

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 REPLY BRIEF

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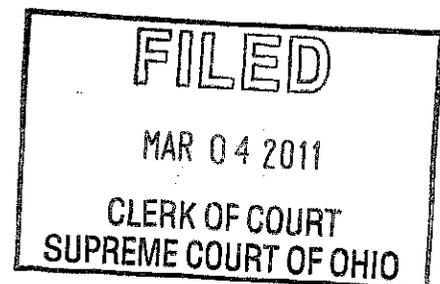


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STATEMENT OF THE CASE AND OF THE FACTS

Thomas Everette relies upon the statement of the case and of the facts contained in his merit brief.

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. However, the appropriate triggering event for the 180-day postconviction petition deadline is not the filing of videotapes, but the filing of the written transcript of those proceedings.

In the present case, that written transcript was filed on October 15, 2009. As a result, Mr. Everette'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.

The State has raised several issues in its brief. Those issues will be addressed below. Mr. Everette relies upon the arguments contained in his merit brief, in addition to the following.

The State's Argument.

The State's argument contains two separate, major flaws. First, the State's interpretation of App.R. 9 is incorrect. Second, the text of R.C. 2953.21 must be given its plain meaning, independent of App.R. 9 as an issue of substantive law, in controlling the triggering event for the 180-day deadline for filing a postconviction petition.

1. Reading Appellate Rule 9 as a Whole.

The State has argued that App.R. 9 must be read as a whole, and that Mr. Everette has failed to do so. (January 31, 2011 Appellee's Merit Brief, pp. 5-6). The State is correct with regard to its first proposition. However, the State is wrong with regard to which reading of App.R. 9 considers the rule as a whole. The State adopted the court of appeals' strained interpretation of the critical section of App.R. 9 in its merit brief. (January 31, 2011 Appellee's Merit Brief, pp. 5-6). For the purpose of analysis, it is helpful to break the relevant portion of App.R. 9(A) into enumerated sentences:

Sentence One: 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.

Sentence Two: 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.

Sentence Three: Proceedings recorded by means other than videotape must be transcribed into written form.

Sentence Four: 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.

The court of appeals stated that Sentence Two "explicitly states that a videotape recording of the trial proceedings constitutes the transcript of proceedings...." And the court of appeals stated that Sentence Three requires that "proceedings recorded by means other than videotape must be reduced to written form." (January 31, 2011 Appellee's Merit Brief, p. 5 quoting *State v. Everette*, 2nd Dist. No. 23585, 2010-Ohio-2832, ¶22-23). But contrary to the plain meaning of Sentence Two, Sentence Four, and the rule as a whole, the court of appeals

reasoned 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. Put simply, the court of appeals held that “shall” does not mean shall.

It is the court of appeals, not Mr. Everette, that has failed to read the rule as a whole. The court of appeals’ interpretation is not supported by the language of App.R. 9(A). And that interpretation must fail, as it is an unreasonable reading of Sentence Two’s “other than hereinafter provided” language, ignores Sentence Four’s unqualified mandate that when a written transcript is certified by the court reporter it “shall then constitute the transcript of proceedings.” and produces unreasonable results, as illustrated by the following chart.

	Correct Reading	State’s Reading
Videotape	May constitute the transcript on direct appeal.	Shall always constitute the transcript on direct appeal.
Non-Videotape	May never constitute the transcript on direct appeal.	May never constitute the transcript on direct appeal.
Certified Written Transcript	Shall always constitute the transcript on direct appeal.	May constitute the transcript on direct appeal but only if produced from a non-videotape recording and only if videotapes are not filed.

Under the State's reading of App.R. 9, even videotapes filed after a certified, written transcript has been filed would supplant that written transcript. Such a result is incompatible with an appropriate reading of App.R. 9. Appellate Rule 9 does allow for videotapes to comprise the transcript of proceedings, for purposes of filing on direct appeal, but only when a written transcript is not produced. And when a certified, written transcript is produced, it shall constitute the transcript of proceedings. In the present case, a written transcript was filed, and Mr. Everette's postconviction petition was filed within 180 days after the filing of that certified, written transcript.

2. Statutes v. Rules: When Substantive Law is at Issue.

Appellate Rule 9 concerns the record on direct appeal. Ohio Revised Code Section 2953.21 concerns postconviction petitions and does not address the use of videotapes, in lieu of written transcripts, as the triggering event for the 180-day deadline for filing postconviction petitions.

The State's Claim of Waiver: Incorrect for Three Reasons.

The State has claimed that the discussion of the relationship between statutes and rules contained in Mr. Everette's merit brief should not be considered by this Court because it was not raised in Mr. Everette's direct appeal. (January 31, 2011 Appellee's Merit Brief, p. 6). The State is incorrect for three reasons. First, the State cited *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, paragraph two of the syllabus, for its assertion. But the State has not accurately quoted this Court's syllabus in *Reasonover*:

State's Quotation: "This Court will not ordinarily consider a claim of error which was not raised and was not considered or decided by [the court of appeals]." (January 31, 2011 Appellee's Merit Brief, p. 7) (Bracketed language provided by the State.)

Complete Quotation: The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court. (Section 2505.21, Revised Code, construed and applied.) *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, paragraph two of the syllabus. (Emphasis added.)

In addition to omitting the "in any way" language from this Court's syllabus, the State also failed to address the fact that in *Reasonover*, this Court was concerned with an entirely new legal proposition. That proposition was based upon the intervening United States Supreme Court decision in *Griffin v. California* (1965), 380 U.S. 609, and was in no way "made in the court of appeals or in this Court in support of the cross-motion to certify of defendant which was argued before this court on June 10, 1965, and subsequently overruled. The question was never raised in this Court until a brief was filed by defendant on November 10, 1965, only seven days before this case was set for argument and argued on the merits." *Reasonover*, at 25. *Reasonover* presented this Court with a situation far different from that of the present case.

Second, the discussion that the State claimed that this Court should ignore was born of the court of appeals' analysis in Mr. Everette's direct appeal.¹ In the present case, the court of

¹ "R.C. 2953.21 does not define the phrase 'trial transcript.' See *State v. Hollingsworth*, 118 Ohio St.3d 1204, 2008-Ohio-1967, P2, 886 N.E.2d 863 (Moyer, C.J., concurring in dismissal). However, App.R. 9(A) defines the 'record on appeal,' which includes the 'transcript of proceedings, if any.'" "In 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 P2. See, also, *State v. Villa*, 9th Dist. No. 08CA9484, 2009-Ohio-5055." *Everette*, at ¶22 and footnote one.

appeals held that the 180-day deadline for filing a postconviction petition, contained in R.C. 2953.21(A)(2), is controlled by the language of App.R. 9. And in doing so, the court of appeals paradoxically relied upon the concurring analysis in *Hollingsworth*. But *Hollingsworth* explained that the plain words of R.C. 2953.21(A)(2), which provide that the limitations period begins when the trial transcript is filed, were controlling with regard to the issue before this Court. The *Hollingsworth* concurrence reasoned that a provision of App.R. 9, describing the record on appeal as including the transcript, could not be used to modify the plain language R.C. 2953.21(A)(2). Yet that is what the court of appeals allowed in the present case. And that is what the State has asked this Court to endorse.

The analysis contained in Mr. Everette's memorandum in support of jurisdiction and merit brief, addressing the means by which conflicts between the Ohio Revised Code and rules of practice are resolved, was necessitated by the court of appeals' opinion. Furthermore, it is not a new "claim of error that was not raised in any way in the court of appeals," but one of many facets of the single Proposition of Law presently before this Court.

Finally, the State's claim of waiver rings hollow in light of its own waiver of the opportunity to respond to Mr. Everette's jurisdictional memorandum, which contained the analysis the State now asks this Court to ignore. (August 16, 2010 Waiver of Memorandum in Response).

Ohio Revised Code 2953.21 v. Appellate Rule 9.

The State initially conceded that Mr. Everette is "technically correct" in concluding that "App.R. 9 may not be construed to alter the triggering event for the 180-day deadline for filing a petition for postconviction relief as stated in R.C. 2953.21(A)(2)." (January 31, 2011 Appellee's Merit Brief, p. 6). But the State then argued that the statute and the rule are not in conflict

because “nothing within the language of App.R. 9 [] can in any way be construed as abridging, enlarging, modifying, or otherwise altering the 180-day filing deadline set out in R.C. 2953.21.” (January 31, 2011 Appellee’s Merit Brief, p. 7).

The State has failed to consider the facts of the present case. If the State’s position is endorsed by this Court, Mr. Everette’s postconviction petition was untimely filed. If this Court holds in favor of Mr. Everette, his petition was timely. Yet, the State has claimed that App.R. 9 cannot, in any way, be construed as modifying or otherwise altering the 180-day filing deadline set out in R.C. 2953.21. (January 31, 2011 Appellee’s Merit Brief, p. 7).

The State’s strained interpretation of App.R. 9, as described above, claims that videotapes filed in a direct appeal always constitute the transcript of proceedings, even after a certified, written transcript is also filed. According to the State’s reasoning, those videotapes, by way of App.R. 9, then fall within the statutory term “trial transcript,” and control the 180-day deadline contained in R.C. 2953.21. In other words, the State has argued that its interpretation of a rule of practice commands a statute with regard to the time for filing a civil action. That proposition is incompatible with this Court’s recent decision in *Erwin v. Bryan*, Slip Opinion No. 2010-Ohio-2202, as explained in Mr. Everette’s merit brief, and with the analysis contained in the concurring opinion in *Hollingsworth*.

Conflict Resolution.

The State has recognized that postconviction petitions are civil in nature. (January 31, 2011 Appellee’s Merit Brief, p. 3). And the State has acknowledged this Court’s recent holding in *Erwin*, in which this Court stated that if a rule of practice conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law. *Erwin*, at ¶28. (January 31, 2011 Appellee’s Merit Brief, p. 6).

This Court also explained in *Erwin* 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. In the present case, the State stopped short of acknowledging that the 180-day deadline for filing a postconviction petition, which is a civil action, is a statute of limitations, and therefore a matter of substantive law under *Erwin*. The State appears to have assumed as much, arguendo, claiming that the issue was waived, and that it is irrelevant because R.C. 2953.21 is not in conflict with App.R. 9. (January 31, 2011 Appellee’s Merit Brief, pp. 6-7). As explained in Mr. Everette’s Merit Brief and herein, the State is wrong on both counts.

The Plain Meaning of Ohio Revised Code 2953.21(A)(2): Legislative Intent.

The term “transcript” is not defined in R.C. 2953.21. The State has argued that this Court need not engage in any analysis of R.C. 2953.21 in order to determine the General Assembly’s intent with regard to what triggers the 180-day deadline for filing a postconviction petition. Because this Court, by way of App.R. 9, has defined the term “transcript” for purposes of R.C. 2953.21. (January 31, 2011 Appellee’s Merit Brief, p. 7). The State has ignored the goal of statutory interpretation, that of determining legislative intent, and has asked this Court to look to a judicially promulgated rule of practice to define the plain meaning of a statutory term.

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. Pub. Emp. Retirement 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 Cty. Bd. of Commrs v. Akron, 109 Ohio St.3d 106, 2006-Ohio-954, ¶52. Yet the State has asked this Court to ignore the plain meaning of the language contained in R.C. 2953.21, and look to this Court's rules of practice in order to expand that statute. (January 31, 2011 Appellate's Merit Brief, p. 7).

The State's request must be denied because statutory language must be given its plain meaning. This Court has looked to common, widely accepted definitions in order to demonstrate the meaning of statutory terms, explaining 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.

Mr. Everette's merit brief contains several legal and traditional dictionary definitions of the term "transcript." According to those definitions, a videotape is not a transcript. Closer examination of the term emphasizes the appropriateness of that conclusion. The prefix "trans" references a change or transfer. While "script" refers to a document, and its Latin root, scribere, means "to write." Webster's II New College Dictionary (1995) 992, 1169.

The plain meaning and common usage of the term dictate that 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 General Assembly intended the 180-day deadline for filing a postconviction petition to begin with the filing of that written transcript.

Public Policy.

The State has responded to Mr. Everette's discussion of public policy concerns by initially asserting that that this Court should ignore those issues as waived. (January 31, 2010 Appellee's Merit Brief, p. 8). The State's position is untenable for the same reasons as its earlier claim of waiver, as explained above.

The State has cited three appellate court opinions, *State v. Fogle*, 5th Dist. No. 09 CA 114, 2010-Ohio-2805, *State v. Downs*, 9th Dist. No. 03CA0053-M, 2003-Ohio-6009, and *Daniels v. Santic*, 11th Dist. No. 2004-G-2570, 2005-Ohio-1101, for the contention that other appellate districts have held that videotapes constitute the transcript of proceedings for purposes of App.R. 9. The State's assertion is accurate, but only to the extent that those cases considered videotapes to be adequate for filing on direct appeal under App.R. 9. Those cases did not involve R.C. 2953.21 and the deadline for filing a postconviction petition.

Furthermore, the video in *Fogle* was in CD ROM format, and does not fall within Sentence Two of App.R. 9. The text of App.R. 9 currently limits the acceptable video format to videotape. The issue of other video formats, alluded to by the court of appeals in the present case, and present in *Fogle*, serves to underscore the need to give R.C. 2952.21 its plain meaning, independent of App.R. 9.²

The court in *Downs* overruled the assignments of error presented by Mr. Downs because, while he did file videotapes of the trial court proceedings, he failed to include written transcripts of those proceedings in the record. The court explained that:

A presumption of validity accompanies the ruling of the trial court. Without those portions of the record necessary for the resolution of an appellant's assignment of error, "the reviewing court has nothing to pass upon and *** has no choice but to presume the validity of the lower court's proceedings and affirm." [Internal citation omitted]. Appellant failed to attach typed portions of the videotape transcript necessary for the review of his assignments of error; therefore, this Court must presume the regularity of the trial court's proceedings and affirm its judgment. *Downs*, at ¶7.

² "Because the record reflects that "videotapes" were filed, we need not discuss use of the DVD or CD format." *State v. Everette*, 2nd Dist. No. 23585, 2010-Ohio-2832, footnote 2.

The *Downs* court considered the videotapes adequate for purposes of filing on direct appeal under App.R. 9, but inadequate for actually reviewing the merits of Mr. Downs' claims.

The *Santic* court came to the same conclusion:

We cannot consider those assignments of error that would require a review of the videotape. *Deer Lake Mobile Park v. Wendel*, 11th Dist. No. 2002-G-2438, 2003 Ohio 6981, P15. See, also, *Visnich v. Visnich* (Dec. 17, 1999), 11th Dist. No. 98-T-0144, 1999 Ohio App. LEXIS 6140, at 4, (stating, "As we have held on numerous occasions this court will not, nor should appellant expect it to, search through the videotapes in order to find passages that support the assignments of error raised."). *Santic*, at ¶12.

The State has recognized that "having a written transcript instead of a video transcript would likely be more convenient for incarcerated defendants." (January 31, 2011 Appellee's Merit Brief, p. 9). Far from being a matter of convenience, the courts in *Downs* and *Santic* held that videotapes were insufficient for a review on the merits in those cases.

The State has also argued that because Mr. Everette and other incarcerated defendants do not have a constitutional right to file for postconviction relief, being "inconvenienced by not having a written transcript before filing for postconviction relief does not implicate public policy concerns." (January 31, 2011 Appellee's Merit Brief, p. 9). That position is undercut by the concurring opinion in *Hollingsworth*, relied upon by the court of appeals in the present case.

In *Hollingsworth*, Chief Justice Moyer explained that the plain language of R.C. 2953.21 required that the time for filing a postconviction petition begins from the filing of the transcript, and not the record on appeal. But Chief Justice Moyer expressed concern regarding that outcome:

I write separately, however, to note that there are strong policy arguments in favor of commencing the limitations period on the date that the record was filed . . . If an individual were planning to focus his petition for postconviction relief on matters that appear in the record but not in the trial transcript, he would benefit greatly from time to review the record . . . I also write separately to note that if the appellant is correct that persons are given no notice of the filing of the trial transcript, that lack of notice may rise to the level of a due process violation. The most basic requirement of due process is that individuals receive notice and a meaningful opportunity to be heard . . . I nevertheless write to note my concern with the due process implications of a failure to provide notice of the filing of the trial transcript when that filing marks the commencement of the limitations period for filing a petition for postconviction relief. I urge the General Assembly to revisit R.C. 2953.21(A)(2) to avoid potential due process problems. *Hollingsworth*, at ¶3-4.

Finally, the State has pointed to this Court's decision in *State ex rel. Murr v. Thierry* (1987), 34 Ohio St.3d 45, for its statement that an appeal or postconviction action must be pending before access to the transcript may be sought, in support of the State's contention that Mr. Everette "was not entitled to have access to a written transcript while preparing his petition. (January 31, 2011 Appellee's Merit Brief, p. 9). The State's reliance is misplaced, as *Thierry* involved a request for the production of the transcript and did not involve the 180-day deadline at issue in the present case. In addition, this Court explained in *Thierry* that, "an indigent prisoner is entitled to relevant portions of a transcript upon, *inter alia*, appeal or in seeking post-conviction relief," "only one copy of a transcript need be provided," and that "[h]ere, the record does not indicate appellant has a petition for post-conviction relief pending, but does indicate he has already been provided with one transcript." *Thierry*, at 45-46. Applying App.R. 9 to alter the plain meaning of R.C. 2953.21 in the manner the State has requested does not foster the important public policies of fairness to defendants and the proper administration of justice.

Recently Proposed Changes to Rule 9 of the Ohio Rules of Appellate Procedure.

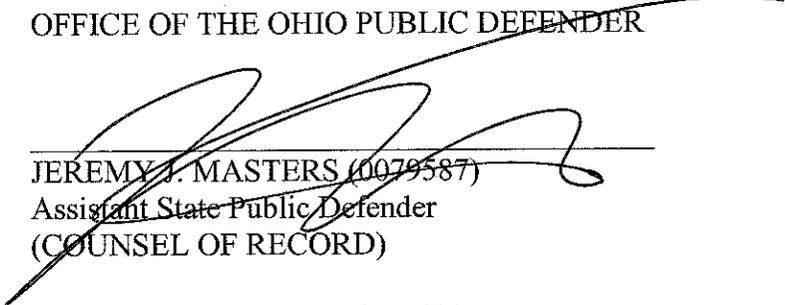
The Supreme Court Commission on the Rules of Practice and Procedure recently recommended amending App.R. 9. The proposed amendments would harmonize App.R. 9 with R.C. 2953.21 and eliminate further confusion. And the amendments would prevent unreasonable interpretations of App.R. 9, such as the interpretation offered by the State in the present case. If adopted, the amended rule would not change the requirement that R.C. 2953.21 controls App.R. 9 with regard to the substantive issue of the 180-day deadline for filing a postconviction petition.

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



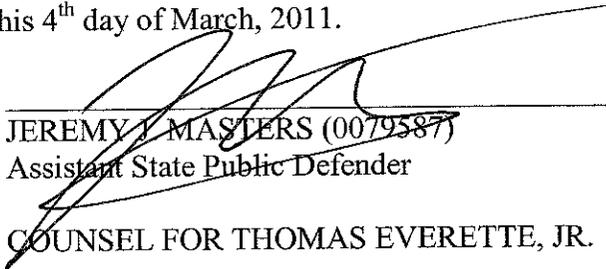
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT THOMAS EVERETTE'S REPLY BRIEF** has been sent via regular U.S. Mail to Andrew T. French, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, 5th Floor, Courts Building, 301 West Third Street, P.O. Box 972, Dayton, Ohio 45422, this 4th day of March, 2011.



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