

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
APPELLEE, : CASE NO. 2009-2028
-VS- :
ROLAND T. DAVIS, :
APPELLANT. : **Death Penalty Case**

On Appeal from the Court of Appeals of Licking County,
Fifth Appellate District, Case No. 2009-CA-00019

**Amici Curiae Ohio Association of Criminal Defense Lawyers and
Cuyahoga County Public Defender's Merit Brief**

COUNSEL FOR APPELLEE:

KENNETH W. OSWALT (0037208)
Prosecuting Attorney

Licking County Prosecutor's Office
20 S. Second Street
Newark, Ohio 43055
(740) 670-5255
Fax: (740) 670-5241
COUNSEL FOR APPELLEE

COUNSEL FOR APPELLANT:

TIM YOUNG
Ohio Public Defender

By: RUTH L. TKACZ (0061508)
Counsel of Record
250 E. Broad Street, Suite 1400
Columbus OH 43215
614-466-5394
614-644-0708 Fax
ruth.tkacz@opd.ohio.gov

COUNSEL FOR AMICI CURIAE:

CULLEN SWEENEY (# 0077187)
Ohio Association of Criminal Defense
Lawyers
310 Lakeside Avenue, Suite 200
Cleveland OH 44113
216-443-3660
216-443-6911 Fax
ROBERT L. TOBIK
Cuyahoga County Public Defender
By: JOHN T. MARTIN (# 0020606)
310 Lakeside Avenue, Suite 200
Cleveland OH 44113
216-443-3675
216-443-6911 Fax

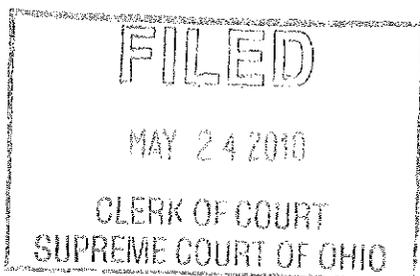


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INTEREST OF AMICI CURIAE

The Ohio Association of Criminal Defense Lawyers (OACDL), founded in 1986, is a professional association with more than 500 members in the State of Ohio. OACDL is among the largest professional organizations of criminal practitioners in the State. OACDL is an advocate of progressive criminal laws and policies that are consistent with constitutional principles, limited government intrusion into the lives of Americans, and a free society.

The Office of the Cuyahoga County Public Defender is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. As such the Office is the largest single source of legal representation of criminal defendants in Ohio's largest county.

The instant case is of great importance to the amici curiae as well as to the people of the State of Ohio. This Court's ruling on the issues presented will affect post-conviction litigation in hundreds of cases throughout the state. The members of the OACDL and the attorneys in the Cuyahoga County Public Defender's Office represent numerous individuals who continue to challenge their convictions after a direct appeal, and both amici curiae have a deep interest in the outcome of the instant case.

STATEMENT OF THE CASE AND FACTS

Amici defer to the Statement of the Case and Facts set forth in the appellant's merit brief and incorporate that statement herein as if set forth in full.

ARGUMENT

In this case, the Fifth District Court of Appeals affirmed the denial of Roland Davis' new trial motion based on newly discovered evidence solely on jurisdictional grounds. Specifically, the Fifth District, relying on this Court's decision in *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St. 2d 94, held that Davis was categorically barred from filing a new trial motion because his conviction was previously affirmed on appeal. This case does *not* require this Court to determine whether Davis was "unavoidably prevented" from filing the motion within the usual 120-day timeframe or whether the motion has merit. Those issues were never addressed by the Fifth District below. Rather, it simply requires this Court to decide whether the Fifth District erred in finding a jurisdictional bar to even considering Davis' new trial motion.

The question of whether the trial court had jurisdiction to entertain Davis' new trial motion turns on an interpretation of this Court's prior decision in *Special Prosecutors*. In *Special Prosecutors*, this Court held that a trial court lacked jurisdiction to grant a motion to withdraw a guilty plea "subsequent to an appeal and an affirmance by the appellate court" because such action would in effect "vacate a judgment which has been affirmed by the appellate court." *Id.* The Fifth District has expansively interpreted *Special Prosecutors* to categorically bar all post-trial motions after an appeal *even if* the issue presented in the post-trial motion was not raised on direct appeal and in fact could not have been raised on direct appeal because it depended upon newly discovered evidence.

Amici submit that the Fifth District's broad reading of *Special Prosecutors* is both incorrect as a matter of law and unfair as a matter of practice. Rather, the jurisdictional rule announced by this Court in *Special Prosecutors* should only serve to bar issues raised in post-appeal trial court motions that were actually litigated on direct appeal. Amici request that this Court adopt the following propositions of law:

Proposition of Law I: A trial court retains jurisdiction to rule on all issues raised by a post-trial motion after an appeal unless the issue was previously addressed on direct appeal. (*Special Prosecutors v. Judges* (1978), 55 Ohio St. 2d 94 explained).

Proposition of Law II: The law of the case doctrine does not bar new trial motions based on newly discovered evidence.

A. *Special Prosecutors*

In *Special Prosecutors*, this Court addressed the concern that a post-appeal Crim. R. 32.1 motion to withdraw a guilty plea might be used improperly to “affect the decision of [a] reviewing court.” 55 Ohio St. 2d at 98. This Court explained that a trial court lacks jurisdiction to grant a motion to withdraw a guilty plea when such action is “inconsistent with the judgment of the Court of Appeals affirming the trial court’s conviction premised upon the guilty plea.” *Id.* at 97. In *Special Prosecutors*, the court of appeals had specifically rejected a challenge to the voluntariness of the defendant’s plea and then the trial court granted the defendant’s motion to withdraw the plea. *Id.* at 96. In seeking a writ of prohibition, the State argued that the trial court had no authority to grant the motion because “the Court of Appeals’ decision on the voluntariness of the plea became the law of the case and the trial court was bound to follow it.” *Id.* This Court agreed with the State and held that the trial court lacked the authority to withdraw the plea as that action was inconsistent with the decision of the court of appeals. *Id.* at 97.

B. Motions for a New Trial: Rule 33

Criminal Rule 33 establishes specific requirements and limitations for new trial motions in criminal cases. A new trial may be granted for numerous reasons “affecting materially [defendant’s] substantial rights.” Crim. R. 33(A). Criminal Rule 33 sets forth clear time frames for the filing of new trial motions based upon newly discovered evidence. Such motions must be filed within 120 days of the jury’s verdict unless the defendant can establish, by clear and convincing evidence, that “the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely.” Crim. R. 33(B). Crim. R. 33 sets no outer limit on the time for filing motions for a new trial based upon newly discovered evidence. Criminal Rule 33 further provides that a motion for a new trial is “not a prerequisite to obtain appellate review.” Crim. R. 33(F). There is nothing in Criminal Rule 33 that explicitly or implicitly limits new trial motions to cases in which no appeal has been filed.

C. This Court’s decision in *Special Prosecutors* does not categorically bar post-appeal new trial motions.

In *Special Prosecutors*, this Court held that a trial court lacks jurisdiction to grant a motion to withdraw a guilty plea when such action is “inconsistent with the judgment of the Court of Appeals affirming the trial court’s conviction premised upon the guilty plea.” 55 Ohio St. 2d at 97. The key question in this case is when is a trial court’s action in ruling on a motion for a new trial “inconsistent with the judgment of the Court of Appeals” which previously affirmed the conviction on appeal. Amici submit that a trial court’s action on a motion for a new trial is only inconsistent with the judgment of the Court of Appeals to the extent that the new trial motion involves the very same issue previously resolved on direct appeal.

Despite some broad language, *Special Prosecutors*’ concern rests with trial court actions which are directly inconsistent with specific appellate court rulings. *State v. Gaston*, Cuyahoga App. No. 82628, 2003 Ohio 5825, ¶¶ 4-5. Properly understood, the legal doctrine underlying

Special Prosecutors is a “part of the law of the case doctrine, which bars the relitigation of issues resolved in appellate decisions.” *Id.* at ¶ 5; *see also Hawley v. Ritley* (1988), 35 Ohio St. 3d 157, 160 (citing *Special Prosecutors* as an example of the law of the case doctrine). In other words, *Special Prosecutors* makes clear that a trial court cannot revisit issues in a post-appeal Rule 32.1 motion to withdraw a plea that were previously addressed on appeal. “Where an appellate court has already ruled on an issue in a direct appeal, a trial court’s ‘reconsideration’ of that *same* issue is inconsistent with the appellate court’s exercise of jurisdiction and the doctrine of the law of the case.” *State ex rel. Rogers v. Marshall*, Scioto App. No. 05CA3004, 2008 Ohio 6341, ¶ 33 (emphasis added).

On the other hand, a trial court retains jurisdiction to rule on post-appeal motions or petitions if the motion is based on different grounds. *Id.* at ¶ 31. For instance, a trial court has jurisdiction to rule on post-appeal motions to reopen a judgment pursuant to Rule 60(B) as long as it involves a different issue. *See Id.* at ¶ 31; *Puls v. Puls*, Montgomery App. No. 21029, 2005 Ohio 6839, ¶ 20; *Polaris Ventures IV, LTD. v. Silverman*, Delaware App. No. 2005 CA E-11-0080, 2006 Ohio 4138, ¶ 19. A trial court has jurisdiction to rule on post-appeal motions to withdraw a guilty plea as long as it involves a different issue. *See e.g. State v. Duvall*, Cuyahoga App. No. 80316, 2002 Ohio 4574, ¶¶ 24-29 (affirming denial of motion to withdraw guilty plea) *and State v. Duvall*, Cuyahoga App. No. 83107, 2004 Ohio 640, ¶¶ 4-5 (reversing denial of subsequent motion to withdraw a guilty plea).

New trial motions are no different. The First, Second, Seventh, Eighth, and Tenth Districts have each entertained new trial motions that were filed *after* a defendant’s conviction was affirmed on direct appeal. *See State v. Beavers* (2006), 166 Ohio App. 3d 605, 610-11 (reversing the trial court’s denial of a motion for new trial); *State v. McConnell* (2007), 170 Ohio

App. 3d 800 (same); *State v. Gillispie*, Montgomery App. No. 22877 & 22912, 2009 Ohio 3640, ¶¶ 119-138 and 155 (same); *State v. Love*, Hamilton App. C-050131, C-050132, 2006 Ohio 6158, ¶¶ 2 & 43-67 (same); *State v. Green*, Mahoning App. No. 05 MA 116, 2006 Ohio 3097, ¶ 27 (same); *State v. Burke*, Franklin App. No. 09AP-686, 2007 Ohio 1810, ¶¶ 16-41 (same); *State v. Siler*, Cuyahoga App. No. 90865, 2009 Ohio 2874, ¶¶ 44-61 (same).

The Fifth District disconnected *Special Prosecutors* from its analytical moorings within the law of the case doctrine and improperly applied it to categorically bar post-appeal Crim. R. 33 motions for a new trial. Criminal Rule 33 clearly contemplates post-appeal new trial motions as it permits new trial motions to be filed more than 120 days after the jury's verdict if "the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely." Crim. R. 33(B). Moreover, by its very nature, newly discovered evidence in a new trial motion will *never* have been addressed in a defendant's direct appeal. The decision of a trial court on a motion for a new trial based on newly discovered evidence will never be inconsistent with a prior appellate court ruling based on a different record. This Court's decision in *Special Prosecutors* is therefore inapplicable to new trial motions based on newly discovered evidence.

The Fifth District's decision, categorically barring post-appeal new trial motions, is not only incorrect but also leads to absurd results and imposes an arbitrary penalty for the exercise of one's appellate rights. Under the categorical bar applied by the Fifth District, a criminal defendant who appealed his or her criminal conviction could not later file a motion for a new trial if the conviction was affirmed on appeal. However, that very same defendant could file a motion for a new trial as long as he or she did not exercise his or her right to appeal the conviction. In essence, a criminal defendant who exercises his or her right to appeal any issue from his or her trial is, under the Fifth District's decision, forever barred from filing a new trial

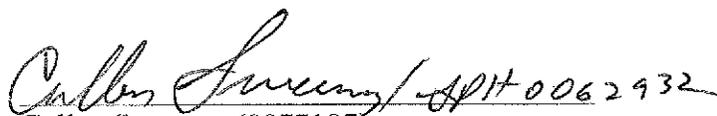
motion based on newly discovered evidence. This Court obviously did not intend its decision in *Special Prosecutors* to lead to such absurd results that are inconsistent with due process. Having been afforded the statutory right to file a motion for a new trial, Mr. Davis is guaranteed a procedure that comports with the requirements of due process and equal protection. *Cf. Evitts v. Lucey* (1985), 469 U.S. 387, 393 and 402-405. It is fundamentally unfair to deny a criminal defendant his statutory right to seek a new trial based on newly discovered evidence *merely* because he also pursued his statutory right to appeal.

If the Fifth District's decision stands and spreads throughout Ohio, it will effectively bar the litigation of post-conviction actual innocence claims in Ohio. No longer could a criminal defendant file a new trial motion based on newly discovered evidence that the victim had recanted, *McConnell*, 170 Ohio App. 3d at 801-802; that someone else committed the crime, *Gillispie*, 2009 Ohio 3640, ¶¶ 119-138, that several new witnesses supported the defendant's alibi defense, *Love*, 2006 Ohio 6158, ¶¶ 45-51; that new or recanted eyewitness testimony demonstrates the defendant's innocence, *Green*, 2006 Ohio 3097, at ¶¶ 14-23 and *Burke*, 2007 Ohio 1810, at ¶¶ 16-41, and that exculpatory evidence had not been disclosed, *Siler*, 2009 Ohio 2874, at ¶¶ 44-61. The Fifth District's approach of categorically barring post-appeal new trial motions is unnecessary, unreasonable, and unconstitutional.

CONCLUSION

Wherefore, amici curiae respectfully ask this Court to accept appellant Roland Davis' proposition of law and reverse the Fifth District's decision categorically barring the Davis' motion for a new trial on jurisdictional grounds. The case should be remanded to the Fifth District to consider whether the trial court erred in denying Davis leave to file a new trial motion outside the 120-day timeframe.

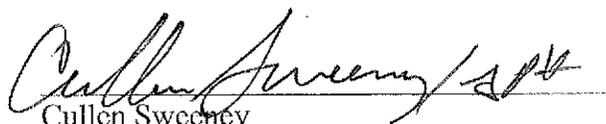
Respectfully submitted,


Cullen Sweeney (0077187)
Counsel for Amicus Curiae
Ohio Association of Criminal
Defense Lawyers


John T. Martin (0061508)
Counsel for Amicus Curiae
Cuyahoga County Public Defender

Certificate of Service

I hereby certify that a true copy of the foregoing Memorandum was forwarded by regular U.S. mail to Kenneth Oswalt, Prosecuting Attorney, Licking County, Admin. Bldg., 20 South Second Street, Newark, Ohio 43055 and to Ruth L. Tkacz, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, on the 24th day of May, 2010.


Cullen Sweeney
Counsel for Amici Curiae