

ORIGINAL

IN THE SUPREME COURT OF OHIO  
2010 TERM

STATE OF OHIO,

Plaintiff-Appellee,

-v-

LARRY GODFREY ,

Defendant- Appellant.

Case No. 10-0666  
On Appeal from the  
Licking County  
Court of Appeals  
Fifth Appellate District

Court of Appeals  
Case No. 97-CA-155

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APPELLEE'S RESPONSE TO APPELLANT'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

---

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and

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DEFENDANT-APPELLANT, PRO SE

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SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS CASE IS NOT OF GREAT  
OR PUBLIC INTEREST AND DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION**

The issues presented herein do not merit this Court's review. The Appellant herein has set forth three propositions of law surrounding his arguments concerning ineffective assistance of counsel. However, the Appellate court did not address these issues in its ruling and found that the Appellant's application to reopen should be denied on procedural grounds.

This case does not involve a question of public or great general interest or a substantial constitutional involvement. The law regarding the re-opening of appeals is well settled. This court has found repeatedly found that denial of applications to reopen were proper where the application was not timely filed and the applicant failed to show good cause for filing outside of time. *State v. Keith*, 119 Ohio St. 3d 161, 2008-Ohio-3866; *State v. Gumm* , 103 Ohio St.3d 162, 2004-Ohio-4755; *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976.

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## STATEMENT OF THE CASE AND FACTS

The appellant, Larry Godfrey, entered pleas of guilty to several sex offenses in October 1997. The appellant has made several unsuccessful attempts to withdraw his pleas and, in the instant case, now seeks to appeal the court's order denying another motion to withdraw his guilty pleas – some 13 years later. In the intervening years, the appellant has attempted several procedural methods to raise issues associated with his conviction. His case has been in front of the Fifth District Court of Appeals on four separate occasions. See *State v. Godfrey*, (Aug. 28, 1998), Fifth App. No. 97CA0155 (hereinafter, *Godfrey I*); *State v. Godfrey* (Sept. 2, 1999), 97CA0155 (hereinafter, *Godfrey II*); *State v. Godfrey* (Feb. 28, 1999), Fifth App. No. 99CA95 (hereinafter *Godfrey III*); *State v. Godfrey* (April 26, 2000), Fifth App. No. 08CA56 (hereinafter *Godfrey IV*.) Moreover, the Appellant has twice before tried to invoke this Court's jurisdiction. See *State v. Godfrey* (2000), 89 Ohio St.3d 1451 and *State v. Godfrey* (2009), 122 Ohio St.3d 1503.

Furthermore the Appellant has mounted various unsuccessful federal proceedings. See *Godfrey v. Beightler* (S.D. Ohio March 28, 2002), 2002 WL 485015, cert. of appealability granted. 2002 WL 1584288, denial of writ aff'd., 54 Fed.Appx. 431, cert. denied, 540 U.S. 865; and *Godfrey v. Wolfe* (2005), 546 U.S. 1037, rehearing denied (2006), 546 U.S. 1211.

In addition to the above described appellate avenues, since 1998, the Appellant has filed multiple pro se motions before the trial court seeking permission to file untimely petitions for post-conviction relief or motions to withdraw guilty pleas. No appellate decisions have been issued on those, as the Appellant did not appeal the court's ruling.

The appeal herein was based on the defendant's filing of a motion to re-open his appeal pursuant to App. R. 26 based on allegations of ineffective assistance of counsel. The Fifth

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District Court of Appeals denied said application citing that “there is no right to file successive applications for reopening pursuant to App. R. 26(B).” Additionally, the Appellate Court also found that the doctrine of res judicata applies and that the application was not timely filed. The Court finally found that the Appellant did not demonstrate good cause for the untimely filing.

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**PROPOSITION OF LAW**

**Proposition of Law No. 1:**

**This Defendant-Appellant's constitutional rights to cross-examine prosecution witnesses concerning bias against him was not violated.**

While the defendant raises multiple propositions of law regarding ineffective assistance of counsel, the issue herein can be simply stated: has the defendant given good cause to demonstrate why he should be permitted to file an application to re-open his appeal eleven years after the Court of Appeals issued its opinion?

App. R. 26(B) governs applications to reopen and states, in pertinent part: A defendant in a criminal case may apply for reopening of the appeal from which 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 the journalization of the appellate judgment unless the application shows good cause for filing at a later time. The rule goes on to require "a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment."

App. R. 26(B)(2)(b).

This court has previously held that application to reopen are properly denied where there is no demonstration of good cause and the application is filed outside of the ninety day time frame. *State v. Keith*, 119 Ohio St. 3d 161, 2008-Ohio-3866; *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755; *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976. The defendant in this case failed at the appellate court and, again, in front of this court to demonstrate even a scintilla of evidence showing good cause for the delay.

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Additionally, given the sheer number of times that this defendant has been in front of the appellate court, the defendant could have raised this issue in his prior appeals. Accordingly, res judicata applies. See *State v. Cheren* (1995), 73 Ohio St.3d 137; *State v. Perry* (1967), 10 Ohio St.2d 175.

Given these issues and the number of times that the defendant has appeared before this court and others at both the State and Federal levels, the defendant's motion for jurisdiction must be denied.

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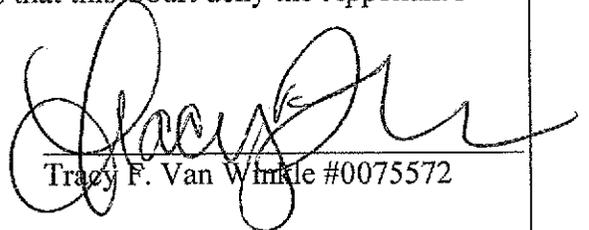
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**CONCLUSION**

As shown above, all of the Propositions of Law presented by the Appellant fail to demonstrate any error committed by the Appellate Court in denying the Appellant's application to reopen.

Wherefore the State of Ohio respectfully requests that this Court deny the Appellant's request, and refuse jurisdiction over this case.

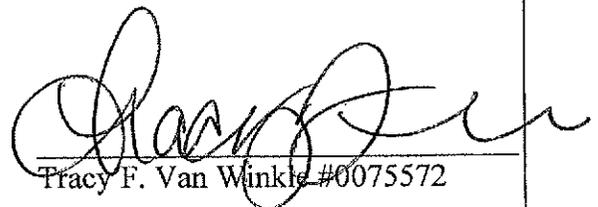


Tracy F. Van Winkle #0075572

COUNSEL FOR APPELLEE –  
STATE OF OHIO

**CERTIFICATE OF SERVICE**

I certify that a copy of this Response to Appellant's Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to Larry Godfrey, Pro Se, Inmate #351-586, NCI EI E103, 15708 McConnellsville Rd., Caldwell, Ohio 43724, this 2<sup>nd</sup> day of May, 2010.



Tracy F. Van Winkle #0075572

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(Cite as: 1998 WL 666749 (Ohio App. 5 Dist.))



Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF  
LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Licking  
County.  
STATE of Ohio, Plaintiff-Appellee,  
v.  
Larry GODFREY, Defendant-Appellant.  
No. 97CA0155.

Aug. 28, 1998.

Appeal from the Licking County Court of Common  
Pleas, Case No. 97CR46, 97CR71  
For Plaintiff-Appellee: STEPHANIE GUSSLER,  
ASSISTANT PROSECUTOR, 20 South Second  
Street, Newark, Ohio 43055.

For Defendant-Appellant: BRUCE A. ENNEN, 51  
North Third Street, Newark, Ohio 43055.

*OPINION*

HOFFMAN, J.

\*1 Defendant-appellant Larry Godfrey appeals the  
Judgment Entry of the Licking County Court of  
Common Pleas adjudicating him a sexual predator.  
Plaintiff-appellee is the State of Ohio.

**STATEMENT OF THE FACTS AND CASE**

On February 7, 1997, the Licking County Grand  
Jury indicted appellant on one count of rape, in vi-  
olation of R.C. 2907.02(A)(1)(b); six counts of  
felonious sexual penetration, in violation of R.C.  
2907.12(A)(1)(b); and seven counts of gross sexual  
imposition, in violation of R.C. 2907.05(A)(4).<sup>FN1</sup>

At his arraignment on February 18, 1997, appellant  
entered pleas of not guilty to the charges contained  
in the indictment. On February 21, 1997, the Lick-  
ing County Grand Jury indicted appellant on three  
additional counts of gross sexual imposition, in vi-  
olation of R.C. 2907.05(A)(4).<sup>FN2</sup> At his arraign-  
ment on March 3, 1997, appellant entered pleas of  
not guilty to the additional charges.

FN1. Licking County Case No. 97CR0046.

FN2. Licking County Case No. 97CR0071.

The trial court scheduled a jury trial for October 14,  
1997. Prior to trial, the trial court granted the  
State's request to amend the indictments to reflect  
eight counts of gross sexual imposition, in violation  
of R.C. 2907.05(A)(4); and two counts of attempted  
felonious sexual penetration, in violation of R.C.  
2923.02 and 2907.12(A)(1)(b). Thereafter, appel-  
lant entered *Alford* pleas of guilty to the amended  
charges. The trial court deferred sentencing in the  
matter until November 14, 1997, pending receipt of  
a pre-sentencing investigation. After hearing testi-  
mony and receiving evidence in mitigation of the  
sentence, the trial court sentenced appellant as fol-  
lows:

In Case No. 97CR71, which was amended to one  
count of gross sexual imposition, the trial court sen-  
tenced appellant to a term of imprisonment of two  
years. Appellant was credited fourteen days for  
time served.

In Case No. 97CR46, on count one, attempted felo-  
nious sexual penetration, the trial court sentenced  
appellant to a term of imprisonment of four to fif-  
teen years.

On count two, gross sexual imposition, the trial  
court sentenced appellant to a definite term of two  
years imprisonment. The trial court ordered the sen-  
tences in counts one and two to be served concu-  
rent with one another, but consecutive to the sen-  
tence in count one in Case No. 97CR71.

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On counts three and four, gross sexual imposition, the trial court sentenced appellant to two years on each count. The trial court ordered the sentences in counts three and four to run concurrent with one another, but consecutive to the sentences in count one in Case No. 97CR71, and counts one and two in Case No. 97CR46.

On count five, attempted felonious penetration, the trial court sentenced appellant to three to fifteen years.

On counts six and seven, gross sexual imposition, the trial court sentenced appellant to two years on each count. The trial court ordered the sentences in counts five, six, and seven to run concurrent with one another, but consecutive to the sentences in count one in Case No. 97CR71, and counts one, two, three, and four in Case No. 97CR46.

\*2 On count eight, gross sexual imposition, the trial court sentenced appellant to two years imprisonment. The trial court ordered the sentence in count eight to run consecutive to the sentences in all other counts.

On count nine, gross sexual imposition, the trial court sentenced appellant to two years imprisonment. The trial court ordered the sentence to run consecutive to the sentences in all other counts.

The trial court also ordered appellant to pay all court costs associated with all counts in both cases and to pay restitution in all counts in both cases for any and all damages caused in the matter. The trial court did not impose a fine.

*See*, November 14, 1997 Judgment Entry.

After imposing the sentence, the trial court conducted a hearing pursuant to R.C. 2950.09(A). The State and appellant stipulated to the report contained in the pre-sentence investigation of Probation Officer Kelly Miller, and the report of appellant's defense psychologist. The trial court concluded, "based upon the facts and circumstances involved in this case, the reports that are contained in

the presentence investigation report, including a report of the psychologist, the report of Mr. Miller, determinations noted in there by Mr. Miller, \* \* \* the defendant is a sexual predator." Excerpt of Sentencing Hearing, November 14, 1997, at 5.

The trial court memorialized appellant's sentence and its adjudication of appellant as a sexual predator in a Judgment Entry dated November 14, 1997.

It is from this judgment entry appellant prosecutes this appeal raising the following assignments of error:

I. THE COURT ERRED IN DENYING DEFENDANT A CONTINUANCE, PRIOR MAKING A DETERMINATION ON DEFENDANT'S STATUS AS A SEXUAL PREDATOR, TO OBTAIN AN EVALUATION, EXAMINATION, AND ASSESSMENT BY A FORENSIC PSYCHIATRIST.

II. THE COURT'S DESIGNATION OF DEFENDANT-APPELLANT AS A SEXUAL PREDATOR WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

#### I

In his first assignment of error, appellant maintains the trial court erred in denying his request for a continuance of the hearing to determine appellant's classification as a sexual predator.

In his Brief to this Court, appellant claims he made an oral motion to continue sentencing in order to have a forensic psychiatrist test and evaluate appellant in respect to a classification of sexual predator. Appellant asserts the trial court denied this motion. The record reflects appellant only requested a partial transcript of the November 14, 1997 sentencing hearing. Upon review of the partial transcript and the record as transmitted in this matter, we find no request (oral or written) for a continuance of the hearing.

When portions of the transcript necessary for resol-

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ution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. *Knapp v. Edwards Lab.* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384. Because appellant has failed to provide this court with those portions of the transcript necessary for resolution of the assigned error, i.e., the complete transcript of the November 14, 1997 sentencing hearing, we must presume the regularity of the proceedings below and affirm, pursuant to the directive set forth in *Knapp, supra*.

\*3 Accordingly, appellant's first assignment of error is overruled.

## II

In his second assignment of error, appellant contends the trial court's classifying him a sexual predator is against the manifest weight of the evidence.

As stated *supra*, because appellant has failed to provide this Court with the necessary portions of the record, we must presume the regularity of the proceedings below and affirm the trial court's determination. *Knapp, supra*.

Accordingly, appellant's second assignment of error is overruled.

The judgment entry of the Licking County Court of Common Pleas is affirmed.

FARMER, P.J. and WISE, J. concur.

## JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

Ohio App. 5 Dist., 1998.  
State v. Godfrey  
Not Reported in N.E.2d, 1998 WL 666749 (Ohio

App. 5 Dist.)

END OF DOCUMENT

Not Reported in N.E.2d, 1999 WL 770253 (Ohio App. 5 Dist.)  
(Cite as: 1999 WL 770253 (Ohio App. 5 Dist.))

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF  
LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Licking  
County.

STATE of Ohio, Plaintiff-Appellee,

v.

Larry GODFREY, Defendant-Appellant.  
No. 97CA0155.

Sept. 2, 1999.

Civil appeal from the Licking County Court of  
Common Pleas, Case Nos. 97CR46 and 97CR71  
Stephanie G. Gussler, Assistant Prosecuting Attor-  
ney, Newark, OH 43055, for Plaintiff-Appellee.

Barry W. Wilford, Columbus, OH 43214, for De-  
fendant-Appellant.

JUDGES WISE, P.J., GWIN, J., and HOFFMAN, J.

*OPINION*

GWIN.

\*1 Defendant Larry Godfrey appeals a judgment of the Court of Common Pleas of Licking County, Ohio, which adjudicated him a sexual predator pursuant to R.C. 2950. This court affirmed the judgment in *State v. Godfrey* (August 28, 1998), Licking App. No. 97CA0155, unreported. Appellant then filed this appeal pursuant to App.R. 26 and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, asserting ineffective assistance of appellate counsel. Appellant assigns three errors which he maintains should have been assigned in his appeal of right:

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR I.

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AT HIS SEXUAL PREDATOR HEARING THUS VIOLATING HIS RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR II.

THE TRIAL COURT'S ADJUDICATION OF DEFENDANT AS A SEXUAL PREDATOR IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR III.

OHIO'S SEXUAL PREDATOR LAW VIOLATES SECTION 1, ARTICLE I OF THE OHIO CONSTITUTION.

The record indicates on February 7, 1997, appellant was indicted for one count of rape in violation of R.C. 2907.02, six counts of felonious sexual penetration in violation of R.C. 2907.12, and seven counts of gross sexual imposition in violation of R.C.2907.05. On February 21, 1997, appellant was indicted on three additional counts of gross sexual imposition. Appellant originally pled not guilty to all counts, but eventually appellant entered *Alford* pleas of guilty to amended charges of eight counts of gross sexual imposition and two counts of attempted felonious sexual penetration. The trial court sentenced appellant to various terms of incarceration, and ordered him to pay restitution and damages.

After imposing sentence, the trial court conducted a hearing pursuant R.C. 2950.09(A). The trial court concluded appellant is a sexual predator.

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 (Cite as: 1999 WL 770253 (Ohio App. 5 Dist.))

In his original appeal, appellate counsel, who was also trial counsel, assigned two errors. Assignment of error number one argued the court should have continued the hearing to permit appellant to be evaluated by a forensic psychiatrist. The second assignment of error challenged the court's finding as not supported by the manifest weight of the evidence. This court affirmed the trial court, and found appellant had failed to provide us with the portions of the record necessary to resolve the assignments of errors. Citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384, we presumed the regularity of proceedings in the trial court, and affirmed its judgment. In his application for re-opening, filed November 25, 1998, appellant asserts appellate counsel was ineffective for failing to provide this court with an adequate record of the proceedings.

In *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, the United States Supreme Court articulated a two-prong test for ineffective assistance of counsel, requiring an appellant to show both that counsel's representation falls below an objective standard of essential duty to his client, and also that the substandard performance actually prejudiced the appellant's ability to receive a fair and reliable trial. Ohio utilizes the *Strickland* test, see *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. We apply the *Strickland* test to all claims of ineffective assistance of counsel, either trial counsel, or appellate counsel.

I

\*2 In his first assignment of error, appellant urges his trial counsel was ineffective at the sexual predator hearing. In his original appeal, appellant argued the court overruled his oral motion to continue the hearing, but this court could find no motion for continuance in the record presented to us at that time. Now appellant argues counsel was ineffective in either failing to request a continuance, or failing to have it properly placed in the record. Had trial counsel secured a continuance, appellant urges he

could have called his psychologist, Dr. Herbert Hausman, to testify. Dr. Hausman furnished a psychological report to the court. Appellant also urges counsel was not prepared for this hearing. Finally, appellant argues his trial counsel stipulated to the pre-sentence investigation report prepared by the probation officer, without having read the report or asking the court for time to review it.

In response the State argues appellant has only pointed to one fact in support of his allegation counsel was not prepared for the hearing, that fact being the failed attempt to call Dr. Hausman. Appellant has failed to suggest what advantage it would have given him to present the live testimony of Dr. Hausman. We have reviewed Dr. Hausman's report, and it is favorable to appellant. Had trial counsel called Dr. Hausman in person, the doctor would have been subjected to cross-examination. Trial counsel may well have felt the written report would be more persuasive.

At the hearing, counsel represented he had not seen the pre-sentence investigation report, but did not wish to call the parole officer to testify. Counsel also indicated that he had discussed the matter with appellant before concluding it was appropriate to submit the matter to the court with the pre-sentence investigation and the report of the psychologist as evidence.

We have reviewed the record, and we find it does not support appellant's allegations that counsel was unprepared at the sexual predator hearing. It could well be sound trial tactics to submit the two reports in written form, and not by means of live witnesses. Trial counsel fully participated in the hearing and presented evidence on appellant's behalf. See *II, supra*.

Finally, in light of our determination in *II, infra*, we find appellant cannot demonstrate he was prejudiced by trial counsel's performance.

The first assignment of error is overruled.

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## II

In his second assignment of error, appellant urges the trial court's decision was against the manifest weight of the evidence. Although appellant's original appellate counsel raised this issue in the first appeal, this court found the record was insufficient. For this reason, we will address this assignment of error on the record as it is before us now.

Appellant entered *Alford* pleas to ten counts of sexually abusing children. As the State points out, the indictments indicated some of the offenses began as far back as 1982 while others occurred as recently as 1991. The State alleged appellant exploited the special relationships of family and church membership in order to victimize these children.

\*3 In the pre-sentence investigation report, the parole officer reviewed the statements of certain of the alleged victims and their families. Appellant presented the psychologist's report, and the testimony of several persons who were acquainted with appellant and did not consider him a threat to him personally or to the community in general. Appellant also presented the testimony of his wife, who asserted appellant was not guilty of the offenses and was not a threat to any person.

Pursuant to R.C. 2950.09, the State has the burden to prove by clear and convincing evidence that the accused is a sexual predator. The statute sets forth a non-exclusive list of factors. Those factors include:

- (a) The offender's age;
- (b) The offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;
- (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed;
- (d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims;

(e) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

(f) If the offender previously has been convicted of or pleaded guilty to any criminal offense, whether the offender completed any sentence imposed for the prior offense and, if the prior offense was a sex offense or a sexually oriented offense, whether the offender participated in available programs for sexual offenders;

(g) Any mental illness or mental disability of the offender;

(h) The nature of the offender's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(i) Whether the offender, during the commission of the sexually oriented offense for which sentence is to be imposed, displayed cruelty or made one or more threats of cruelty;

(j) Any additional behavioral characteristics that contribute to the offender's conduct.

In *State v. Cook* (1998), 83 Ohio St.3d 404, 700 N.E.2d 570, the Ohio Supreme Court found R.C. 2950 is remedial in nature, and not punitive. As such, we review the assignment of error under the civil standard of review as enunciated in *C.E. Morris Company v. Foley Construction* (1978), 54 Ohio St.2d 79.

Our review of the record leads us to conclude the trial court did not err in finding appellant should be classified a sexual predator. Accordingly, the second assignment of error is overruled.

## III

Appellant cites us to *State v. Williams* (January 29,

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(Cite as: 1999 WL 770253 (Ohio App. 5 Dist.))

1999), Lake Appellate No. 97-L-191, unreported. In this case, the 11th District Court of Appeals held the community notification provisions contained in R.C. 2950.11 are unreasonable and constitute an invalid exercise of police power. The Lake County Court of Appeals found the statute is unreasonable because it interferes with the offender's privacy rights.

\*4 In *State v. Smith* (June 30, 1999), Perry App. No. CA-98-2, unreported, this court held the provisions of R.C. 2950.11 do not violate the constitutional right to privacy.

The third assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

WISE, P.J., and HOFFMAN, J., concur.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed. Costs to appellant.

Ohio App. 5 Dist., 1999.  
*State v. Godfrey*  
Not Reported in N.E.2d, 1999 WL 770253 (Ohio App. 5 Dist.)

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Court of Appeals of Ohio, Fifth District, Licking  
County.

STATE of Ohio, Plaintiff-Appellee,

v.

Larry R. GODFREY, Defendant-Appellant.  
No. 99 CA 95.

Feb. 28, 2000.

CHARACTER OF PROCEEDING: Criminal Ap-  
peal from the Court of Common Pleas, Case Nos.  
97 CR 46 and 97 CR 71.

Kenneth W. Oswalt, Assistant Prosecutor, Newark,  
Ohio 43055, for Plaintiff-Appellee.

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GWIN, P.J., WISE and EDWARDS, JJ.

OPINION

WISE.

\*1 Appellant Larry Godfrey appeals the decision of the Licking County Court of Common Pleas that denied his "Motion to Withdraw Guilty Plea and Alternative Petition to Vacate or Set Aside Sentence Pursuant to O.R.C. § 2953.21." The following procedural history gives rise to this appeal.

On February 7, 1997, the Licking County Grand Jury indicted appellant for fourteen counts of rape, felonious sexual penetration and gross sexual imposition.<sup>FN1</sup> The grand jury issued another indict-

ment, on February 21, 1997, charging appellant with three counts of gross sexual penetration.<sup>FN2</sup> Appellant entered pleas of not guilty to the charges contained in both indictments. At a change of plea hearing, on October 14, 1997, appellant entered guilty pleas to two counts of attempted felonious sexual penetration and eight counts of gross sexual penetration pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.

FN1. Case No. 97 CR 46

FN2. Case No. 97 CR 71

On November 14, 1997, after the completion of a pre-sentence investigation, the trial court sentenced appellant to concurrent and consecutive terms of imprisonment which, in the aggregate, total an indefinite term of fifteen to thirty-eight years. Following the sentencing hearing, the trial court conducted a hearing pursuant to R.C. 2950.09 and found appellant to be a "sexual predator."

Appellant filed a notice of appeal on December 12, 1997. The record transmitted by the Licking County Clerk of Court, on January 21, 1998, included a partial transcript entitled "Excerpts of Sentencing Hearing." On January 22, 1998, appellate counsel filed a motion, in the trial court, for a transcript of proceeding of the sentencing hearing. The trial court sustained appellant's motion. On June 3, 1998, appellant filed a *pro se* motion for "Preparation of Complete Transcript of Proceedings at State Expense." The state filed a memorandum opposing appellant's *pro se* motion. The trial court overruled appellant's motion on July 22, 1998.

On August 28, 1998, we issued our opinion overruling both of appellant's assignments of error.<sup>FN3</sup> In our decision, we stated that:

FN3. *State v. Godfrey* (Aug. 28, 1998), Licking App. No. 97 CA 155, unreported.

[b]ecause appellant has failed to provide this

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court with those portions of the transcript necessary for resolution of the assigned error, i.e., the complete transcript of the November 14, 1997 sentencing hearing, we must presume the regularity of the proceedings below and affirm, pursuant to the directive set forth in *Knapp, supra. State v. Godfrey* (Aug. 28, 1998), Licking App. No. 97 CA 155, unreported, at 5.

On November 25, 1998, appellant filed an "Application for Reopening" on the basis that he was denied effective assistance of appellate counsel. On December 23, 1998, appellant filed a "Motion to Supplement" the application for reopening and "Motion to Supplement the Record" in which he sought to file a complete transcript of proceedings filed in the trial court on November 28, 1999. On January 7, 1999, we granted the application to reopen the appeal and the motion to supplement the application for reopening. On February 16, 1999, the record was transmitted to this court. The record contained a transcript of proceedings filed in the trial court on November 28, 1998, which was not part of the record in our initial review of this matter.

\*2 On July 6, 1999, appellant filed, in the trial court, a "Motion to Withdraw Guilty Plea and Alternative Petition to Vacate or Set Aside Sentence Pursuant to O.R.C. § 2953.21." The state filed a motion to dismiss, based on lack of jurisdiction, on July 14, 1999. The trial court granted the state's motion to dismiss on August 11, 1999. Appellant filed his notice of appeal on August 19, 1999. On September 2, 1999, we issued our opinion, in the reopened appeal, and affirmed the judgment of the trial court.<sup>FN4</sup>

FN4. *State v. Godfrey* (Sept. 2, 1999), Licking App. No. 97 CA 155, unreported.

Appellant sets forth the following assignments of error for our consideration.

#### I. THE TRIAL COURT ERRED IN DISMISSING PETITIONER'S PETITION FOR POST-

#### CONVICTION RELIEF FOR LACK OF JURISDICTION PURSUANT TO R.C. § 2953.21 (A)(2).

#### II. THE TRIAL COURT ERRED IN DISMISSING PETITIONER'S MOTION TO WITHDRAW GUILTY PLEA PURSUANT TO CRIM.R. 32.1 FOR LACK OF JURISDICTION.

#### I

In his First Assignment of Error, appellant contends the trial court erred when it dismissed his petition for postconviction relief for lack of jurisdiction. We disagree.

The language at issue, in appellant's First Assignment of Error, is contained in R.C. 2953.21(A)(2), which provides as follows:

(2) A petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing appeal. (Emphasis added.)

The issue presented, concerning the above cited language, is whether the time limitation of one hundred eighty days begins to run from the time of direct appeal or from the time the appeal is reopened pursuant to App.R. 26(B). Appellant's petition for postconviction relief is only timely if the one hundred eighty day calculation is applied to the date we reopened appellant's appeal.

In finding appellant's petition for postconviction relief untimely, the trial court relied on the language of R.C. 2953.21(A)(2) which provides that the petition must be filed " \* \* \* no later than one hundred eighty days after the date on which the trial tran-

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script is filed \* \* \* in the direct appeal of the judgment of conviction or adjudication \* \* \*." The trial court found this language clearly required appellant to file his petition for postconviction relief one hundred eighty days after appellant filed the partial transcript in the direct appeal. Judgment Entry, Aug. 11, 1999, at 2. The trial court further noted that simply because we granted appellant's motion to reopen his appeal, this did not entitle appellant to ignore the fact that he filed a direct appeal in this matter on December 12, 1997.

We agree with the trial court's conclusion that a "direct appeal" differs from a "reopened appeal." A "direct appeal" is referred to as an "appeal as of right" under App.R. 3. A "direct appeal" or "appeal as of right" must be filed within thirty days of the entry of judgment or order appealed. App.R. 4(A). An application for reopening, pursuant to App.R. 26(B), is a remedy available to a defendant in a criminal case whereby a "direct appeal" may be reopened on the basis that the defendant received ineffective assistance of appellate counsel. See App.R. 26(B). Further, an applicant has ninety days from the journalization of the appellate judgment to file an application for reopening unless the applicant shows good cause for filing at a later time.

\*3 Based on the procedural differences that exist between a "direct appeal" or "appeal as of right" and a "reopened appeal," we find the language contained in R.C. 2953.21(A)(2) does not apply to reopened appeals as a "reopened appeal" clearly is different than a "direct appeal" or "appeal as of right."

In reaching its conclusion, the trial court cited the case of *State v. Price* (Sept. 29, 1998), Franklin App. No. 98AP-80, unreported. The issue in *Price* was whether the filing of a delayed appeal may be taken to indefinitely extend the period for filing a motion for postconviction relief. The Tenth District Court of Appeals concluded that it did not because to hold otherwise would nullify the intent of the General Assembly to place a time limitation on postconviction actions. *Id.* at 2. The court noted

that since there was no time limitation upon a motion for delayed appeal, there would be no time limitation for filing a petition for postconviction relief. *Id.* The court also found that it would be unreasonable to permit a defendant who had neglected to file a direct appeal, and subsequently brought a delayed appeal, to be given more time to prepare and bring his or her postconviction petition than a defendant who had timely prosecuted his or her direct appeal. *Id.*

We find the court of appeal's reasoning, in *Price*, applicable to the case *sub judice*. Appellant argues, unlike with delayed appeals, a ninety-day time limit exists for reopened appeals. Although App.R. 26(B) contains a ninety-day time limit, it also provides that an application to reopen may be made after the ninety-day period for good cause. Thus, as with the delayed appeal, theoretically, there is no time limitation with a reopened appeal as long as the applicant has good cause to reopen his or her appeal. Such a result contravenes the General Assembly's intent to place time limitations on petitions for postconviction relief.

Also, to permit an appellant to calculate the one hundred eighty day period, from the date his or her appeal is reopened, gives that appellant more time to prepare and bring his or her petition for postconviction relief. Further, if we were to adopt appellant's reasoning, an appellant could file a petition for postconviction relief within one hundred eighty days of filing his or her direct appeal and timely file a second petition for postconviction relief one hundred and eighty days after an application to reopen is granted if the record is supplemented with another portion of the transcript.

Based on the above, we conclude it is not the filing of a transcript that triggers the one hundred eighty day rule in R.C. 2953.21(A)(2), but rather the filing of a direct appeal. Because appellant filed his direct appeal in this matter on December 12, 1997, and did not file his petition for postconviction relief until July 6, 1999, well over the one hundred eighty day period provided for in the statute, the trial court

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did not err when it dismissed appellant's petition for postconviction relief for lack of jurisdiction.

\*4 Appellant's First Assignment of Error is overruled.

## II

In his Second Assignment of Error, appellant maintains the trial court erred when it dismissed his motion to withdraw his guilty plea for lack of jurisdiction. We disagree.

The trial court concluded that it did not have jurisdiction because to consider appellant's motion to withdraw his guilty plea would be inconsistent with our authority to review appellant's sexual predator status. Judgment Entry, Aug. 11, 1999, at 2. We agree with the trial court's conclusion. In the recent case of *State v. Winn* (Feb. 19, 1999), Montgomery App. No. 17194, unreported, the Second District Court of Appeals addressed this issue and explained:

Although the rule [Crim.R. 32.1] does not specify a time limit for filing the motion, we have previously held that the filing of a notice of appeal divests the trial court of jurisdiction to consider a motion to withdraw a plea. See, *State v. Haley* (July 7, 1995), Greene App. Nos. 94-CA-89, 94-CA-108, and 94-CA-109, unreported. This is consistent with the general rule that after appeal, trial courts retain jurisdiction over issues 'not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction.' *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (citation omitted). A motion to withdraw a plea is not a collateral issue, because it potentially directly impacts an appeal. Accordingly, the trial court did not have jurisdiction over the motion to withdraw the plea once the notice of appeal was filed, and the court did not err

in failing to rule on the motion. *Id.* at 5.

In the matter currently before the court, we reopened appellant's appeal on January 7, 1999. Appellant filed his motion to withdraw his guilty plea on July 6, 1999. Clearly, the trial court did not have jurisdiction to address appellant's motion as we did not issue our opinion, on appellant's reopened appeal, until September 2, 1999. Had the trial court permitted appellant to withdraw his guilty plea, the assignment of error in appellant's reopened appeal would have been moot thereby affecting our jurisdiction. Accordingly, we conclude the trial court did not err when it concluded it lacked jurisdiction to address appellant's motion to withdraw his guilty plea.

Appellant's Second Assignment of Error is overruled.

\*5 For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

GWIN, P.J., and EDWARDS, J., concur.

## JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is affirmed.

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**H**  
CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF  
LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Fifth District, Licking County.  
STATE of Ohio, Plaintiff-Appellee

v.

Larry GODFREY, Defendant-Appellant.  
No. 2008CA0056.

Decided March 30, 2009.

Appeal from the Court of Common Pleas, Case  
Nos. 97CR46 and 97CR71.  
Kenneth W. Oswalt, Newark, OH, for plaintiff-ap-  
pellee.

Dennis Pusateri, Columbus, OH, for defendant-ap-  
pellant.

FARMER, P.J.

\*1 {¶ 1} On October 14, 1997, appellant, Larry Godfrey, entered *Alford* pleas of guilty to two counts of attempted felonious sexual penetration in violation of R.C. 2923.02 and R.C. 2907.12 and eight counts of gross sexual imposition in violation of R.C. 2907.05. By judgment entry filed November 14, 1997, the trial court sentenced appellant to an aggregate indefinite term of fifteen to thirty-eight years in prison, and classified him as a sexual predator.

{¶ 2} Appellant filed an appeal (App. No. 97CA0155). This court affirmed appellant's case, presuming regularity in the proceedings because of the lack of a complete transcript. *State v. Godfrey* (August 28, 1998), Licking App. No. 97CA0155, (*Godfrey I*).

{¶ 3} On November 25, 1998, appellant filed a mo-

tion to re-open his appeal pursuant to App.R. 26. This court granted the motion and re-opened appellant's appeal.

{¶ 4} On July 6, 1999, while his re-opened appeal was pending, appellant filed a motion to withdraw guilty plea or in the alternative, postconviction relief to vacate or set aside his sentence pursuant to R.C. 2953.21. By judgment entry filed August 11, 1999, the trial court dismissed the motion/petition for want of jurisdiction because of appellant's pending appeal. Appellant appealed this decision (App. No. 99 CA 95).

{¶ 5} On September 2, 1999, this court affirmed appellant's re-opened appeal. See, *State v. Godfrey* (September 2, 1999), Licking App. No. 97CA0155, (*Godfrey II*).

{¶ 6} On February 28, 2000, this court affirmed the trial court's denial of appellant's motion/petition for want of jurisdiction. See, *State v. Godfrey* (February 28, 2000), Licking App. No. 99 CA 95, (*Godfrey III*).

{¶ 7} On March 14, 2007, appellant filed a motion to withdraw guilty plea pursuant to Crim.R. 32.1. By judgment entry filed April 10, 2008, the trial court denied appellant's motion for want of jurisdiction.

{¶ 8} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 9} "THE TRIAL COURT ERRED IN RULING THAT IT DID NOT HAVE JURISDICTION TO CONSIDER DEFENDANT-APPELLANT'S MOTION TO WITHDRAW HIS PLEAS PURSUANT TO CRIMR 32.1."

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## II

{¶ 10} “THE TRIAL COURT ERRED IN DISMISSING DEFENDANT-APPELLANT’S MOTION TO WITHDRAW HIS PLEAS PURSUANT TO CRIMR 32.1 WITHOUT AN EVIDENTIARY HEARING.”

## I

{¶ 11} Appellant claims the trial court erred in denying his Crim.R. 32.1 motion to withdraw his plea. We disagree.

{¶ 12} Crim.R. 32.1 governs withdrawal of guilty plea and states “[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” The right to withdraw a plea is not absolute and a trial court’s decision on the issue is governed by the abuse of discretion standard. *State v. Smith* (1977), 49 Ohio St.2d 261. In order to find an abuse of discretion, we must determine the trial court’s decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

\*2 {¶ 13} In its judgment entry filed April 10, 2008, the trial court found it lacked jurisdiction to review appellant’s motion. Appellant argues the entry is “terse” and contains insufficient reasoning. We find the entry focuses on the single and salient issue sub judice: Does a trial court lose jurisdiction to entertain a Crim.R. 32.1 motion once an appellate court has affirmed the case?

{¶ 14} Appellant argues his motion to withdraw is not barred by the holding in *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97-98, wherein the Supreme Court of Ohio held the following:

{¶ 15} “Furthermore, Crim. R. 32.1 does not vest

jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty pleas subsequent to an appeal and affirmance by the appellate court. While Crim. R. 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do. Thus, we find a total and complete want of jurisdiction by the trial court to grant the motion to withdraw appellee’s plea of guilty and to proceed with a new trial.”

{¶ 16} In support of his argument, appellant cites the Supreme Court of Ohio’s intervening ruling in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993. The syllabus states, “ R.C. 2953.21 and 2953.23 [postconviction relief statutes] do not govern a Crim.R. 32.1 postsentence motion to withdraw a guilty plea.” In dicta at ¶ 11, Justice Cook recites the long line of cases supporting the conclusion of the syllabus:

{¶ 17} “Our precedent distinguishes postsentence Crim.R. 32.1 motions from postconviction petitions. See *State ex rel. Tran v. McGrath* (1997), 78 Ohio St.3d 45, 47, 676 N.E.2d 108 (unanimous court describing postconviction relief petition and postsentence motion to withdraw a guilty pleas as ‘alternative remedies’); *State ex rel. WLWT-TV5 v. Leis* (1997), 77 Ohio St.3d 357, 360, 673 N.E.2d 1365 (unanimous court identifying postsentence Crim.R. 32.1 motion to withdraw a guilty plea and postconviction petition as separate remedies). We have continued to recognize a Crim.R. 32.1 postsentence motion to withdraw a guilty plea as a distinct avenue for relief following our decision in *Reynolds* [*State v.* (1997), 79 Ohio St.3d 158]. See *State ex rel. Stovall v. Jones* (2001), 91 Ohio St.3d 403, 404, 746 N.E.2d 601 (unanimous court describing a postsentence Crim.R. 32.1 motion as an ‘adequate legal remed[y]’); *State ex rel. Chavis v. Griffin* (2001), 91 Ohio St.3d 50, 51, 741 N.E.2d

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130 (unanimous court summarizing trial court's obligations in addressing a postsentence Crim.R. 32.1 motion); *Douglas v. Money* (1999), 85 Ohio St.3d 348, 349, 708 N.E.2d 697 (unanimous court citing *Tran* in identifying postsentence motion to withdraw a guilty plea as separate from postconviction relief petition); *State v. Ashworth* (1999), 85 Ohio St.3d 56, 70, 706 N.E.2d 1231 (discussing the operation of Crim.R. 32.1 without mentioning postconviction relief statutes); *Shie v. Leonard* (1998), 84 Ohio St.3d 160, 161, 702 N.E.2d 419 (unanimous court citing *Tran* for proposition that alternative legal remedies of postconviction relief petition and postsentence motion to withdraw a guilty plea existed). And we confirm today that our holding in *Reynolds* continues to be narrow.”

\*3 {¶ 18} An examination of these cases reveals the Crim.R. 32.1 motions were made when there had been no direct appeals of the underlying convictions. Therefore, the holding in *Special Prosecutors* has not been discussed, reversed or modified.

{¶ 19} Under any normal course of events, the lack of any Supreme Court holdings on this narrow jurisdictional issue is not surprising. Generally speaking, sentences pursuant to pleas were not appealable until S.B. No. 2 allowed appellate review. However, S.B. No. 2 specifically excluded appellate review of sentences imposed pursuant to negotiated pleas [R.C. 2953.08(D)]. *Alford* pleas, such as the one sub judice, permit appellate review of evidentiary rulings and classifications (*Alford* plea is a guilty plea with a continued claim of innocence. *North Carolina v. Alford* (1970), 400 U.S. 25).

{¶ 20} In this case, appellant's re-opened direct appeal concluded on September 2, 1999 with an affirmance of the trial court's November 14, 1997 sentencing entry.

{¶ 21} We find the holding of *Special Prosecutors* to be on all fours with the issue presented in this case. Once an appellate court has affirmed a case, a trial court's jurisdiction is limited to taking “action

in aid of the appeal”:

{¶ 22} “ ‘But, the general rule is that when an appeal is taken from the district court the latter court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court.’ [7 Moore's Federal Practice (2 Ed.) 419, Paragraph 60.30[2]]

{¶ 23} “Yet, it has been stated that the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction. *In re Kurtzhalz* (1943), 141 Ohio St. 432; *Goode v. Wiggins* (1861), 12 Ohio St. 341; *Fawick Airflex Co. v. United Electrical Radio & Machine Workers* (1951), 90 Ohio App. 24. However, in the instant cause, the trial court's granting of the motion to withdraw the guilty plea and the order to proceed with a new trial would be inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea. The judgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment. Accordingly, we find that the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision.” *Special Prosecutors*, at 97.

{¶ 24} Upon review, we conclude the trial court was correct in finding it lacked jurisdiction to entertain appellant's Crim. R. 32.1 motion to withdraw his plea.

{¶ 25} Assignment of Error I is denied.

## II

{¶ 26} Based upon our decision in Assignment of Error I, this assignment is moot.

\*4 {¶ 27} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

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FARMER, P.J., GWIN, J. and HOFFMAN, J. con-  
cur.

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