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MUSKINGUM COUNTY, 3-14-14,	

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

This cause presents several critical issues and questions which this court must consider and decide as they deal not only with the instant case but also any case similar in nature that this or any inferior Court might be presented with. (1) does Ohio Rules of Evidence Rule 410 (A) (5), Mandate that counsel for the prosecutor be physically present to be considered a participant and satisfy the requirement set forth by this court in State V. Meeds, 2nd Dist. Miami No.2003 CA 5, 2004-Ohio-3577, which this Court held that Evid.R. 410 (A)(5) clearly states that a defense attorney or an attorney for the prosecutor MUST be a participant in the plea discussions in order for the Rule to apply.

(2) As the defendant in any criminal case is said to be presumed innocent until proven guilty, with the burden of proof being on the prosecution and not the defense, would the court admitting statements that were protected not switch the burden of proof from the prosecution now to the defense and now make him guilty until he could prove himself innocent, which would prejudice the defendant and deny him his constitutional right to a fair trial in violation of both the Ohio and United States Constitution ? as well as Due process of Law ?

(1) in the instant case it is clear that Mr. Poulton did in fact engage in plea negotiations in which he gave certain information to Detective Hittle, who in turn took said information to Mike Haddox, who also in turn made a plea offer for a misdemeanor assault, All of which is supported by the record and irrefutable, Now the only way that the Court can say that Mike Haddox was not a participant is to say that he had to physically present to be considered a participant, which theory is not supported by either Evid. Rule 410 (A) (5) or this Courts interpretation of the Rule as handed down in State v. Meeds, 2nd Dist. Miami No.2003 CA 5, 2004-Ohio-3577, which clearly mandate that a Prosecutor must be a participant, but does not mandate that one be physically present for the Rule to apply, So the question this Court needs to decide is what the Courts definition of participant is and how the decision rendered by this Court in State V. Meeds is applied to the instant case ?

STATEMENT OF THE CASE AND FACTS

The grand Jury for Muskingum County, Ohio returned an indictment against Mr. Poulton, in which Mr. Poulton was charged with the following counts:

1. possession of a deadly weapon during an attempt to commit theft in violation of R.C. 2911.01 (A) (1);
2. infliction of serious physical harm on another while attempting a theft in violation of R.C. 2911.01 (A) (3);
3. causing serious physical harm to another in violation of R.C. 2903.11 (A) (1);
4. theft of a motor vehicle in violation of R.C. 2913.02 (A) (1);
5. being a felon in possession of a firearm in violation of R.C. 2923.13 (A) (2);
6. illegal possession of a firearm in violation of R.C. 2923.13 (A) (3); and
7. theft of a wallet containing U.S. Currency in violation of R.C. 2913.02 (A) (1).

Indictment (01-16-13). Counts one, Two, and Three contained specifications that a firearm was displayed or brandished in violation of R.C. 2941.145 and that Mr. Poulton was a repeat violent offender in violation of R.C. 2941.149.

Prior to trial, the trial Court asked the parties to brief whether certain portions of Mr. Poulton's statements to police was admissible under Rule of Evidence 410, as the trial Court felt the statements may have been made in an effort to obtain a favorable plea. As demonstrated through video recording of Detective Brady Hittle's interview of Mr. Poulton (entered as Courts exhibit 1), the Detective informed Mr. Poulton of the potential charges. Mr. Poulton informed Hittle that he had information regarding an unrelated drug offense, as well as an unrelated murder. Mr. Poulton gave statements after being told by Hittle that he would meet with the prosecutor to work out what deal could be offered. Despite the evidence indicating Mr. Poulton reasonably believed he was making statements as part of plea discussions, the trial court ruled that the statements be admitted. Transcript of Trial Proceedings, at 17.

Mr. Poulton proceeded to jury trial. Following presentation of evidence and deliberation, the jury returned a verdict of guilty on all charges and specifications. Verdicts (05-31-13). Mr. Poulton appeared for sentencing. After merging several counts, the trial court sentenced Mr. Poulton to a term of ten years incarceration on count two with a three year consecutive term for the firearm specification. The trial court imposed a consecutive term of 36 months as to count five. Sentencing Entry (06-06-13).

Mr. Poulton filed a timely appeal and argued that the Trial Court erred in admitting statements Mr. Poulton made during the course of plea discussions. And on March, 14th 2014, the Court of Appeals Muskingum County, Ohio Fifth Appellate District Affirmed Mr. Poulton's Convictions and stated that: Although appellant presently urges that Detective Hittle was seeking to make a plea deal on behalf of the prosecutor's office we reiterate that Evid.R. 410(A)(5) clearly states that a defense attorney or an attorney for the Prosecutor MUST be a participant in the plea discussions in order for the Rule to apply. see, e.g., State V. Meeds, 2nd Dist. Miami No.2003 CA 5, 2004-Ohio-3577, We are unpersuaded that Detective Hittle's generalized references to leaving and speaking with the Prosecutor made that official a "participant" in a plea deal. Hittle repeatedly communicated to appellant that any such deal would be in the hands of the prosecutor. Now as the Fifth District Court is unpersuaded that Detective Hittle's generalized references to leaving and speaking with the prosecutor made that official a "participant" in a plea deal, The Fifth District Court of Appeals failed to consider or address the fact that Detective Hittle did in fact leave and eventually speak with The Prosecutor which did make that official a "participant" When Mike Haddox, offered Mr. Poulton a plea offer for a sole charge for a misdemeanor assault he officially became a participant. After Mr. Poulton received the courts decision he filed a timely motion for reconsideration under The Ohio

Rules of Appellate Procedure Rule 26, And timely
filed this Appeal to The Ohio Supreme Court
asking the Court to accept Jurisdiction...

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law # 1

The trial Court erred in admitting statements Mr. Poulton made during the course of plea discussions.

Issue presented for review and argument

Whether a Trial court errs in admitting statements an accused made while under the subjective belief, which is objectively reasonable, that he is speaking in the course of plea negotiations.

A. Standard of Review

The admission or exclusion of relevant evidence rests within the sound discretion of the trial court and that courts ruling on such matters will not be reversed absent an abuse of discretion. *Krischbaum V. Dillon* (1991) 58 Ohio St.3d 56,66,667 N.E.2d 1291; *Rigby V. Lake Cty.* (1991), 58 Ohio St.3d 269,271,569 N.E.2d 1056. In order to find an abuse of discretion, we must determine that the trial courts decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgement. *Blackmore V. Blackmore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

B. Ohio Evid.R.410 protects statements when the accused had both a subjective and an objectively reasonable expectation that a plea deal was being negotiated.

Ohio Rule of Evidence 410 provides that statements made in the course of plea discussions

are not admissible against the defendant in court. Evid. R. 410 (A) (5). In particular, Rule 410 (A) (5) Provides that the following is not admissible against the defendant in any civil or criminal proceeding: " any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn. " Id.;see State V. Jeffries (2008), 119 Ohio St. 3d 265, 488-89, 893 N.E.2d 487. Ohio Courts have held that in order for statements to be protected by Rule 410, it is necessary that, at the time of the statements, the accused had a subjective expectation that a plea was being negotiated. State V. Frazier(1995) 73 Ohio St.3d 323, 337,652 N.E.2d 1000. Plea bargaining is defined, in part, as " the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval." BLACK'S LAW DICTIONARY, 1152 (6th Ed. 1990). Further, the subjective belief of the accused must have been reasonable under the circumstances.

C. The statements were improperly admitted, as Mr. Poulton had a subjective expectation that was objectively reasonable that he was engaging in plea negotiations.

In Jeffries, the accused's inculpatory statements were made well before sitting down with investigators and were simply repeated during the plea negotiations. The Ohio Supreme Court, looking to the clear language of the Rule, found

that the statements were not protected. Jeffries, 119 Ohio St. 3d at 268 (A defendant cannot protect existing statements by providing them to the prosecution in the course of plea discussions.) And when the accused simply asks if some charges might be dropped during the course of making inculpatory statements did not render the statements protected. State V. Kidder (1987), 32 Ohio St. 3d 279, 513 N.E.2d 311. This case is different. Mr. Poulton made his statements for the first time while speaking to Detective Hittle who, in turn, spoke to the prosecutor. The record demonstrates that Mr. Poulton had a subjective expectation that he was negotiating a deal to plead guilty and make statements. As shown by the trials court exhibit 1, at the beginning of the interview Hittle said that Mr. Poulton was "possibly" looking at facing a charge of aggravated robbery with a gun specification, felonious assault with a gun spec, and aggravated burglary with a gun spec. But Hittle stated, that "All that could change" where I'm at right now, if your willing to give your side of the story, I'm willing to take it, and then I'm going to meet with [assistant prosecutor] Mike Haddox, right now after we're done, and come back over and let you know what he has to say." These statements lead Mr. Poulton to reasonably conclude that anything he said would be used for the purpose of obtaining fewer charges or less serious charges. in response to Hittle's offer and suggestion, Mr. Poulton stated that he has information regarding drugs and a murder and that he was trying to offer that up as part of the negotiation toward reduced charges, stating, " Thats what I'm trying to put on the

table." In an effort to let Hittle know that the information was trustworthy and valuable, Mr. Poulton provided more detail but stopped short of reporting everything he knew. Hittle responded, "well, I've got to know what I can take to Mike and what I can take to Guernsey County." Here, Hittle was implying that Mr. Poulton will benefit by speaking. In response, Mr. Poulton referred to the information as "the only two bargaining chips I got." Hittle continues the negotiation, asking what Mr. Poulton wants in return for his "Bargaining chip's." Mr. Poulton responded that he does not want the State to stack the charges against him. Hittle eventually left to speak with Mike and upon return stated he could not get in touch with Mike but spoke to someone at his office and received an offer of a charge of Felonious Assault and also stated they were still trying to get Mike on the line, at which point Mr. Poulton let Hittle know that this was not a favorable enough deal to reveal everything he knew, and went on to inform Hittle that he had a strong distrust of Mike treating him right, Now not shown on the video is the fact Hittle eventually did get Mike on the phone and Mike offered Mr. Poulton a sole misdemeanor charge for his remaining information. Now while this fact is not on the video it is part of the record, on May 30th 2013, prior to trial the Court had a hearing on the issue of whether the statements would be admitted or not, and the Court was made aware of the fact that The Prosecutor Mike Haddox, in fact did offer Mr. Poulton a sole misdemeanor charge. Now found on pages 10-11 of the trial transcripts is the actual argument made to the Court and

never rebutted by either Hittle, Mike Haddox, or the Prosecutor "Verbatim" ultimately, what happens often, you know, is that Detective Hittle comes back and tells Mr. Poulton that he has an offer for a misdemeanor assault charge if he's willing to provide the information. The Court from who? Mr. Long: Mike Haddox. The Court: So he had talked to the prosecutor that night. Mr. Long: at that point he had. Now at this point in the proceedings the Court can not dispute that Plea negotiations in fact did take place, by the fact that Mr. Poulton was offered a plea agreement for a sole misdemeanor assault charge in return for his remaining information. So Mr. Poulton clearly had a subjective expectation that a plea was being negotiated. as required by State V. Frazier, Now in order for the statements to become privileged Mr. Poulton must satisfy the requirements of Evid.Rule 410 (A) (5), that require that counsel for the prosecuting authority, or for the defendant MUST be a participant. as the final plea offer of a misdemeanor assault came directly from Mike Haddox, who in fact is the assistant prosecuting attorney, clearly establishes that he was a participant in the plea negotiations, which must render the statements made by Mr. Poulton, privileged and protected, and should not have been admitted. accordingly, the trial court erred in admitting the statements. Mr. Poulton Respectfully asks this Court to vacate his convictions and remand for a new trial with an order that the interview not be played at the new trial.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and substantial constitutional question. The appellate requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Adam Poulton # 686-056

P.O. Box 7010

Chillicothe, Ohio 45601

Adam Poulton
3/28/14

CERTIFICATE OF SERVICE

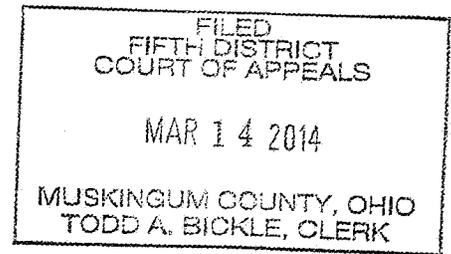
I, hereby certify that a copy of the foregoing memorandum in support of jurisdiction has been forwarded by regular U.S. Mail to the Muskingum County Prosecutors office at 27 North Fifth Street Suite 201, Zanesville, Ohio 43702 on this

28, day of MARCH, 2014

Adam Poulton # 686-056

Adam Poulton
3/28/14

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT



STATE OF OHIO

Plaintiff-Appellee

-vs-

ADAM POULTON

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. CT2013-0030

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. CR2013-0011

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1}. Defendant-Appellant Adam Poulton appeals from his convictions, in the Muskingum County Court of Common Pleas, on several felony offenses, including aggravated robbery. The relevant facts leading to this appeal are as follows.

{¶2}. On January 10, 2013, Dresden Police Officer Scott Caldwell was on routine patrol when he observed an African-American male, later identified as Jeffrey Body, enter a residence at 801 Canal Street, in an area known for illegal drug activity. Officer Caldwell also noticed a Cadillac automobile moving through the area. A few minutes later, he returned to the area of the residence and saw a number of people in the middle of the street. Officer Caldwell then saw Body, with blood on his person, running away from the group of people. The officer notified the Muskingum County Sheriff's Office for assistance. Body thereafter told investigators that he had been jumped and robbed by three or four males. During the altercation, Body suffered several broken bones to his face and was robbed of his wallet and automobile.

{¶3}. After appellant was apprehended, he was interviewed by Detective Brady Hittle of the Muskingum County Sheriff's Office. The interview was recorded on DVD, as further analyzed infra.

{¶4}. On January 16, 2013, the Muskingum County Grand Jury indicted appellant on the following charges:

{¶5}. 1) Aggravated Robbery with a firearm specification and repeat violent offender specification, a felony of the first degree, R.C. 2911.01(A)(1), 2941.145, and 2941.149;

{¶6}. 2) Aggravated Robbery with a firearm specification and repeat violent offender specification, a felony of the first degree, R.C. 2911.01(A)(3), 2941.145, and 2941.149;

{¶7}. 3) Felonious Assault with a firearm specification and repeat violent offender specification, a felony of the second degree, R.C. 2903.11(A)(1), 2941.145, and 2941.149;

{¶8}. 4) Theft (motor vehicle), a felony of the fourth degree, R.C. 2913.02(A)(1);

{¶9}. 5) Having a Weapon While Under Disability, a felony of the third degree, R.C. 2923.13(A)(2);

{¶10}. 6) Having a Weapon While Under Disability, a felony of the third degree, R.C. 2923.13(A)(3);

{¶11}. 7) Theft (\$1,000-\$7,500), a felony of the fifth degree, R.C. 2913.02(A)(1).

{¶12}. Appellant appeared with his attorney for arraignment on January 23, 2013, at which time he entered pleas of not guilty to all of the aforesaid counts.

{¶13}. On March 26, 2013, appellant's trial attorney filed a written motion to withdraw as counsel. The trial court denied said motion via judgment entry the next day.

{¶14}. Prior to trial, the trial court asked the parties to brief whether certain portions of appellant's statements, made during his interview with Detective Hittle, were admissible under Evid.R. 410, concerning whether the statements may have been made in an effort to obtain a favorable plea. After reviewing the briefs and the DVD of the police interview and conducting a short hearing before the commencement of the trial, the court ruled that the statements should be admitted. See Tr. at 6-17.

{¶15}. The case proceeded to a jury trial on May 30, 2013. After hearing the evidence and viewing the DVD of appellant's interview with Detective Hittle, the jury returned a verdict of guilty on all charges and specifications.

{¶16}. At sentencing, the trial court found the following counts would merge: Counts One, Two, and Three; Counts Four and Seven; Counts Five and Six; all firearm specifications; and all repeat violent offender specifications. The court also found that Counts One and Two would merge with Counts Four and Seven. The trial court thereupon sentenced appellant to an aggregate prison term of sixteen years.

{¶17}. Appellant herein raises the following two Assignments of Error:

{¶18}. "I. THE TRIAL COURT ERRED IN ADMITTING STATEMENTS MR. POULTON MADE DURING THE COURSE OF PLEA DISCUSSIONS.

{¶19}. "II. THE TRIAL COURT ERRED IN DENYING COUNSEL'S MOTION TO WITHDRAW, LEADING TO DENIAL OF MR. POULTON'S RIGHTS TO COUNSEL OR CHOICE OF COUNSEL."

I.

{¶20}. In his First Assignment of Error, appellant argues the trial court erred in admitting into evidence certain statements he had previously made during plea negotiations. We disagree.

{¶21}. The admission or exclusion of evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. Our task is to look at the totality of the circumstances in the particular case under appeal, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman* (Feb. 14, 2000), Stark App.

No. 1999CA00027. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶22}. Evid.R. 410 governs inadmissibility of pleas, offers of pleas, and related statements. Subsection (A)(5) states the following:

{¶23}. "(A) Except as provided in division (B) of this rule, evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions: *** (5) any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn."

{¶24}. In *State v. Frazier* (1995), 73 Ohio St.3d 323, at the syllabus, the Supreme Court of Ohio held as follows in regard to Evid.R. 410:

{¶25}. "In determining admissibility of statements made during alleged plea discussions, the trial court must first determine whether, at the time of the statements, the accused had a subjective expectation that a plea was being negotiated. The trial court must then determine whether such an expectation was reasonable under the circumstances. *** "

{¶26}. In making our analysis, the totality of the circumstances must be reviewed. *See Frazier* at 337.

{¶27}. In the case sub judice, the DVD Exhibit reveals that appellant spoke to Detective Hittle after waiving his Miranda rights. The detective informed appellant of the potential charges, suggesting that appellant was "possibly" looking at facing a

charge of aggravated robbery with a gun specification, felonious assault with a gun specification, and aggravated burglary with a gun specification. Hittle also stated, "but all that could change." Hittle added: "Where I'm at right now, if you want to give your side of the story, then I'm willing to take it, and I'll go meet with [Prosecutor] Mike Haddox, right now after we're done, and come back over and let you know what he has to say." Appellant at first rejected the idea, challenging the existence of a gun at the scene. He also denied that Jeffrey Body had any money on him and insisted one of the other men decided to take Body's car. Appellant then abruptly informed Hittle that he had information regarding an unrelated stash of "ice" (crystal methamphetamine), as well as an unrelated murder case from Guernsey County. Appellant said that "that's what I'm trying to put on the table." Appellant then indicated that if he had done anything, it was just that he had "beat Jeff's ass." But he stopped short of reporting everything he knew. Hittle responded: "Well, I've got to know what I can take to Mike [Haddox] and what I can take to Guernsey County." Appellant, in response, referred to the ice and murder information as "the only two bargaining chips I got." Appellant told Hittle that he did not want the state to "stack" the charges against him. Hittle left the interview room for a few minutes. Upon his return, Hittle indicated the possibility of a ~~X~~ sole charge of felonious assault from the prosecutor. ~~X~~ Hittle again stated that he would meet with Prosecutor Haddox and return. However, he clearly told appellant he could not do "anything from behind this desk" without talking to the prosecutor. Hittle's final return is not shown on the DVD, although appellant asserts that Hittle came back and offered, on behalf of the prosecutor's office, a deal for a misdemeanor assault charge in exchange for appellant's remaining information.

{¶28}. Although appellant presently urges that Detective Hittle was seeking to make a plea deal on behalf of the prosecutor's office (we reiterate that Evid.R. 410(A)(5) clearly states that a defense attorney or an attorney for the prosecutor must be a participant in the plea discussions in order for the rule to apply.) See, e.g., *State v. Meeds*, 2nd Dist. Miami No. 2003 CA 5, 2004-Ohio-3577, ¶ 20. We are unpersuaded that Detective Hittle's generalized references to leaving and speaking with the prosecutor made that official a "participant" in a plea deal. Hittle repeatedly communicated to appellant that any such deal would be in the hands of the prosecutor; moreover, the entire interview took place before appellant was booked in the jail or formally indicted. It is well-recognized that the rule is "not intended to be used to hamper police at such an early investigatory stage." See *State v. Cassell*, 10th Dist. Franklin Nos. 08AP-1093, 08AP-1094, 2010-Ohio-1881, ¶ 65, quoting *State v. Kidder* (1987), 32 Ohio St.3d 279, 285, 513 N.E.2d 311. Furthermore, while the jurors' viewing of the DVD in this instance most likely created the inference that appellant had information about the assault and robbery of Jeffrey Body and that appellant was almost certainly at the scene, we find appellant's further incrimination of himself in the video beyond an unarmed assault is limited at best.

{¶29}. Upon review, we are unable to conclude the trial court abused its discretion in finding appellant did not have a reasonable expectation of a plea deal at the time in question, and thereby declining to strike the DVD of the police interview. We find no basis to vacate appellant's convictions and remand the matter for a new trial.

{¶30}. Accordingly, appellant's First Assignment of Error is overruled.

II.

{¶31}. In his Second Assignment of Error, appellant contends the trial court erred in denying his trial counsel's motion to withdraw from representation.¹ We disagree.

{¶32}. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defense." This right "guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989). A criminal defendant who desires and is financially able to retain his own counsel should be afforded a fair opportunity to secure counsel of his own choice. *State v. Grigsby*, 5th Dist. Licking No. 13-CA-11, 2013-Ohio-2300, ¶ 17 (internal quotations and citations omitted).

{¶33}. In *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964), the United States Supreme Court stated: "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* at 589, 84 S.Ct. at 849. In *Morris v. Slappy*, 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), the Court stated that a trial court's responsibility of assembling witnesses, lawyers and jurors for trial "counsels against continuances except for compelling reasons."

¹ Appellant's present appellate counsel did not represent him at trial.

{¶34}. Appellant's trial counsel's motion to withdraw included a short memorandum which merely referenced unspecified irreconcilable differences between counsel and appellant. Appellant presently concedes that his trial attorney did not specify out the nature of the breakdown, in part due to protecting confidential communications, but he urges that "it appears the attorney refused to fully communicate with Mr. Poulton or interview witnesses because of the lack of full payment." See Appellant's Brief at 1, 10. Nonetheless, we find appellant's argument speculates as to events dehors the record, and therefore is not properly raised in a direct appeal. See *State v. Lawless*, Muskingum App. No. CT2000-0037, 2002-Ohio-3686, citing *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452.

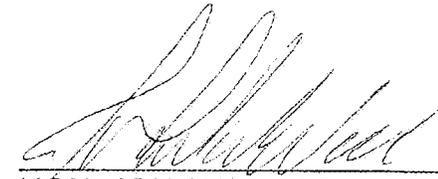
{¶35}. Appellant's Second Assignment of Error is therefore overruled.

{¶36}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is hereby affirmed.

By: Wise, J.

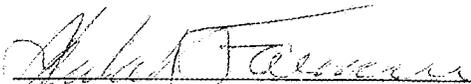
Farmer, J., concurs.

Hoffman, P. J., concurs separately.



HON. JOHN W. WISE

HON. WILLIAM B. HOFFMAN



HON. SHEILA G. FARMER

Hoffman, P.J., concurring

{¶37} I concur in the majority's analysis and disposition of Appellant's second assignment of error.

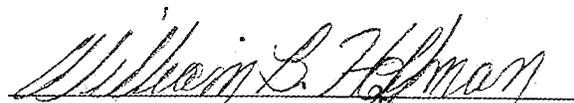
{¶38} I further concur in the majority's disposition of Appellant's first assignment of error. Unlike the majority, I would find Appellant's statements to Hittle as to what Appellant wanted relayed to Haddox (the prosecutor), followed by Hittle leaving the interview room for the purpose of consulting the prosecutor and coupled with Hittle's statement upon return of the possibility of a single felonious assault charge, all combined to create a reasonable, subjective expectation on Appellant's part a plea was being negotiated with the prosecutor.¹ I find such sufficient to render the prosecutor a participant at that point in time for purposes of the rule even if the prosecutor was not actually contacted.

{¶39} However, Appellant's incriminating statements concerning his allegedly limited involvement in the underlying crimes were made prior to Hittle's first leaving the interview room to purportedly go speak to the prosecutor. At that point in time, the prosecutor was not yet a participant. Accordingly, such statements are admissible.

{¶40} Appellant does not specifically identify in his brief any inculpatory statements made during the video interview in reliance of negotiating a plea. From my review of the video, I find nothing Appellant says upon Hittle's return to the interview room, appears specifically connected to the underlying charges nor provides any

¹ I am not convinced our standard of review is abuse of discretion. *Sage* deals only with the admission or exclusion of "relevant" evidence.

additional incriminating statements not previously disclosed prior to Hittle's first leaving the room. As such, any further statements are at best, harmless.


HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
FIFTH DISTRICT
COURT OF APPEALS
MAR 14 2014
MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

ADAM POULTON

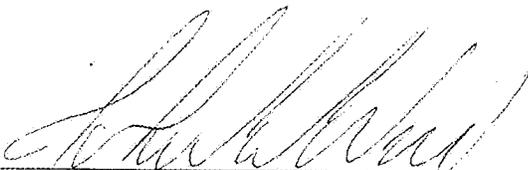
Defendant-Appellant

JUDGMENT ENTRY

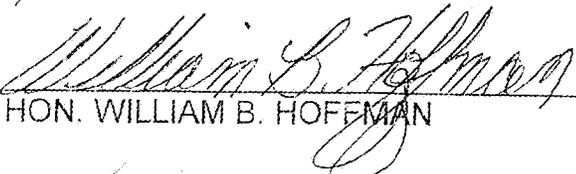
Case No. CT2013-0030

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

Costs assessed to Appellant.



HON. JOHN W. WISE



HON. WILLIAM B. HOFFMAN



HON. SHEILA G. FARMER