ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio EX. REL.
Rodney D. Zeune,
Chillicothe Correctional Institution
P.O. Box 5500
Chillichote, Ohio 45601

Relator,

vs.

Judge Alan Travis
[Sitting Judge for John F. Bender]
Franklin County Common Pleas Court
345 South High Street
Columbus, Ohio 43215

Respondent.

13-0959

FILED
JUN 12 2013
CLERK OF COURT
SUPREME COURT OF OHIO

ORIGINAL ACTION IN PROCEDENDO
WRIT OF PROCEDENDO

Posture of Judgment:

The trial court has not pronounced the jury's verdict or findings, therefore, the court has not proceeded to judgment in case number ***09 CR 4919, State of Ohio v. Rodney D. Zeune.***

Sentence

By definition, a sentence is the judgment that the court pronounces after finding a criminal defendant guilty. The ***verdict*** is the finding on the factual issues of the case. The Judgment is the court's final determination of the rights of the parties and the final disposal of all issues.

Verdict

A jury found Relator guilty of ***Complicity in Trafficking in Cocaine***. The amount of cocaine, involved at the time of the offense, was equal to or exceeding ten (10) grams but less than one hundred (100) grams. Without the pronouncement of the jury's verdict, there is not an equitable ORDER from which an appeal lies.

RECEIVED
JUN 12 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Judgment Entry/Entries

The trial court's judgment entry does not state the jury's verdict pursuant to Crim. R. 32(C), where the judgment ***shall*** set fourth the verdict. Relator's sentencing entries state that his sentencing hearing was held in pursuant to R.C. 2929.19. ***In R.C. 2929.19 (A)***, The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender. The judgment entry must have the complete verdict to be a final order.

** In the case at hand, the trial court has not complied with R.C. 2929.19. The trial court has not pronounced a charge, the verdict (including the amount of cocaine), or has the trial court afforded Relator a right to allocution at resentencing.

ATTACHMENTS:

1. Indictment
2. Bill of Particulars
3. Verdict form
4. Sentencing Transcripts – First Sentencing Hearing
5. Judgment Entry #1
6. Trial court's decision denying Motion to Vacate Sentence
7. Sentencing Transcripts – Second Sentencing Hearing
8. Judgment Entry- Resentencing

Relator hereby states the following and verifies his pleadings in the included Affidavit of Verity.

1. On March 5, 2009, Ayman Musleh and I purchased an ounce of cocaine from Rayshon Alexander, a principle offender. I paid $100 and Musleh paid $1000.

2. On August 18, 2009, I was indicted on one count of trafficking in cocaine, a felony of the third

degree, in violation of Section 2925.03 of the Ohio Revised Code. The Indictment stated that I knowing sold or offered to sell cocaine in the amount of ten to one hundred grams. *Indictment attached hereto, Attachment 1.*

3. The facts presented to the Grand Jury were that I, acting alone, sold cocaine in Franklin County. In the indictment, there is no mention of a principle, an accomplice, or that I acted "along with another" in the commission of a crime.
4. On November 2, 2009, the State filed a Bill of Particulars. The Bill gave no more detail than the "bare bones" indictment, ***except*** for the location of the crime. Again, there was no mention that "another" was involved in the crime. *Bill of particulars is attached hereto, Attachment 2.*
5. On the first day of trial, the State elected to implement the complicity theory by claiming that I no longer actually sold the cocaine, however, I did aid and abet Rayshon Alexander, of who, now was an unnamed principle. I objected to the amendment, which now included complicity, because there was no mention of an accomplice or "another" in the bill of particulars.
6. The principle offender, Rayshon Alexander, was not charged, arrested, or indicted. The jury was instructed that there was ***no*** requirement for the proof of a principle in the crime, but only proof that a transaction took place, in order to convict one for complicity. The jury never found that Rayshon Alexander committed the crime.
7. The trial court then expressed its belief that "complicity" only requires that "one who acts with the intent that a transaction with a controlled substance takes place, does some act in furtherance of that intent, i.e., arranging for a seller, whether or not the person who does that received any remuneration, is sufficient to convict." (Tr. 77-78.). With that theory in mind, the trial court instructed the jury that I did not have to have the same intent as Alexander, and they

need not prove that a principle committed the crime.

8. With the erroneous jury instruction and the jury being told, by Judge Bender, "to forget about trafficking, that term has no legal meaning for you to consider" (Tr. 396), I was found guilty. *The verdict form is attached hereto, Attachment 3.*

9. On October 21, 2010, a sentencing hearing was held. At the hearing, Judge Bender did not proceed to judgment and refused to pronounce my charge, verdict of guilt, or the amount of cocaine involved [on the record]. *The sentencing transcripts are attached hereto, Attachment 4.*

10. On October 22, 2010, Judge Bender journalized a Judgment entry. The judgment entry lacked the actual finding (verdict). The Entry states, a jury found Defendant guilty to count one of the indictment, to wit: Rodney D. Zeune is guilty in trafficking in cocaine, a felony of the third degree. The jury's verdict [is] two part: 1) guilty of complicity in trafficking and 2) the amount of cocaine involved. The court's journalized verdict is incomplete. In furtherance, the court stated that the sentence hearing was held pursuant to R.C. 2929.19. The requirements of R.C. 2929.19 were ***not*** met.

11. **Crim. R. 32(C) Judgment, states:**
    A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

    Here, the trial court did not include the complete verdict of the jury (the amount of the cocaine involved), and has deprived Relator of an appropriate judgment of which he can appeal. *Judgment Entry attached hereto, Attachment 5.*

12. On January 31, 2011, I filed a Motion to Vacate Sentence arguing that my sentence was contrary

to law, void *ab initio*, and not in compliance with the recent ruling in ***State V. Fischer, 128 Ohio St.3d 92, 2010 Ohio 6238, 942 N.E.2d 332***. I further informed the court that he did not pronounce the jury's verdict, a charge, or the amount of the cocaine involved at the sentencing hearing.

13. On February 16, 2011, Judge Bender journalized an entry/decision stating that he ***did*** announce the jury's verdict. The transcripts speak for themselves. The court ***did not*** pronounce the verdict. *Decision attached hereto, Attachment 6.*

14. On January 25, 2012, I had a second sentencing hearing. The Tenth District Court of Appeals remanded my case back to the trial court. My original sentence was contrary to law and a *de novo* sentencing hearing was required. Based on ***State V. Fischer***, the Appellate Court remanded the case for resentencing. This Court exhausted themselves over the determination of what constituted a "void" sentence. This Court decided that a sentence that is contrary to law is void, and a complete resentencing hearing is required. In the instant case, there was no sentence imposed. I have been incarcerated for over three years and the trial court has never pronounced a charge, for which I was found guilty of, on the record; neither trafficking nor complicity in trafficking. I was informed, by counsel, that Judge Bender refused to pronounce my charge and the jury's verdict [**on the record**] because there was no "actual" principle offender to whom I was complicit with, or did the the jury ever prove that "anyone" committed the principle offense; trafficking. The jury did not make the finding that Rayshon Alexander, a confidential informant, was the principle and that I was complicit with Alexander. I was also informed that the judge would not make record of the jury's finding, *as to the amount of the cocaine involved.* Judge Bender stated that he was not required to hold an actual resentencing hearing on remand

and I was denied allocution. *Re-Sentencing transcripts attached hereto, Attachment 7.*

15. On February 6, 2012, Judge Bender journalized a Sentencing Entry. Again, the complete jury verdict was not recorded; amount of cocaine involved was ten (10) to one hundred (100) grams. In the body of the entry, Judge Bender manipulates the facts and states: Defendant was indicted and convicted of one count of trafficking in cocaine in an amount of 20 grams or more but less that 27 grams, to wit: 25.5 grams. First, I was indicted for 10 to 100 grams of cocaine. Secondly, the jury did not make the finding that the court recorded. They made a finding of 10 to 100 grams. This false verdict allowed the court to work around the new felony thresholds of H.B. 86. This verdict is so contrary to the evidence and so unjust that it should be set aside. The verdict is contrary to law. *Re-Sentencing Entry attached hereto, Attachment 8.*

16. ***Procedendo*** is an extraordinary remedy, issued by the court of superior jurisdiction, ordeing a lower court to proceed to judgement in a case. ***THE STATE, EX REL. RATLIFF ET AL., APPELLANTS, v. MARSHALL, JUDGE, Supreme Court of Ohio, 30 Ohio St. 2d 101; 282 N.E.2d 582; 1972, State ex. rel. Sava v. Riley, (1973), 36 Ohio St. 2d 171, 174.*** A writ of procedendo is proper where the court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. ***State ex. Rel. Doe v Tracy (1988), 51 Ohio App. 3D 198, 200; Stae ex. Rel. Wallace v. Tyack, (1984), 13 Ohio St. 3d 4.*** An "inferior courts refusal or failure to timely dispose of a pending action is the ill a writ of procedendo is designed to remedy." ***State ex. Rel. Thomas v. Hoga, No. 09AP-804, (Ohio 10 District, 2010, Ohio 1386).***

17. Here, Procedendo is appropriate because the trial court has refused proceed to judgment and sentence me to a charge, pronounce a verdict, and there is a ***pending action*** that has not been

disposed of. There are pending Motions *(Motions to Impose a Valid Sentence)* where Relator has requested the reading of the verdict, and those Motions have not been disposed of or ruled upon. Relator has an incomplete judgment. As previously stated, there has been no pronouncement of the jury's verdict. An incomplete judgment cannot be properly appealed. When the court speaks through the journal, and there are discrepancies in that journal, the proper review is to look to the record and the transcripts.

18. ***Wherefore***, I have a claim of which I am entitled to relief. I have a right to a due process of law under the fifth and fourteenth amendments to the United States Constitution. The trial court did not meet its minimal requirement of holding a complete sentencing hearing which is guaranteed by the Due Process Clause. I presented the aggregate of operative facts giving rise to a right enforceable by the court. I hereby request the following relief:

    The Court issue a **WRIT** to compel the trial court to proceed to judgment, hold a sentencing hearing pursuant to R.C. 2929.19 and Crim R. 32. I further request that the Court ORDER the trial court to pronounce the jury's verdict and journalize an ENTRY with the jury's finding as to the amount of cocaine involved at the time of the offense; ten to one hundred grams. Last, I request that the Court ORDER the trial court to allow me my right to allocution which was denied at the January 25, 2012 sentencing hearing. The posture of this case may be different if the trial court pronounced the verdict at the original sentencing hearing. However, the trial court has failed to ***ever*** pronounce my judgment. The verdict, judgment and sentence should be set aside because they are void. **[The trial court is attempting to disguise my conviction as "trafficking" without an accomplice (Alexander of "another") , when in fact, I was only found guilty as being an**

accomplice.]

***** [Judge Alan Travis is the Sitting Judge for John F. Bender. Therefore, Judge Travis is the trial court].

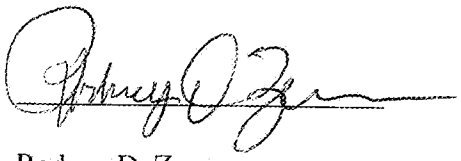
Respectfully submitted,

Rodney D. Zeune,
Chillicothe Correctional Institution
P.O. Box 5500
Chillichote, Ohio 45601

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Action, Affidavit of Verity, and Affidavit(s) of compliance with 2969.25, were sent to Respondent, Judge Alan Travis, Franklin County Common Pleas Court, 345 South high Street, Columbus, Ohio 43215, on May 22, 2013.

Respectfully submitted,



Rodney D. Zeune

IN THE SUPREME COURT OF OHIO

State of Ohio EX. REL. Rodney D. Zeune,
Chillicothe Correctional Institution
P.O. Box 5500
Chillichote, Ohio 45601

Relator,

vs.

Judge Alan Travis
[Sitting Judge for John F. Bender]
Franklin County Common Pleas Court
345 South High Street
Columbus, Ohio 43215

Respondent.

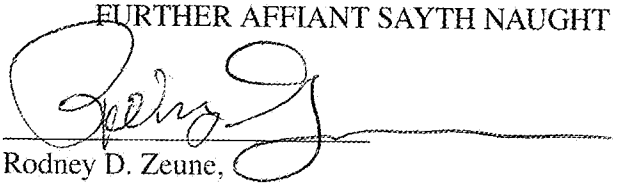
ORIGINAL ACTION
IN PROCEDENDO

AFFIDAVIT OF VERITY

State of Ohio)
:SS
Ross County)

I, Rodney D. Zeune, to solemnly swear and hereby verify that the claims and pleadings made in the foregoing writ of procedendo are true and accurate to the best of my knowledge.

FURTHER AFFIANT SAYTH NAUGHT



Rodney D. Zeune,

Sworn to a subscribed in my presence on this 22 day of May, 2013.

Notary Public

MY COMMISSION EXPIRES
MO. 8 DAY 11 YEAR 2013

IN THE SUPREME COURT OF OHIO

State of Ohio EX. REL. Rodney D. Zeune,
Chillicothe Correctional Institution
P.O. Box 5500
Chillichote, Ohio 45601

Relator,

vs. **ORIGINAL ACTION IN PROCEDENDO**

Judge Alan Travis
[Sitting Judge for John F. Bender]
Franklin County Common Pleas Court
345 South High Street
Columbus, Ohio 43215

Respondent.

AFFIDAVIT OF RELATORS INDIGENCY PURSUANT TO R.C. 2969.25, MOTION OF WAVIER OF PREPAYMENT OF FEES AND COURT COST, AND SIX MOUNTH CERTIFIED CASHIER STATEMENT OF INMATE'S ACCOUNT.

I, Rodney D. Zeune do hereby swear and affirm that I am without the necessary funds and assets of any kind to support the fees, filing, and cost in the WRIT OF PROCEDENDO. I hereby request a wavier of prepayment in this action. I ***have*** enclosed a certified six month statement of my inmate account, pursuant to R.C. 2969.25.

Rodney D. Zeune

Sworn to a subscribed in my presence on this 22 day of May, 2013.

Notary Public

MY COMMISSION EXPIRES
MO. 8 DAY 1 YEAR 2013

IN THE SUPREME COURT OF OHIO

State of Ohio EX. REL. Rodney D. Zeune,
Chillicothe Correctional Institution
P.O. Box 5500
Chillichote, Ohio 45601

Relator,

vs. ORIGINAL ACTION IN PROCEDENDO

Judge Alan Travis
[Sitting Judge for John F. Bender]
Franklin County Common Pleas Court
345 South High Street
Columbus, Ohio 43215

Respondent.

AFFIDAVIT OF CIVIL ACTIONS PRSUANT TO R.C. 2969.25

I, Rodney D. Zeune, list the following civil actions filed in the last five years puruant to R.C. 2969.25 and hereby submit the following duly sworn and in accordance to law.

1. *Rodney D. Zeune v. Robert Krapenc, Franklin County Common Pleas Court, Case 11CV-04-4185*, malpractice claim; ineffective assistance of counsel, case dismissed without a hearing on the pleading or merits.

2. *State of Ohio ex. rel. Rodney Zeune v. Judge John Bender, 2012-0555, Supreme Court of Ohio 132 Ohio St. 3d 1407, 2012 Ohio 2454, 968 N.E. 2d 490 , 2012*. In Mandamus. On answer of respondent. On S.Ct.Prac.R. 10.5 determination, cause dismissed. Relator requested relief for Respondent not ruling on Motion for Disqualification of Judge John F. Bender in Franklin County Common Pleas Case No. 90 CR 4919.

3. *State of Ohio ex. rel. Rodney D. Zeune v. Judge John F. Bender, Jennifer Hunt, Matt Daily, Russell Moore and Janey Carroll*, SUPREME COURT OF OHIO 2012-0745,2013 Ohio 1857; 2013 Ohio LEXIS 1156. In Mandamus. On motions to dismiss and motion for judgment on the pleadings. Motions granted. Cause dismissed. Respondent's filed Motions to Dismiss, Motions were granted. Relator was requesting that Respondents to carry out their clear legal duty and provide withheld evidence in Franklin County Common Pleas Case No. 90 CR 4919.

4. *State of Ohio ex rel. Rodney D.* ***Zeune*** *v. John F. Bender*, SUPREME COURT OF OHIO, 2012-1806, 134 Ohio St. 3d 1413; 2013 Ohio 158; 981 N.E.2d 881; 2013 Ohio LEXIS 136, January 23, 2013, Decided. In Procedendo. Upon consideration and pursuant to S.Ct.Prac.R. 12.04, it is ordered by the court that a peremptory writ of procedendo is granted to compel Judge John Bender to set an evidentiary hearing on the relator's postconviction issues, or issue his findings of fact and conclusions of law. It is further ordered that the motion to dismiss is denied.

5. *State of Ohio ex rel. Rodney D. Zeune v. John F. Bender*, Tenth District Court of Appeals, Case No. 12 AP 341. In Mandamus requesting Judge Bender to comply with R.C. 2953.21 and proceed to judgment on Relator's Post Conviction Petition. Cause dismiss for non-compliance with R.C. 2969.25.

Rodney D. Zeune,

Sworn to a subscribed in my presence on this 22 day of May, 2013.

Notary Public

MY COMMISSION EXPIRES
MO. 8 DAY 11 YEAR 2013

ATTACHMENT 1

57314 - P93

Case No. 09CR 08 4919

State of Ohio,
Franklin County, ss:

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2009 AUG 18 PM
CLERK OF COURTS

INDICTMENT FOR: Trafficking In Cocaine (2925.03 R.C.) (F-3) (1 Count); (Total: 1 Count)

In the Court of Common Pleas, Franklin County, Ohio, of the Grand Jury term beginning May eighth in the year of our Lord, Two Thousand Nine.

Count 1

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Rodney D. Zeune late of said County, on or about the 5th day of March in the year of our Lord, 2009, within the County of Franklin aforesaid, in violation of section 2925.03 of the Ohio Revised Code, did knowingly sell or offer to sell a controlled substance included in Schedule II, to wit: methylbenzoylecgonine, commonly known as cocaine, in an amount equal to or exceeding ten (10) grams but less than one hundred (100) grams of cocaine as defined in section 2925.01 of the Ohio Revised Code, contrary to

ON COMPUTER

the statute in such cases made and provided and against the peace and dignity of the State of Ohio.

RON O'BRIEN
Prosecuting Attorney
Franklin County, Ohio

A TRUE BILL

Assistant Prosecuting Attorney

Foreperson, Grand Jury

ATTACHMENT 2

57372 - M44

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2009 NOV -2 PM 3:10
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,	:	
Plaintiff,	:	
vs.	:	Case No. 09 CR 4919
Rodney D. Zeune	:	Judge: Bender
Defendant.	:	

BILL OF PARTICULARS

Now comes the Franklin County Prosecuting Attorney, on behalf of the State of Ohio, pursuant to Rule 7(E) of the Ohio Rules of Criminal Procedure and informs the defendant of the following particulars regarding the indictment in the above captioned case.

Count 1

1. Nature of Offense: Trafficking In Cocaine, specifically the defendant violated Section 2925.03 F-3, Ohio Revised Code.

2. Conduct of Defendant, Date and Time: Rodney D. Zeune, at approximately 5:16 p.m., on or about the 5th day of March in the year of our Lord, 2009, within the County of Franklin aforesaid, in violation of section 2925.03 of the Ohio Revised Code, did knowingly sell or offer to sell a controlled substance included in Schedule II, to wit: methylbenzoylecgonine, commonly known as cocaine, in an amount equal to or exceeding ten (10) grams but less than one hundred (100) grams of cocaine as defined in section 2925.01 of the Ohio Revised Code,.

cpd

57372 - M45

3. Location of Offense: Cardinal Creek Apartment Complex, Columbus, Ohio

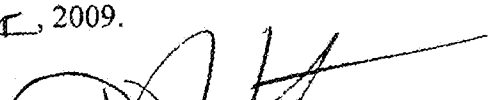
Respectfully submitted,

Ron O'Brien
Prosecuting Attorney
Franklin County, Ohio

Jennifer D. Hunt 0068104
Assistant Prosecuting Attorney
373 South High Street, 14th Floor
Columbus, Ohio 43215
(614) 462-3555

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by U.S. mail postage prepaid to Robert F. Krapenc, at 601 South High Street, Columbus, Ohio 43215-5657 on the 2nd day of November, 2009.



Jennifer D. Hunt 0068104
Assistant Prosecuting Attorney

ATTACHMENT 3

57623 - C34

36IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,	:	
Plaintiff,	:	Case No. 09CR-4919
v.	:	Judge John F. Bender
Rodney D. Zeune,	:	
Defendant.	:	

FILED
C.P. PLEAS COURT
FRANKLIN CO. OHIO
2010 OCT 22 AM 8:51
CLERK OF COURTS

COUNT ONE – COMPLICITY IN TRAFFICKING IN COCAINE
VERDICT – GUILTY

We, the Jury in this case, being duly impaneled and sworn, find beyond a reasonable doubt that defendant Rodney D. Zeune is **guilty of complicity in trafficking in cocaine**, as charged in Count One of the indictment.

~~We, the Jury in this case~~, being duly impaneled and sworn, further **find beyond a reasonable doubt / do not find (circle one)** that the amount of cocaine involved at the time of the offense was equal to or exceeding ten (10) grams but less than one hundred (100) grams.

Each of us jurors concurring in this verdict signs his / her name hereto this 5TH day of August, 2010.

Lynettra Coleman
Louis H. Hurd
Diane Bell
John Shen
Charlotte L. Johnson
D'Andra Schwabel
Charlotte Martin
Ann Wu
Jane M Roth
Norma Hammond
John Dimond
Lisa M. Dell

ATTACHMENT 4

1 IN THE COURT OF COMMON PLEAS
2 FRANKLIN COUNTY, OHIO
3 CRIMINAL DIVISION
4
5 STATE OF OHIO,)
6 PLAINTIFF,)
7 -vs-) CASE NO. 09CR08-4919
8 RODNEY D. ZUENE,) 10APA11-1102
9 DEFENDANT.)
10
11
12 TRANSCRIPT OF SENTENCING PROCEEDINGS
13
14 HELD: THURSDAY, OCTOBER 21, 2010
15 BEFORE: HONORABLE JOHN F. BENDER, JUDGE
16
17 APPEARANCES:
18 ON BEHALF OF THE STATE OF OHIO:
19 JENNIFER L. HUNT, ESQ.
20 ON BEHALF OF THE DEFENDANT:
21 DENNIS PUSATERI, ESQ.
22
23 REPORTED BY:
24 SHIRLEY A. ERWIN
25 ASSISTANT OFFICIAL COURT REPORTER

COPY

1 Thursday, October 21, 2010
2 Morning Session
3 - - -
4 THE COURT: The PSI does not reflect, at
5 least I can't find it, the conviction out of Knox
6 County.
7 MR. PUSATERI: Yes, sir, I found it in
8 there.
9 THE COURT: Where?
10 MR. PUSATERI: Somewhere in that long
11 list.
12 MS. HUNT: Page six, Your Honor, bottom
13 of page six, passing bad checks case.
14 THE COURT: Oh, sorry. There it is,
15 below the incident offense.
16 State have a position on sentencing in this
17 case, having received the PSI?
18 Mr. Pusateri, I take it you have seen the
19 PSI?
20 MR. PUSATERI: Yes, sir.
21 MS. HUNT: Yes, thank you, Your Honor.
22 Just for the knowledge of the Court I would note that
23 Russ Moore and Janie Caroll, the investigators on the
24 case from the DEA are present here in court today.
25 I'll try to be brief if possible as I know the Court is

well aware of the facts in this case. We did sit through approximately a week long trial although we have a different counsel member at the defense table.

The Court did hear all the evidence in this case. I think it's important to note that Mr. Zeune seems to be in a unique position than I would hazard to say the majority of individuals who come into this court with these type of charges. He comes from a family where he received benefits that most folks sitting in his position do not have. He was provided a good education. He went to DeSales High School. Three years of college.

Was running a good business. He had many, many opportunities that individuals we see often times do not have.

And despite that, he chose a path where he is doing 17 months out of Knox County for -- through a passing bad checks, essentially stole approximately $59,000.00 from the Central Ohio Farmers Co-op and is now facing a mandatory prison time trafficking case.

Despite -- and I know this from the record, being told and counseled over and over of the law in Ohio of trafficking, he still seems to argue that he was purchasing, he was purchasing, he was purchasing,

1 he was not trafficking. The Court is well aware of the
2 law, it instructed Mr. Zeune on the law in the middle
3 of this trial.
4 THE COURT: Twice.
5 MS. HUNT: Twice, of what trafficking
6 is. And obviously the jury applied the facts and Mr.
7 Zeune was not purchasing, he was guilty of
8 trafficking.
9 The State is arguing for consecutive time
10 in this case. It is mandatory time. If consecutive
11 time is given, we would argue that he should be
12 entitled to zero days jail time credit as during the
13 pendancy of this he has been incarcerated on the Knox
14 County and the jail time credit appropriately should go
15 to that.
16 In addition, I do have the paperwork for the
17 BMV suspension. We are also requesting $1,000.00
18 restitution to the DEA. There is also a mandatory fine
19 in this case based on the fact it is a felony three
20 level. We are requesting the mandatory fine. If the
21 Court sees fit to order that --
22 THE COURT: Mandatory fine is one half
23 of the maximum?
24 MS. HUNT: One half of the maximum, yes.
25 I would argue Mr. Zeune is not indigent although he is

1 incarcerated. Both of his attorneys have been
2 privately retained. The Court looks at his employment
3 given prior to this. He had a very lucrative business
4 going on.
5 In addition, the entry which the State
6 would prepare and present to the Court does declare
7 him indigent at least during his incarceration while
8 he is in prison. Therefore, you know, they wouldn't
9 take whatever amount they allocate, the small amount on
10 a daily basis, however, upon his release he would be
11 required then to pay that mandatory fine.
12 If I may approach, Your Honor.
13 THE COURT: Uh-huh. He was indicted
14 on the bad check case on what, 3/14/09; is that
15 correct?
16 MS. HUNT: That appears to be correct,
17 yes, Your Honor. And I believe had a jury trial and
18 was convicted in December of '09.
19 THE COURT: And this offense occurred on
20 March 5, '09, it was a week and a half before he was
21 indicted on the bad checks?
22 MS. HUNT: Correct.
23 THE COURT: Anything further from the
24 State?
25 MS. HUNT: No, nothing further, Your

1 Honor.

2 THE COURT: Mr. Pusateri.

3 MR. PUSATERI: Thank you, Your Honor.

4 First of all, with due respect to Ms. Hunt

5 and she does, I do have due respect for her, I'm a

6 little dumbfounded to be standing at a sentencing and

7 having the State argue that because my client has a

8 good background that he should be more harshly

9 punished. I understand how that might work in a case

10 of public trust, theft in office or something like

11 that.

12 But I think we stand here today, I stand here

13 today telling this Court that Mr. Zeune's past is a

14 plus rather than a minus because we know he can do

15 these things. I don't think that there is any doubt

16 that this picture that is painted here is one of a

17 person who is educated, who is capable, whose life

18 crashed and burned.

19 Now, is that his fault? Yes. Sure it is.

20 But we have somebody who I believe were not a mandatory

21 offense, I would be standing here arguing for community

22 control. I believe in my heart that Mr. Zeune is

23 amenable to community control.

24 As to this purchase versus sale thing, I have

25 several remarks and I'm going to start with this one,

1 persons who even 40 years later shall remain unnamed
2 when this counsel went to undergrad school would score
3 an ounce of marijuana, give quarters, bags to their
4 three friends, everybody pays equal, nobody makes any
5 money, nobody thought they were drug trafficking. They
6 were wrong.
7 We're now three months post-trial, counsel
8 has now made Mr. Zeune understand that difference.
9 Should he have gotten it when the Court gave him two
10 opportunities during trial? Yes. But the Court will
11 also recall that Mr. Zeune's very experienced counsel
12 came out in opening statement and said, this is what
13 we're going to show. And at least as it is told to me,
14 and the Court may please correct me if I'm wrong, the
15 Court recognized that that is not a workable legal
16 theory and at that point told counsel so and told Mr.
17 Zeune so. Should Mr. Zeune have listened at that
18 point? I'm tempted to swear the H word here, but I
19 won't, the answer is an emphatic, yes, he should
20 have.
21 Mr. Zeune found himself in a position of
22 terror. I have in my 33 year career had --
23 THE COURT: Terror?
24 MR. PUSATERI: Terror, and I will
25 explain. I've had two cases in my 33 years where

1 sometime during a trial it became clear that I was not
2 going to get the instruction that I wanted to support,
3 I believe in one case it was self-defense and in
4 another case it was the lesser included instruction of
5 aggravated assault. I respectfully disagreed with the
6 court's rulings on those things, but even with my
7 experience I was stunned and didn't know how to do a
8 backup.
9 And I would respectfully submit, especially
10 after speaking with Mr. Zeune at length about this,
11 that when he found out his trial theory wasn't correct
12 he did feel terror. He was afraid to pull the trigger
13 on the deal. He now knows that that was very close to
14 the stupidest thing he ever did excluding his criminal
15 activities. He meant no disrespect to the Court by
16 that.
17 I would also tell the Court that his
18 incarceration from Knox County he had been assigned to
19 an honor camp, I think reasonably so, he would, should
20 be an honor inmate that could help others, be no
21 security trouble. He was moved to closed security as a
22 result of this case. I would bet the Court that if he
23 has the length of sentence and the opportunity, which
24 we hope he doesn't, he'll end up back in an honor camp
25 before long.

1 I want to elaborate a little bit on his past
2 to show the Court he has accomplished and can. Some of
3 it is in the PSI, I'm going to skip that part. But in
4 addition to being a little ahead of the class at Saint
5 Francis DeSales High School, he was a very accomplished
6 football player and wrestler which he and I have in
7 common. That's a sport where people without strong
8 wills don't survive, don't make it. I also was
9 coaching wrestling in college at the time and I
10 remember Mr. Zeune's name, I remember his brother's
11 name, I remember that DeSales program. Those guys were
12 tough minded, every single one of them. The coach made
13 them that way, the program made them that way and I
14 think in Mr. Zeune's case his family helped make him
15 that way.
16 What wasn't in the presentence investigation
17 is that he worked successfully for his father's
18 company, his communication company as a network
19 engineer, became more and more involved in the
20 corporate end of things as time went by and did great
21 things to move that business forward.
22 He was next a project manager for a -- the
23 project manager for a prominent Cleveland firm that
24 designed corporate networks and equipment and under his
25 direction his business, that business tripled its sales

1 from approximately one million dollars to approximately
2 three million dollars in one year. This guy can move
3 things.
4 Then he went into business for himself and
5 with the constant application of the effort he built a
6 chain of convenience stores and oil distribution that
7 made him affluent by most people's standards. He is
8 now indigent. He has no assets. He has no income.
9 That's a very big fall for a man who has worked that
10 hard and done as well as he did. Before his alcohol
11 and drug use in his imploding domestic situation led to
12 his present downfall he had never known a major failure
13 before.
14 And I'm quoting, I often write down what I
15 think what are worthwhile quotes from clients and Rod
16 said to me, I've never been humbled like this before in
17 my life. And here's the reason it's a quote I wrote
18 down and he said, and I never will be again.
19 THE COURT: Humbled in what respect and
20 by what? By his loss of businesses, his --
21 MR. PUSATERI: By his -- by the, I can't
22 remember the emphasis on the words, by the ignominious
23 nature of the place he finds himself where his own
24 conduct put him.
25 THE COURT: What are you referring to,

1 the criminal offenses or the loss of the business and
2 all of those other things?
3 MR. PUSATERI: Both, I mean both. The
4 humiliation of being the businessman and now being the
5 inmate is one thing, but the criminal conduct --
6 he's now a criminal for life, this is not an
7 expungeable offense, and even if it were, the Knox
8 County case probably precludes that although there
9 could be an argument that they were part of the
10 course of conduct within 90 days and all of that. But
11 it doesn't even have -- this is a non-expungeable
12 offense. It will follow him his entire life. It will
13 be something that will be an additional factor for him
14 to overcome.
15 We know you have to send him to prison. I
16 wish I could argue for probation, but I cannot. I am
17 not the one with the robe, I'm only the one with the
18 opinion. In my opinion this is a one year case. I
19 pray this Court will give him one year. There is no
20 point, in a crowded situation with ODRC, to imprison
21 him for longer, it won't teach him any more of a
22 lesson, it won't make him any more or less strong when
23 he comes out. It won't help the people who used to
24 depend on him and do not any longer.
25 I believe he would complete community control

1 in a flying and successful manner. But it looks like
2 instead that will to be post release control. I have
3 no doubt he can do that. I pray that the Court will
4 give him the minimum one year. I pray that the Court
5 will make that a sentence concurrent to his Knox County
6 case which he has only three months to do.
7 He needs to be punished. He needs to know
8 what he did was wrong. I pray the Court to show
9 mercy, reasonableness and compassion with a minimum
10 sentence.
11 THE COURT: Thank you, Mr. Pusateri.
12 Is this mandatory PRC?
13 MS. HUNT: No, Your Honor.
14 THE COURT: I didn't think so. It is
15 discretionary three year post release control?
16 MS. HUNT: Yes, Your Honor.
17 THE COURT: Mr. Zeune, what would you
18 like to -- you can remain seated, please.
19 DEFENDANT ZEUNE: Your Honor, as my
20 counsel said, I have never been so humbled by anything
21 in my life. I will clarify that the crime of which I
22 have committed was not only wrong, but one of -- one
23 that would never happen again. And I don't think I
24 will ever be so humbled again in my life.
25 Thank you.

1 THE COURT: I remember this case very
2 well. Before trial in this case there was an offer.
3 The Defendant decided not to take that offer. After it
4 became clear that the defense he wanted to mount, while
5 the jury could have believed it even though there would
6 not have been an instruction on it, that it was really
7 not a defense. And the Defendant's counsel and the
8 Defendant were informed of that. And the Defendant was
9 given an opportunity not once, but twice to take
10 advantage of an offer without a promise from this Court
11 as to what this Court would do because this Court would
12 never make a promise in return for a plea. But it was
13 explained to him that he was responsible, that he did
14 aid and abet the sale, and Mr. Zeune not once, but
15 twice refused to take responsibility. And I told him
16 at the time taking responsibility for your actions is
17 the first step to rehabilitation and he refused to do
18 that.
19 And thereafter, the evidence was presented
20 including the audiotape of Mr. Zeune's comments at the
21 time of the commission of the offense. That tape very
22 clearly showed this Court and everyone in the courtroom
23 Mr. Zeune's total disregard for the law. And even for
24 people in his personal life. This was a joke to him.
25 This was a, get over it. If you listen to that tape,

1 he didn't care. He even threw money into this deal to
2 make it happen. This was his lifestyle.
3 So, for Mr. Zeune now to say, oh, I am
4 totally sorry and humbled, and I take full
5 responsibility. I don't believe it. Why? Because
6 when he had the opportunity to do that, he chose not
7 to. Why? Because he still wanted to roll the dice
8 with the jury which he did. And now once the jury has
9 convicted him, now he wants to take the responsibility.
10 And this Court does not buy it.
11 I never punish anybody for taking a trial and
12 I never will. However, as I told Mr. Zeune at that
13 time, taking responsibility when it counts for your
14 actions is a mitigating factor for this Court. And he
15 chose not to do it. So his statements today fall on
16 deaf ears. After listening to that tape, which at the
17 time the offers were discussed, I had not heard I find
18 the contents of that tape to be an aggravating factor.
19 I have very little remorse for the situation you put
20 yourself in. None. Aiding and abetting, trafficking
21 in cocaine, people like you is why we have these
22 problems in society. I consider it a very serious
23 offense as does the General Assembly.
24 It is the sentence of this Court that you
25 spend four years in the Ohio Department of

1 Rehabilitation and Corrections. And that sentence is
2 to run consecutive with your sentence out of Knox
3 County.
4 I will impose the mandatory fine of $5,000.00
5 plus the costs to the DEA of $1,000.00.
6 I will impose a -- what's the license
7 suspension up to what three?
8 MS. HUNT: I believe it is six to
9 five.
10 THE COURT: The license suspension it is
11 not going to matter.
12 THE BAILIFF: How long, Judge?
13 THE COURT: Four years.
14 I do advise you that you will be subject to
15 post release control -- or that you may be subject to
16 post release control for three years. And that if you
17 violate the terms and conditions of post release
18 control when you are released, then you could be
19 returned for up to one half of your original
20 sentence.
21 Now, I did not give you the maximum sentence
22 in this case. The maximum sentence was five years.
23 I'm sure your counsel can explain to you what that
24 means. Because if it is less than five years, you have
25 the opportunity to file for what's called judicial

1 release. I make you no promises, but I do advise you
2 with a five year sentence, you wouldn't have had such
3 an option.
4 That's it.
5 THE BAILIFF: Judge, another matter.
6 THE COURT: I do advise you that you
7 have the right to appeal. And that if you cannot
8 afford counsel, counsel will be appointed for you for
9 that appeal. Do you wish to have counsel appointed for
10 appeal?
11 MR. PUSATERI: Yes, sir, we do and I
12 would request that the Court appoint Schregardus.
13 THE COURT: Who?
14 MR. PUSATERI: Schregardus, an appeals
15 specialist that we have brought in our office.
16 THE COURT: Just brought in your
17 office?
18 MR. PUSATERI: Yes, sir.
19 THE COURT: And he is on the appointed
20 list I take it?
21 MR. PUSATERI: Yes, sir.
22 THE COURT: We'll give that to that
23 person.
24 THE BAILIFF: I need a spelling.
25 MS. HUNT: Your Honor, I will present

1 the Court late this morning or early this afternoon
2 with the mandatory fine paperwork.
3 THE COURT: All right. That's fine.
4 MS. HUNT: Thank you, Your Honor.
5
6 - - -
7
8 Thereupon, the sentencing hearing concluded.
9
10 - - -
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1
2 C E R T I F I C A T E
3
4 I do hereby certify that the foregoing is a
5 true, correct, and complete transcript of the
6 proceedings in this matter on Thursday, October 21,
7 2010 taken by me and transcribed from my original
8 stenographic notes.
9
10
11
12
13 Shirley A. Erwin
14 Assistant Official
Court Reporter
15
16
- - -
17
18
19
20
21
22
23
24
25

COPY

ATTACHMENT 5

57623 - C38

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,

Plaintiff,

vs.

Rodney Zeune,

Defendant.

Termination No. 5 By MK

Case No. 09CR-4919(Bender, J.)

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2010 OCT 22 AM 8:
CLERK OF COURT

JUDGMENT ENTRY
(Prison Imposed)

On July 29, 2010, the State of Ohio was represented by Assistant Prosecuting Attorney Jennifer Hunt and the Defendant was represented by Attorney, Dennis Pusateri. The case was tried by a jury which returned a verdict finding the Defendant guilty of Count One of the Indictment, to wit: Trafficking in Cocaine, in violation of Section 2925.03 of the Revised Code, a Felony of the Third Degree.

The Assistant Prosecuting Attorney and the Defendant's Attorney did not recommend a sentence.

The Court ordered and received a pre-sentence investigation.

On October 21, 2010, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Assistant Prosecuting Attorney Jennifer Hunt and the Defendant was represented by Attorney, Dennis Pusateri.

The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording Defendant an opportunity to make a statement on Defendant's own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the Court has considered and weighed.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term is not mandatory pursuant to R.C. 2929.13(F).

57623 - C39

The Court hereby imposes the following sentence: FOUR (4) YEARS at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS. Sentence is to be served CONSECUTIVE to Knox County, Ohio Case No. 09-0023. It is further ordered that the Defendant's Ohio Bureau of Motor Vehicles Driver's License be suspended for a period of four (4) years without work driving privileges.

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, order the following fine and/or financial sanctions: Defendant shall pay a mandatory fine in the amount of $5,000.00. Defendant shall pay court costs in an amount to be determined. Defendant shall pay restitution in the amount of $1,000.00 to DEA/Columbus District Office, 500 South Front Street, Suite 612, Columbus, Ohio 43215.

The total fine and financial sanction judgment is $6,000.00 plus court costs and the Court hereby renders judgment for the amount.

After imposing sentence, the Court stated its reasons as required by R.C. 2929.19 and consistent with State v. Foster, 2006-Ohio-856.

The Court notified the Defendant pursuant to R.C. 2929(B)(3) that the applicable period(s) of post-release control is up to three (3) years optional.

The Court **disapproves** of the Defendant's placement in a shock incarceration program or an intensive prison program.

The Court finds that the Defendant has 0 days of jail credit and hereby certifies the time to the Ohio Department of Rehabilitation and Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

JOHN F. BENDER, JUDGE

ATTACHMENT 6

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,	:	
Plaintiff,	:	Case No. 09CR-4919
v.	:	Judge John F. Bender
Rodney Zeune,	:	
Defendant.	:	

2011 FEB 15 AM 9:06
CLERK OF COURTS

DECISION AND ENTRY
DENYING MOTION OF DEFENDANT
TO VACATE SENTENCE
Filed January 31, 2011

BENDER, J.

Defendant claims his sentence is void because the court failed to inform him of the jury's verdict before sentencing. The record shows that defendant was present in open court when the jury's finding of guilty was announced and again when the jury's finding of guilty was repeated at his sentencing. Defendant's argument that the court failed to inform him of the jury's finding before imposing sentence is not well taken.

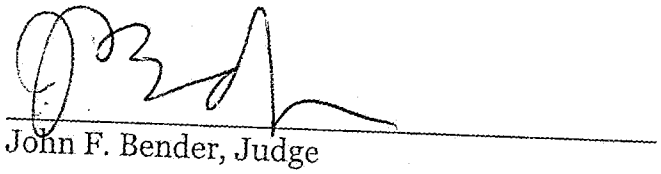
The Rules of Superintendence for the Courts of Ohio are directive in nature; they do not alter basic substantive rights of criminal defendants. *State v. Singer* (1977), 50 Ohio St.2d 103, 109; *State v. Bristow*, 4th Dist. No. 07CA3186, 2009-Ohio-523, ¶39. Defendant's argument that his sentence is void because his sentencing entry was not timely filed under the Rules of Superintendence is not well taken.

Defendant also claims his sentence was not "imposed without unnecessary delay" as required by Crim.R. 32(A). However, any delay was attributable to (1) ordering a pre-sentence investigation, which is clearly permissible, and (2) accommodating defendant's

request to appoint new counsel before sentencing. Defendant's sentence was properly imposed pursuant to Crim.R. 32.

For these reasons, defendant's motion to vacate his sentence is overruled.

SO ORDERED.



John F. Bender, Judge

Copies to:

Jennifer D. Hunt, Esq.
Assistant Prosecuting Attorney
373 South High Street, 14th Floor
Columbus, OH 43215
Counsel for Plaintiff

Rodney D. Zeune #625-137
Ross Correctional Institution
P.O. Box 7010
Chillicothe, OH 45601
Defendant pro se

ATTACHMENT 7

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

- - -

State of Ohio,	:	
Plaintiff,	:	
vs.	:	Case No. 09CR-4919 12AP-198
Rodney Zeune,	:	
Defendant.	:	

- - -

TRANSCRIPT OF RESENTENCING PROCEEDINGS

Before the Honorable John F. Bender, Judge, on Wednesday, January 25, 2012.

- - -

APPEARANCES:

Ms. Jennifer D. Hunt,
Assistant Prosecuting Attorney,

On behalf of the Plaintiff, State of Ohio.

Mr. Craig M. Jaquith,
Attorney at Law,

On behalf of the Defendant, Rodney Zeune.

- - -

BE IT REMEMBERED, that on the resentencing of the above entitled cause at the January Term, 2012, of the Common Pleas Court of Franklin County, Ohio, before the Honorable John F. Bender, Judge, the Plaintiff and the Defendant, to maintain the issues on their part to be maintained, offered and introduced on their behalf the following, to wit:

1 Wednesday Afternoon Session
2 January 25, 2012
2:13 p.m.
3
4 - - -
5 Thereupon, the following proceedings were
6 held in open court:
7 THE COURT: Oh, have a seat.
8 All right. Based on the decision of the
9 Court of Appeals in Case No. 09CR-4919, this case has
10 been returned to the Court for resentencing. The
11 basic error that this Court made at that time was to
12 not inform the Defendant that the time imposed was
13 mandatory. Am I correct in that?
14 MR. JAQUITH: That's -- yes, in a nutshell,
15 yes.
16 THE COURT: And the time was mandatory under
17 the law as it existed at that time?
18 MR. JAQUITH: That is correct.
19 THE COURT: And, therefore, the Court
20 returned this case for what they referred to as
21 resentencing.
22 Based upon that, this matter has been set
23 for hearing today, and counsel for the Defense has
24 filed a motion, or a memorandum. And if I summarize
25 it correctly, it would be -- is that based upon HB 86,

1 the Defendant is entitled to the benefit of the
2 sentencing structure for a Felony of the Third Degree,
3 which is what the Defendant was convicted of under the
4 prior law, and that he is now entitled to the benefit
5 of the Felony of the Third Degree conviction for
6 Trafficking under the new law. Am I correct in that?
7 MR. JAQUITH: That's correct, Your Honor.
8 We actually have a preliminary matter. I'm not sure
9 if the Court's aware of the affidavit of
10 disqualifications that Mr. Zeune filed pro se a week
11 ago.
12 THE COURT: Against you?
13 MR. JAQUITH: No, against the Court,
14 actually.
15 THE COURT: Against the Court?
16 MR. JAQUITH: Yeah.
17 THE COURT: And what would the basis of that
18 be?
19 Did you file that?
20 MR. JAQUITH: Mr. Zeune filed it pro se
21 without my knowledge. So if you would like to have
22 Mr. Zeune address that, that might be --
23 THE COURT: No. I mean, you know, once he's
24 got counsel, he's got no right to file anything
25 pro se.

1 MR. JAQUITH: Okay.
2 THE COURT: So -- but if you wish to address
3 it for him, I will allow you to.
4 MR. JAQUITH: Okay.
5 - - -
6 Thereupon, the Defendant and Counsel
7 conferred out of the hearing of open court.
8 - - -
9 THE COURT: I'll take it as if you filed it,
10 how's that?
11 MR. JAQUITH: I would prefer if you did not
12 do that, Your Honor.
13 THE COURT: All right. I'll take it that he
14 filed it.
15 MR. JAQUITH: I will convey to you,
16 Mr. Zeune has conveyed to me --
17 THE COURT: That's fine. You can do that.
18 MR. JAQUITH: -- that his view of the law is
19 that once it's accepted for filing by the Clerk of
20 Courts, it must be ruled upon by the Presiding Judge
21 before the Sitting Judge in the matter can proceed
22 further.
23 THE COURT: So that's the argument, is
24 therefore there must be -- the disqualification must
25 be ruled upon by the Presiding Judge?

1 MR. JAQUITH: That's my understanding from
2 Mr. Zeune.
3 THE COURT: That's his understanding, that's
4 your understanding, if it is a properly filed motion.
5 MR. JAQUITH: I have not -- that's my
6 understanding.
7 THE COURT: And so the question is: Is it a
8 properly filed motion? Once counsel has been --
9 you're appointed in this matter, or were you retained?
10 MR. JAQUITH: I came into the case on the
11 post-conviction petition, and I do not recall if
12 there's a separate final entry regarding this
13 sentencing.
14 THE COURT: But you have been, in effect,
15 representing him in this matter?
16 MR. JAQUITH: That's correct. Absolutely.
17 THE COURT: Do you have a view on whether or
18 not this is a properly filed motion for
19 disqualifications.
20 MS. HUNT: I absolutely do have a view.
21 THE COURT: And what is that view?
22 MS. HUNT: My view is that it is not
23 properly filed.
24 I have looked at the motion, and despite
25 Mr. Zeune having very capable representation, I

1 believe you are now the third attorney on this case.
2 Throughout the pendency of this appeal afterwards
3 waiting here, Mr. Zeune has continuously filed pro se
4 motions, to the point where some were addressed, and
5 obviously it's handled by my appellate.
6 Now, I did discuss this last one, and it's
7 our position that, number one, you know, because he
8 has appointed counsel, to stop addressing these pro se
9 motions. Number two, I don't want to even pretend to
10 have all the knowledge of this post conviction and the
11 appellate, but from talking with Seth Gilbert, that
12 this was improperly filed in the Common Pleas Court,
13 period. It should not have been filed here based on
14 the state we are at. In looking at it, it just seems
15 to be a lot of the same that we've seen in these
16 previous motions, a lot of the same that we addressed
17 during the trial in court.
18 The State's position is it's not a proper
19 motion in this case for this Court.
20 THE COURT: Do you wish to address it
21 further, counsel?
22 MR. JAQUITH: I do not, Your Honor.
23 THE COURT: Thank you.
24 Well, this Court's ruling is that it is not
25 properly filed, and it is, in effect, in contradiction

1 to the Court of Appeals decision.
2 One, once counsel has been appointed, all
3 motions, all documents must be filed by counsel.
4 Pro se's are inappropriate.
5 Two, the Court of Appeals returned this case
6 to the Sentencing Judge. I am the Sentencing Judge
7 and the Trial Judge in this case. There is no basis
8 for a motion for disqualification of the Sitting Judge
9 in that situation. So the motion's denied.
10 MR. JAQUITH: Understood, Your Honor. Thank
11 you.
12 THE COURT: All right. Now we may proceed.
13 Do you wish to expound upon your sentencing
14 memorandum?
15 MR. JAQUITH: Just one second, Your Honor.
16 Two matters, Your Honor. The case cited by
17 the State, Kaplowitz, I believe it is --
18 THE COURT: Uh-huh.
19 MR. JAQUITH: -- distinguishable from the
20 incident/situation. Paragraph 29 of that case makes
21 it clear that what occurred in Kaplowitz was that the
22 Trial Court's treatment at sentencing of the offense
23 of conviction, in fact, changed the offense of
24 Aggravated Vehicular Assault with an Alcohol
25 Specification to the lesser offense of Recklessly

1 Causing Harm, i.e., Vehicular Assault. We are not
2 asking the lesser offense be the offense of sentencing
3 today. The Offense of Conviction is the Offense of
4 Sentencing. Kaplowitz, for that reason, does not
5 control this scenario. So in that light, I would --
6 THE COURT: Well, isn't the sense of the
7 case the same? In other words, if we went back and
8 must sentence him under the new law, then it would now
9 be a Felony of the Second Degree; is that correct?
10 MR. JAQUITH: If he were indicted today. If
11 the offense occurred after September 30th, then yes,
12 it would be an F-2. There is --
13 THE COURT: But he only gets the benefit of
14 1.58 if the change in the statute would reduce his
15 sentence, his conviction.
16 MR. JAQUITH: Correct. So --
17 THE COURT: And in this case, it's no longer
18 an F-3, it's an F-2.
19 MR. JAQUITH: But the Offense of Conviction
20 in this instance must remain an F-3. But within the
21 new statutory language for that offense, the
22 sentencing time, there's several components, but the
23 one I'd like to address on that point is that the
24 sentencing time is no longer mandatory, there must be
25 two prior offenses now for the sentence to be imposed

1 as mandatory time.
2 THE COURT: So what you're arguing here is
3 not that the four years is inappropriate but that it
4 can no longer be, under the statute, mandatory time;
5 is that what you're arguing?
6 MR. JAQUITH: Both, Your Honor. There's a
7 separate basis for arguing that the range now is nine
8 to 36, instead of -- five was the maximum before; I
9 believe the minimum was 1. I don't recall what the
10 minimum was.
11 THE COURT: How do you square that with the
12 concept, however, that the change in the law -- that
13 the retroactivity, basically, is that he gets the
14 benefit of a lesser sentence under the new law? Under
15 the new law it's an F-2, so how can you argue on the
16 one hand --
17 MR. JAQUITH: Because it's not appropriate
18 to look at the principal offense; it's appropriate to
19 look at the sentencing statute, 2929.14. And then if
20 you look at the new range of penalties under 2929.14
21 for any F-3, and then continue on to look at Section
22 3, I believe it was, of the actual legislative act,
23 the -- it says that the new penalty range shall be
24 applied to anybody penalized after September 30th,
25 2011. Mr. Zeune does not have a sentence right now.

1 He's being penalized today for his F-3, and Section 3
2 says that 2929.14 shall apply to anybody in his
3 position and 2929.14 dictates the range of penalties
4 available for the F-3. So that's wholly independent
5 of the principal offense. This is the sentencing
6 provision. The only range available for an F-3 as of
7 today's date is nine to 36.
8 THE COURT: Do you wish to comment?
9 MS. HUNT: Yes, Your Honor. Thank you very
10 much.
11 Upon recessing for us to brief this, I
12 almost fell down when I found the case Kaplowitz,
13 because not only was it a controlling case as an Ohio
14 Supreme Court case, it is absolutely 100 percent
15 directly on point. And then as an icing on the
16 cake --
17 THE COURT: Well, how is it 100 percent
18 directly on point?
19 MS. HUNT: Well -- and I think that's
20 illustrated -- the icing on the cake was the Supreme
21 Court, the charts that I put into my response --
22 THE COURT: Uh-huh.
23 MS. HUNT: -- I didn't make those up. The
24 chart that is given first under the Kaplowitz section
25 is directly in the Court's decision, and so it

1 certainly made my job of showing the Court how this is
2 directly and 100 percent -- it's not distinguishable
3 whatsoever.
4 If you look at the charts, it's this exact
5 situation. There was a conviction that was on the
6 record, or a guilty finding on the record. In between
7 the sentencing, there was a change in law, just as we
8 are here, and it illustrates that just like here under
9 the new law a conviction for the exact same offense
10 was now increased to a third-degree felony. And they
11 point-blank said, "Well, clearly you cannot do that."
12 That's basic understanding of constitutional rights.
13 That's where we are here. The only way of
14 getting a benefit to a change is under 1.58. And this
15 case is directly explaining why the only exception,
16 which is the B section, does not apply in these
17 situations.
18 The Defense is asking this Court to do the
19 same exact thing that the Defense did in that case,
20 "Well, Your Honor, you can't treat this as one-level
21 hire, but you should look at this as the fourth-degree
22 felony offense here and just sentence under those
23 guidelines." And the Court says you cannot do that.
24 You cannot --
25 THE COURT: Sentence under the old law?

1 MS. HUNT: Correct. You have to revert. So
2 the only way to do it is to revert back to the old
3 law.
4 And I absolutely contest the fact that the
5 Felony 3 under the new law -- I think the only
6 argument was, "Well, this isn't a lesser-included
7 offense." It absolutely is. The only way you go up
8 in increments in these trafficking cases is based on
9 the amount of the cocaine.
10 And what they're asking the Court to do is
11 ignore the fact that the evidence in this case and the
12 guilty verdict in this case was on 25.5 grams. And to
13 treat it as a new Felony 3 law, they're basically
14 asking you to ignore that fact. And no, it's less
15 than 20 -- between 10 and 20. That inherent of itself
16 is a lesser-included offense because it's incrementing
17 down the amount of the cocaine, which increments down
18 the level of the offense.
19 THE COURT: Which would violate the
20 conviction in this case.
21 MS. HUNT: Correct.
22 THE COURT: And that's the Kaplowitz -- the
23 conviction as to the degree of the offense?
24 MS. HUNT: Correct. So they're trying to,
25 just like in Kaplowitz, piece and part and take apart

1 and say, "Well, we deserve this benefit, but ignore
2 this fact." And it was directly on point with the
3 Supreme Court saying, "You can't do that. You are not
4 entitled to the benefit of 1.58, and you have to
5 assume the position you were before that new law was
6 enacted." And that's what the State is arguing is
7 proper in this case.
8 THE COURT: Do you wish to respond?
9 MR. JAQUITH: It's -- I would simply
10 reiterate my prior positions, that Kaplowitz is
11 distinguishable because the Trial Court there, at
12 sentencing, determined that the offender had committed
13 a lesser degree of offense. That is not what we are
14 asking here. We are asking to be kept at an F-3,
15 which was what he was convicted of. So Kaplowitz is
16 distinguishable there.
17 And further, it's distinguishable on the
18 range available because that issue wasn't even present
19 in Kaplowitz. The range for the prior felony in
20 Kaplowitz didn't change as it's changed in this case,
21 so it's in no way applicable on that front certainly.
22 And further, yeah, Section 3 states that
23 anybody penalized after September 30th, 2011 is
24 penalized under this range of penalties, nine to 36.
25 It couldn't be more clear, Your Honor.

1 THE COURT: Thank you.
2 One, the Court of appeals has characterized
3 its order in terms of a resentencing. This error that
4 was made by the Court, fully admitted, by not
5 informing of mandatory time in my view is a
6 clarification of a prior legal sentence. And the
7 requirement that I am to abide by is that I am
8 clarifying a prior sentence. This is not a technical
9 resentencing in my view. I think that term is very
10 broadly used by the Court.
11 This is more akin in this case to the line
12 of cases where, because courts fail to advise of
13 post-release control, that we had to go back and
14 re-advise those individuals, and we've done it in
15 numerous cases throughout this slate because that was
16 an error by the statute. You had to tell them at the
17 time that they were subject to post-release control.
18 So the error here is not going to the core
19 of the sentencing, it's only to define for the
20 Defendant error that the nature of the time imposed
21 was mandatory instead of non-mandatory. I don't
22 recall whether the Court of Appeals said it or you
23 said it, but the issue would be is that the Defendant
24 was mislead about filing judicial release.
25 MS. HUNT: Correct.

1 MR. JAQUITH: May I speak to that,
2 Your Honor?
3 THE COURT: Oh, of course you may.
4 MR. JAQUITH: My understanding of the Court
5 of Appeals opinion is that because the Court was under
6 the impression that it was non-mandatory time
7 Mr. Zeune would be eligible for judicial release. And
8 the Court of Appeals was concerned that the imposition
9 of a four-year sentence may have been made with the
10 understanding that he would be eligible for judicial
11 release, which would enable him to be released before
12 four years was served.
13 The logical next point is that if -- the
14 Court of Appeals was also concerned that if, in fact,
15 the Trial Court had understood at the time it was
16 mandatory, a lesser sentence might have been imposed.
17 THE COURT: Well, isn't that mere
18 speculation on the Court of Appeals?
19 Do you wish to respond to that?
20 MS. HUNT: I do, Your Honor.
21 And obviously, you know, I understand the
22 difficulties of the Court of Appeals. They're kind of
23 looking in hindsight --
24 THE COURT: Of course they are.
25 MS. HUNT: -- and they have their job to do.

1 THE COURT: Exactly.
2 MS. HUNT: My recollection as being present
3 during the whole trial is that maybe them looking
4 through their small scope at this one issue they got
5 they were lost in the fact that it was clear on the
6 record we had -- and I'm sure the Court remembers many
7 discussions because of questions between Mr. Zeune and
8 complaints with regards to Mr. Krapenc and then the
9 State -- at least a couple times where we were
10 discussing this charge before putting the, you know,
11 pulling the jury up and the State putting the plea on
12 the record. It was stated innumerable times that this
13 was a mandatory-time level offense, and I think the
14 Court was absolutely aware of that --
15 THE COURT: I do recall that, yes.
16 MS. HUNT: -- at the time that the sentence
17 was imposed.
18 THE COURT: I do recall that, yes.
19 MS. HUNT: But, you know, the Court of
20 Appeals might not have been absolutely able to focus
21 on all those details. But it's the State's position
22 that --
23 THE COURT: Yeah, I do recall in
24 discussions -- and I haven't gone back and read the
25 record, but my recollection of that record is that in

1 the discussions with the Defendant concerning the
2 potential for entering a plea, that the issue of
3 mandatory time was discussed on the record.
4 MS. HUNT: Correct. And so it's the State's
5 position Your Honor was absolutely aware when you
6 imposed that sentence that it was mandatory time,
7 whether you point-blank said it or not.
8 THE COURT: Absolutely, I was.
9 MS. HUNT: And I just don't see anything
10 that has changed between then and now other than
11 Mr. Zeune's -- which we might not have necessarily
12 been aware of, but his obvious persistence in failing
13 to take responsibility and stop blaming others for
14 this, which we only know because of all these pro se
15 motions he keeps filing. Other than that, I see no
16 change.
17 The Court recollected and I think was deeply
18 disturbed by the undercover recording that was played
19 in here. That hasn't changed. The Defendant's
20 attitude towards this case hasn't changed.
21 THE COURT: Well, I think you're going
22 beyond what we need to do.
23 MS. HUNT: Correct. But I think everybody
24 was aware at the time, whether it was said or not,
25 that this was mandatory time.

1 THE COURT: Do you wish to respond?
2 MR. JAQUITH: Just briefly, Your Honor.
3 To the view that this is merely a technical
4 resentencing, my reading of the Court of Appeals
5 opinion does not support that, in that because the
6 Court of Appeals thought that the distinction between
7 mandatory and non-mandatory may have affected the
8 length of the sentence, their intention was to send
9 this back down for de novo resentencing, so he stands
10 without a sentence now. This is distinguishable from
11 the PRC Fisher universe of cases, in that this is --
12 you know, he is being penalized after September 30th,
13 as mentioned in the statutory language. Thus, the
14 penalties in place now control, not the penalties in
15 place earlier in 2011.
16 THE COURT: Thank you.
17 Well, my recollection is that it was clear
18 at the time that it was mandatory. I did not say
19 that. I can tell you on the record, and I will tell
20 you, that my thought in sentencing the Defendant at
21 the time was to give him four years and would never
22 grant judicial release because my belief is that issue
23 was discussed throughout the trial that it was
24 potentially mandatory time.
25 Irrespective of whether it was said or not,

1 the sentence I gave him would not have changed. I did
2 not give him a maximum sentence; I gave him four
3 years.
4 I believe that the Kaplowitz case is
5 controlling in this case. I do not believe that he is
6 eligible to be sentenced under the new statute because
7 the nature of the offense under the new statute would
8 have been more severe, and we cannot at this point in
9 time, on a resentencing, change the nature of the
10 offense. Therefore, I am advising you, Mr. Zeune, and
11 I am reimposing the sentence of four years that I
12 imposed previously and advising you that it is
13 mandatory time.
14 Anything further for the day?
15 MS. HUNT: Just clarification for the
16 record. Although I don't know if that time has run
17 out already or not, he's incarcerated out of the
18 Knox County case and the Court imposed a
19 consecutive --
20 THE COURT: I imposed a consecutive
21 sentence. As I said, I do not believe 1.58 is
22 applicable in this case, and I reimpose the same
23 sentence that I imposed before, that it should be
24 served consecutive to the Knox County case. The only
25 change in my prior order is that the time is

1 mandatory.
2 MS. HUNT: Thank you very much, Your Honor.
3 MR. JAQUITH: May I, briefly, Your Honor?
4 THE COURT: Yes.
5 MR. JAQUITH: Because I did not address
6 consecutive sentences, I just wanted to make a record
7 that --
8 THE COURT: You can make a record --
9 MR. JAQUITH: -- I object to that
10 imposition.
11 THE COURT: -- based upon your memorandum,
12 which I thought was very well-done, by the way.
13 MR. JAQUITH: Thank you, Your Honor.
14 And I do not believe I have anything
15 further. I made a record on everything else.
16 THE COURT: Very, very well. Thank you.
17 MS. HUNT: Thank you, Your Honor.
18 THE COURT: An entry will follow.
19 For the record, the fines and penalties
20 imposed in the prior case remain the same.
21 - - -
22 Thereupon, at 2:39 p.m., the further
23 proceedings of this cause were concluded.
24 - - -
25

CERTIFICATE

I do hereby certify that the foregoing is a true, correct and complete transcript of the proceedings in this matter held on Wednesday, January 25, 2012, taken by me and transcribed from my original stenographic notes.

_____
William P. Zaremba, RPR
Assistant Official
Court Reporter

ATTACHMENT 8

57931 - V54

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,

Plaintiff,

vs.

Rodney Zeune,

Defendant.

Termination No. 5 By DB

Case No. 09CR-4919 (Bender, J.)

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2012 FEB -6 PM 3:50
CLERK OF COURTS

RE-SENTENCING ENTRY
(Prison Imposed)

On July 29, 2010, the State of Ohio was represented by Assistant Prosecuting Attorney Jennifer Hunt and the Defendant was represented by Attorney, Dennis Pusateri. The case was tried by a jury which returned a verdict finding the Defendant guilty of Count One of the Indictment, to wit: Trafficking in Cocaine, in violation of Section 2925.03 of the Revised Code, a Felony of the Third Degree.

The Court found the Defendant guilty of the charge to which the plea was entered.

The Court ordered and received a pre-sentence investigation.

On October 21, 2010, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Assistant Prosecuting Attorney Jennifer Hunt and the Defendant was represented by Attorney, Robert Krapenc.

The Court imposed a sentence on October 21, 2010, however, the sentence has been reversed and remanded to this Court for re-sentencing by the Opinion rendered on October 6, 2011, by the Court of Appeals of Ohio, Tenth Appellate District.

In accordance with the Opinion rendered on October 6, 2011, by the Court of Appeals of Ohio, Tenth Appellate District, this Court is required to resentence the Defendant. At the sentencing hearing, the State was represented by Assistant Prosecuting Attorney, Jennifer Hunt, and the Defendant was represented by Attorney, Craig Jaquith.

Defendant was indicted and convicted of one count of Trafficking in Cocaine in an amount of 20 grams or more but less than 27 grams, to wit: 25.5 grams, in violation of R.C. 2925.03. When Defendant was sentenced the offense was a Felony of the Third Degree punishable by a mandatory sentence of one, two, three, four or five years in prison.

After the original sentence was imposed, H.B. 86 was enacted effective September 30, 2011. Under H.B. 86, the offense of Trafficking in Cocaine in an amount of 20 grams or more but less than 27 grams is a Felony of the Second Degree, punishable by two, three, four, five, six, seven or eight years in prison.

If the penalty, forfeiture or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as reenacted or amended. R.C. 1.58(B). However, R.C. 1.58 does not apply to give a criminal defendant the benefit of a reduced sentence if, by applying it, the court alters the nature of the offense of which the defendant was found guilty. *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, syllabus.

Therefore, since the degree of the offense and the penalty range for the offense of which the Defendant was convicted are more severe under H.B. 86 than they were when he was originally sentenced, the Defendant must be sentenced in accordance with the statutory penalties in effect prior to the enactment of H.B. 86. R.C. 1.58(B) does not apply here.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term **is** mandatory pursuant to R.C. 2929.13(F).

The Court hereby imposes the following sentence: FOUR (4) YEARS, mandatory, at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS. Sentence is to be served CONSECUTIVE to Knox County, Ohio Case No. 09-00[redacted] the Defendant's Ohio Bureau of Motor Vehicles Driver's License [redacted] four (4) years without work driving privileges.

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: Defendant shall pay a mandatory fine in the amount of $5,000.00. Defendant shall pay court costs in an amount to be determined. Defendant shall pay restitution in the amount of $1,000.00 to DEA/Columbus District Office, 500 South Front Street, Suite 612, Columbus, Ohio 43215.

The total fine and financial sanction judgment is $6,000.00 plus costs.

The Court notified the Defendant pursuant to R.C. 2929(B)(3) that the applicable period(s) of post-release control is three (3) years mandatory.

The Court finds that the Defendant has 444 days of jail credit and hereby certifies the time to the Ohio Department of Rehabilitation and Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

JOHN F. BENDER, JUDGE