

[Cite as *State v. Holzapfel*, 2010-Ohio-2856.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-17
Frank J. Holzapfel,	:	(M.C. No. 2009 CR B 003089 )
Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-18
Frank J. Holzapfel,	:	(M.C. No. 2009 TR D 111390)
Defendant-Appellee.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on June 22, 2010

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*Richard C. Pfeiffer, Jr.*, City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias* and *Orly Ahroni*, for appellant.

*Richard Cline & Co., LLC*, and *Richard A. Cline*, for appellee.

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ON MOTION FOR LEAVE TO APPEAL

CONNOR, J.

{¶1} Plaintiff-appellant, State of Ohio ("the State"), filed a motion for leave to appeal pursuant to App.R. 5(C), R.C. 2505.02(B)(3), 2505.03(A), and 2945.67(A). The State seeks leave to appeal a judgment from the Franklin County Municipal Court

granting defendant-appellee, Frank J. Holzapfel's ("defendant"), motion for a new trial. Because we find no abuse of discretion, and because the State has failed to sufficiently demonstrate a probability that its claimed errors did in fact occur, we deny the State's motion for leave to appeal.

{¶2} On December 29, 2008, defendant was traveling in his vehicle heading eastbound on West Broad Street. As he was making a left-hand turn onto North Terrace Avenue, he collided with a motorcycle driven by Glenn Stepp. The passenger on the motorcycle, Pamela Stepp, was thrown from the motorcycle, thereby sustaining injuries from which she later died. Following an investigation, defendant was charged with vehicular manslaughter and failure to yield the right of way on a left turn. Defendant proceeded to a jury trial on the vehicular manslaughter charge and was convicted on September 25, 2009. Defendant was also found guilty of failure to yield the right-of-way on a left turn by the trial court.

{¶3} In October 2009, defendant filed a timely motion for new trial in municipal court pursuant to Crim.R. 33, alleging an irregularity in the proceedings, as well as newly discovered evidence. Defendant alleged that Detective Cornute, a Columbus Police Detective with the accident investigation unit who conducted the investigation at issue and testified at the trial on behalf of the State, had made a mathematical error in calculating the speed of the motorcycle. As a result, defendant alleged this error warranted a new trial.

{¶4} Under Crim.R. 33(A), a new trial may be granted upon the motion of the defendant for causes materially affecting his substantial rights, including:

- (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of

which the defendant was prevented from having a fair trial;  
\* \* \* (6) When new evidence material to the defense is  
discovered, which the defendant could not with reasonable  
diligence have discovered and produced at the trial. \* \* \*

{¶5} Following a hearing in which Detective Cornute, as well as defendant's expert, Gregory DuBois, testified, the trial court issued a written decision granting defendant's motion for a new trial on both offenses. The trial court determined that Detective Cornute's testimony regarding the estimated speed of the motorcycle, which was based upon an erroneous mathematical calculation, was an irregularity in the proceedings. The trial court also determined the range of the speed as properly calculated was newly discovered evidence. The State then filed the instant motion for leave to appeal, alleging the trial court abused its discretion in granting defendant's motion for new trial.

{¶6} Although R.C. 2505.03 generally provides that every final order or judgment may be reviewed on appeal, appeals by the State in criminal proceedings are specifically governed by R.C. 2945.67(A). *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶30. Pursuant to R.C. 2945.67(A), the State may appeal as of right an order which: (1) grants a motion to dismiss all or any part of an indictment, complaint, or information; (2) grants a motion to suppress evidence; (3) grants a motion for the return of seized property; and (4) grants postconviction relief. See *In re A.J.S.*, ¶30 and R.C. 2945.67(A). The statute further provides that, with the exception of final verdicts, the State may appeal any other decision in a criminal case by leave of the court of appeals. *Id.*

{¶7} Therefore, even when a trial court's order constitutes a final order pursuant to R.C. 2505.02 and 2505.03, the State may only appeal from that order by leave of the court of appeals, unless it involves one of the types of orders listed under R.C.

2945.67(A) that permits an appeal as of right. *In re A.J.S.* at ¶31, citing *State v. Matthews*, 81 Ohio St.3d 375, 378, 1998-Ohio-433 (although a trial court's order granting a criminal defendant a new trial is a final appealable order under R.C. 2505.02 and 2505.03, the State may appeal from that order only by leave of court).

{¶8} Here, the State's appeal is not an appeal of right, but one which requires leave of the appellate court. The decision to grant or deny the State's motion for leave to appeal lies solely within the discretion of the court of appeals. *State v. Fisher* (1988), 35 Ohio St.3d 22, syllabus; *State v. Burke*, 10th Dist. No. 06AP-656, 2006-Ohio-4597, ¶8; *State v. Johnson* (Apr. 4, 1996), 10th Dist. No. 95APA10-1380.

{¶9} An appellate court reviews a trial court's decision on a motion for new trial under an abuse of discretion standard. *State v. Velez*, 9th Dist. No. 09CA009564, 2010-Ohio-312, ¶11; *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76; *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518, ¶8. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶10} Under App.R. 5(C), when the State seeks leave from the court of appeals to appeal an order or judgment of the trial court, its motion for leave must set forth the errors it claims occurred in the proceedings of the trial court. The motion must also be accompanied by affidavits or by the parts of the record upon which the State relies to demonstrate the probability that the claimed errors did in fact occur. The State must also file a brief or memorandum of law in support of its claims. App.R. 5(C).

{¶11} Turning to the substantive issues in this matter, the State contends the trial court lacked discretion to grant defendant a new trial based upon the facts of this case. Specifically, the State argues the trial court abused its discretion in granting a new trial by finding that: (1) the State's expert testimony regarding the estimated speed of the motorcycle was erroneous and constituted an irregularity in the proceedings; (2) the range of speed as calculated by defendant's expert constituted newly discovered evidence that was not readily discoverable; and (3) defendant was prevented from having a fair trial as a result of the "new" speed calculations of his expert.

{¶12} In order to grant a new trial based upon a claim of newly discovered evidence, it must be demonstrated that the newly discovered evidence:

- (1) discloses a strong probability that it will change the result if a new trial is granted,
- (2) has been discovered since the trial,
- (3) is such as could not in the exercise of due diligence have been discovered before the trial,
- (4) is material to the issues,
- (5) is not merely cumulative to former evidence, and
- (6) does not merely impeach or contradict the former evidence.

*State v. Petro* (1947), 148 Ohio St. 505, syllabus; *State v. Davis*, 10th Dist. No. 03AP-1200, 2004-Ohio-6065, ¶7; *Burke* at ¶13.

{¶13} The State submits that Detective Cornute's trial testimony did not constitute an irregularity in the proceedings. The State also asserts there is currently no "new" evidence which could not have been discovered with reasonable diligence and produced at trial, since defendant had received Detective Cornute's work product and report prior to the trial. In addition, the State argues there is not a strong probability that the allegedly "new" evidence would change the result of the trial. The State further argues that the evidence alleged as being "new" is merely cumulative to evidence

formerly presented at trial and also merely impeaches or contradicts the evidence presented at trial.

{¶14} The critical factual issue in this case appears to rest on whether the motorcycle was proceeding lawfully at the time of the accident, since defendant, while making a left-hand turn, had a duty to yield the right-of-way to oncoming traffic that was proceeding lawfully. If the motorcycle was not proceeding lawfully at the time of the accident, then its driver and passenger forfeited the right-of-way, and defendant was not under a duty to yield the right-of-way and thus, would not be guilty of the offenses upon which he was originally convicted. The opposite analysis is also true, so if the motorcycle was proceeding lawfully, then defendant was under a duty to yield the right-of-way and would be guilty of the offenses. Thus, any testimony regarding the estimated speed of the motorcycle is critically important.

{¶15} The posted speed limit in the area where the accident occurred was 35 miles per hour. At trial, Detective Cornute testified that the estimated speed of the motorcycle at the time of impact was 27.9 miles per hour. This determination was made using a mathematical formula known as the "vault formula." Detective Cornute used an angle of departure (also known as trajectory) of zero degrees and 45 degrees. While he did not testify at trial as to the specific estimated speed "range," at the hearing, he indicated that, had he testified to that "range" of speed (under the improper calculation) it would have been 17.9 to 27.9 miles per hour.<sup>1</sup> However, at the hearing on the motion for new trial, Detective Cornute acknowledged that his trial testimony was mistakenly based

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<sup>1</sup> It is apparent that this speed "range" was contained within his work product and his report, which were provided to defendant's counsel and expert.

upon a computational error. This error occurred in his speed computation using the zero degree angle of departure and resulted in an incorrect speed of 17.9 miles per hour.

{¶16} At the motion hearing, Detective Cornute testified that since the trial, he had not re-calculated the speed of the motorcycle using a zero degree angle of departure. Instead, he had corrected his calculation and used angles of departure of 18 and 45 degrees. Although he had testified at trial that he did not know the exact trajectory the motorcycle rider had traveled in reaching her final resting place, Detective Cornute now testified that the angle had to be a minimum of 18 degrees, and thus his previous use of a zero degree angle of departure was incorrect. This minimum angle was due to the fact that the motorcycle rider did not or would not have been able to go through the motorcycle driver in front of her, the motorcycle, or the car in order to reach her final resting place and thus would have "vaulted" over them at an angle of 18 degrees or more. Under this new calculation, Detective Cornute indicated that the estimated range of speed would be 27.9 to 34 miles per hour. Despite this new "range," Detective Cornute testified at the hearing that this new information would not alter his trial testimony estimating the motorcycle's speed to be 27.9 miles per hour, based upon other evidence obtained from the accident.

{¶17} At the motion hearing, defendant's expert, Gregory DuBois, testified that Detective Cornute made a mathematical error in his original calculation. Mr. DuBois also took exception with Detective Cornute's testimony that it was scientifically impossible for the departure angle to be less than 18 degrees. He testified that he believed the zero and 45 degree angles of departure should be used in the formula, rather than the 18 and 45 degree angles of departure Detective Cornute was now using. While he generally

disputed that the vault formula was the proper formula to apply in these circumstances, Mr. DuBois testified that, at a zero degree angle of departure, the maximum speed of the motorcycle would have been 86.6 miles per hour.

{¶18} In reviewing the trial court's decision to grant defendant's motion for a new trial under an abuse of discretion standard, and keeping in mind that we cannot substitute our judgment for that of the trial court, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in granting defendant a new trial on the basis that the computational error subsequently resulted in the discovery of new evidence. Furthermore, although the State submits that defendant did not meet the six factors required under the *Petro* test in order to receive a new trial on the grounds of newly discovered evidence, we disagree.

{¶19} In addressing the *Petro* requirements, the State first argues the evidence discovered was not "new" and that it was either known prior to trial or could have been discovered prior to trial if the defense had exercised due diligence.

{¶20} "Newly discovered evidence" is "evidence of facts in existence at the time of trial of which the party seeking a new trial was justifiably ignorant." *State v. Love*, 1st Dist. No. C-050131, 2006-Ohio-6158, ¶43, citing *Campbell v. Am. Foreign S.S. Corp.* (C.A.2, 1941), 116 F.2d 926, 928.

{¶21} The trial court determined that the range of speed as properly calculated was newly discovered evidence, finding that Detective Cornute's testimony (and likely Mr. DuBois' testimony), as based upon the corrected mathematical calculation, constituted new evidence not known during the trial, despite the fact that it was not new "physical" evidence upon which to base the calculation. Additionally, as to the issue of whether this

was evidence which could have been discovered prior to trial if the defense had exercised due diligence, the trial court determined that it was not readily discoverable before trial, due to the complexity of the applicable mathematical formula and the likelihood that it was not understood by the average lay person or attorney.

{¶22} Black's Law Dictionary defines due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." Black's Law Dictionary (9th ed.2004). Furthermore, in *Love*, the First District Court of Appeals found that "[d]ue diligence has a somewhat accordion-like definition, as where one court might find expansively that a defendant acted with due diligence, while another court might restrictively deem that the defendant had not." *Love* at ¶52.

{¶23} In the instant case, although the defense was provided with Detective Cornute's work product regarding his calculations, it cannot be disputed that the formula in question involves complicated computations and variables. Even Detective Cornute himself was unaware of the mistaken calculation or the incorrectly computed speed range until *after* the trial. Given this, we cannot say that the trial court abused its discretion in determining that this error could not have been discovered before trial even in the exercise of due diligence. In addition, we note there is nothing to indicate that defendant withheld his knowledge about the incorrect calculation with the intent to use it in reserve as grounds for a new trial.

{¶24} The State also argues that the new evidence is merely cumulative to the former evidence and merely impeaches or contradicts that former evidence. However, it is apparent that the trial court did not find this to be the case. Although the new evidence

would most certainly contradict the former evidence, the new evidence, as noted by the trial court, shows that Detective Cornute's testimony regarding the estimated speed of the motorcycle is based upon a rationale that is very different from the rationale used to reach his conclusion provided at trial. Furthermore, as the trial court noted, given this new rationale, the questioning of Detective Cornute upon cross-examination, as well as Mr. DuBois' questioning on direct, would most certainly be different and would elicit different testimony and different evidence to be considered by the jury. Moreover, this new evidence provides specific areas of conflict between the two experts and their analysis of the accident and thus is not "merely cumulative" nor "merely" contradictory.

{¶25} Finally, the new evidence is clearly material to the issues. The trial court noted that the issue of the speed of the motorcycle was "the key factor" in the jury's determination of whether the motorcycle was being operated in a lawful manner. (December 10, 2009 decision and entry granting new trial, at 2.) Additionally, this determination is essential to establishing defendant's guilt.

{¶26} Given the analysis as set forth above, and taking into account that (1) the posted speed limit in the area was 35 miles per hour; (2) Detective Cornute's new speed estimate under the vault formula ranges from 27.9 to 34 miles per hour and only estimates speed at the time of impact, and not in the seconds prior to impact; (3) an independent witness testified at trial that she was traveling at a speed of 35 miles per hour and that the motorcycle passed her; and (4) a determination that Mr. DuBois' new testimony under the revised calculation (but using the zero and 45 degree angles of departure) would establish an estimated speed range of 27.9 to 86.6 miles per hour, the

new evidence discloses a strong probability that it will change the result if a new trial is granted.

{¶27} Therefore, we find the trial court did not abuse its discretion in ordering a new trial on the basis of newly discovered evidence. We also find the State failed to sufficiently demonstrate a probability that its claimed errors on this ground did in fact occur. Because we have determined there was no abuse of discretion in ordering a new trial on this ground, we need not address the State's argument regarding the trial court's finding of an irregularity in the proceedings. Accordingly, the State's motion for leave to appeal is denied.

*Motion denied.*

BROWN, J., concurs.  
SADLER, J., dissents.

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SADLER, J., dissenting.

{¶28} Because I believe that the State sufficiently demonstrated a probability that its claimed errors involving the granting of a new trial did in fact occur, I respectfully dissent and would grant the State leave to appeal.

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