

IN THE SUPREME COURT OF OHIO

State of Ohio,  
Plaintiff-Appellee,  
-vs-  
Thomas C. DiBiase,  
Defendant-Appellant.

:  
: Case No. 14-0082  
:  
:  
: On appeal from the Lake County  
: Court of Appeals,  
:  
: Eleventh District No. 2013-1-040  
:

MEMORANDUM IN SUPPORT OF JURISDICTION OF  
DEFENDANT-APPELLANT THOMAS C. DiBIASE, pro se

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Opinion and Judgment Entry of the Lake County Court of Appeals, Eleventh Appellate District No. 2013-L-040, <del>2013-Ohio-5830</del> (December 31, 2013) .....	Exhibit A-1 to A-7
(2013 Ohio App.LEXIS 6126)	

WHY LEAVE TO APPEAL SHOULD BE GRANTED

Defendant-Appellant Thomas C. DiBiase ("DiBiase") respectfully requests that leave to appeal should be granted to hear this case mainly because it involves an incorrect interpretation of Ohio's Public Records Law under R.C. 149.43.

This is currently DiBiase's third attempt to invoke this Court's jurisdiction. His last attempt was recently denied on September 25, 2013 involving a strong claim of ineffective counsel on appeal raised under App.R. 26(B), in which Ohio Supreme Court Justice O'Neill wanted to review. See, Ohio S.Ct Case No. 2013-1152, 136 Ohio St.3d 1495 (9/25/13), appeal not accepted for review, Judge O'Neill dissents.

While this Honorable Court was reviewing S.Ct. Case no. 2013-1152, it was noticing the instant case at bar. As explained previously, DiBiase was unsuccessful in persuading the lower appellate court to consolidate his App.R. 26(B) action with his pending appeal of the trial court's denial of his request for public records which were essential to fairly determine his claim of ineffective assistance of appellate counsel. The lower court's failure to consolidate Lake County App. Nos. 2011-L-124 with 2013-L-040 (this case), worked to DiBiase's detriment and substantially prejudiced the outcome as will be explained in detail below.

Under R.C. 149.43(B)(8), an inmate must first seek an order from the trial court to get public records relating to his criminal prosecution. The public records sought must support a justiciable claim. See the well-established case law from this Honorable Court: State ex rel. Fernback v. Brush, (2012), 133 Ohio St.3d 151.

As will be shown below, DiBiase did make a justiciable claim, but the appellate court relied on its previously mistaken findings which DiBiase requested this Court notice in his last appeal in S.Ct. Case no. 2013-1152. See, "Memorandum in Support of Jurisdiction of Appellant," page 1, S.Ct. No. 2013-1152:

"In the case at bar, DiBiase provided proof that appellate counsel omitted serious errors on his appellate brief, resulting in his case being affirmed on appeal. Instead of looking at this proof, the appellate court outright lied and falsely stated that, 'This court considered and addressed the phone recordings in appellant's appeal. DiBiase, supra, at par.26-27.' See, Exhibit A-5. In reality, there was no assignment of error on direct appeal addressing the phone recordings. So this must be a false statement the court of appeals relied upon to overlook DiBiase's strong claims of ineffective assistance of appellate counsel presented to them.

Further, appeal counsel failed to have the phone recordings transcribed for appeal, even though proof was submitted to the court of appeals that appellate counsel submitted nonsensical motions attempting to have this done."

S.Ct. Case no. 2013-1152, pages 1-2. (Memorandum in Support of Jurisdiction.)

As briefed below, Ohio's public records law is to be construed in favor of the public records requestor. Instead of following this well-established mandate, the court of appeals apparently took their only way out by relying upon its previously mistaken facts.

Therefore, DiBiase respectfully requests, in this his final

appeal, to reverse the decision below and allow DiBiase to obtain the public records he sought under R.C. 149.43(B)(8).

### STATEMENT OF THE CASE AND FACTS

On March 7, 2013, DiBiase filed a Motion entitled: "Petitioner's Request to Transcribe and Provide a Written Copy of Jail-House Phone Recordings, R.C. 149.43(B)(8), et. seq." (hereinafter, "Motion.")

DiBiase claimed that during trial, various jail-house phone recordings were made audio-taping DiBiase and were used against him at trial. DiBiase stated that he is indigent and therefore Due Process of Law and Equal Protection of the Law mandates that he have the same access to the courts as a rich person would enjoy who could afford to pay for transcripts to perfect an appeal. See, Motion, page 2.

On December 26, 2012, the lower court affirmed DiBiase's first appeal of his conviction. State v. DiBiase, Lake App.No. 2011-L-124, 2012-Ohio-6125. This Court denied leave to appeal on April 24, 2013; S.Ct. Case No. 2013-0176.

DiBiase also timely-filed an Application for Reopening under Ohio App.R. 26(B). It remains unreported and was assigned the same appellate case number as his first direct appeal. On July 1, 2013, the appellate court denied relief. Recently, on September 25, 2013, this Court denied leave to appeal; S.Ct. Case No. 2013-1152, 136 Ohio St.3d 1495 (Judge O'Neill dissents).

PUBLIC RECORDS SOUGHT:

DiBiase asked the trial court for a transcribed copy of all the Jail-House Phone Recordings currently in the possession of the trial court and the prosecutor as evidenced in the trial record on T.pgs. 137, 173-174, 275, 285. The trial court went on record verifying that there are 18 of them called "WAV FILES" with a total playing time of 175 minutes. State's Exhibit 51 contained some of the WAV FILES, but not all of them were admitted in evidence at trial, and some of them were only partially played to the jury. T.Pgs. 541, 636-640, 724 (playing WAV FILES ## 126902275, 1269455096, 1269469423, 1269637933, 1269638797, 1269801378, 1269965051, 1270242190). For relief, DiBiase requested a transcribed copy of all 18 WAV Files. See, **Motion**, pages 3-4.

WHY THESE RECORDS ARE NEEDED TO SUPPORT A JUSTICIABLE CLAIM:

DiBiase told the trial court that he needed these records to give him a fair chance to prove ineffective assistance of appellate counsel in his pending App.R. 26(B) filing. He articulated his need for these public records by carefully showing the trial court how a copy of the WAV FILES is necessary because they are at the heart of his App.R. 26(B) filing:

(a copy of his App.R. 26(B) filing was attached to the Motion)

" \*\*\* On page 3, para.7, it is shown how the jailhouse recordings prejudiced his right to a fair trial. Exhibit C-3.

His second prong, it is shown how appeal counsel stumbled in his attempt to transcribe these WAV FILES for appeal which resulted in appeal

counsel's ineffectiveness. Appeal counsel refused to supply these WAV FILES to DiBiase. Exhibit C-3, C-4.

In DiBiase's third prong, he shows that he needs the WAV FILES in order to prove ineffective assistance of trial counsel for failing to file a motion in limine to prohibit the introduction of this evidence at trial. The prosecutor provided late discovery and conducted a "trial by ambush" with the late introduction of these WAV FILES, and DiBiase was prejudiced because he could have pled out had he known the court was going to allow this very prejudicial evidence. Exhibit C-4, C-5, C-6.

The Lake County Court of Appeals has recently found that trial counsel is ineffective in a similar instance when he fails to file a pre-trial motion contesting the evidence when there is no strategic basis for not filing the motion. See, State v. Allen, Lake App.No.2011-L-157, (Feb.8, 2013), 2013-Ohio-434, para.22. DiBiase was prejudiced, because had he known the court was going to allow admission of this evidence, he would have accepted the pre-trial plea bargain of five years (Exhibit C-6, top paragraph), instead of the 19 years he actually received at sentencing.

DiBiase also needs these records because he is attempting to show in his App.R. 26(B) pending motion that trial counsel was also ineffective for failing to transcribe the jail-house recordings to properly review on appeal. See, Exhibit C-7, prong "c." Trial counsel was aware that the court of appeals needed an offer of proof (Tr.318), and he knew how prejudicial they were to DiBiase's right to a fair trial (Tr.536). Appeal counsel could have raised this issue when he stumbled at obtaining a chance to get these records transcribed for appeal. See, Exhibit C-3, C-4, para.8-17. (Showing counsel's futile attempt to supplement the record under App.R. 9(C) & (E)).

These jail-house recordings could also substantiate DiBiase's claim that trial counsel was ineffective for failing to object to prosecutorial misconduct during closing argument as set forth in Exhibit C-7, prong "d."

Further, DiBiase is arguing that he needs these records in order to prove that he was prejudiced by the improper comment on the right to remain silent and to prove extreme prejudice that the introduction of the jail-house recordings showing his prior and current confinement (including profanity contained therein) denied him a fundamentally fair trial. See, Exhibit C-7, C-8, C-9, prongs "a," & "b."

**Motion, pages 4-6.**

The appellate court affirmed the appeal of the denial of the public records on December 31, 2013, by relying on the previous erroneous facts that they already addressed the phone recordings in the first appeal. See the attached **Opinion at paragraphs 17-24.**

As will be demonstrated under Proposition of Law No. II, the decision below is unjust because DiBiase did show how the public records are needed to support a justiciable claim, both now and in anticipated review in federal courts under federal habeas corpus proceedings.

Other operative facts will be set forth in the next section.

### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: An indigent defendant must be afforded the same procedural guarantees and access to the courts a rich person enjoys to comport to the State and Federal constitutional guarantees of Due Process and Equal Protection of the law.

DiBiase remains indigent and was not allowed to have the same procedural guarantees and access to the courts as a rich person would enjoy as set forth below under Proposition of Law No. II.

The United States Supreme Court has given rather significant procedural guarantees in criminal cases, including the right to counsel and a transcript at public expense for appeals as of right. The right to a transcript for indigents was established in Griffin v. Illinois (1956) 352 U.S.12, where the court, at page 18, stated that although a right of appeal was not required by the due process

clause, once a state gave that right in a criminal case it could not effectively deny it to indigents by requiring that they pay for a transcript they could not afford. The court held broadly that there could be no equal justice where the kind of trial received depended on the ability to pay. The same rationale was used in Douglas v. California, (1963), 372 U.S.353, when the court ruled that denial to indigents of counsel at public expense for an appeal of right was as invidious as denial of a transcript and violated the requirement of equality found in the Fourteenth Amendment.

DiBiase notified all of the lower courts that he has a due process and equal protection right to obtain a transcribed copy of the audio CD of the jail-house recordings. (See, appellant's brief on appeal, pages 9-11; appellant's reply brief on appeal, pages 2-5.) Further, in his reply brief, he asked the court of appeals to at least compromise somehow and send a cost bill to DiBiase in order to receive a copy of the public record in question (page 5, therein).

The appellate court admitted that pursuant to App.R. 9(A), the jailhouse phone recordings should have been transcribed (Opinion at para. 12, 14, 24), but falsely stated (as addressed in Proposition of Law No. II), " \*\*\* (t)he recordings in this case were sufficiently reviewed without written transcriptio(n)." (See, opinion at para. 24.) "Accordingly, his constitutional claims are unfounded." *ibid.*

Therefore, DiBiase requests review on this proposition of law in order to correct the lower court's mistaken findings of fact.

Proposition of Law No. II: A public office or person responsible for public records must liberally construe the Public Records Act in favor of broad access, and any doubt is to be resolved in favor of disclosure of public records when a prisoner sets forth a justiciable claim that the information is needed to fairly pursue his criminal appeals.

On March 7, 2013, DiBiase filed his Motion to obtain the jail-house recordings. It was made pursuant to R.C. 149.43(B)(8), which provides, in pertinent part:

" (8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction \*\*\* to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution \*\*\* unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence \*\*\* finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person."

R.C. 149.43(B)(8) (Motion, page 2.)

Well-established case law from this Court mandates that the Public Records Act must be construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records. This same rationale applies to any exemptions the public office may claim to the public records in question. See, State ex. rel. Cincinnati Enquirer v. Hamilton Cty, 75 Ohio St.3d 374, 376, 379, 1996-Ohio-214. Further, in that same case, this Court granted writs of mandamus requiring the city to release copies of 911 tapes. The tapes were public records and were not subject to exceptions to release. id.

According to State ex rel. Ferback, supra, DiBiase followed the correct procedure to first seek an order from the trial court to get the public records in question relating to his criminal prosecution.

In his Motion, DiBiase sought these public records:

(see, "PUBLIC RECORDS SOUGHT," page 4, supra)

Some of the WAV FILES were not played to the jury, and some were only played in part.

His Motion also stated why these records are needed to support a justiciable claim:

(see, "WHY THESE RECORDS ARE NEEDED TO SUPPORT  
A JUSTICIABLE CLAIM," pages 4-5, supra)

DiBiase put the trial court on full notice that he needed these public records in order to effectively litigate his recently filed application for reopening (filed on 2/28/2013), and to obtain further review in federal habeas corpus if needed. Motion, page 6.

REQUEST TO COURT OF APPEALS TO CONSOLIDATE

2011-L-124 & 2013-L-040

On May 17, 2013, (filed) "REQUEST TO CONSOLIDATE CASE NO. 2011-L-124 WITH CASE NO. 2013-L-040." This motion was filed by DiBiase and placed on the docket in both case numbers. DiBiase explained that his application for reopening was still pending (Case No. 2011-L-124) and the appeal of his denial of the public records (Case No.

2013-L-040 (this case)) are interrelated to his application for reopening, and should be heard together to preserve precious court resources. See, **Request to Consolidate**, page 2. The court of appeals denied this request, and overruled it as "moot," and issued the incorrect and faulty finding that, "This Court considered and addressed the phone recordings in appellant's appeal." See the Memorandum In Support of Jurisdiction filed by DiBiase on July 19, 2013, seeking review of his application for reopening; S.Ct. Case No. 2013-1152 (pages 5-9, 11-15). (Leave to appeal denied, (9/25/13), 136 Ohio St.3d 1495, Judge O'Neill dissents.)

DiBiase was further prejudiced by the denial of his motion to consolidate these two appeals because the appellate court relied on the same incorrect and faulty finding it did in DiBiase's first direct appeal. See, **Opinion**, para. 17, 19, 21, 24 (falsely stating that the appellate court sufficiently reviewed without written transcription the public records sought).

The Opinion being appealed now contains several illogical conclusions and premises which should be looked at in detail if the Court grant leave to appeal. Here is a brief summary of the erroneous facts and conclusions relied upon to deny DiBiase a copy of the public records:

**Opinion at para.5**

"Appellant filed a direct appeal, Case No. 2011-L-124, asserting that his convictions were without sufficient evidence and against the manifest weight of the evidence."

This was the sole assignment of error that appeal counsel raised

and there was no error assigned on direct appeal addressing the impropriety of using the audio recordings, even after DiBiase tried to get appellate counsel to assign phone recordings as one of his assignments of error. Therefore the appellate court never addressed these phone recordings in the first direct appeal.

**Opinion at para.11**

"Appellant, who had been declared an indigent, was provided counsel and a trial transcript at state's expense in his direct appeal."

The trial transcript does not include the WAV FILES. DiBiase wanted trial counsel to take at least an one hour recess after finding out about the State's intention to use audio tapes. Counsel then assured DiBiase that there was no need to listen to the recordings because there was no possible way the Court would admit the tapes into evidence stating the probative value was clearly outweighed by the prejudicial value. Judge Lucci allowed some of the tapes into evidence, even after admitting that some of them had lots of exculpatory evidence in them. The State only chose the worse 8 out of the 18 tapes to be played in front of the jury, and not allowing DiBiase to hear the other 10 tapes. This was a trial by ambush due to the late discovery of the tapes.

Again, DiBiase needs the public records to prove ineffective assistance of counsel. These tapes clearly tainted the jury by allowing only some of the calls to be played. Counsel knew that DiBiase was not going to take the stand so that he wouldn't taint the jury with the fact that he was incarcerated in a federal prison.

Accordingly, DiBiase was denied his right to a fair trial when counsel failed to protect DiBiase's Fifth Amendment right to remain silent.

**Opinion at para.12**

"At the outset, we note that \*\*\* App.R. 9 was later amended in July 2011 to provide that a transcript is required for the record on appeal and that a videotape recording of the trial court proceedings is no longer adequate."

Here, the appellate court agreed with the wisdom of the appellate rules that a transcript is necessary to assign error on direct appeal, but goes on to falsely state that they listened to the tapes during the first direct appeal.

**Opinion at para.14**

"Pursuant to App.R. 9(A), the jailhouse phone recordings should have been transcribed \*\*\* (however), based on the facts in this case, the outcome does not change."

In this statement, the appellate court conveniently omits the fact that ten (10) of the tapes were not even played to the jury, so how could they conclude the outcome does not change? The partial tapes that were played to the jury were extremely prejudicial to DiBiase's right to a fair trial and the appellate court had no assignment of error to review on direct appeal to listen to the tapes or review for the various errors DiBiase raised in his application for reopening. See, Reply Brief (Case No. 2013-L-040), pages 3-5. See also previously filed Memorandum in Support of Jurisdiction, S.Ct. Case No. 2013-1152, page 12 (showing the falsity of the claim that the appellate court addressed the phone recordings in the first appeal).

Opinion at para.16

"In addition, the Ohio Supreme Court has held that '(t)ape recordings (themselves) are the best evidence of their content, not transcripts prepared from them.' State v. Coleman, 85 Ohio St.3d 129, 142 (1999) \*\*\* ."

The appellate court used the same faulty analysis of the Coleman when it denied the application for reopening and DiBiase notified this Court in his last Memorandum in Support of Jurisdiction, S.Ct. Case No. 2013-1152, page 12, why Coleman does not apply:

"Moreover, their citing to State v. Coleman, 85 Ohio St. 3d 129, 142 (1999) (ibid.) (tape recordings are the best evidence of their content, not transcripts prepared from them), does not apply to this issue because in Coleman the issue was dealing with inaudible portions of tape recordings, and Coleman failed to object at trial. See, 85 Ohio St.3d, at 142. There is no evidence in that case that Coleman's appeal counsel forgot to transcribe his tape recordings on appeal; and no evidence that the audio was not transcribed during Coleman's trial, rendering Coleman inapplicable to the case at bar."

Opinion at para.17

"The facts in this case show that the recordings at issue were contained in State's Exhibit 51, which was provided to appellant's counsel, admitted into evidence at trial, and made part of the record for purposes of appellant's direct appeal. As such, although not transcribed, we stress that this court has already listened to, considered, and addressed the phone recordings in appellant's direct appeal. DiBiase, *supra* at para.26-27."

Again, the evidence proves that this is a false statement as previously stated. The tapes were never made an issue by appellate counsel. Trial and appellate counsel never let DiBiase listen to the tapes and spurned all of his requests to obtain these public records. Trial counsel was aware that these tapes were his first

grounds for appeal when Judge Lucci allowed these tapes to work to severe prejudice by improperly tainting the jury. To add salt to the wound, appellate counsel tricked DiBiase when he spurned DiBiase's pleas to make the tapes assignment of errors on direct appeal as set forth in his App.R. 26(B) filings and his request for public records to the trial court.

**Opinion at para.18-23**

The appellate court finished the Opinion by repeating their same findings as previously set forth in the prior appeal and this Court was alerted to their faulty facts in S.Ct. Case No. 2013-1152, **supra**. The evidence leans to the conclusion that appellate counsel did not listen to the audio tapes, whereas the appellate court claims there is no evidence that appellate counsel did not listen to the phone recordings (**Opinion, para.19**).

DiBiase also alerted this Court in the prior appeal that the appellate court violated App.R. 26(B)(6) by failing to address all of the errors raised regarding the tapes. Therefore, their recent rehearsal of the prior opinion denying the App.R. 26(B) application for reopening leads to the conclusion that it is based on faulty facts and cannot be trusted as authority.

DiBiase still needs these public records to pursue this appeal and further proceedings in federal habeas corpus proceedings, if necessary. The court of appeals even spurned DiBiase's offer to compromise by making the trial court send him a cost bill to obtain the CD's in question (without transcription). See, **Reply Brief on appeal, page 5 (Conclusion)**.

CONCLUSION

Appellant respectfully requests that this case should be reviewed on the merits in order to give the lower courts guidance that Ohio's Public Records Law must be liberally construed in favor of broad access under R.C. 149.43(B)(8). Further, this Court has jurisdiction to correct the lower court's mistaken facts because appellant was prejudiced when his App.R. 26(B) application for reopening (S.Ct. Case No. 2013-1152) opinion contained erroneous factual findings and are interrelated to his request for public records.

Respectfully submitted,

  
Thomas C. DiBiase, #594-063  
Defendant-Appellant, pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum in support of jurisdiction was sent by ordinary U.S. mail, postage prepaid, to counsel for appellee, Charles E. Coulson, Lake County Prosecutor, at PO Box 490, Painesville, OH 44077, on January 14, 2014.

  
Thomas C. DiBiase, #594-063  
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Defendant-Appellant, pro se

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO

STATE OF OHIO,

:

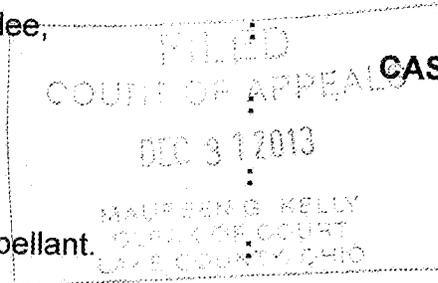
OPINION

Plaintiff-Appellee,

- vs -

THOMAS C. DIBIASE,

Defendant-Appellant.



CASE NO. 2013-L-040

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 11 CR 000036.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Thomas C. DiBiase*, pro se, PID: A594063, Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Thomas C. DiBiase, appeals from the April 16, 2013 judgment of the Lake County Court of Common Pleas, denying his request to transcribe and provide a written copy of jailhouse recordings.

{¶2} Appellant was indicted by the Lake County Grand Jury on three counts of burglary, three counts of receiving stolen property, and two counts of engaging in a pattern of corrupt activity. Appellant pleaded not guilty to all counts.

Exhibit A-1

{¶3} The matter proceeded to jury trial in July 2011. Appellee, the state of Ohio, presented substantial evidence in the form of 19 witnesses and over 55 exhibits. The evidence collectively established that appellant and his co-defendants burglarized homes and sold the stolen items for cash at local precious metal dealers and pawn shops. Jewelry stolen from the victims' homes was recovered from the various dealers and shops as well as from appellant's and his co-defendants' homes. At the close of the state's case, appellant moved for acquittal pursuant to Crim.R. 29 on all counts. The trial court denied his motion. Appellant declined to call any witnesses, rested his case, and renewed his Crim.R. 29 motion, which was again denied.

{¶4} The jury returned a verdict on two counts of burglary, two counts of receiving stolen property, and two counts of engaging in a pattern of corrupt activity. The trial court sentenced appellant in August 2011 to a total of 19 years in prison.

{¶5} Appellant filed a direct appeal, Case No. 2011-L-124, asserting that his convictions were without sufficient evidence and against the manifest weight of the evidence. On December 24, 2012, this court affirmed the trial court's judgment, holding that the state submitted substantial evidence as to the six counts appellant was convicted of and that the jury did not lose its way in delivering a guilty verdict. *State v. DiBiase*, 11th Dist. Lake No. 2011-L-124, 2012-Ohio-6125, ¶43.

{¶6} Thereafter, appellant filed a pro se notice of appeal and a motion for stay with the Ohio Supreme Court. However, the Court did not accept appellant's discretionary appeal and denied his motion for stay as moot. *State v. DiBiase*, 135 Ohio St.3d 1415, 2013-Ohio-1622.

{¶7} On February 28, 2013, appellant filed a pro se application to reopen his appeal pursuant to App.R. 26(B) based upon a claim of ineffective assistance of appellate counsel. On July 1, 2013, this court overruled appellant's application.

{¶8} Prior to our ruling on appellant's reopening, he filed with the trial court on March 7, 2013, a pro se request to transcribe and provide a written copy of jailhouse phone recordings. The state filed a response five days later. Appellant filed a reply the following week.

{¶9} On April 16, 2013, the trial court denied appellant's request to transcribe and provide a written copy of jailhouse phone recordings. Appellant filed the instant appeal, Case No. 2013-L-040, asserting the following assignment of error:

{¶10} "The trial court erred in overruling appellant's motion to transcribe and provide a written copy of jail-house phone recordings."

{¶11} Appellant, who had been declared an indigent, was provided counsel and a trial transcript at state's expense in his direct appeal. As alleged in his application for reopening, appellant argues again that transcription of the phone recordings was necessary. Thus, the main issue in this appeal is whether appellant was entitled to have the jailhouse phone recordings contained in State's Exhibit 51 transcribed, and if so, whether the failure to do so amounts to reversible error.

{¶12} At the outset, we note that under former App.R. 9(A), trial court proceedings were required to be transcribed, with the exception of videotape recordings. App.R. 9 was later amended in July 2011 to provide that a transcript is required for the record on appeal and that a videotape recording of the trial court proceedings is no longer adequate. See App.R. 9(A); *White v. Damiani*, 11th Dist.

Trumbull No. 90-T-4432, 1992 Ohio App. LEXIS 3441, \*10 (June 30, 1992); *State v. Elliott*, 5th Dist. Licking No. 2011-CA-00064, 2012-Ohio-771, ¶1-4.

{¶13} The instant matter involves jailhouse phone records. In his appellate brief, appellant maintains that the state has no legal duty under R.C. 149.43 to create a record and have the jailhouse phone recordings transcribed to meet his continued demands. Nevertheless, he believes a special exception should be made for him.

{¶14} Pursuant to App.R. 9(A), the jailhouse phone recordings should have been transcribed. They were not. However, based on the facts in this case, the outcome does not change.

{¶15} Although mindful of App.R. 9(A), Evid.R. 1002 states in part: "*To prove the content of a \* \* \* recording, \* \* \* the original \* \* \* recording \* \* \* is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio.*" (Emphasis added.)

{¶16} In addition, the Ohio Supreme Court has held that "[t]ape recordings [themselves] are the best evidence of their content, not transcripts prepared from them." *State v. Coleman*, 85 Ohio St.3d 129, 142 (1999); *see also State v. Rogan*, 94 Ohio App.3d 140, 148 (2d Dist.1994), citing *State v. Holmes*, 36 Ohio App.3d 44 (10th Dist.1987).

{¶17} The facts in this case show that the recordings at issue were contained in State's Exhibit 51, which was provided to appellant's counsel, admitted into evidence at trial, and made part of the record for purposes of appellant's direct appeal. As such, although not transcribed, we stress that this court has already listened to, considered,

and addressed the phone recordings in appellant's direct appeal. *DiBiase, supra*, at ¶26-27.

{¶18} In his application for reopening, appellant set forth four "prongs" or issues for our review. His second and third "prongs" involved the jailhouse phone recordings. In this court's judgment overruling appellant's application for reopening, we specifically found the following regarding "prongs" two and three:

{¶19} "With respect to appellant's second 'prong,' \* \* \* [t]he jailhouse phone recordings at issue were contained in State's Exhibit 51, which was admitted into evidence and made part of the record for purposes of appeal. Appellant's conversations indicated a consciousness of guilt and a desire to hinder the investigation. This court considered and addressed the phone recordings in appellant's appeal. *DiBiase, supra*, at ¶26-27. Contrary to appellant's assertions, there is no evidence that appellate counsel did not listen to the phone recordings.

{¶20} "We fail to see any ineffective assistance of appellate counsel warranting a reopening under appellant's second 'prong.'

{¶21} "Regarding appellant's third 'prong,' \* \* \* the recordings were played for the jury, identified on the record, and marked as Exhibit 51. This court considered and addressed the phone recordings in appellant's appeal. *DiBiase, supra*, at ¶26-27. \* \* \*

{¶22} " \* \* \*

{¶23} "We fail to see any ineffective assistance of appellate counsel warranting a reopening under appellant's third 'prong.'"

{¶24} Upon further consideration, although mindful of App.R. 9(A), the recordings in this case were sufficiently reviewed without written transcription, despite

appellant's continued contention to the contrary. Accordingly, his constitutional claims are unfounded. Therefore, based on the facts in this case, there is no reversible error due to the trial court's denial of appellant's March 7, 2013 pro se request to transcribe and provide a written copy of the jailhouse recordings.

{¶25} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.

STATE OF OHIO )  
 )SS.  
COUNTY OF LAKE )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

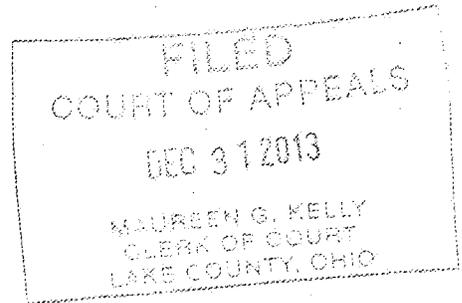
STATE OF OHIO,  
Plaintiff-Appellee,

JUDGMENT ENTRY

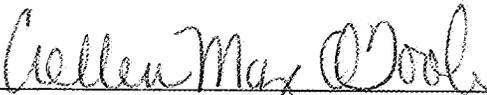
CASE NO. 2013-L-040

- vs -

THOMAS C. DIBIASE,  
Defendant-Appellant.



For the reasons stated in the Opinion of this court, the assignment of error is without merit. The order of this court is that the judgment of the Lake County Court of Common Pleas is affirmed. It is the further order of this court that costs are waived since appellant appears from the record to be indigent.

  
\_\_\_\_\_  
JUDGE COLLEEN MARY O'TOOLE  
FOR THE COURT

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