[Cite as *State v. McCombs*, 2009-Ohio-4036.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91784

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARK MCCOMBS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-496822

BEFORE: Cooney, A.J., McMonagle, J., and Boyle, J.

RELEASED: August 13, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

John T. Castele
1310 Rockefeller Building
614 W. Superior Avenue
Cleveland, Ohio 44113

Henry J. Hilow
McGinty, Hilow & Spellacy Co., LPA
614 W. Superior Avenue, Suite 1300
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Mary McGrath
Debra A. Obed
David Zimmerman
Assistant County Prosecutors
9th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Mark McCombs ("McCombs"), appeals his tampering with evidence convictions and his sentence. Finding no merit to the appeal, we affirm.

{¶ 2} In May 2007, McCombs was charged in a multi-count indictment. Counts 1 and 2 charged him with the rape of O.P.[1] Count 3 charged him with the kidnapping of O.P. Counts 4 and 5 charged him with the sexual battery of O.P. Counts 6 through 8 charged him with the gross sexual imposition of O.P.[2] Counts 9 and 10 charged him with tampering with evidence, and Count 11 charged him with dereliction of duty. The matter proceeded to a jury trial, at which the following evidence was adduced.[3]

{¶ 3} In the early morning hours of April 1, 2007, O.P. and her boyfriend, William Taylor ("Taylor"), were driving home. They began to argue, and Taylor ordered O.P. out of his car. They were approximately two blocks from their home in Parma when O.P. got out of the car. She was heavily intoxicated, having consumed alcohol with Taylor at a bar that night.

{¶ 4} As O.P. approached their house, she saw Taylor backing out of the driveway with her belongings, so she decided to walk to her mother's house. While she was walking to her mother's house, O.P. was stopped by a

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[1]The anonymity of the alleged victim is preserved in accordance with this court's guidelines for protecting the identity of sex crime victims.

[2]Counts 1 through 8 each carried a firearm specification.

Parma police officer, Daniel Toporowych ("Toporowych"). She told Toporowych that she had gotten into a fight with her boyfriend who had "thrown her out" of their house. She asked the officer to drive her to a friend's house nearby. Toporowych agreed and placed O.P. in his cruiser. McCombs, another Parma police officer, arrived on the scene with a third officer, Christopher Dillenbeck ("Dillenbeck").[4] Toporowych testified that O.P. appeared to know McCombs because she called him by his name and had a brief conversation with him.

{¶ 5} McCombs and Dillenbeck followed Toporowych to the friend's house where he dropped off O.P. and then left the scene. McCombs and Dillenbeck remained outside while O.P. went into her friend's house. O.P. testified that she left the house after ten minutes because her friends were "doing drugs" and they did not want the police there. She walked to the police car and asked for a ride to her mother's house.

{¶ 6} At some point in time, McCombs called another officer, Joseph Mazur ("Mazur"), and requested the digital camera Mazur carried in his police cruiser. They met across the street from the Parma Justice Center where Mazur gave McCombs the camera. Mazur testified that McCombs

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[3]Counts 4, 5, and 11 were dismissed at trial.

[4]McCombs and Dillenbeck were driving separate police cruisers.

was alone at that time and did not advise why he needed the camera. McCombs never returned the camera to Mazur during that shift.

{¶ 7} O.P. testified that as she got into McCombs's police cruiser, one of the officers said that they normally take intoxicated girls to jail. O.P. did not want to be arrested because she was on probation. The next thing she knew, they drove behind Padua High School. O.P. testified that she got out of the car and McCombs told her that they were going to take pictures. She claimed that he reminded her that she could go to jail. He told her to take off her clothes and told her how to pose for the pictures. She further testified that he told her to put her clothes back on and perform oral sex on him. O.P. testified that McCombs then drove her back to her friend's house, gave her a "courtesy card," and instructed her not to tell anyone about what happened. She told Taylor about the incident, however, so he would regret what happened to her as a result of his throwing her out of the car.

{¶ 8} Eight days later, on April 9, 2007, Parma police received a call that a man was beating a woman in a pickup truck. Officer Oliver Simic ("Simic") responded to the scene. He testified that Taylor was the man driving the truck and O.P. was the passenger. Taylor's truck had struck a light pole. Simic arrested Taylor for driving under the influence and carrying a concealed weapon. After being arrested, Taylor told Simic that he needed to "make this go away." Taylor indicated that he had "stuff" on other

officers and would "bring them down" if he went down. Simic testified that Taylor told him that he had nude photos of his girlfriend on a police cruiser. He then gave Simic a courtesy card signed by McCombs and addressed to O.P. Taylor told him that McCombs had given O.P. the courtesy card for "a blow job." Simic testified that based on what Taylor alleged, he approached O.P. and told her that Taylor claimed that there are nude photos of her. He asked her if she had them, and she responded, "No. He has them." Simic assumed she meant Taylor, but O.P. never specifically said who possessed the pictures.

{¶ 9} Simic testified that he reported the allegations to his sergeant, but his sergeant did not seem concerned because it did not involve the current incident. Later that evening, Simic spoke with McCombs and advised him of Taylor's allegation. Simic assumed that there would be an investigation if Taylor planned on using the photos as a means to avoid prosecution. Simic returned the courtesy card to McCombs. Simic testified that he was not sure if the incident between McCombs and O.P. had occurred, but he suggested that McCombs get rid of any pictures if they existed.

{¶ 10} Officer Scott Faulisi ("Faulisi") testified that approximately on the evening of April 8, 2007, McCombs called him and asked him to retrieve a mini CD from McCombs's work locker. Faulisi testified that it was the same type of CD used by the police department for its cameras, but there were no

markings on it to indicate that the CD was police property. Faulisi brought the CD to McCombs, who destroyed it in front of him by breaking it into pieces. Faulisi testified that when he asked McCombs what was on the CD, McCombs told him "he did something stupid, and it involved [O.P.]"

{¶ 11} The jury found McCombs guilty of both counts of tampering with evidence and not guilty of all remaining charges. The trial court sentenced McCombs to two years in prison on each count, to be served concurrently.

{¶ 12} McCombs now appeals, raising four assignments of error.

Sufficiency of the Evidence

{¶ 13} In the first assignment of error, McCombs argues that the State failed to produce sufficient evidence to sustain his convictions for tampering with evidence.

{¶ 14} The standard of review for the sufficiency of evidence is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus, which states:

> "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶ 15} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541 and *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *Thompkins*.

{¶ 16} On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jenks* at paragraph two of the syllabus.

{¶ 17} In the instant case, McCombs was convicted of two counts of tampering with evidence in violation of R.C. 2921.12, for having Faulisi remove the CD from McCombs's work locker and for destroying the CD.

{¶ 18} R.C. 2921.12(A)(1) provides in pertinent part:

> "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation * * *."

{¶ 19} McCombs claims that the State failed to produce evidence that the CD was considered evidence in an official proceeding. He also claims that no evidence was presented that McCombs knew an investigation was occurring or about to be instituted when he asked Faulisi to retrieve the CD from his locker. He relies on the testimony of other officers who were unaware that any official investigation was instituted until May 2007.

{¶ 20} However, a review of the record reveals that the State presented sufficient evidence to sustain McCombs's tampering with evidence convictions. Mazur testified that on the night of the incident, McCombs asked him to use a police camera. Mazur gave McCombs the camera, but did not inquire as to why the camera was needed. O.P. testified that McCombs used a camera to take nude photos of her on the police cruiser. McCombs also gave O.P. a courtesy card when he dropped her off at her friend's house. When Simic arrested Taylor, Taylor attempted to use McCombs's courtesy card and the nude photos to avoid the possible charges of driving under the influence and carrying a concealed weapon. Simic reported Taylor's allegations to his sergeant and to McCombs. He wanted to give McCombs a "heads up" because Taylor's allegations were serious, and he assumed there would be an investigation if one had not already started.

{¶ 21} From this evidence, the jury could reasonably infer that McCombs, as a police officer, knew that an investigation into this matter would likely be instituted. This inference is supported by McCombs's subsequent actions. Faulisi testified that McCombs called him later that evening and asked him to get a mini CD out of his work locker. Faulisi testified that the CD was the same type of CD used in the police department's digital cameras, but it did not have any markings on it to indicate that it was police property. He further testified that when he gave McCombs the CD, McCombs broke it into pieces. When asked what was on the CD, McCombs told him that, "he did something stupid, and it involved [O.P.]"

{¶ 22} Thus, in reviewing the evidence in a light most favorable to the State, we conclude that the jury could have found the essential elements of tampering with evidence beyond a reasonable doubt.

{¶ 23} Accordingly, the first assignment of error is overruled.

Specificity of Indictment

{¶ 24} In the second assignment of error, McCombs argues that the trial court erred by not dismissing the tampering with evidence counts because the State failed to produce evidence that the conduct occurred within the time frame listed in the indictment.

{¶ 25} As this court stated in *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321, "specificity as to the time and date of an offense is not

required in an indictment. *State v. Shafer*, Cuyahoga App. No. 79758, 2002-Ohio-6632. Under R.C. 2941.03, 'an indictment or information is sufficient if it can be understood therefrom: * * * (E) That the offense was committed at some time prior to the time of filing of the indictment * * *.' An indictment is not invalid for failing to state the time of an alleged offense or doing so imperfectly. The State's only responsibility is to present proof of offenses alleged in the indictment, reasonably within the time frame alleged. Id. at ¶17-18." Id. quoting *State v. Bogan*, Cuyahoga App. No. 84468, 2005-Ohio-3412.

{¶ 26} We acknowledge that an exception to this general rule exists when the failure to allege a specific date "results in material detriment to the accused's ability to fairly defend himself, as where the accused asserts an alibi or claims that he was indisputably elsewhere during part, but not all, of the interval specified." *Yaacov*, citing *State v. Morgan* (May 11, 2001), Lucas App. No. L-00-1114, and *State v. Sellards* (1985), 17 Ohio St.3d 169, 171, 478 N.E.2d 781. See, also, *State v. Tesca* (1923), 108 Ohio St. 287, 140 N.E. 629.

{¶ 27} McCombs argues that the State failed to set forth with any particularity what evidence he tampered with and when the tampering with evidence allegedly occurred. He contends that his convictions should be reversed, relying on *State v. Vitale* (1994), 96 Ohio App.3d 695, 645 N.E.2d 1277.

{¶ 28} *Vitale* arose out of a dispute over the defendant's failure to pay for car repairs, which he claimed were not properly performed. Vitale was charged with theft, alleged to have occurred on June 14, 1991. At the end of the State's case, the State moved to amend the indictment to show that the theft offense was committed from "June 14, 1991 through June 21, 1991 inclusive" and at a location different from the initial location listed in the indictment. The trial court allowed the amendment, and found Vitale guilty of theft.

{¶ 29} On appeal, this court found that the trial court committed reversible error in permitting the State to amend the indictment, when the amendment changed the identity of the crime and presented a risk that the defendant was convicted of an offense on evidence that was never presented to the grand jury. *Vitale* at 701.

{¶ 30} However, *Vitale* is distinguishable from the instant case. Here, the indictment for tampering with evidence lists the dates of the offenses as April 1, 2007 – April 6, 2007. At trial, the State attempted to amend the indictment regarding the tampering charges, but its motion was denied by the trial court, unlike in *Vitale*.

{¶ 31} Moreover, the evidence presented at trial revealed that after Simic told McCombs about the incident with Taylor on April 9, 2007, McCombs asked Faulisi to get the CD from his work locker and then

McCombs destroyed the CD. Thus, the State's evidence set forth the factual basis for each tampering with evidence charge. Furthermore, the failure to allege the specific date in the indictment did not prejudice McCombs's ability to defend himself because he never suggested an alibi or claimed that he was elsewhere. Rather, his defense strategy centered on his claim that he never engaged in sexual conduct with O.P. and that he never destroyed any evidence with knowledge of an investigation.

{¶ 32} Thus, we find that the evidence presented at trial provided discernible facts to substantiate the two charges, and unlike *Vitale*, the identity of the crime in the instant case was not changed.[5] Accordingly, McCombs failed to demonstrate how the exact date was critical to his defense, and as a result, he suffered no prejudice.

{¶ 33} Thus, the second assignment of error is overruled.

[5]We note, however, that the better practice requires the State to differentiate the charges in the indictment with a "to wit" phrase, or at least clearly specify the act alleged in the bill of particulars.

Discovery Violations

{¶ 34} In the third assignment of error, McCombs argues that he was prejudiced by the State's failure to comply with Crim.R. 16. He further argues that the State violated the discovery rules promulgated in *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, when it failed to turn over exculpatory evidence in its possession. McCombs contends that it was quite apparent from the beginning of trial that the defense did not receive all the discovery to which it was entitled under Crim.R. 16.

{¶ 35} In *Brady*, the United States Supreme Court held that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. See, also, *State v. Johnston* (1988), 39 Ohio St.3d 48, 60, 529 N.E.2d 898. In Ohio, a prosecuting attorney is required, upon motion of the defendant before trial, to disclose to the defendant all known evidence "favorable to the defendant and material to either guilt or punishment." Crim.R. 16(B)(1)(f).

{¶ 36} The Ohio Supreme Court declared that, "the key issue in a case where exculpatory evidence is alleged to have been withheld is whether the evidence is material." *Johnston* at 60. The court noted that such evidence will be deemed material only if there is a "reasonable probability" that, had

the evidence been disclosed to the defense, the result of the proceeding would have been different. Id. at 61 (quoting *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481.) See, also, *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 92, 667 N.E.2d 1041.

{¶ 37} Moreover, a reviewing court should consider the cumulative effect of all nondisclosures in determining whether reversal is required. *Kyles v. Whitley* (1995), 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490. Although each bit of omitted evidence standing alone may not be sufficiently material to justify a new trial, the net effect, however, may warrant a new trial. Id. at 434.

{¶ 38} Crim.R. 16(B)(1)(f) governs the disclosure of evidence favorable to a defendant and provides:

> "Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection."

{¶ 39} In the instant case, McCombs alleges three main violations in which he claims the State failed to turn over exculpatory evidence: statements by officers Dillenbeck and Simic and testimony by Parma Police Captain Robert DeSimone ("DeSimone").[6] He claims that certain statements

[6]McCombs also refers to a statement made by Toporowych, which was not in the State's response to his discovery requests. While testifying on direct, Toporowych

by Taylor to Simic that were included in Simic's statement to the Parma Police Department were not turned over to defense counsel prior to trial. He refers to Simic's testimony that Taylor informed him that he had pictures of O.P. taken by McCombs. He also claims that not until the third day of trial was defense counsel made aware of the inconsistencies in Dillenbeck's statements. Dillenbeck first stated that he did not see anything happen between McCombs and O.P., because he was away from the area when McCombs and O.P. were together. The State brought the inconsistency to the court's attention when Dillenbeck advised the prosecutor that he was present during the entire incident and that he observed no sexual acts take place between McCombs and O.P.

{¶ 40} McCombs's third allegation of a discovery violation occurred post-trial, when DeSimone indicated that criminal charges were not going to be pursued against Dillenbeck because he was less culpable than McCombs, and Dillenbeck could testify at trial as a witness. The State maintained, however, that it did not offer the witnesses any "deals" in exchange for their testimony.

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stated that when he asked McCombs if he did anything that night he should not have done, McCombs said, "no," but also said, "if they find out, they're gonna' hang me." The State argued that they did not know about this statement until Toporowych made it on the stand. However, McCombs concedes that the trial court allowed defense counsel to cross-examine Toporowych about this statement to acknowledge that it was not included in the statement he provided to Parma police as part of its investigation.

{¶ 41} McCombs alleges that because of these discovery violations he was not able to properly prepare a defense.[7] However, all of the discovery violations he alleges are relevant to the rape, kidnapping, and gross sexual imposition charges of which he was acquitted. Thus, McCombs has not demonstrated how he was prejudiced by the delay in receiving this "exculpatory evidence," when it ultimately exculpated him. Because there is no reasonable probability that this evidence would have changed the result of his trial, we overrule the third assignment of error.

Sentence

{¶ 42} In the fourth assignment of error, McCombs challenges his sentence. He argues that his two-year sentence is contrary to law because it is inconsistent with the principles and purposes of R.C. 2929.11.

{¶ 43} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court addressed our standard of review for felony sentences. The *Kalish* court, in a split decision, declared that in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to the existing statutes, appellate courts "must apply a two-step approach." Id. at ¶4.[8]

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[7] McCombs moved for a mistrial, but the trial court denied his motion.

[8] We recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court split over whether we review sentences under an abuse-of-discretion standard in some instances.

{¶ 44} Appellate courts must first "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." Id. at ¶4. If this first prong is satisfied, then we review the trial court's decision under an abuse-of-discretion standard. Id. at ¶4, 19.

Step One–Is the Sentence Contrary to Law?

{¶ 45} In the first step of our analysis, we determine whether the sentence is contrary to law as required by R.C. 2953.08(G). Id. at ¶14.

{¶ 46} As the *Kalish* court noted and as McCombs concedes, post-*Foster*, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence." Id. at ¶11; *Foster*, paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. See, also, *State v. Redding*, Cuyahoga App. No. 90864, 2008-Ohio-5739; *State v. Ali*, Cuyahoga App. No. 90301, 2008-Ohio-4449. The *Kalish* court declared that although *Foster* eliminated mandatory judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact. Id. at ¶13. As a result, the trial court must still consider these statutes when imposing a sentence. Id., citing *Mathis* at ¶38.

{¶ 47} R.C. 2929.11(A) provides that:

{¶ 48} "[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 49} R.C. 2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶ 50} The *Kalish* court also noted that R.C. 2929.11 and 2929.12 are not fact-finding statutes like R.C. 2929.14. *Kalish* at ¶17. Rather, they "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." Id. Thus, "[i]n considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purposes of Ohio's sentencing structure." Id.

{¶ 51} McCombs argues that his sentence is excessive and contrary to law. He contends that he should be sentenced to a lesser term or be placed on probation. We disagree.

{¶ 52} In the instant case, the trial court noted in its journal entry that it considered the purposes of R.C. 2929.11 and all factors required by law. Furthermore, the court properly applied postrelease control, and McCombs's sentence is within the permissible statutory range. Thus, we find that his sentence is not contrary to law.

Step Two–Did the Trial Court Abuse its Discretion?

{¶ 53} Having satisfied step one, we next consider whether the trial court abused its discretion. *Kalish* at ¶4, 19. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 54} The trial court indicated that it had put a lot of thought into this matter. The court reviewed McCombs's history as a Marine and a police officer, and acknowledged that this incident was an aberration in McCombs's behavior. However, the court concluded that, as a police officer, when McCombs broke the chain of custody by destroying the CD, he also broke the criminal justice system. Thus, there is nothing in the record to suggest that the trial court's decision was unreasonable, arbitrary or unconscionable.[9]

[9]McCombs also contends that his sentences are inconsistent with sentences imposed upon similar offenders, but he concedes that he does not have any authority where courts impose a lesser sentence and that "this analysis is really not relevant."

{¶ 55} Therefore, the fourth assignment of error is overruled.

{¶ 56} Judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS;
CHRISTINE T. McMONAGLE, J., CONCURS IN JUDGMENT ONLY