Ohio Prosecuting Attorneys Association

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Untimely Applications for Reopening

In *State v. McNeal*, 8th Dist. No. 91507, 2009-Ohio-6453, the defendant filed her application for reopening three days late. The 8th District denied the application, noting the untimeliness, and noting that the defendant had failed to include a showing of good cause for the delay, as required by App.R. 26(B)(2)(b). The court cited a number of cases in which it had denied reopening when the delay was as short as one day late, two days late, three days late, and eight days late.

The court did not elaborate further on what might have constituted "good cause." But there would be good reason for a court to find a lack of good cause. The defendant apparently did not allow sufficient time for the mailing to reach the Clerk in time to meet the deadline. "Lack of effort or imagination, and ignorance of the law, * * * do not automatically establish good cause for failure to seek timely relief" under App.R. 26(B). *State v. Reddick* (1995), 72 Ohio St.3d 88, 91. "As a corollary, miscalculation of the time needed for mailing would also not state good cause." *State v. Agosto*, 8th Dist. No. 87283, 2007-Ohio-848, ¶ 3.

Nor can a defendant take advantage of a "prison mailbox" rule, as Ohio has rejected such an approach. *State ex rel. Tyler v. Alexander* (1990), 52 Ohio St.3d 84; *State v. Williams*, 157 Ohio App.3d 374, 2004-Ohio-2857.

Nor can a defendant contend that, because he was only one day late, such minimal lateness should establish "good cause." There is no "one day late" excuse for untimely filings. "If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it." *Carlisle v. United States* (1996), 517 U.S. 416, 430 (quoting another case).

Pelfrey Misapplied

In *State v. Schwable*, 3rd Dist. No. 7-09-03, 2009-Ohio-6523, the 3rd District found a *Pelfrey* problem where none really existed. The offense of failure to comply with an order or signal of a police officer has two main provisions: the paragraph (A) violation

for failing to comply with a lawful order of police officer, and the paragraph (B) violation for operating a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

Both the (A) and (B) violations are first-degree misdemeanors. But the (B) violation can rise to the level of a third-degree felony if the operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

The defendant in *Schwable* was charged with the (B) violation, including the additional substantial-risk allegation. The jury was instructed on the (B) violation, including the additional substantial-risk allegation, and the jury approved a verdict form including a finding that the defendant had caused a substantial risk of serious physical harm to persons or property.

In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, the Court applied R.C. 2945.75(A)(2), which provides that, if one or more additional elements makes an offense one of more serious degree, the guilty verdict shall state either the degree of the offense of which the offender was found guilty or that such additional element or elements are present.

In *Schwable*, the verdict form had apparently complied with this requirement, since the verdict form included a finding on the substantial-risk additional element. But the 3rd District found a problem because the verdict form referred to the paragraph (B) charge as "failure to comply with an order or signal of a police officer." That is also the name of a paragraph (A) violation, and the 3rd District believed the verdict form was erroneous because it failed to include additional elements related to willful eluding, etc., which distinguish the paragraph (B) offense from the paragraph (A) violation.

But really no problem existed under *Pelfrey* or R.C. 2945.75(A)(2). The elements in paragraph (B) that distinguish the paragraph (B) violation from a paragraph (A) violation are not degree-raising elements. The (A) and (B) violations are both first-degree misdemeanors. The only degree-raising fact involved was the substantial-risk fact, which the verdict form included. R.C. 2945.75(A)(2) only requires that degree-raising elements be included in the verdict form.

Post-Conviction Petitions

A defendant must file his post-conviction petition within 180 days of the filing of the trial transcript with the Court of Appeals in the direct appeal or within 180 days of the expiration of his time for appeal. R.C. 2953.21(A)(2). The question has arisen from time to time regarding how to count the pertinent time period when the initial appeal resulted in a partial remand for resentencing and then the defendant pursues an appeal from the resentencing.

In *State v. Haschenburger*, 7th Dist. No. 08-MA-223, 2009-Ohio-6527, the 7th District addressed this problem and concluded that the refiling of the trial transcript in the resentencing appeal did not restart the post-conviction clock. See, also, *State v. Laws*, 10th Dist. No. 04AP-283, 2004-Ohio-6446 ("if we were to determine that the time for filing a defendant's post-conviction did not begin to run until the last of the direct appeals from the trial court's judgments, the time for filing post-convictions petitions would be extended well beyond the time limits set forth in R.C. 2953.21(A)(2) to an undetermined time in the future, all contrary to the intent of the legislature."); *State v. Casalicchio*, 8th Dist. No. 89555, 2008-Ohio-2362 (resentencing appeal "[did] not serve to restart the clock for postconviction relief purposes as to any claims attacking his underlying conviction."); *State v. O'Neal*, 9th Dist. No. 08CA0028-M, 2008-Ohio-6572 (time limit for filing of petition runs from the original appeal of the conviction).

However, the courts make allowance for new claims that arise for the first time from the resentencing proceedings themselves. Since such issues could not have been raised before, there is a new 180-day clock for constitutional errors arising for the first time from the resentencing proceeding.

Leniency-Based Dismissals

In *State v. Montiel*, 2nd Dist. No. 23353, 2009-Ohio-6589, the defendant had pleaded guilty to misdemeanor domestic violence in 2004, but the defendant succeeded in getting the plea withdrawn in 2008 because of a lack of immigration advisement. In 2009, the common pleas court dismissed the indictment, citing several factors: (1) the defendant had already "done his time" by reason of his "time served" sentence in 2004; (2) he had gone five years without "any trouble at all"; and (3) the only result of a new conviction would be collateral sanctions (e.g., immigration). The court believed "it serves no purpose of justice to go forward at this point."

The prosecution appealed the dismissal, noting that the victim had still wanted the case to go to trial and that the court had failed to consider the fact that a conviction would prevent the defendant from possessing a firearm and could be used to enhance any future domestic violence case.

Applying an abuse-of-discretion standard, the 2nd District affirmed the dismissal. Although Crim.R. 48(B) requires that a court give findings and reasons if it is dismissing a charge over the prosecution's objection, the Court in *State v. Busch* (1996), 76 Ohio St.3d 613 determined that the rule "does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interest of justice." Id. at 615. According to *Busch*, "[t]rial judges have the discretion to determine when the court has ceased to be useful in a given case." Id. at 616.

Insofar as the victim still wished to prosecute, the 2nd District concluded that the victim's wishes were not dispositive and that the "interests of justice" standard allowed dismissal despite the victim's wishes.

It seems doubtful that such a leniency-based dismissal would survive scrutiny if the charge were a felony. The concurring judge noted that there is a right to an evidentiary hearing, and so a prosecutor facing such a "motion to dismiss" could demand a hearing exploring the various leniency-based rationales and giving the victim her day in court. In many cases, the prosecutor would want to make a clear record of the facts of the defendant's crime. A clear understanding of the crime could make the judge hesitant to dismiss. Overall, there is good reason to question the legitimacy of *Busch* itself, as courts should not have the power to grant the equivalent of a judicial pardon.

Eleventh-Hour Request to Change Counsel

In *State v. Satterwhite*, 2nd Dist. No. 23142, 2009-Ohio-6593, the defendant requested new appointed counsel on the day of his scheduled trial. The trial court rejected the request, and then the defendant accepted a plea agreement. The 2nd District upheld the denial of the request, emphasizing the presumed bad faith underlying the last-minute request:

> {¶ 39} * * * Even though Satterwhite's complaint concerning his assigned counsel occurred literally minutes before the time scheduled for the commencement of his trial, the trial court conducted an inquiry on the record, and allowed Satterwhite to make his case for the substitution of new assigned counsel at that late date.
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> {¶ 40} A determination of whether an indigent criminal defendant has shown good cause for the substitution of counsel necessarily involves the exercise of some discretion. Only in the most extreme circumstances should appointed counsel be substituted. *State v. Glasure* (1999), 132 Ohio App.3d 227, 239. An indigent criminal defendant is entitled to the effective assistance of counsel, but not to his first choice of counsel. Neither is an indigent criminal defendant entitled to a review of all criminal defense lawyers practicing in the jurisdiction of the court with a view to determining which lawyer's personality best meshes with the defendant's personality.
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> {¶ 41} Satterwhite's generalized complaints concerning his assigned counsel largely boiled down to a perceived lack of empathy on his assigned counsel's part. This is an occupational risk of a career criminal. The right to the effective assistance of counsel does not require that a criminal defendant must develop and share a "meaningful relationship" with his attorney. *Morris v. Slappy* (1983), 461 U.S. 1, 13.
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> {¶ 42} Finally, a motion to substitute counsel, made on the day of trial, suggests that the motion was made in bad faith for purposes of delay, especially when the trial date had been set for some time. *State v. Haberek* (1988), 47 Ohio App.3d 35, 41. Therefore, a motion to substitute counsel, made on the day of a trial that

> has been set for some time, requires a strong showing of good cause to overcome the implication of bad faith resulting from the timing of the motion.

Misapprehension of Appeal Rights Vitiates Plea

The defendant in *Satterwhite* had lost a suppression motion. During the plea colloquy, the defendant said that he was not giving up his appeal. The trial court replied that he could appeal anything he wanted.

The 2nd District concluded that this misadvice regarding appeal rights vitiated the plea, as it demonstrated that the defendant did not understand the true effect of his guilty plea, inasmuch as a guilty plea does not preserve adverse rulings on motions to suppress.

A similar problem arose in *State v. Echard*, 9th Dist. No. 24643, 2009-Ohio-6616. The defendant pleaded no contest on the assumption that he would be able to appeal the trial court's adverse ruling on a motion in limine that sought to exclude evidence of a prior domestic-violence case, which, he contended, could not be properly used as a prior "conviction." A two-judge majority concluded that, because the pretrial motion could only be preserved by taking the case to trial, the defendant had misunderstood whether he could appeal, thereby invalidating his plea.

The dissenting judge believed that the pretrial motion was the functional equivalent of a motion to suppress, which could be preserved by a no contest plea. Under the view of the dissent, the plea was valid, since the legal issue in fact was appealable in a manner consistent with the defendant's understanding.

Proving Shoplifting

In *State v. Jeantine*, 10th Dist. No. 09AP-296, 2009-Ohio-6775, the defendant had entered a Walmart, purchased an item from the electronics department, and then put other items in the shopping bag and left the store without paying for them. A loss prevention officer had been watching these events and apprehended the defendant, who apologized for the theft. The officer testified that she had not given the defendant permission to take the items from the store.

The defendant challenged the sufficiency of the evidence on appeal, contending that the prosecution had not produced all possible Walmart employees who might have given consent and had not produced evidence that the loss prevention officer had the authority to determine who could leave the store.

The 10th District rejected these challenges. The prosecution was not required to produce an omniscient storekeeper who would testify that no one ever gave the defendant permission to take the items. "[T]he State is not required to introduce the testimony of every Walmart employee who might be authorized to give consent."

The circumstances themselves demonstrated a lack of permission to take the items, as the State was only required that the defendant lacked authority to have the items:

> {¶ 22} * * * [T]he State is not required to prove ownership, other than to show that appellant did not have a lawful right to possession. Establishing ownership in another person is not an element of a theft offense under R.C. 2913.02. *State v. Shaw* (Aug. 10, 1995), 10th Dist. No. 94APA12-1778. Under R.C. 2913.02, the prosecution only needs to prove that someone who had possession or control or an interest in the property was deprived of that property by the accused. Id. See also *State v. Mason* (July 14, 1992), 10th Dist. No. 91AP-1012.
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> {¶23} In proving a theft offense, the relevant inquiry is not whether the person from whom the property was stolen was the actual owner. Instead, the focus is on whether the accused had any lawful right to possess the property. *State v. Rhodes* (1982), 2 Ohio St.3d 74, 77. Thus, it is the appellant's relationship to the property that is controlling. Id. The gist of a theft offense is not the particular ownership of the property, but instead the "wrongful taking." *State v. Shoemaker* (1917), 96 Ohio St. 570, 572. If the taking is wrongful, it does not matter who owns the property at issue. Id. * * *