

IN THE SUPREME COURT OF OHIO

ORIGINAL

Thornton H. Taylor,

Appellant,

-vs-

State of Ohio,

Appellee.

CASE NO. 11-0251

On Appeal from the Fourth
Appellate District of Ohio,
Scioto County,

Court of Appeals
Case No. 10-CA-3339

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT THORNTON H. TAYLOR

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
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This cause presents a number of critical issues for individuals who are arrested in society, who are “innocent until proven guilty.” As well as those litigants who are incarcerated and pro se. Not to mention the fairness and security relied upon by all United States Citizens in our judicial system in an entirety.

- Is a clearly apparent Constitutional violation subject to statutory time lines or procedural niceties.
- Can the negligence of a Defendant's attorney be held against the convicted Defendant. And, used as cause or reason for not allowing the Defendant to litigate certain errs. When according to standing laws and practice, it is the attorney's final decision as to what issues or errs will be addressed while the Defendant is being represented by an attorney. And, it is the Defendant's Sixth Amendment Constitutional Right to be represented by “ competent or adequate ” representation.

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STATEMENTS OF CASE AND FACTS

In 2007, appellant was convicted of : Count 1; Illegal Manufacturing of Drugs in violation of R.C. 2925.04(A) and (C)(2); (2) Possession of Criminal Tools in violation of R.C. 2923.24(A) and (C); (3) Possession of Drugs (Crack Cocaine) in violation of R.C. 2925.11(A) and (C)(4)(B); (4) Having a Weapon while Under Disability in violation of R.C. 2925.03 (A) and (C)(4)(C); and (5) Drug Trafficking in the Vicinity of a School in violation of R.C. 2925.03(A)(1) and (C)(4)(D). Appellant received sentence of twelve and a half (12.5) years in prison. The Appeals Court affirmed that conviction. See State v. Taylor, Scioto App. No. 07CA3147, 2007-Ohio- 7174.

Appellant commenced the instant proceedings on April 4, 2008, with a motion to “Correct Sentence. “ Thereafter, Appellant filed a fury of other motions including one for a new trial, a “Franks Hearing “ and a request for findings of facts and conclusions of law. The prosecution responded with several memoranda contra.

On February 1, 2010, the trial Court overruled all of appellant's outstanding (eight) motions.

Most of the motions were overruled on the grounds they "should have been filed in his appeal" "As for the motions for New Trial and the motion for "Franks" hearing, the Court concluded that they were filed out of rule.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Trial Court abuses its discretion and errs when it overrules a Defendant's motion for leave to file a motion for a new trial stating the Defendant is outside time lines when there was information set forth as cause for being outside time limits pursuant to Criminal Rule 33(A) (6) and (B)

The Trial Court's overruling of a Motion For Leave To File a Motion For a New Trial is an abuse of discretion when there is information set forth as cause for being outside the statutory time lines provided by Criminal Rule 33 (A)(6)and (B). The term "abuse of discretion" connotes more than an error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary or capricious. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. The decision to grant or deny a motion for a new trial on the basis of newly discovered evidence is within the sound discretion of the trial court, and that decision will not be disturbed on appeal in the absence of an abuse of discretion.

State v. Hawkins (1993), 66 Ohio St.3d 339, 350 . The Criminal Rule 33 (B) statute provides :

Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

In the instant case the letter signed by the Honorable Judge Harcha after the one hundred-twenty(120) day time limit should have been more than enough to show by clear and convincing proof that the

Defendant-Appellant was unavoidably prevented from filing the Motion For A New Trial within the required time limits. The Courts being fully aware of the Defendant-Appellant not being in possession of the Trial Transcripts and the Trial Transcripts being needed in order to review and discover errors showed the Court's unreasonableness and lack of interest in wishing to further the cause of justice.

Proposition of Law No. II: The Trial Court erred by not properly reviewing the statutes and applying proper legal analysis to the proposed Motion For Leave To File For A New Trial

The Trial Court failed to do any legal analysis of its own. And, by failing to do so did not properly review the motions set before it under the right standards of law. The Defendant-Appellant placed before the Court statutes and case law which clearly and correctly presented the Court with the correct legal standards and statutes. In which the Defendant-Appellant stated that the Trial Court does have jurisdiction to answer and grant this requested motion. As provided under Criminal Rule 33(B), if a Defendant-Appellant fails to file a motion for a new trial based on newly discovered evidence within 120 days of the jury's verdict or court's decision, then he or she must seek leave from the trial court to file a "delayed motion." *State v. Willis*, 6th Dist. No. L-06-1244, 2007-Ohio-3959, ¶ 20. In the instant case the Defendant-Appellant has done just that, requested Leave of the Trial Court.

However, the Trial Court chose to disregard the proper standards of law and reviewed the motion set before the Court as a Post Conviction Relief Motion or Criminal Rule 33(A)(6) Motion. Just as the Prosecution put forth in their motion which opposed Defendant's Motions For New Trial and Leave to File Motion For New Trial. However, the time lines of Crim. R. 33 (B) are clearly set and not in any way related to or governed by the same time limits as the Post Conviction Relief Petition or Criminal Rule 33(A)(6) motion. Therefore, the Courts analysis of the Motion and Judgment to not allow the motion even though the Defendant-Appellant was clearly hindered beyond the 120 day time limit and the Courts clearly had prior knowledge of the Defendant-Appellant being hindered was harmful error. The Trial Court must review any titled motion under what it is titled and the proper statutes which govern that particular motion. It may not re-title or re-name a motion in order to review

filed motions under different legal statutes or standards.

Furthermore, the Defendant-Appellant would like to direct the court's attention to Ohio App. 3 Dist., 2006. State v. Ray, Not Reported in N.E.2d, 2006 WL 3055694 (Ohio App. 3 Dist.), 2006 -Ohio-5640 where the Courts in this case state” {¶ 57} Section 5(B), Article IV, of the Ohio Constitution prescribes in part: “The Supreme Court shall prescribe rules *governing* practice and *procedure* in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. * * * All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” (Emphasis added). And, {¶ 58} Crim.R. 33(B) is purely procedural in character. *State v. Straub* (June 17, 1983), 4th Dist. No. 912. It does not create, affect or alter the right to a new trial, but merely controls the timing of the motion for such. *Id.* Therefore, Crim.R.33(B) supersedes the conflicting provision contained in R.C. 2905.80. Thus, Ray's motion for a new trial was timely filed. The trial court's denial of said motion on the basis that it was filed out of rule was unreasonable.” The same goes for the instant case. The rules which govern Leave to File For A New Trial Crim. R. 33(B) supersedes any time limits stated in any and all other statutes when it comes to Leave to File For A New Trial.

Proposition of Law No. III : The Trial Court erred by not preparing a separate findings of facts and conclusions of as requested by the Defendant

The Trial Court erred by not preparing any findings of facts and conclusions of law. As requested by the defendant and pursuant to Civil Rule 52 which states in relevant part;

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58 or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.

In the instant case the Defendant-Appellant filed a motion requesting a separate findings of

facts and conclusions of law. However, has not been afforded one. The Defendant-Appellant would ask this Honorable Court to turn its attention to Ohio App. 3 Dist., 2009, Vanderhoff v. Vanderhoff, Slip Copy, 2009 WL 3720576 (Ohio App. 3 Dist.), 2009 -Ohio- 5907 where the Court stated; {¶ 12} “ Filing a Civ.R. 52 motion means the judgment is not final for purposes of appeal, pursuant to App.R.4 but that does not mean that it is not final for other purposes. The clear purpose of Civ.R. 52 is to provide the litigants and the appellate court with a record containing sufficient information concerning the facts and conclusions of law that formed the basis for the trial court's decision when that information is lacking in the original judgment.” Here, the trial court's judgment entry acted as a general judgment in favor of the prevailing party. The entry did not include any findings of fact separate from its conclusions of law. Defendant-Appellant timely filed a Civ.R. 52 motion, and is /was entitled to have the Trial Court comply with that request. The Defendant-Appellant is presenting a judgment entry that does not include separate findings of fact and conclusions of law, but that otherwise complies with R.C. 2502.02 and Civ.R. 54(B) and for all other purposes would be a final, appealable order but for the fact that a timely motion for findings of facts and conclusions of law pursuant to Civ.R. 52 was not filed and improperly denied. Because the Trial Court's failed to comply with Civ.R. 52 this is reversible error, and should be remanded for further proceedings, specifically for the purpose of “providing separate findings of fact and conclusions of law.” Id.; Mahlerwein v. Mahlerwein, 160 Ohio App.3d 564, 2005-Ohio-1835, 828 N.E.2d 153 at ¶ 22, citing In re Adoption of Gibson (1986), 23 Ohio St.3d 170, 172, 23 OBR 336, 492 N.E.2d 146. As well the trial court should vacate the prior judgment and re-enter the judgment complying with Civ.R. 52. As this Court has traditionally observed that “[w]hen a timely motion for findings of fact and conclusions of law has been filed in accordance with Civ.R. 52, the time period for filing a notice of appeal does not commence to run until the trial court files its findings of fact and conclusions of law.” Caudill v. Caudill (1991), 71 Ohio App.3d 564, 565, 594 N.E.2d 1096, citing Walker v. Doup (1988), 36 Ohio St.3d 229, 522 N.E.2d 1072. In Caudill, this court has reasoned that because the trial court's entry did

not include properly requested findings of fact and conclusions of law at the time it was filed, it was not a final, appealable order under R.C. 2505.02 and therefore this court did not have jurisdiction to consider the appeal. Caudill. Furthermore, The Eighth District Court of Appeals has reasoned that “[w]hen a trial court's judgment has been reversed and remanded solely for findings of fact and conclusions of law, it is incumbent upon the trial judge to vacate the previous judgment and re-enter the same as of the date of the filing of the findings of fact and conclusions of law. This procedure is followed to reserve to the parties their respective rights of appeal after such findings have been made.” (Citations omitted.) Kennedy v. Cleveland (1984), 16 Ohio App.3d 399, 401, 16 OBR 469, 476 N.E.2d 683. The Kennedy court further reasoned that “[f]indings of fact and conclusions of law do not constitute a final judgment. Cf. Victor Mortgage Co. v. Arnoff (C.P.1952), 67 Ohio Law Abs. 459, 120 N.E.2d 615; see Civ.R. 52 and 54. Thus, if the trial court does not re-enter its judgment when it files these findings and conclusions, there is no final judgment. See Civ.R. 54.” Kennedy at 401, 16 OBR 469, 476 N.E.2d 683.

Proposition of Law No. IV: The Trial Court erred by deciding rather to grant or deny Defendant's Motion For Leave To File For A New Trial based on a claimed procedural deficiency rather than on the merits of the error presented.

he Trial Court erred by deciding rather to grant or deny Defendant-Appellant's Motion For Leave To File For A New Trial base on a claimed procedural deficiency rather than on the merits of the errors presented. Civ. R. Rule 1 (B): Construction

These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

Courts in Ohio may adopt local rules as long as those rules are not inconsistent with any rules governing practice and procedure that the Supreme Court of Ohio promulgates. Section 5, Article IV of the Ohio Constitution; Civ.R. 83; Ohio Furniture Co. v. Mindala (1986), 22 Ohio St.3d 99, 22 OBR 133, 488 N.E.2d 881; Capital One v. Burkey, 11th Dist. No. 2008-L-084, 2008-Ohio-5944, 2008 WL

4901741, ¶ 14. The enforcement of local court rules is well within the sound discretion of the court, including the power to strike a brief that does not comply with those rules. Capital One at ¶ 15-16; . Furthermore, the Supreme Court of Ohio has previously and consistently encouraged courts to resolve cases on their merit rather than upon procedural technicalities or niceties. Doerman v. Doerman, 12th Dist. No. CA2001-03-071, 2002-Ohio-3165, 2002 WL 1358792, ¶ 22

The Defendant-Appellant clearly and properly presented the Trial Court with an error. This error substantially effected the Defendant-Appellant's rights and in the interest of justice should have been addressed. The Trial Court disregarded the Defendant-Appellant's Constitutional Right to have the State prove beyond a reasonable doubt each essential element of the crime charged this error should be noticed even under the Criminal Rule 52 standard.

(B) Plain error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

In the Illegal Manufacturing of Drugs charge the prosecution failed to prove there was in fact any amount of controlled substance in the microwave used as the basis of the charge itself. Count 1: Illegal Manufacturing of drugs 2925.04(A)(C)(2): The microwave used in the illegal manufacture of drugs charge does not add to the record essential facts needed to convict Defendant-Appellant of charge. As stated in *State v. Davis* 2007 WL4696960,2007, Ohio App. 7 Dist. Dec.18,2007 (No.05 MA 235) R.C. 2925.51(A) provides that chemical test reports shall be prima facia evidence of the "content, identity and weight" of controlled substances under the following conditions: (A) In any prosecution for a violation of this chapter or chapter 3719 of the Revised Code, a laboratory report from the Bureau of Criminal Identification and Investigation, a laboratory established by or under the authority of an institution of higher education that has its main campus in this state and that is accredited by the association of American Universities or the North Central Association of Colleges and secondary schools, primarily for the purpose of providing scientific services to law enforcement agencies and

signed by the person performing the analysis, stating that the substance that is the basis of the alleged offense has been weighed and analyzed and stating the finding as to the content, weight and identity of the substance and that it contains any amount of a controlled substance and the number and description of unit dosages of the substance. "(Emphasis added) In the instant case Identity and weight of evidence are not in record. Without those essential facts the record does not contain sufficient evidence to convict Defendant. In *State v. Davis* the laboratory technicians were not present. In the instant case they were present. And when questioned on Tr.p. 338 L.18 to 20, Ms. Reed stated she didn't know where the substances were taken from. The Defendant-Appellant would further like it noted at no time after that was she questioned directly about the microwave. The State used the testimony of Det. Todd Bryant to establish the elements they wanted on record where the microwave and illegal manufacture of drugs are concerned. Det. Bryant's testimony on the microwave started on pg. 160 of transcript and went on for quite sometime. He stated on pg. 161 lines 22-33 that the field test was presumptive. And, "that means it's possibly cocaine or crack cocaine." Then went on to say that it still would need to be tested by B.C.I. And I. On page 162 lines 10-17, Det. Bryant stated item number 2 on the inventory list and item number 5 on B.C.I. And I submission form were the residue he scraped from inside of microwave and attempted to photograph. However, upon reviewing this B.C.I & I form, the Defendant has found that "the clear bag containing an off-white substance" (item number 5) was not tested by the technician, Ms. Reed. On page 193, Det. Todd Bryant states he chose not to submit the microwave for testing. The Defendant would like to turn the courts attention to Evidence Rule 901 Requirement of authentication or identification. Chain of custody is a part of the authentication or identification mandate of Evid.R.901. The State need only establish that it is reasonably certain that substitution, alteration, or tampering did not occur. *State v. Brown*, 107 Ohio App. 3D, 194,668, N.E. 2D 514 (1995). In the instant case there was for certain substitution as Det. Bryant testified to scraping and submitting residue from microwave. Not the submitting the microwave itself, as he should have. Violating Evid. R. 901. In response to the State using Det. Bryant's testimony to establish their case.

The Defendant -Appellant would like to turn the courts attention to the statue governing laboratory testing R.C.2925.51. This statue specifies what is “prima facia evidence of the content, identity and weight” of substance. And further specifies conditions for introducing such evidence. As well as specifies what labs are acceptable to provide such reports. These statutory conditions were not satisfied in the instant case. This statue does not recognize the reliability or admissibility of a field test for purposes of introducing prima facia evidence. Nor did Det. Bryant properly establish his credentials for this purpose. Without any evidence establishing the reliability of the field test or any law to confirm that an Officer's field test is sufficient proof the substance was indeed crack cocaine, the state failed to prove an essential element of the charge, that the residue or substance found was a controlled substance . Defendant must be acquitted. State v. Adkisson. Not reported in N.E. 2D, 2003 WL 11468881(Ohio App. 8 Dist.)2003 Ohio-3322.

Proposition of Law No. V:The Trial Court erred by deciding rather to grant or deny Defendant's Motion To Correct Sentence based on a claimed procedural deficiency rather than on the merits of errors presented.

The Supreme Court of Ohio Has previously held in a number of cases that wherever possible courts should decide cases upon there merits and not upon procedural niceties. The Defendant-Appellant filed A Motion to Correct Sentence in which motion the Defendant-Appellant put forth the following errors for review. These errors substantially effect the rights afforded the Defendant by the United States and Ohio Constitutions. These errors should have been noticed even under the Crim. Rule 52 statute.

- The Defendant-Appellant properly placed before the court R.C. 2945.75(A)(2) which directs that a “guilty verdict constitutes a finding of guilt of the least degree of the offense charged.”

This mandate was first brought to the Scioto County Court of Common Pleas , Judge H. Harcha III before the jury verdict forms were turned over to the jury. Ms. Hutchinson, Assistant Prosecutor, brought the “requirement” to the attention of the court.(Tr.p. 360 L. 19-20).

The Appellant later found State v. Pelfrey 112 Ohio St. 3d 422, 860 N.E. 735, 2007 Ohio 256,

February 7, 2007 No. 2005-2075, 2005-2211, 3069 Case Certified pursuant to section 3(B)(4), Article IV, Ohio Constitution and App. R. 25 where accepting jurisdiction over discretionary appeal the Supreme Court, Chief Justice Moyer C.J., held "A verdict form signed by a jury must include either the degree of the offense of which the Defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater offense.

"Whether the trial court is required as a matter of law to include in the jury verdict form either the degree of the offense of which the defendant is convicted or to state that the aggravating element has been found by the jury when the verdict incorporates the language of the indictment, the evidence overwhelmingly shows the presence of the aggravating element, the jury verdict form incorporates the indictment and the defendant never raised the inadequacy of the jury verdict form at trial. " The answer is yes none of these cures the defect.

In the instant case the State proposed to the Trial Court that the weight or amount of drugs found in the trafficking and possession charges of this case are the "aggravating element" that has been found to justify convicting the Defendant-Appellant of a greater degree of the offense. However, this is not so, the amount of drugs are merely an element of the offense not an aggravating element to enhance the amount of time allowed the offense or justify giving the Defendant-Appellant more time. As well the evidence overwhelmingly showing the presence of the aggravating elements does not cure the defect, as stated above.

As well even if this court agrees with the State there are still three (3) other counts that are not covered by that argument. These should be dropped to the lowest degree of the offense as directed in this rule.

Second error presented in Motion to Correct Sentence, the Trial Court improperly punished the Defendant for exercising his Constitutional Right to trial. This violates the Defendant's Constitutional Rights. This shows an abuse of discretion. Beyond question, any increase in sentence that is based upon the Defendants' decision to exercise his constitutional right to a jury

trial and to put the State to its burden to prove each essential element rather than pleading guilty is improper. *State v. Morris*, 159 Ohio App. 3D 775, 2005-Ohio-962. Defendant-Appellant relies on *State v. Brewer* (April 26, 1983), Montgomery App. No. 7870, wherein this court, quoting from the syllabus in *Columbus v. Bee* (1979), 67 Ohio App. 2D 65, stated: Once it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence had been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty and must affirmatively show that the court sentenced Defendant-Appellant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. *State v. Dawson* 2007 W.L. 2812966, 2006-Ohio-5172, Ohio App. 2 Dist., September 28, 2007 (No.21768). Just as in *Brewer*, supra the trial court failed to explain why *Brewer's* sentence was harsher than that of his co-defendant who accepted the plea offer. Defendant in instant case would like two things noted. One; the co-defendant (Robert Harris plea agreement) Co-defendant(Robert Harris) has not been incarcerated. He was sentenced to Rehabilitation and probation with a suspended prison term on the shelf if he violates community control. And two; The Defendant in instant case was taken to final pretrial on or about 3-9-07. At which time the court stated on record a stated plea agreement for 3 years if Defendant-Appellant plead guilty that day. This would serve as proof of the courts involvement in plea negotiations. However, after trial the court sentenced Defendant to 13 ½ years with one year to be served concurrently. For stated term of 12 ½ years. The Defendant was clearly punished for going to trial and exercising his constitutional right.

Proposition of Law No. VI:The Trial Court erred and improperly denied the Defendant's Request For a Franks Hearing.

The Defendant-Appellant placed before the Trial Court a request for a "Franks Hearing" under *Franks v. Delaware* 438 U.S. 154, 98 S.Ct. 2674, 57 L. Ed. 2d 667(1978). *State v. Parr, Williams* App. No. WM-07-007, 2008-Ohio-979, describes a *Franks* hearing as an evidentiary hearing " '[w]here the

defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.' This standard was adopted by the Ohio Supreme Court in State v. Roberts (1980), 62 Ohio St.2d 170, 177, 405 N.E.2d 247 ." *Parr* at ¶ 15, quoting *Franks* at 155-156. As stated by the courts in *State v. MC Knight, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005 -Ohio- 6046* " To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.' " *State v. Waddy (1992), 63 Ohio St.3d 424, 441, 588 N.E.2d 819,* quoting *Franks v. Delaware (1978), 438 U.S. 154, 155-156, 98 S.Ct. 2674, 57 L. Ed.2d 667.* "Reckless disregard" means that the affiant had serious doubts about the truth of an allegation. *United States v. Williams (C.A.7, 1984), 737 F.2d 594, 602.* Omissions count as a false statement if "designed to mislead, or *106 * * * made in reckless disregard of whether they would mislead, the magistrate." (Emphasis deleted.) *United States v. Shockley (C.A.4, 1990), 899 F.2d 297, 301.*

In the instant case, The Defendant-Appellant used the Trial Transcripts and the testimony of Det. Steven Timberlake to prove false entries made in the Affidavit For Search Warrant (see Defendant's Request For Franks Hearing). However, Det. Timberlake had provided all information related to Robert Harris and his residence. Which were given to the Affiant Det. Todd Bryant and later used to obtain the Search Warrant for 1221 Franklin Ave.

First, there was an entry Det. Timberlake relayed that there had been three (3) bags of crack-cocaine found "in an area near where Thornton Taylor had been arrested." Giving the misleading illusion that the anonymous tip called in that morning had been checked out and reliable. However, in trial the Detective stated that this was incorrect. That Thornton Taylor had been arrested east of the home and the drugs had been found south of the home a distance of over 30 feet and approximately 45

min. after the arrest took place, " while he was looking or searching around the cartilage of the home." This violates the rights of the Defendant-Appellant and all others involved or present at time of search. As this evidence was misleading to the issuing Judge, and obtained against the rights afforded each residence of the United States. Not to mention the fact that this statement being in the Affidavit For Search Warrant and part of the Probable Cause to issue Search Warrant is incorrect in and of itself. As it is being used retroactively. The Detective had already entered and cleared out the residence. For purposes of the Fourth Amendment the search or seizure had already began. And, this information attempts to justify or give cause for intrusion. When in reality had it not been for the illegal intrusion the drugs would not have been there. Robert Harris testified to throwing drugs in the driveway after being removed from residence.

Second, the entry where Det. Timberlake relayed that the driver stated that she had seen the Defendant-Appellant in the Kitchen of the residence with a golf ball size piece of crack-cocaine. This entry is also used retroactively as the Detective stated during trial that he had no contact with the driver of the vehicle before entering and clearing the home. Therefore this should not be part of the probable cause or Affidavit For Search Warrant. As stated above the omission of any facts with the intent to mislead the Judge or Magistrate are considered false statements. Det. Timberlake stated he and Det. Brewer first seen A. Salsgiver (driver of vehicle) north of the residence coming out of an alley. Therefore, there was no reason to believe she had any knowledge of what was going on inside of home. Or, that her word was in anyway reliable. However the wording of the Affidavit For Search Warrant leads the Judge to believe that the driver was with the Defendant-Appellant and would have firsthand knowledge of his activities.

Third, another entry in the Affidavit For Search Warrant relayed by Det. Timberlake that was incorrect was that Thornton Taylor was selling drugs out of Robert Harris' house located at 1722 17th Street. This error is one of two great errors because one: that residence does not belong to Robert Harris nor was it under Robert's control: two, because with the police being involved in a number of

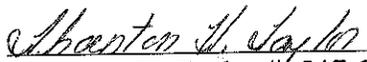
searches at that address due to Mrs. Taylor's being on Post Release Control. This was not a mistake and the entry a misleading statement. It would appear that Robert Harris and Thornton Taylor were partners in a number of on-going illegal ventures.

Although, Det. Timberlake was not the Affiant himself the concept is the same as

CONCLUSION

In conclusion the Defendant-Appellant would ask this Honorable Court to either reverse and remand this case with instructions or to decide this case upon the merits of the errors properly set before it. As in the interest of justice this is fitting.

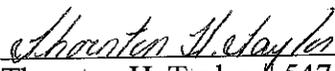
Respectfully submitted,


Thornton H. Taylor # 547-142
11781 State Route 762
P.O. Box 209
Orient, Ohio 43146

CERTIFICATE OF SERVICE

I, Thornton H. Taylor, hereby certify that a true and accurate copy of the foregoing has been sent to the Scioto County Prosecutor's Office at 602 Seventh Street, Portsmouth, Ohio 45662. By regular U.S. Mail on the 9 day of February 2010. 2011

Respectfully submitted,


Thornton H. Taylor # 547-142

THE COURT OF APPEALS OF OHIO

SCIOTO COUNTY

OHIO

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

FILED

2010 DEC 28 AM 10 32

Lisa D. White
CLERK OF COURTS

STATE OF OHIO, :
 Plaintiff-Appellee, : Case No. 10CA5339
 vs. :
 THORNTON TAYLOR, : DECISION AND JUDGMENT ENTRY
 Defendant-Appellant. :

APPEARANCES:

APPELLANT PRO SE: Thornton H. Taylor, 11781 State Route 762, P.O. Box 209, Orient, Ohio, 43146,

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Julie Cooke Hutchinson, Scioto County Assistant Prosecuting Attorney, 602 Seventh Street, Room 310, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Scioto County Common Pleas Court judgment that overruled a number of motions filed by Thornton, Taylor, defendant below and appellant herein. The following errors are assigned for our review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED IS [sic] DISCRETION AND ERRED IN OVERRULING DEFENDANT'S MOTION FOR LEAVE TO FILE A MOTION FOR A NEW TRIAL WHEN THERE WAS INFORMATION SET FORTH AS CAUSE FOR BEING OUTSIDE TIME LIMITS."

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SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY NOT PROPERLY REVIEWING THE STATUTES AND APPLYING PROPER LEGAL ANALYSIS TO THE PROPOSED MOTION FOR LEAVE TO FILE FOR A NEW TRIAL."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY NOT PREPARING A SEPARATE FINDINGS OF FACTS AND CONCLUSIONS OF LAW AS REQUESTED BY THE DEFENDANT."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY DECIDING RATHER TO GRANT OR DENY DEFENDANTS' [sic] MOTION FOR LEAVE TO FILE FOR A NEW TRIAL BASED ON A CLAIMED PROCEDURAL DEFICIENCY RATHER THAN ON THE MERITS OF THE ERRORS PRESENTED."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY DECIDING RATHER TO GRANT OR DENY DEFENDANTS' [sic] MOTION TO CORRECT SENTENCE BASED ON A CLAIMED PROCEDURAL DEFICIENCY RATHER THAN ON THE MERITS OF THE ERRORS PRESENTED."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND IMPROPERLY DENIED THE DEFENDANT'S REQUEST FOR A FRANKS HEARING."

In 2007, appellant was convicted of: (1) illegal manufacture of drugs in violation of R.C. 2925.04(A)&(C); (2) possession of criminal tools in violation of R.C. 2923.24(A) & (C); (3) possession of drugs (crack) in violation of R.C. 2925.11(A) & (C) (4) (b); (4) having a weapon while under a disability in violation of R.C. 2925.03(A)&(C) (4) (c); and (5) drug trafficking in the vicinity of a school in violation of R.C.

2925.03(A)(1)&(C)(4)(d). Appellant received sentence of twelve and a half (12½) years in prison. We affirmed his conviction. See State v. Thornton, Scioto App. No. 07CA3147, 2007-Ohio-7174.

Appellant commenced the instant proceedings on April 4, 2008, with a motion to "correct sentence." Thereafter, appellant filed a a flurry of other motions including one for a new trial, a "Franks Hearing" and a request for findings of fact and conclusions of law. The prosecution responded with several memoranda contra.

On February 1, 2010, the trial court overruled all of appellant's outstanding (eight) motions. Most of the motions were overruled on grounds they "should have been filed in his appeal." As for the motions for new trial and "Franks" hearing, the court concluded that they were filed out of rule. This appeal followed.

I

We jointly consider appellant's first, second and fourth assignments of error because they challenge the trial court's denial of his motion for leave to file a motion for new trial. As noted previously, appellant's motion for new trial is based on the existence of "newly discovered evidence." See Crim.R. 33(A)(6). The Rules of Criminal Procedure require that such a motion be filed within one hundred and twenty days after the jury verdict. Id. at (B). Appellant was convicted in March 2007.

Appellant, however, did not file a motion for new trial until June 16, 2009. Ten days later, he filed a motion for leave. Clearly, appellant filed his motion beyond the rule's deadline.

We recognize that a motion may be filed out of rule if, by clear and convincing proof, a movant shows that he was unavoidably prevented from discovering the new evidence within that time frame. *Id.* Furthermore, the decision to grant leave to file a motion for new trial out of rule rests in the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. State v. Pinkerman (1993), 88 Ohio App.3d 158, 160, 623 N.E.2d 643; State v. Golden, Franklin App. No. 09AP-1004, 2010-Ohio- 4438, at ¶11; State v. Franklin, Mahoning App. No. 09 MA 96, 2010-Ohio-4317, at ¶15. The phrase "abuse of discretion" means more than an error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. See State v. Herring (2002), 94 Ohio St.3d 246, 255, 762 N.E.2d 940; State v. Clark (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331. In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. See State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254; In re Jane Doe 1 (1991). 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181.

A review of appellant's motion reveals that appellant did not argue the existence of "newly discovered" evidence but, rather, put forth a different argument on evidence that already existed and was introduced at trial. Appellant argues, albeit without any proof of his own, that the prosecution improperly tested drug residue that was used against him. Even if we assume arguendo that this may be true, that particular evidence existed at the time of the trial and is not "newly discovered." Further, although appellant claims that he could not discover this "new evidence" until he received a copy of the trial transcript, both he and defense counsel were present at trial to hear the testimony.

Simply put, appellant did not establish either the existence of newly discovered evidence nor a convincing argument that he had been unable to discover any flaw in the analysis of evidence introduced at trial. Therefore, we find no abuse of discretion in the trial court's judgment to deny him leave to file a new trial motion out of rule. Accordingly, we overrule appellant's first, second and fourth assignments of error.

II

Appellant asserts in his third assignment of error that the trial court erred by overruling his Civ.R. 52 request for findings of fact and conclusions that he filed in anticipation of the court's ruling on his various motions.

Many courts have long held that Civ.R. 52 does not apply to criminal cases. Also, no comparable criminal rule applies to criminal cases. See State v. Collins (Sep. 22, 1995), Athens App. No. 94CA1639; State v. Weakland (Oct. 17, 1974), Cuyahoga App. Nos. 33116 & 3354. Thus, the court did not err by overruling appellant's request and we overrule appellant's third assignment of error.

III

Appellant's fifth assignment of error asserts that the trial court erred by overruling his motion "to correct" (reduce) his sentence. Once again, we disagree.

The two bases appellant asserts for the reduction are (1) because the verdicts failed to set out the degree of the defense he could only be sentenced to the least degree of the offense pursuant to State v. Pelfrey, 112 Ohio St.3d 422, 2007- Ohio-256, 860 N.E.2d 735, at the syllabus, and (2) the "reformed [federal sentencing] guidelines . . . [s]ubstantially reduced" his sentence pursuant to Kimbrough v. United States (2007), 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481.

Pelfrey was decided on February 7, 2007. This predates appellant's final judgment of sentence (March 23, 2007). Moreover, even if it had not, the Ohio Supreme Court made it clear that its decision did not make "new" law, but simply applied R.C. 2945.75 as the Ohio General Assembly had expressly

written it. Any failure of the jury verdicts to comply with the statute, or any reduction of sentence pursuant to Pelfrey, should have been raised on direct appeal. The issue is now barred from being considered at this late date. See e.g. State v. Turrentine, Allen App. No. 1-10-40, 2010-Ohio-4826, at ¶9; State v. Goldick, Montgomery App. No. 23690, 2010-Ohio-4394, at ¶24; State v. Hill, Washington App. No. 06CA63, 2007-Ohio-5360, at ¶5.

As for appellant's reliance on Kimbrough, we believe that he has misinterpreted the issue. The Kimbrough trial judge departed from federal guidelines that imposed harsher sentences for crack-cocaine than powder-cocaine. The Fourth Circuit vacated the sentence, but was subsequently reversed by the United States Supreme Court. Although the Court discussed the controversy surrounding the decision to impose higher penalties for crack rather than the powder, the Court ruled, based on United States v. Booker (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, that federal sentencing guidelines were advisory only and the federal district court did not err in departing from them. 552 U.S. at 110-11.

Whatever reliance appellant places on dicta from that case, we believe that his reliance is misguided. Kimbrough simply does not affect his sentences in the case sub judice. As noted by our Ninth District colleagues, Kimbrough neither vacated the federal sentencing guidelines nor did it create any new state or federal

rights. State v. Smith, 180 Ohio App.3d 684, 906 N.E.2d 1191, 2009-Ohio- 335 at ¶¶11-13; State v. Horne, Summit App. No. 24271, 2008-Ohio- 6932, at ¶10. The Sixth District has come to the same conclusion. See State v. Jackson, Lucas App. No. L-08-1098, 2008-Ohio-3700, at ¶¶10-11. This comports with our reading of the case as well, and we thus conclude that Kimbrough provides no authority for reducing appellant's sentence.

Furthermore, even though Kimbrough was decided after appellant's conviction and sentence, the issue of disparity in sentencing between crack and powder cocaine has been argued for quite some time. Appellant could, but did not, raise this issue on direct appeal. For all these reasons, we overrule appellant's fifth assignment of error.

IV

In his sixth assignment of error, appellant asserts that the trial court erred by denying him a hearing pursuant to Franks v. Delaware (1978) 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667. This argument is also devoid of merit.

The gist of Franks is that if a credible challenge is made to the veracity of an affidavit used to secure a search warrant, a hearing must be afforded the defendant to allow him to proffer evidence to show that the information in the affidavits were intentionally or recklessly false. Nothing the Supreme Court's decision, however, suggests that a "Franks Hearing" can be held

anytime, let alone years after conviction and affirmance on appeal. Indeed, a "Franks Hearing" is typically conducted in conjunction with a motion to suppress evidence. See e.g. State v. Roberts (1980), 62 Ohio St.2d 170, 177, 405 N.E.2d 247; also see e.g. State v. Gales (2001), 143 Ohio App.3d 55, 60, 757 N.E.2d 390; State v. Harrington, Hamilton App. Nos. C-0800547 & C-0800548, 209-Ohio-5576 at ¶¶6-10. A motion to suppress evidence must be made prior to trial. See Crim.R. 12(C)(3). A trial court may not re-open proceedings years after a conviction to hold a hearing of this sort. Moreover, for the same reasons as noted earlier, any attempt to challenge the issue of the veracity of a search warrant affidavit is also barred by the doctrine of res judicata. Thus, the trial court correctly denied appellant's motion. Therefore, we hereby overrule appellant's sixth assignment of error.

Having considered all the errors appellant assigned and argued in his brief, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court


BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.