

IN THE SUPREME COURT OF OHIO

ORIGINAL

Case No. 2011-1665

STATE OF OHIO :
 :
 Plaintiff-Appellant :
 :
 vs. : Cross-Appeal from Cuyahoga
 : County App. No. 95556,
 : Eighth Judicial District of Ohio
 CHRISTOPHER TUCKER :
 :
 Defendant-Appellee/Cross-Appellant :

MEMORANDUM OF APPELLEE/CROSS-APPELLANT CHRISTOPHER TUCKER
IN RESPONSE TO APPELLANT'S MEMORANDUM OF JURISDICTION
AND IN SUPPORT OF JURISDICTION OF THE CROSS-APPEAL

COUNSEL FOR APPELLANT/
CROSS-APPELLEE, STATE OF OHIO

WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
BY: KATHERINE MULLIN, #0084122
Justice Center 9th Floor
1200 Ontario Street
Cleveland, OH 44113
216-443-7800

COUNSEL FOR APPELLEE/CROSS-
APPELLANT, CHRISTOPHER TUCKER

ROBERT L. TOBIK, ESQ.
Chief Public Defender
BY: ERIKA CUNLIFFE, # 0074480
310 Lakeside Avenue
Suite 200
216-443-7583
Fax: 216-443-6911

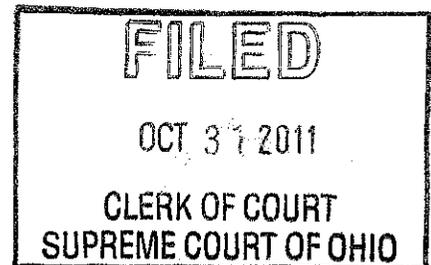


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OF THE APPELLANT'S PROPOSITION OF LAW AND APPELLEE/CROSS-
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CONSTITUTIONAL MAGNITUDE AND PUBLIC INTEREST**

The state has asked this Court to accept jurisdiction over Mr. Tucker's case so it can fashion a rule that says - the time for computing when the notice of appeal must be filed begins to run once a civil litigant has actual notice of a final appealable order. The State claims such a rule is called for because litigants otherwise have incentive to unjustifiably sit on their rights when the trial court fails to comply with the notice provision set forth under Civ.R. 58. The state offers the highly speculative fear that "potentially thousands of cases are now subject to a direct appeal" because the trial court issuing the final order in the case failed to comply with the explicit dictates of Civ.R. 58. The State also complains that the Eighth District's construction of Civ.R. 58's notice requirements conflicts with that employed by other appellate districts. Neither concern is realistic or even accurate. Moreover, because the procedural history of this case is so unique and complex, it does not provide this Court with the proper vehicle for addressing the State's professed concerns. Under the circumstances this Court should decline jurisdiction for purposes of addressing the State's proposition of law.

As for why this Court should accept jurisdiction over Mr. Tucker's cross appeal, Chris Tucker here challenges the constitutionality of the trial court's decision to summarily dismiss his petition for post conviction relief and motion for new trial.¹ That petition challenged the reliability of his aggravated murder conviction in the wake of evidence that the two witnesses who testified against him were recanting. In two *pro se* pleadings - a petition for post conviction relief and a motion for a new trial - Mr. Tucker alerted the trial court to this important

¹ Mr. Tucker must raise this issue in this Court for purposes of fulfilling the exhaustion and fair presentment requirements necessary for seeking further review of his conviction in federal court.

development. The pleadings were submitted to the same judge who had presided over the actual trial and had observed the eyewitnesses when they testified. That judge concluded that the pleadings had merit and appointed counsel, consolidated the pleadings, and ordered the matter to proceed to an evidentiary hearing.

That hearing never took place. Instead, it was summarily dismissed by the trial judge's successor, who had no familiarity with the case.

The Eighth District affirmed the dismissal, concluding that the pleadings Mr. Tucker filed were not timely and were otherwise barred from consideration under the doctrine of *res judicata*. In so ruling, however, the court never addressed the fact that the pleadings' summary dismissals only occurred after the original trial judge had determined they had merit and warranted a hearing.

Mr. Tucker is asking this Court to accept jurisdiction over this case and find that post conviction petitions and motions seeking a new trial may not be summarily dismissed where they are prompted by new evidence that undercuts prosecution's case at trial.

STATEMENT OF THE CASE AND FACTS

Chris Tucker is appealing from one judge's decision to summarily dismiss his petition for post conviction relief and motion for a new trial, notwithstanding the fact that the original trial judge, who reviewed those pleadings, had concluded that the issues they raised warranted an evidentiary hearing. Even though the State ultimately prevailed when the Eighth District affirmed that summary dismissal, the State seeks this Court's leave to appeal. That State argues that the Eighth District should never have allowed the appeal to proceed in the first place, because Mr. Tucker's notice of appeal was filed well outside the 30 days permitted under App.R. 4. The case's procedural history is extraordinarily convoluted and requires some amplification

Incident and Trial Court Proceedings

On May 28, 2003, a Cuyahoga County grand jury issued a two count indictment charging Christopher Tucker with aggravated murder and having a weapon under disability, along with a three year firearm specification. The charges stemmed from the May 22, 2003 shooting of Timothy Austin, which occurred on the sidewalk in front of Whatley's Bar on Euclid Boulevard in East Cleveland. Christopher Tucker was at Whatley's that night drinking with several friends. Although he denied involvement in the shooting, Tucker was charged with the crime. The charges were based on information provided to police by a single alleged eyewitness named Joseph Fussell, who claimed to have witnessed the incident from the other side of the street.

When the matter went to trial in August of 2003, the police had also located another witness, Nikia Beal, who had been with Austin when he was shot.

The evidence demonstrated that Mr. Tucker and Timothy Austin were among many patrons in Whatley's Bar on the night of the incident. Both had accompanied different groups of friends to the drinking establishment. Austin and Ms. Beal left the bar sometime around 1:00 am. While the couple stood on the sidewalk in front of the bar, Mr. Austin was approached by a man who shot him at least six times. Both Fussell and Beal testified at trial that Mr. Tucker was the man who approached Timothy Austin and shot him.

Mr. Tucker countered that he was inside Whatley's when the shooting occurred and that he had nothing to do with it. According to Tucker, he had gone to the bar with friends that night and was still inside when the shots were fired. Stefan King and Lehandro Hill, two of Tucker's friends, confirmed that Mr. Tucker was in Whatley's that evening when everyone heard the shots. Nevertheless, a jury found Mr. Tucker guilty of aggravated murder.

The court imposed a sentence of 23 years to life imprisonment. Tucker appealed his conviction to this Court, arguing 1) that trial counsel was ineffective for failing to seek the suppression of the eyewitness identifications or otherwise challenge the reliability of that evidence; 2) that the trial court erred by allowing the jury to hear inadmissible hearsay; 3) that the prosecutor committed misconduct by allowing one of their witnesses to inform the jury that Mr. Tucker had just been released from prison, and by suppressing exculpatory evidence about other potential suspects; and 4) that the evidence of guilt was insufficient. On October 7, 2004, this Court affirmed. *State v. Tucker*, Cuyahoga App. No. 83419, 2004 Ohio 5380 (*Tucker I*).

Post-Conviction Litigation

On April 22, 2004, while his direct appeal was pending in this Court, Mr. Tucker, acting *pro se*, filed a Petition for Post Conviction Relief in the Court of Common Pleas and a Motion for the Appointment of Counsel. On May 6, 2004, the Honorable John P. O'Donnell, before whom the case was tried, granted Mr. Tucker's request for counsel and appointed Brian Moriarty to represent him. On August 2, 2004, Mr. Tucker filed a *pro se* motion for a new trial based on newly discovered evidence in accordance with *Ohio Crim. R. 33(B)*.

In his petition and new trial motion Mr. Tucker maintained that his trial counsel was ineffective for failing to investigate the case further and for failing to call additional alibi witnesses. Mr. Tucker also maintained that the eyewitness testimony, which provided the only evidence against him, was either perjured or mistaken. In support, Mr. Tucker submitted an affidavit from Joseph Fussell wherein he recanted his testimony, along with additional information that Nikia Beal had confessed to others in the wake of trial that she was uncertain about the shooter's identity.

The trial judge again appointed counsel to assist Mr. Tucker and ordered him returned to Cuyahoga County from his state correctional institution for a hearing. The proceedings were repeatedly continued. The State submitted written opposition to both the new trial motion and request for post-conviction relief. On November 10, 2004, Mr. Tucker's counsel filed a Supplemental Petition for Post Conviction Relief. There, counsel effectively consolidated and reiterated the information in both pleadings 1) that Joseph Fussell had recanted his testimony and 2) that Nikia Beal had confessed to others that she had panicked when the shooting started, ran away, and never saw the shooter.

In the supplemental pleading, counsel also stressed that without Fussell and Beal's testimony, the prosecution could not have proved its case. Counsel noted that in affirming Mr. Tucker's conviction on direct appeal, this Court had explicitly relied on Fussell and Beal's accounts, stating –

Two witnesses identified defendant as the person who killed the victim. Beal testified she knew defendant was the person who shot Austin. She testified defendant had been staring at her inside the bar earlier that evening. She also stated that she had a good look at defendant's face as he shot Austin . . . Fussell testified he knew defendant from high school. Fussell was certain it was defendant that shot and killed Austin.

Tucker I, ¶¶ 143-144 (emphasis added). If, as Mr. Tucker maintained, the testimony of those witnesses was invalidated, the integrity of the entire prosecution would collapse. The trial court agreed. On January 5, 2005, after reviewing all of the pleadings filed, the judge entered an order declaring that Mr. Tucker's claims deserved a full-evidentiary hearing to take place on February 25, 2005. That hearing was continued over the course of the coming year. During the fall of 2005, the trial judge lost his seat on the common pleas bench. His docket was assumed by another judge.

On March 31, 2006, the new judge summarily dismissed the post conviction petition as follows:

DEFENDANT'S PETITION FOR POST CONVICTION RELIEF AND A NEW TRIAL/BRIEF IN OPPOSITION/SUPPLEMENTAL MOTION FOR NEW TRIAL/DEFENDANT'S RENEWED MOTION--UPON CONSIDERATION OF THE MOTIONS AND UPON REVIEW OF THE TRIAL TRANSCRIPT AND PURSUANT TO CR. 33 AS WELL AS THE 6 PART TEST OUTLINED IN ST. V. PERRO, THE COURT FINDS THE MOTION UNTIMELY FILED.

HOWEVER, THIS COURT FINDS THAT DEFENDANT'S NEW EVIDENCE WOULD NOT CHANGE THE OUTCOME OF TRIAL HAD IT BEEN ADMITTED. THE TRANSCRIPT OF TRIAL CLEARLY INDICATES THAT DEFENDANT WAS CONVICTED BASED UPON THE EVIDENCE OF TWO EYEWITNESSES, NAKIA BEEM AND JOSEPH FUSSELL. THE PREVIOUS ORDER REQUIRING AN EVIDENTIARY HEARING WAS THAT OF THIS COURT'S PREDECESSOR AND IS VACATED. DEFENDANT'S MOTION FOR A NEW TRIAL IS DENIED AS UNTIMELY FILED AND IS DEFECTIVE FOR ITS NON-COMPLIANCE WITH CR. R 33 AND THE TRANSCRIPT OF THE TRIAL CLEARLY INDICATES DEFENDANT CONVICTED BY TWO EYEWITNESSES.

When he received the summary dismissal order, some two weeks after the court issued it, Mr. Tucker filed a *pro se* motion for leave to appeal with the Eighth District. That motion was subsequently denied. On August 13, 2010, Mr. Tucker noted an appeal from the decision, arguing that defects in the service of the above referenced journal entry tolled the time for filing the appeal. On November 12, 2010, over the State's objections, the Eighth District allowed Mr. Tucker's appeal from this decision to proceed. Nevertheless, on August 18, 2011, the Court issued a decision affirming the trial court's summary denial of his post trial motion and post conviction petition.

LAW AND ARGUMENT

In Opposition to the State's Proposition of Law

The State (Appellant/Cross-Appellee) is asking this Court to adopt the following rule –

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 CIVIL 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.

Mr. Tucker's appeal from the trial court's order of March 31, 2006, which summarily dismissed his petition for post conviction relief and new trial motion, was taken pursuant to Ohio Rule of Appellate Procedure 4(A). That rule reads as follows:

(A) Time for Appeal – 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.

Under this rule, a party seeking to appeal a decision must file a notice of appeal within 30 days of the decision's entry or, in a civil case, within 30 days of service of the notice of judgment and its entry. Civil Rule 58(B), which establishes how to properly serve that judgment dictates as follows :

Notice of filing. When the court signs a judgment, the court *shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal.* Within 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 the time for appeal except as provided in App.R. 4(A).

Civ. R. 58(B) (emphasis added). The rule explicitly mandates that the court entering the judgment include in the journal entry itself a further direction to the clerk that it serve all parties not in default. *Atkinson v. Gumman Ohio Corp.* (1988), 37 Ohio St.3d 80, syllabus.

The justification for this requirement is simple and completely understandable. Often in civil cases not all of the interested parties are physically in the courtroom when the court enters final judgment. Accordingly, the rule assures party notice by including it in the final order. As a consequence, as long as the party notice is reflected on the final entry, the service itself – i.e. actual notice - need not be demonstrated. But if the order lacks a directive to the clerk to serve the identified parties, then the 30-day period under App. R. 4(A) is tolled. *In re Anderson* (2001), 92 Ohio St.3d 63, 67 (Time for appeal from judgment entered in juvenile proceeding tolled where entry did not demonstrate service compliance under Civ. R. 58 – and a juvenile adjudication was a civil proceeding).

That is the approach the Eighth District adopted when it denied the State’s motion to dismiss Mr. Tucker’s appeal. *State v. Tucker*, 2011 Ohio 4092, ¶¶9-13. That approach accords with the explicit language of the applicable rules and it is not inconsistent with the reasoning adopted by this Court and that of other appellate districts. See, *State v. Harris*, Cuyahoga App. No. 94186, 2010-Ohio-3617, citing *In re Anderson*, 92 Ohio St.3d 63, supra. See also, *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; *Welsh v. Tarentelli* (1992), 76 Ohio App.3d 831 (10th District); and *Whitehall ex rel. Fennessy v. Bambi Motel, Inc.* (1998), 131 Ohio App.3d 734, 741 (3rd District).

The State claims that the Eighth District’s construction of these rules conflicts with other decisions addressing the issue. Specifically, the State points to The *Flynn* matter involved an appeal from a judgment entered by the Columbiana County Court of Common Pleas, granting

Appellee General Motors Corporation's motion to dismiss an administrative appeal filed by David Flynn, individually, and Columbiana Buick-Olds-Cadillac-Chevrolet, Inc. (Appellants) on jurisdictional grounds. On December 2, 2002, Appellants noted an appeal from an order entered on October 22, 2002 – well over the 30 days permitted for doing so. Appellants maintained that the appeal was timely, however, because the trial court clerk of court failed to properly serve appellants' counsel with a copy of the October 22, 2002 judgment entry as required by Civil Rule 58(B).

The 7th District observed that that counsel for the appellants had received notice within three days of the date of judgment entry – which is required under App.R. 4(A) and Civ.R. 58(B). The fact that such service actually occurred is evidenced by a motion that appellants' counsel filed on October 24, 2002, within two days of the judgment entry specifically referring to the October 22, 2002 order. The Court went on to conclude that based on that October 24, 2002 motion, it was clear that appellants' counsel had received requisite notice of the trial court's October 22, 2002 judgment entry no later than October 24, 2002. Thus, the appeal, noted more than 30 days after October 22, 2002, was untimely.

In *Tucker*, the only evidence that he and his counsel ever received notice of the trial court's March 31, 2006 dismissal order is reflected in a letter his counsel sent to Tucker two weeks after the decision. In that communication, counsel advised Mr. Tucker that they had "FINALLY received" the court's order. Since the letter is dated two weeks after the order was issued, and counsel suggested that he had only just received the order, it can only be read as evidence that the notice was improper

Moreover, in taking the position that evidence of actual notice within the 30 day period is sufficient, the State unjustifiably equates the formal terms of "service" and "notice" with

“receipt.” It is true, that when the trial court summarily dismissed Mr. Tucker’s original petition for post conviction relief, his lawyer eventually sent him a copy of the order reflecting that decision – and Tucker received it. Mr. Tucker has always acknowledged that his counsel at the time mailed him a copy of the order about 2½ weeks after the decision was issued. The fact that he received the order, however, does not mean that its service was proper. Rule 58 is clear and its language regarding service is mandatory: The order must reflect that the court ordered the clerk to notify the parties that the decision was issued. There is nothing in the order addressing when the order is received, or what is properly done, “upon its receipt.”

What the State is really seeking here is a wholesale revision of the rules governing civil and appellate practice. Such an undertaking ought to be accomplished through the established rules amendment process. Reviewing this factually intricate and unusual case will not change those rules or further the interest in creating new ones. Under the circumstances, this Court should decline jurisdiction over the State’s proposition of law.

In Support of Appellee/Cross-Appellant Christopher Tucker’s Proposition of Law:

A TRIAL COURT VIOLATES THE DEFENDANT’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WHEN IT SUMMARILY DISMISSES A MERITORIOUS POST-CONVICTION PETITION OR A MOTION FOR A NEW TRIAL THE FILING OF WHICH WAS PROMPTED BY NEW EVIDENCE OF ACTUAL INNOCENCE.

Following his conviction for aggravated murder and while his direct appeal was pending, Chris Tucker filed a petition for post conviction relief, which was followed a couple months later by a motion for new trial. Both pleadings were filed *pro se*. These filings were spurred by new evidence involving the possible recantations of Joseph Fussell and Nikia Beal, the only two testifying witnesses to actually see the shooting. Operating without the assistance of counsel, Mr. Tucker attempted, albeit awkwardly, to present claims he thought were supported by the new evidence in the context of both a petition for post conviction relief and a motion for new trial.

When the original trial judge reviewed these pleadings, he deemed them to be sufficiently meritorious to warrant an evidentiary hearing. When that judge subsequently lost his seat on the common pleas bench, his successor reconsidered that decision and summarily dismissed both the post conviction petition and new trial motion. Because these motions involved bona fide claims of actual innocence, that development was a travesty.

Petition for Post-Conviction Relief

Governed by R.C. 2953.21, post-conviction relief is a collateral civil attack on a criminal judgment. *State v. Calhoun* (1999), 86 Ohio St. 3d 279, 281. R.C. 2953.21(A)(1)(a) provides that, “[a]ny person convicted of a criminal offense . . . who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States,” may petition under the act stating the grounds for relief. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph four of the syllabus.

A hearing on the grounds raised in a petition for post conviction relief is required where it “demonstrates a cognizable claim of constitutional error.” *State v. Sherrills*, Cuyahoga App. No. 2467, 2005 Ohio 2467, ¶ 13; see also *Calhoun*, 86 Ohio St. 3d at 282-83. Under the circumstances it is improper to dismiss a petition for post-conviction relief that alleges a genuine issue of material fact affecting a constitutional right. See, *State v. Milanovich* (1975), 42 Ohio St.2d 46. Because Mr. Tucker’s petition and its supporting documentation presented genuine issues of material fact that his constitutional rights, in particular his rights to due process, a fair trial and the effective assistance of counsel had been violated, summary dismissal of his petition was improper.

In addressing a motion seeking summary dismissal of a petition for post conviction relief, the trial court's central concern must be whether there are substantive constitutional grounds for relief that would warrant a hearing based upon the petition, the supporting affidavits and materials, and the files and record of the cause. *State v. Strutton* (1988), 62 Ohio App.3d 248. If the petition and other materials indicate a cognizable claim for relief, the trial court must, under R.C. 2953.21(E), proceed to a prompt hearing on that claim.

When the trial court dismissed Mr. Tucker's post conviction petition, it did so simultaneously with its dismissal of his motion for a new trial. The court's dismissal order, however, never explicitly disposed of the post conviction petition.

Motion for a New Trial

Mr. Tucker also sought a new trial based on the recantation information. A motion for a new trial may be sought under Crim.R. 33(A), where any of the following has a material impact on the defendant's constitutional rights:

- (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
- (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;
- (5) Error of law occurring at the trial;
- (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the

witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

Mr. Tucker maintained he was entitled to a new trial based on either prong (2) witness misconduct, or prong (6) newly discovered evidence.

Although Crim.R. 33(B) does require new trial motions based on newly discovered evidence to be filed within 120 days after the verdict, where, as in this case, the record clearly and convincingly demonstrates that the party is “unavoidably prevented” from filing the motion within rule, delayed motions are permitted. Joseph Fussell did not sign his affidavit admitting that he was wrong when he identified Chris Tucker as the shooter until June 26, 2004 – well after the 120-days had lapsed. Under the circumstances, it is clear that Tucker was unavoidably prevented from seeking the new trial in time.

When Mr. Tucker filed this motion, the trial judge who reviewed it concluded that Tucker sufficiently demonstrated that a hearing was needed. This is a decision typically reserved to the sound discretion of the trial judge. *State v. Gondor* (2006), 112 Ohio St.3d 377, ¶ 58 (cautioning that a reviewing court should not overrule a trial court decision to grant a petition for post-conviction relief if it is supported by competent and credible evidence). Moreover, as this Court observed in *Gondor, supra*, the judge who “presided over the underlying trial...stands in an especially strong position to determine the significance” of any error alleged in post-conviction. ¶55.

Although it is unclear from Mr. Tucker’s post conviction petition when Nikia Beal started telling others that she harbored doubts about her identification, it is clear that the information developed well after trial. Any concerns about the timing, quality and credibility of Beal’s

possible recantations could be readily addressed at the evidentiary hearing. The judge, nevertheless dismissed the motion, concluding that it failed to meet the six part test propounded under *State v. Petro* (1947), 148 Ohio St.505 and that the motion was otherwise untimely. The judge then went on to reject the new trial motion on its merits by concluding that the –

NEW EVIDENCE WOULD NOT CHANGE THE OUTCOME OF TRIAL HAD IT BEEN ADMITTED. THE TRANSCRIPT OF TRIAL CLEARLY INDICATES THAT DEFENDANT WAS CONVICTED BASED UPON THE EVIDENCE OF TWO EYEWITNESSES, NAKIA BEEM (SIC) AND JOSEPH FUSSELL.

That finding falters on at least two levels. Initially, the summary dismissal is wrong because it relies on Fussell and Beal's testimony as grounds for denying an evidentiary hearing to explore their recantations. If their recantations are valid, then their trial testimony would be rendered invalid. Since the recantations provided the basis for the petition and new trial motion, it was simply irrational for the judge to summarily dismiss pleadings using evidence that those pleadings actually undermined

Moreover, at least on its face, it is clear that the evidence upon which the new trial and post-conviction pleadings were based did meet *Petro's* requirements. Under that test, newly discovered evidence will warrant a new trial if it demonstrates the following: (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) 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.

If an evidentiary hearing demonstrated that Fussell and Beal's identifications of Tucker as Austin's shooter were false or mistaken, then Mr. Tucker would be entitled to a new trial. The prosecution's case was not overwhelming. Mr. Tucker and two witnesses testified that he was

inside Whatley's when Austin was shot. Other than Fussell and Beal's identifications, there was nothing linking Tucker to this shooting. The shooting happened late at night, both Fussell and Beal admitted to consuming alcohol beforehand, and the circumstances surrounding the incident were understandably extraordinarily stressful. For good reason, eyewitness identification evidence has come to be seen as notoriously unreliable.

Statistics from the Innocence Projects at the Benjamin N. Cardozo School of Law at Yeshiva University and Northwestern University demonstrate that confidence in eyewitness identifications has been tragically misplaced. Since 1989, those organizations have freed hundreds of individuals using post conviction DNA analysis on biological samples from their supposed crimes. Many were on death row, facing execution for something they did not do. The average length of time served has been 12 years, with many in prison for more than two decades. Collectively, these individuals have served thousands of years in prison for crimes they did not commit. Two thirds of those exonerated were convicted based on faulty eyewitness identifications. Mr. Tucker cannot look to DNA evidence to gain his freedom.

Concerns about the reliability of eyewitness identification testimony have recently attracted the U.S. Supreme Court's attention. This past term, that Court granted certiorari in an eyewitness identification case, *Perry v. New Hampshire*, No. 10-8974, to address the following question:

Do the due process safeguards against the State's use of unreliable eyewitness identification evidence at trial apply to all identifications which arise from impermissibly suggestive circumstances and which are very substantially likely to lead to misidentification, or only to those identifications which are also the product of "improper state action"?

Resolving that question may have important implications for Mr. Tucker's case.

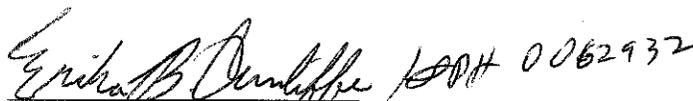
Recognizing the need for reform, Ohio's General Assembly enacted S.B. 77 in March 2010. The Bill mandates new requirements for identification procedures. The goal of this bipartisan legislation is to prevent wrongful convictions. It requires law enforcement agencies in Ohio that conduct live lineups or photo lineups to adopt specific procedures. Simultaneous lineups, photo arrays and photo or in-person show-up procedures are forbidden. When Nikia Beal identified Chris Tucker as the man she saw shooting Tim Austin, she did so almost a month after the incident. The police officer showed her a single photograph of Tucker, who she had already seen in an online news story about the shooting. Under the reforms enacted this past March, such an identification procedure would have been prohibited, or at the very least provided grounds for suppression.

Given the overall potential importance of the recantation evidence to the integrity of this prosecution, resolving Mr. Tucker's post conviction and post trial motions without a reasoned consideration of its merits was at best premature, and at worst a miscarriage of justice.

CONCLUSION

For the foregoing reasons, Appellee/Cross-Appellant Christopher Tucker asks this Court to deny jurisdiction over this matter with respect to the State/Appellant/Cross-Appellee's proposition of law; and accept jurisdiction over his Cross Appeal.

Respectfully Submitted,


ERIKA B. CUNLIFFE
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 31st day of October, 2011.


ERIKA B. CUNLIFFE
Assistant Public Defender