

ORIGINAL

IN THE SUPREME COURT OF OHIO

Supreme Court Case Number 12-1858

STATE OF OHIO

Appellee

v.

NADEEM ABRAHAM

Appellant

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Court of Appeals No. 26258

**MEMORANDUM IN OPPOSITION
STATE OF OHIO**

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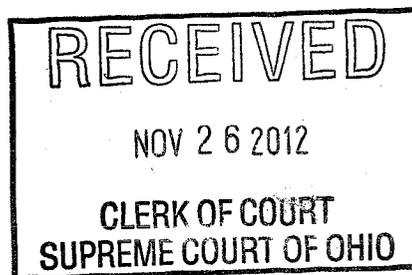
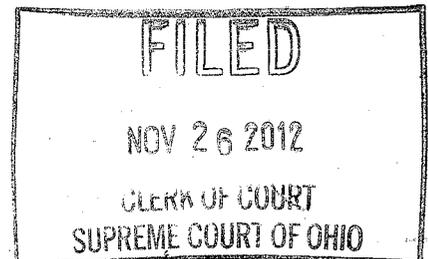


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STATEMENT ON JURISDICTION

This case does not involve a substantial constitutional question and it affects nobody except appellant Abraham.

While the State agrees that the Memorandum in Support of Jurisdiction generally sets out the procedural posture of the case and facts some clarification is in order.

In Abraham's principal brief in the court of appeals he argued that the trial court erred in denying his motion to sever. Abraham specifically termed his motion one under Crim.R. 14. The State responded that since Abraham had not renewed the motion either at the conclusion of the State's case or at the conclusion of all the evidence the issue was forfeited under Ninth District precedent.

In his Reply Brief Abraham argued that the substance of his motion showed that it was one under Crim.R. 8 and thus not forfeited; and that if there was a forfeiture there was plain error. The State filed an additional authority indicating that it was not proper to raise new matter in a Reply Brief.

The majority of the court of appeals found that the motion was indeed one under Crim.R. 14 and forfeiture applied. *Abraham*, 2012-Ohio-4248, ¶8. Then, disregarding that Abraham had raised the plain error argument in his Reply Brief, the majority found no plain error because Abraham had not, in the court of appeals, analyzed the issue under *State v. Schaim*, 65 Ohio St.3d 51, 59 (1992). *Abraham*, ¶11-¶12.

The dissenting Judge agreed that forfeiture applied. *Abraham*, ¶54 (Dickinson, Judge, dissenting.) Judge Dickinson went on to state, at variance with his previous statement that the majority correctly found that forfeiture applied, that

the majority had not addressed whether Abraham's motion was actually one under Crim.R. 8 or Crim.R. 14. *Id.* ¶55. In fact, the majority specifically found that the motion was "squarely within the purview of Crim.R. 14." *Id.* ¶8.

Judge Dickinson went on to make an argument that Abraham did not make, under *Schaim*. *Id.* ¶58-¶59. Judge Dickinson found plain error under Evid.R. 404(B). *Id.* ¶60-¶61. Nevertheless, Judge Dickinson found that the evidence concerning the computer crimes and the molestation crimes was simple and distinct. *Id.* ¶58.

The court of appeals over Judge Dickinson's dissent later denied an application for reconsideration in part because Abraham "failed to set forth an argument in his brief on appeal" (under *Schaim*). Journal Entry dated October 30, 2012.

There is no reason to believe that the dissent offers Abraham any support because Judge Dickinson found the evidence to be simple and distinct. This case is not even an error case.

PROPOSITION OF LAW I AND II

PROPOSITION OF LAW I

APPELLANT ABRAHAM WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY THE FAILURE TO RENEW THE RULE 14 MOTION FOR SEVERANCE AT THE CONCLUSION OF HIS TRIAL

PROPOSITION OF LAW II

APPELLANT ABRAHAM RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BY THE FAILURE TO RAISE TRIAL COUNSEL'S INEFFECTIVENESS BEFORE THE NINTH DISTRICT COURT OF APPEALS AND TO FULLY BRIEF THE PLAIN ERROR ARGUMENT BEFORE THE APPELLATE COURT.

LAW AND ARGUMENT

As to the first Proposition of Law Abraham cannot show any prejudice because even if his motion had been renewed and denied his argument on appeal would fail under *Schaim*. That case holds that there is no prejudice in joining counts for trial where the evidence on the alleged improperly joined counts is simple and distinct. *Abraham*, ¶10; *State v. Markwell*, 5th Dist. No. CT2011-0056, 2012-Ohio-3096, ¶49-¶51.

Judge Dickinson incorrectly focused only on one factor under *Schaim*, whether the evidence would be admissible even if the counts were severed. He found the evidence to be simple and distinct. *Abraham*, ¶58. In his Memorandum in Support, Abraham does not argue that the evidence was not simple and distinct.

Concerning the second Proposition of Law Abraham says, as if this were an application under App.R. 26(B), that appellate counsel were ineffective because they did not assert that trial counsel were ineffective for failing to preserve the joinder issue for appeal by renewing the motion in the trial court.

The fact is that Abraham was represented on appeal by the same two attorneys who represented him at trial. Abraham does not explain why this Court should approve an appellate attorney asserting that she was ineffective at trial.

This Court addressed a similar concern in *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297. There this Court cautioned against finding structural error because it might “encourage defendants to remain silent at trial only to raise the error on appeal where the conviction would be automatically reversed.” *Perry*, ¶23. There is no need to encourage trial counsel to set traps that the same counsel could later spring on appeal.

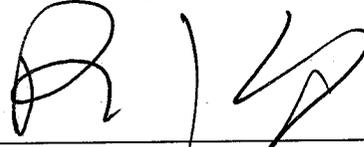
Moreover, Abraham faces the same obstacle as he does in the first proposition. He would not be able to show, and makes no effort here to even attempt to show, prejudice.

WHY LEAVE TO APPEAL SHOULD BE DENIED

Pursuant to the argument offered, the State respectfully contends that leave to appeal should be denied, as the defendant has failed to present a substantial constitutional issue, or indicate this case is of great public or general interest.

Respectfully submitted,

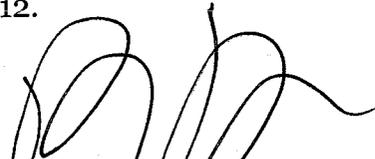
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition was sent by regular U.S. mail to Attorney Nathan A. Ray, 137 South Main Street, Akron, Ohio 44308, on the 16th day of November, 2012.



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