

In The Supreme Court of Ohio

State of Ohio, :

Appellee, :

-vs- : **Case No. 12-1644**

Nathaniel Jackson, :

Appellant. : **This is a death penalty case**

Nathaniel Jackson's Suggestion of Lack of a Final Appealable Order

DENNIS WATKINS - 0009949
Trumbull County Prosecuting Attorney

OFFICE OF THE
OHIO PUBLIC DEFENDER

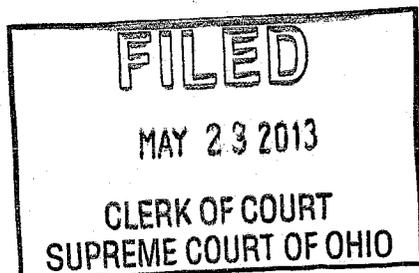
LUWAYNE ANNOS - 0055651
Assistant Prosecuting Attorney

RANDALL L. PORTER - 0005835
Assistant State Public Defender
Counsel of Record

Trumbull County Prosecutor's Office
160 High Street, N.W.
4th Floor Administration Building
Warren, Ohio 44481
(330) 675-2426 (Voice)
(330) 675-2431 (Facsimile)
psannos@co.trumbull.oh.us

250 E. Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394 (Voice)
(614) 644-0708 (Facsimile)
Randall.Porter@OPD.ohio.gov

And
DENNIS L. SIPE - 0006199
Buell & Sipe, Co., L.P.A.
322 Third Street
Marietta, Ohio 45750
(740) 373-3219 (Voice)
(740) 373-2892 (Facsimile)
dennis@buelssipe.com



COUNSEL FOR APPELLEE

COUNSEL FOR APPELLANT

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Appellant Nathaniel Jackson suggests to this Court that the trial court's August 14, 2012 sentencing opinion that he filed almost immediately after his resentencing hearing on the same date fails to comply with the requirements contained in R.C. 2929.03(F) and therefore does not constitute a final appealable order. Specifically, the trial court: 1) acknowledged at the resentencing hearing that it had already written its opinion, 2) announced that he would not consider any new evidence and 3) failed to consider any new evidence in his sentencing opinion. Appellant has attached a memorandum of law that he incorporates in his motion.

Respectfully submitted,

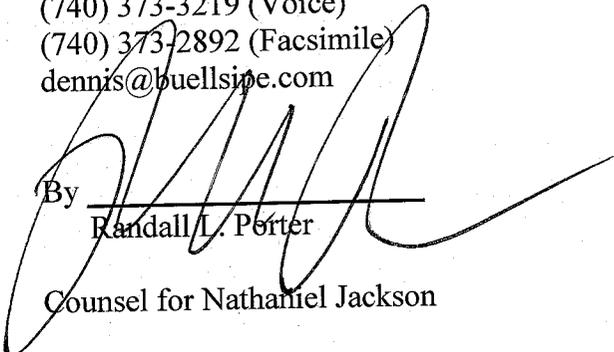
Office of the
Ohio Public Defender

RANDALL L. PORTER - 0005835
Assistant State Public Defender
250 E. Broad Street - Suite 1400
Columbus, Ohio 43215-9308
(614) 466-5394 (Telephone)
(614) 644-0708 (Facsimile)
Randall.Porter@opd.ohio.gov

And

DENNIS L. SIPE – 0006199

Buell & Sipe, Co., L.P.A.
322 Third Street
Marietta, Ohio 45750
(740) 373-3219 (Voice)
(740) 373-2892 (Facsimile)
dennis@buellesipe.com

By 

Randall L. Porter

Counsel for Nathaniel Jackson

Memorandum in Support

On October 18, 2010, the Trumbull County Court of Appeals ordered that the trial court conduct a new sentencing hearing for Nathaniel Jackson. *State v. Jackson*, 11th Dist. No. 2009-T-0050, 190 Ohio App.3d 319, 2010-Ohio-5054. The Court of Appeals premised its conclusion on the fact that the trial court had permitted the prosecution to draft the sentencing opinion. *Id.* at ¶¶ 29-30.

The trial judge in his subsequent sentencing opinion failed to consider any evidence that Appellant put forward at the resentencing hearing in support of a sentence less than death. Consequently, the trial court's sentencing opinion fails to constitute a final appealable order.

I. This Court's Jurisdiction to Hear this Appeal Is Dependent Upon the Existence of a Final Appealable Order.

Appellate courts lack jurisdiction to review an order that is not final and appealable. *State, ex rel. Bates, Pros. Atty. v. Court of Appeals*, 130 Ohio St.3d 326, 2011-Ohio-5456, 948 N.E.2d 162, ¶ 17; *Summerville, Admr. v. City of Forest Park*, 128 Ohio St.3d 221, 943 N.E.2d 522, 2010-Ohio-6280, ¶11. The final appealable order requirement extends to capital cases in

which the direct appeals are taken directly to this Court from the trial court. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 19.

II. The Trial Court's August 14, 2012 Findings of Fact and Conclusions of Law Do Not Constitute a Final Appealable Order.¹

In cases in which a sentence of death is imposed “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). *Id.*, at ¶ 18. In *Ketterer*, this Court in ruling on the final appealable order raised in that case, addressed whether the three judge panel had complied with Crim. R. 32(C). *Id.* at ¶¶ 6-19. Appellant raises the other issue with respect to the existence of a final appealable order, whether the trial court complied with R.C. 2929.03(F).

A trial court when it imposes a sentence of death is required in a separate opinion to 1) identify the aggravating circumstances, 2) identify the mitigating factors, and 3) articulate the reasons that the aggravating factors outweigh the mitigating factors by proof beyond a reasonable doubt. R.C. 2929.03(F). *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984), paragraph two of the syllabus; *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 156. The relevant portion of the statute provides:

The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

R.C. 2929.03(F).

¹The trial judge labeled the sentencing opinion as “Findings of Fact, Conclusions of Law.” Appellant will reference the trial court’s entry as the “sentencing opinion.”

The trial court did not comply with R.C. 2929.03(F). First, it refused to consider (and therefore identify) the existence of any new mitigating factors that Jackson raised at the resentencing proceeding and any evidence that Jackson submitted at the resentencing hearing in support of the mitigating factors raised in the 2002 sentencing proceedings. Second, when the trial court refused to consider the mitigating factors raised and evidence submitted at the resentencing hearing, the trial court failed to properly articulate the reasons that the aggravating circumstances outweighed the mitigating factors by proof beyond a reasonable doubt.²

Because the trial court failed to comply with R.C. 2929.03(F) when it drafted its sentencing opinion, the document does not constitute a final appealable order.

A. The trial judge announced that he had already drafted his sentencing opinion.

Twice the trial judge stated on the record that he had drafted his sentencing opinion prior to the commencement of the sentencing hearing:

Now pursuant to law, the Trial Court this day August 14, 2012, having determined in a separate opinion of specific findings, that will be filed this afternoon, have [sic] found that the aggravating circumstances as to the count of aggravated murder outweigh the mitigating factors by proof beyond a reasonable doubt.

[*Id.* at Tr. 22].

As I said, the Court's finding on the weighing of mitigating factors will be filed this afternoon.

[*Id.* at Tr. 27].

²Subsumed within the statutory mandate that the trial court articulate its reasoning, is the requirement that the court must consider all of the mitigating factors and evidence supporting those factors. Otherwise, a trial court's weighing analysis would necessarily be flawed. *See State v. Green*, 90 Ohio St.3d 352, 363, 738 N.E.2d 1208 (2000).

B. The trial judge stated that he would not consider any new evidence.

The trial judge repeatedly stated during the resentencing hearing that he would not consider any new evidence:

This matter is back on the re-sentencing, and I view the matter that this re-sentencing should be conducted as the original was. To allow mitigating factors to come in, in addition at this point, there is no way that could be presented to the jury, and I think that it befuddles the whole process to allow that

[*Id.* at Tr. 5]

So I will follow the action taken in the previous case and deny any broadening of the scope other than what had been available to Mr. Jackson at the time of trial and which he took advantage.

[*Id.*]

I'll permit that [the proffering of mitigation evidence] in this case. I'm just saying that would only be for purposes of appeal only.

[*Id.* at p. 14].

C. The trial court did not consider any new evidence in the sentencing opinion.

The trial judge, consistent with his statements in open court, filed the sentencing opinion shortly after the conclusion of the sentencing hearing. In the sentencing opinion, which was seventeen pages in length, the trial court did not reference the contents of Appellant's statement at the resentencing hearing or any of the documentary evidence that he submitted at that hearing. In fact, he did not even acknowledge that Appellant had made a statement at the resentencing hearing and instead constantly referenced the unsworn statement that Appellant had made to the jury eleven years earlier. [*Id.* at p. 14].

D. The trial court's sentencing opinion does not comply with R.C. 2929.03(F).

This Court has found that the failure of a trial court to consider mitigating evidence violates R.C. 2929.03(F). *State v. Green*, 90 Ohio St.3d 352, 363, 738 N.E.2d 1208 (2000). In that case the three judge panel in its sentencing opinion failed to consider the mitigating factor that the defendant was not the principal offender. *Id.* In this case the trial court in his sentencing opinion failed to consider *all* of the mitigating factors and evidence Appellant offered at the resentencing hearing.³

This Court has also found that the failure of a three judge panel to properly weigh the aggravating circumstances against the mitigating factors violates R.C. 2929.03(F). *State v. Davis*, 38 Ohio St.3d 361, 372, 528 N.E.2d 925 (1988); *Green*, 90 Ohio St.3d at 363; *Roberts*, 2006-Ohio-3665, at ¶¶ 159-160. The trial court's conscious decision to limit its consideration of all of the mitigating factors and evidence in the weighing process was an equally serious violation of R.C. 2929.03(F), as the errors this Court identified in *Davis*, *Green*, and *Roberts*.

While not every flaw in a trial court's sentencing opinion warrants the finding of a lack of final appealable order, given the nature of the errors in this case, such a finding is warranted. The trial court drafted its opinion prior to the sentencing hearing, it announced in open court that it

³ Appellant at the resentencing hearing informed the trial court that since he had been removed from death row (after the Court of Appeals vacated his death sentence) and placed in general population he had "obtained a certificate in basic skills computer class and I passed advanced class and also become a tutor down there [at Trumbull Correctional Institute] and also got a certificate in the music program" [8/14/22 Tr. 21]. Appellant further informed the trial court that "I haven't been in any trouble since I have been on death row since 2007 and that was a little minor situation, but I haven't been in any trouble or anything since then, your Honor." [*Id.* at Tr. 21-22]. The failure of the trial court in its opinion to even reference Appellant's exemplary behavior not only violated R.C. 2929.03(F), but also the Eight Amendment. *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S. Ct. 1669, 90 L. Ed 2d 1 (1986).

would not consider any new evidence, and consistent with that announcement, did not consider any new evidence its sentencing opinion. This Court has recognized that the cumulative effect of the errors in a sentencing opinion can warrant the granting of relief. *Green*, 90 Ohio St.3d at 363-64. Similarly, the cumulative effect of the errors in the trial court's sentencing opinion warrant a finding that there is a lack of final appealable order in this case.

III. Appellant Did Not Waive This Issue.

On May 3, 2013, this Court heard oral argument in the co-defendant's case. *State v. Roberts*, Ohio Supreme Court Case No. 07-2288. Ms. Roberts also raised the trial court's failure to consider the evidence that she initially put forward at her resentencing hearing. Some of the Court's questions indicated concern because Ms. Roberts in the first sentencing proceedings had waived the presentation of evidence. Appellant did not waive the presentation of evidence in either of his sentencing proceedings.⁴

Conclusion

This Court only has jurisdiction if Appellant has instituted this proceeding from a final appealable order. For there to be a final appealable order the trial court must have complied with Crim. R. 32(C) and R.C. 2929.03(F). The trial court's sentencing opinion does not comply with the requirements contained in R.C. 2929.03(F); the trial court refused to consider all of the mitigating factors and evidence, incorrectly believing that it was precluded from considering the

⁴Appellant had a strong reason to want to supplement the record at his resentencing hearing, the deficient performance of trial counsel in the initial sentencing proceedings. The attorney representing him who was responsible for the mitigation presentation portion of his case became ill just prior to the start of the mitigation hearing. The trial court appointed substitute counsel at the start of the mitigation hearing. [Sent. Tr. 4-7]. The attorney who remained on the case from the trial phase had not met with the witnesses prior to the day of the mitigation hearing. Trial counsel gave no opening statement at the mitigation phase. [Sent. Tr. 23.] Trial counsel called four lay witnesses; the cumulative length of their testimony was ten pages. [Sent. Tr. 23-33]. That testimony was both incomplete and inaccurate.

same. This resulted in the trial court conducting an infirm weighing of the aggravating circumstances and mitigating factors.

The Court should dismiss this appeal because of a lack of a final appealable order and remand the matter to the trial court.

Respectfully submitted,

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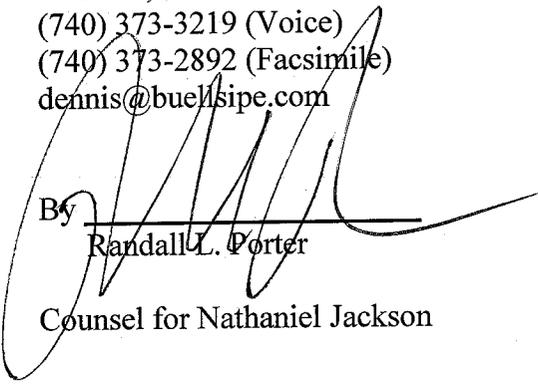
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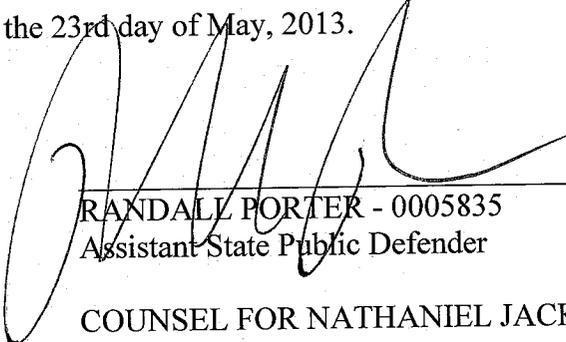


Randall L. Porter

Counsel for Nathaniel Jackson

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Nathaniel Jackson's Suggestion of Lack of a Final Appealable Order* was forwarded by electronic and regular U.S. Mail to Luwayne Annos, Assistant Prosecuting Attorney, 160 High Street, N.W., 4th Floor Administration Building, Warren, Ohio 44481 on this the 23rd day of May, 2013.



RANDALL PORTER - 0005835
Assistant State Public Defender
COUNSEL FOR NATHANIEL JACKSON