

[Cite as *State v. Lucky*, 118 Ohio St.3d 446, 2008-Ohio-3178.]

**THE STATE OF OHIO, APPELLEE, v. LUCKY, APPELLANT.**

[Cite as *State v. Lucky*, 118 Ohio St.3d 446, 2008-Ohio-3178.]

*Discretionary appeal accepted and cause remanded for application of State v. Smith.*

(No. 2008-0532 — Submitted June 3, 2008 — Decided July 2, 2008.)

APPEAL from the Court of Appeals for Delaware County,

No. 07CAA040018, 2008-Ohio-331.

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{¶ 1} The discretionary appeal is accepted on Proposition of Law No. III.

{¶ 2} Because the court of appeals entered its judgment on appellant's third assignment of error below prior to the release by this court of its opinion in *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595, this cause is remanded to the court of appeals for consideration of whether the court of appeals' judgment should be modified in view of our opinion in *State v. Smith*.

MOYER, C.J., and PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and LANZINGER, JJ., concur.

CUPP, J., dissents and would not accept the appeal.

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David A. Yost, Delaware County Prosecuting Attorney, and Elizabeth A. Matune, Assistant Prosecuting Attorney, for appellee.

Timothy Young, State Public Defender, and Theresa G. Haire, Assistant State Public Defender, for appellant.

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