ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2010-1373
v.	:	Appeal taken from the Summit County Court of Common Pleas
ASHFORD THOMPSON,	:	Case No. CR 2008-07-2390
Appellant.	:	**This Is A Capital Case.**

REPLY BRIEF OF APPELLANT ASHFORD THOMPSON

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Preface

Appellant Ashford Thompson replies to the Appellee's Merit Brief filed on December 12, 2011 concerning Propositions of Law Nos. 1, 2, 3, 4, 7, 8, 11, 13 and 14. A failure to respond to any specific argument or Proposition of Law is not a waiver of that argument. Rather, Thompson relies on his original Merit Brief.

Argument

Proposition of Law No. 1

A capital defendant's judgment is neither final, nor appealable until the sentencing opinion filed pursuant to R.C. § 2929.03(F) and the judgment of conviction filed pursuant to Crim. R. 32(C) comply with the requirements of Crim. R. 32(C) as well as the defendant's constitutional rights under the Double Jeopardy Clause. U.S. Const. Amend. V.

A. Introduction

Even though generally "[o]nly **one** document can constitute a final appealable order." *State v. Baker*, 119 Ohio St. 3d 197, 201, 893 N.E.2d 163, 167 (2008), and even in capital cases "a final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim. R. 32(C)," *State v. Ketterer*, 126 Ohio St. 3d 448, 935 N.E.2d 9 (2010), at the syllabus, the purportedly final, appealable order in this case impermissibly consists of three documents, all of which contain fatal errors. Those documents are: (1) the original Judgment Entry filed on June 24, 2010; (2) an incomplete *nunc pro tunc* Judgment Entry filed July 1, 2010; and (3) the 2929.03(F) sentencing opinion filed on June 23, 2010.

B. The *nunc pro tunc* entry is not a final appealable order.

The State does not contest that the *nunc pro tunc* entry fails to contain the elements of a final order. The State's reliance on *Lester* to demonstrate that a *nunc pro tunc* entry need not contain all the substantive requirements is misplaced. The *nunc pro tunc* entry considered by this Court in *Lester* did contain all of the necessary elements of a final, appealable order because it "supplemented the wording of the original resentencing judgment entry by adding [a] sentence *to the existing text*." *State v. Lester*, 130 Ohio St. 3d 303, 305, 958 N.E.2d 142, 145 (2011). In contrast, Thompson's *nunc pro tunc* entry does not contain the original text of the judgment

entry with an addition, but rather, only provides a small piece of information, none of which comports with the requirements of Criminal Rule 32(C).

C. Failure to journalize a dismissal does not render a judgment inadequate

Thompson concedes pursuant to *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, 127 Ohio St. 3d 29 (2010), that a failure to journalize dismissal of a count does not prevent a judgment from being a final, appealable order, and withdraws his argument otherwise.

D. The erroneous sentencing opinion violates Thompson's right to be free from double jeopardy.

The State agrees that the sentencing opinion erroneously sentences Thompson for a crime of which he was acquitted. The State does not argue that sentencing Thompson in such a matter does not violate his constitutional rights.

The State bases its argument on the position that any mention of non-capital sentencing in a sentencing opinion is surplusage. Here, however, the sentencing opinion accurately reflects what the court said during the sentencing hearing itself when it sentenced Thompson to five years' incarceration on merged Counts 3 and 4 (the dismissed F-3 Escape and the remaining F-5 Escape). (Transcript of Proceedings – Sentencing, pg. 42–43). The State does not contest that this error occurred.

E. Conclusion

The *nunc pro tunc* entry filed in this case does not constitute an appropriate final, appealable order and it is the relevant order because the purpose of such an order is to "replace the original with a complete, corrected judgment." *State ex rel. Elkins v. Sandusky Cty. Court of Common Pleas*, No. 5-11-008, 2011 Ohio 1904, 2011 Ohio App. LEXIS 1627 *6 (Sandusky Ct. App. April 19, 2011). The judgment entry filed in this case, which is represented by the *nunc pro tunc* order is insufficient. Moreover, because Thompson was wrongly sentenced in both the

court's sentencing opinion and on the record, this case must be remanded for a new sentencing hearing.

Proposition of Law No. 2

The defendant's right to due process, equal protection, and freedom from cruel and unusual punishment is violated when the State excludes an African-American juror without providing a satisfactory race-neutral reason. U.S. Const. Amends. VIII and XIV.

A. Introduction

The State does not dispute that Thompson's counsel need not make a prima facie showing of discrimination when the court immediately requires a race-neutral reason from the State. Rather, the State focuses on the reason itself but ignores the error the trial court made when it failed to properly investigate the State's reasoning.

B. The court, after finding the State's reasoning pretextual, failed to properly evaluate credibility.

Tellingly, the State does not respond to the substantial federal law in this area requiring the trial court make a searching inquiry, particularly when it does not accept the State's reasoning and the State offers "implausible or fantastic justifications." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). The State's justification for the canard that the juror worked closely with the Prosecutor's office is that a different prosecutor advanced that theory. The question here is not about individual prosecutors but the State acting through its agents. The State cannot argue that the court did its duty here to "to examine all of the evidence." *Riley v. Taylor*, 277 F.3d 261, 286 (3rd Cir. 2001).

The State also improperly argues that because there were some African-Americans on Thompson's jury that a *Batson* challenge cannot succeed. However, once a prima facie case has been established, "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his preemptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338–39 (2003). Here, the prosecutor's

explanations were neither credible nor persuasive. Rather than conducting a searching inquiry, the court improperly accepted one of the two on its face. That was error.

C. Conclusion

The State's theory that two prosecutors acted separately because only one offered a clearly pretextual reason cannot succeed because both acted as agents of the State. The State's pretextual reason, so identified by the judge, combined with its failure to conduct an inquiry into the circumstances of the reasoning behind the preemptory challenge indicate the court did not and should not have accepted the State's race neutral reasoning. As such, Thompson's conviction should be reversed.

Proposition of Law No. 3

The defendant's rights to a fair jury and due process are violated when the trial court fails to inquire into pre-trial publicity after a juror reveals that members of the jury pool are discussing a defendant's withdrawn prior guilty plea. U.S. Const. Amends. VI and XIV, Ohio Const. Art. I, § 5.

A. Introduction

The State's response to Thompson's concern over the tainting of the jury pool with knowledge about his prior plea misses the mark factually and as a matter of law. The court knew that jurors were discussing the prior plea and did not re-inquire with those jurors about their knowledge. That was error.

B. Counsel's failure to object is not relevant.

Thompson's counsel certainly should have objected but they did not. However, the "obligation to impanel an impartial jury lies in the first instance with the trial judge." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). The trial judge failed to fulfill her responsibility in this instance.

C. If counsel's failure to object acted as a waiver, then counsel was ineffective.

In Proposition of Law No. 13(F) Thompson argued his counsel was ineffective for failing to make the request the State argues they should have made. Thompson's Merit Brief, pg. 106. Counsel's failure was prejudicial because this case is similar to *United States v. Chagra*, 669 F.2d 241 (5th Cir. 1982). Thompson's prior guilty plea was played on the local news and many jurors were aware of the information. Recall, at least twenty jurors had to be excused because they knew too much about the case, knew Thompson previously pleaded guilty, and/or believed Thompson to be already guilty. (*Id.* at 99, 150, 153, 204, 225, 353, 381, 418, 432, 437, 444, 546, 549, 616, 622, 675, 684, 698, 876, 905).

D. Conclusion

It is clear that "pretrial publicity about his case raised 'a significant possibility of prejudice,' and that the voir dire procedure followed by the . . . court in his case failed to provide a 'reasonable assurance that prejudice would be discovered if present.'" *Chagra*, 669 F.2d at 250. This failure is the trial court's fault and reversal is required. Alternatively, Thompson's counsel were ineffective and reversal is required.

Proposition of Law No. 4

The defendant's rights to a fair trial, impartial jury, due process and freedom from cruel and unusual punishment are violated when the trial court refuses to allow counsel to question jurors who are hesitant about imposing the death penalty and applies the wrong standard in deciding whether to exclude jurors for cause. U.S. Const. Amends. VI, VIII and XIV, Ohio Const. Art. I, §§ 9, 10.

A. Introduction

The State's argument concerning Proposition of Law No. 4 ignores the similarities between this case and *State v. Hodge*, 128 Ohio St. 3d 1, 941 N.E.2d 768 (2010). Additionally, the State fails to reconcile the position that counsel did not have the right to question the juror with the plain language of R.C. § 2945.25(C).

B. *State v. Hodge* demonstrates that it is not the job of this court to rewrite the law.

This Court was clear in *Hodge* that "[o]nly the General Assembly, the lawmaking branch of our constitutional government, has authority to repeal, as well as to enact, statutory language." *Hodge*, 128 Ohio St. 3d at 7, fn.6. Based on *Hodge,* this Court should overrule its prior precedent and recognize that, in this instance, it is not the job of the court to mold the clear statutory language to changing constitutional standards. R.C. § 2945.25 was not made unconstitutional by *Witt*; rather, it stood as a higher bar subject to revision by the General Assembly.

The State's argument based on the non-binding authority of *State v. Adams*, No. 08 MA 246, 2011 Ohio 5361, 2011 Ohio App. LEXIS 4390 (Mahoning Ct. App. Oct. 14, 2011) is unpersuasive because it ignores the maxim that "Where there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence." *State v. Frost*, 57 Ohio St.2d 121, syllabus (1979). R.C. § 2945.25(C) is

clearly a special provision concerning death penalty cases and has not been legislatively swallowed by the "catchall" contained in 2945.25(O).

C. The plain language of R.C. 2945.25(C) gives each party a right to voir dire jurors.

The State cannot and does not dispute the plain language of R.C. § 2945.25(C), nor does it cite any case law contradicting Thompson's plain language theory. As such, Thompson's argument stands. It was error for the court to refuse additional questioning of an undecided juror.

D. Conclusion

For the reasons outlined above, Thompson's argument on Proposition of Law No. 4 stands and he should be granted a new trial.

Proposition of Law No. 7

The defendant's rights to a fair trial, due process and freedom from cruel and unusual punishment are violated when the trial court allows the state to introduce irrelevant prejudicial statements and impermissible character evidence over the objection of defense counsel. U.S. Const. Amends. VI, VIII and XIV, Ohio Const. Art. I, §§ 9, 10. Ohio R. Evid. 403, 404.

Primarily, Thompson rests on his Merit Brief for this Proposition of Law. However, he notes that the State argues in this Proposition of Law that the statements were necessary to demonstrate the element of purpose while arguing in Proposition of Law No. 11 that "the evidence is overwhelming that Thompson purposely caused the death of the officer. And in truth Thompson had no defense." Appellee's Merit Brief, pg. 43. The State further argues in its Brief, "Thompson cannot escape the evidence of four shots fired into the officer's head with at least two of them while the officer was on the ground and two of the shots with the barrel pressed against the officer's skin." *Id.* at 47. These statements cannot be reconciled with the apparent need to introduce the statements that Bartz purportedly heard.

Proposition of Law No. 8

The Defendant's due process rights are violated when the trial court instructs the jury in a manner that undermines his presumption of innocence, as guaranteed by the Fourteenth Amendment of the United States Constitution and Ohio Revised Code § 2901.05(A).

The Court told Thompson's jury that "there will be a break between this phase and the next phase. And you will remain part of the jury until we finish the second phase of the – get to the second phase." (Tr. 1823.) The State concedes that this language is "incorrect." Appellee's Merit Brief, pg. 29. The State however then claims that this statement cannot be prejudicial. However, a Court directing the jurors that they ***will*** unequivocally remain on the jury through both phases of the trial is indeed prejudicial. Thompson requires a new trial, as his rights to due process and a fair trial were violated.

The State further asserts that plain error analysis is appropriate. Appellee's Merit Brief, pg. 28. However, to the extent that Thompson's counsel failed to object that constitutes ineffective assistance of counsel as outlined in Proposition of Law No. 13.

Proposition of Law No. 11

A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.

A. Introduction

The State admits that the prosecutor's comment regarding the defense being willing to deceive the jury "arguably went over the line," but wrongly argues that it was not prejudicial. Appellee's Merit Brief, pg. 43. Additionally, the State incorrectly asserts that Thompson did not cite the transcript when discussing the police dispatcher's testimony. *Id.* at 42. Last, the State requested that the Court ignore Thompson's claims that the State admitted improper photographic evidence against him. *Id.* at 46. That photograph is clearly marked in the transcript as State's Exhibit 1.

B. The State's comment that Thompson's counsel was willing to deceive the jury was prejudicial.

The State casts the prosecutor's comment as isolated when, in fact, the theme of the defense being deceptive carried over from trial into the sentencing phase: "How much more do you think the Defense is willing to deceive you to find out – find the defendant not guilty?" (Tr. 2474). *See also* Mitig. Tr. 203 (referring to defense argument as "absurd" and "crazy"); id. at 210 ("and if you don't think that [defense counsel are] shading those facts in their favor, you're wrong, because they are and you know they are").

The cumulative impact of these statements along with the other statements identified by Thompson "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)) (internal quotations omitted).

Again, to the extent that Thompson's counsel failed to object that constitutes ineffective assistance of counsel as outlined in Proposition of Law No. 13. The fact that counsel did object to the prosecutor calling them untruthful in front of the jury is all the more puzzling and prejudicial.

C. Thompson did identify the improper questioning of the police dispatcher.

Thompson properly cited the transcript when referring to the improper questioning of the police dispatcher:

> During the testimony of Christine Franco, the prosecutor sought to change the testimony elicited from Franco on cross-examination. Franco was the police dispatcher, and she testified in response to a question by the defense that there were never any distress codes that came from Miktarian. (Tr. 1400). The prosecutor made two attempts to get Franco to state that Miktarian meant "I need another unit" as a distress call, but both were objected to and sustained because Franco could not know Miktarian's thought processes.
>
> The prosecutor asked on redirect: "When he said—when Officer Miktarian said on the radio, send Reminderville up here. I need another unit—I know you don't know one way of the other, but could that have been a distress call?" (Tr. 1403). Although Franco never answered, because the court sustained the objection, the prosecutor went on to ask, "So when you answered [defense counsel's] question, you didn't know that either?" Franco finally gave in and agreed with the prosecutor. (Id).
>
> Thompson's Merit Brief, pg. 80.

D. Conclusion

Thompson's brief properly identifies the appropriate transcript pages. Additionally, the prosecutor's admittedly over-the-top comments identified by the State, coupled with the others Thompson identified, demonstrate a prejudicial level of prosecutorial misconduct. Thompson must be given a new trial and/or sentencing phase.

Proposition of Law No. 13

The defendant's right to the effective assistance of counsel is violated when counsel's performance, during the trial phase, is deficient to defendant's prejudice. U.S. Const. Amends. VI and XIV, Ohio Const. Art. I, § 10.

A. Introduction

Thompson primarily relies on his Merit Brief but responds to the State's argument that counsel's failure to listen to Roberson's testimony was not prejudicial.

B. Thompson's counsel's failure to listen to Roberson's testimony prejudiced Thompson.

The State admits that counsel "should have listened to the recording had they known it existed." Appellee's Merit Brief, pg. 61. The State also admits that the tape was available. *Id.* at 61.

The question then becomes prejudice. Roberson was the only defense witness, and she was unprepared to testify. The prejudice is readily apparent because Thompson was not able to convince the court to give a manslaughter instruction because he had not presented sufficient evidence. (Tr. 2371).

During trial, Roberson testified that the victim was being "rude" (Tr. 2256), that Thompson "ended up on the ground" (Tr. 2124), that the Officer then threatened "to let [his] dog out on [Thompson's] ass" (Tr. 2125), that the officer "pushed [Thompson] back to the police car and slammed – kind of slammed him down on the hood" (Tr. 2274-75), that she "feared for Ashford's life" (Tr. 2257), and that Thompson told her that he shot the victim because the victim "was trying to hurt him." (Tr. 2277). The State, however, was able to paint Roberson as an unreliable witness because she was not prepared.

C. The cumulative effect of counsel's failure constituted ineffective assistance.

The State asserts that Thompson is attempting to add up a substantial number of zeros to make something of nothing. Appellee's Merit Brief, pg. 66. However, the State's assertion is belied by the fact that it notes in its brief that Thompson's counsel failed to object at least fifteen times in arguing that he has waived all but plain error on multiple issues. *Id.* pgs. 6, 22, 28, 31, 33, 36, 38-40, 43, 45, 46-47.

D. Conclusion

Thompson's counsel was ineffective in myriad fashion during his trial and his conviction should be reversed.

Proposition of Law No. 14

The defendant's rights to the effective assistance of counsel, and protection from cruel and unusual punishment are violated when counsel's performance during the mitigation phase is deficient to defendant's prejudice. U.S. Const. Amends. VI, VIII and XIV, Ohio Const. Art. I, §10.

A. Introduction

Thompson again primarily relies on his Merit Brief but responds to the State's argument that counsel's failure to retain and present a psychological expert was neither deficient nor prejudicial.

B. Thompson was prejudiced by counsel's failure to present psychological testimony during the sentencing phase of his capital trial.

For precisely the reasons the State points out in its Appellee Brief, Thompson's counsel were deficient to Thompson's prejudice when they failed to present the testimony of Dr. James Siddall. Appellee's Merit Brief, pg. 70. As the State points out, Dr. Siddall was indeed retained and had been paid a significant amount of money. *Id.* However, contrary to the State's assertions, it cannot be presumed that counsel made a strategic decision to not present this testimony.

When evaluating the reasonableness of counsel's strategy in a capital case, "a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Only after a full investigation can counsel make an informed, tactical decision about which information would be helpful in a client's case. *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995); *State v. Johnson*, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986).

Here, it is impossible to know whether a reasonable investigation was conducted from the face of the record. In addition, because Kerry O'Brien was lead counsel in both this case as well as in the case of Phillip Jones, it is unreasonable to assume that counsel was competent in light of

the recent remand from the Ninth District Court of Appeals on exactly this issue (sentencing phase ineffectiveness) in Jones' case. See *State v. Jones*, No. 25695, 2011 Ohio 6063, 2011 Ohio App. LEXIS 4949 (Summit Ct. App. Nov. 23, 2011).

As there is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel", Thompson's counsel were prejudicially deficient when they failed to present the testimony of Dr. James Siddall during the sentencing phase of Thompson's capital trial. *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974).

C. Conclusion

Thompson's counsel was ineffective in myriad fashion during the sentencing phase, and his sentence should be reversed.

Conclusion

For the foregoing reasons along with reasons articulated in his Merit Brief, Ashford Thompson's convictions and sentence must be reversed.

Respectfully Submitted:

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Certificate Of Service

I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT ASHFORD THOMPSON was forwarded by regular U.S. Mail to Richard Kasay, Assistant Summit County Prosecutor, 53 University Ave., Akron, Ohio 44308, this 25th day of January, 2012.

By: _____
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