[Cite as *State v. Lawson*, 2011-Ohio-1140.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1204

Appellee — Trial Court No. CR0199307496

v.

James D. Lawson — **DECISION AND JUDGMENT**

Appellant — Decided: March 11, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
J. Christopher Anderson, Assistant Prosecuting Attorney,
for appellee.

Kenneth J. Rexford, for appellant.

* * * * *

PER CURIAM.

{¶ 1} This case is before the court on appellant's "Motion for Orders to Assist with Remand" and "Renewed Motion for Orders to Assist with Remand."

{¶ 2} On September 1, 2010, we remanded this case to the trial court to issue a settlement and approval of a contested App.R. 9(C) statement that is to be used by this court in deciding this appeal. The App.R. 9(C) statement is to be used in place of a transcript of the 1994 plea hearing in this case since no transcription of the hearing is possible due to the notes of the court reporter being destroyed.

{¶ 3} Appellant filed his App.R. 9(C) statement in the trial court, in which he states that his client's recollection of the plea hearing is that he entered a plea pursuant to *North Carolina v. Alford* but no statement of the evidence against him was given at the hearing upon which the judge could have accepted his *North Carolina v. Alford* plea. Appellee responded with an objection to appellant's App.R. 9(C) statement, agreeing that appellant entered an *Alford* plea but stating that there was sufficient evidence presented at the plea hearing upon which to accept the *Alford* plea. Since the parties disagree as to what occurred at the plea hearing, under App.R. 9(C), the difference must be submitted to the trial court for a settlement of the dispute and approval of a statement of the evidence.

{¶ 4} In this case, the trial court cannot settle and approve an App.R. 9(C) statement because the trial court judge who presided over these hearings in 1994 has signed a sworn statement that she has no independent recollection of the hearing but that she normally would hear a statement of the evidence against the defendant at a plea hearing. Thus, it would appear that despite the parties' best efforts, an accurate App.R. 9(C) statement cannot be obtained for this court's use. In *State v. Jones* (1994), 71 Ohio St.3d 293, 298, the court faced this situation concerning an entire trial. The court stated:

{¶ 5} "[In] *Knapp v. Edwards Laboratories* [(1980), 61 Ohio St.2d 197, the court held that] an appellant is entitled to a new trial where, after an evidentiary hearing, a record cannot be settled and it is determined that the appellant is not at fault. See, also, *State v. Polk* [(Mar. 7, 1991), 8th Dist. No. 57511].

{¶ 6} "In *Knapp*, supra, the issue was whether the plaintiffs were entitled to a new trial because the court reporter was unable to transcribe portions of trial testimony necessary to properly present the assigned errors on appeal. This court held that, absent fault on the part of the appealing party, a new trial should be granted if, after all reasonable solutions are exhausted, an appellate record could not be compiled.

{¶ 7} "In *Polk*, supra, the indigent defendant's motion for a new trial was denied by the trial court, but appellate counsel was never appointed. The defendant was later granted a delayed appeal. In the interim, fire had destroyed the reporter's notes of the trial. The defendant and the prosecution submitted separate App.R. 9(C) statements. * * *

{¶ 8} "The court of appeals ruled that because the trial judge had no independent recollection of the events of the trial and could not settle and approve the 9(C) statement, a new trial should be granted. As in Knapp, the reviewing court in Polk noted that although the transcript was unavailable, it was not the fault of either the appellee or the appellant."

{¶ 9} In this case, it is a plea hearing that cannot be transcribed or recreated. Extending the holding in *State v. Jones*, supra, to this case, we remand this case to the trial court until March 29, 2011, for the parties to brief the issue of whether the

unavailability of the transcript is the fault of appellant and for the trial court to determine the issue and enter an order stating its findings. If the trial court finds that the unavailability of the transcript is the fault of appellant, this court will hear the appeal without benefit of a complete record. If the trial court finds that the unavailability of the transcript is not the fault of appellant, the remand is extended to April 19, 2011, for the trial court to hold a new plea hearing, where Lawson will again enter a plea pursuant to *North Carolina v. Alford*[1] and the court will decide whether or not to accept the plea. The clerk of court is ordered to notify this court when the trial court enters a decision on whether appellant is at fault concerning the unavailability of the transcript. Further, if a new change of plea hearing is held, the court reporter is ordered to transcribe the proceedings and the transcript shall be filed as a supplement to the record in this appeal. The clerk of court is ordered to notify this court if the record is supplemented.

{¶ 10} It is so ordered.

CASE REMANDED.

[1]Since there is no debate that appellant entered an *Alford* plea in 1994, and the only disagreement between the parties is whether the prosecution presented enough evidence for the judge to accept the plea, under these circumstances appellant cannot now enter a plea other than an *Alford* plea.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE