

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
Plaintiff-Appellant)

CASE NO. 2009-1619

-vs-

DENNY ROSS,)
Defendant-Appellee)

REPLY BRIEF OF APPELLANT

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RECEIVED
JUN 17 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUN 17 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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REPLY BRIEF OF APPELLANT

Now comes Cuyahoga County Prosecuting Attorney William D. Mason on behalf of the State of Ohio, by and through his undersigned assistant, and respectfully submits the following Reply Brief of Appellant pursuant to Sup. Ct. R. P. VI, § 4.

1. *Carlisle v. U.S.* squarely applies to this case.

Ross argues that *Carlisle v. United States*, (1996), 517 U.S. 416, 116 S.Ct. 1460 does not apply to this case because “it did not involve reconsideration of a motion for acquittal which was timely filed in accordance with Rule 29.” (Ape. Br. at 12-13). Like this case, however, the district court in *Carlisle* “announced that it was reversing its ruling. When it made its decision in August, the court said, it had prepared two opinions, one granting and one denying the motion, and it had now decided to substitute the former for the latter.” *Id.*, at 418. Here, Judge Cirigliano denied Ross’s Motion for Crim. R. 29(C) acquittal on September 10, 2003. Ross’s

attorney then lobbied Judge Cirigliano to reverse himself and reopen the issue, which Judge Cirigliano did. Only at that point did Ross begin filing new “briefs” raising additional arguments for Crim. R. 29(C) acquittal. After Judge Cirigliano denied Crim. R. 29(C) acquittal on September 10, 2003, any subsequent request by Ross for acquittal constituted an untimely motion under Crim. R. 29(C). Calling these new acquittal requests “supplemental” pleadings rather than actual motions is nothing more than subterfuge to avoid the Crim. R. 29(C) time constraints. They looked like acquittal motions, sounded like acquittal motions, and behaved like acquittal motions. See generally, *State v. Schlee*, 117 Ohio St. 3d 153, 2008-Ohio-545, ¶ 12 (however styled, a pleading constitutes a petition for postconviction relief if it meets the governing legal criteria for such a petition because “[c]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged”).

The facts of this case therefore present a clear mirror of the facts of *Carlisle*. After September 10, 2003, Ross filed untimely requests for Crim. R. 29(C), and Judge Cirigliano subsequently reversed his earlier order denying acquittal.

2. Denial of Crim. R. 29(C) acquittal is not subject to reconsideration “at any time.”

Although the bulk of Ross’s arguments on this point are addressed by the State’s merit brief and therefore warrant no further response, Ross does cite to *State v. Alderman* (Dec. 11, 1990), Athens App. No. CA 1433, 1990 WL 253034, at *4, which is inapplicable to this case. In *Alderman*, the defendant’s first trial ended in a mistrial, requiring a second trial. Alderman appealed his conviction in the

second trial, complaining that he could not challenge the sufficiency of the evidence on appeal after the mistrial. The Fourth District Court of Appeals in *Alderman* held that the denial of a defendant's motion for acquittal was not a final appealable order and Alderman had to wait until his conviction in the second trial to challenge the sufficiency of evidence on appeal. *Id.*

Based on the principle behind *Alderman*, Ross and his *amicus* submit that the denial of acquittal was not "final and appealable," and therefore must be "interlocutory" and subject to reconsideration at any time. (Ape. Br. at 15, *Amicus* Ape. Br. at 2-4). This argument is a prime example of "[t]he *post hoc ergo propter hoc* fallacy [which] assumes causality from temporal sequence. It literally means 'after this because of this.' It is called a fallacy because it makes a false assumption based on the false inference that a temporal relationship proves a causal relationship." *McClain v. Metabolife Intern., Inc.* (C.A. 11, 2005) 401 F.3d 1233, 1243 (citing *Black's Law Dictionary* 1186 (7th ed.1999)). Ross and his *amicus* refuse to recognize that a criminal defendant's inability to file a post-mistrial appeal challenging the sufficiency of evidence has absolutely no bearing on Crim. R. 45(B). That rule explicitly states that there is no basis for a trial court to take any action not provided for by Crim. R. 29. Rule 45's broad prohibition necessarily includes "reconsideration at any time" where Crim. R. 29(C) instead has a strict time limit.

Ross complains that such an interpretation of Crim. R. 45 would lead to “nonsensical results” because it would bar motions filed a few minutes after the Crim. R. 29(C) deadline. (Ape. Br. at 14). The *Carlisle* Court soundly rejected this argument:

The only evident “rationale” behind Rule 29(c)'s 7-day time limit is that a motion for judgment of acquittal filed eight days after trial is a motion filed one day later than justice and equity demand. As we said in a case involving the filing deadline of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1988 ed.): “If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it.” *United States v. Locke*, 471 U.S. 84, 101, 105 S.Ct. 1785, 1796, 85 L.Ed.2d 64 (1985).

Carlisle, *supra*, at 430. It is highly doubtful that Ross would find the uniform application of a legal deadline to be “nonsensical” if the State had violated Ohio’s statute of limitations by filing an indictment one minute later than allowed under R.C. 2901.13. Regardless, Ross’s hypothetical is not appropriate to this case. He filed untimely requests for acquittal nearly *three years* after the Rule 29(C) deadline, not a few minutes past midnight.

3. Conclusion.

For the foregoing reasons, the State respectfully urges this Honorable Court to reject the arguments of defendant and his *amicus* and reverse the decision of the Ninth District Court of Appeals below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was sent by regular U.S. mail this 16th day of June, 2010 to counsel for defendant-appellee, Lawrence J. Whitney, Esq., 137 South Main Street, Suite 201, Akron, Ohio 44308, and Jacob A. Cairns, Esq., 1720 Zollinger Road, Suite 202, Upper Arlington, Ohio 43221, as well as Shelley M. Pratt, Esq., Office of the Ashtabula County Prosecutor, 25 W. Jefferson Street, Jefferson, Ohio 44047, Billie Jo Belcher, Esq., Office of the Lorain County Prosecutor, 225 Court Street, Jefferson, Ohio 44047, and Craig M. Jacquith, Esq.,

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