

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

SUPREME CT. CASE NO.

Appellee

14-0950

-vs-

ON APPEAL FROM THE TENTH
DISTRICT COURT OF APPEALS
CASE NO. 12AP-952

KEVIN E. MURPHY

Appellant

NOTICE OF APPEAL

Kevin E. Murphy
Inst. no. 669-223
Pickaway Corr. Inst.
P.O. Box 209
Orient, Ohio 43146

Appellant, pro se.

Ron O'Brien
Franklin County Prosecuting Attorney
and
Steven L. Taylor
Chief Counsel, Appellate Division
373 South High Street, 13th floor
Columbus, Ohio 43215

Counsel for Appellee

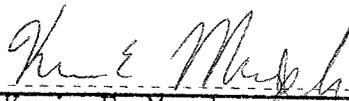
RECEIVED
JUN 06 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUN 06 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant Kevin Murphy hereby submits the following statement in support of his claim for Supreme Court Jurisdiction.

- A). Case name: State of Ohio vs Kevin E. Murphy
- B). Case No. 12AP-952, Tenth District Court of Appeals.
- C). Appeal of Tenth District Court of Appeals decision to deny Appellants Motion to Strike Appellee's memorandum contra to appellant's application to reopen, for failure to comply with the page limitation requirement of Appellate R. 26B (4). Journal Entry of April 30, 2014
- D). This case is a felony and raises a substantial Appellate Rule and constitutional question.
- E). This case is one of public and/or great general interest.

Respectfully Submitted,



Kevin E. Murphy
Inst. No. 669-223
Pickaway Corr. Inst.
P.O. Box 209
Orient, Ohio 43146

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellee, :
v. : No. 12AP-952
Kevin E. Murphy, : (REGULAR CALENDAR)
Defendant-Appellant. :

JOURNAL ENTRY

Appellant's April 29, 2014 motion to strike appellee's memorandum contra appellant's application for reconsideration is denied, appellee's memorandum being prepared in 16 point type which is preferred by this Court.

/S/ JUDGE
Judge Susan Brown

cc: Court Assignment Commissioner
Administrative Support Specialist

Tenth District Court of Appeals

Date: 04-30-2014
Case Title: STATE OF OHIO -VS- KEVIN MURPHY
Case Number: 12AP000952
Type: COURT ENTRY

So Ordered




/s/ Judge Susan Brown, P.J.

Court Disposition

Case Number: 12AP000952

Case Style: STATE OF OHIO -VS- KEVIN MURPHY

Motion Tie Off Information:

1. Motion CMS Document Id: 12AP0009522014-04-2999980000
Document Title: 04-29-2014-MOTION TO STRIKE
Disposition: 3200
2. Motion CMS Document Id: 12AP0009522014-04-1499980000
Document Title: 04-14-2014-APPLICATION TO REOPEN
Disposition: 3200

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. _____

Appellee

-vs-

ON APPEAL FROM THE TENTH
DISTRICT COURT OF APPEALS
CASE NO. 12AP-952

KEVIN E. MURPHY

Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, KEVIN E. MURPHY

Kevin E. Murphy
Inst. No. 669-223
Pickaway Corr. Inst.
P.O. Box 209
Orient, Ohio 43146

Appellant, pro se.

Ron O'Brien
Franklin County Prosecuting Attorney
373 South High Street - 13th Floor
Columbus, Ohio 43215

Counsel for Appellee

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APPENDIX:

Memorandum of Plaintiff-Appellee Opposing Application to Reopen
(April 16, 2014)

Motion To Strike Plaintiff/Appellee Memorandum Opposing Appellant
Application To Reopen Pursuant to App. R. 26(B) For Failure to
Conform/Comply With App. R. 26(B)(4).
(April 29, 2014)

Memorandum Of Plaintiff-Appellee Opposing Motion To Strike
(April 29, 2014)

Journal Entry of Court of Appeals Decision on Motion to Strike
(April 30, 2013)

TABLE OF AUTHORITIES

- 1). Cavalry Invs. v. Dzelinski, 2007-Ohio-3767, 2007 Ohio App. lexis 3435 HN5, HN13.....Page 4

- 2). Cook v Wilson, 165 Ohio App. 3d 202, 2006-Ohio-234, 845 N.E. 2d 563, HN1, HN2.....Page 4

RULES AND STATUTES

Rules of Appellate Procedure 26 (B)(4)

Ohio Tenth District Local Rule 2

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

The issue raised in this cause for review by the Ohio Supreme Court is a question of great general and public interest in that a determination/examination is presented for clarification of whether the font/point size of print can supersede the page limitation requirement of App. Rule 26B(4)?

And whether the Courts of Appeals are empowered with the authority to permit and sanction the exception to the Rules of Appellate procedure without the filing of a leave of Court, notification to parties and in direct contradiction to that Courts' Local Appellate Rules.

PROCEDURAL HISTORY OF CAUSE FOR APPEAL

On April 14, 2014, Appellant Kevin E. Murphy, filed in the Tenth District Court of Appeals an Application To Reopen his Appeal pursuant to App. R. 26(B). This document numbered 7 pages inclusive of the cover page in compliance to the Rules of Appellate Procedure, 26(B)(4) which states;

"An application for reopening and opposing memorandum shall not exceed ten pages"

On or about April 16, 2014, Chief Counsel of the Appellate division of the Franklin County Prosectors' Office, Mr. Steven Taylor (hereafter Appellee) filed Appellee's Memorandum of Plaintiff-Appellee Opposing Application to Reopen. This document numbered 14 pages and did not comply with the page limitation as mandated by App. R. 26(B)(4).

On April 29, 2014, Appellant filed a motion captioned as, Motion To Strike Plaintiff /Appellee Memorandum Opposing Appellant Application To Reopen Pursuant To App. R. 26(B) For Failure To Conform/Comply With App. R. 26(B)(4).

On or about April 29, 2014, Appellee filed a Memorandum of Plaintiff-Appellee Opposing Motion to Strike. This document asserts that it was the understanding of Appellee that the Court was using a 20 page limit for responses to application for reopening in consideration of 16 point font.

On April 30, 2014, The Tenth District Court of Appeals issued its' decision to deny Appellant's Motion to Strike Appellee's Memorandum Contra that was filed on April 29, 2014. The Court's decision states that 16 point type is preferred by the Court but this decision did not address the exceeding of the page limitation as stipulated by both the Rules of Appellate Procedure and the Tenth District Local Rules.

PROPOSITION OF LAW

Courts' of Appeals are required and mandated to adhere to the Rules of Appellate Procedure without prior notification or change in the Local Rules of Court of the district. Deliberate deviation from the Rules of Appellate Procedure should not be condoned or permitted without leave of that Court. Font size or point size should not be a determining factor in the page limitation requirement as mandated and stipulated by the Rules of Appellate Procedure.

ARGUMENT IN SUPPORT

The Rules of Appellate Procedure govern the procedures in appeals, applications for reconsideration and to reopen in Courts' of record in the State of Ohio. The failure of a document to comply with the Rules of Court or of Appellate Procedure subjects that document to be stricken and not accepted for consideration.

In the cause presented for examination and review by the Ohio Supreme Court is the question of whether the font size should be a determination permitting the disregard of the page limitation

stipulation as mandated by App. R. 26(B)(4).

It is the position of Appellant that both Appellate Rule 26(B)(4) and the Local Rule of the Tenth District Court of Appeals are plain, precise and concise in their directives. App. R. 26(B)(4) states;

"An application for reopening and opposing memorandum shall not exceed ten pages"

The wording of the word "shall" in App. R. 26(B)(4) denotes mandatory language that must be adhered to and complied with. The Ohio 10th District Local Rule 2 states;

"The Ohio Rules of Appellate Procedure.....shall govern procedure in Appeals....."

Again notice should be given to the usage of the word "shall" in the directive of the Rule of Court.

Examination of the opposing Memorandum of the Appellee (attached hereto) clearly showing that the submitted document is in direct contradiction to both the Local Rules of the Tenth District and the Ohio Rules of Appellate Procedure.

Pursuant to the holding in Cook v. Wilson, 165 Ohio App. 3d 202, 2006-Ohio-234, 845 N.E. 2d 563 HN1, HN2;

"Procedural rules adopted by courts are designed to promote the administration of justice and to eliminate undue delay. A substantial disregard of procedural rules cannot be tolerated. As stated by the Ohio Supreme Court, **there is no excuse for the failure of any member of the bar to understand or comply with such rules...**(bolded for emphasis)

and the holding in Cavalry Invs. v. Dzilinski, 2007-Ohio-3767, 2007 Ohio App. lexis 3435 HN5, HN13 ; that any litigant availing himself of the jurisdiction of the Court is subject to understand and comply with the Rules of Ohio Courts.

CONCLUSION

For the reasons as contained herein, that definitively shows an abuse of discretion on the part of the Tenth district Court of Appeals in permitting a document that clearly does not comport to App. R. 26(B)(4), and denying Appellants' motion to have the non-complying document stricken.

In addition, the Tenth District Court of Appeals Journal Entry of April 30, 2014 mistakenly identifies Appellant's April 29, 2014 motion to strike appellee's memorandum contra appellant's application for reconsideration, when in fact the motion to strike was directed at appellee's memorandum contra to appellant's application to reopen. The mistaken identification may be clerical in nature but still requires correction.

Appellant, Kevin E. Murphy. hereby respectfully request that this Court accept jurisdiction and address the issue as presented.

Respectfully Submitted,

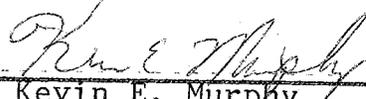


Kevin E. Murphy
Inst. No. 669-223
Pickaway Corr. Inst.
P.O. Box 209
Orient, Ohio 43146

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT A TRUE AND ACCURATE COPY OF APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION WAS SENT VIA REG. U.S.MAIL
ON THIS 31 DAY OF MAY 2014 TO:

Steven L. Taylor, Chief Counsel
Appellate Division
Franklin County Prosecutors' Office
373 South High Street, 13th floor
Columbus, Ohio 43215


Kevin E. Murphy

APPENDIX

- 1). Memorandum of Plaintiff-Appellee Opposing Application to Reopen (April 16, 2014)
- 2). Motion To Strike Plaintiff/Appellee Memorandum Opposing Appellant Application To Reopen Pursuant to App. R. 26(B) For Failure to Conform/Comply with App. R. 26(B)(4).
- 3). Memorandum of Plaintiff-Appellee Opposing Motion To Strike (April 29, 2014)
- 4). Journal Entry of Court of Appeals Decision on Motion to Strike (Aprile 30, 2013)

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

STATE OF OHIO

CASE NO. 12AP-952

Appellee/Plaintiff

-vs-

FROM FRANKLIN COUNTY
COURT OF COMMON PLEAS
CASE NO. 10CR1753

KEVIN MURPHY

Appellant/Defendant

MOTION TO STRIKE PLAINTIFF/APPELLEE MEMORANDUM OPPOSING
APPELLANT APPLICATION TO REOPEN PURSUANT TO APP. R 26B
FOR FAILURE TO CONFORM/COMPLY WITH APP. R. 26B(4)

Now comes Appellant, Kevin Murphy pro se. and without benefit of Counsel hereby submits his motion to strike the opposing memorandum filed by the Appellee in response to Appellants' Application to Reopen filed on April 14, 2014.

This motion is being submitted as a result of Appellee having failed to adhere to the page limitation requirements as mandated by Appellate Rule 26B (4).

The applicability of the Rules of Appellate Procedure govern the procedures in appeals to court of appeals from the trial courts of record in Ohio. Failure to adhere or comply with the Rules of Appellate Procedure subjects the non-complying document to be

stricken from the record.

In the instant case of State v. Murphy, case no. 12Ap-952, it is the position of the Appellant that the action taken by the Appellee was a deliberate attempt to circumvent and disregard the Rules of Appellate Procedure, and thus mandates that the non-complying document be stricken from the record.

Appellate Rule 26B (4) is plain, precise and concise in the directive of the number of pages permitted for both an Application for Reopening and an opposing memorandum. App. R. 26B (4) states;

"An application for reopening and opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record"

The wording of "shall" in App. R. 26B (4) denotes mandatory language that must be complied with.

The document filed by the Appellee's does not comport to the page limitation as mandated by the wording of "shall not exceed ten pages". The document filed by Appellee numbers 14 pages, including the cover page. Appellant was limited in the number of pages that he was permitted to file in his Application to Reopen. Appellant's Application to Reopen numbered 7 pages, and should Appellant be required to adhere to the requirements of procedures as mandated by the Rules of Appellate Procedure, as all litigants are, then should not the Appellee be required to conform?

The Ohio 10th District Loc. R. 2 states;

"The Ohio Rules of Appellate Procedure.....shall govern procedure in Appeals....."

The opposing Memorandum of Appellee is in direct contradiction to both the Local Rules of the Tenth District and the Ohio Rules of

Appellate Procedure and **must** (emphasis added) be stricken, for failure to comply with the required rules. Appellee has a duty as a branch of the Judicial to comply with state procedural rules and must bear the burden of failure to follow those rules, Cook v. Wilson, 165 Ohio App. 3d 202, 2006-Ohio-234, 845 N.E. 2d 563 HN1, HN2. Pursuant to HeadNote 1 in Cook v. Wilson;

"Procedural rules adopted by courts are designed to promote the administration of justice and to eliminate undue delay. A substantial disregard of procedural rules cannot be tolerated. As stated by the Ohio Supreme Court, **there is no excuse for the failure of any member of the bar to understand or comply with such rules....**(emphasis added)"

In addition, Appellees' opposing Memorandum appears to be an effort to mis-characterize the issue and argument presented in Appellants Application to reopen. Appellants' Application to reopen was not/is not the same issue as presented in his Application for Reconsideration. The submitted Application for reconsideration focused on the missing parts of the record that were not reviewed pursuant to an Anders examination. Whereas the Application for reopening, is centered on Appellate Counsel and the Court of Appeals not having discerned the failed duty on the part of trial counsel to perform (argue for probation) as stipulated by the plea agreement, that was prepared by trial counsel and the State.

In conclusion, Appellant respectfully requests that should this Court not strike the non-complying opposing Memorandum of Appellee, that Appellant be afforded an opportunity to refute the misrepresentation presented in the aforementioned opposing Memorandum.

Respectfully Submitted

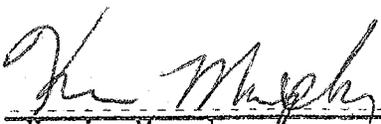


Kevin Murphy
Inst. No. 669-223
Pickaway Corr. Inst.
P.O. Box 209
Orient, Ohio 43146

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT A TRUE AND ACCURATE COPY OF THE FOREGOING
WAS SENT VIA REG. U.S. MAIL ON THIS 20 DAY OF APRIL 2014 TO:

STEVEN L. TAYLOR, Chief Counsel
Appellate Division
Franklin County Prosecutors'
Office
373 South High Street 13 floor
Columbus, Ohio 43215



Kevin Murphy

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
2014

State of Ohio,

Plaintiff-Appellee

vs.

Case No. 12AP-952

Kevin Murphy,

Defendant-Appellant

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING MOTION TO STRIKE

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Fl.
Columbus, Ohio 43215
614-525-3555
staylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876
Chief Counsel, Appellate Division

Counsel for Plaintiff-Appellee

Kevin Murphy
#669-223
Pickaway Corr. Inst.
P.O. Box 209
Orient, Ohio 43146

Pro se

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING
MOTION TO STRIKE**

Defendant has filed a motion to strike the State's response to his application for reopening. Defendant complains that the State's response exceeds the 10-page limit on such responses set forth in the Appellate Rules. But that 10-page limit assumes a 12-point font for such filings, see App.R. 19, and this Court has decided to deviate therefrom by requiring a 16-point font on such filings. It is the State's understanding that the Court is using a 20-page limit for responses to applications for reopening in light of the change to 16-point font. As a result, the State's 13-page response meets the Court's page limit and therefore the motion to strike should be denied.

Respectfully submitted,

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day, April 29, 2014, to KEVIN MURPHY, # 669-223, Pickaway Correctional Institution, P.O. Box 209, Orient, Ohio 43146.

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellee, :
v. : No. 12AP-952
Kevin E. Murphy, : (REGULAR CALENDAR)
Defendant-Appellant. :

JOURNAL ENTRY

Appellant's April 29, 2014 motion to strike appellee's memorandum contra appellant's application for reconsideration is denied, appellee's memorandum being prepared in 16 point type which is preferred by this Court.

/S/ JUDGE
Judge Susan Brown

cc: Court Assignment Commissioner
Administrative Support Specialist

Tenth District Court of Appeals

Date: 04-30-2014
Case Title: STATE OF OHIO -VS- KEVIN MURPHY
Case Number: 12AP000952
Type: COURT ENTRY

So Ordered




/s/ Judge Susan Brown, P.J.

Court Disposition

Case Number: 12AP000952

Case Style: STATE OF OHIO -VS- KEVIN MURPHY

Motion Tie Off Information:

1. Motion CMS Document Id: 12AP0009522014-04-2999980000
Document Title: 04-29-2014-MOTION TO STRIKE
Disposition: 3200
2. Motion CMS Document Id: 12AP0009522014-04-1499980000
Document Title: 04-14-2014-APPLICATION TO REOPEN
Disposition: 3200