[Cite as *State v. Russell*, 2011-Ohio-4519.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-108 (C.P.C. No. 01CR-6462)
Mark R. Russell,	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 8, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Mark R. Russell, pro se.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Appellant, Mark R. Russell, is appealing from the ruling of the Franklin County Court of Common Pleas which did not set aside his murder conviction. He assigns five errors for our consideration:

> [I.] APPELLANT'S 5TH 6TH AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION WERE VIOLATED ALONG WITH HIS OHIO CONSTITUTIONAL RIGHTS WHEN THE TRIAL COURT JUDGE ERRED AND ABUSED HER DISCRETION WHEN SHE FAILED TO MAKE THE

REQUISITE FINDING AS TO WHETHER APPELLANT RUSSELL WAS UNAVOIDABLY PREVENTED FROM THE DISCOVERY OF NEWLY DISCOVERED EVIDENCE WITHIN THE MEANING OF CRIMINAL RULE 33(B).

[II.] APPELLANT'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION WERE VIOLATED, ALONG WITH HIS OHIO CONSTITUTIONAL RIGHTS, WHEN THE TRIAL COURT JUDGE JULIE LYNCH ABUSED HER DISCRETION BY RECLASSIFYING HIS MOTION TO CORRECT VOID SENTENCE, MOTION FOR LEAVE TO FILE DELAYED MOTION FOR NEW TRIAL, MOTION FOR APPOINTMENT OF INVESTIGATOR, AND MOTION FOR COURT TO TAKE JUDICIAL NOTICE., AS PETITIONS FOR POST CONVICTION RELIEF.

[III.] APPELLANT'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION WERE VIOLATED, ALONG WITH HIS OHIO CONSTITUTIONAL RIGHTS, WHEN HE RECEIVED A "VOID JUDGMENT & SENTENCE" DUE TO THE TRIAL COURTS FAILURE TO ADHERE TO THE STATUTORY MANDATED REQUIREMENTS SET FORTH BY THE OHIO SUPREME COURT IN STATE V. SOUEL, R.C. 2903.02 note 15, CRIM.R. 30(A).

[IV.] APPELLANT'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION WERE VIOLATED ALONG WITH HIS OHIO CONSTITUTIONAL RIGHTS WHEN HE RECEIVED A VOID THREE (3) YEAR SENTENCE FOR A FIREARM SPECIFICATION, DUE TO THE VERDICT FORM NOT BEING IN COMPLIANCE WITH R.C.2929.71, CRIMINAL RULE 31(A).

[V.] APPELLANT'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION WERE VIOLATED ALONG WITH HIS OHIO CONSTITUTIONAL RIGHTS WHEN THE TRIAL COURT JUDGE JULIE LYNCH ABUSED HER DISCRETION BY DENYING HIS "MOTON TO CORRECT VOID SENTENCE" BASED UPON THE DOCTRINE OF RES JUDICATA. APPELLANT'S SENTENCE IS VOID DUE TO THE UNLAWFUL IMPOSITION OF POST RELEASE CONTROL.

{¶2} Russell was convicted in June 2003 of a single count of murder with a firearm specification. He pursued a direct appeal and this court affirmed the judgment of the trial court. See *State v. Russell*, 10th Dist. No. 03AP-666, 2004-Ohio-2501.

{¶3} The facts, as found by a panel of this court, were:

> On the afternoon of August 11, 2000, the victim in this case, Kenny Sartin, was found dead at the wheel of an idling car stopped on a quiet residential street in northwest Columbus with a crack pipe in his lap and a bullet hole behind his right ear. A short-barreled .38 revolver lay on the floorboards of the car. Appellant was taken into custody at the scene and never denied that he had spent much of the preceding day socializing with the victim at several motels not far from the crime scene, that he had left as a passenger in the victim's car, and that he had been in the vicinity at the time of the shooting. Appellant was not charged with Sartin's death, however, until 14 months later, after having given conflicting accounts to investigating officers regarding events surrounding the shooting.
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> At trial, the state presented the testimony of Tyrone Woods, an acquaintance of both the victim and appellant who spent time with them in the days preceding the shooting. Woods testified that on the morning of August 11, 2000, he went to visit his uncle in a room at the Suburban Lodge on State Route 161. While he was there, he received a call from his friend Kenny Sartin asking him to go to the Motel 6, also on State Route 161, so that Sartin could buy crack cocaine from Woods. Woods then returned to his uncle's room at the Suburban Lodge to drink and smoke marijuana. Around 2:00 p.m ., Woods received another call to return to Kenny's room. While there, he observed appellant and an individual known as “Chello” pull into the Motel 6 parking lot in a gray Honda Accord. After leaving, Woods received yet another phone call from a friend named Yashir staying at the Suburban Lodge. Yashir said that appellant was in a room across the hall being disruptive and would not leave, and asking Woods to come and persuade appellant to leave the area.

When Woods arrived, he found appellant, Chello, Yashir, and Sartin, among others, in the room, and they went out to the parking lot. Sartin was preparing to give Woods $50 he owed for crack cocaine when appellant became upset, saying that it was rightfully his money. Woods observed that appellant had a gun hanging out of his pocket, and Woods told him to cover it up so that it would not show. There was more bickering regarding the debt, and Woods decided to leave. At this point, appellant asked Woods to take the gun with him, but Woods refused and left with Chello and Yashir.

Woods testified that later that evening, appellant came to his house just before 11:00 p.m. and announced that Kenny Sartin was dead. The two then watched the late news on television and immediately Woods saw footage of the car that he had seen appellant and Sartin driving earlier. As they watched the news story, appellant described leaving the Suburban Lodge with Sartin and an individual known as Casper, and that at some point, the car pulled over and appellant got out, leaving Sartin and Casper in the car. Appellant stated to Woods that he then heard a pop and saw Casper running away. Woods testified that although he had not seen anyone named Casper or fitting his description during the morning or afternoon of August 11, 2000, he was, at the time, inclined to believe the story because appellant and Sartin were generally friendly despite the day's argument over the $50 debt.

Woods specifically testified that the gun recovered from the crime scene and presented as evidence in the case resembled the gun he had seen earlier in appellant's possession. He further testified that other persons partying at the motels in question had stated that appellant had been drinking and smoking crack for three days straight, although Woods did not personally observe this. Woods had seen appellant drinking alcohol on the day of the shooting, and knew that appellant possessed crack and felt that he was probably smoking it, although he did not directly observe that.

Another acquaintance of appellant and the victim, Marchello Cox, testified for the prosecution. He stated that he was the “Chello” identified in previous testimony. He testified, like Woods, that he saw both appellant and Kenny Sartin on

August 11, 2000, at motels on State Route 161. Cox testified that he was taking drugs to the motel to sell to Kenny Sartin, and that appellant was driving him. After selling drugs to Sartin, they went to the Motel 6 and drank in Sartin's room with appellant and Woods. Later he ran with appellant to the Suburban Lodge to deliver more drugs.

On the morning of the 11th, Cox gave appellant $20 because appellant said he was tired, and Cox told him to go home and get some rest. Cox stated that he knew appellant was tired because they had been up all night drinking, but that he had not personally observed appellant taking cocaine. On the afternoon of the 11th, Cox returned to the Suburban Lodge and again saw appellant and Sartin there. At this time, Cox saw the handle of appellant's gun sticking out of his pants. Cox also identified the holster submitted as evidence by the state as resembling the one he saw on appellant's person that day. When Cox left the motel parking lot on the afternoon of the 11th, appellant and Kenny Sartin were still in the parking lot, and they appeared to be having a disagreement. Cox stated that he had known Kenny Sartin approximately two years at the time of his death, and that he had never known Sartin to carry a gun.

The state presented several eyewitnesses to events surrounding the discovery of the victim's body at the wheel of his car. Michael Magora testified that about 3:15 p.m. on August 11, 2000, he was driving his daughter to a pitching clinic when he noticed a car in the area of Sandalwood Boulevard and Redwood Road. The passenger door was open and an individual, who appeared confused, was walking into the street near the vehicle. Mr. Magora could not see anyone else in the car. Mr. Magora was not asked to make a positive identification of appellant as the person he had seen walking in the vicinity of the vehicle.

Nathan Rich testified for the prosecution that he was leaving a group home he managed on Redwood Road in the vicinity of Sandalwood Boulevard when he saw a man attempting to flag down vehicles. The defense stipulated that this man seen by Rich was appellant. Appellant got in front of Rich's vehicle, and when Rich stopped, appellant opened the passenger side door and got into the car. Appellant appeared to Rich to be acting rather erratically and high, as

though as on a stimulant. Appellant seemed eager to leave the area, and told Rich that appellant's buddy was “really drunk” and appellant wanted to leave immediately. Rich became concerned for his own safety both because of appellant's behavior and because Rich could see an apparently lifeless person in the driver's seat of the stopped vehicle. Rich told appellant that he could not drive him any further and, instead, returned to his near-by place of work and remained in the car in the driveway for a short while pleading with appellant to leave the vehicle and convincing appellant that he could use the phone in the group home. Appellant appeared to attempt to make two phone calls but was unable to complete them and left on foot. As appellant left, he again pleaded with Rich to give him a ride but Rich again refused.

Cheryl Drissen was another prosecution witness describing the scene at the discovery of the victim's body. She was visiting her parents on Sandalwood Boulevard when a woman came to the door and said she had been riding a bike with her children and seen an individual in a car who appeared to be sick. After Ms. Drissen looked in the car, she called 911. At this time, a man, later identified as appellant, came running towards her from a house on the opposite corner and asked her, “did you call 911?” Ms. Drissen noticed that the car was running and asked appellant to turn it off. When he refused to do so, she reached in and turned off the ignition herself. As she did so, she noticed a gun and a brown paper bag on the floor of the passenger side of the vehicle and that the person occupying the driver's seat appeared dead. Appellant seemed to notice her observing the gun, and at this point became very agitated. Appellant said that he had just hitched a ride with some persons, and that when someone began acting weird in the car he had jumped out as the car pulled over. Appellant seemed distressed and was repeating, “oh God, oh God.” The police arrived shortly thereafter and handcuffed appellant. Ms. Drissen identified a police crime scene photograph showing the gun and paper bag on the floor of the car as accurately depicting what she had observed.

Officer Timothy J. Lewis of the Columbus Division of Police, testified and described his response to the crime scene. At 3:24 p.m. on August 11, 2000, he was on patrol on

Sandalwood Boulevard when he was flagged down by bystanders and observed an individual apparently passed out in a car with a gun laying on the passenger side floor of the vehicle. He described the vehicle as a 1992 Honda Accord. He also noticed a glass crack pipe in the individual's lap. When Officer Lewis and his partner opened the door, he noticed that the victim was bleeding from the back of his head and was completely unresponsive. The officers ascertained that the victim was not breathing, and called for an ambulance and more units to secure the scene.

Officer Lewis and other officers then detained appellant, whom other bystanders had pointed out. Appellant appeared very nervous and was apparently intoxicated.

Officer Janel Mead of the Crime Scene Search Unit, also testified regarding the crime scene. Officer Mead testified regarding the various photographs taken of the crime scene and also identified objects recovered from the vehicle. These included two crack pipes and a .38 caliber revolver containing one spent round and three live rounds.

Detective William Gillette testified regarding the homicide investigation. He testified that, on the day of the shooting, he went to the crime scene to begin his investigation, but did not personally interview appellant after appellant was taken into custody at the scene. Another detective conducted the first interview with appellant and, based on the result of that interview in which appellant implicated another person as the shooter, appellant was released. The other individual named by appellant, Robert Heltebrake, whom appellant referred to as “Casper,” was eventually detained and interviewed. Without objection, Detective Gillette was allowed to testify that Heltebrake subsequently agreed to take a polygraph examination which he passed successfully, and that this was one reason that police did not further pursue Heltebrake as a suspect.

At a subsequent interview with Detective Gillette, appellant described the circumstances of the shooting. He stated that he was seated in Casper's car, and that Casper had left the vehicle to get into the victim's car when the shooting occurred. Because this differed in some details from what Detective Gillette had been told about appellant's first

interview, he asked appellant if he would take a polygraph examination. Appellant acquiesced initially, but missed the first polygraph appointment.

Appellant subsequently contacted police stating that he had additional information regarding the shooter and would like to meet again with Detective Gillette. Detective Gillette met appellant at a restaurant and appellant indicated that he was no longer willing to take a polygraph exam. He stated that a previously unnamed person by the name of “Mook,” later identified as Jesse Lanier, was responsible for the shooting.

Yet another interview occurred between Detective Gillette and appellant, this time in the tractor cab of appellant's semi-truck. At this interview, appellant stated that he had stopped hauling drugs for certain persons on his runs as a long-haul trucker, and that these persons had recently shot at him. Appellant did not identify exactly who was responsible. Appellant then stated that he knew who had killed the victim, and that appellant was not responsible.

Detective Gillette subsequently interviewed Jesse Lanier, and based on the results of that interview, again interviewed appellant. At this interview, appellant returned to his story that “Casper” was responsible. When told that Heltebrake had been interviewed and passed the polygraph test, appellant asserted that “Casper” must have a twin brother, because he was there at the shooting. The detective also advised appellant that Heltebrake's prints had not been found in the car, only the victim's and appellant's prints. At this time, appellant stated that the victim had stolen an ATM card and was using the card to steal money from the owner's account, and that this had possibly led to the shooting.

When Detective Gillette confronted appellant with witness accounts that identified the gun and holster found in the car as those in his possession earlier in the day at the motel, appellant not having the gun on his person that day, stated only that he had had a different weapon on his person the day before. Appellant then indicated that he was once more interested in taking a polygraph test and a time was arranged for him to do so, but appellant once again did not show for his polygraph appointment.

At yet another interview in which Detective Gillette was speaking with appellant's live-in girlfriend, appellant arrived in the middle of the interview and offered yet another version of the shooting to Detective Gillette. He indicated this time that Marchello Cox was responsible for the shooting, but that Casper was there as well.

At a subsequent interview on September 17, 2002, appellant gave yet another version of the shooting. On this occasion, he stated that he and Sartin had just purchased some crack cocaine in the vicinity of Karl Road and Robinwood Drive, and while Sartin drove to Sandalwood Boulevard with appellant in the car, appellant smoked crack cocaine. Sartin then pulled over the car on Sandalwood Boulevard and appellant handed the crack pipe to him. After the crack pipe returned to appellant and he recommenced smoking, he noticed Sartin playing with a handgun. Sartin pointed the gun at appellant and appellant pushed the barrel away with his hand, whereupon the gun accidentally discharged and killed Sartin.

After this lengthy series of interviews with appellant, Detective Gillette was ultimately able to arrange for appellant to take a polygraph test. The results indicated that appellant was not being truthful about his description of events on the day of the shooting.

On circumstantial issues, Detective Gillette also testified that subsequent investigation determined that the automobile driven by the victim on the day in question had been reported as stolen. A bullet recovered during the victim's autopsy was a ballistic match for the handgun recovered at the scene.

Dr. Patrick Fardal, Chief Forensic Pathologist for the Franklin County Coroner's Office, testified regarding his examination of the victim's body. He described the victim as having no injuries other than a single gunshot wound entering behind the right ear, traversing the brain and coming to rest in the left frontal area, indicating a direction of travel from behind the victim to the left and slightly upwards. The presence of gunpowder residue inside the skull and on the outer brain membrane indicated with a high degree of certainty that the

bullet wound occurred from a contact wound, with the gun muzzle pressed against the victim's skin.

The victim suffered no other visible conditions contributing to his death. The toxicology results indicated a low level of alcohol, and moderate levels of cocaine and cocaine metabolite, roughly the equivalent of four episodes of usage over a period of four to eight hours.

Brian D. Reigle of the Ohio State Highway Patrol, testified regarding administration of the polygraph exam to appellant. Appellant was asked four specific questions regarding the circumstances surrounding the shooting. For each question covering his participation in the shooting, appellant's denials were recorded as deceptive on the polygraph examination.

Appellant testified on his own behalf. Appellant stated that he had known the victim since 1981. On the day of the shooting, appellant had been riding with the victim, who had offered to give appellant a ride home but indicated that he first wished to stop and buy some crack cocaine. As they turned onto Sandalwood Boulevard, they encountered a car driven by Robert “Casper” Heltebrake. Appellant got out of the car so that Heltebreak could get in and sell the victim some crack. Heltebreak gave the victim a porcelain pipe and, after the victim smoked some crack, an argument broke out. Appellant heard a shot and saw Heltebrake get out of the car and leave.

Appellant then flagged down the various bystanders and attempted to make a call to 911, but could not get the phone to work properly. He ran to another bystander and ask her to dial 911, which she did. This woman then asked appellant to open the door and turn the victim's car engine off, and he refused because he did not wish to disturb the crime scene. Police handcuffed appellant upon arrival and took him to police headquarters where he was interviewed by police. He told them what had happened and volunteered to take a gun powder residue test. He was told that the gun powder residue test was negative and he was released.

Appellant further testified that he took the lie detector test after he was arrested 14 months after the crime. He took the test under coercion from his counsel, who also told him that

> he should abandon his story that Heltebrake was responsible for the shooting, and tell the police that the shooting was accidental. Appellant then retained new counsel and reverted to his original, truthful version of events in which Heltebrake shot Sartin.
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> Appellant's direct testimony at trial was that he had not killed the victim, whom he described as a friend, and had never told anyone that anyone other than Heltebrake was responsible. On cross-examination, the prosecution attempted to impeach appellant with Detective Gillette's accounts of his previous recorded interviews, in which appellant implicated Jesse Lanier and Marchello Cox. Appellant continued to assert that he had never told investigating detectives that anyone other than Heltebrake had committed the shooting. He stated that Detective Gillette was the one who kept bringing up other names in interviews and that appellant had always denied that other persons were involved.
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> Appellant did admit that, at one point, he had told the detective that the shooting was accidental, and that he had written a letter to the victim's mother indicating that the shooting was accidental. He stated that he wrote this letter because of pressure from his then-counsel, who indicated that the accident story would produce a more favorable outcome than continuing to assert that Heltebrake was the shooter.
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> No other significant testimony was presented by the defense. At the close of evidence, the prosecution successfully objected to the defense's attempt to introduce the video and audio tape recordings of appellant's police interviews into evidence.
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> The jury returned a verdict of guilty and appellant was sentenced to a term of 15 years to life, with an additional three years on the firearm specification.

Id. at ¶2-34.

{¶4} Russell has filed many motions since then, the most recent including a motion for a new trial based upon the affidavit of a fellow inmate. The motions have each been overruled.

{¶5} Turning to the individual assignments of error, the trial court judge assigned to Russell's case noted that Russell had filed two previous motions for a new trial. The third motion for a new trial was filed over seven years after Russell was convicted of murder. The affidavit appended to the motion was apparently signed on November 2, 2009 and then filed as a part of a motion filed over eight months later. The affiant is not identified with an inmate number or full name.

{¶6} The trial court was within its discretion to find that Russell was too late in attempting to pursue a third motion for new trial. Even the lapse between the signing of the affidavit and the filing of the motion is beyond the time allowed for the filing of a motion for new trial based upon "newly discovered" evidence.

{¶7} The first assignment of error is overruled.

{¶8} Whether the motions filed by Russell were viewed as motions or as a form of petition for post-conviction relief is immaterial under the circumstances. Russell waited too long to seek relief.

{¶9} The second assignment of error is overruled.

{¶10} Nothing about Russell's judgment or sentence is void. He was convicted of murder in 2003 and received the term of incarceration mandated for murder.

{¶11} The third assignment of error is overruled.

{¶12} Nothing about the gun specification added to Russell's murder conviction is void. On an earlier appeal, the mistake about the number of gun specifications assessed against Russell was corrected. The issue has been addressed and resolved. In technical legal terms, the issue regarding his gun specification is res judicata and barred by the doctrine of res judicata.

{¶13} The fourth assignment of error is overruled.

{¶14} As to the fifth assignment of error, the mistaken part of Russell's sentencing entry which refers to post-release control has no effect on Russell. If he ever is released from prison, it will be via parole. As a parolee, he will be under the supervision of the Adult Parole Authority and an assigned parole officer. The terms of his release will be significantly more strict than those of an inmate who is on post-release control. No reversible error is presented by the fifth assignment of error.

{¶15} All five assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and KLATT, J., concur.

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