

ORIGINAL

In The Supreme Court Of Ohio

10-0662

Roy Duncan
Appellant

-Vs-

State Of Ohio
Appellee

On Appeal From Richland County
Court Of Appeals 5th District

Appellate Case Number 2009-CA-028

Criminal Case Number 2006-CR-0491 D

Memorandum In Support Of Jurisdiction
Of Appellant Roy Duncan

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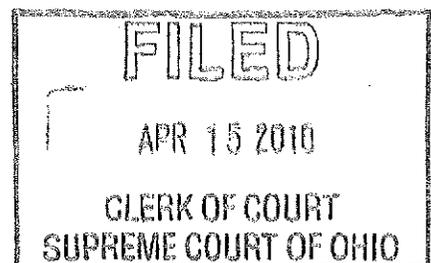


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Explanation Of Why This Case Is A Case Of
Public Or Great General Interest And
Involves A Substantia Constitutional Question

This cause presents a unique question of what exactly a Motion For Instanter means if Granted. In this Case the Fifth Appellate District Granted a Motion To File Instanter, pursuant to their own **Local Appellate Rule 9(D)**, that presented, and had accompanying it a Motion For Reconsideration pursuant to **Appellate Rule 26(A)**.

Appellant knew upon Mailing the Reconsideration Motion that it may have been one day late; due to His incarceration, the time it took to receive Legal Mail through the Institution, and process procedure when sending an 8-11 inch envelope through the mailing arrangements at the Institution. Which is why Appellant presented this Reconsideration Motion, by way of Motion To File Instanter.

The 5th Dist. " Granted " the Motion To File Instanter. Upon which in structed Appellant to re-submit the Motion For Reconsideration within 14 days of the time stamp on the Entry Granting the Motion To File Instanter. The Entry also stated that the additional 14 days to re-submit the Motion For Reconsideration was due to a Clerical Error from the Clerk.

Appellant (as instructed) re-submitted the, reestablished Motion For Reconsideration (pursuant to **App.R. 26(A)**) within 10 days of the Judgment Granting the Instanter Motion, that instructed a resubmission of the Reconsideration Motion. Well within the time limitation allotted.

The 5th Appellate Dist. denied the Motion stateing that it was submitted late from the initial Ruling. Which is why Appellant now brings forth this Jurisdictional Memoranda. He ask this Court to consider, what He thought was already a well established Constitutional Law.

Can a Court modify/increase its own valid, and final judgment? Because in this Case the Court excused the Motion for being late (by way of Granting the Motion To File Instanter that presented it), then denied the Motion For Reconsideration as being late? Did this not defeat the purpose of even Granting the Motion To File Instanter? That was the reason the Motion For Reconsideration was presented by way of Motion To File Instanter.

This ruling by the Appellate Court presents a Constitutional Violation of modifying/increasing its own valid and final judgment in light of **State v. Hayes (1993), 86 Ohio App.3d 110; State v. Addison (1987), 40 Ohio App.3d 7.**

Once the Appellate Court Granted the Motion To File Instanter, it is Appellant's position that this obligated the Court to make a ruling on the merits of the Reconsideration Motion, rather than denying it as being late when the Court had already excused that fact by Granting the Motion To File Instanter presenting the Motion For Reconsideration.

The substantial Constitutional question this Case poses is Can a Court decide to Grant a Motion excusing the fact that it was submitted late, then decided to Deny the same Motion for being late? Would this not contradict and defeat the purpose what a Motion For Instanter represent?

Statement Of The Facts And Case

The circumstances surrounding this Case is that Appellant had a Direct Appeal pending in the Fifth District Court Of Appeals (Caption Appellate Case Number). This Appeal originated from a Richland County Jury's Conviction (Captioned Criminal Case Number.

Judgment on this Appeal was pronounced October 21, 2009 Affirming in part, Reversing in part, and Remanding for Re-Sentencing. As a result of this Judgment/Opinion, Appellant submitted a " Motion To Certify Conflicts," November 3, 2009, and this Motion To Certify Conflicts, was presented by way of Motion To File Instantly, pursuant to the 5th Dist. **Local Appellate Rule 9(D)**. This Instantly Motion had attached to it Exhibits, showing just cause as to why the Motion To Certify Conflicts was being submitted late(one day).

Due to Appellant's incarceration, and the time in which He actually received the October 21, 2009 Judgment/Opinion by way of Institutional Legal Mail (10/26/2009), and any out going Mail in an 8-11 inch envelope with an attached cash slip is a two day process procedure to verify sufficient funds in the Inmate's account, is why the Motion To Certify Conflicts was sent by way of Motion To File Instantly, and submitted one day late.

The 5th Appellate Dist., Granted the Motion To File Instantly January 28, 2010, in response to a Petition For Writ Of Mandamus And/Or writ of Procedendo submitted January 6, 2010, attempting to compel a response on the Motion To Certify Conflicts.

In this Entry Granting the November 3, 2009 Motion To File Instantly the 5th Dist. instructed Appellant to re-submit the Reconsideration Motion, and also gave a time stamp cover page of the Motion To Certify Conflicts (insinuating approval to submit the Motion To Certify Conflicts)

Granting and instructing an additional 14 days of the time stamp on the Entry, due to a Clerical in the record from the Clerk. Appellant then (as instructed), re-submitted the reestablished Motion Certifying Conflicts (pursuant to **App.R. 25(A)**) February 10, 2010. Well within the 14 days allotted per January 28, 2010 Entry Granting the Motion To File Instantly, and giving the resubmission instruction.

March 19, 2010 the 5th Dist. ruled on the reestablished Motion To Certify Conflicts, denying the Motion, and stating that the Motion was submitted late from the initial October 21, 2009 Judgment/Opinion (Caption Appellate Case Number).

The 5th Dist. was obviously confused as to the January 28, 2010 Entry Granting the Motion to File Instantly, that presented the Motion Certifying Conflicts, instructing and Granting an additional 14 days to re-submit the Motion To Certify Conflicts.

March 30, 2010 Appellate submitted a Document titled " Notice Of This Court's Previous Ruling." Appellant in the Notice informs the 5th Dist., and submits Exhibits of the previous Granting of the Motion To File Instantly.

As of today the 5th Appellate Dist. still has not responded to the " Notice Of This Court's Previous Ruling," submitted March 30, 2010 in attempts of reminding the 5th Dist., that the reestablished Motion To Certify Conflicts submitted February 10, 2010, could not have been submitted late pursuant to the January 28, 2010 Judgment Entry, Granting the Motion To File Instantly, Granting and instructing Appellant to re-submit a reestablished Motion For Reconsideration/Certify Conflict (insinuation by time stamp cover page of the Conflict Motion dated the same date as the granting of the 1/28/10 Instantly Motion). Which is why Appellant now brings forth this cause, so as not to exceed the 45 day time limitation of which to Appeal to this Court.

Argument In Support

Proposition Of Law No. 1; Once a valid Judgment has been executed, a Court no longer has Authority to modify or increase, except as provided by the General Assembly.

Pursuant to the 5th District Court Of Appeals **Local Appellate 9(D)**: In Extension of **App.R. 14(B)**: In short, requires the Document (requesting enlargement of time) to be submitted with the Motion To File Instantly. The logical reasoning of this can only be assumed, that if the Motion To File Instantly is Granted, then the accompanying Document it is presenting is being excused for the untimeliness.

In this Case when the 5th Dist. pronounced Judgment/Opinion in **State v. Duncan 2009-CA-028**, October 21, 2009, this Ruling did not reach Appellant's hands until October 26, 2009 (by way of Institutional Legal Mail) due to His incarceration.

From 10/26/2009 until 10/28/2009 Appellant litigated and composed 4 Motions To Certify Conflicts, and a Motion For Reconsideration. All Motions were mailed 10/28/2009 at 8:00pm. The Mail Room at N.C.C.I. has a two day process procedure in which it takes to mail any 8-11 inch envelope with an attached Cash Slip, for verification of sufficient funds on the inmate's account.

Appellant knew that the documents may have been submitted late so He presented each Motion with a Motion To File Instantly pursuant to the 5th Dist. **Loc.App.R. 9(D)**. And also gave Notice to this Court that Motions to Certify Conflicts existed and were pending. So as this Honorable Court could stay consideration on the Jurisdictional Memoranda pursuant to **Supreme Court Rules Of Practice IV, Section 4(A)**.

The 5th Dist. Granted the Motions To File Instantly, that presented the

Motions To Certify Conflicts & Reconsideration. This Instanter Motion was Granted January 28, 2010, in the Entry Granting this Instanter Motion was an instruction stating that due to a Clerical Error the Motions were untimely submitted and that the Court was Granting an additional 14 days in which to resubmitt the Motion.

As instructed Appellant submitted a Motion For Reconsideration February 8, 2010. Then, February 10, 2010 Appellant submitted a Motion To Certify 4 Conflicts, in light of the January 28, 2010 Entry Granting the Motion To File Instanter.

March 10, 2010 the 5th Dist. Ruled on the Motion For Reconsideration, denying it as being untimely filed. Then again March 19, 2010 the 5th Dist. Ruled on the Motion To Certify 4 Conflicts, denying it as being untimely filed.

The results of these circumstances, surrounding this Case is of Great Interest for all Appellants, Appellees, Plaintiffs, Defendants, Relators, & Respondents alike. Because it would be the position of everyone just mentioned that if the Motion For Instanter that presents the late Document being Filed, is Granted, this in turn would automatically be assumed that, the accompanying late Document is being excused for being late.

With the decision of the 5th Dist. Granting the Motions To File Instanter that presented, and/or was accompanied by a Motion For Reconsideration, & a Motion To Certify Conflicts. Then Denying the Reconsideration & Conflicts Motions as being untimely filed, would be allowing a Court to modify/increase its own valid and final Judgment.

The untimeliness of the Reconsideration Motion & Motion To Certify 4 Conflicts were already excused with the Granting of the Motion To File Instanter.

Conclusion

Appellant in this Case Respectfully ask this Court to accept Jurisdiction in this matter and reslove the issue of the 5th Dist. Ruling.

Respectfully Submitted



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Certificate Of Service

The undersigned acknowledges a true copy of this Memorandum In Support Of Jurisdiction was sent, by regular US Mail to Richland County Prosecutors Office, James Mayer, 38 South Park Street. This 13 Day of April 2010.

Respectfully Submitted



Roy Duncan

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

RICHLAND COUNTY OHIO
FILED

2019 MAR 10 AM 8:30

LINDA L. HENRY
CLERK

STATE OF OHIO
Plaintiff/Appellee

-vs-

ROY DUNCAN
Defendant/Appellant

JUDGMENT ENTRY

CASE NO. 2009-CA-028

This matter came on for consideration upon separate motions filed by Appellant Roy Duncan on January 29, 2010 and February 8, 2010 requesting this Court reconsider its October 21, 2009 Judgment Entry affirming Appellant's conviction in the Richland County Court of Common Pleas. Appellant State of Ohio did not file a brief in opposition to either motion.

Ohio Appellate Rule 26 provides:

"(A) Application for reconsideration

"Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court."

Exhibit

Upon review, both motions for reconsideration filed by Appellant are untimely; therefore, denied.

IT IS SO ORDERED.

William B. Hoffman

W. Scott G's

Patricia A. Olaney

JUDGES

WBH;ag; 2/23/10