

THE COURT OF APPEALS OF OHIO  
SCIOTO COUNTY  
OHIO  
FILED

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

2014 NOV 24 PM 1:25

*Lisa Novinger*  
CLERK OF COURTS

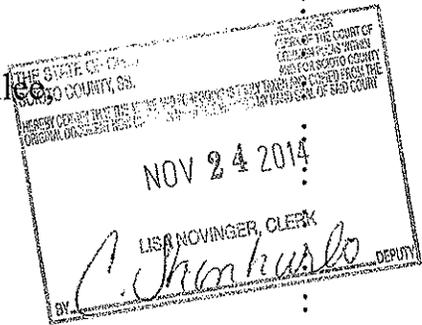
STATE OF OHIO,

Plaintiff-Appellee

vs.

CHELSEY BARRY,

Defendant-Appellant.



Case No. 13CA3569

DECISION AND JUDGMENT  
ENTRY GRANTING  
MOTION TO CERTIFY  
CONFLICT

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APPEARANCES:

Timothy Young, Ohio Public Defender, and Stephen P. Hardwick, Assistant Public Defender, Columbus, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecutor, and Pat Apel, Assistant Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

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McFarland, J.

{¶1} Appellant, Chelsey Barry, filed a Motion to Certify a Conflict, pursuant to App.R. 25, asserting that this Court's Decision and Judgment Entry in *State v. Barry*, 4<sup>th</sup> Dist. Scioto No. 13CA3569, 2014-Ohio-4452, conflicts with the appellate court decision and judgment entry in *State v. Cavalier*, 2<sup>nd</sup> Dist. Montgomery No. 24651, 2012-Ohio-1976.

{¶2} Section 3(B)(4), Article IV of the Ohio Constitution permits an appellate court to certify an issue to the Ohio Supreme Court for review and final determination when "the judges of a court of appeals find that a judgment upon

which they have agreed is in Conflict with a judgment pronounced upon the same question by any other court of appeals of the state.”

{¶3} In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993), the Supreme Court of Ohio clarified the requirements that an appellate court must find before certifying a judgment as being in Conflict:

“First, the certifying court must find that its judgment is in Conflict with the judgment of a court of appeals of another district and the asserted Conflict must be ‘upon the same question.’ Second, the alleged Conflict must be on a rule of law--not facts. Third, the journal entry or opinion must clearly set forth that rule of law which the certifying court contends is in Conflict with the judgment on the same question by other district courts of appeals.”

{¶4} In her Motion to Certify a Conflict, Appellant contends that our decision is in conflict with the reasoning of the Second District in *State v. Cavalier*, supra, on the following question: “Whether a person who hides evidence of a crime that is unmistakable to him or her commits tampering with evidence in the absence of evidence that a victim or the public would report a crime?” In the case sub judice, we believe that our decision conflicts with the case Appellant cites. In our prior decision, we adhered to precedent from our district and held that “ ‘[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed[,]’ ” and thus affirmed Appellant’s conviction for tampering with evidence. *State v. Barry* at ¶ 10; quoting *State v. Nguyen*, 4<sup>th</sup> Dist. No 12CA14, 2013-Ohio-3170,

¶ 89; citing *State v. Schmitz*, 10<sup>th</sup> Dist. Franklin No. 05AP-200, 2005-Ohio-6617, ¶ 17. We applied this legal theory despite Appellant's argument and the holding in *State v. Cavalier*, supra, that this legal theory should not be applied to cases involving crimes in which victims are unlikely to make reports.

{¶5} Essentially, Appellant argues and the *Cavalier* court reasoned that constructive knowledge of an impending investigation should not be imputed to a defendant when the crime at issue involves a victim who is unlikely to make a report. In adhering to precedent in our district and not making an exception to the application of this legal theory based upon the nature of the crime at issue, our decision is in conflict with the decision of Second District Court of Appeals in *State v. Cavalier*, supra. Thus, because our prior decision conflicts on the same question of law presented in the cited case, we encourage further review and determination by the Supreme Court of Ohio. Accordingly, we grant Appellant's motion for certification of conflict.

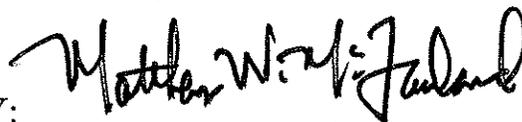
**MOTION GRANTED.**

Abele, P.J.: Concur.

Harsha, J.: Concur in Part and Dissents in Part with Opinion on Motion to Certify Conflict.

For the Court,

BY:



Matthew W. McFarland, Judge

Harsha, J., concurring in part and dissenting in part:

{¶6} I agree that a conflict exists between our judgment in the direct appeal and that of the Second District in *State v. Cavalier, supra*. However, I do not concur in the entry that certifies the matter to the Supreme Court of Ohio.