

NO.

11-1665

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95556

STATE OF OHIO

Plaintiff-Appellant

-vs-

CHRISTOPHER TUCKER

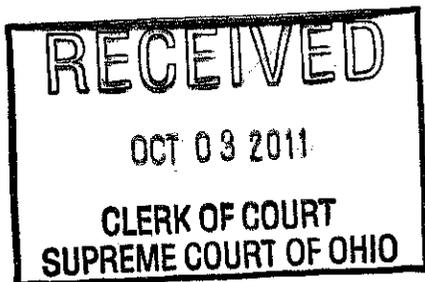
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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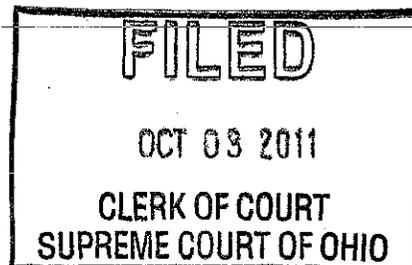


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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR AN ISSUE OF
GREAT PUBLIC INTEREST**

Does the tolling provision in App. R. 4(A) toll time indefinitely as a penalty for noncompliance with Civ. R. 58 regardless of a defendant receiving actual notice? This is an issue of great public and general interest because it has the ability to affect thousands of cases in the State of Ohio. This is also a constitutional question as the right to appeal is a property interest and is afforded due process protection. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851. Despite the violation of common sense and equitable application of the rules, the Eighth District felt constrained to find an appeal that was initiated over four years after the defendant received actual notice was timely filed. The Eighth District's opinion allows for litigation to continue years after a civil litigant receives actual notice of a final appealable order.

Christopher Tucker was convicted of Aggravated Murder and Having a Weapon Under Disability in 2003. Tucker filed a direct appeal and the Eighth District affirmed his convictions. In 2004, Tucker filed a petition for post-conviction relief and a motion for new trial. These motions were eventually denied on March 31, 2006. Tucker sought a delayed appeal which was denied. In his motion for delayed appeal, Tucker stated that he received notice of the trial court's ruling on April 18, 2006. On August 13, 2010, over four years after the trial court's ruling, Tucker appealed the 2006 denial of his motions. The State filed a motion to dismiss, which the Eighth District denied. The Eighth District found that because the trial court failed to comply with Civ. R. 58, App. R. 4(A) tolled the time for Tucker to appeal from the trial court's denial of his motions despite evidence that Tucker actually received the judgment of denial. *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶14 (*Tucker IV*).

Although the State, as appellee, technically prevailed in the Court below due to the affirmance of the trial court's judgment, the State submits that the legal principle applied by the Eighth District nevertheless warrants review by this Honorable Court. Allowing litigants to have actual notice of a final appealable order but elect to exercise their right years later is bad policy and inequitable. Continuing litigation years after notice of a final appealable order is not the intent of the civil rules. This case should be considered because there are potentially thousands of cases that are now subject to a direct timely appeal despite all parties having actual notice of the final order years earlier.

The Eighth District's ruling is also contrary to the Seventh District Court of Appeal's holding in *Flynn et al v. Gen. Motors Corp.*, Columbiana App. No. 02 CO 71, 2003-Ohio-6729, reconsideration and certification denied in 2004-Ohio-392, and this Court's holding in *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429, 1993-Ohio-214. As such, the State of Ohio respectfully petitions this Honorable Court to accept jurisdiction over the Eighth District Court of Appeals opinion in *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092 and either summarily reverse or adopt the following proposition of law:

PROPOSITION OF LAW I: WHEN THERE IS EVIDENCE THAT A CIVIL LITIGANT HAS ACTUAL NOTICE OF A FINAL APPEALABLE ORDER, SUCH NOTICE BEGINS THE TIME FOR COMPUTING WHEN A NOTICE OF APPEAL MUST BE FILED TO INVOKE THE JURISDICTION OF THE APPELLATE COURT. THE REQUIREMENT IN CIV. R. 58 THAT NOTICE OF SERVICE MUST APPEAR IN THE DOCKET DOES NOT APPLY WHERE THERE IS EVIDENCE THAT THE LITIGANT HAS ACTUAL NOTICE OF THE FINAL APPEALABLE ORDER.

STATEMENT OF THE CASE AND FACTS

In May, 2003, a Cuyahoga County Grand Jury indicted Tucker with one count each of Aggravated Murder in violation of R.C. 2903.01 with a firearm specification (Count 1) and Having a Weapon While Under Disability in violation of R.C. 2923.13 (Count 2). On August 25,

2003, a jury found Tucker guilty of Aggravated Murder and the firearm specification. Tucker entered a plea of no contest to the Weapon Under Disability count. Tucker was sentenced accordingly.

Tucker filed a direct appeal with the Eighth District Court of Appeals and the court affirmed Tucker's conviction and sentence. *State v. Tucker*, Cuyahoga App. No. 83419, 2004-Ohio-5380 (*Tucker I*). Tucker filed a motion for delayed appeal to this Court and this Court denied his motion and dismissed the matter. *State v. Tucker*, 105 Ohio St.3d 1462, 824 N.E.2d 91, 2005-Ohio-1024.

On April 22, 2004, Tucker filed his first petition for post-conviction relief. On August 2, 2004, Tucker filed a motion for a new trial. On January 5, 2005, the trial court determined that it would conduct a limited evidentiary hearing. On January 13, 2005, the State filed a motion for reconsideration of the order granting an evidentiary hearing. On March 31, 2006, the trial court, after reviewing the trial transcript and pertinent law-summarily denied both Tucker's petition for post, conviction relief and his motion for new trial.¹

It is from this nearly five-year old ruling that Tucker appealed to the Eighth District Court of Appeals. Tucker, however, previously sought a delayed appeal of this ruling. The Eighth District denied leave and dismissed the matter. *State v. Tucker* (July 6, 2006), Cuyahoga App. No. 88254 (*Tucker II*). In his pro se motion for a delayed appeal, Tucker acknowledged that he received notice of the trial court's ruling on April 18, 2006. The State attached this pro se filing as an exhibit to its motion to dismiss as evidence that Tucker received actual notice of the trial court's ruling.

¹ The trial judge at the time of this ruling was not Judge Eileen T. Gallagher who succeeded Judge John P. O'Donnell. As such, Judge Eileen T. Gallagher officially took over Judge John P. O'Donnell's original docket.

On August 2, 2007, Tucker filed his second petition for post-conviction relief/motion for new trial. The State opposed Tucker's petition and the trial court denied the petition without a hearing. Tucker appealed the denial of his second petition for post-conviction relief. The Eighth District held that the trial court erred by not holding an evidentiary hearing on Appellant's second petition for post-conviction relief. *State v. Tucker*, Cuyahoga App No. 90799, 2008-Ohio-5746 (*Tucker III*). However, the Eighth District found that Tucker's claim with respect to his original petition for post-conviction relief (the subject of the underlying appeal) was barred by *res judicata* because Tucker "appealed the trial court's ruling and his appeal was subsequently dismissed." *Id.* at ¶37.

Pursuant to the Eighth District's remand, the trial court scheduled the matter for an evidentiary hearing. A disagreement arose as to the scope of the evidentiary hearing. After entertaining briefs from both parties, the trial court held that the Eighth District's remand required a hearing only on Tucker's 2007 petition for post-conviction relief as the Eighth District found Tucker's argument with respect to his first petition was barred by *res judicata*.

Tucker filed the underlying appeal on the eve of a previously scheduled post-conviction hearing. In *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, (*Tucker IV*), Tucker-for a second time-appealed the trial court's March 31, 2006, denial of his original petition for post-conviction relief/motion for new trial. The State filed two motions to dismiss, arguing that Tucker's appeal was untimely. The Eighth District denied the motions and decided the matter on the merits in contrast to its prior dismissal. In its opinion affirming the trial court's denial, the Eighth District first discussed the State's argument that the appeal was untimely. The Eighth District held that despite evidence of actual notice, Tucker's appeal was timely because the trial court failed to comply with Civ. R. 58 and, therefore, App. R. 4(A) indefinitely tolled the time

for Tucker to appeal. *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶14 (*Tucker IV*).

The State filed a motion to certify a conflict between *Tucker IV* and the Seventh District Court of Appeal's opinion in *Flynn et al v. Gen. Motors Corp.*, Columbiana App. No. 02 CO 71, 2003-Ohio-6729, reconsideration and certification denied in 2004-Ohio-392. The Eighth District denied the motion despite finding that its opinion in *Tucker IV* was "contrary to" *Flynn*. *Tucker IV* at ¶13 ("while at least one other Ohio appellate district has found that affirmative evidence in the record that a party received the order is sufficient to start the 30-day period, *Flynn* [citation omitted], that decision is contrary to the holding of cases in this district.").

Because the tolling provision of App. R. 4(A) affects thousands of criminal and civil cases and because there is dissent among the lower courts as to its application in the face of actual notice, the State respectfully requests this Honorable Court grant jurisdiction over this critical issue.

LAW AND ARGUMENT

PROPOSITION OF LAW I: WHEN THERE IS EVIDENCE THAT A CIVIL LITIGANT HAS ACTUAL NOTICE OF A FINAL APPEALABLE ORDER, SUCH NOTICE BEGINS THE TIME FOR COMPUTING WHEN A NOTICE OF APPEAL MUST BE FILED TO INVOKE THE JURISDICTION OF THE APPELLATE COURT. THE REQUIREMENT IN CIV. R. 58 THAT NOTICE OF SERVICE MUST APPEAR IN THE DOCKET DOES NOT APPLY WHERE THERE IS EVIDENCE THAT THE LITIGANT HAS ACTUAL NOTICE OF THE FINAL APPEALABLE ORDER.

I. Summary of Argument

"While the state has affirmatively shown that appellant received a copy of the journal entry before 30 days from the date of the decision from which he is now appealing, the law in this district holds that actual notice is insufficient given the clear dictates of Civ. R. 58. Therefore, we must conclude that this appeal was timely filed." *Tucker IV* at ¶14. (Emphasis Added).

The Eighth District felt constrained to find that noncompliance with Civ. R. 58 indefinitely tolled the time to initiate a timely appeal despite evidence of actual notice of the final appealable order. This holding is an inequitable interpretation of the Ohio Rules of Civil Procedure and the Ohio Rules of Appellate Procedure that this Court should review.

II. Civ. R. 58 & App. R. 4(A).

“The timely filing of a notice of appeal is a jurisdictional requirement for a valid appeal.” *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 649 N.E.2d 1229, syllabus. App. R. 4(A) sets forth the time in which to file a timely appeal. App. R. 4(A) requires a party to file a notice of appeal within thirty days of the “later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.”

Civ. R. 58(B) requires a trial court to note in the final entry that the clerk is to serve notice of the judgment on the parties and states that “[w]ithin three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of time for appeal except as provided in App. R. 4(A).”

This Court has previously stated that the “thirty-day time limit for filing the notice of appeal does not begin to run until the later of (1) entry of the judgment or order appealed if the notice mandated by Civ.R. 58(B) is served within three days of the entry of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in Civ.R. 58(B).” *In re Anderson*, 92 Ohio St.3d 63, 67, 748 N.E.2d 67,

2001-Ohio-131. The question that troubles lower courts is whether time to appeal tolls despite evidence that a party actually received notice of the entry appealed. There is dissention on this issue in the lower courts.

III. In re Anderson, State ex rel Hughes v. Celeste, & Flynn v. Gen. Motors Corp

In *In re Anderson* this Court found that a juvenile appeal was timely filed where: (1) the trial court never directed the clerk to serve notice on the parties, and (2) the court docket did not contain any indication that the defendant was ever served with notice. Tucker used *In re Anderson* to argue that his appeal, filed nearly five years after the trial court's judgment, and over four years after he admitted actual notice of the order, was timely despite having actual notice of the judgment. However, the rule in *Anderson* has not been applied in contravention of common sense. This Court has held that where there is evidence that counsel was served, the thirty day rule applies. *State ex rel Hughes v. Celeste*, 67 Ohio St.3d 429, 1993-Ohio-214. In *Hughes*, there was no notation of service made on a writ but the facts showed that counsel for the governor had in fact been served. This Court held that because the facts established that the governor was in fact served, the appeal was to be filed in thirty days despite a lack of service in the entry.

Hughes and *Anderson* can be reconciled to hold that where there is evidence that a party was served with a final appealable order in a civil case, the time for filing a notice of appeal begins to run. The Seventh District Court of Appeals has held just that in *Flynn et al v. Gen. Motors Corp.*, Columbiana App. No. 02 CO 71, 2003-Ohio-6729, reconsideration and certification denied in 2004-Ohio-392.

In *Flynn*, the Appellants appealed an October 22, 2002 entry by the trial court dismissing an administrative appeal for being filed in the wrong court. The appeal from the October 22,

2002 order was not filed within 30 days. The Appellants argued that the appeal was timely filed because the “the clerk of the trial court failed to properly serve Appellants with a copy of the judgment entry as required by Civ.R. 58(B), and failed to note the date of service in the trial court's appearance docket.” The Appellants went on to argue that under this Court’s decision in *In Re Anderson*, for an order to be final “two things [must] happen: (1) the clerk of courts, and only the clerk of courts, serves the parties with notice of the judgment entry as permitted by Civ.R. 5(B); and (2) the notice of service is noted on the court's appearance docket.” *Flynn et al v. Gen. Motors Corp.*, Columbiana App. No. 02 CO 71, 2003-Ohio-6729, at ¶s 22 & 24.

The Seventh District disagreed. The Court found that a filing by Appellant’s on November 1, 2002 established notice of the Appellant’s service of the October 22, 2002 order. The Court distinguished *Anderson* because in *Anderson* there was no evidence that counsel was served with the order and in fact counsel had no notice of the order. The Seventh District held that “based on these documents in the record, we do not need to rely solely on the clerk's notation described in Civ.R. 58(B) as proof of the date of service. Because the record reflects that service was made within the three-day time limit set in Civ.R. 58(B), the time for filing an appeal in this case began to run on the date that the judgment entry was filed, which was October 22, 2002.” *Id.* at ¶ 39.

The Eighth District did not apply *Flynn* but recognized that the Seventh District’s decision was “contrary to the holding of cases in this district.” *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶13 (*Tucker IV*). The Eighth District found that the Tenth District Court of Appeals has also indicated that actual notice “does not matter when the clerk fails to perfect service pursuant to Civ. R. 58.” *Id.* at ¶12 citing *Whitehall ex rel. Fennessy v. Bambi Motel, Inc.* (1998), 131 Ohio App.3d 734, 723 N.E.2d 633. The court went on to hold that while

the State had “affirmatively shown that appellant received a copy of the journal entry before 30 days from the date of the decision from which he is now appealing, the law in this district holds that actual notice is insufficient given the clear dictates of Civ.R. 58. Therefore, we must conclude that this appeal was timely filed.” *Tucker IV* at ¶14.

The Eighth and Tenth Districts are not only now in conflict with the Seventh District, they have substituted form over substances and allow appeals to be taken years after a decision is known to the parties. Because of the dissention among the lower courts, and as the decision allowing the appeal in this case allows parties the opportunity to delay finality in a case because of a technical or notational defect, the State respectfully requests this Honorable Court accept jurisdiction in this case and hold that the tolling provisions of App. R. 4(A) do not apply to parties with actual notice of a judgment.

IV. Allowing indefinite tolling despite actual notice is bad policy

To allow a party to wait to exercise his or her right to appeal despite having actual notice of a judgment is bad policy and can open reviewing courts up to a multitude of often-frivolous appeals which may be initiated whenever it is opportune to the appealing party. The instant case is a strong example. Even Tucker’s first attempt to appeal the trial court’s denial of his petition for post-conviction relief and motion for new trial were untimely. According to Tucker, he received notice of the trial court’s rulings on April 18, 2006. Properly applying Civ. R. 58(B), Tucker would have had until May 18, 2006 to initiate a timely appeal. Tucker failed to do so. His initial notice of appeal was filed on June 2, 2006, and the Eighth District properly dismissed the appeal. Tucker then waited until August 13, 2010, on the eve before a scheduled hearing, to file a second appeal of the March 2006 judgment entry.

Allowing a party to wait to exercise their right purely at their convenience is not equitable to either the opposing party or the trial court who considers the litigation closed. The “Rules of Civil Procedure are designed to benefit parties, non-parties, and the court. If justice is to be served in a timely, inexpensive, and equitable manner, all must adhere to them.” *Ray v. Jacquemain*, Summit App. No. 20851, 2002-Ohio03192, ¶33. The State seeks this Court’s review in order to ensure that the rules are applied consistent with their purpose.

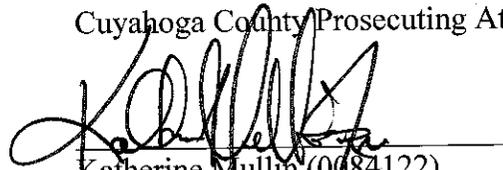
The State has raised a similar issue to this Court in *State v. Borys Kondush* (appeal by Seneca Insurance Co.), OSC 11-1099. This is a frequent issue that requires this Court’s guidance as there is disagreement among the districts.

CONCLUSION

The State respectfully requests this Honorable Court grant jurisdiction over this matter of great public importance and is worthy of Supreme Court review as it affects thousands of litigants and provides clarity when a notice of appeal must be filed.

Respectfully submitted,

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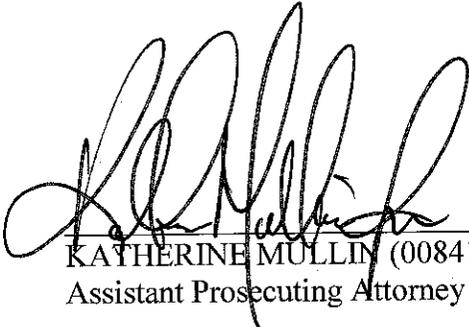
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S.

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[Cite as *State v. Tucker*, 2011-Ohio-4092.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95556

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER TUCKER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED; REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-437731

BEFORE: Celebrezze, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 18, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Christopher Tucker, seeks a new trial or, at the very least, a hearing on his motions for postconviction relief and new trial. After a thorough review of the record and law, we affirm the decision of the trial court.

~~{¶ 2} The history of this case has previously been recited by this court in *State v. Tucker*, Cuyahoga App. No. 83419, 2004-Ohio-5380 (“*Tucker I*”), and *State v. Tucker*, Cuyahoga App. No. 90799, 2008-Ohio-5746 (“*Tucker III*”).~~

Appellant was convicted of aggravated murder for the shooting death of Timothy Austin outside of Whatley's Lounge in Cleveland, Ohio.

{¶ 3} After his first unsuccessful appeal in *Tucker I*, appellant filed a postconviction relief petition on April 24, 2004. He argued that his counsel was ineffective, that witness Nikia Beal had told people that she could not identify appellant as Austin's killer, and that the trial judge had a bias against him.

{¶ 4} Appellant also filed a motion for a new trial on August 2, 2004. He argued that a new trial was warranted based on newly discovered evidence, namely, the recantation of eyewitness Joseph Fussell. Appellant attached an affidavit purportedly from Fussell stating, "what I said I saw last year in May at Whatley's Bar is not what I really saw. I was mistaken it was not Christopher Tucker."

{¶ 5} The trial judge granted appellant a hearing regarding Fussell's recantation only, but was then replaced due to a lost election. The state filed a motion for reconsideration with the successor judge, which was granted on March 31, 2006.¹ The trial court found that the postconviction relief petition was untimely and that the recantation of one witness when two witnesses

¹ The trial judge's actions are not prohibited. This was an interlocutory order not subject to the law of the case doctrine and a proper issue for a timely filed motion for reconsideration. See *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 423 N.E.2d 1105, fn.1; *Tablack v. Wellman*, Mahoning App. No. 04-MA-218, 2006-Ohio-4088, ¶139-40.

identified appellant as the killer was insufficient to grant a new trial. This order, however, did not direct the clerk to serve the parties, and the clerk of courts did not note the date of service on the docket.

{¶ 6} On June 2, 2006, appellant sought leave to file a delayed appeal, arguing that he did not receive service of the trial court's journal entry denying his motions until April 18, 2006. This court, without opinion, denied appellant's request and dismissed his appeal. *State v. Tucker* (July 6, 2006), Cuyahoga App. No. 88254 ("*Tucker II*").

{¶ 7} Appellant then filed a new petition for postconviction relief and a motion for new trial on August 2, 2007. He brought forth a new affidavit from D.R.² who claimed appellant was inside the bar at the time of the shooting. These motions were denied without hearing. In *Tucker III*, appellant appealed the denial of these motions and attempted to argue that the trial court's denial of his first set of motions was improper. This court agreed that the trial court should have held a hearing on the second motions and ordered that such a hearing take place, but also held that appellant's attempt to appeal the denial of his first motions was barred by res judicata.

~~{¶ 8} The hearing mandated by this court in 2008 has not yet occurred.~~

Shortly before the hearing was set to commence, appellant filed an appeal

² This witness asked to not be publicly identified, so in accordance with these wishes, we ~~identify the witness by initials.~~

from the March 31, 2006 judgment entry denying his first motions. The state sought dismissal of the instant appeal, claiming it was untimely. However, due to deficiencies in the trial court's order and docket, we must conclude that the appeal is timely.

Law and Analysis

Timeliness of the Appeal

{¶ 9} The state argues that the instant appeal was filed over 1500 days out of rule. Generally, a party has 30 days from the date of a final, appealable order to perfect an appeal. App.R. 4(A). However, the Ohio Supreme Court has recognized that the right to an appeal is a property interest that must be protected and afforded due process. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851. As such, Civ.R. 58 was enacted in Ohio to preserve the appellate rights of individuals. This is a bright-line rule establishing that if the clerk of courts properly perfects service within three days of the issuance of the judgment, then parties have 30 days to file a notice of appeal no matter if service is actually received. However, if service is not perfected as outlined in Civ.R. 58, then ~~the period for filing an appeal is tolled according to App.R. 4(A). This rule states, "[a] party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on~~

the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.”

{¶ 10} Here, the trial court did not direct the clerk to serve notice upon the parties. The clerk also failed to note the date of any notice sent. Accordingly, because service was not perfected in accordance with Civ.R. 58, the time for filing an appeal never began to run, and the instant appeal is timely.

{¶ 11} The state argues that res judicata bars the instant appeal because appellant filed a motion for a delayed appeal, which this court denied. However, appellant had no need to file for a delayed appeal, and we decline to give our prior determination denying leave to appeal the effect of precluding all litigation from the trial court’s order.

{¶ 12} The state also argues that appellant received actual notice as indicated by his June 6, 2006 motion for leave to file a delayed appeal. The memorandum appellant attached to this motion indicates that he “did not receive [the judgment entry] until April 18, 2006 at least 20 days after the ruling.” Even though appellant acknowledges that he received the journal entry, the Third District has indicated that actual notice does not matter when the clerk fails to perfect service pursuant to Civ.R. 58. *Whitehall ex rel. Fennessy v. Bambi Motel, Inc.* (1998), 131 Ohio App.3d 734, 741, 723 N.E.2d 633.

{¶ 13} While at least one other Ohio appellate district has found that affirmative evidence in the record that a party received the order is sufficient to start the 30-day period, *Flynn v. Gen. Motors Corp.*, 7th Dist. No. 02 CO 71, 2004-Ohio-392, that decision is contrary to the holding of cases in this district. See *In re L.B.*, Cuyahoga App. Nos. 79370 and 79942, 2002-Ohio-3767; *In re A.A.*, Cuyahoga App. No. 85002, 2005-Ohio-2618. Accord *Steel v. Lewellen* (May 16, 1996), 5th Dist. Nos. 95 CA 53 and 95 CA 54; *In re Fennell* (Jan. 23, 2002), 4th Dist. No. 01CA45; and *Welsh v. Tarentelli* (1992), 76 Ohio App.3d 831, 603 N.E.2d 399.³ Perhaps adoption of a rule similar to Loc.R. 3(D)(2) in the Eleventh District would be wise. See *Consol. Invest. Corp. v. Olive & The Grape*, Lake App. No. 2009-L-165, 2010-Ohio-1275, ¶6 (“In the filing of a Notice of Appeal in civil cases in which the trial court clerk has not complied with Ohio Civ.R. 58(B), and the Notice of Appeal is deemed to be filed out of rule, appellant shall attach an affidavit from the trial court clerk stating that service was not perfected pursuant to Ohio App.R. 4(A). The clerk shall then perfect service and furnish this Court with a copy of the appearance docket in which date of service has been noted. ~~Lack of compliance shall result in the sua sponte dismissal of the appeal.~~”)

³ This court has applied Civ.R. 58 and App.R. 4 to postconviction relief petitions. *State v. Harris*, Cuyahoga App. No. 94186, 2010-Ohio-3617, citing *In re Anderson*, 92 Ohio St.3d 63, 67, 2001 Ohio 131, 748 N.E.2d 67.

under Ohio App.R. 4(A).”). In the absence of such a rule, this court is bound by prior precedent.

{¶ 14} While the state has affirmatively shown that appellant received a copy of the journal entry before 30 days from the date of the decision from which he is now appealing, the law in this district holds that actual notice is insufficient given the clear dictates of Civ.R. 58. Therefore, we must conclude that this appeal was timely filed.

Denial of Postconviction Relief Petition

{¶ 15} Appellant assigns only one error, but it addresses the dismissal of two motions, a postconviction relief petition and a motion for a new trial. Appellant asserts that “[t]he trial court violated [his] state and federal Constitutional rights when it summarily dismissed” these motions.

{¶ 16} According to the postconviction relief statute, a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169. Before granting an evidentiary hearing on the petition, the trial court shall determine *whether there are substantive grounds for relief* (R.C. 2953.21(C)), i.e., ~~whether there are~~ grounds to believe 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.” (Emphasis added.)
R.C. 2953.21(A)(1).

{¶ 17} In the interest of judicial economy and efficiency, it is not unreasonable to require the defendant to show in his petition for postconviction relief that such errors resulted in prejudice before a hearing is scheduled. See *State v. Jackson* (1980), 64 Ohio St.2d 107, 112, 413 N.E.2d 819. Therefore, before a hearing is granted, “the petitioner bears the initial burden to submit evidentiary documents containing *sufficient operative facts* * * *.” (Emphasis added.) *Id.* at syllabus. Where a petitioner fails to carry this burden, the trial court does not abuse its discretion in denying the petition without a hearing.

{¶ 18} The Ohio Supreme Court, in *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905, stated: “[A] trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact. To hold otherwise would require a hearing for every postconviction relief petition.” *Id.* at 284. ~~“[I]f we would allow any open ended allegation or~~ conclusory statement concerning competency of counsel without a further showing of prejudice to the defendant to automatically mandate a hearing,

division (D) of R.C. 2953.21 would be effectively negated and useless.” *Id.*, quoting *Jackson*, 64 Ohio St.2d at 112.

{¶ 19} Appellant’s petition contained three bases for relief. First, it alleged that a witness at trial, Nikia Beal, had told others that she could not identify appellant as Austin’s killer. However, appellant attached no affidavits from Beal or others who allegedly heard Beal state this. This claim is not sufficient to necessitate a hearing because it is wholly unsupported.⁴

{¶ 20} Appellant also raises issues of ineffective assistance of counsel. He argues that counsel did not call alibi witnesses that appellant requested. However, appellant previously raised the same issue of ineffective assistance in *Tucker I*. Therefore, this claim is barred by res judicata. *State v. Sherman*, Cuyahoga App. No. 95716, 2011-Ohio-1810, ¶5. Even if it were not, appellant’s attorney called two alibi witnesses who testified that appellant was with them inside the bar at the time of the shooting. No prejudice, a required element for an ineffective assistance claim, can be shown here. *State v. Hamilton*, Cuyahoga App. No. 86520, 2006-Ohio-1949,

⁴ In a supplemental motion, appellant also argues that Joseph Fussell recanted his testimony. Appellant initially raised this issue in his motion for a new trial and attached an affidavit purportedly from Fussell to that motion. This argument is addressed below in the denial of the motion for a new

¶50. Therefore, the trial court was not required to hold a hearing on this aspect of appellant's petition in order to overrule it.

¶21} Finally, appellant argues that the trial judge was biased against him. He states that during a conversation in chambers between the judge, defense counsel, and the state, the judge said, "[h]ow will the appeal courts know if I was wrong in this decision." Appellant argues that "[d]iscussion about Appeal Court procedures in the middle of trial shows prejudice toward defendant and shows his guilt was in the eye of the courts before verdict [sic] was even given." This evidence, the only evidence attached to appellant's petition, does not even begin to establish an apparent bias.⁵

¶22} Appellant's petition for postconviction relief was unsupported by any affidavit, provided implausible arguments, and could have been denied without a hearing. It was not an abuse of discretion for the trial court to so rule.

¶23} The state also argues that appellant's petition was untimely given that it was filed 10 days after the 180-day period established in R.C. 2953.21. However, R.C. 2953.23 provides for review of petitions filed outside of this time frame should a petitioner demonstrate: (a) that the petitioner was

⁵ "R.C. 2701.03 provides the exclusive means by which a litigant may claim that a common pleas court judge is biased and prejudiced. * * * If [the defendant] believed the trial judge should be removed from his case due to bias or prejudice against him, his exclusive remedy was to file an affidavit of disqualification pursuant to R.C. 2701.03." *State v. Cody*, Cuyahoga App. No. 95753,

unavoidably prevented from discovering the facts supporting the petition, and (b) the petitioner demonstrates by clear and convincing evidence that no reasonable fact finder would have found the petitioner guilty. R.C. 2953.23(A)(1)(a) and (b). While appellant has sufficiently demonstrated that he was unavoidably detained from discovering the alleged recantation of witnesses at trial, the other grounds for relief were known at the conclusion of appellant's trial and are untimely.

{¶ 24} Appellant also failed to demonstrate that a reasonable fact finder would have found him not guilty because he failed to attach any supporting evidence that Beal testified untruthfully. Therefore, appellant's postconviction relief petition was untimely because he failed to satisfy the second condition in R.C. 2953.23(A)(1). The trial court was not wrong in so finding.

Denial of Motion for New Trial

{¶ 25} Appellant also argues that the denial of his motion for a new trial was improper without the benefit of a hearing. A motion for a new trial is governed by Crim.R. 33, and the decision to grant or deny such a motion is within the sound discretion of the trial judge. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶82.

{¶ 26} A trial court may grant a motion for a new trial based on newly discovered evidence when such evidence is material and "could not with

reasonable diligence have [been] discovered and produced at the trial.” Crim.R. 33(A)(6). In order to warrant a new trial based on newly discovered evidence, the defendant must show “that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.” *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, at the syllabus.

{¶ 27} The first prong of the *Petro* test requires appellant to show that the newly discovered evidence gives rise to a strong probability that he would be acquitted. Appellant advances Fussell’s affidavit to support this position.

This would provide sufficient grounds to demonstrate a strong probability of a different outcome but for the trial testimony of Beal. There were two eye witnesses who testified that appellant shot and killed Austin.⁶ Prior to the court ruling on his motion, appellant provided no evidence, other than his own unsworn statement, that Beal recanted. Yet, he argued repeatedly that ~~both witnesses recanted their testimony. Because, at the time the trial court~~ made its determination, appellant had provided no evidence that Beal

⁶ The trial court referenced this fact in ruling on the motion and found that appellant had not ~~met the factors set forth in the *Petro* test.~~

recanted her testimony, the trial court could properly conclude that appellant failed to meet the first prong of the *Petro* test.

{¶ 28} The trial court also found this motion was untimely. Crim.R. 33(B) establishes a 120-day filing period following the verdict. However, a party may seek leave to file a motion outside of this period, but is required to show by clear and convincing evidence that the party was unavoidably prevented from discovering the basis for the motion within the 120-day period.

{¶ 29} Here appellant did not seek leave to file his motion for a new trial. He otherwise failed to satisfy these requirements in his motion, and the trial court could properly determine that the motion was untimely. While the recantation of a witness may serve as the basis for a motion for a new trial based on newly discovered evidence, appellant failed to seek leave to file such a motion.

Conclusion

{¶ 30} The trial court did not abuse its discretion in denying appellant's petition for postconviction relief and motion for new trial without a hearing ~~where appellant failed to support those motions with adequate evidence necessitating a hearing.~~ The trial court should now, after many years, conduct the hearing ordered by this court in *Tucker III*.

{¶ 31} Judgement affirmed; case remanded to the lower court for further proceedings consistent with *State v. Tucker*, Cuyahoga App. No. 90799, 2008-Ohio-5746.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR