

IN THE SUPREME COURT OF OHIO

On Appeal from the Eighth Appellate District Court
for Cuyahoga County, Ohio
Case No. 98327

12-1025

STATE OF OHIO,
Plaintiff/Appellee,

Supreme Court No. _____

- vs -

CHANANA AQU-SIMMONS,
Defendant/Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION

FILED
JUN 14 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Appearances:

FOR THE DEFENDANT/APPELLANT

FOR THE PLAINTIFF/APPELLEE

CHANAN AQU-SIMMONS, #313-893
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PROPOSITION OF LAW NO. 2

Whether, and in the absence of a filed and journalized jury verdict form, appellant's imprisonment offends due process and whether a trial court may properly rely on a nunc pro tunc order to supply that omitted action. see: U.S.C.A. Const. Amends. 6, 14; Norris v. Schotten, 146 F. 3d 314, at: *333 (6th Cir. 1998); and, Crim. R. 55 § 5

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**STATEMENT AS TO WHY THIS CASE IS OF GREAT
PUBLIC INTEREST**

[T]his case involves a felony, raises a substantive constitutional question, is a case of 'first impression' and is of great public interest insomuch as it involves fundamental concepts of law openly breached resulting in the imprisonment of one whom is 'actually innocent.'

In this case, *** a trial by jury was had, however, ... no verdicts were ever returned by the trial nor filed and journalized by the clerk of courts.

It is well established law that a court of record speaks only through its journal and where, as here, that journal is patently devoid of any written record (in the form of a jury verdict form) ever being filed and journalized with the clerk, there is no judgment of conviction as a matter of law and defendant's 18 years of imprisonment can only constitute daily exercises in false imprisonment set upon a total suspension of his civil rights.

The public policy that no person shall be deprived of life, liberty, or property without due process of law stands irreparably implicated in this case, and because cutative measures have been systemically deprived appellant, there exists a real and compelling public interest that 'justice satisfy the appearance of justice.'

The record in this case irrefutably demonstrates that 'simply justice' has not been served.

The indigent defendant has been incarcerated for over 18 years without any judgment, i.e. 'VERDICT FORM' from the jury ever being filed, journalized and made part of the record to which, this case, being one of 'first impression' is one of great public interest therefore.

This action follows.

STATEMENT OF CASE AND FACTS

[T]his case originated in the Cuyahoga County Common Pleas Court as the criminal matter entitled: State of Ohio v. Chanan R. Aqu-Simmons, Case No. CR 327075, therein charging the offense(s) of: 'aggravated murder; aggravated robbery; and, aggravated burglary.'

After having initially entered pleas on no guilty, a trial by jury followed and arguably some form of verdicts were returned.

The record however indicates that for whatever reasons, the JURY VERDICTS were 'thrown away' or 'destroyed' to which the trial court sought to issue a nunc pro tunc order in lieu of the jury verdicts to "supply that omitted action."

Appellant sought a copy of the JURY VERDICT FORMS from the Cuyahoga County Clerk of Court via the Ohio Public Record Act and was instructed 'repeatedly' 'in writing' that no such JURY VERDICT FORMS were ever received, filed, or journalized in this case with that office ... ever.

Appellant then filed a pro se motion with the trial court for immediate discharge from custody after having already served in excess of 18 years of imprisonment with the 'guilt phase' of the trial proceedings having never been concluded.

The trial court denied defendant's motion (without hearing) and thereupon both the trial court and the clerk of courts negligently failed to timely provide defendant a copy of that judgment entry denying the proceeding.

A 'delayed appeal' eventually followed and was denied sua sponte by the Eighth Appellate District Court on: 'May 23, 2012' to which this appeal does thus respectfully follow.

[R]elief is accordingly sought.

LAW AND ARGUMENT:

PROPOSITION OF LAW NO. 1

Whether the court of appeals violated due process, U.S.C.A. Const. Amend. 14, when it denied appellant's motion for leave to file 'delayed appeal,' Wolfe v. Randle, ___ F. Supp. 2d ___ (2003) (citation omitted) which appeal was predicated solely on the clerk's negligence in timely providing appellant the required 'journal entry' upon which a timely appeal as of right must be based. see: O.R.C. § 2303. __

[I]n raising this constitutional proposition, appellant does so from the position that where a 'delayed appeal' is as a result of the trial court failing to advise a criminal defendant about his appellate right, due process rights are implicated. see: Wolfe v. Randle, 267 F. Supp. 2d 743 (S.D. Ohio 2003).

"Due process claims are implicated when defendant is denied adequate opportunity to present his claim and receive adjudication on merits, or when defendants are treated differently in such way that affects their ability to pursue meaningful appeal. U.S.C.A. Const. Amend. 14." id. at: *2.

In the instant case, defendant sought relief from judgment of conviction in the Cuyahoga County Common Pleas Court to which, and upon denial of defendant's motion for immediate discharge from custody, the trial court failed to 'timely' provide the *indigent defendant ('whom was proceeding in the matter pro se') with a copy of the judgment entry disposing of the matter.

The clerk of courts in turn completely failed to provide defendant a copy of said judgment until AFTER the time for filing an 'appeal as of right,' i.e. 30-days, had completely expired.

Hence, *** appellant had no opportunity to pursue a meaningful appeal within the time limits authorized by law, App. R. 4, and was treated so

differently and in such way, that it prejudicially affected his right to a meaningful appeal altogether.

It is well established that:

"In order to be properly informed, defendant must be told of his right to appeal, procedures and time limits involved in proceeding with that appeal, and right to have assistance of counsel for that appeal." id. at: Wolfe v. Randle, at: *9

This constitutional mandate presupposes that a criminal defendant would, at a minimum, be accorded notice (in the form of a judgment entry) that the underlying proceedings had been concluded that a 'timely' appeal might follow.

It is equally well established that: "a clerk of courts who negligently fails to perform a ministerial duty and thereby proximately causes injury to another has no immunity from an action for damages." see: Dalton v. Hysell, 56 Ohio App. 2d 109, 381 N.E. 2d 955, 10 O.O. 3d 131.

see also: Crim. R. 55; and, O.R.C. § 2303. __.

At a minimum, *** due process requires 'notice' and an 'opportunity to object or to be heard' ... such then was not that case at bar.

"Although defendant is not necessarily denied constitutional right when state court denies request for delayed appeal, due process rights are implicated when delayed appeal is result of lower court's failure to ensure that indigent defendant's appellate rights are protected." id. at: Wolfe v. Randle, at: *744 [*5].

Having some knowledge of his appellate rights and being completely denied of meaningful opportunity to pursue those rights are not distinguishable as the result remains the same ... due process rights are implicated.

So says basic fairness and due process of law.

PROPOSITION OF LAW NO. 2

Whether, and in the absence of a filed and journalized jury verdict form, appellant's imprisonment offends due process and whether a trial court may properly rely on a nunc pro tunc order to supply that omitted action. see: U.S.C.A. Const. Amends. 6, 14; Norris v. Schotten, 146 F. 3d 314, at: *333 (6th Cir. 1998); and, Crim. R. 55

[T]he record in this case shows that appellant was tried by a jury, which trial commenced on: 'October 30, 1995.'

On: 'November 8, 1995' the record reveals that some form of *verdict was returned, however, no verdict forms (signed by the jurors) was ever filed and journalized by the clerk of courts in this case.

What did occur, *** is that the trial court, and on: 'November 24, 1995' issued a nunc pro tunc order purporting to be a 'journal entry' (which document was never properly filed with the clerk of courts, Crim. R. 32(C)) urging that at some point the jury had returned verdicts of guilty.

It is well established that a court of record speaks only through its journal, Schenley v. Kauth (1953), 160 Ohio St. 109, 51 O.O. 30, 113 N.E. 2d 625.

"[a] court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum." id. at: paragraph one of the syllabus.

Simply stated, *** there exists nowhere in the record any 'VERDICT FORMS' which have been signed by each of the respective jurors and filed and journalized with the clerk of courts. see: State v. Reese, 2007 WL 1390647 (Ohio App. 9 Dist.), 2007-Ohio-2267, at: ¶10.

"[w]ithout the journalization of this information, there is no judgment

of conviction pursuant to Crim. R. 32(C) and therefore, not final appealable order." id.

It follows, that:

"Filing and journalization are two separate acts." id.

[a]nd that:

"There is no requirement that a judgment be filed and journalized on the same day, only that both acts occur within 30 days of the decision. Sup. R. 7(A)." see: State v. Orosz, 2008 WL 2939471 (Ohio App. 6 Dist.), 2008-Ohio-3841, at: ¶8, ¶9 and ¶10. see also: State v. Baker, 119 Ohio St. 3d 197, 893 N.E. 2d 163, 2008-Ohio-3330.

Simply stated, *** and while this case is clear one of 'first impression,' the inescapable conclusion is and remains that defendant/appellant is deprived of his liberty without due process of law, U.S.C.A. Const. Amend. 14, and that in the absence of a signed and properly filed verdict from the jury on all counts alleged, there is no judgment of conviction.

As was stated above, ... the trial court attempted to "supply that omitted action" via the Office of Nunc Pro Tunc, a function to which such office simply cannot do. see: Norris v. Schotten, 146 F. 3d 314, at: *333 (6th Cir. 1998), citing: State v. Greulich (1988), 61 Ohio App. 3d 22, 572 N.E. 2d 132, *134.

Defendant in turn sought "immediate discharge from custody" where, and after a thorough Ohio Public Record Act ("ACT") request to the Cuyahoga County Clerk of Courts had 'repeated' revealed that NO JURY VERDICT FORMS had ever been received, filed, or journalized with that office.

The trial court denied appellant's properly pled and substantively support motion for immediate discharged from custody, however, and as was

stated above, the clerk of courts then failed to provide defendant a copy of said judgment on which a timely appeal as of right could follow.

In each instance, *** defendant was denied due process of law, fundamental fairness, and his imprisonment not only offends multiple Amendments to the United States Constitution, but is the very antithesis of due process of law.

"when the reason for the rule no longer exists,
so ought not the rule."

A nunc pro tunc order will no suffice to supply that omitted action nor will it suffice as substitute for a signed jury verdict.

So says basic fairness and due process of law.

Ultimately, *** and until a properly signed, filed and journalized verdict form is spread across the journal of the court, the 'guilt phase' of the trial is incomplete and appellant is entitled to relief as a matter of law and fact.

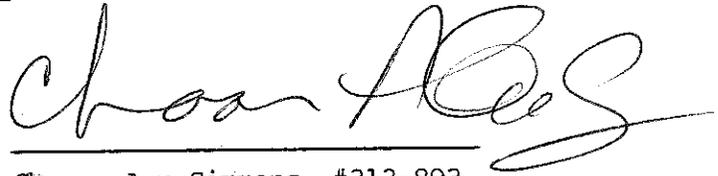
This action follows.

Conclusion:

[W]herefore, *** and for each of those reasons stated above, this Court should accept jurisdiction in and over this matter because it is clearly a case of 'first impression' is of genuine public interest, and to correct the resulting fundamental miscarriage of justice therefore.

[R]elief is accordingly sought.

[E]xecuted this 8th day of June, 2012.



Chanan Aqu-Simmons, #313-893

M.C.I.

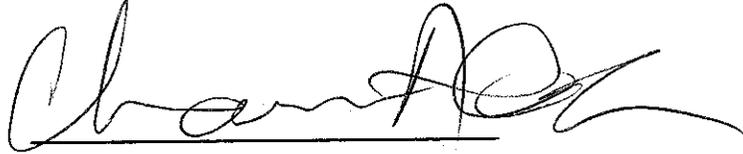
P.O. Box 57

Marion, Ohio

43301

CERTIFICATE OF SERVICE:

This is to certify that the foregoing was duly served by United States Mail on the Office of the Cuyahoga County Prosecutor, at: 1200 Ontario Street, Cleveland, Ohio, 44113, on this 8th day of June, 2012.



Chanan Aqu-Simmons, #313-893

[]

Court of Appeals of Ohio, Eighth District

FILED

County of Cuyahoga

Gerald E. Fuerst, Clerk of Courts

2012 MAY 24

P 2:05

STATE OF OHIO GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

COA NO.
98327

LOWER COURT NO.
CP CR-327075

COMMON PLEAS COURT

-vs-

CHANAN AQU-SIMMONS

A 313893

Appellant

MOTION NO. 454876

Date 05/23/12

Journal Entry

Motion by Appellant, pro se, for leave to file delayed appeal is denied.

RECEIVED FOR FILING

MAY 23 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.



Judge JAMES J. SWEENEY, Concur

Frank D. Celebrezze, Jr.
Presiding Judge
FRANK D. CELEBREZZE, JR.

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