[Cite as *State v. Brown,* 2014-Ohio-5824.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 13 MA 172
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	O P I N I O N
	)	
PAUL BROWN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 09CR1231.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul Gains
Prosecuting Attorney
Attorney Ralph Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Attorney Anthony Meranto
4822 Market Street, Suite 220
Boardman, Ohio 44512

JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 29, 2014

[Cite as *State v. Brown*, 2014-Ohio-5824.]
VUKOVICH, J.

{¶1} Defendant-appellant Paul Brown appeals the decision of the Mahoning County Common Pleas Court which granted the state's Civ.R. 60(B) motion for relief from a dismissal order in a criminal case involving murder and weapons charges. The trial court had granted the defendant's motion to dismiss based upon the belief that a police officer destroyed evidence. Specifically, it was believed that the current SIM card in appellant's cell phone was not the same card that was present in the phone at the time of appellant's arrest years earlier, which is when the phone first entered police custody.

{¶2} The state sought relief from the dismissal judgment under Civ.R. 60(B)(1) and (5). The state pointed out that appellant's dismissal motion was based upon a claim that he told police at his initial interview to check his phone to find an allegedly exculpatory voicemail left for him by a person he says was present when the victim was shot. The state attached the transcript of the police interview, which showed that appellant told police that the statement was made to him in person (not in a voicemail) and that appellant's statement about checking his phone dealt with his statement that the victim's mother was calling him.

{¶3} The state also emphasized that the parties and the expert utilized by the court were all mistaken in the conclusions drawn from the documents supplied to the court by the phone company, which specifically showed that the phone number combined with the SIM card currently in the phone were associated with various calls just preceding appellant's arrest. The state enlisted the expertise of a BCI forensic examiner, who established that the SIM card in the phone was the same one in the phone at the time appellant was arrested.

{¶4} It was thus established that the allegations of a switched SIM card and destroyed exculpatory phone evidence were untrue. After hearing this evidence, the court granted relief from judgment and vacated the dismissal order. This occurred prior to the expiration of time for the state to appeal the dismissal order.

{¶5} In appealing the order granting the state relief from the dismissal order, appellant states that a criminal court is not authorized to vacate a final order and that

the state's only option was to appeal the dismissal order. Appellant alternatively urges that the state's motion was actually a request for reconsideration which is a nullity. Finally, appellant contends that if the court was permitted to entertain the state's motion, the state failed to show that it was entitled to relief for mistake, inadvertence, surprise, or excusable neglect under Civ.R. 60(B)(1) or extraordinary circumstances under Civ.R. 60(B)(5).

{¶6} For the following reasons, we hold that the state was permitted to utilize Civ.R. 60(B) pursuant to the facts in this case and the trial court did not abuse it discretion in concluding that the state demonstrated entitlement to relief under Civ.R. 60(B)(1) or (5). In accordance, the trial court's order granting relief from the dismissal order is affirmed.

STATEMENT OF THE CASE

{¶7} On the night of May 25, 2009, April Jackson filed a missing persons report as to her seventeen-year-old son Ashten Jackson. It was reported that Ashten left the house the night before with appellant Paul Brown and a Raymond Patterson. Ashten briefly returned home at 4:00 a.m., retrieved a black hooded sweatshirt, and left again with Brown and Patterson. While a Youngstown police officer was taking this report, Ms. Jackson pointed out that appellant was driving past the house. The officer yelled for appellant to stop his vehicle. That officer ended up arresting appellant as he was armed with a weapon (which Ms. Jackson said was stolen from her).

{¶8} Appellant was then interviewed by Detectives Kelty and Kelly just as May 26 began. Appellant stated that Ashten Jackson wanted to participate in a robbery with Raymond Patterson in the early morning hours of May 25. Appellant denied involvement. He noted that Ms. Jackson called him on the morning of May 25 asking for help finding her son and that he drove her to various places.

{¶9} Appellant claimed that he later saw Patterson, who was fidgety as he "stood there" and told him that it went "all bad" over on the east side, quoting Patterson as saying, "Man, it's all bad. The theory went bad, man. I think he got hit. It went all bad." (DVD Tr. 38, 40). Appellant also alleged that after "standing" there

and speaking to him for 15 minutes, Patterson gave him Ashten's gun. (DVD Tr. 38-39). In explaining that he was arrested while taking the gun back to Ms. Jackson, appellant added that the police had his phone so they could see that she had been calling him. (DVD Tr. 39-40).

{¶10} The detectives thereafter interviewed Raymond Patterson, who said *appellant* and Ashten were planning to rob a drug dealer on the east side. He provided police with the location of the house where the target lived and his nickname.

{¶11} The person in that house with the same nickname provided by Patterson told police that an armed person knocked on his door at 4:00 a.m., while another person waited in the car. The armed visitor called himself Paul and said he received a call that his friend had some trouble there. The resident refused to open the door. The resident described the visitor and the vehicle.

{¶12} On May 27, the detectives were contacted by a person stating that appellant confessed to him the shooting of Ashten at a May 25 Memorial Day picnic. Ashten's body was found in a field on the east side (near the target house) on May 30, 2009. Ashten had been shot by the weapon recovered from appellant during his arrest.

{¶13} On November 5, 2009, appellant was indicted for murder with a firearm specification, having a weapon under a disability, and carrying a concealed weapon. A trial began in January of 2012. There was an issue with the failure to produce a police report from Raymond Patterson's arrest by another officer. The defense obtained this report from the defendant's attorney in a federal case. The court considered citing a detective for contempt but concluded that the report was not maliciously denied to the defense. Then, an issue arose during Ms. Jackson's testimony when it was realized that her interview was not provided to the defense.

{¶14} The trial court declared a mistrial. After various trial dates were scheduled and continued, a trial was set to begin on April 16, 2013. Before a jury was assembled, there was an off-the-record discussion concerning appellant's cell phone. The trial court then ordered Net 10 aka TracFone to provide a pin number for

voicemail, the original SIM card number for the phone number, and an electronic copy of any voicemails.

{¶15} A few weeks later, the court ordered AT&T to provide all incoming and outgoing calls pertaining to appellant's cell phone number from May 20 to May 30. Based upon statements of a purported expert retained to assist with the phone, the order instructed the phone company to include the SIM card number ending in 4168 (currently in the phone) and the SIM card number ending in 6604 (which the court defined as the one that was purchased with the phone and that should have been in the phone). The next entry stated that the jury trial set for May 28, 2013 was continued because the phone records were still not available; this entry set a pretrial for June 13 and the jury trial for September 16, 2013.

{¶16} On September 5, 2013, the defense filed a motion to dismiss, asserting that appellant's due process rights were violated when the police tampered with/destroyed material exculpatory evidence or in the alternative tampered with/destroyed potentially useful evidence in bad faith. The evidence said to be tampered with was the defendant's cell phone containing a relevant voicemail message. The defense claimed that during the May 26 interview, appellant "told detectives to check his cell phone, as there was a message to him from state's witness Ray Patterson, wherein Patterson told Defendant that 'it went bad, I think he got hit,' meaning the victim in this case." The defense stated that this message shows that Patterson, not appellant, was present at the robbery. (The defense also claimed that the existence of a voicemail is confirmed by the witness who may have seen appellant armed with a gun at his door that night because the armed man "said that he got a phone call [from] one of his dudes who was out here and some trouble happened.")

{¶17} The defense sought a hearing in order to establish that the phone was rendered inoperable by a state operative who removed the SIM card which was in the phone at the time of appellant's arrest and replaced it with another SIM card which cannot operate the phone. It was stated that Richard Rococi examined the phone and records and would testify at the hearing.

{¶18} The state responded on September 16, the morning of trial. The state asserted that merely because the defendant claims there was a voicemail message does not make it true. The state emphasized that appellant did not request the May 25, 2009 message until April 16, 2013 (just as the second trial was to commence). The state also urged that comparable evidence may exist in other forms. As to bad faith, the state contended that it was unknown who switched the SIM card or when or why. Lastly, the state urged that only the issue with the phone was before the court (not the prior discovery issues that the court had already addressed).

{¶19} Instead of proceeding with trial, the court held a hearing on the defendant's motion. Notice was taken that when the court ordered the evidence brought to the court, the phone was not properly sealed in the evidence bag. (Tr. 24). Two detectives testified that once the phone was placed in the evidence locker upon appellant's arrest, it could not have been accessed until the next business day and even then they would have had to officially sign the phone out in order to access it from the evidence room. The detective accused by the defense of acting improperly in this case testified that he did not sign the evidence out and could not have circumvented the evidence room procedure. (Tr. 50).

{¶20} Defense counsel elicited from the detective that appellant told him to talk to Ray Patterson because Patterson was the one who told appellant that it "went bad" and "I think Ashten got hit." (Tr. 53). Defense counsel also asked, "And tells you, check my phone by the way; right?" The detective responded in the affirmative. (Tr. 54). (He was not asked if the defendant told him there was a voicemail from Patterson.)

{¶21} The defense also called Richard Rococi to the stand. The state entered objections as to the witness's status as an expert and as to hearsay regarding the phone company's statements and documents. (Tr. 30-32, 36-37). This witness stated that he does forensic examinations and that this was his fourth court case. (Tr. 26). He disclosed that he was asked by the court and counsel to retrieve a voicemail from a cell phone. (Tr. 27). First, he tried to call the voicemail directly from the phone and then tried to extract data from the phone by using a device. (Tr. 28).

When these attempts failed, he called the phone company to inquire why he could not access the voicemail from the phone, leading to a discussion of the phone's SIM card, which is chip that acts as an identifier tying a device to a network. (Tr. 32). In this phone, the battery would have to be removed in order to access the SIM card. (Tr. 41).

{¶22} The witness testified that the phone company advised that he did not have the correct SIM card in the phone. (Tr. 29). He believed this meant that the SIM card in the phone was not the original card that came with the phone. (Tr. 33). He testified that the SIM card currently in the phone ended in 4168 and the SIM card that originally operated the phone ended in 6604. (Tr. 35). The witness opined that the 4168 SIM card was placed in the phone sometime after May 30, 2009, since that was the last call listed in the phone records (which was the last date requested by court order). He believed the calls listed in the records request corresponded to the phone's "original" SIM card (which he thought was 6604). (Tr. 39-40, 45).

{¶23} However, the documents submitted in support of this testimony tend to show that the requested May 20 through May 30, 2009 call history for appellant's phone number was associated with SIM card number 4168. *See* Defendant's Exhibit 4 (Declaration of Authenticity of Records faxed to the court from the phone company, stating that the attached call detail was associated with the requested phone number in conjunction with SIM 4168); Defendant's Exhibit 5 (call detail from May 20-May 30, 2009). This is the very same SIM card still in the phone. (Tr. 35). Apparently, defense counsel, the assistant prosecutor, and the expert did not notice this and instead relied upon the expert's statement that the phone company told him that the 4168 SIM card currently in the phone is not the original SIM card and thus cannot operate the phone.

{¶24} After the hearing, the court issued a September 16, 2013 judgment entry, granting the defendant's motion to dismiss. Initially, the court set forth the history of the case but then agreed with the state that the accumulation of prior discovery issues in the case was irrelevant. The entry disclosed that when the existence of a voicemail was mentioned just prior to the second trial, the court had

the evidence brought to the courtroom. The court noted that the seal had been broken and resealed with scotch tape. The entry stated that they charged the phone and counsel tried to retrieve information from it but could not. It was also related that the court ordered the phone to be sent to electronics expert Rococi to retrieve any information in it. There was then a review of this witness's testimony that the cell phone was inoperable because the SIM card had been switched.

{¶25} The court's entry then set forth the law that suppression of materially exculpatory evidence violates a defendant's due process rights regardless of the state's bad faith, but bad faith must be shown if the evidence is merely "potentially useful." The court concluded that the evidence was not shown to be materially exculpatory but was only potentially useful so the defense was required to show bad faith. The court described the mishandling of the phone while in police custody as "extremely disturbing" and found conscious wrongdoing in the replacement of appellant's SIM card. On this basis, the court granted the motion to dismiss.

{¶26} On October 3, 2013, the state (through a different assistant prosecutor) filed a motion for relief from judgment pursuant to Civ.R. 60(B)(1) and (5), noting that Crim.R. 57(B) provides that if no procedure is specified in the criminal rules, then the court may proceed in any lawful manner not inconsistent with the criminal rules and shall look to the rules of civil procedure and the applicable law if no criminal rule exists. The state asked for a hearing to present evidence outside of the record of the dismissal hearing.

{¶27} First, the state's motion revealed that appellant did not in fact tell detectives during his interview to check his voicemail for a message from Ray Patterson as the defense's dismissal motion specifically claimed. A transcription of the DVD interview was attached showing that appellant actually told detectives that Patterson made the pertinent statements *in person*. This transcription also shows that when appellant mentioned checking his phone, he was talking about Ms. Jackson calling him as he was driving over to her house to bring back the gun. It was pointed out that when the detective was asked at the dismissal hearing if appellant said to check his phone, neither the question nor the answer connected this

statement with the alleged statement made by Ray Patterson. The state concluded that the entire issue with the phone originated from this misrepresentation by the defense.

{¶28} Second, the state's motion for relief from judgment elucidated that the 4168 SIM card that is currently in the phone is the same SIM card that was in the phone at the time of appellant's arrest on May 25, 2009. The state pointed out how the subpoenaed phone records supported the position that the 4168 SIM card and appellant's phone number (330-207-4797) jointly produced the call detail attached from the requested time frame of May 20 through May 30, 2009. The state also noted that the phone company had also responded that as to the 6604 SIM card, no results were found for the requested time period, meaning that the 6604 SIM card was not in the phone at the time of arrest as the defense represented. This was characterized as a mistake of the parties and the expert.

{¶29} At an October 15, 2013 hearing on the motion, an internal affairs lieutenant testified about his investigation of the allegedly switched SIM card. He stated that he listened to appellant's recorded interview several times and found no instruction to check his phone for a voicemail message from Patterson. (Tr. 26). He also stated that his review of the subpoenaed phone records showed that the phone number for the phone and the 4168 SIM card in the phone created the call detail provided from the requested time frame, May 20 to May 30, 2009. (Tr. 34-35). He concluded that the same SIM card had been in the phone since before appellant's arrest. (Tr. 41).

{¶30} To confirm this, the state enlisted the assistance of a BCI forensic computer examiner. She also testified that the phone records showed that the 4168 SIM card was in the phone during appellant's arrest. (Tr. 101-102). Furthermore, she placed the disputed 4168 SIM card into a SIM card reader and confirmed that it was associated with appellant's phone number. (Tr. 70-71). She was able to retrieve from the SIM card the last ten numbers dialed. She was also able to establish that those last ten numbers dialed on the SIM card were also physically contained on the

phone (showing screen shots of the phone display as proof) and they matched the phone records provided by the phone company. (Tr. 72, 76, 88).

{¶31} She explained that a SIM card can store some text but cannot store voicemail. (Tr. 65). Both the BCI agent and the lieutenant stated that the 6604 SIM card did not even become active on this phone number until January of 2013 and that other people (with other phones and thus other SIM cards) had been assigned the phone number for certain periods in the interim as well. (Tr. 72, 38-39). They also both related the well-known procedure of a phone company reassigning a phone number to a different person with a different phone at some point after the prior number holder discontinues service (stops paying their bill). (Tr. 38-39, 72).

{¶32} Mr. Rococi was called to the stand. He noted that he and the parties attended a meeting with the court in April as to what the phone company told him. (Tr. 139). He acknowledged that he did not perform a forensic examination on the SIM card and was thus unaware that the 4168 SIM card was associated with that phone. (Tr. 149). He insisted that he was only asked to retrieve a voicemail from a cell phone and that he merely reported to the court why he was told that he could not retrieve voicemail. (Tr. 106, 126).

{¶33} The witness explained that he put minutes on the pay-as-you-go phone, and when he could still not access voicemail from the phone, he called the phone company saying that he needed to activate the phone to access the voicemail. (Tr. 110-111). He said that he was told twice that the SIM card would not work in the phone. (Tr. 111, 114). He did not tell the phone company that he was trying to get a voicemail from 2009 but did advise that the phone was older. (Tr. 112).

{¶34} He also disclosed that when he asked for the correct SIM card number, the phone company told him to get a court order. He spoke to the court's bailiff through email and they constructed a court order seeking that SIM card number, which came back as the one ending in 6604. (Tr. 114). He also revealed that he had only investigated three or four phones before and never investigated a phone such as the one in this case (TracFone). (Tr. 120).

{¶35} The defendant's opposition to the state's Civ.R. 60(B) motion urged that the court's dismissal constituted a final appealable order and there is no reconsideration after a final judgment. The court was urged to apply our holding in *Tate* and conclude that there is no procedure to vacate a final order. The defense said that even assuming the court can address a Civ.R. 60(B) motion, there was no mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from judgment. The defense observed that the state did not have the cell phone independently examined or contradict the evidence presented at the dismissal hearing due to its "apparent arrogance" that the court "would not dare dismiss a murder case," urging that the state was unprepared, incompetent, and inept (but in much more sensational language).

{¶36} It was pointed out that the prosecution knew of the cell phone issue in April of 2013, when the issue of a voicemail message was raised by counsel and the expertise of Mr. Rococi was sought by both parties. It was related that Mr. Rococi attended the June of 2013 pretrial, where his opinion was that the SIM card in the phone was not the card that operated the phone at the time of arrest. The defense noted that three months then passed before Mr. Rococi testified at the September 16 dismissal hearing. Defense counsel urged that the state at least should have acted after the September 5 dismissal motion (less than two weeks before a trial date that ended up transforming into a dismissal hearing.)

{¶37} When some of these arguments were reiterated at the relief from judgment hearing, the state agreed with the defendant's characterization of the dismissal order as a final appealable order, and the assistant prosecutor advised that she had until the next day to file a timely appeal and would do so if the court did not grant relief from judgment. (Tr. 8). The state urged that the court's judgment was based upon misinformation, adding, "I'm not saying that he did it intentionally". (Tr. 12, 18).

{¶38} Defense counsel insisted that he did not mislead the court and suggested that an attorney merely relates what his client tells him when making motions. (Tr. 13-16, 19-20). The state responded that, although the prior assistant

prosecutor should have noticed that the interview did not elicit information about an exculpatory voicemail, the defense had an obligation to present correct factual statements. (Tr. 18-19).

{¶39} The trial court issued a judgment entry sustaining the state's motion for relief from judgment on October 16, the last day the state would have had to appeal the dismissal order. The court reviewed the testimony presented by the BCI agent that the SIM card in the phone when appellant was arrested is the one currently in the phone (and the one in the phone when the court ordered its examination).

{¶40} The court recognized that the defendant did not make the statements as represented in defense counsel's motion. The court voiced that no attorney should mislead the court or misrepresent facts. The court also chastised the state, finding it disconcerting that the prior assistant prosecutor was not familiar with the contents of the interview and did not discover the SIM card issue.

{¶41} The trial court then expressed that the situation was extremely unique and pointed out that the criminal rules do not address the situation involving misrepresentations made to the court either inadvertently or purposely. The court opined that it would be a miscarriage of justice to reject the state's motion since the prior judgment was premised on falsely presented facts. The court's dismissal order was thus vacated.

{¶42} On November 12, 2013, appellant filed a timely notice of appeal. Appellant sets forth three assignments of error. We address the second assignment of error first.

ASSIGNMENT OF ERROR NUMBER TWO

{¶43} Appellant's second assignment of error contends:

{¶44} "THE STATE'S MOTION FOR RELIEF FROM JUDGMENT, PURSUANT TO CIVIL RULE 60(B)(1)/(5), AND REQUEST TO SUPPLEMENT THE RECORD WAS IN REALITY A MOTION FOR RECONSIDERATION, WHICH IS A NULLITY UNDER OHIO LAW."

{¶45} Appellant's argument here relies solely on the Supreme Court's *Pitts* case. The syllabus of that case held: "The Ohio Rules of Civil Procedure do not

prescribe motions for reconsideration after a final judgment in the trial court." *See Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 423 N.E.2d 1105 (1981), syllabus at ¶ 1. In explaining its holding, the Court pointed out that Civ.R. 60(B) provides: "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules." *Id.* at 380, quoting Civ.R. 60(B) (and noting the Civil Rules allow for relief from final judgments by means of a Civ.R. 50(B) motion notwithstanding the verdict, a Civ.R. 59 motion for a new trial, and a Civ.R. 60(B) motion for relief from judgment). *Id.*

{¶46} "Succinctly stated, the Rules of Civil Procedure specifically limit relief from judgments to motions expressly provided for within the same Rules. A motion for reconsideration is conspicuously absent within the Rules." *Id.* at 380. Such a motion was called a legal fiction created by counsel under an informal local practice. *Id.* at 381 (also pointing out that a trial court should not have to ascertain whether a motion for reconsideration could fall under one of the allowable motions in the rules).

{¶47} The *Pitts* Court concluded that although reconsideration can be sought from an interlocutory order, a motion for reconsideration of a final judgment in the trial court is a nullity. *Id.* at 379-380, fn. 1 ("Without a specific prescription in the Civil Rules for a motion for reconsideration, it must be considered a nullity."). As the motion was a nullity, any judgment arising from such motion was also said to be a nullity. *Id.* at 381

{¶48} After reviewing *Pitts*, appellant argues that a motion for reconsideration is conspicuously absent from the Criminal Rules as well as the Civil Rules. Appellant states that relief from a final judgment is provided for only in a Crim.R. 29 motion for acquittal after verdict, a Crim.R. 33 motion for a new trial, and a Crim.R. 36 motion to correct clerical mistakes. Appellant acknowledges that Crim.R. 57(B) allows the trial court to look at the Civil Rules when there is not a specific prescription in the Criminal Rules. He then reasons that since neither the Criminal nor Civil Rules provide for a motion for reconsideration, the trial court cannot entertain a reconsideration motion and its order granting reconsideration is a nullity. On this basis, appellant asks that we reinstate the September 16, 2013 judgment of dismissal.

{¶49} However, the *Pitts* holding deals with the situation where the party wants the trial court to merely change its mind (reconsider), i.e. where the party argues that the trial court made a mistake in ruling on the evidence provided and the arguments made by the parties. *Pitts* does not prevent the filing of a Civ.R. 60(B) motion for relief from judgment. This relates to the concept that Civ.R. 60(B) shall not be used as a substitute for appeal. *See, e.g., Key v. Mitchell* (1998), 81 Ohio St.3d 89, 90-91, 689 N.E.2d 548 (1998) ("A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal or as a means to extend the time for perfecting an appeal from the original judgment."). "It is a fundamental principle of both civil and criminal procedure that a Civ.R. 60(B) motion is not a substitute for a direct appeal." *State v. Rucci*, 7th Dist. Nos. 13MA65, et al., 2014-Ohio-1396, ¶ 12.

{¶50} As Civ.R. 60(B) is not a substitute for an appeal, it cannot be utilized merely to raise mistakes allegedly committed by the trial court. *Id.* In other words, to raise mistakes allegedly committed by the trial court, one must appeal rather than attempt to use a Civ.R. 60(B) motion (which would actually just be an attempt at reconsideration with a 60(B) label). Notably, this does not mean that one cannot appeal the trial court's decision based upon the record before the court and also seek relief from judgment under Civ.R. 60(B) based upon a proper ground for relief thereunder using evidence outside of the record in support.

{¶51} Here, the state's motion was labeled as being filed under Civ.R. 60(B), and the state was not arguing that the trial court erred in granting dismissal but that the parties and the expert proceeded under a mistake and misstatement and that evidence outside of the record had been collected to establish and explain such mistake and misstatement. The state did not merely ask the trial court to change its mind based on the prior record. As such, the premise in *Pitts* is not present here, and thus, appellant's argument is without merit.

{¶52} The issue becomes whether the state is permitted to seek Civ.R. 60(B) relief from a dismissal order, which is raised in assignment of error number one. If so, the remaining issue is whether the state demonstrated that it was entitled to relief

from judgment, which is raised in assignment of error number three. We thus proceed to address these issues.

ASSIGNMENT OF ERROR NUMBER ONE

{¶53} Appellant's first assignment of error provides:

{¶54} "THE STATE SHOULD NOT HAVE BEEN PERMITTED TO SUPPLEMENT THE RECORD AS THE TRIAL COURT'S DISMISSAL ON SEPTEMBER 16, 2013 WAS A FINAL APPEALABLE ORDER AND JEOPARDY HAD ATTACHED."

{¶55} Appellant urges that our *Tate* case dictates that the state's only option after the trial court's September 16, 2013 dismissal was an appeal. *See State v. Tate*, 179 Ohio App.3d 135, 2008-Ohio-5820, 900 N.E.2d 1067. Appellant emphasizes that the expert did not intentionally mislead the court and the state possessed the evidence at issue but failed to timely investigate the matter.

{¶56} The state responds by pointing to the Supreme Court's statements in *Schlee*, regarding Civ.R. 60(B) being used by way of Crim.R. 57(B), urging that it can no longer be said that a criminal court cannot grant relief from a final judgment that was based upon a misrepresentation or incorrect facts. The state urges that there is no specific rule of criminal procedure to correct a misrepresentation such as this and thus Civ.R. 60(B) can be used by the state, just as the defendant has various rules that he can use in similar situations. The state points out that it was not trying to circumvent its deadline to appeal as the filing deadline had not yet passed when the judgment was vacated by the trial court. The state points to various appellate cases in support.[1]

{¶57} For instance, the Sixth District has permitted a Civ.R. 60(B) motion for relief to be filed by the state from the granting of shock probation where the state did not respond to the motion for probation because they did not get served. *State v.*

[1]The state relies in part on *In re Bowers*, 10th Dist. No. 07AP-49, 2007-Ohio-5969, holding that the state can use Civ.R. 60(B) to challenge an order sealing records where the prosecution later learned that the defendant was not a first time offender and thus was not eligible for expungement. However, expungement is a civil, post-conviction matter. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶ 19. That case is thus not comparable to the situation at bar.

Hasenmeier, 6th Dist. No. E-93-33 (Mar. 18, 1994) (upholding trial court's grant of relief from judgment). The Sixth District has also stated that a Civ.R. 60(B) motion for relief (from an order dismissing on speedy trial grounds) can be filed in a criminal case where appropriate. *State v. Major*, 6th Dist. No. E-08-030, 2008-Ohio-2734, fn. 1.

{¶58} However, it was not found to be used appropriately in that case as it was being used as a substitute for appeal. *Id.* at ¶ 8-9 (noting that Civ.R. 60(B)(1) does not deal with the mistake or inadvertence of a trial court {that can be appealed} but deals with mistakes of the parties). Because the state's speedy trial arguments could have been raised in a direct appeal, the court concluded that the matter was not properly raised by way of Civ.R. 60(B) basis for relief from judgment. *Id.* at ¶ 9.

{¶59} We turn now to *Tate* and then *Schlee*. In *Tate*, the trial court suppressed evidence, the state appealed, and we affirmed. The state then filed a motion to vacate the suppression order stating that the defendant sent letters to the court which the state did not receive. The trial court denied the motion, and the state's appeal to this court was dismissed as it was untimely. The state filed a second motion to vacate, alleging new evidence showed the testimony at the suppression hearing was untrue. The trial court denied the motion, and the state again appealed.

{¶60} This court pointed out that there is no appeal of right from a motion to vacate suppression under R.C. 2945.67 as there is from the actual suppression order. *Tate*, 179 Ohio App.3d 135 at ¶ 7 (thus noting that if an appeal was available, it could only be a discretionary state's appeal). It was also concluded that we had no jurisdiction to accept even a discretionary appeal. *Id.* at ¶ 8. We cited an Eighth District case and stated that there is no provision in the criminal rules for a motion to vacate a final order granting a motion to suppress. *Id.* (also stating there is no authority to reconsider a final judgment or to reenter a judgment in order to circumvent an appeal deadline), citing *State v. Mayo*, 8th Dist. No. 80216 (Apr. 24, 2002) (a case where the state sought to have the suppression order reentered because it did not receive service of the order in time to file a timely appeal).

{¶61} The *Tate* case stated that the Criminal Rules provide the state with one direct appeal of an adverse ruling on suppression. *Id.* at ¶ 9. We observed that the state is generally prohibited from filing appeals in criminal cases and any limited rights to appeal under the law are strictly construed. *Id.*, citing *State v. Caltrider*, 43 Ohio St.2d 157, 331 N.E.2d 710 (1975). We then cited *Bassham* for the proposition that an appellate court lacks jurisdiction over an appeal challenging a ruling on a motion to reconsider a suppression order. *Id.*, citing *State v. Bassham*, 94 Ohio St.3d 269, 272, 762 N.E.2d 963 (2002).

{¶62} *Bassham* dealt with the state failing to file a timely appeal of the trial court order suppressing the BAC results and the officer's observations. The state filed a motion to clarify what observations were being suppressed and only appealed from the order of clarification. The Supreme Court concluded that the state's request for clarification was an apparent attempt to circumvent the time for appealing. *Bassham*, 94 Ohio St.3d at 272. The Court noted that the same appellate court had previously held that a motion to reconsider suppression is a nullity so should have similarly held that a motion for clarification would not extend the time to appeal. *Id.*, citing *State v. Flynn*, 2d Dist. No. CA10152 (Mar. 6, 1987), applying *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 423 N.E.2d 1105 (1981).

{¶63} In *Tate*, this court opined that there was no reason to treat a motion to vacate a suppression order different than a motion to reconsider a suppression order and concluded that we had no jurisdiction to entertain a discretionary appeal from the entry overruling the state's motion to vacate a suppression order. *Tate*, 179 Ohio App.3d 135 at ¶ 10. Essentially though, *Tate* dealt with appealability.

{¶64} Furthermore, that same year, the Supreme Court released *Schlee* where the main issue was whether a criminal defendant's Civ.R. 60(B) motion could be recast as a petition for post-conviction relief. The Court first pointed out that Crim.R. 57(B) plainly provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no

rule of criminal procedure exists." *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431 at ¶ 7, quoting Crim.R. 57(B).

{¶65} The Supreme Court noted that appellate courts "have crossed the intersection of Civ.R. 60(B) and Crim.R. 57(B) in both directions." *Id.* at ¶ 9. Some courts hold that Civ.R. 60(B) has no application to judgments in criminal cases and some courts hold that Civ.R. 60(B) is available in criminal cases for certain procedures that were not anticipated by the criminal rules. *Id.*

{¶66} The Court found this split of authority "puzzling given the plain language of Crim.R. 57(B) that courts 'shall look to the rules of civil procedure * * * if no rule of criminal procedure exists'." *Id.* But, the Court then admitted: "We would have thought that the clarity of that command would be impossible to miss if we had not made the same mistake ourselves." *Id.*, citing *State ex rel. Natl. Broadcasting Co. v. Lake Cty. Court of Common Pleas*, 52 Ohio St.3d 104, 108, 556 N.E.2d 1120 (1990). The *Schlee* Court declared: "Today we hold that the plain language of Crim.R. 57(B) permits a trial court in a criminal case to look to the Rules of Civil Procedure for guidance when no applicable Rule of Criminal Procedure exists." *Id.* at ¶ 10 (specifically overruling *Natl. Broadcasting* to the extent that it stands for a contrary proposition of law).

{¶67} Finally, the Court moved to the question of whether the defendant properly resorted to Civ.R. 60(B) *in that particular case*, "that is, whether the absence of an applicable Criminal Rule justified invoking a Civil Rule in its place." *Id.* at ¶ 11. The Court found that because Crim.R. 35, setting forth the procedure for post-conviction relief petitions, was available to the defendant and served the same purpose as the Civ.R. 60(B) motion he filed, Civ.R. 60(B) could not be utilized. *Id.* at ¶ 11-12. And, the Court concluded that a trial court can recast a criminal defendant's Civ.R. 60(B) motion as a petition for post-conviction relief. *Id.* at ¶ 12.

{¶68} More recently, this court addressed a case where the state attempted to use Civ.R. 60(B) from a dismissal order. In that case, a common pleas court dismissed prostitution-related charges against certain businesses and men because a county court dismissed the case against the alleged prostitutes. The state had

argued against dismissal of the common pleas court case on the grounds that the county court judge incorrectly ruled in favor of the dancers. The state failed to appeal the dismissal of the case against the men. The state did appeal the dismissal of the case against the dancers. After this court reversed the dismissal in the dancers' county court case, the state filed a Civ.R. 60(B) motion for relief from the dismissal of the common pleas case. The trial court denied this motion, and the state appealed to this court.

{¶69} *This court set forth the Schlee holding and pointed out that the trial court did not conclude that Civ.R. 60(B) was inapplicable to criminal proceedings but said that applying Civ.R. 60(B) in this particular case was inappropriate because the state had a mechanism by way of a direct appeal*. *State v. Rucci*, 7th Dist. Nos. 13MA65, et al., 2014-Ohio-1396, ¶ 10-11. We pointed out that a Civ.R. 60(B) motion cannot be used as a substitute for appeal or a way to circumvent appellate deadlines. *Id.* at ¶ 11-12 (and noting that Civ.R. 60(B) is not for raising trial court mistakes). The *Rucci* case also pointed to the *Tate* case's rejection of an attempt by the state to appeal the denial of a Civ.R. 60(B) challenge to a decision granting suppression. *Id.* at ¶ 13.

{¶70} We then reasoned that although the state framed the proceeding as an appeal of the denial of a motion to vacate, we concluded that it was in reality a direct challenge to the trial court's decision dismissing parts of the indictment. *Id.* at ¶ 15. It was pointed out that R.C. 2945.67 provides the state an appeal as a matter of right from any decision in a criminal proceeding which grants a motion to dismiss all or any part of an indictment. *Id.* It was also expressed that the state has no right to appeal in a criminal matter unless specifically granted by statute. *Id.* at ¶ 16. It was concluded that R.C. 2945.67(A) and App.R. 5(C) provided the state with an opportunity to contest the dismissal with a direct appeal, but the state did not appeal and was attempting to use Civ.R. 60(B) as a substitute for the appeal. *Id.* at ¶ 19. .

{¶71} In *Rucci,* the state made the same argument in its Civ.R. 60(B) motion that it made in arguing against dismissal in the first place. That argument could have been made and resolved by an appeal from the dismissal. Here, the state is not

using Civ.R. 60(B) as a substitute for appeal. The state could have appealed the dismissal, but relief was granted before the appeal time ran. After the trial court vacated its dismissal, there was no longer a judgment for the state to appeal. And, that appeal would have been based upon a different argument than that made in the Civ.R. 60(B) motion. The motion for relief raised items existing outside of the record and was based upon mistakes of the parties and the expert and not a mere argument that the trial court committed a mistake.

{¶72} In conclusion, Civ.R. 60(B) exists in order for a party to seek relief from final orders due to allegations that cannot be raised on appeal. Civ.R. 57(B) says that the Civil Rules can be used when there is no applicable Criminal Rule. From this, the *Schlee* Court ruled that a motion under Civ.R. 60(B) is clearly permissible in a criminal case (where there does not already exist a procedure to present the motion). Accordingly, a Civ.R. 60(B) motion to vacate a dismissal order can be filed by the state via Crim.R. 57(B) in order to raise a mistake of the parties and of the expert, which mistake was to be established by evidence outside of the record. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

{¶73} Appellant's third assignment of error contends:

{¶74} "THE TRIAL COURT ERRED BY GRANTING THE STATE OF OHIO'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO CIVIL RULE 60(B)(1)/(5), AND REQUEST TO SUPPLEMENT THE RECORD AND VACATING ITS SEPTEMBER 16, 2013 JUDGMENT ENTRY OF DISMISSAL AS THE STATE OF OHIO FAILED TO DEMONSTRATE THAT THEY WERE ENTITLED TO RELIEF, PURSUANT TO 60(B)(1) OR (5) AND THEREFORE, GRANTING THEIR MOTION WAS AN ABUSE OF DISCRETION."

{¶75} Appellant concedes that the state established that the motion was timely and that it had a meritorious defense or claim to present. Appellant asks us to review only whether the trial court abused its discretion in finding that the state was entitled to relief under one of the grounds in Civ.R. 60(B).

{¶76} Civ.R. 60(B) provides in pertinent part:

{¶77} 'On 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, or 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, order or proceeding was entered or taken."

{¶78} Thus, in order to prevail on a Civ.R. 60(B) motion, the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is timely. *GTE Automatic Elec., Inc. v. ARC Indus., Inc.*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976). In an appeal from a Civ.R. 60(B) determination, the appellate court ascertains whether the trial court abused its discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 684 N.E.2d 1237 (1997). The abuse of discretion standard asks whether the decision was unreasonable, arbitrary, or unconscionable. *Id.*

{¶79} Appellant asserts that this case does not fall under Civ.R. 60(B)(5)'s "any other reason" catch-all category, urging that there are no extraordinary circumstances. Appellant also argues that the situation should not be categorized under Civ.R. 60(B)(1)'s choices of mistake, inadvertence, surprise or excusable neglect, urging that the state purposely did not attempt to dispute the evidence regarding the cell phone until after the case was dismissed.

{¶80} Here, the trial court participated in obtaining an expert to advise regarding the cell phone. The expert told the court and the parties that the SIM card

had been switched. It was not until an internal affairs investigation, which was prompted by the court's dismissal, that it was discovered that this was incorrect.

{¶81} Moreover, in seeking dismissal, the defense stated that appellant told police at his initial interview that his phone had a message from Ray Patterson indicating that Patterson was with the victim during a robbery and suggesting that appellant was not there. However, such statement did not in fact occur during that interview. That statement was the basis for the phone investigation in the first place. As the state points out, without that statement, there was no support for a contention that exculpatory or useful evidence was destroyed.

{¶82} Although defense counsel's misstatement regarding what occurred at the interview does not appear intentional, it is still a reasonable consideration by the court in evaluating a motion for relief from judgment. Moreover, a defendant's misrepresentation, not just an attorney's representation, is a consideration. Furthermore, there was mistake and inadvertence by the attorneys on both sides and by what could be considered the court's expert. That mistake was firmly demonstrated at the Civ.R. 60(B) hearing, and the evidence clearly supports that the SIM card allegation was false and based upon mistaken assumptions and conclusions of the expert. Additionally, the circumstances here could be categorized as extraordinary and substantial.

{¶83} We cannot say that the trial court abused its discretion in granting relief from the dismissal order. This assignment of error is overruled, and the trial court's judgment is affirmed.

Waite, J., concurs.
DeGenaro, P.J., concurs.