

ORIGINAL

NO. 2011-1665

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IN THE SUPREME COURT OF OHIO

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

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STATE OF OHIO

Plaintiff-Appellant-Cross-Appellee

-vs-

CHRISTOPHER TUCKER

Defendant-Appellee-Cross-Appellant

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**MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT OF  
CROSS-APPEAL**

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**WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR  
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

Christopher Tucker's cross-appeal requests this Court accept jurisdiction over well-established legal principles because Tucker is displeased with the outcome of his untimely appeal. No aspect of Tucker's cross-appeal warrants the jurisdiction of this Court.

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*).

Tucker's 2004 petition for post-conviction relief failed to contain any evidence in support of his allegations, was untimely, and was-in part-barred by res judicata. Tucker's 2004 motion for new trial was also untimely and did not present adequate grounds for either relief or a hearing. The trial court properly denied the motions and the Eighth District correctly applied controlling precedent and affirmed. As Tucker's

cross-appeal does not present this Court with a constitutional issue or a matter of great public interest, this Court should decline jurisdiction over Tucker's cross-appeal.

**PROPOSITION OF LAW I (As Formulated Appellee/Cross-Appellant):**  
**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 NEW TRIAL THE FILING OF WHICH WAS PROMPTED BY NEW EVIDENCE OF ACTUAL INNOCENCE.**

**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.<sup>1</sup>

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.

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

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<sup>1</sup> 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.

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 memorandum in support of jurisdiction over the Eighth District's application of the tolling provisions in App. R. 4(A). Tucker filed a cross-appeal alleging that the Eighth District erred when it affirmed the trial court's 2006 denial of his petition for post-conviction relief and motion for a new trial. As Tucker's cross-appeal lacks merit and does not present a substantive constitutional question, the State respectfully requests this Honorable Court decline to accept jurisdiction of Tucker's cross-appeal.

## LAW AND ARGUMENT

**PROPOSITION OF LAW I (As Formulated Appellee/Cross-Appellant):  
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 NEW TRIAL THE FILING OF WHICH WAS PROMPTED  
BY NEW EVIDENCE OF ACTUAL INNOCENCE.**

### ***I. Summary of Argument***

Much as he did in his appeal below, Tucker has raised one argument of error in which he argues that the trial court erred in 2006 when it denied both his petition for post-conviction relief filed on April 22, 2004, and his motion for a new trial filed on August 2, 2004. On November 10, 2004, Tucker filed a supplemental petition in support of both motions, which was also denied on March 31, 2006. The State submits that the trial court properly denied both of Tucker's motions. The Eighth District then properly applied controlling precedent and affirmed the trial court's denial. Therefore, the State requests this Honorable Court decline to accept jurisdiction over Tucker's cross-appeal.

### ***II. Standard of Review.***

The standard of review for both motions is well-established and was applied in this case. "A post-conviction relief proceeding is a collateral civil attack on a judgment." *State v. Carey*, Cuyahoga App. No. 92052, 2009-Ohio-368 at ¶7. A trial court has discretion in granting or denying a petition for post-conviction relief and will be reviewed under the abuse of discretion standard. *Id.*

Similarly, a "motion for new trial pursuant to Crim. R. 33 is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. Abuse of discretion implies that the trial court acts in an unreasonable, arbitrary, or

unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

***III. Tucker's petition for post-conviction relief was untimely and he failed to present evidence that his Constitutional rights were denied or infringed upon as to render judgment void or voidable.***

**A. Appellant failed to file his Petition for Post conviction relief within 180 days.**

Tucker filed his original petition for post-conviction relief on April 22, 2004. Tucker filed the transcripts for his direct appeal on October 15, 2003. Therefore, Tucker's original petition for post-conviction relief was untimely filed as it was due by April 12, 2004. R.C. §2953.21.

On April 22, 2004, Tucker filed his first petition for post-conviction relief in which he alleged three claims for relief. Tucker's first claim alleged that his trial counsel was ineffective for failing to call some of his requested witnesses. Tucker's second claim- in which he did not provide any evidence in support-alleged that "several individuals have contacted my family and friends that are willing to acknowledge [that witness Nikia Beal committed perjury] through affidavits only. The "individuals"(none of whom provided affidavits) would allegedly state that they heard Beal say that "she panicked when the shooting started and she ran off never seeing whom was shooting" and that the police suggested who the shooter was. Tucker's third claim alleged that the original trial judge [Judge John P. O'Donnell] possessed apparent bias against him.

Tucker clearly knew of the facts to support his first and third claim prior to his direct appeal. As to his second claim, Tucker only made a generic statement that there were individuals willing to state that Beal provided false testimony. Tucker did not include affidavits from any individual in support of his claim, nor did he provide any

other evidence to support his assertion. Nowhere in his petition did Tucker claim that he was unavoidably prevented from discovering any of the facts claimed in his petition. Further, Tucker does not argue that a new constitutional right has been created that can be applied retroactively to a person in his situation.

Because Tucker has not proven an exception under R.C. 2953.23, the trial court did not err in denying his petition. R.C. 2953.23(A). The Eighth District agreed and found that while Tucker sufficiently demonstrated that he was unavoidably detained from discovering the alleged recantation, the other grounds for relief were known and the time of trial and were untimely. *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶23 (*Tucker IV*).

**B. Tucker's Petition was Properly Denied as it Lacked Substantive Merit.**

**i. Defense counsel was not ineffective for failing to call alleged witnesses as they would have been cumulative to the witnesses that testified at trial.**

Tucker's first argument in his petition or post-conviction relief was that he was not provided effective assistance of counsel because counsel did not call witnesses that Tucker alleges may have supported his alibi. "On the issue of counsel's ineffectiveness, the petitioner has the burden of proof, since in Ohio a properly licensed attorney is presumably competent." *State v. Calhoun* (1999), 86 Ohio St.3d 279. In *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, this Court established that counsel's performance must be below an objective standard to be considered ineffective. This Court has adopted a two-prong test to determine whether trial counsel was ineffective: "first, appellant must show that counsel's performance was deficient, and second, that the deficient performance prejudiced appellant so as to deprive him of a fair trial. *State v. Fraizer*,

115 Ohio St.3d 139, 2007-Ohio-5048; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

Tucker's argument fails for two reasons. First, the decision to call a witness is a tactical decision that will not support a claim for ineffective assistance of counsel. *State v. Payton* (1997), 124 Ohio App.3d 552, 559, 706 N.E.2d 842. Second, Tucker's trial counsel did in fact call two witnesses, Lhendro Hill and Stefan King, who testified that Tucker was in the bar at the time of the homicide. While Tucker failed to provide any evidence of what the purported witness would have said, if the witness testified consistent with Hill and King then the witness's testimony would have been merely cumulative and would not support granting Tucker's requested relief. See *State v. Clay*, 181 Ohio App.3d 563, 910 N.E.2d 14, 2009-Ohio-1235, ¶20 (finding no reversible error where the evidence was cumulative).

As such, Tucker's claim is meritless and the trial court did not err in denying his petition for post-conviction relief. The Eighth District found that Tucker's argument in this respect lacked merit and was barred by res judicata as it was raised in Tucker's first direct appeal. *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶20 (*Tucker IV*).

**ii. Tucker did not present any evidence to support his claim that Beal lacked credibility and/or presented false testimony.**

In his second claim, Tucker alleged that "several individuals have contacted my family and friends that are willing to acknowledge [that witness Nikia Beal committed perjury] through affidavits only. The "individuals"-none of whom provided affidavits-would allegedly state that they heard Beal say that "she panicked when the shooting

started and she ran off never seeing whom was shooting” and that the police suggested who the shooter was.

Tucker did not present any evidence to support his generic statement. Tucker was not entitled to a hearing on his petition as he failed to offer evidence outside of the record to support his claim. Tucker was required to provide evidence that was competent, relevant, and that advanced his claim “beyond [a] mere hypothesis and a desire for further discovery.” *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362; see also *State v. Jackson* (1980), 64 Ohio St.2d 107, 111 (a petitioner cannot satisfy his burden with broad, conclusory allegations, but generally must assert specific operative facts in evidentiary form). Tucker failed to do so.

“Post conviction relief is available only to redress constitutional violations.” *State v. Cleveland*, Lorain App. No. 08CA009406, 2009-Ohio-3697, ¶25. The recantation of a key trial witness does not rise to the level of a constitutional violation that is required before a trial court is able to grant post-conviction relief. *Id.* Furthermore, “evidence of perjury, without proof of knowledge on the part of the prosecution of that perjury, does not implicate constitutional rights” and also will not support a petition for post-conviction relief. *Id.* To the extent that Tucker’s second claim can be considered a recantation; it would not support Tucker’s requested relief.

Because Tucker failed to meet his evidentiary burden and has not presented a constitutional violation, the trial court did not err in denying Tucker’s petition for post-conviction relief. The Eighth District properly affirmed finding that Tucker’s claim in this respect was “wholly unsupported” such that a hearing was not required. *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶19 (*Tucker IV*).

**iii. Tucker did not present any evidence to support his claim that Judge John O'Donnell was biased.**

In his third claim, Tucker alleged that the original trial judge [Judge John O'Donnell] possessed apparent bias. Tucker claimed that during an in chamber conversation, Judge O'Donnell made the following comment: “[h]ow will the Appeal Courts know if I was wrong in this decision?”

This Court has held that a party may be considered to have waived its objection to the judge when “the objection is not raised in a timely fashion and the facts underlying the objection have been known to the party for some time.” *State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, 2008-Ohio-2762, ¶56. Further, an “appellate court is without authority to pass upon issues of disqualification or to void a judgment on the basis that a judge should be disqualified for bias or prejudice.” *State v. Drummond*, Mahoning App. No. 05 MA 197, 2006-Ohio-7078, ¶105, (Emphasis Added); see also *Grogan v. T.W. Grogan Co.* (2001), 143 Ohio App.3d 548.

First, there is no indication of bias on the part of the original trial judge. Second, if Tucker’s claim has merit, then Tucker was aware of the fact during the proceedings. Tucker’s proper remedy would have been to file an affidavit of disqualification against the judge when he learned of the incident. Tucker failed to do so, and has waived this issue. As Tucker did not meet his evidentiary burden, nor did he follow the proper procedure for addressing judicial bias, the trial court did not err in denying Tucker’s petition for post conviction relief. The Eighth District properly concluded that this claim lacked merit as the allegation “does not even begin to establish an apparent bias.” *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶21 (*Tucker IV*).

### C. Conclusion

The Eighth District properly affirmed the trial court's denial of Tucker's petition for post-conviction relief as it was untimely, barred by res judicata, and unsupported. As such, Tucker's cross-appeal does not warrant this Court's jurisdiction.

#### ***IV. Tucker's motion for new trial was untimely and did not present adequate grounds for relief.***

##### **A. Tucker's motion was untimely filed and Tucker did not request leave to file a delayed motion for new trial.**

The Eighth District properly applied controlling precedent and affirmed the denial of Tucker's motion for new trial. Tucker filed his motion for new trial on August 2, 2004. The verdict was rendered on August 25, 2003, and journalized on September 2, 2003. Therefore, Tucker's motion was filed well beyond the 120 day time limit imposed in Crim. R. 33(B).

"Pursuant to Crim.R. 33(B), if a defendant fails to file a motion for a new trial based on newly discovered evidence within 120 days of the jury's verdict or court's decision, then he or she ***must seek*** leave from the trial court to file a delayed motion. To obtain such leave, the defendant must demonstrate by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence within the 120 days. A party is "unavoidably prevented" from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence." *State v. Berry*, Franklin App. No. 06AP-803, 2007-Ohio-2244, ¶19.

Tucker did not request leave to file a delayed motion for new trial and did not show that he was unavoidably prevented from ascertaining the alleged "new evidence."

Tucker's purported new evidence was an alleged recantation by one of the State's eyewitnesses, Joseph Fussell. Fussell's testimony is not new. Fussell testified at trial and was available and subject to full cross-examination. Therefore, Tucker was not unavoidably prevented from discovering Fussell's veracity. Fussell's affidavit also fails to state why he did not recant his testimony for over nine months after Appellant's conviction. See *State v. Fortson*, Cuyahoga App. No. 82545, 2003-Ohio-5387 (recanting witnesses affidavits did not explain the delay for their failure to recant).

Other than the date of the affidavit, Tucker does not present in either the motion or the affidavit a clear explanation of why he was unavoidably prevented from discovering the recantation. The Eighth District, as well as the Third, Seventh, and Twelfth District Courts of Appeals, have concluded that an "affidavit signed outside of Crim. R. 33's one hundred and twenty day time limit does not necessarily offer clear and convincing proof that the movant was unavoidably prevented from obtaining the evidence within the time limit." *State v. Shakoor*, Mahoning App. No. 10 MA 64, 2010-Ohio-6386; *State v. Fortson*, Cuyahoga App. No. 82545, 2003-Ohio-5387, ¶11; *State v. Jackson*, Union App. No. 14-04-11, 2004-Ohio-5103; *State v. Williams*, Butler App. No. CA2003-01-001, 2003-Ohio-5873.

The Eighth District correctly held that Tucker did not seek leave to file his motion and otherwise failed to satisfy the standard for leave. *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶29 (*Tucker IV*). Tucker's motion or new trial was properly denied.

***C. Tucker's claim did not satisfy the Petro standard. Tucker is not entitled to a new trial.***

Tucker's evidence does not meet the standard set forth in *Petro*. Tucker's evidence only serves to impeach or contradict Fussell's previous testimony. Such evidence fails to

satisfy the *Petro* test. See *State v. Saban* (March 18, 1999), Cuyahoga App. No. 73647 (such evidence is neither new nor not discoverable as the witnesses were known to the defense, on the witness list, and subpoenaed); *State v. Stanishia*, Franklin App. No. 03AP-476, 2003-Ohio-6836 (later affidavit of witness who was on the state's witness list and was subpoenaed to testify is not newly discovered evidence).

The Eighth District and other jurisdictions "have cautioned that recanted testimony is ordinarily unreliable and should be subjected to the utmost scrutiny." *State v. Nash*, Cuyahoga App. No. 87635, 2006-Ohio-5925, citing *State v. Mack* (Oct. 28, 1999), Cuyahoga App. No. 75086; *State v. Moore* (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319. "Recantations of prior testimony are to be examined with utmost suspicion. Recantation by a significant witness does not, as a matter of law, entitle a defendant to a new trial. This determination is left to the sound discretion of the trial court." *Id.* citing *State v. Gray*, Cuyahoga App. No. 82841, 2003-Ohio-6643, 10, citing *State v. Germany* (Sept. 30, 1993), Cuyahoga App. No. 63568. See, also, *State v. Lane* (1976), 49 Ohio St.2d 77, 358 N.E.2d 1081; *State v. Walker* (1995), 101 Ohio App.3d 433, 655 N.E.2d 823.

In the instant case, the trial court reviewed the record and trial transcript before it denied Tucker's motion. As the Eighth District found, Fussell's testimony, while important, was not the only evidence to support Tucker's conviction. *State v. Tucker*, Cuyahoga App. No. 95556, 2011-Ohio-4092, ¶27 (*Tucker IV*). Further, the jury heard all of the evidence-including Tucker's witnesses that claimed he was in the bar-and found Tucker guilty. In ruling on Defendant's motion for a new trial, the trial court had to consider the credibility of Fussell's recantation. Given the testimony provided in this case, there is reason to question the legitimacy of Fussell's delayed recantation. See

*State v. Calhoun* (1999), 86 Ohio St.3d 279, 285, 714 N.E.2d 905 (the trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent).

Because Tucker's convictions were not solely supported by Fussell's testimony, Fussell's "recantation" would not have materially affected the outcome of the trial. As the evidence set forth by Tucker does not warrant a new trial, the trial court did not err when it denied Tucker's motion and the Eighth District did not err in affirming the trial court's ruling.

### CONCLUSION

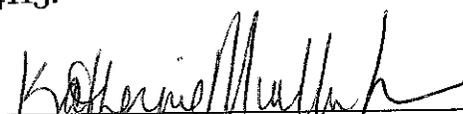
The State respectfully requests this Honorable Court decline jurisdiction over Tucker's cross-appeal.

Respectfully submitted,  
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### CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 29<sup>th</sup> day of November, 2011 to ERIKA CUNLIFFE, ESQ., 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113.

  
Assistant Prosecuting Attorney