

ORIGINAL

In The Supreme Court of Ohio

State of Ohio, :
 Appellee, : Case No. 11-0857
 -vs- : Appeal taken from Cuyahoga County
 Court of Common Pleas
 Denny Obermiller, : Case No. CR 10-542119-A
 Appellant. : **Capital Case**

Appellant's Motion for Supplemental Briefing

Sherri Bevan Walsh - 0030038
Summit County Prosecutor

Office of the
Ohio Public Defender

Richard S. Kasay - 0013952
Assistant Prosecuting Attorney
Counsel of Record

Kathryn L. Sandford – 0063985
Supervisor, Death Penalty Division
Counsel of Record

Randall L. Porter – 0005835
Assistant State Public Defender

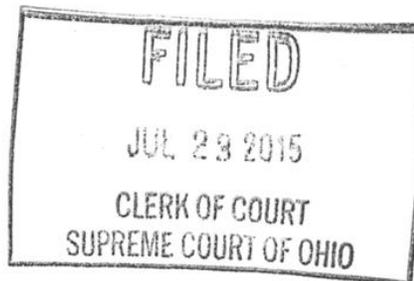
Shawn P. Welch – 0085399
Assistant State Public Defender

Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2800
(330) 643-2137 (FAX)

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215-2998
(614) 466-5394
(614) 644-0708 (FAX)

Counsel For Appellee

Counsel for Appellant



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Appellant's Motion for Supplemental Briefing

Appellant Denny Obermiller hereby requests that he be permitted to supplement his merit brief to address the issue of the three-judge panel assuming the prosecutor's role of calling and questioning witnesses. The State's counsel of record, Richard S. Kasay, has no objection to the filing of this motion. Obermiller has attached a memorandum of law.

Respectfully submitted,

Office of the Ohio Public Defender

Kathryn L. Sandford – 0063985
Supervisor, Death Penalty Division
Counsel of Record

Randall L. Porter – 0005835
Assistant State Public Defender

Shawn P. Welch – 0085399
Assistant State Public Defender

Office of the Ohio Public Defender
250 E. Broad St., Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (FAX)

By: 
Counsel for Appellant

MEMORANDUM OF LAW

Appellant Denny Obermiller filed his merit brief on April 17, 2012, raising issues that arose from the record of his case. The state filed its merit brief on September 4, 2012. Obermiller filed his reply brief on December 11, 2012. On July 2, 2015 the clerk notified the parties that the Court scheduled oral argument for September 1, 2015.

While preparing for oral argument, counsel identified a unique issue that was not briefed and raises substantial concerns regarding the fairness of the proceedings below and whether Obermiller was afforded due process. As will be more detailed herein, members of the three-judge panel usurped the role of the prosecution in the latter part of the plea proceedings and improperly served as both judge and prosecutor, prejudicing Obermiller.

I. Factual Posture

Prior to his trial, on January 10, 2011, Obermiller informed the court that he wanted to waive his right to a jury and change his plea to guilty. Tr. 218. Prior to the seating of two other judges, the court accepted Obermiller's jury waiver. Tr. 284-85. Shortly thereafter, Obermiller pled guilty to all of the charges and specifications contained in the indictment. Tr. 323-79.

After Obermiller entered his guilty plea, the State gave a lengthy opening statement concerning the evidence as to guilt. Tr. 386-400. The State then presented evidence as to guilt on January 11, 2011 (Tr. 407-535); January 12, 2011 (Tr. 547-683, 695-818); and January 13, 2011 (Tr. 829-947, 949-1047). After completing its presentation of the evidence, the State rested. Tr. 1048. The following day, January 14, 2011, the State gave a lengthy closing argument. Tr. 1074-1110. At the conclusion of the closing argument, Judge Sutula queried, "I think at this time we're going to retire and deliberate on these charges, right?" Tr. 1111. Judge Saffold, who was the presiding judge, answered "Okay, we'll recess." *Id.*

On January 21, 2011, the panel *sua sponte* placed on the record a journal entry with the following instructions:

The Court will resume the proceedings on Monday January 24, 2011 at 11:00 a.m. on the plea and evidence. All attorneys and the Defendant are to be present. *The State shall produce the following individuals* to-wit: Gina Mikluscak; Stacey Music (sp), Patrolman Gazer, Bank and Phone records, David Henderson.

See Ex. A (emphasis added).

On January 24, 2011, the panel resumed the proceedings. The panel identified the witnesses who would testify at the latter hearing. Tr. 1122. The members of the panel conducted all of the direct examination of two of the three witnesses who testified. Tr. 1122-1277, 1300-43. After the examination of the witnesses by the court, counsel for the parties were afforded an opportunity to ask questions. Tr. 1278-79, 1345-50. The panel subsequently further examined the witnesses. Tr. 1279-80, 1350-51.

II. The State Was Required to Prove Obermiller's Guilt Beyond a Reasonable Doubt

When a defendant waives jury and pleads guilty in a capital case, the prosecution is not relieved of its burden of proving the defendant's guilt. "[T]he three-judge panel, upon acceptance of a no contest [or guilty] plea to the charge of aggravated murder, [is required] to hear evidence in deciding whether the accused is guilty of aggravated murder beyond a reasonable doubt." *State v. Post*, 32 Ohio St.3d 380, 392-93, 513 N.E.2d 754 (1987); *State v. Green*, 81 Ohio St.3d 100, 104, 689 N.E.2d 556 (1998) (quoting *Post*). The State bears the burden to prove the defendant's guilt beyond a reasonable doubt. *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938, ¶¶ 52-59, 826 N.E.2d 266; *State v. Kelley*, 8th Dist. No. 87234, 2006-Ohio-5432, ¶ 21.

II. Due Process Required a Fair Tribunal

The Due Process Clause of the Fourteenth Amendment requires a fair trial in a fair tribunal. A fair trial subsumes the right to an unbiased judge with no interest in the outcome of

the case. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749 (1927). Moreover, a fair trial means more than simply the absence of actual bias; rather, “justice must satisfy the appearance of justice.” *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 865, n.12, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971). A trial judge is required to step aside when there is a likelihood of bias or even an appearance of bias or when there is too great a temptation to not hold the balance of neutrality. *Taylor v. Hayes*, 418 U.S. 488, 501, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974); *Unger v. Sarafite*, 376 U.S. 575, 588, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964); *Ward v. Monroeville*, 409 U.S. 57, 60, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); *Tumey*, 273 U.S. at 532. “[I]t is structural error when, in a bench trial, the judge who is also the finder of fact ceases to be impartial. A fundamental aspect of due process is trial by an impartial finder of fact.” *See Tumey*, 273 U.S. at 535.

A defendant’s right to due process is violated when a trial court adopts a procedure “that would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies him the latter due process of law.” *Tumey* at 532. To that end a trial judge cannot act both as a prosecutor and trial judge on the same case. *In re Murchison*, 349 U.S. at 137 (“It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very person accused as a result of his investigations.”)

The United States Supreme Court in *Lo-Ji Sales, Inc., v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979) reached the same conclusion, a judicial authority ceases to be neutral when he becomes involved in the investigation of the individual whose case is pending before him. In that case the Town Justice issued a warrant for the search of an adult book store

Id. at 321. The Town Justice and ten other individuals then converged on the book store to execute the warrant. *Id.* The United States Supreme Court found that because the Town Justice had ceased to be a neutral and detached judicial officer, the search of the store violated the Fourth Amendment. The Court concluded that the Town Justice “allowed himself to become a member, if not the leader, of the search party which was essentially a police operation...he was not acting as a judicial officer but as an adjunct law enforcement officer.” *Id.* at 327.

III. The Panel’s Usurping of the Prosecutor’s Role Denied Obermiller Due Process

After the State rested and the panel began its deliberations, the panel determined that it needed additional information to determine if the State had met its burden of proof beyond a reasonable doubt as to Obermiller’s guilt. The panel placed an entry of record, ordering the State to produce certain witnesses and records. (“*The State shall produce the following individuals to-wit: Gina Mikluscak; Stacey Music (sp), Patrolman Gazer, Bank and Phone records, David Henderson.*”) *See Ex. A* (emphasis added).

It is clear from that point the panel had assumed the prosecutor’s role in establishing Obermiller’s guilt beyond a reasonable doubt. The panel in its January 21, 2011 entry, had decided which witnesses would testify. Judge McGinty announced at the start of the January 24, 2011, hearing that “[w]e [the panel] would like to recall the witness, Gina Mikluscak.” Tr. 1222. Later the prosecutor attempted to discern which witnesses the panel would call after the examination of Mikluscak had been completed. Tr. 1166. (“It’s up to you [the panel]. You may call him [Mr. Staton], Ginger Muzic - - Bounds and cousin, Kenney Freidel. So those are the names you’ve heard. You may want to hear from them”). The panel concluded the hearing by saying “[t]he Court has no desire for any further witnesses or clarifications.” Tr. 1352.

The panel also assumed the role of identifying the exhibits that would be offered into evidence at the hearing. The panel instructed the State to see if Obermiller would stipulate to the phone records. Tr. 1234. Judge McGinty requested that the State provide the panel with whatever police documents it had on an unidentified subject even though the documents had never been marked, identified, or received into evidence. Tr. 1353-54. Judge McGinty explained the panel's need to call and examine witnesses and review police reports, "knowing how appellate proceedings go for decades and the imaginations of appellate counsel run astray." Tr. 1169-70.

The panel identified three witnesses from which it entertained testimony, Gina Mikluscak, Stacey Muzic, and Natasha Branam. The scope of the panel's questioning of these witnesses shows the manner in which panel had usurped the prosecution's role.

Gina Mikluscak

The panel recalled Gina Mikluscak to testify. During her lengthy testimony, defense counsel did not ask any questions and the State asked only four questions. Tr. 1278-80. The judges used a tag team approach to question the witnesses; they followed up on each other's questions as they deemed appropriate. Tr. 1122-1280.

The panel's questions of the witness were not limited to the events surrounding the crimes. The panel quizzed Ms. Mikluscak in detail about: 1) physical altercations that she had with Obermiller (Tr. 1155-59, 1163, 1190, 1217-19); 2) Obermiller's wife who had committed suicide (Tr. 1164-65); 3) Obermiller's drug usage (Tr. 1178-85); 4) the scars on her lip (she has a cleft palate) (Tr. 1190); 5) her sexual relations with Obermiller in the time period around the crimes (Tr. 1191); 6) Obermiller's issues with anger (Tr. 1220-25); 7) if Obermiller had ever abused animals (Tr. 1224); 8) the number of pull-ups Obermiller could do (Tr. 1225-26, 1228); 9) the number of pull-ups the male victim could do (Tr. 1228-29); 10) the medication Obermiller

took for his bipolar mental illness (Tr. 1240-42); 11) whether Obermiller was delusional, paranoid, schizophrenic, manic, or heard voices, talked to trees, and knew the difference between right and wrong (Tr. 1243-44); and 12) if Obermiller expressed his anger sexually (Tr. 1250).

In the few times that defense counsel did object to one of the panel's questions, another panel member (who had also been participating in the questioning) ruled on the objections. Tr. 1165, 1117, 1182-83, 1240. The fellow panel members often overruled the objections despite the lack of relevancy if a panel member's question.

Stacey Muzic

The panel called Stacey Muzic, Obermiller's stepmother, to testify. Tr. 1299. Judge Saffold announced, "[c]an we see Ms. Muzic." Tr. 1299-1300. Again the panel assumed the role of the prosecutor and took the lead in asking her questions. Tr. 1300-44, 1350-51. The State briefly questioned Muzic, but only *after* the panel completed its examination. Tr. 1345-50, 1351.

The panel's questioning of Muzic had little to do with the crimes, but instead focused on Obermiller's youth. At one point Judge Saffold posed a question, defense counsel objected, and Judge Saffold overruled the objection to *her question* because "[w]e want to hear it." Tr. 1320.

Natasha Branam

The State did call one witness, Natasha Branam, a computer forensic specialist with the Ohio Bureau of Criminal Identification and Investigation. Tr. 1284-85. However, the panel controlled the substance of her testimony, and eventually Judge McGinty took over the direct examination of the witness. Tr. 1293-98.

IV. The Panel Violated the Separation of Powers Doctrine

By usurping the role of prosecutor, the panel violated separation of powers. In explaining the importance of the doctrine of separation of powers, this Court in *State v. Bodyke*, 126 Ohio

St.3d 266, 2010-Ohio-2424, quoted *Kilbourn v. Thompson*, 103 U.S. 168, 190-191, 26 L.Ed. 377

(1880) as follows:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Bodyke 2010-Ohio-2424 at ¶ 40.

The panel violated the Ohio Constitution by overtaking the role of the executive branch.

V. The Court Should Permit Supplemental Briefing as to the Panel's Involvement

For appellate counsel to completely present, and more importantly for this Court to conduct a thorough adjudication of this capital case, counsel must raise all potentially meritorious errors. If counsel fails in that regard, the defendant is denied his right to effective assistance of appellate counsel. *See State v. Murnahan*, 63 Ohio St.3d 60, 65, 584 N.E.2d 1204 (1992); *State v. Buell*, 70 Ohio St.3d 1211, 639 N.E.2d 110 (1994); *Evitts v. Lucey*, 469 U.S. 387, 397 84 S. Ct. 841, 11 L. Ed. 2d 921 (1985). It is especially important that Obermiller's right to effective assistance of appellate counsel be protected because he has been sentenced to death.

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

State v. Griffin, 138 Ohio St.3d 108, 2013-Ohio-5481 at ¶ 32 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

Obermiller has identified a unique, potentially meritorious issue in this motion. Accordingly, Obermiller respectfully requests leave of this Court to file supplemental briefing.¹ The three-judge panel overstepped its bounds when it decided during its deliberation that the State had introduced insufficient evidence and scheduled an additional hearing at which it would identify, call, and question the witnesses, and Obermiller was prejudiced. The panel failed to hold the balance nice, clear, and true between the State and Obermiller, thereby depriving him of his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

For the reasons identified herein and any other reasons that may be apparent on the face of the record, Denny Obermiller respectfully requests this Court grant this motion and enter an order that provides for the filing of supplemental briefing.

Certificate Of Service

I hereby certify that a true copy of the foregoing **Appellant's Motion for Supplemental Briefing** was forwarded by first-class, postage prepaid U.S. Mail to Richard S. Kasay, Assistant Prosecuting Attorney, Appellate Division, Summit County Prosecutor's Office, 53 University Avenue, 6th Floor, Akron, OH 44308, on July 23, 2015.

By: Shawn P. Welch
Shawn P. Welch – 0085399
Counsel for Appellant

¹ This Court has *sua sponte* ordered supplemental briefing in death penalty cases. See *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019; *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087.

IN THE COURT OF COMMON PLEAS

FILED
CUYAHOGA COUNTY, OHIO

2011 JAN 21 P 4:10

STATE OF OHIO

vs

DENNY OBERMILLER

Defendant

GF
GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

CASE NO: CR 542119

JUDGE SHIRLEY STRICKLAND SAFFOLD

JOURNAL ENTRY

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Shirley Strickland Saffold
SHIRLEY STRICKLAND SAFFOLD
JUDGE

Timothy J. McGinty
TIMOTHY J. MCGINTY
JUDGE

John Sutula
JOHN SUTULA
JUDGE

January 21, 2011

PROCESSED

JAN 24 2011

GERALD E. FUERST
CLERK OF COURTS

EXHIBIT

A

CR10542119-A

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