[Cite as *State v. Melton*, 2004-Ohio-5483.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82765

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	and
-vs-	:	
	:	OPINION
ROBERT MELTON	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION: OCTOBER 14, 2004

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court Case No. CR-424010

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellant: THOMAS A. REIN
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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Robert Melton appeals his conviction and assigns the following errors for our review:

{¶ 2} "I. The trial court erred in denying Appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence against Appellant."

{¶ 3} "II. Appellant's conviction is against the manifest weight of the evidence."

{¶ 4} "III. Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article I, of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to file a motion to suppress."

{¶ 5} Melton filed the following pro se supplemental assigned errors in his brief on September 25, 2003, which this court accepted for review:

{¶ 6} "I. Appellant was denied a fair trial due to suppression of evidence by prosecutor violative of the Fifth and Fourteenth Amendments."

{¶ 7} "II. The Appellant was denied his right to a speedy trial predicated on false claims for delay."

{¶ 8} "III. The Appellant was denied protection against double jeopardy violative of the Fifth Amendment to the U.S. Constitution."

{¶ 9} "IV. The Appellant was denied effective assistance of counsel on his first appeal as of right in violation of the Sixth and Fourteenth Amendments."

{¶ 10} We will review the assigned errors collectively or jointly, except where they raise distinct and separate issues.

{¶ 11} Having reviewed the record and pertinent law, we affirm the trial court's judgment. The apposite facts follow.

{¶ 12} While aboard an RTA train, Melton sold transfers to two passengers. At some point, the train operator announced that passengers shall pay fares upon exiting the train. When the passengers attempted to use the transfers purchased from Melton, they were rejected. Both passengers then asked Melton to return their money, but Melton refused; he insisted the transfers were good. The train operator called the RTA police for assistance.

{¶ 13} When the train arrived at the Tower City station, Melton and the two passengers exited the train. The train operator identified Melton to the transit police. The RTA police attempted to stop him. When he refused to stop, a scuffle ensued. The officers used pepper spray, batons, and handcuffs to bring him into submission. In the end, Melton lay handcuffed, face down, in a pool of blood. The officers arrested Melton for disorderly conduct and intoxication.

{¶ 14} Thereafter, the Cuyahoga County Grand Jury indicted Melton on three counts of assault with peace officer specifications, and one count of obstructing official business.

{¶ 15} Melton petitioned the court to dismiss the indictment for violating his right to a speedy trial. The trial court denied the motion, ruling that Melton's requested continuances had tolled the speedy trial time.

{¶ 16} Though Melton had court-appointed counsel, on September 3, 2002, he sought to represent himself because of his stated mistrust for white people.[1] After conducting the requisite hearing, the trial court denied the motion and the matter proceeded to trial.

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[1]Transcript at 53.

{¶ 17} RTA Supervisor Lee Grimes testified he received a radio transmission from operator Tim Perkins regarding Melton. Minutes later the train pulled into the station. Grimes recognized Melton from prior confrontations and alerted the RTA police. They proceeded to stop Melton. While Grimes was obtaining a statement from Perkins about the incident on the train, he turned around and saw the RTA police in a physical altercation with Melton. Melton was on the ground with two transit police on top of him and a third officer standing over them. Grimes testified he did not see how the altercation started, but it lasted approximately three to five minutes.

{¶ 18} RTA Officer Robert Schwab testified he went to the light rail platform to investigate a complaint that a passenger was selling transfers on the inbound Shaker Blue Line train. Officers Laubenthal and Kemmett came to assist. He approached the supervisor and the rail operator, who identified Melton as the passenger causing the problem on the train. When he approached Melton outside the turnstiles, Melton became loud and boisterous and yelled that he had paid his fare. He asked Melton several times to put down a bag he was holding, but Melton refused until the two other officers approached. When Melton finally put the bag down, the sides of it fell open and a partially consumed bottle of King Cobra malt liquor became visible. Melton had a strong odor of alcohol on him, and Schwab noticed a bulge in Melton's front pocket, which turned out to be a six-ounce jar of Vaseline. Schwab tossed the bottle to the ground and Melton became more irate.

{¶ 19} Schwab then told Melton he was under arrest for disorderly conduct and intoxication; he attempted to take Melton into custody. Melton resisted by pulling his hands away as they attempted to handcuff him. He spat in Schwab's face, pulled his hands away from Laubenthal, and grabbed Kemmett around the neck, and a fight ensued. Schwab tried to break Melton's grip, but to no avail and thus proceeded to warn Melton he was going to use pepper spray. Schwab then sprayed Melton in the face, mouth, and eyes with pepper spray. Some of the spray cross-contaminated the

other officers. Melton still held Kemmett, so Schwab proceeded to strike Melton's shin with the baton several times, finally handcuffing him.

{¶ 20} On cross-examination, Schwab admitted hitting Melton four or five times with the baton hard enough to break Melton's skin through a pair of jeans causing him to be soaked in blood.

{¶ 21} Officer Joseph Kemmett testified he heard Officers Schwab and Laubenthal speaking with Melton, and from the conversation he gathered it involved fare evasion or selling transfers. He stated Melton was irate and kept saying "I don't have them." He observed Schwab and Laubenthal trying to arrest Melton. He stated Melton charged at Schwab and Kemmett; Kemmett grabbed Melton from behind in an attempt to handcuff him, at which time, Schwab warned Melton he was going to use the pepper spray.

{¶ 22} After Schwab pepper sprayed him, Melton grabbed Kemmett from behind and they both fell to the ground. Kemmett said he tried to get Melton off him, but to no avail. He said he did not know what the other officers were doing to get Melton off him. Finally, he stated he sustained injuries, was treated, and did not work for five weeks because of a sprained shoulder.

{¶ 23} Officer Mark Laubenthal testified he was working as a plain clothes officer along with Officer Kemmett. He overheard Grimes request assistance on the platform. He observed Schwab attempt to detain Melton. Melton was uncooperative and attempted to get around Schwab. Melton appeared to have been drinking heavily because his breath smelled of alcohol, and he was carrying a half-filled bottle of alcohol. Schwab asked him about the transfers and Melton became belligerent. Laubenthal attempted to handcuff Melton, but was able to cuff only one hand before Schwab applied the pepper spray. Melton dodged the bulk of the pepper spray, causing Schwab and Kemmett to be overpowered by the spray. Melton spun from Schwab's grip, ripping the handcuff out of his hand, severing the tip of Schwab's right ring finger.

{¶ 24} Eventually, Laubenthal took the loose end of the handcuffs and hit Melton in the head several times, causing him to release Kemmett. Melton rolled over on his stomach and Laubenthal handcuffed him. Thereafter, Melton kept yelling "Rodney King, Rodney King."

{¶ 25} Tim Perkins testified he operated an RTA train traveling westbound into Tower City. Melton boarded the train and sat in the front. Upon approaching Tower City, Perkins made an announcement for passengers to pay as they exited the train. A woman and a man approached the fare box. When the woman inserted the transfer, it was rejected. She turned to Melton and told him to give her money back. While the woman talked with Melton, the man inserted his transfer, which was also rejected. Melton proceeded to argue with Perkins that the transfers should have worked. Perkins responded by calling the RTA police.

{¶ 26} Upon arrival at Tower City, Melton exited the train. Perkins pointed out Melton to the undercover RTA police officer, who then followed him into the station. From the train, Perkins observed the officers gesture to Melton to come to them. Melton looked back, appeared to have said something, and then kept walking. An officer grabbed Melton by the hand and Melton pulled away. Several transfers fell to the ground when the officers attempted to grab Melton again. Melton attempted to walk away and the officer grabbed him by the arm again, and they started struggling. The officer had Melton in a "bear hug" and they both fell to the ground, with Melton falling flat on his back. Melton and the officer continued to struggle on the floor.

{¶ 27} Thereafter, another officer approached with handcuffs and tried to handcuff Melton. A third officer proceeded to strike Melton several times on the leg with a baton. Several other officers gathered, which prevented Perkins from seeing anything further from his vantage point on the train. Finally, Perkins' train pulled out of the station.

{¶ 28} Melton took the stand in his own defense. According to Melton, on April 29, 2002, he boarded the train at East 34th Street going west to Tower City. He had a weekly RTA pass for himself. He sold a transfer to a passenger for one dollar. The train operator saw him and voiced his displeasure, and Melton then returned the passenger's money. Upon approaching Tower City, the operator told everybody to pay on the train. Melton refused to pay on the train because the booth operators inside the station were still on duty. He stated he did not want to pay twice, and this caused the argument with the train operator.

{¶ 29} After exiting the train, Officer Schwab approached him and told him to put down the bag he was carrying. Melton did not comply immediately. After he put the bag down, Schwab reached towards Melton's shirt pocket, but Melton pulled away. Melton then took a jar of Vaseline he was carrying in his shirt pocket and gave it to Schwab. Schwab opened the jar, looked in it and then threw it on the ground beside the bag. Melton told Schwab he did not have to throw the Vaseline on the floor, at which time Schwab pepper-sprayed him. Melton held his hands up to his face; Schwab continued to grab at him and aimed the pepper spray into his eyes, nose, and mouth. Officer Kemmett then grabbed Melton, and another officer spread Melton's feet. Melton held Kemmett and they both fell to the ground. While he and Kemmett were on the ground, another officer started to beat Melton with a baton. Melton kept holding Kemmett in an attempt to shield himself from the baton's blows. Nonetheless, the officer hit him twelve to fifteen times. He released Kemmett after another officer hit him several times with handcuffs.

{¶ 30} Melton said the officers took him to MetroHealth Medical Center, but he refused medical attention, and they took him to the police station. The police refused custody because of his condition and sent him to St. Vincent Charity Hospital. He again refused medical attention. Melton stated he refused treatment because he wanted pictures taken of his injuries for use as evidence.

{¶ 31} Melton admitted the bag he was carrying the night of the encounter contained a bottle of beer. He stated the contents were not apparent because the beer was wrapped in a brown paper bag inside of a black plastic bag. He also admitted drinking about ten ounces of beer while waiting for the train, but insisted he was not drunk. Finally, Melton stated the transit police knew him and were always harassing him.

{¶ 32} After the State rested, defense counsel moved for an acquittal, and the trial court granted it on two of the three counts of assault of a peace officer. The jury found Melton guilty of one count of assault and one count of obstructing official business. The trial court imposed a sentence of seventeen months on count one and eleven months on count two, to be served concurrently. Melton now appeals.

{¶ 33} In the first assigned error, Melton argues the evidence was insufficient to convict him of assault and obstructing official business. We disagree.

{¶ 34} A challenge to the sufficiency of evidence supporting a conviction requires the appellate court to determine whether the State met its burden of production at trial.[2] On review for legal sufficiency, the appellate court's function is to examine evidence admitted at trial and determine whether such evidence, if believed, would convince the average person of the defendant's guilt beyond a reasonable doubt.[3] In making its determination, an appellate court must view the evidence in a light most favorable to the prosecution.[4]

{¶ 35} First, we address the charge of assault which, by its very terms, includes causing or attempting to cause physical harm to another. "Physical harm" in this sense is defined as "any injury,

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[2]*State v. Thompkins* (1997), 78 Ohio St.3d 380.

[3]Id. *State v. Fryer* (1993), 90 Ohio App.3d 37.

[4]Id. at 43.

illness, or other physiological impairment, regardless of its gravity or duration."[5] In the case sub judice, there was testimony Melton charged at Officers Schwab and Kemmett, ultimately grabbing Kemmett from behind, with both falling to the ground where the struggle continued. Melton continued to attack and to bite or scrape Kemmett on the back of his head. Consequently, Kemmett sustained a sprained shoulder, resulting in five weeks off the job.

{¶ 36} Though Melton maintains the evidence was insufficient to meet the element of "knowingly" assaulting Kemmett, according to R.C. 2901.22(B), "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or probably be of a certain nature. The person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 37} We conclude the above testimony at trial supported the conviction for assault.

{¶ 38} Secondly, we address the charge of obstructing official business. The elements of obstruction of official business are: (1) No person, without privilege to do so; (2) with purpose to prevent, obstruct or delay the performance by a public official of any authorized act within his official capacity; (3) shall do an act which hampers or impedes a public official in the performance of his lawful duties.[6]

{¶ 39} In the case sub judice, there was testimony Melton resisted the officers' attempt to detain him to investigate the report that he illegally sold transfers. Melton became loud. He yelled

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[5]R.C. 2901.01(A)(3).

[6]R.C. 2921.31(A).

that he paid his fare and refused to cooperate with the officers. Finally, Melton's resistance resulted in an altercation with the officers when they were attempting to arrest him for disorderly conduct and intoxication.

{¶ 40} Based on the foregoing, we conclude the State met its burden of production at trial as to both the charges of assault and obstructing official business. Accordingly, the trial court did not err in denying Melton's motion for acquittal; thus, we overrule his first assigned error.

{¶ 41} In the second assigned error, Melton argues his conviction was against the manifest weight of the evidence. We disagree.

{¶ 42} Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of evidence.[7]

{¶ 43} When an appellant challenges a conviction on manifest weight grounds, we review the record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, "and determine whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be vacated and a new trial ordered."[8] The discretionary power to grant a new trial should be exercised only in exceptional cases in which the evidence weighs heavily against the conviction.[9]

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[7]*State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

[8]*State v. Martin* (1983), 20 Ohio App.3d 172,175, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 38, 42. See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380.

[9]*Martin*, citing *Tibbs*. See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶ 44} Stated succinctly, a reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all elements of an offense have been proven beyond a reasonable doubt.[10]

{¶ 45} In determining whether the decision of a trial court is against the manifest weight of the evidence, the following factors are guidelines to be taken into account by the reviewing court:

(1) The reviewing court is not required to accept as true the incredible;

(2) whether the evidence is uncontradicted;

(3) whether a witness was impeached;

(4) what was not proved;

(5) the certainty of the evidence;

(6) the reliability of the evidence;

(7) whether a witness' testimony is self-serving;

(8) whether the evidence is vague, uncertain, conflicting or fragmentary.[11]

{¶ 46} Three transit police officers testified Melton resisted their attempt to arrest him. He became disorderly, spat in one officer's face, charged at them, grabbed one officer around the neck and refused to let go. Ultimately, the police had to administer pepper spray and strike him numerous times with their batons before Melton submitted. On the other hand, Melton insisted it was Officer Kemmett who first grabbed him and another officer spread his feet, causing him to fall to the floor. Further, he contends he held Kemmett when they fell to the floor to shield himself from strikes from the baton.

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[10]*State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus; *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus.

[11]*State v. Mattison* (1985), 23 Ohio App.3d 10.

{¶ 47} The jury apparently found the testimony of the State's witnesses to be credible and Melton's testimony to be less so. It is within the purview of the fact-finder to believe all or part of any testimony the fact-finder hears. We cannot say in resolving conflicts in the evidence, that the jury lost its way in resolving this conflicting testimony so as to create a manifest miscarriage of justice. Accordingly, we overrule Melton's second assigned error.

{¶ 48} In the third assigned error, Melton argues he was denied effective assistance of counsel when counsel failed to file a motion to suppress the illegal and improper stop and subsequent arrest. We disagree.

{¶ 49} In evaluating whether an appellant has been denied his Sixth Amendment right to effective assistance of counsel, the ultimate query is "whether the accused, under all the circumstances, * * * had a fair trial and substantial justice was done."[12]

{¶ 50} In order to prevail on a claim of ineffective assistance of counsel, the appellant must show trial counsel's performance fell below an objective standard of reasonableness and such performance resulted in undue prejudice.[13] In this regard, the appellant has the burden of proof, since in Ohio a properly licensed attorney is presumed competent.[14] An essential element of an ineffective assistance of counsel claim is a showing that, but for trial counsel's alleged errors, there is a substantial probability that the outcome of the trial would have been different.[15]

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[12]*State v. Hester* (1976), 45 Ohio St.2d 71, paragraph four of the syllabus.

[13]*State v. Madrigal* (2000), 87 Ohio St.3d 378, 397, reconsideration denied (2000), 88 Ohio St.3d 1428, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011.

[14]*State v. Calhoun* (1999), 86 Ohio St.3d 279.

[15]*State v. Lindsey* (2000), 87 Ohio St.3d 479, 489, reconsideration denied (2000), 88 Ohio St.3d 1438.

{¶ 51} The record indicates the transit police were summoned because of the report that Melton was selling expired transfers, an illegal activity. Based on the report, the officers approached Melton, who became irate and belligerent, and the aforementioned altercation ensued. Melton had in his possession several expired transfers in addition to a half-consumed bottle of malt liquor. Based on the report, the officers were effecting a legal and authorized stop; thus, filing a motion to suppress would have been futile.

{¶ 52} The cumulative effect of the perceived errors is not "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[16] Accordingly, we overrule Melton's third assigned error.

{¶ 53} In his first pro se assigned error, Melton argues he was denied a fair trial due to suppression of evidence violative of the Fifth and Fourteenth Amendments. Melton contends in a previous case two RTA patrolmen he allegedly assaulted claimed they went to the hospital for treatment. Melton asked the judge to compel the prosecutor to produce the records. However, the prosecutor failed to produce hospital records and the RTA patrolmen he allegedly assaulted failed to appear in court. The trial judge dismissed the case against Melton. Melton argued the information from the previous case should be admitted in the present case to show the propensity for the RTA officers to lie. The record reveals the trial judge refused to allow evidence from the previous trial to be admitted. The trial court told him he could get any records pertinent to the present case through discovery. The record reveals there was no exculpatory evidence which the prosecution withheld from Melton. Accordingly, we overrule Melton's first pro se assigned error.

{¶ 54} In his second pro se assigned error, Melton argues he was denied his right to a speedy trial predicated on false claims for delay. We disagree.

i. Our standard of review upon an appeal raising a speedy trial issue is to count the expired days as directed by R.C. 2945.71, et seq.[17] Where we find ambiguity, we construe the record in favor of the accused.[18]

{¶ 55} The Ohio speedy trial statute provides the time starts to run the day after arrest.[19] Also, we triple-count each day the accused was in jail in lieu of bail solely on the pending charge.[20]

{¶ 56} Melton was originally arrested on April 29, 2002. He was released on May 3, 2002 after several misdemeanor charges were disposed of. Melton was rearrested on June 26, 2002 and trial began November 21, 2002.

{¶ 57} An accused has the right to be brought to trial within ninety days after arrest. However, the record reveals Melton requested numerous continuances prior to trial. We toll the speedy trial count during "the period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than the accused's own motion."[21] We also toll "any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused."[22] The record also reveals there was significant motion

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[16]*State v. Smith* (1997), 80 Ohio St.3d 89, 112, citing *Strickland*, 466 U.S. at 687.

[17]*State v. DePue* (1994), 96 Ohio App.3d 513, 516; see, also, *Cleveland v. Seventeenth Street Association* (Apr. 20, 2000), Cuyahoga App. No. 76106; *State v. Gabel* (Oct. 31, 1996), Cuyahoga App. No. 69607.

[18]*State v. Singer* (1977), 50 Ohio St.2d 103, 109; *State v. Mays* (1996), 108 Ohio App.3d 598, 609.

[19]R.C. 2945.71; See, *State v. Gabel* (Oct. 31, 1996), Cuyahoga App. No. 69607, citing *State v. McCornell* (1993), 91 Ohio App.3d 141, 145.

[20]R.C. 2945.71(E).

[21]R.C. 2945.72(H).

[22]R.C. 2945.72(E).

practice occasioned by Melton. We, therefore conclude Melton's speedy trial right was not violated. Accordingly, we overrule his second pro se assigned error.

{¶ 58} In his third pro se assigned error, Melton argues he was denied protection against double jeopardy. We disagree.

{¶ 59} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, protects a criminal defendant from multiple prosecutions for the same offense.[23]

{¶ 60} The record reveals the offenses of which Melton complains were open container and disorderly conduct, both misdemeanor charges which were disposed of in the Cleveland Municipal Court prior to his facing felony charges for assaulting a peace officer. As such, the double jeopardy clause was not implicated. Accordingly, we overrule Melton's third pro se assigned error.

{¶ 61} In his fourth pro se assigned error, Melton argues he was denied effective assistance of counsel on his first appeal of right. Allegations of ineffective assistance of appellate counsel are not properly raised in a direct appeal.[24] Such arguments may be raised in App.R. 26(B)(2)(a)(iii), Article IV of the Ohio Constitution.[25] Therefore, Melton has not employed the proper vehicle to raise this argument. Accordingly, Melton's fourth pro se assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

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[23]*Oregon v. Kennedy* (1982), 456 U.S. 667, 671, 72 L.Ed.2d 416, 102 S.Ct. 2083.

[24]*State v. Murnahan* (1992), 63 Ohio St.3d 60, paragraph one of the syllabus.

[25]Id. at paragraph two of the syllabus.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., J., and

COLLEEN CONWAY COONEY, J., CONCUR.

PATRICIA ANN BLACKMON
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).