

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

vs.

ADRIAN A. BIZZELL

Defendant-Appellant.

CASE NO. 2014-0570

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT

COURT OF APPEALS
CASE NO: 25905 & 25906

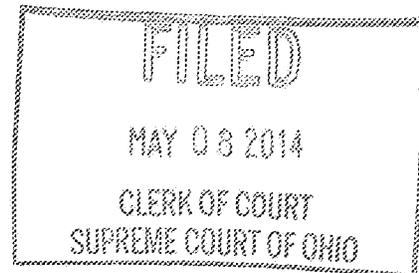
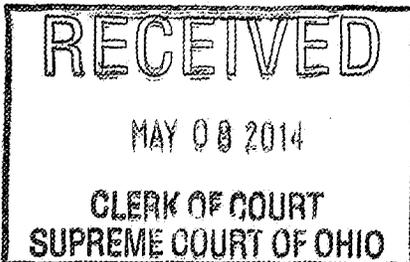
MEMORANDUM IN RESPONSE

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY
By **MICHELE D. PHIPPS**
REG. NO. 0069829
(COUNSEL OF RECORD)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
Montgomery County Courts Building
P.O. Box 972
301 W. Third Street - Suite 500
Dayton, Ohio 45422
(937) 225-4117

ATTORNEY FOR APPELLEE,
STATE OF OHIO

Office of the Ohio Public Defender
STEPHEN P. HARDWICK
Assistant Public Defender
REG. NO. 0062932
250 E. Broad Street
Suite 1400
Columbus, OH 43215
(614) 466-5394

ATTORNEY FOR APPELLANT,
ADRIAN A. BIZZELL



**STATEMENT AS TO WHY THIS COURT SHOULD DECLINE
JURISDICTION IN THIS MATTER**

This Court should not accept jurisdiction in this matter as no issue of public or great general interest, nor any substantial constitutional question, is involved. Adrian A. Bizzell (hereinafter "Bizzell") has raised no issues that may not be resolved by well-settled law. In this case, Bizzell did not raise the issue of the lack of a mens rea in his indictments in the trial court or in his appeal to the Second District Court of Appeals. Consequently, Bizzell cannot raise the issue for the first time in the Ohio Supreme Court. Accordingly, this Court should not allow this appeal to proceed.

STATEMENT OF THE CASE AND OF THE FACTS

This appeal involves two criminal trial court cases that were consolidated into a single appeal: 2013-CR-310 and 2013-CR-2387.

2013-CR-310

A Montgomery County Grand Jury indicted Bizzell for failure to notify (underlying offense is a third-degree felony and prior conviction), in violation of R.C. 2950.05(A) and (F)(1). Bizzell waived a jury trial. The matter proceeded to a bench trial and the trial court found Bizzell guilty as charged. The trial court subsequently sentenced Bizzell to a twelve-month prison term to be served concurrently with the sentence in 2013-CR-2387.

2013-CR-2387

Bizzell entered a no contest plea to failure to notify (underlying offense is a third-degree felony and prior conviction). The trial court sentenced Bizzell to a twelve-month prison term to be served concurrently with the sentence in 2013-CR-310.

Bizzell appealed both cases. On appeal, Bizzell argued that the State failed to notify him of the registration requirements and raised an impossibility defense. The Second District Court of Appeals affirmed Bizzell's case. *State v. Bizzell*, 2d Dist. Nos. 25905, 25906, 2014-Ohio-726.

LAW AND ARGUMENT OPPOSING PROPOSITIONS OF LAW

In his first proposition of law, Bizzell alleges that failing to properly notify or register as a sex offender under R.C. 2950.04 is not a strict liability offense. Bizzell argues that under R.C. 2901.21(B) the mens rea for failure to properly register under R.C. 2950.04 is recklessness. Accordingly, Bizzell argues that neither his indictment in one case nor his bench trial in the other case included evidence that he acted recklessly.

“As a general rule, an appellate court will not consider an alleged error that the complaining party did not bring to the trial court's attention at the time the alleged error is said to have occurred.” *State v. Petkovic*, 8th Dist. Cuyahoga No. 97548, 2012-Ohio-4050, ¶ 54, quoting *State v. Slagle*, 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992).

In this case, Bizzell did not raise the issue of the lack of a mens rea in his indictments in the trial court or in his appeal to the Second District Court of Appeals. Consequently, Bizzell cannot raise the issue for the first time in the Ohio Supreme Court.

In his second proposition of law, Bizzell alleges that his trial counsel and his appellate counsel were ineffective for failing to raise the issue of a lack of a mens rea in his indictments. As previously stated, Bizzell did not raise this issue in his appeal to the Second District Court of Appeals.

App.R.26(B)(1) provides for the reopening of an appeal after the appellate court has rendered its opinion. The rule provides:

A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of

appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

App.R.26(B)(1) was the proper vehicle for Bizzell to raise the issue that his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective for failing to raise the issue that his indictments were not proper because they failed to include a mens rea. Consequently, Bizzell cannot raise the issue for the first time in the Ohio Supreme Court.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to dismiss this appeal.

Respectfully submitted,

MATHIAS H. HECK, JR.
Prosecuting Attorney


MICHELE D. PHIPPS
Reg. No. 0069829
Assistant Prosecuting Attorney
301 West Third St., 5th Floor
P.O. Box 972
Dayton, Ohio 45422
(937) 225-4117
COUNSEL OF RECORD FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response was sent by first class, postage pre-paid, to Counsel for Defendant-Appellant: Office of the Ohio Public Defender, Stephen P. Hardwick, Assistant Public Defender, 250 E. Broad Street, Suite 1400, Columbus, OH 43215, on May 7, 2014.


MICHELE D. PHIPPS
REG. NO. 0069829