

LICKING COUNTY  
COMMON PLEAS COURT

State of Ohio,

2007 MAR 16 A 11: 17

Plaintiff,

vs.

FILED  
GARY R. WALTER Case No. 05 CR 245  
CLERK

Richard D. Sherman, Sr.,

Defendant.

**JUDGMENT ENTRY**

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This matter came before the Court this 12<sup>th</sup> day of February 2006 pursuant to a motion titled State of Ohio's Motion for Relief pursuant to Civil Rule 60(B), through Criminal Rule 57(B), filed January 22, 2007. No responsive pleading was filed on behalf of the Defendant.

The motion contains photographs, a hand drawn sketch, a letter dated November 3, 2006 directed to the Defendant's spouse and a transcript of a hearing conducted December 20, 2006. The December 20, 2006 hearing was conducted as a result of the Defendant's motion filed December 19, 2006 which bears a file stamp of that date and a Certificate of Service of the 18<sup>th</sup> of December 2006. The Certificate of Service is directed to Robert W. Cheugh, II, Assistant Attorney General, Environmental Enforcement, 30 E. Broad St., Columbus, Ohio 43215-3400. This motion was received by the person to whom it was directed according to the Certificate of Service.

As is set out in the transcript of the hearing of December 20, 2006, the hearing was conducted by virtue of the Court having noticed the Defendant was going to be present that day for a hearing on a separate case and the Court's independent determination to take advantage of the presence of the Defendant rather than require that the Sheriff incur the cost of transportation to the penitentiary and back again to the Court for purposes of the judicial release hearing.

Sufficient notice of the hearing was provided for the local newspaper to file a request with the Court for permission to record the proceedings on December 20, 2006 and for the Court to grant the request that same date. The Court's docket for the day published and posted in the courthouse indicates the hearing for December 20, 2006. (See attached Ex. A, B & C.)

The state's objection as set forth in the motion filed January 22, 2007 generally is that the attorney generals who prosecuted the case received no notice of the date of the hearing, that the prosecuting attorney of Licking County received no formal written notice, and that the Court did not receive a report from the Department of Corrections pursuant to Section 2929.20(E) of the Defendant's activities while incarcerated.

Civil Rule 60(B) relied upon by the state in this motion, provides in pertinent part that "upon motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, where it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of the judgment or suspend its operation. The procedure for obtaining any relief from a judgment shall be by motion as

prescribed in these rules.”

Initially, the state relies on the case of State ex rel. Petro v. Marshall, 4<sup>th</sup> Dist. Ct. App. Of Ohio, Scioto Cty., decided October 10, 2006, 2006-Ohio-5357 for the proposition that Civil Rule 60(B) can be used in a criminal proceeding. The Court notes in that case, however, the attorney general took the position that the judge patently and unambiguously lacked the jurisdiction to grant a Civil Rule 60(B) motion for relief in the underlying criminal case. Relying upon the Supreme Court of Ohio’s holding in State ex rel. Special Prosecutors v. Judges, 55 Ohio St. 2d 94 (1978), the Court in State ex rel. Petro v. Marshall agreed that the judge lacked jurisdiction to grant a Civil Rule 60(B) motion for relief in an underlying criminal case. Other cases have indicated that Civil Rule 60(B) may afford a criminal defendant relief from a judgment of conviction where another remedy is not provided; See Miller v. Walton, 163 Ohio App. 3d 703 (2005). The state provided the Court with no authority for the proposition that the state could use 60(B) as a remedy.

To succeed on a 60(B) motion a party generally must file the motion timely, and this motion would appear to be timely. However, the State of Ohio presented no evidence by affidavit or otherwise upon which the Court may make any finding of any of the grounds upon which relief can be based under Civil Rule 60(B). The motion itself cites Section (5), “any other reason justifying relief from judgment.” This is based on the Court’s alleged oversight in failing to provide the assistant attorneys general with notice of the hearing on Defendant’s motion for judicial release, failing to provide the prosecuting attorney an opportunity to be heard, failing to provide the assistant attorneys general with an opportunity to contact victims of the Defendant’s crime and to provide them with an opportunity to be heard, as well as failing to include in the

record the correctional institution report regarding the prisoner.

At the 60(B) hearing, counsel for the state represented to the Court that it had cases, which indicated that the failure of the Court to have a correctional report, as specified under Ohio Revised Code Section 2929.20(E), resulted in judicial releases being reversed on appeal. It did not proffer those cases to the Court or provide them in its motion or at the hearing, nor did the Court ask for them.

In the only case found by the Court on that point, specifically State v. Anderson, 11<sup>th</sup> Dist. Ct. App. of Ohio, Ashtabula County, decided October 6, 2000, 2000-LW-4600, Case No. 98-A-0110, the 11<sup>th</sup> District Court of Appeals in fact held opposite the representation of the state, “therefore, it was not error for the Court to proceed without the report.”

Section 2929.20, which governs judicial release at paragraph D reads in pertinent part as follows: “If the Court schedules a hearing for judicial release, the Court promptly shall give notice of the hearing to the prosecuting attorney of the county in which the eligible offender was indicted.” There is no provision in the code, nor could the assistant attorneys general direct one to the Court, which requires notice to be given to the assistant attorneys general. There can be no doubt that the prosecuting attorney of the county in which the Defendant was indicted received notice of the hearing for judicial release because the prosecuting attorney appeared at the hearing.

The legislature may be free to require that the assistant attorneys general or the attorney who prosecutes the case receive notice but the legislature has not yet chosen to do so. For the assistant attorneys general or anyone to guess as to what the prosecutor would have done had they received more or different notice is simply guessing. Further, the names of no victims of the Defendant’s offenses have been provided to the Court at any time, for purposes of Pre-Sentence

Investigation, in the sentencing memorandum prepared by the assistant attorneys general, or now. The Defendant was convicted of running an illegal dump. The community at large is the victim, but no specific people were ever named.

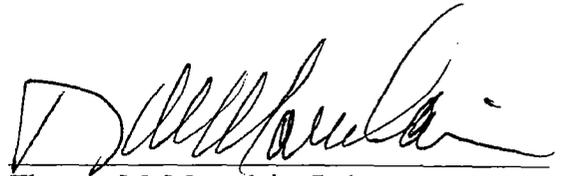
The release of the Defendant on judicial release as well as the Court's alleged proceeding without notice or without the record of the Defendant from the Department of Corrections are all issues that could have been raised on appeal by the state. Civil Rule 60(B) should not be used as a substitute for an appeal. A trial court cannot modify the terms of a judgment from which no appeal has been taken. Brewer v. Salins, Ohio 2d App. Dist., Montgomery County, 11-21-2003, No. 19624, 2003 – Ohio – 6323. The issue in Marshall, supra, which resulted in the judge having no jurisdiction under a 60(B) motion to grant relief from the criminal case was because the precise issues had been raised, and denied, on appeal.

A defendant's civil motion for relief from judgment has been held not to be a substitute for a timely appeal from judgment granting post conviction relief. See State v. Dayer, Ohio App. 11<sup>th</sup> Dist. Lake Cty., 09-26-2003, No. 2002-L-043, 2003-Ohio-5225.

Generally to be successful under Civil Rule 60(B) a party should demonstrate a meritorious defense. To prevail on a motion for relief from judgment, the moving party must establish that he has a meritorious defense or claim to present if relief is granted. Morgan Adhesives Company v. Sonikor Instrument Corporation, Ohio App. Dist. (decided 11-8-1995) 107 Ohio App. 3d 327; Southern Ohio Coal Company v. Kidney, 100 Ohio App. 3d 661. The state has demonstrated nothing which would cause the Court to assume that it should not have granted judicial release to the Defendant. The state has presented nothing that was unknown to the Court or not set forth in the Pre-Sentence Investigation, in its 60(B) motion. The state alleges

that the threat of three and one-half more years in prison is no incentive to further clean up the dump site. Yet, the Attorney General's office does not supervise defendants on community control, nor has that office since the date of his original sentencing, yet contacted the supervising probation officer for the Defendant.

The Court therefore finds the state has not presented sufficient evidence upon which a Civil Rule 60(B) motion should be granted and accordingly finds the motion to be not well taken and is therefore DENIED.



Thomas M. Marcelain, Judge

Copies to:

Robert Cheugh, Esq. and Karla Gebel Perrin, Esq., Assistant Attorneys General  
Environmental Enforcement Section, Public Protection Division, 30 E. Broad St., 25<sup>th</sup> Fl.,  
Columbus, OH 43215

Kelly Miller, Adult Court Services  
Courthouse, Newark, OH 43055

Thomas Tyack, Esq., Attorney for Defendant  
536 S. High St., Columbus, OH 43215

Licking County Prosecutor, 20 S. 2<sup>nd</sup> St., Newark, OH 43055

Licking County Common Pleas Court  
Events Schedule Report  
12/20/2006 - 12/20/2006

Judge Thomas M. Marcelain - East Courtroom

Wednesday, December 20, 2006

DownTime

Start Time	End Time	Description
08:00 am	04:25 pm	SET NOTHING ELSE PER TMM
08:00 am	04:25 pm	JUDGE HOOVER TO USE COURTROOM IF AVAILABLE
02:30 pm	02:30 pm	TMM MTG. - MR. SCANLON

08:00 am

Downtime Scheduled

SET NOTHING ELSE PER TMM  
JUDGE HOOVER TO USE COURTROOM IF AVAILABLE

02:00 pm

05 CR 00245

ORAL HEARING ON MOTION FOR JUDICIAL RELEASE

Plaintiff

Defendant

SHERMAN, RICHARD D

Event Atty's

TYACK, THOMAS  
CHEUGH, ROBERT

DFNDT  
DFNDT

Charges:

- 1 ILLEGAL OPEN DUMPING
- 2 OPERATING AND/OR MAINTAINING A SOLID WASTE T
- 3 OPERATING AND/OR MAINTAINING A SOLID WASTE T

02:30 pm

Downtime Scheduled

TMM MTG. - MR. SCANLON

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

LICKING COUNTY  
COMMON PLEAS COURT

2006 DEC 20 A 11:13

Ohio  
Plaintiff,

vs.

Richard Sherman  
Defendant.

FILED  
Case No: OSCR 245  
GARY N. WALTERS  
CLERK

**JUDGMENT ENTRY**  
**PERMITTING RECORDING OF COURT PROCEEDINGS**

This cause came on for consideration upon the written request of

Kimberly Duk of The Advocate  
(Media Representative) (Media Affiliation)

for permission pursuant to the Rules of Superintendence of Common Pleas Court and pursuant to Canon 3A(7) of the Code of Judicial Conduct to permit the recording by electronic means of the court proceedings in the above stated matter.

The Court finds said request to be well-taken and the Court hereby grants to the above stated Media Representative the right to electronically record the being held by Judge Thomas M. Marcelain in the East Courtroom at 2 A.M.(P.M.) on the 20 day of December, 2006. This Court is satisfied that the approval of this request would not distract the participants, impair the dignity of the proceedings or otherwise materially interfere with the achievement of fair proceedings herein.

The Court hereby reserves the right to instruct the above stated Media Representative concerning the placement of cameras and technicians.

It is the further order of this Court that this Entry shall be made a part of the record of the proceedings in this case.

Thomas M. Marcelain  
Thomas M. Marcelain, Judge

Judge  
Thomas M. Marcelain  
0-670-5777

Judge  
John R. Spahr  
0-670-5770

Courthouse  
Columbus, OH 43055

*Walters 206*

SCANNED

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

LICKING COUNTY  
COMMON PLEAS COURT

Ohio  
Plaintiff,

vs.

2006 DEC 20 A 11:13

Case 05 CR 245

Richard Sherman  
Defendant.

FILED  
GARY F. WALTERS  
CLERK

REQUEST OF MEDIA TO RECORD COURT PROCEEDINGS

1. Kimberly Druk  
(Media Representative)

The Advocate  
(Media Affiliation)

request permission pursuant to the Rules of Superintendence of Common Pleas Court and pursuant to Canon 3A(7) of the Code of Judicial Conduct to permit the recording by electronic means of the court proceedings in the above stated matter.

Kimberly Druk  
Media Representative

The Advocate  
Media Affiliation

22N 1ST ST  
Address

NEWARK OH 43055

Judge  
M. Marcelain  
670-5777

Judge  
R. Spahr  
670-5770

courthouse  
X, OH 43055