege of plea deal and ineffective assistance of trial counsel, were not argued at all in spite of evidence that Appellant has presented showing that he did inform Hoovler of his wishes. The prosecutor's use of the calendar and renegeing on a plea deal should be disconcerting to this Court.

With the errors presented Appellant would be eligible for
Page-11-

ORIGINAL

immediate release. There could be no other conclusion regarding the speedy trial with a correct calendar and argued the correct way. The same would go for the resentencing. If the original sentence is upheld Appellant would have been granted Judicial Release in August of 2009.

CERTIFICATE OF SERVICE

I, Brian Balderson certify that a copy of this Notice of Appeal was sent via ordinary U.S. Mail to counsel for the appellee's, James J. Mayer, Jr., Richland County Prosecutor, at 38 S. Park Street, in Mansfield, Ohio 44902, this 10th day of March, 2010.


Brian Balderson pro se
Defendant/Appellant
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44901

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
FILED

2010 FEB 25 AM 10:43

LINDA H. FRARY
CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRIAN BALDERSON

Defendant-Appellant

JUDGMENT ENTRY

Case No. 2009 CA 0043

This matter is before the Court upon an Application for Reopening, pursuant to App.R.26(B), filed by Defendant-Appellant Brian Balderson on December 28, 2009. Plaintiff-Appellee State of Ohio did not file a response.

On November 19, 2009, this Court affirmed Appellant's conviction and sentence in the Richland County Court of Common Pleas for felony offenses involving forgery and theft in two cases, 2008-CR-611H and 2008-CR-692H. *State v. Balderson*, 5th Dist. No. 2009 CA 0043, 2009-Ohio-6183. This Court found the trial court did not commit error in resentencing Appellant and that Appellant's speedy trial rights were not violated.

Ohio App. Rule 26 states:

"(B) Application for reopening

"(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

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ORIGINAL

"(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal."

Appellant's application for reopening raises three issues of ineffective assistance of appellate counsel:

"I. APPELLANT'S COUNSEL NEVER SUBMITTED A RECORD TO THIS COURT AS TO APPELLANT'S TIME OF INCARCERATION FOR THE PURPOSE OF RESENTENCING.

"II. APPELLANT'S COUNSEL REFUSED TO FILE INEFFECTIVE ASSISTANCE CLAIM AGAINST TRIAL COUNSEL AND ALSO REFUSED TO SUBMIT RELEVANT PARTS OF THE RECORD THAT WOULD ASSIST APPELLANT IN UNRAISED ISSUES AND ISSUE AT HAND.

"III. APPELLANT'S COUNSEL DID NOT SUBMIT A RECORD SUSTAINING HIS SPEEDY TRIAL CLAIM TO THIS COURT."

The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693, is the appropriate standard to assess whether an appellant has raised a "genuine issue" as to the ineffectiveness of appellate counsel, in his request under App.R. 26(B)(5). *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696, 697; *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458.

To show ineffectiveness of counsel, an appellant must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had those claims been presented on appeal *State v.*

Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Moreover, to justify reopening his appeal, an appellant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d at 696-697.

I.

In Appellant's first Assignment of Error, he argues that appellate counsel was ineffective for failing to provide this Court with documentation of Appellant's jail records to support his first Assignment of Error on his direct appeal. In his direct appeal, Appellant argued the trial court erred in modifying Appellant's sentence before Appellant sentence had been executed. The trial court sentenced Appellant on February 13, 2009. Appellant was ordered to report to the Richland County Jail for transportation to prison on February 16, 2009. The trial court warned Appellant to stay away from a certain woman while he was released, or the trial court would resentence Appellant. During Appellant's release, he was arrested for criminal trespass because he was found in the woman's garage. The trial court resented Appellant to a harsher sentence.

In our decision, we found that when the execution of the sentence has not begun, the trial court possesses the authority to modify or change Appellant's sentence. Appellant argues that if his appellate counsel had provided this Court with his jail records, it would have shown that Appellant was arrested for criminal trespass on February 15, 2009 and released from the Richland County Jail on February 17, 2009.

We find that Appellant has not shown that his appellate counsel was deficient for failing to raise this issue, nor has he shown a reasonable probability of success had this Court been in possession of that record. As we stated in *State v. Balderson*, 5th Dist.

No. 2009 CA 0043, 2009-Ohio-6183, ¶26: "Due to Appellant's activities after his release on February 11, 2009, Appellant did not report to prison on February 16, 2009 pursuant to the sentencing entry. Therefore, execution of Appellant's sentence for Case Nos. 2008-CR-611H and 2008-CR-692H had not begun." Appellant may have been in jail, but he was being held pursuant to a criminal charge unrelated to Case Nos. 2008-CR-611H and 2008-CR-692H. Therefore, Appellant's sentence in the instant case had not begun, and the trial court possessed the authority to modify or change Appellant's sentence as stated in our Opinion.

II.

Appellant argues in his second Assignment of Error that his appellate counsel failed to raise the ineffective assistance of his trial counsel as to his speedy trial arguments. Upon review of Appellant's arguments, we find that his appellate counsel appropriately and thoroughly raised the speedy trial issues as now argued by Appellant.

III.

In his third Assignment of Error, Appellant argues that his appellate counsel was ineffective for his failure to include his jail time records in support of his speedy trial claims. Appellant also raises a separate criminal case, Case No. 09-CR-102H, as additional evidence he argues to support his contention that his speedy trial rights were violated.

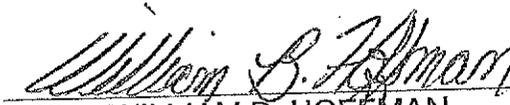
Upon review of the record presented, we find that Appellant has failed to establish that his appellate counsel was deficient and that there was a reasonable probability of success on the speedy trial claim if his appellate counsel had furnished this Court with additional records. Appellant's argument for reopening merely restates

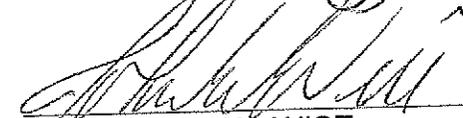
the original argument on appeal that the two criminal cases should have been brought in a single indictment so that the triple count provision of R.C. 2945.71(E) would be applicable.

Upon due consideration, we find the Application for Reopening to be not well taken and DENY the same.

IT IS SO ORDERED.


HON. PATRICIA A. DELANEY


HON. WILLIAM B. HOFFMAN


HON. JOHN W. WISE