

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

CASE NO. 13-1417

Plaintiff-Appellee,

:

ON APPEAL FROM THE BUTLER
COUNTY COURT OF APPEALS
TWELFTH APPELLATE DISTRICT

vs.

:

DERRICK BRYANT,

:

C.A. CASE NO. CA2013-01-0007

:

DEFENDANT-APPELLANT

MEMORUDIUUM IN SUPPORT OF JURISDICTION

MICHEAL T. GMOSE
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PLAINTIFF-APPELLEE, THE STATE OF OHIO

DEFENDANT-APPELLANT

RECEIVED
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CONSTITUTIONAL PROVISIONS

Fourth Amendment Violation

Sixth Amendment Violation

Section 16, Article 1 Ohio Constitutional Violation

STATUES

R.C. Code Criminal Rule 52 & 103.

R.C. 2901.05 (D)(1)(b)

R.C. 2923.02 (D)

EXPLANATION OF WHY THIS IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The Trial Court improperly denied its Subject-Matter Jurisdiction as to a Void Judgment.

“Jurisdiction” means the courts’ statutory or constitutional power to adjudicate the case.

The term encompasses jurisdiction over the subject matter and over the person.” Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. It is a condition precedent to the court’s ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void. The term “jurisdiction” is also used when referring to a court exercising of its jurisdiction over a particular case. The category of jurisdiction encompasses the trial court’s authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject-matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable. Once a tribunal has jurisdiction over both the subject-matter of an action and the parties to it, the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred. State v. Parker, 95 Ohio St. 3d 524 at p22-25.

Cooke v. Montgomery County, 158 Ohio App. 3d 139: Appellate courts are bound by and

“must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled.” “*” ‘In Ohio, our Supreme Court is the primary judicial policymaker.**

As an intermediate appellate court, we should use caution in determining what the public policy of this state should be.

' "Corporex Development & Construction Management, Inc. v. Shook, Inc. Franklin App. No. 03AP-269, 2004 Ohio 2715 at p25. (citations omitted).

INTRODUCTION

The Twelfth District Court of Appeals held that the trial court could apply Res Judicata to a Void Judgment. Therefore, relieving the lower court of its Subject-Matter Jurisdiction. In conclusion violates Due Process of Law. That clearly recognizes Res Judicata does not apply to a Void Judgment. Which also ignores the plain language of Revised Code, Evidence Rule 103 (D) & federal 52: Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

STATEMENT OF THE CASE AND FACTS

The Appellant in this matter was denied his Constitutional Rights to a fair trial, denying him due process of law and Effectiveness Assistance of trial Counsel. This process included his right to claim a defense to the State charges. The Trial Court abused its discretion, because as the transcript clearly shows the trial Court denied the defendant, (Without Valid Justification) the request for an Affirmative defense to be considered by the jury as the sole fact-finder. The jury is suppose to be left to determine the facts beyond a reasonable doubt. Defendant is also denied his Sixth Amendment right to be afforded Effective Assistance of Trial Counsel. In essence of what defendant has been denied, because his trial Counsel requested, and presented the defense, but, when asked if he was still pursuing the Affirmative defense, trial Counsel stood moot, and therefore leaving the defendant without a defense, when defendant could have plea bargained.

ARGUMENTS IN SUPPORT OF PROPOSTION OF LAW

PROPOSTION OF LAW

THE TRIAL COURT OR THE REVIEWING COURT IS WITHOUT SUBJECT-MATTER JURISDICTION TO REFUSE A CLAIM OF A VOID JUDGMENT BY APPLYING THE DOCTRINE OF RES JUDICATA. IN DOING SO THE TRIAL COURTS HAS DENIED THE DEFENDANT DUE PROCESS OF LAW. CRIMINAL RULE 52; “ THE PLAIN ERROR STANDARD.” REVISED CODE:2901.05 (D)(1)(B) & 2923.02(D).

Since the Boswell decision: “The Ohio Supreme Court has clarified to the lower court's how to deal with challenges to sentences and judgment claims as being void. State v. Holcomb 184 Ohio App. 3d 577, 2009 Ohio 3187, 921 N.E. 2d 1077 2009 Ohio App. lexis 2714: “The Ohio Supreme Court held: Despite the lack of a motion for re- sentencing hearing in the trial court. Because the original sentence is actually considered a nullity, a court cannot ignore the sentence and instead must vacate it and order re-sentencing. Id at p12. In Boswell, for the first time, the Supreme Court provided direction about how to raise or consider a void sentence. A defendant may raise this claim in the trial court by filing a motion for re-sentencing and, in light of Boswell's analysis, the motion should not be re-classified as a petition for post conviction relief. If a sentence is void for failure to follow statutory law, the trial court or the re-viewing court—has an obligation to recognize the void sentence, vacate it, and order re-sentencing. Boswell at p.13. Presumably, this means that a trial court, confronted with an untimely or successive petition for post-conviction relief that challenges a void sentence must ignore the procedural irregularities of the petition and,

instead, vacate the void sentence and re-sentence the defendant. The trial court incorrectly categorized said motion to correct sentencing as a petition for post conviction relief.

The judgment by the Twelfth Appellate District is asked to be reversed, as a void sentence vacated, and cause remanded back to the trial court to re-sentence defendant according to law.

The Ohio Supreme Court has “recognized the inherent power of courts to vacate a void judgment.” Cincinnati School Dist. Bd. Of Education v. Hamilton City Pud. Of Revisions (2000), 87 Ohio St. 3d 363, 368, 721 N.E. 2D 40. “A court has inherent powers to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity. VanDeryf v. VanDeryf (1966)6 Ohio St. 2d 31, 36, 215 N.E. 2D 698. An appellant court reviews a trial court's decision to give or not to give a jury instruction under the Abuse of Discretion Standard. If however, the jury instructions or lack thereof, incorrectly states the law, then the appellant court will conduct a de novo review to determine whether the incorrect jury instruction probably misled the jury in a manner materially affecting the complaining party's substantial rights. State v. Martens 629 N.E. 2D 462 (1993). The defendant offered a plausible alternative to the trial court as to why he should have been given the affirmative defense instruction, at trial. A reading of defendant's Motion explains to the court his state of mind as to the circumstances which transpired at the scene of the alleged act and how he believes he abandoned the intent to cause harm. The defendant ejected the bullet that was in the rifle, and left on his own accord. See: (T.p. 59,60,44,66,67,80,90,92,167). The State of Ohio proffered that defendant was bear-hugged and removed, but, actual transcript testimony of the witness who

supposedly bear-hugged and removed the defendant reads drastically different from the State's account.

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See: T.p. Line 14-25 testimony of Witness, Ronald Crenshaw).

“A. Trying to reason with him.

Q. You and I were talking at the same time. And that's—you went up to him and grabbed him-- not grabbed him really, but made contact with him.

A. (Nodding head).

Q. And get the gun down and kind of moved him into the other room, into the foyer?

A. We tried to move him the first time, and he pushed me back. He's a lot bigger than me.

Q. And you went back and tried to help?

A. I went back and tried to talk to him, and tried to, you know, get the weapon down and told him he didn't want to do this like this.

See: T.p. 88 lines 12-19:

“Q. And then you got hold of him again?

A. Yes

Q. Kind of walked him out of the office into the foyer?

A. Yes

Q. Over towards the door?

A. Right

Q. And that's where he stayed there until he left...”

It definitely appears defendant came to his senses and abandoned his reckless actions. It is the essence and understanding of the legislature's intent, when the enacted Ohio Revised Code Section 2923.02(D): “It is an affirmative defense...if the actor abandons his effort to commit the offense or otherwise prevent its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

The disarming of the weapon along with leaving the premises, constitutes a viable reason for him to have been given the instruction, the outcome of that should have been left to the fact-finder. It axiomatic that the state and federal constitution require a criminal conviction to rest upon the

jury's determination that the defendant is guilty of every element of the crime charged beyond a reasonable doubt. See: United States v. Gauden, (1995), 515 U.S. 506 (citing Sullivan v. Louisiana (1993) 508 U.S.275,277.

The question of reasonable doubt is encompassed in the right to an Affirmative defense. This alternative gives the fact-finder, and the fact-finder alone the complete evidence to determine a defendant's guilt or innocence. The trial court may not incorrectly categorize the motion to Vacate as a petition for post conviction relief, the trial court denied the defendant a defense he is entitled to and thusly warrants the granting of a new trial. Courts of Appeals should review jury charges or lack thereof, as a whole, to determine whether it fairly and adequately submitted issues of law to the jury. U.S. v. Carr 5 F 3d 1369.

Trial court's exercising of its discretion in charging a jury will only be reviewed if instruction taken as a whole are mis-leading or given inadequately as to the understanding of the law.

U.S. v. Weilliger 981 F 2d 1497.

The Appellant in this matter was denied his Constitutional right to due process. The process included his right to claim a defense to the state charges. The trial court abused its discretion, because as the transcript clearly shows the lower court denied defendant his request for an affirmative defense. See t.p. 135-136 denying the defendant of the affirmative defense without an valid justification.

This is the essence of what defendant has been denied because his attorney stood moot.

Inadequate assistance, by failing to continue what he started, the affirmative defense he does not

object to when asked if he is still pursuing the defense. See: Britton v. Smythe, 139 Ohio App. 3D 337: An Attorney owes a client a duty of vigorous advocacy that a client has a right to expect will continue until the matter is completely resolved.

In re Corn Derivatives Antitrust Litigation (C.A. 3, 1984), 748 F. 2d 157, 161. Moreover, "an attorney may not abandon his client and take [***27] an adverse position in the same case "Id.

As a matter of professional responsibility, an attorney owes a duty of loyalty to his client.

Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636, 20 Fed. R. Evid.

Serv. 801 (1986) Stating: "...an essential component of procedural fairness is an opportunity to be heard," Which would be effectively denied if, "The State were permitted to exclude competent, reliable evidence.. When such evidence is central to defendant's claim of innocence. Evidence clearly shows defendant abandoned the crime. See: (T.p. 8,44,66,67,80,90,91). In the absence of (valid justification) it is objectively unreasonable to exclude this type of exculpatory evidence. A defendant is deprived the basic right to have the Prosecutor's case encounter and survive crucible meaningful adversarial testing." As to defendant's Constitutional rights, it is axiomatic that the State and Federal Constitution requires a criminal conviction to rest upon a jury determination that the defendant is guilty of every element of the crime charged, beyond a reasonable doubt. See: United States v. Gaudin (1995), 515 U.S. 506 (citing) Sullivan v. Louisiana (1993), 508 U.S. 275, 277. This line of thinking extends also to a jury determination that a defendant may abandon the commitment of a crime. This abuse of discretion of the trial Court is unreasonable, and the ineffectiveness of trial Counsel not to lodge a timely objection. When asked if he was in favor of removing the affirmative defense, he made no reply: United States v Cronin,

Trial is unfair if the accused is denied counsel at a critical stage of the trial. U.S.C.A.

Constitutional Amendment. 6

(BRENNAN, J., dissenting) (“ To satisfy the constitution, counsel must function as an advocate, as opposed to a friend of the court”) Ferri v. Ackerman, 444 U.S. 193, 204, 100 S. Ct. 402, 409, 62 L. Ed 2d 355 (1979) (“ Indeed, an indispensable element of the effective performance of (defense counsel's) responsibilities is the ability to act independently of the Government and oppose it in adversary litigation”) United States v. Cronin, 466 U.S. 648.

IN CONCLUSION

Defendant is deprived of his right to liberty without due process of law.

A fair trial allows a defendant the opportunity to present a defense to the State's charges.

A fair trial determines a defendant's guilt as well as his innocence (beyond a reasonable doubt).

Procedural fairness permits the Prosecutor's case to be put to meaningful adversarial testing.

In part of due process is for a jury to hear all the evidence that's pertinent to the case and to the

law. The case at bar shares the same set of circumstances as in Javor v. United States: (“ In that

no legal assistance during a substantial portion of his trial.”) Whereas, Prejudice is also inherent

in the case at bar. Because just as an unconscious counsel, sleeping counsel, thus does a counsel

whom makes no reply, is just as equivalent to no counsel at all. Javor v. United States, 724 f. 2d

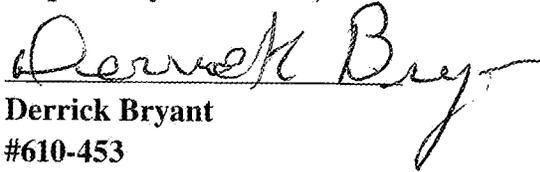
831, 1984 U.S. App. Lexis 26080 HN1. As a plain error violation to the Revised Code Criminal

Rule 52: “Nothing in this rule precludes taking Notice of plain errors effecting substantial rights

although they were not brought to the attention of the court. This error has a critical effect on the process or the likelihood of such an effect, as to a violation of a Sixth Amendment Right.

I pray The Supreme Court of Ohio, will grant jurisdiction because this case raises a substantial constitutional question, involves a felony, and is of public or great interest.

Respectfully Submitted,



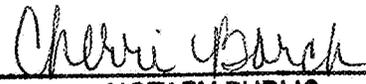
Derrick Bryant

#610-453

P. O. Box 550

Chillicothe, Ohio 45601

Sworn to and subscribed in my presence, a Notary Public for the State of Ohio in the County of Ross, this 28 day of August 2013.



NOTARY PUBLIC

MY COMMISSION EXPIRES

MO. 1 DAY 19 YEAR 2017

I, hereby certify that a copy of the foregoing Notice of Appeal of Appellant, Derrick Bryant, has been served by U.S. Mail, postage pre-paid, upon Michael T. Gmoser, Butler County Prosecuting Attorney, 315 High Street- 11Th. Floor, Hamilton, Ohio 45011, this ___ day of August 2013.

PROSE

THE COURT OF APPEALS FOR BUTLER COUNTY, OHIO

STATE OF OHIO, : CASE NO. CA2013-01-007

Appellee,

FILED BUTLER COUNTY COURT OF APPEALS ENTRY DENYING APPLICATION FOR RECONSIDERATION

vs.

AUG 07 2013

DERRICK BRYANT,

MAHE L. CHAMBERLAIN CLERK OF COURTS

Appellant.

The above cause is before the court pursuant to an application for reconsideration filed by appellant, Derrick Bryant, on June 24, 2013. Appellant seeks reconsideration of this court's decision filed June 3, 2013 which denied his motion for post-conviction relief.

When reviewing an application for reconsideration, an appellate court determines whether the application calls the attention of the court to an obvious error in its decision, or raises an issue for consideration that was either not considered at all or not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.*, 91 Ohio App.3d 469 (10th Dist.1993). An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and logic used by an appellate court. *State v. Owens*, 112 Ohio App.3d 334 (11th Dist.1996).

In 2010, appellant was convicted of kidnapping and felonious assault. His convictions were affirmed on direct appeal. Later, appellant filed a motion for "relief from void judgment" arguing that he should have been able to present an abandonment instruction to the jury. The trial court denied appellant's motion, characterizing it

as a motion for post-conviction relief. The court concluded that appellant's argument was barred by res judicata because it could have been raised on direct appeal.

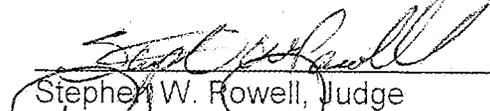
On appeal, appellant argued that the trial court erred by characterizing his motion for relief from void judgment as a motion for post-conviction relief, and argued that his sentence was void because the trial court should have instructed the jury as to an abandonment defense. This court found both arguments to be without merit.

In his application for reconsideration, appellant essentially makes the same arguments that he did on appeal. The application does not call the attention of the court to an obvious error, or raise an issue for consideration which was either not considered at all or not fully considered. Accordingly, the application for reconsideration is DENIED.

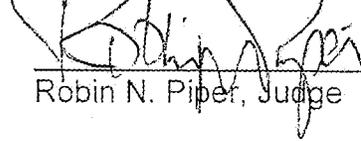
IT IS SO ORDERED.



Robert A. Hendrickson, Presiding Judge



Stephen W. Rowell, Judge



Robin N. Piper, Judge

PW Se

FILED IN THE COURT OF APPEALS

2013 JUN -3 PM 2:45 TWELFTH APPELLATE DISTRICT OF OHIO

MARY L. SWAIN,
BUTLER COUNTY
CLERK OF COURTS

BUTLER COUNTY

STATE OF OHIO,

FILED BUTLER CO.
COURT OF APPEALS

Plaintiff-Appellee,

JUN 03 2013

CASE NO. CA2013-01-007
(Accelerated Calendar)

- vs -

MARY L. SWAIN
CLERK OF COURTS

JUDGMENT ENTRY

DERRICK BRYANT,

Defendant-Appellant.

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-12-1974

{¶ 1} This cause is an accelerated appeal from the Butler County Court of Common Pleas. Defendant-appellant, Derrick Bryant, appeals the denial of his 2012 motion to "Vacate and Set Aside the Judgment and Conviction as Void" which the trial court construed as appellant's petition for postconviction relief.¹

{¶ 2} Appellant's single assignment of error is overruled on the basis of *State v. Reynolds*, 79 Ohio St.3d 158 (1997). Appellant's motion was properly construed as a petition for postconviction relief because it was filed subsequent to a direct appeal and the motion sought to vacate his sentence on the basis that his constitutional rights were violated. *Reynolds* at syllabus; *State v. Strunk*, 12th Dist. No. CA2010-09-085, 2011-

1. Pursuant to Loc.R. 6(A), we have sua sponte assigned this appeal to the accelerated calendar.

Ohio-417, ¶ 11. Furthermore, appellant's motion is barred under the doctrine of res judicata because appellant cannot raise or litigate any defense or claim lack of due process that was raised or could have been raised by appellant at trial, which resulted in the judgment of conviction or on an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. See *State v. Rose*, 12th Dist. No. CA2012-03-050, 2012-Ohio-5957, ¶ 22.

{¶ 3} Judgment affirmed.

{¶ 4} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

{¶ 5} Costs to be taxed in compliance with App.R. 24.



Robert A. Hendrickson, Presiding Judge


Stephen W. Powell, Judge
Robin N. Piper, Judge