[Cite as *State v. Delawder*, 2015-Ohio-1857.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	Case No. 14CA12
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
RODNEY E. DELAWDER,	:	
Defendant-Appellant.	:	**RELEASED: 05/12/2015**

APPEARANCES:

J. Roger Smith, II, Law Offices of J. Roger Smith, II, Huntington, West Virginia, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and W. Mack Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

Harsha, J.

{¶1} A jury convicted Rodney E. Delawder of murder and an accompanying firearm specification, improperly discharging a firearm at or into a habitation, and felonious assault. The evidence established that Delawder beat up his brother-in-law, Larry McKnight, and then fired a shotgun through the glass panel of a back door of a home, killing another brother-in-law, John McKnight.

{¶2} Because the state incorrectly advised his trial counsel that DNA on the fired shotgun shell had been contaminated and was not available for testing, Delawder contends that the trial court erred by denying his renewed motion to suppress the state's evidence that found his DNA on the shotgun. However, the state's evidence established that the evidence was not materially exculpatory because the act of firing a shotgun shell destroys DNA on the fired shell so that the chance of DNA remaining on the shell is minimal. Moreover, it was uncontroverted that the state's mistaken

statement in discovery was not a product of bad faith. And the trial court granted Delawder's request that the state test the preserved swab of the fired shell casing, with the result confirming the state's contention by finding no DNA on the shell. Therefore, the trial court did not err in denying Delawder's renewed motion to suppress the state's DNA evidence.

{¶3} Delawder next asserts that his trial counsel's refusal to call expert or character witnesses constituted ineffective assistance of counsel. Delawder cannot establish deficient counsel performance because the decision to call witnesses constitutes trial strategy and will not be second-guessed by a reviewing court. Moreover, there is no evidence in the record that expert and character witnesses were available or what their testimony would have been. Finally, because of the overwhelming evidence of his guilt, Delawder has not established a reasonable probability that, but for his trial counsel's failure to call expert and character witnesses, the result of his jury trial would have been different. Therefore, we reject Delawder's claims and affirm his convictions and sentence.

I. FACTS

{¶4} The state charged Delawder with one count of murder with a firearm specification, one count of improperly discharging a firearm at or into a habitation, and one count of felonious assault. After receiving appointed counsel, Delawder pleaded not guilty to the charges.

{¶5} In discovery the state provided Delawder with copies of reports from the Bureau of Criminal Investigation ("BCI") indicating that: 1) a forensic scientist had swabbed the trigger and trigger guard, stock, hammer, barrel latch, and shell casing

from the single-barrel 12-gauge shotgun submitted to BCI for testing; 2) everything was tested for DNA except for the shell casing; and 3) all the DNA tested on the shotgun matched Delawder's DNA. Delawder's trial counsel then contacted Sgt. Aaron Bollinger, the lead detective of the Lawrence County Sheriff's Office, who advised him that any DNA evidence from the fired shell had been contaminated by BCI personnel and could not be tested by either party.

{¶6} Delawder filed a motion to suppress the state's use or reference to any DNA evidence at trial based in part on Sgt. Bollinger's representation that any DNA evidence from the expended shell had been contaminated by BCI and could not be tested. At the hearing on the suppression motion, Delawder's trial counsel conceded there was no "allegation of bad faith" on the part of the state in destroying any DNA evidence on the fired shotgun shell. The trial court denied the motion.

{¶7} The case proceeded to a five-day jury trial, which produced the following evidence. Delawder lived with his wife, Jody, her daughter, Hannah, and Jody's mother, Carolyn McKnight, and Jody's brothers, John and Larry McKnight, in Carolyn McKnight's home in Ironton. Delawder drank beer with his brothers-in-law and after consuming their supply, Delawder sold a gun and used the proceeds to buy more beer. After more drinking Delawder got angry and starting punching and kicking Larry McKnight. Larry McKnight ultimately suffered a broken jaw, cranial fracture, sprained wrist, and concussion from the beating. He could not remember anything between when Delawder beat him up and when the police arrived after his brother John got shot. Larry McKnight owned a single-barrel 12-gauge shotgun that he kept in the building on

his mother's property where he stayed. The gun hung on deer antlers, and he never kept it loaded.

{¶8} Delawder's wife, Jody, drove back home with Hannah, who she had taken to urgent care to check a dislocated kneecap. When they returned they saw Delawder chasing and beating up Larry McKnight. John called 911 and reported the fight to the police. Jody managed to get Delawder to stop beating Larry, but when he got mad and threatened to kill her, she ran back to the car and drove off with her daughter. At the time Delawder threatened to kill his wife, she had called Delawder's sister, Dana Sherman, who overheard the threat and called the Lawrence County Sheriff's Office. In a statement she gave to police, Sherman mentioned that when her brother, Delawder, drinks, "he is not in his right mind and the kids are scared to be around him cause he doesn't know what he does" and that Delawder "has a chemical imbalance when he drinks."

{¶9} Carolyn McKnight, Delawder's mother-in-law, testified that she was in the house and saw Delawder kicking Larry McKnight in his stomach and head in the backyard. Larry managed to get into the house and laid on the floor, holding his head. She saw Delawder and John fighting over a gun and Delawder ended up with it. John came into the house and held the door, and then Carolyn heard a shot, and John fell to the floor telling her that Delawder had shot him. An autopsy performed on John McKnight's body established that he died of the gunshot wound to the chest.

{¶10} Although Carolyn has had paranoid schizophrenia for years, she has been on regular medication for it. Sgt. Bollinger testified that Carolyn's testimony about

Delawder killing John McKnight was consistent with the statements that she had provided to law enforcement during the investigation.

{¶11} Jody testified she had driven away because she thought that the fight was over, and when she and Hannah returned to the home a few minutes later, they saw that Delawder's truck was gone. She went to the kitchen, saw a gunshot hole in the side glass portion of the back door, and then observed her brother John lying face down on the floor, her brother Larry sitting on the floor beside John, and her mother, Carolyn McKnight, sitting in a rocking chair. She called 911 and reported the incident. She also called Delawder's sister, Dana, and told her that Delawder shot John and was coming to her house. Delawder crashed his car and then fled on foot to his mother's residence, where he told her John and Larry McKnight had raped his wife.

{¶12} The police subsequently took Delawder into custody. Lawrence County Sheriff Jeff Lawless testified that Delawder told him he was sorry, that he did not mean for this to happen, and that John and Larry McKnight had raped Jody several years ago when she was 13 years old. When Sheriff Lawless asked Delawder what he had done with the gun, he told him he got rid of it.

{¶13} In subsequent statements to Sgt. Bollinger, Delawder claimed that he got into a fight with John and Larry concerning his belief that they molested Jody when she was younger and although he initially claimed that he did not remember anything about a gunshot, he finally stated that he remembered swinging the gun backwards and it going off.

{¶14} Police recovered the single-barrel 12-gauge shotgun in the backyard of the McKnight home. BCI Special Agent Shane Hanshaw testified that based on tests

he performed at the crime scene the gunshot that entered through the glass part of the back door was fired by someone of Delawder's height at a place in the backyard about 19 feet from the door. Hanshaw testified that Delawder's claim that the gun accidentally went off when he was at the bottom of the back steps was not possible. According to Hanshaw if the shooting occurred as Delawder claimed, the trajectory of the shell would have gone into the ceiling, not into the victim's chest.

{¶15} Sara Smith, a forensic scientist in the DNA section of BCI, testified that she received the shotgun for testing and swabbed the trigger, trigger guard, stock, hammer, barrel latch, and fired shell casing for possible DNA. She performed testing on all of the areas swabbed except for the spent shell casing. She testified that she did not test the swab of the shell casing because shell casings are small so the amount of DNA that may be present would be so minimal as to not be as useful as swabs of other areas of the gun. Smith further testified that the act of firing a shell destroys the DNA so that the chance of it being on the fired shell is "slim to none." Smith has performed thousands of DNA tests and she could not recall anyone getting a DNA profile from a fired shell. All of the other tested areas of the shotgun matched Delawder's DNA.

{¶16} When Smith testified on cross-examination that the swab taken of the fired shotgun shell could still be tested for DNA, Delawder's trial counsel requested that the trial court order BCI to test it and the state agreed. The state then rested its case, and Delawder renewed his motion to suppress the state's DNA evidence. In light of Smith's testimony that the shell had been swabbed, but not tested, Delawder's trial counsel argued that his trial strategy had been prejudiced by Sgt. Bollinger's erroneous representation that the shotgun shell could not be tested because of contamination.

Delawder's counsel acknowledged that this evidence had been withheld from the defense "through inadvertence I'm sure." Sgt. Bollinger noted that his erroneous statement to Delawder's trial counsel was based on his conversation with an employee in the BCI firearms section, who advised him that she had handled the items and that DNA testing could no longer be done; unbeknownst to this employee, however, the DNA section had already swabbed the gun and shell. The trial court denied Delawder's renewed motion to suppress. Later, Smith tested the swab of the spent gunshot shell, but found no DNA on it.

{¶17} Delawder presented the testimony of two witnesses in his case. First, his stepdaughter Hannah testified that after Delawder stopped beating up Larry McKnight, Larry darted into the smokehouse, which is where he lived and where the shotgun was located. Nevertheless, Hannah also confirmed that Delawder violently beat Larry, she was scared of Delawder at that time, and when they returned to the house after Delawder fled, she saw John lying face down on the kitchen floor and Larry sitting behind him. Delawder's only other witness was James Swab, a cellmate, who testified that he ran into Larry after the incident and claimed that Larry told him that he had retrieved the gun when he was tired of Delawder beating him up and that they then fought over the gun, and it went off.

{¶18} The jury returned verdicts finding Delawder guilty as charged, and the trial court sentenced him accordingly. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶19} Delawder assigns the following errors for our review:

1. The Trial Court committed an abuse of discretion and reversible error in its decision to deny Appellant's Motion To Suppress, as it pertains

> to DNA testing, by allowing the State to present evidence of the Defendant's DNA on the shotgun when the State incorrectly advised Defendant's counsel that the DNA on the shotgun shell had been contaminated and not tested when, in fact, it had [been] preserved by the State but not tested until the fourth day of trial.
>
> 2. Trial counsel's refusal to call expert witnesses and character witnesses amounted to ineffective assistance of counsel to such extent that the Defendant was deprived of a fair trial and, but for the ineffective assistance of counsel, the result of the proceeding below would have been different.

III. LAW AND ANALYSIS

A. Disclosure of Evidence Favorable to the Defendant

{¶20} In his first assignment of error Delawder asserts that the trial court erred in denying his renewed motion to suppress the state's DNA evidence. He contends by mistakenly representing that the shell could not be tested because it had been contaminated, the state improperly withheld evidence that the fired shotgun shell was in fact available for testing. In general appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Codeluppi*, 139 Ohio St.3d 165, 2014–Ohio–1574, 10 N.E.3d 691, ¶ 7; *State v. Wesson*, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶ 40; *State v. Burnside*, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶ 8; *State v. Richards*, 4th Dist. Athens No. 14CA1, 2015-Ohio-669, ¶ 24. Under this standard:

> When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.

Burnside at ¶ 8.

{¶21} In essence Delawder claims that the state improperly withheld discovery of material exculpatory evidence in the form of the untested swab of the fired shotgun shell. " 'Whether evidence is materially exculpatory is a question of law.' " *State v. Campbell*, 4th Dist. Adams No. 13CA969, 2014-Ohio-3860, ¶ 10, quoting *State v. Fox*, 2012-Ohio-4805, 985 N.E.2d 532, ¶ 28 (4th Dist.).

{¶22} "Due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever that evidence is material either to their guilt or punishment." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 30, citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This result is the same regardless of whether the state acted in good faith or bad faith. *Brady* at 87; *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶ 7. Similarly, upon a defendant's written demand for discovery Crim.R. 16(B)(5) imposes a duty on the prosecuting attorney to disclose "[a]ny evidence favorable to the defendant and material to guilt or punishment." *See State v. Norman*, 2013-Ohio-1908, 992 N.E.2d 432, ¶ 54 (10th Dist.). In cases in which the defendant asserts that the government withheld or destroyed evidence, the defendant bears the burden of establishing his case. *State v. Rivas*, 121 Ohio St.3d 469, 2009-Ohio-1354, 905 N.E.2d 618, ¶ 14; *see also Fox* at ¶ 26 ("Ordinarily, a defendant bears the burden to prove that withheld evidence is materially exculpatory").

{¶23} The dispositive issue is whether the withheld evidence—the fired shotgun shell that had been swabbed for DNA, but not tested before trial—was materially exculpatory. "Evidence is considered material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

have been different.' " *Brown* at ¶ 40, quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶24} "The *Brady* test is stringent * * * [so] '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' " *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549 (1991), quoting *United States v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Rivas* at ¶ 14. Evidence is not materially exculpatory if " 'no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' " *Geeslin* at ¶ 9, quoting *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *see also State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 79; *Fox* at ¶ 25.

{¶25} According to the unrebutted testimony of BCI forensic scientist Smith, who had performed thousands of DNA tests and could not recall anyone obtaining a DNA profile from a fired shell, there was little or no chance that DNA remained on the fired shotgun shell. The mere possibility that the fired shell could still be tested for DNA thus did not establish that this evidence was materially exculpatory.

{¶26} Notably, Delawder cites no case authority on appeal in support of his claim that this inadvertently withheld evidence was materially exculpatory. *See Robinette v. Bryant*, 4th Dist. Lawrence No. 14CA28, 2015-Ohio-119, ¶ 33 ("It is within our discretion to disregard any assignment of error that fails to present any citations to cases or statutes in support"). Instead, his citation of authority in his initial brief is

limited to a passing reference to Crim.R. 16(B), which we have determined to be inapplicable to the evidence in question because it was not materially exculpatory.

{¶27} Moreover, although the evidence that the spent shell had not been tested for DNA does not fall into the category of evidence that was lost or destroyed by the state, we are persuaded that cases addressing these circumstances are instructive. In these cases "[u]nless a defendant can show that the state acted in bad faith, the state's failure to preserve potentially useful evidence [as opposed to materially exculpatory evidence] does not violate a defendant's due process rights." *Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, at syllabus, citing *Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281; *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 77 ("*Youngblood* made a clear distinction between materially exculpatory evidence and potentially useful evidence"). We already found the withheld evidence did not constitute materially exculpatory evidence so, at best, it was potentially useful. But as Delawder's trial counsel conceded and the evidence at trial established, the state's erroneous statement to him that the shell could not be tested was not made in bad faith, but instead was based on a mistaken statement by a BCI employee from the firearms section who did not know that the DNA section had already swabbed the shell. Therefore, the state's inadvertent withholding of the evidence from Delawder did not violate his right to due process.

{¶28} In addition once the misstatement was discovered during the cross-examination of the BCI forensic scientist, the state agreed to and did test the swab of the fired shotgun shell. The result of the test—finding no DNA on the shell—confirmed

the forensic scientist's testimony that there was little or no chance of recovering DNA from a fired shell.

{¶29} Insofar as Delawder argues on appeal that the trial court should have declared a mistrial, he did not request a mistrial during the trial and his assignment of error does not specify this as error. " 'Appellate courts review assignments of error-we sustain or overrule assignments of error and not mere arguments.' " *See State v. Lamb*, 4th Dist. Highland No. 14CA3, 2014-Ohio-2960, ¶ 13, quoting *State v. Harlow*, 4th Dist. Washington No. 13CA29, 2014-Ohio- 864, ¶ 10.

{¶30} Therefore, the trial court did not err in denying Delawder's renewed motion to suppress the state's DNA evidence. We overrule his first assignment of error.

B. Ineffective Assistance of Counsel

{¶31} In his second assignment of error Delawder asserts that his trial counsel's failure to call expert and character witnesses constituted ineffective assistance of counsel.

{¶32} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014–Ohio–308, 2014 WL 346691, ¶ 23. The defendant bears the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006–

Ohio–6679, 860 N.E.2d 77, ¶ 23. Failure to establish either part of the test is fatal to an ineffective-assistance claim. *Strickland* at 697, 104 S.Ct. 2052; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶33} First Delawder claims that he requested that his trial counsel retain a firearm and a DNA expert and that the DNA expert testify on his behalf at trial. However, as the state notes his trial counsel's motion for approval of payment of appointed counsel fees and expenses proves that counsel did retain firearms and DNA experts who assisted counsel in the defense of the criminal case. (OP76) For example, the motion notes that the DNA expert reviewed the case file and helped trial counsel prepare questions for cross-examination of the state's DNA witness. (*Id.*)

{¶34} Moreover, " 'counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 203, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001). "Because calling witnesses is within the realm of trial tactics, defense counsel did not have a duty to call an expert witness." *State v. Goza*, 8th Dist. Cuyahoga No. 89032, 2007-Ohio-6837, ¶ 58.

{¶35} Delawder also argues that his trial counsel was ineffective for failing to call character witnesses who could have rebutted the evidence concerning his alleged violent nature when drinking alcohol. Again, we will not second-guess counsel's decision whether to call witnesses because "[d]ebatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if a better strategy had been available." *State v. Albert*, 10th Dist. Franklin No. 14AP-30, 2015-Ohio-249, ¶ 40, citing *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

Because Delawder's own wife and sister testified about his drinking and violent behavior on the date in question and his sister testified about his history of violent behavior when drinking, counsel could have reasonably determined that no character witnesses would have credibly testified in rebuttal. Delawder's claim on appeal that he "advised his trial counsel of several character witnesses that he wanted called on his behalf at trial" is not supported by the record and we cannot speculate about testimony that was not presented or proffered at trial. *See State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 179, quoting *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus (" '[a] reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matter' "); *State v. Hibbler*, 2d Dist. Clark No. 2001-CA-43, 2002-Ohio-4464, ¶ 30 ("Absent evidence in the record indicating that positive character witnesses were willing and able to testify, we cannot say that trial counsel provided deficient representation by failing to call them").

{¶36} Finally, the evidence was overwhelming that Delawder committed the crimes. He consumed alcohol, got angry, beat up Larry McKnight, and scared his own wife and sister by threatening to kill his wife. His mother-in-law witnessed John McKnight fighting with him over the gun and after Delawder gained control of it and John ran inside the house and held the door, she heard the gunshot and saw John fall, telling her that he had shot him. Delawder then fled the scene, and when his wife arrived at the scene, she called his sister and told her that Delawder had shot John. When Delawder was arrested, he told the sheriff that he was sorry, that he got rid of the gun, and that he was angry at John and Larry because they had sexually assaulted his

wife several years earlier. He later claimed to the lead detective that he held the gun and it went off when he swung it backwards, but a BCI investigator determined that his story of an accidental shooting was not possible because of the trajectory taken by the shell. Delawder's DNA was present on the shotgun. The speculative musings about what in hindsight additional witnesses might have testified to cannot establish a reasonable probability that, but for his trial counsel's alleged error in failing to call expert and character witnesses, the result of his jury trial would have been different.

{¶37} Delawder's claim that his trial counsel provided ineffective assistance fails because he cannot establish that his counsel was either deficient or that he was prejudiced by counsel's failure to call expert and character witnesses. We overrule his second assignment of error.

IV. CONCLUSION

{¶38} Delawder has not established that the trial court committed error. Having overruled his assignments of error, we affirm his convictions and sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.