[Cite as *State v. Wade*, 2015-Ohio-997.]

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

STATE OF OHIO,	:	Case No. 14CA3435
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JON WADE,	:	
Defendant-Appellant.	:	**RELEASED: 03/12/2015**

APPEARANCES:

Brian A. Smith, Barberton, Ohio, for appellant.

Sherri K. Rutherford, Chillicothe Law Director, and Benjamin A. Sigall, Chillicothe Assistant Law Director, Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} A jury convicted Jon Wade of operating a vehicle under the influence of alcohol or drugs of abuse or a combination of them, and operating a vehicle while under the influence of a listed metabolite of a controlled substance. On appeal Wade claims that his trial counsel's decision to call him as a witness despite his prior felony convictions constituted ineffective assistance of counsel. Although these decisions are normally based on trial strategy, the evidence supports Wade's contention that the decision to call him as a witness was based on a mistake attributable to his trial counsel. Nevertheless, Wade cannot establish prejudice because there is no reasonable probability that but for counsel's errors the outcome of the trial would have been different. Without his testimony he was left with only the testimony of his friend, James Lucas, who was heavily intoxicated at the time the offenses occurred. On the other hand the state presented the credible evidence of Ross County Deputy Sheriff

Chris Davis, who had no motivation to lie on the dispositive issue of whether Wade operated the vehicle. We need not address any additional arguments that are not encompassed in his specifically assigned error.

{¶2} Next Wade argues that his trial counsel was ineffective when she stated in her closing argument that Deputy Sheriff Davis reasonably concluded that Wade had been driving the vehicle because he was in the driver's seat. Trial counsel's concession of reasonableness was not an admission that it was also accurate. Rather it was an effort to avoid calling the deputy either a liar and to provide the jury an acceptable way to discredit his testimony. In other words, it constituted sound trial strategy. In addition there is no reasonable probability that without this statement, the outcome of his trial would have been different.

{¶3} In his third assignment of error Wade asserts that his trial counsel was ineffective for failing to file a motion to suppress his urinalysis result. He claims that the state's trial testimony indicated that law enforcement officers failed to collect his urine specimen in accordance with the applicable health regulation. Wade's assertion fails because a failure to file a motion to suppress does not constitute ineffective assistance of counsel per se. And he may not demonstrate that his trial counsel's performance was deficient in failing to file a pretrial motion by focusing on evidence adduced at trial. Finally, the state's evidence at trial did not establish that the state violated the health regulations.

{¶4} In his fourth assignment of error Wade claims that his convictions are against the manifest weight of the evidence because Deputy Sheriff Davis's testimony was inconsistent and there were problems with the chain of custody of the urine

specimen. Deficiencies in the chain of custody that Wade raises go to weight of the evidence, not admissibility. And because we defer to the jury on the weight and credibility of the evidence, we are not persuaded that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the convictions. Therefore, we overrule Wade's fourth assignment of error and affirm his convictions.

II. FACTS

{¶5} The state charged Jon Wade with operating a vehicle under the influence of alcohol or drugs of abuse or a combination of them in violation of R.C. 4511.19(A)(1)(a) and operating a vehicle while under the influence of a listed metabolite of a controlled substance (marijuana) in violation of R.C. 4511.19(A)(1)(j)(viii)(II). The trial court appointed counsel to represent Wade, who entered a plea of not guilty to the charges.

{¶6} The case proceeded to a jury trial, where according to Wade's witnesses, Wade finished work at a store in Waverly and drove to visit his friend, James Lucas, at his apartment in Chillicothe. Lucas's girlfriend, Christina Smith, acting as the designated driver of Lucas's 1976 Pontiac Bonneville, drove Lucas, Wade, and Jeremy Smith to several places where they consumed alcohol. After Christina Smith and Lucas got into an argument, she pulled the car into an apartment complex in Chillicothe. At that point Lucas, who admitted drinking seven beers and two shots, was extremely intoxicated; Wade drank at least a few beers.

{¶7} Christina Smith then drove the car a short distance from the apartment complex to a lane near the parking lot of the Tractor Supply Company, where she got out of the car and left towards the apartment complex. According to Lucas and Wade,

Lucas got into the driver's seat and then slid over to the front passenger seat when Wade got into the driver's seat.

{¶8} Deputy Sheriff Chris Davis testified that around 10:30 p.m. that evening, he responded to a report of a disturbance, which involved a vehicle that matched Lucas's car, at the apartment complex. When he arrived at the scene there was no disturbance, and after questioning a bystander who had heard an argument, he looked over at the Tractor Supply Company's parking lot and spotted Lucas's car about 75 to 100 yards away from him. Davis saw that the car was being driven towards the street from the parking lot, but when the deputy made a right-hand turn into the parking lot, the car stopped, and the lights went off. According to Davis, the vehicle was out of his sight only two to three seconds after he first spotted it, and after he started driving his cruiser towards the car about six to eight seconds elapsed until the car stopped.

{¶9} Davis then pulled in behind the car, activated his emergency lights, and approached the vehicle. Davis observed Wade in the driver's seat with the keys in the ignition, Lucas in the front passenger seat, and Jeremy Smith in the back seat. He could smell an overwhelming odor of alcohol from the vehicle and open containers of alcohol. When Davis noticed that Wade's eyes were bloodshot, glassy, and watery, and that Wade smelled of alcohol, Davis performed field sobriety tests on him. After he determined that Wade was intoxicated, he gave Wade Miranda warnings. Deputy Sheriff Davis testified that Wade never denied that he was the driver of the vehicle, and he admitted having had three beers.

{¶10} Davis arrested and transported Wade to the police station, where Wade consented to a urine test. Deputy Sheriff Shane Daubenmire testified that using a

highway patrol collection kit, he collected the urine sample from Wade in a restroom at the police station, and that he followed the instructions on the kit in collecting the sample. Daubenmire sealed the kit and gave it to Davis, who mailed it to the Ohio State Highway Patrol Crime Laboratory for testing. Nancy Keune, a criminalist working at the crime laboratory, testified that she tested the sample and found it contained 78.08 nanograms of marijuana metabolite per milliliter of Wade's urine.

{¶11} After Davis arrested Wade he made contact with the passengers—Lucas and Jeremy Smith—who appeared very nervous. A K-9 dog conducted a sniff and alerted on the vehicle. The officers searched the vehicle and found a small amount of marijuana and a marijuana pipe in a plastic bag under the back seat where Jeremy Smith had been sitting. Davis testified that Lucas was drunk, loud, belligerent, and uncooperative during the incident. Davis further testified that there was no need to ask Wade whether he had been driving the vehicle because the car was only out of his sight for two to three seconds and there was no way they could have switched seats given their level of intoxication.

{¶12} Wade had three witnesses. Christina Smith testified that when she was with the group, Wade had not been driving. However, she conceded that at the time she left the group, the police had not arrived and she did not have any idea whether any of them, including Wade, got into the driver's seat of the vehicle and operated it after she left. Lucas and Wade testified that although Wade was sitting in the driver's seat when the police arrived, he had not operated the car and the keys were not in the ignition. Wade admitted smoking marijuana the night before the incident when he was

with a friend, but denied smoking any marijuana on the date of his arrest. He also testified that he specifically told Davis that he has not been driving the car.

{¶13} The jury returned verdicts finding Wade guilty as charged. After the trial court sentenced him this appeal followed.

III. LAW AND ANALYSIS

A. Ineffective Assistance of Counsel

{¶14} In his first, second, and third assignments of error Wade claims that his trial counsel was ineffective. To prevail on a claim of ineffective assistance of counsel an appellant must establish that (1) counsel's performance was deficient, that is, it fell below an objective standard of reasonable representation, and (2) counsel's deficient performance resulted in prejudice, meaning that there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mundt*, 115 Ohio St.3d 22, 2007–Ohio–4836, 873 N.E.2d 828, ¶ 62; *State v. Sowards*, 4th Dist. Gallia No. 06CA13, 2013–Ohio–3265, ¶ 11. In employing this standard we apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," with the "benchmark" being "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* at 689, 686; *State v. Williams*, 99 Ohio St.3d 493, 2003–Ohio–4396, 794 N.E.2d 27, ¶ 159.

{¶15} In his first assignment of error Wade asserts that his trial counsel's decision to have him testify, despite his previous felony convictions, constituted ineffective assistance of counsel. Wade testified on his own behalf. On cross-

examination when the state attempted to impeach Wade's credibility with his three prior felony convictions for sexual battery, his trial counsel objected on the basis that the state had not disclosed these felony convictions in discovery. The state represented that its copy of discovery included twenty pages sent by facsimile transmission; but counsel indicated that she had received only 18 of the 20 pages transmitted. Counsel indicated that it might be her fault for not noticing that pages were missing from the state's transmission and that had she known about Wade's prior felony convictions for sexual battery, she would have advised him not to testify:

> COURT: Now then. Ms. Rankin. Would you like to, let's state your basis for your objection here, alright?
>
> MS. RANKIN: I'm sorry, Judge, I'm a little upset. Because it's possible that I made a mistake that may be fatal to my client's case. The State contends that it provided me with my client's criminal record. I don't have that in my discovery packet. Discovery is faxed to my office. (Inaudible) twenty pages. I'm missing the two critical pages * * *. * * * I'm not accusing Mr. Sigall or the Law Director's office of doing anything at all inappropriate. * * * I don't know what to say, Judge. Other than if I had been provided with * * * a criminal record where my client has three felonies, I never would have put my client on the stand. I never would have put my client on the stand, Judge. And particularly in this case. Where I've already had two witnesses testify that he wasn't driving. There's no need to put him on the stand under those circumstances. He and I never * * * talked about his driving record because I have a copy of his driving record. We talked about how that would affect sentencing. But I didn't discuss with him anything further in regards to that because I wasn't aware. Had I been aware, again, I would not have put him on the stand or at least my advice to him, it still would be his choice whether to testify, but I have a feeling that Jon would have taken my advice and he would not have testified your honor. I can't take that back, now. If I had, if the State had provided, this is a problem with the faxing.
>
> * * *
>
> COURT: Alright. So again, Ms. Rankin, your objection is what? What's the basis?

> MS. RANKIN: Well, I'm gonna maintain, your honor that I have not been provided with those two pages pursuant to Criminal Rule 16. * * * But I think the remedy here is that the State doesn't get to impeach him based on the printout it has. And [i]nquire of him convictions that are listed on the printout.
>
> * * *
>
> Again, Judge, I didn't discuss with Jon a criminal record because I wasn't, I didn't see that documentation that the State has. Those two pages. I didn't discuss it with him. I don't know that my client has knowledge of the rules of evidence, of 609 that he could be impeached on that. I think that's why he has a lawyer so his lawyer can advise him. * * * In fact, I don't have those discussions with my client unless there's, I've been provided with something that tells me that is an issue. And I did not, I don't have any confirmation that those pages came through, your honor. I dispute that characterization. That's not what I said. I said I didn't look and see where I was missing pages and then, and go to the prosecutor's office and say hey I don't have these pages what's on 'em. I will take responsibility for that Judge. I have to because I didn't look. I don't know that that's required under Criminal Rule 16, though.

{¶16} The trial court then overruled counsel's objection and permitted the state to cross-examine Wade about the felony convictions. On cross-examination Wade admitted he had prior felony convictions for sexual battery in 2005.

{¶17} We do not doubt the state's contention that as a general rule defense strategy to have the defendant testify, notwithstanding the availability of prior felony convictions to impeach the defendant on cross-examination, does not constitute deficient attorney performance. *See, e.g., State v. H.H.*, 10th Dist. Franklin No. 10AP-1126, 2011-Ohio-6660, ¶ 25, quoting *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶ 138 ("Although introducing evidence of prior convictions or bad acts may be questionable strategy in hindsight, this court generally 'refrains from second-guessing strategic decisions counsel makes at trial, even when counsel's trial strategy was questionable' "); *State v. Marbury*, 10th Dist. Franklin No. 03AP-233, 2004-Ohio-3373, ¶ 54 ("the decision to have appellant testify was sound trial strategy

[because, among other reasons,] appellant admitting to his prior criminal record helped bolster his credibility").

{¶18} Here Wade's trial counsel did not make the decision to have him testify based on trial strategy. Instead, as she candidly and forthrightly conceded, if she had known about his prior felony convictions, she would have advised Wade not to testify. Rather than making a specious argument that she acted reasonably in determining that the state had provided her with all of the requested discovery and believing that she had received it all, counsel acted professionally and took responsibility for the mistakes of not checking to see if she had all the pages of the state's transmission, and not asking Wade about his prior convictions.

{¶19} Notwithstanding the evidence supporting a finding of deficient performance, it is clear that her conduct did not prejudice Wade. Without his own testimony Wade's only witnesses were Christina Smith and Lucas. Christina Smith admitted that she left the group in the car before the police arrived so she had no knowledge whether Wade operated the vehicle after she left. And the evidence established that Lucas was extremely intoxicated, belligerent, and uncooperative at the time of the incident, and he had a motive to lie to support his friend, Wade. Lucas admitted that when the police officers arrived, Wade was in the driver's seat of the car. Contrasted against Lucas's testimony that Wade had not operated the car, the state introduced Deputy Davis's testimony that he had seen the car move between 75 and 100 yards away from where he first spotted it. Davis lost sight of the car for only two or three seconds, which was too little time for Wade to switch places before Davis stopped behind it. Davis, unlike Lucas, had no motive to lie or to frame Wade for something

Lucas did. And the trial court specifically instructed the jury that evidence that Wade was convicted of sexual battery was received only for the limited purpose of testing his credibility and the weight to be given by his testimony. Evid.R. 609(A)(2). We presume the jury followed instructions from the court. *See State v. Mammone,*139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 51.

{¶20} Under these circumstances Wade has not established that his trial counsel's decision to call him as a witness prejudiced him. Based on the record there was no reasonable probability that but for counsel's alleged errors, the outcome of the trial would have been different.

{¶21} Wade also argues that his trial counsel was ineffective because she did not object to the admission of his prior felony convictions based on Evid.R. 403. He also notes the trial record disclosed that his trial counsel was suffering from certain health issues. We need not address these unassigned errors because " '[a]ppellate courts review assignments of error—we sustain or overrule assignments of error and not mere arguments.' " *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, and cases cited there. Moreover, we can discern no prejudice regarding the former claim and no deficient performance or prejudice for the latter one. Therefore, we overrule Wade's first assignment of error.

{¶22} In his second assignment of error Wade contends his trial counsel was ineffective when she stated in her closing argument that after Deputy Davis stopped the vehicle, it was reasonable for him to conclude that Wade was the driver because he was in the driver's seat.

{¶23} Wade's trial counsel was not deficient in this request. It was sound trial strategy to concede an uncontroverted point—that it is generally reasonable to conclude that the person in the driver's seat drove the car—to bolster her credibility in arguing that Deputy Sheriff Davis simply misperceived the situation, instead of accusing the police officer of committing perjury. *See State v. Young*, 5th Dist. Fairfield No. 30-CA-85, 1999 WL 252835, *4 (Apr. 19, 1999) ("Clearly, any concession as to appellant's guilt or as to the credibility of witnesses constituted trial strategy, rather than ineffective assistance of counsel"). The remarks by Wade's trial counsel did not constitute a concession of guilt, but to the contrary, focused the jury's attention to the portion of the state's case that she was contesting, i.e. the conclusion was reasonable but not accurate. *See State v. King*, 2d Dist. Montgomery No. 18463, 2002 WL 1332565, *6 (June 14, 2002). " 'There is a distinction which can and must be drawn between a statement or remark which amounts to a tactical retreat and one which has been called a complete surrender.' " *State v. Goodwin*, 84 Ohio St.3d 331, 337, 703 N.E.2d 1251 (1999), quoting *Clozza v. Murray*, 913 F.2d 1092, 1099 (4th Cir.1990). Trial counsel's statement in closing argument represented nothing more than a tactical retreat based on sound trial strategy rather than an admission of guilt or surrender.

{¶24} Moreover, Wade did not establish that he was prejudiced by counsel's statements in closing argument. The trial court emphasized in its instructions to the jury that "closing arguments are not evidence." *See State v. Pickens*, __ Ohio St.3d __, 2014-Ohio-5445, __ N.E.3d __, ¶ 138 (in determining that prosecutorial misconduct in closing argument did not constitute reversible error, court relied in part on the fact that "the trial court instructed the jurors to decide the verdict on the evidence alone and

explained that arguments of counsel were not evidence"). We overrule Wade's second assignment of error.

{¶25} In his third assignment of error Wade argues that his trial counsel was ineffective for failing to file a motion to suppress his urinalysis result. He claims that the state's trial testimony indicated that law enforcement officers failed to collect his urine specimen in accordance with Ohio Adm.Code 3701-53-05(D) ("The collection of a urine specimen must be witnessed to assure that the sample can be authenticated'). He asserts that there was no testimony that the collection of his urine specimen was witnessed by anybody.

{¶26} Wade's argument is meritless for two reasons. First, " '[f]ailing to file a motion to suppress does not constitute ineffective assistance of counsel per se. To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question.' " *State v. Williams*, 4th Dist. Scioto No. 10CA3381, 2012–Ohio–6083, ¶ 15, quoting *State v. Brown*, 115 Ohio St.3d 55, 2007–Ohio–4837, 873 N .E.2d 858, ¶ 65. "Claims of ineffective assistance of counsel are rejected when counsel's failure to file a suppression motion was a tactical decision, there was no reasonable probability of success, or there was no prejudice." *State v. Siggers*, 4th Dist. Ross No. 13CA3368, 2014-Ohio-506, ¶ 10, citing *State v. Nields*, 93 Ohio St.3d 6, 34, 752 N.E.2d 859 (2001). "We must presume that trial counsel was effective if counsel 'could have reasonably decided that filing a suppression motion would be a futile act, even if there is some evidence to support a motion.' " *Siggers* at ¶ 10, quoting *State v. Walters*, 4th Dist. Scioto No. 12CA949, 2013–Ohio–772, ¶ 20.

{¶27} Second, "[s]ince a motion to suppress is a *pretrial* motion, ineffective assistance is not demonstrated by defense counsel's failure to file such a motion in response to * * * testimony in the course of trial." (Emphasis sic.) *State v. Boyd*, 2d Dist. Clark No. 2012 CA 85, 2014-Ohio-5571, ¶ 63. This is especially true here as the state had no duty at trial to satisfy the administrative foundational requirements for admissibility. *See, Cincinnati v. Ilg*, 141 Ohio St.3d 22, 2014-Ohio-4258, 21 N.E.2d 278, ¶ 26, citing *State v. French*, 72 Ohio St.3d 446, 650 N.E.2d 887 (1995). Therefore, we cannot simply presume that the state failed to comply with Ohio Adm.Code 3701-53-05(D). In fact, Deputy Daubenmire testified that he went into the restroom at the police station with Wade and that he followed the instructions on the highway patrol collection kit in collecting the sample. Presumably, this included witnessing the collection of the specimen. Therefore, we overrule Wade's third assignment of error.

B. Manifest Weight of the Evidence

{¶28} In his fourth assignment of error Wade asserts that his convictions are against the manifest weight of the evidence because Davis's testimony was inconsistent and there were problems with the chain of custody of the urine specimen.

{¶29} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011–Ohio–6254, 960 N.E.2d 955, ¶ 119.

{¶30} Wade claims that the jury lost its way and created a manifest miscarriage of justice because: (1) Davis's testimony was inconsistent when he testified about the period of time that passed between when he first spotted the vehicle and when he made contact with the occupants; (2) it was unclear from Davis's testimony how he was able to rule out that passengers switched sides or who was driving the car given the evening conditions with low light; and (3) there were problems with the chain of custody of the urine specimen.

{¶31} Wade confuses the testimony in his claim of inconsistency. Davis's testimony concerning the lapse of two to three seconds related to the period that the car was out of his sight; his additional testimony referring to six to eight seconds was his estimate of the passage of time from when he started driving towards the car to when the car stopped. The deputy's testimony was not inconsistent.

{¶32} Wade's second contention is based upon the time of day and low light conditions that arguably could have precluded Davis's ability to see what was occurring in the car. However, Davis's conclusion about who was driving was based upon the short time period available, not that he was able to observe what happened inside the car. Davis's testimony was that because only a few seconds elapsed without him seeing the car, there was "no way" Wade and Lucas could have switched seats given their intoxicated state. In addition, neither Wade nor Lucas testified that they switched seats after being spotted by the police.

{¶33} Despite claiming "manifold issues with the chain of custody," Wade identifies only one, whether the urine sample was properly witnessed. That purported

failure does not go to the chain of custody. Rather it relates to compliance with the Ohio Administrative Code. Having already addressed that issue, we will not revisit it here.

{¶34} To the extent his argument could raise a chain of custody issue, we also disagree. The testimony of Deputy Sheriffs Davis and Daubenmire and Ohio State Highway Patrol criminalist Keune established the chain of custody for the urine specimen collected from Wade with his consent. Moreover, when a strict chain of custody is broken it goes to the weight to be given to the evidence, not its admissibility. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5324, 776 N.E.2d 1061, ¶ 57. On appeal, "the weight and credibility of evidence are to be determined by the trier of fact." *State v. Dillard*, 4th Dist. Meigs No. 13CA9, 2014-Ohio-4974, ¶ 28, citing *State v. Kirkland*, 140 Ohio St.3d 73, 2013–Ohio–1966, 15 N.E.3d 818, ¶ 132. "A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it." *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014–Ohio–1941, ¶ 23. "We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility." *Dillard* at ¶ 28, citing *West* at ¶ 23.

{¶35} Because the jury determines the weight and credibility of the evidence and we must afford deference to that determination, we are not persuaded that the jury clearly lost its way and created such a manifest miscarriage of justice. Therefore, we overrule Wade's fourth assignment of error.

IV. CONCLUSION

{¶36} Wade has not met his burden on appeal of establishing that the trial court committed prejudicial 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 Chillicothe Municipal Court 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.: Concurs in Judgment and Opinion.
McFarland, A.J.: Concurs in Judgment Only.

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.