

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2010-1325
Plaintiff-Appellee, :
vs. : On Appeal from the Montgomery County
THOMAS EVERETTE, JR., : Court of Appeals, Second Appellate
Defendant-Appellant. : District Case No. CA 023585

APPELLANT THOMAS EVERETTE, JR.'S MERIT BRIEF

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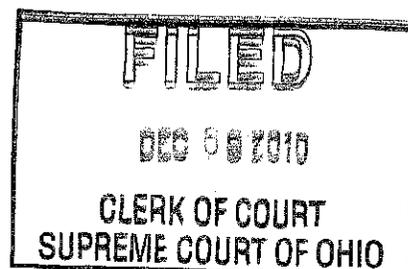


TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND OF THE FACTS 1

ARGUMENT 3

PROPOSITION OF LAW: A postconviction petition shall be filed no later than 180 days after the date on which the certified, written transcript of the trial court proceedings is filed in the court of appeals. 3

CONCLUSION 10

CERTIFICATE OF SERVICE 10

APPENDIX

State v. Everette (July 29, 2009), Montgomery County Common Pleas Court, Case No. 2007-CR-3147, *Decision and Entry* A-1

State v. Everette (June 18, 2010), Montgomery County Court of Appeals, Case No. 23585, *Opinion* A-2

State v. Everette (July 29, 2010), Supreme Court of Ohio, Case No. 10-1325, *Notice of Appeal of Appellant Thomas Everette, Jr.* A-13

State v. Everette (October 13, 2010), Supreme Court of Ohio, Case No. 10-1325, *Entry* A-15

R.C. 2953.21 A-16

App.R. 9 A-19

Civ.R. 15 A-22

TABLE OF AUTHORITIES

Page No.

CASES:

Cincinnati Bar Ass'n v. Newman, 124 Ohio St.3d 505, 2010-Ohio-9287

Cundall v. U.S. Bank, 122 Ohio St.3d 188, 2009-Ohio-25238

Erwin v. Bryan, Slip Opinion No. 2010-Ohio-22026

Portage County Bd. of Comm'rs v. City of Akron, 109 Ohio St.3d 106, 2006-Ohio-9547

State ex rel. Van Dyke v. Public Emples. Ret. Bd., 99 Ohio St.3d 430, 2003-Ohio-41237

State v. Calhoun, 86 Ohio St.3d 279, 1999-Ohio-1026

State v. Everette, 2nd Dist. No. 23585, 2010-Ohio-2832..... *passim*

State v. Hughes (1975), 41 Ohio St.2d 208.....6

State v. Johnson, 116 Ohio St.3d 541, 2008-Ohio-697

State v. Silsby, 119 Ohio St.3d 370, 2008-Ohio-38347

State v. Thomas, 106 Ohio St.3d 133, 2005-Ohio-41067

Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 1007

STATUTES:

R.C. 2953.21 *passim*

RULES:

App.R. 9 *passim*

Civ.R. 156

OTHER AUTHORITIES:

Black's Law Dictionary (9th Edition 2009) 1636.....7

Webster's II New College Dictionary (1995) 1170.....7

STATEMENT OF THE CASE AND OF THE FACTS

The relevant dates regarding the filing of Mr. Everette's postconviction petition are as follows:

June 20, 2008	Sentencing Entry filed.
July 16, 2008	Notice of appeal and praecipe for transcript filed.
August 26, 2008	Videotapes of trial filed.
October 15, 2008	Written transcripts filed.
April 8, 2009	Postconviction petition filed.

On April 8, 2009, Thomas Everette filed a postconviction petition regarding his June 2008 convictions for aggravated murder, aggravated robbery, weapons under disability, grand theft, and a firearm specification. (April 8, 2009 Petition to Vacate or Set Aside Judgment of Conviction or Sentence, 2007-CR-3147). Videotapes of the trial court proceedings were filed in the trial court and the court of appeals on August 26, 2008. The court reporter's written transcript of the trial court proceedings was filed in the trial court and the court of appeals on October 15, 2008. (August 26, 2008 Six Video Tapes Filed, 2007-CR-3147 and CA 022838; October 15, 2008 Transcript of Proceedings Filed – Two Volumes, 2007-CR-3147 and CA 022838).

The State argued that Mr. Everette's postconviction petition should be dismissed as untimely because it was filed more than 180 days from the date upon which the videotapes of the court proceedings were filed. (April 20, 2009 Motion to Dismiss/Motion for Summary Judgment, 2007-CR-3147). The trial court dismissed Mr. Everette's postconviction petition as untimely under R.C. 2953.21(A)(2). (July 29, 2009 Decision and Entry, 2007-CR-3147). Mr. Everette filed a pro se notice of appeal from the trial court's dismissal of his postconviction

petition. (August 13, 2009 Notice of Appeal, 2007-CR-3147). The Office of the Ohio Public Defender filed a brief as amicus curiae regarding the timeliness of Mr. Everett's petition. (October 23, 2009 Amicus Curiae Brief, CA 023585). The court of appeals endorsed the trial court's use of the filing of the videotaped court proceedings as the triggering event for the 180-day deadline. *State v. Everett*, 2nd Dist. No. 23585, 2010-Ohio-2832, ¶35. This Court accepted Mr. Everett's memorandum in support of jurisdiction. (October 13, 2010 Entry, Case No. 2010-1325). Mr. Everett asks that this Court reverse the court of appeals in the present case and hold that the triggering event for the 180-day deadline under R.C. 2953.21 is the filing of the written transcript.

ARGUMENT

PROPOSITION OF LAW

A postconviction petition shall be filed no later than 180 days after the date on which the certified, written transcript of the trial court proceedings is filed in the court of appeals.

The court of appeals in the present case held that, under App.R. 9(A), the filing of videotaped court proceedings constitutes the trial transcript for purposes of filing a postconviction petition under R.C. 2953.21. According to the court of appeals' reasoning, because those videotapes were filed on August 26, 2008 in the present case, Mr. Everett's postconviction petition was due to be filed on or before February 23, 2009. Therefore, according to the court of appeals, Mr. Everett's April 8, 2009 postconviction petition was untimely. *Everette*, at ¶11-35.

Ohio Revised Code Section 2953.21 and the 180-day Postconviction Petition Deadline.

Ohio Revised Code Section 2953.21(A)(2), not App.R. 9, sets the time for filing a postconviction petition:

Except as otherwise provided in section 2953.23 of the Revised Code, 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, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

The appropriate triggering event for the 180-day postconviction petition deadline is not the filing of videotaped trial proceedings, but rather the filing of the court reporter's certified, written transcription of those proceedings. In the present case, that written transcript was filed on October 15, 2009. As a result, Mr. Everett's postconviction petition was due to be filed on

or before April 13, 2009. Mr. Everette's postconviction petition was timely filed on April 8, 2009.

Ohio Rule of Appellate Procedure 9 and the Transcript on Direct Appeal.

The court of appeals pointed to a portion of App.R. 9(A) and held that, "a videotape recording of the trial proceedings constitutes the transcript of proceedings and that it need not be transcribed into written form in order to be filed." *Everette*, at ¶22. However, App.R. 9(A) states in its entirety:

The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means. (Emphasis added.)

Ohio Rule of Appellate Procedure 9(A) states that when a written transcript is certified by the court reporter, as it was in the present case, that written transcript shall constitute the transcript of proceedings on direct appeal. Yet contrary to the plain language of App.R. 9(A), the court of appeals in the present case held that, "the provision that the written form is the transcript of proceedings applies solely when a non-videotaped proceeding (e.g. audio only, shorthand, stenotype,) is reduced to written form, not to all circumstances when a written

transcript is produced,” and that “[the] mere fact that a court reporter or transcriptionist, at counsel’s request, has produced a written transcript of a videotaped proceeding and has certified its accuracy, as required by *App.R. 9(A)*, does not render that transcript the official transcript of proceedings.” *Everette*, at ¶23-24. The court of appeals’ assertions are not supported by the language of *App.R. 9(A)*.

Ohio Rule of Appellate Procedure 9(A) states that a videotaped recording may be considered the transcript on appeal, “other than hereinafter provided.” The next sentence states that a non-videotaped recording may never be the transcript on appeal. And the following sentence states then when a written transcript is filed, it is the transcript of proceedings, as referenced earlier by the “other than hereinafter provided” language.¹ In other words, a non-videotaped recording may never be the transcript on appeal, but a videotaped recording may be, subject to the filing of a certified, written transcript, which, when filed, is always the transcript of proceedings.

Ohio Rule of Appellate Procedure 9 does allow for videotapes to comprise the transcript of proceedings for purposes of direct appeal, but *only* when a written transcript is not produced. But irrespective of *App.R. 9, R.C. 2953.21*, which specifically concerns postconviction petitions, does not address the use of videotapes, in lieu of written transcripts, as the triggering event for the 180-day deadline for filing a postconviction petition.

¹ Ohio Rule of Appellate Procedure 9(B) addresses the requirements of a transcript of proceedings. Rule 9(B) dictates that the transcript must be bound with a front and back cover, be printed on white paper, and requires that each volume of the transcript may not exceed 250 pages. Rule 9(B) contains several other requirements for the production of the court reporter’s certified, written transcript.

Statutes vs. Rules: When Substantive Rights are at Issue.

This Court has recently addressed the means by which conflicts between the Ohio Revised Code and rules of practice, as promulgated by this Court, are resolved. *Erwin v. Bryan*, Slip Opinion No. 2010-Ohio-2202. This Court explained that:

[T]he Modern Courts Amendment of 1968, Section 5(B), Article IV, Ohio Constitution, empowers this Court to create rules of practice and procedure for the courts of this state. As we explained in *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, Section 5(B), Article IV “expressly states that rules created in this manner ‘shall not abridge, enlarge, or modify any substantive right.’” *Id.* at P 17. “Thus, if a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law.” *Erwin*, at ¶28. (Emphasis added.)

This Court went on to explain that, “[t]he existence and duration of a statute of limitations for a cause of action constitutes an issue of public policy for resolution by the legislative branch of government as a matter of substantive law.” *Erwin*, at ¶29, citing *State v. Hughes* (1975), 41 Ohio St.2d 208, syllabus (invalidating court rule enlarging prosecution’s statutory right of appeal).

Postconviction petitions are civil, collateral attacks upon convictions. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102. Therefore, much like the statute of limitations involved in *Erwin*, the present case involves the deadline for filing a civil action. In *Erwin*, this Court stated that “[w]e cannot, through a court rule, alter the General Assembly’s policy preferences on matters of substantive law, and Civ.R. 15(D) therefore may not be construed to extend the statute of limitations beyond the time period established by the General Assembly.” *Erwin*, at ¶30. And in the present case, App.R. 9 may not be construed to alter the triggering event for the 180-day deadline for filing a postconviction petition as stated in R.C. 2953.21(A)(2).

The Plain Meaning of R.C. 2953.21(A)(2).

This Court has held that a court's preeminent concern in construing a statute is the legislative intent in enacting that statute. *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, ¶15, citing *State ex rel. Van Dyke v. Public Emples. Ret. Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123, ¶27. A court shall apply an unambiguous statute in a manner consistent with the plain meaning of the statutory language and may not add or delete words. *Johnson*, at ¶27, citing *Portage County Bd. of Comm'rs v. City of Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶52.

As the court of appeals in the present case noted, R.C. 2953.21 does not define the term "transcript." *Everette*, at ¶18. Therefore, that statutory language must be given its plain meaning. This Court has looked to common, widely accepted definitions in order to demonstrate the meaning of terms. *State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, ¶18; *Cincinnati Bar Ass'n v. Newman*, 124 Ohio St.3d 505, 2010-Ohio-928, ¶6. Examining the common, dictionary definitions of terms not defined in the Ohio Revised Code, this Court explained, "we begin, therefore, 'with the time-honored rule that words used by the General Assembly are to be construed according to their common usage.'" *State v. Thomas*, 106 Ohio St.3d 133, 2005-Ohio-4106, ¶15, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 103.

Black's Law Dictionary defines the term "transcript" as, "[a] handwritten, printed, or typed copy of testimony given orally; esp., the official record of proceedings in a trial or hearing, as taken down by a court reporter." Black's Law Dictionary (9th Edition 2009) 1636. Webster's II New College Dictionary defines the term "transcript" as, "transcribed matter, esp. a written, typewritten, or printed copy, as of a legal or academic record." Webster's II New College Dictionary (1995) 1170.

The plain meaning of the statutory language contained in R.C. 2953.21 indicates that a videotape is not a transcript within the meaning of that statute. A transcript is a written record of the proceedings. And the plain meaning of the statutory language contained in R.C. 2953.21 indicates that the legislature intended the 180-day deadline for filing a postconviction petition to begin with the filing of that written transcript.

Public Policy.

Public policy supports the use of the certified, written transcript as the triggering event for the 180-day postconviction petition deadline. This Court has stated that limitation periods “foster important public policies,” including “ensuring fairness to the defendant.” *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, ¶22. With regard to those limitation periods, this Court explained that, “[w]e apply them consistently to ensure the proper administration of justice.” *Cundall*, ¶22. In the present case, the use of the videotaped trial proceedings as the triggering event for the 180-day deadline is *inconsistent* with the practice of other Ohio courts. And the Second District Court of Appeals appears to be the first appellate court to address the issue.

Many postconviction petitions, such as the petition in the present case, are filed by incarcerated, pro se litigants. Pro se litigants’ access to legal materials and ability to investigate are necessarily limited by incarceration. Without access to the appropriate equipment, videotapes or digital recordings of the trial court proceedings are effectively useless to such litigants. If the filing of the videotaped court proceedings triggers the postconviction deadline, many incarcerated, pro se litigants will not have access to the trial court record while preparing postconviction petitions. In addition, unless clerks of court throughout Ohio provide and maintain the necessary viewing equipment, the public will be precluded from reviewing the trial

court proceedings as well. Holding that the 180-day deadline for filing a postconviction petition, contained in R.C. 2953.21(A)(2), is triggered by the filing of the certified, written transcript is consistent with the plain language of the statute as well as public policy.

Recently Proposed Changes to Ohio Rule of Appellate Procedure 9.

The Supreme Court Commission on the Rules of Practice and Procedure recently recommended amending App.R. 9. The proposed amendment was summarized as:

The proposed amendments to App.R. 9 specify that a written transcript is the record on appeal, making a videotape transcript no longer adequate. The proposed amendments specify that any electronic recording must be transcribed by a court appointed reporter. If a court uses electronic or video recording, the electronic version should also be included with the record when filed; however, the written transcript is the official record. These proposed amendments were agreed to and presented to the Commission by the Ohio Judicial Conference and the Court of Appeals Judges Association. (October 4, 2010 Proposed Amendments to the Ohio Rules of Appellate Procedure, Civil Procedure, Criminal Procedure, and Juvenile Procedure, p. 2).

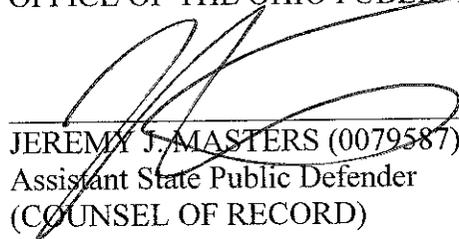
As described above, the plain meaning of the language contained in R.C. 2953.21(A)(2) is controlling in determining what constitutes a “transcript,” with regard to triggering the 180-day deadline for filing a postconviction petition. However, the recently proposed amendments to App.R. 9 highlight the need for clarity with regard to what constitutes the transcript for purposes of direct appeal as video recording becomes more pervasive. Finally, the proposed amendments would harmonize App.R. 9 with R.C. 2953.21 and eliminate further confusion and doubt regarding what is, and is not, the official transcript of proceedings.

CONCLUSION

Mr. Everette requests that this Court reverse the court of appeals and hold that the 180-day deadline for filing a postconviction petition under R.C. 2953.21(A)(2) begins to run upon the filing of the certified, written transcript of the trial court proceedings.

Respectfully submitted,

~~OFFICE OF THE OHIO PUBLIC DEFENDER~~



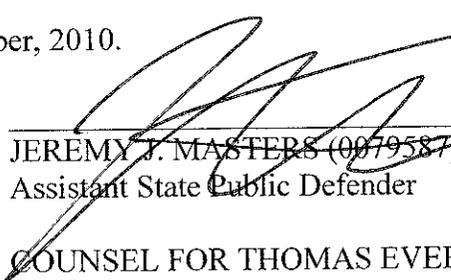
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT THOMAS EVERETTE'S MERIT BRIEF** has been sent via regular U.S. Mail to Mathias H. Heck, Jr., Montgomery County Prosecutor's Office, 5th Floor, Courts Building, 301 West Third Street, P.O. Box 972, Dayton, Ohio 45422, this ___ day of December, 2010.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.
Plaintiff-Appellee,	:	
vs.	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District Case No. CA 023585
THOMAS EVERETTE, JR.,	:	
Defendant-Appellant.	:	

APPENDIX TO

APPELLANT THOMAS EVERETTE, JR.'S MERIT BRIEF

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GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
34



THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO

Plaintiff-Respondent

vs.

THOMAS EVERETTE, JR.

Defendant-Petitioner

CASE NO. 2007-CR-3147

JUDGE MICHAEL L. TUCKER

DECISION AND ENTRY

Upon consideration of the petition for post-conviction relief filed by Thomas Everette on April 8, 2009, the State's motion to dismiss/motion for summary judgment filed on April 20, 2009, Petitioner's May 12, 2009 memo in opposition to the State's motions, and the State's May 28, 2009 submission, the Court hereby DISMISSES the petition for post-conviction relief. The petition is untimely under R.C. 2953.21(A)(2) and because Petitioner has failed to establish the existence of the extraordinary circumstances listed in R.C. 2953.23(A) that would excuse his late filing, this Court is without jurisdiction to entertain the petition. *State v. Brewer* (May 14, 1999), Montgomery App. No. 17201; *State v. Ayers* (Dec. 4, 1998), Montgomery App. No. 16851. In any case, Everette has not shown the existence of substantive grounds for relief, which would render his petition subject to dismissal without a hearing, even if timely. R.C. 2953.21(C) and (E).

APPROVED:



JUDGE MICHAEL L. TUCKER



IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

v.

THOMAS E. EVERETTE, JR.

Defendant-Appellant

C.A. CASE NO. 23585

T.C. NO. 2007 CR 3147

(Criminal appeal from
Common Pleas Court)

FILED
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OPINION

Rendered on the 18th day of June, 2010.

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Defendant-Appellant

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Attorney for Amicus Curiae, Ohio Public Defender

FROELICH, J.

Thomas E. Everette, Jr., appeals, pro se, from a judgment of the Montgomery County Court of Common Pleas, which dismissed his petition for post-conviction relief as untimely.

Everette appeals from the dismissal of his petition for post-conviction relief. The Office of the Ohio Public Defender has submitted an amicus curiae brief in support of Everette's position. For the following reasons, the trial court's judgment will be affirmed.

I.

In June 2008, Everette was convicted after a jury trial of two counts of aggravated murder, aggravated robbery, and grand theft of a motor vehicle, all with firearm specifications. Everette was also convicted by the trial court of having a weapon while under disability. The charges stemmed from the shooting death of Phillip Cope on July 29, 2007, and the theft of Cope's vehicle. The two aggravated murder counts were merged, as were the firearm specifications; all of the charges were to be served concurrently to each other, and the three-year term for the firearm specification was to be consecutive and prior to this sentence as a matter of law. Everette was sentenced to an aggregate term of life imprisonment with the possibility of parole after 28 years.

Everette appealed from his conviction on July 16, 2008. The same date, Everette's trial counsel requested that a transcript of the trial be prepared. On August 1, 2008, Everette's appellate counsel filed a "Praecepte/Instructions to Court Reporter" in this Court, requesting a transcript of a suppression hearing. On August 26, 2008, six videotapes – including the trial, the hearing on Everette's motion to suppress, and the sentencing hearing – were filed. A summary of docket was filed two days later and, the same day (August 28, 2008), the Clerk of Courts issued its App.R. 11(B) notification indicating that

the appellate record was complete. The App.R. 11(B) notification stated that the transcript of proceedings had been filed on August 26, 2008. Written transcripts of the suppression hearing and the trial were filed on October 15, 2008.

On April 8, 2009, Everette submitted a petition for post-conviction relief. He claimed that his trial counsel had rendered ineffective assistance by failing to call a detective as a witness, to gather and present telephone records at trial, and to object to prosecutorial misconduct. Everette further argued that the prosecutor had engaged in misconduct by commenting on evidence that was not in the record during the State's rebuttal argument. Everette supported his petition with his own unsworn statement and indicated that he needed the transcripts to further support his claims.

The State moved to dismiss Everette's petition or for summary judgment. It argued that Everette's petition was untimely because it was filed more than 180 days after the transcript of proceedings was filed on August 26, 2008. Alternatively, the State argued that Everette had not shown that there were substantive grounds for relief and that his petition should be summarily denied. The State argued that Everette did not explain how he was prejudiced by his counsel's failure to call a police detective as a witness and by failing to obtain telephone records. Further, the State asserted that Everette's claims of prosecutorial misconduct and his attorney's failure to object to such misconduct should be raised in Everette's direct appeal.

Everette opposed the State's motion, arguing that his 180-day time limitation began to run on October 15, 2008, when the written transcripts were filed. He stated that his petition was due on April 13, 2009, not February 23, 2009, as the State asserted. He also argued that he was prejudiced by the jury's not hearing the detective testify that Ashley

Ross, one of the State's witnesses, knew him (Everette) prior to the day of Cope's death and not hearing that he had never made telephone calls to Daryl Stollings, another witness.

In July 2009, the trial court dismissed Everette's petition. The court held that the petition was untimely under R.C. 2953.21(A)(2), and Everette had not established that this late filing met any of the exceptional circumstances listed in R.C. 2953.23(A). The court further stated that, even if Everette's petition had been timely, he did not show substantive grounds for relief.

We affirmed Everette's conviction in his direct appeal on October 30, 2009. *State v. Everette*, Montgomery App. No. 22838, 2009-Ohio-5738.

Everette appeals from the dismissal of his petition for post-conviction relief, raising two assignments of error.

II.

Everette's first assignment of error states:

"THE TRIAL COURT ERRED IN ITS DECISION DENYING APPELLANT[']S PETITION FOR POST CONVICTION RELIEF."

In his first assignment of error, Everette claims that the trial court erred in dismissing his petition as untimely. He argues that the time for filing his petition began to run on October 15, 2008, when the written transcripts were filed. Everette cites two cases from this appellate district – *State v. Carson*, Montgomery App. No. 22654, 2009-Ohio-1406, and *State v. Jamison*, Montgomery App. No. 22806, 2009-Ohio-3515 – to support his contention that the 180-day period begins to run when written transcripts are filed. The Ohio Public Defender reiterates these arguments and further states that App.R. 9(A) indicates that, when written transcripts are certified by the court reporter, the written

transcript constitutes the transcript of proceedings instead of the videotaped transcript.

R.C. 2953.21(A)(1)(a) provides that "[a]ny person who has been convicted of a criminal offense *** and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, *** may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."

If a defendant has filed a direct appeal of his or her conviction, a petition for post-conviction relief must be filed no later than 180 days after the "trial transcript" is filed in the court of appeals in the direct appeal. R.C. 2953.21(A)(2). If the petition is not filed within that statutory time period, the trial court lacks jurisdiction to consider the petition for post-conviction relief, unless the untimeliness is excused under R.C. 2953.23(A)(1)(a). *State v. West*, Clark App. No. 08 CA 102, 2009-Ohio-7057, ¶7.

Pursuant to R.C. 2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief (1) if he was unavoidably prevented from discovering the facts upon which he relies to present his claim, or (2) if the United States Supreme Court recognizes a new right that applies retroactively to his situation. *Id.* If one of these conditions is met, the petitioner must then also show by clear and convincing evidence that, if not for the constitutional error from which he suffered, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b).

Everette does not argue that the trial court had jurisdiction over his petition under R.C. 2953.23. Rather, he claims that his petition was filed within 180 days of the filing of the trial transcript, in accordance with R.C. 2953.21. The crucial questions are, therefore,

what is a "trial transcript" and when was it filed in the court of appeals in Everett's direct appeal.

R.C. 2953.21 does not define the phrase "trial transcript." See *State v. Hollingsworth*, 118 Ohio St.3d 1204, 2008-Ohio-1967, ¶2 (Moyer, C.J., concurring in dismissal). However, App.R. 9(A) defines the "record on appeal," which includes the "transcript of proceedings, if any."¹ Specifically, App.R. 9(A) provides:

"The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording² of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their

¹In his concurrence in the dismissal of the appeal in *Hollingsworth*, Chief Justice Moyer commented that "trial transcript" is not synonymous with "record on appeal" under R.C. 2953.21. He stated that an argument that "trial transcript" means "the record on appeal" for purposes of a petition for post-conviction relief would be reasonable "if it were not inconsistent with the plain words of R.C. 2953.21(A)(2) which expressly provides that the limitations period begins when the *trial transcript* is filed." (Emphasis in original) *Hollingsworth* at ¶2. See, also, *State v. Villa*, Lorain App. No. 08CA9484, 2009-Ohio-5055.

²Because the record reflects that "videotapes" were filed, we need not discuss use of the DVD or CD format.

briefs.

"In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means." (Footnote added.)

In its amicus curiae brief, the Ohio Public Defender asserts that App.R. 9(A) establishes that a written transcript, certified by the court reporter, is the transcript of proceedings and, thus, when the written transcript is filed, that filing triggers the 180-day time limitation. Specifically, the Ohio Public Defender relies on the sentence that reads: "When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings."

However, the second sentence of App.R. 9(A) explicitly states that a videotape recording of the trial proceedings constitutes the transcript of proceedings and that it need not be transcribed into written form in order to be filed. App.R. 9(A) further states that, when the proceedings are videotaped, counsel must reduce the portions of the videotaped transcript necessary for appellate review into written form, certify the accuracy of the written transcript, and append the written transcripts to the brief.

In contrast, proceedings recorded by means other than videotape must be reduced to written form. The sentence following the requirement for non-videotaped proceedings (i.e., the sentence upon which the Ohio Public Defender primarily relies) then states that the written form is the transcript of proceedings. Reading App.R. 9(A) as a whole, the provision that the written form is the transcript of proceedings applies solely when a non-videotaped proceeding (e.g., audio only, shorthand, stenotype) is reduced to written form, not to all circumstances when a written transcript is produced.

Although the burden to produce the necessary written transcripts of videotaped

proceedings falls on counsel, most written transcripts are produced, upon counsel's request, by a court reporter or other professional transcriptionist and not by counsel himself or herself. The mere fact that a court reporter or transcriptionist, at counsel's request, has produced a written transcript of a videotaped proceeding and has certified its accuracy, as required by App.R. 9(A), does not render that written transcript the official transcript of proceedings.

Turning to when the "trial transcript" was filed in Everette's case, a summary of the relevant dates in Everette's case is useful to our discussion:

June 18, 2008	Guilty verdict
July 16, 2008	Notice of appeal and praecipe for transcript
August 26, 2008	Videotapes of trial filed
August 28, 2008	App.R. 11(B) notification that "transcript of proceedings" were filed on August 26, 2008
October 15, 2008	Written transcripts filed
April 8, 2009	Petition for post-conviction relief filed
October 30, 2009	Direct appeal decided

In Everette's case, the videotaped proceedings were filed on August 26, 2008. Although written transcripts were prepared and filed at the request of Everette's trial and appellate counsel in order to support his assignments of error on direct appeal, the videotaped transcript remained the transcript of proceedings. Accordingly, the 180-day time period for filing Everette's petition for post-conviction relief began to run on August 26, 2008, and expired on February 23, 2009.

Everette and the Ohio Public Defender cite to *Jamison* and *Carson* as examples of

cases in which we referred to the date when the written transcripts were filed as opposed to the filing of the videotaped recordings. We acknowledge that we have, on occasion (including in *Jamison* and *Carson*), cited to the date that the written transcripts were filed as the date from which we determined whether a petition was untimely under R.C. 2953.21. However, in citing to the dates that the written transcripts were filed in *Jamison* and *Carson*, we did not state that the 180-day period always began to run with the filing of the written transcripts. Nor did we discuss whether the filing of the written transcripts, as opposed to the videotaped transcripts, always represented the proper starting date under R.C. 2953.21. Such a discussion would have been inconsequential in *Carson*, considering that Carson filed his petition more than three years after we affirmed his conviction.

In *Jamison*, we noted that Jamison's petition was filed 182 days after the filing of the written transcript; however, because Jamison's petition was barred by res judicata, we did not reach the timeliness of his petition. Accordingly, we had no need to discuss – and did not discuss – whether Jamison's time began to run with the filing of the written transcript or the unmentioned previously-filed videotaped transcript.

However, in *State v. Carver*, Montgomery App. No. 22407, 2008-Ohio-5516, we expressly held that videotapes of the proceedings constitute the transcript of proceedings, per App.R. 9(A), and that the 180-day period within which to petition for post-conviction relief began on the date when the videotapes were filed in the court of appeals. *Id.* at ¶6. We have found no cases that have expressly addressed the issue before us and held to the contrary.

Finally, the Ohio Public Defender asserts that the videotaped recordings are not the transcript of proceedings, because the videotapes were certified as "a correct and

complete mechanically reproduced transcript" by the trial court's judicial assistant, not by a court reporter.

App.R. 9(B) requires the transcript, whether in written or videotape form, to be certified as correct by the "reporter," not the "court reporter." The Rule defines the reporter as "the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonographic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems." App.R. 9(B).

In many courtrooms, audio and/or video recording devices have replaced traditional stenographic reporters. Where trial court proceedings are memorialized solely through video recording devices, it is not uncommon for judicial assistants to be responsible for maintaining, copying, and filing the electronic media for the trial court. Stated differently, the judicial assistant is the "reporter" who certifies the accuracy of the electronically-recorded transcript and files it. In such situations, written transcripts can be prepared by private transcriptionists, whether arranged by counsel directly or through the court, as well as by a "court reporter" on the court's staff.

In this case, the videotaped transcript was certified as correct by the trial court's judicial assistant. We see no violation of App.R. 9(B).

Because Everette's time for filing his petition for post-conviction relief began on August 26, 2008, Everette's petition for post-conviction was untimely filed. The trial court did not err in dismissing his petition.

The assignment of error is overruled.

III.

Everette's second assignment of error states:

"APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE U.S. CONSTITUTION [sic]"

In light of our disposition of Everette's first assignment of error, his second assignment of error is overruled as moot.

IV.

The judgment of the trial court will be affirmed.

.....
FAIN, J. and DONOFRIO, J., concur.

(Hon. Gene Donofrio, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Michele D. Phipps
Thomas E. Everette, Jr.
Jeremy J. Masters
Hon. Michael L. Tucker

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.	10-1325
Plaintiff-Appellee,	:		
vs.	:	On Appeal from the Montgomery County	
	:	Court of Appeals, Second Appellate	
THOMAS EVERETTE, JR.	:	District Case No. CA 023585	
Defendant-Appellant.	:		

**NOTICE OF APPEAL OF APPELLANT
THOMAS EVERETTE, JR.**

MATHIAS H. HECK, JR. (0014171)
Montgomery County Prosecutor

301 West Third Street, 5th Floor.
P.O. Box 972
Dayton, Ohio 45422
(937) 225-5757
(937) 225-3470 – Fax

OFFICE OF THE OHIO PUBLIC DEFENDER

JEREMY J. MASTERS (0079587)
Assistant State Public Defender
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COUNSEL FOR STATE OF OHIO

COUNSEL FOR THOMAS EVERETTE, JR.

FILED
JUL 29 2010
CLERK OF COURT
SUPREME COURT OF OHIO

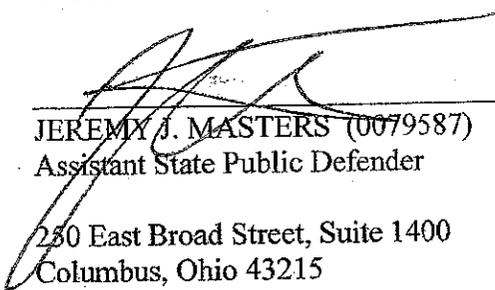
NOTICE OF APPEAL OF APPELLANT THOMAS EVERETTE

Thomas Everett, Jr. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 023585, on June 18, 2010.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

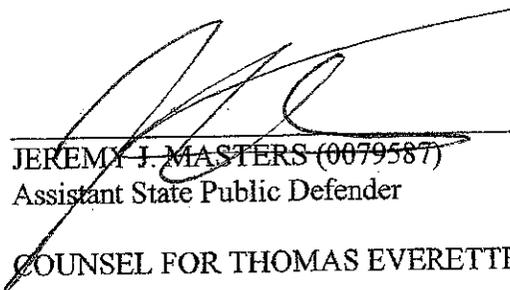

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COUNSEL FOR THOMAS EVERETTE, JR.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Notice of Appeal of Appellant Thomas Everett, Jr.** has been sent via regular U.S. Mail to Mathias H. Heck, Jr., Montgomery County Prosecutor's Office, 5th Floor, Courts Building, 301 West Third Street, P.O. Box 972, Dayton, Ohio 45422, this 20th day of July, 2010.


JEREMY J. MASTERS (0079587)
Assistant State Public Defender

COUNSEL FOR THOMAS EVERETTE, JR.

#324629

The Supreme Court of Ohio

FILED

OCT 13 2010

State of Ohio

Case No. 2010-1325
CLERK OF COURT
SUPREME COURT OF OHIO

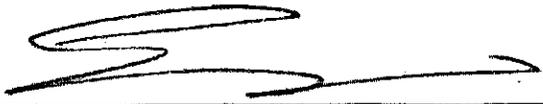
v.

ENTRY

Thomas E. Everette, Jr.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Montgomery County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Montgomery County Court of Appeals; No. 23585)



ERIC BROWN
Chief Justice

LEXSTAT ORC 2953.21

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
 *** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES
 POSTCONVICTION REMEDIES

Go to the Ohio Code Archive Directory

ORC Ann. 2953.21 (2010)

§ 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony and who is an offender, for whom DNA testing that was performed under *sections 2953.71 to 2953.81 of the Revised Code* or under former *section 2953.82 of the Revised Code* and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of *section 2953.74 of the Revised Code* provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under *sections 2953.71 to 2953.81 of the Revised Code* or under former *section 2953.82 of the Revised Code* been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of *section 2953.74 of the Revised Code* no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former *section 2953.82 of the Revised Code*" means *section 2953.82 of the Revised Code* as it existed prior to the effective date of this amendment.

(2) Except as otherwise provided in *section 2953.23 of the Revised Code*, 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, except as otherwise provided in *section 2953.23 of the Revised Code*, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in *section 2953.23 of the Revised Code*, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or *section 120.06, 120.16, 120.26, or 120.33 of the Revised Code* and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by *section 2953.08 of the Revised Code*, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

HISTORY:

131 v 684 (Eff 7-21-65); 132 v H 742 (Eff 12-9-67); 141 v H 412 (Eff 3-17-87); 145 v H 571 (Eff 10-6-94); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 258 (Eff 10-16-96); 149 v H 94. Eff 9-5-2001; 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

LEXSTAT OHIO APP. R. 9

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*** RULES CURRENT THROUGH NOVEMBER 1, 2010 ***
 *** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Appellate Procedure
 Title II Appeals From Judgments And Orders Of Court Of Record

Ohio App. Rule 9 (2010)

Review Court Orders which may amend this Rule.

Rule 9. The record on appeal

(A) Composition of the record on appeal.

The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with *App. R. 9(B)*, such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonographic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. If there is no officially appointed reporter, *App. R. 9(C)* or *9(D)* may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.

Unless the entire transcript is to be included, the appellant, with the notice of appeal, shall file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the record, a statement that no transcript is necessary, or a statement that a statement pursuant to either *App. R. 9(C)* or *9(D)* will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or ap-

Ohio App. Rule 9

ply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, the party ordering the transcript shall arrange for the payment to the reporter of the cost of the transcript.

A transcript prepared by a reporter under this rule shall be in the following form:

- (1) The transcript shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;
- (2) The transcript shall be firmly bound on the left side;
- (3) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;
- (4) The transcript shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;
- (5) An index of witnesses shall be included in the front of the transcript and shall contain page and line references to direct, cross, re-direct, and re-cross examination;
- (6) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;
- (7) Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;
- (8) No volume of a transcript shall exceed two hundred and fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length.

The reporter shall certify the transcript as correct, whether in written or videotape form, and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter. The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court.

(C) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable.

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to *App.R. 10*, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to *App.R. 10*, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

(D) Agreed statement as the record on appeal.

In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record pursuant to *App.R. 10*, may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised by the appeal, shall be approved by the trial court prior to the time for transmission of the record pursuant to *App.R. 10* and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by *App.R. 10*.

(E) Correction or modification of the record.

Ohio App. Rule 9

If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

HISTORY: Amended, eff 7-1-77; 7-1-78; 7-1-88; 7-1-92.

LEXSTAT OHIO CIV. R. 15

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*** RULES CURRENT THROUGH NOVEMBER 1, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Civil Procedure
Title III Pleadings And Motions

Ohio Civ. R. 15 (2010)

Review Court Orders which may amend this Rule.

Rule 15. Amended and supplemental pleadings

(A) Amendments.

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(B) Amendments to conform to the evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(C) Relation back of amendments.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

(D) Amendments where name of party unknown.

When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant.

(E) Supplemental pleadings.

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefore.