NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Appeals

APPELLEE'S BRIEF FILED
April 11, 2018 20:36

By: DANIEL VAN 0084614

Confirmation Nbr. 1353856

STATE OF OHIO

vs.

JEIMIL HUNT

CA 17 105769

Judge:

Pages Filed: 21

IN THE COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,	)	**CASE NO. CA 17-105769**
	)	
Plaintiff - Appellee	)	Lower Court Case Nos.
vs.	)	CR-94-305667-D
	)	CR-91-273936-C
JEIMIL HUNT	)	CR-93-300402-D
	)	CR-94-307512-B
Defendant - Appellant.	)	

BRIEF OF APPELLEE

On Appeal from the
Cuyahoga County Court of Common Pleas
Criminal Division

Counsel for Defendant – Appellant
WILLIAM B. NORMAN (#0088113)
600 E. Granger Road, 2nd Floor
Brooklyn Heights, OH 44131
(216) 487-7055

Counsel for Plaintiff – Appellee
MICHAEL O'MALLEY, ESQ
Cuyahoga County Prosecuting Attorney
BY: DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney
1200 Ontario Street, 9th Floor
Cleveland, OH 44113
(216) 698-6418
(216) 698-2270 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ASSIGNMENT OF ERRORS PRESENTED FOR REVIEW

FIRST ASSIGNMENT OF ERROR: APPELLANT HUNT'S PANEL FATALLY ERRED, UNDER *STATE V GREEN,* 81 OHIO ST. 3D 100 (1998), BY ACCEPTING HIS GUILTY PLEA TO CAPITAL MURDER, WITH SPECIFICATIONS, ABSENT REQUIRING EVIDENCE, TESTIMONY, AND WITNESSES ESTABLISHING APPELLANT HUNT'S GUILT BEYOND A REASONABLE DOUBT, AND BY FURTHER FAILING TO ENTER A JOURNAL ENTRY REFLECTING *GREEN* COMPLIANCE.

SECOND ASSINGMENT OF ERROR: INSUFFICIENT EVIDENCE EXISTS TO SUSTAIN APPELLANT HUNT'S CONVICTION FOR CAPITAL MURDER, WITH SPECIFICATIONS.

THIRD ASSIGNMENT OF ERROR: APPELLANT HUNT'S GUILTY PLEA TO CAPITAL MURDER WITH SPECIFICATIONS WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY AS REQUIRED BY ARTICLE I, SECTION 10, TO THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION.

FOURTH ASSIGNMENT OF ERROR: THE PANEL'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 REQUIRES VACATUR OF APPELLANT HUNT'S GUILTY PLEA TO CAPITAL MURDER, WITH SPECIFICATIONS.

FIFTH ASSIGNMENT OF ERROR APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICATION WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY, AS REQUIRED BY ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION

SIXTH ASSIGNMENT OF ERROR: THE TRIAL COURT'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 WHEN ACCEPTING APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICAITON REQUIRES VACATUR OF HIS PLEA AND SENTENCE.

SEVENTH ASSIGNMENT OF ERROR: APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED BURGLARY WAS KNOWING, INTELLIGENT, AND VOLUNTARY AS REQUIRED BY ARTICLE I, SECTION 10, TO THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV, TO THE UNITED STATES CONSTITUTION.

EIGHTH ASSIGNMENT OF ERROR: THE TRIAL COURT'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 WHEN ACCEPTING APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICAITON REQUIRES VACATUR OF HIS PLEA AND SENTENCE.

NINTH ASSIGNMENT OF ERROR: THE TRIAL COURT FATALLY ERRED AND DEPRIVED APPELLANT HUNT DUE PROCESS OF LAW, BY REJECTING HIS UNOPPOSED APP. R. 9(C) STATEMENT, AND SUBMITTING A RECORD WHICH LACKS AN INTELLIGENT BASIS IN FACT.

ISSUES PRESENTED FOR REVIEW

FIRST ASSIGNMENT OF ERROR: APPELLANT HUNT'S PANEL FATALLY ERRED, UNDER *STATE V GREEN,* 81 OHIO ST. 3D 100 (1998), BY ACCEPTING HIS GUILTY PLEA TO CAPITAL MURDER, WITH SPECIFICATIONS, ABSENT REQUIRING EVIDENCE, TESTIMONY, AND WITNESSES ESTABLISHING APPELLANT HUNT'S GUILT BEYOND A REASONABLE DOUBT, AND BY FURTHER FAILING TO ENTER A JOURNAL ENTRY REFLECTING *GREEN* COMPLIANCE.

SECOND ASSINGMENT OF ERROR: INSUFFICIENT EVIDENCE EXISTS TO SUSTAIN APPELLANT HUNT'S CONVICTION FOR CAPITAL MURDER, WITH SPECIFICATIONS.

THIRD ASSIGNMENT OF ERROR: APPELLANT HUNT'S GUILTY PLEA TO CAPITAL MURDER WITH SPECIFICATIONS WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY AS REQUIRED BY ARTICLE I, SECTION 10, TO THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION.

FOURTH ASSIGNMENT OF ERROR: THE PANEL'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 REQUIRES VACATUR OF APPELLANT HUNT'S GUILTY PLEA TO CAPITAL MURDER, WITH SPECIFICATIONS.

FIFTH ASSIGNMENT OF ERROR APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICATION WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY, AS REQUIRED BY ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION

SIXTH ASSIGNMENT OF ERROR: THE TRIAL COURT'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 WHEN ACCEPTING APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICAITON REQUIRES VACATUR OF HIS PLEA AND SENTENCE.

SEVENTH ASSIGNMENT OF ERROR: APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED BURGLARY WAS KNOWING, INTELLIGENT, AND VOLUNTARY AS REQUIRED BY ARTICLE I, SECTION 10, TO THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV, TO THE UNITED STATES CONSTITUTION.

EIGHTH ASSIGNMENT OF ERROR: THE TRIAL COURT'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 WHEN ACCEPTING APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICAITON REQUIRES VACATUR OF HIS PLEA AND SENTENCE.

NINTH ASSIGNMENT OF ERROR: THE TRIAL COURT FATALLY ERRED AND DEPRIVED APPELLANT HUNT DUE PROCESS OF LAW, BY REJECTING HIS UNOPPOSED APP. R. 9(C) STATEMENT, AND SUBMITTING A RECORD WHICH LACKS AN INTELLIGENT BASIS IN FACT.

STATEMENT OF THE CASE AND FACTS

The Appellant waited over a decade to file a direct appeal from his guilty plea and convictions in several cases, and without a transcripts asks this Court to presume irregularity and to vacate his convictions. After Appellant filed a delayed appeal, the state public defender was appointed. On June 29, 2018 a motion for an extension of time to file the record was filed. On July 28, 2018 Appellant filed an objection to any unauthorized appellate rule 9(C) statement. On August 7, 2017 another motion to extent time to transmit the record was filed and the state public defender moved to withdraw as Appellap4dnt retained counsel. On August 30, 2017 a statement of the evidence was filed by Appellant. This Court sua sponte struck the motion on August 31, 2017. On September 18, 2017, Appellant filed a motion with this court to settle the statement of the evidence or proceedings. On September 19, 2017, this Court denied the motion. On September 19, 2017, Hunt now filed a motion to settle statement of the evidence with the trial court. On September 28, 2017, the trial court denied the motion. Appellant again filed a motion to settle the evidence or proceedings on October 10, 2017. In an entry filed on October 17, 2017 the trial court indicated:

> WHILE THE COURT NOW ACCEPTS THE REPRESENTATION THAT ALL TRANSCRIPTS RELATING TO THIS CASE ARE UNAVAILABLE AND IMPOSSIBILE TO OBTAIN, THIS COURT DOES NOT, IN AY WAY, INTEND TO AGREE WITH DEFENDANT'S STATEMENT OF THE EVIDENCE IN WHOLE OR IN PART. THE COURT'S RECOLLECTION OF IT'S PRACTICES BOTH THEN AND NOW WOULD CAUSE THIS COURT TO DISAGREE WITH SOME PORTION OF THE STATEMENT PRESENTED.

Jeimil Hunt nextfiled a writ of mandamus against Judge Kathleen Sutula. On December 15, 2017, the trial court entered a statement of the record or proceedings as follows:

> Based upon a review of App.R. 9, the statement of the evidence or proceedings filed by Defendant Jeimel Hunt ("Defendant") on August 30,2017, the motion to settle statement filed by Defendant on September 30, 2017, the motion to approve

record filed by Defendant on November 11,2017 and the response to the motion to approve record filed by Plaintiff on November 29, 2017, the Court hereby deletes, adds, and modifies the statements of the parties and settles and approves the following statement of the evidence or proceedings as follows:

Case No. CR-91-273936-C

1. In January 1992, Defendant was indicted for one count of attempted aggravated burglary in violation of R.C. 2923.02/R.C. 2911.11 with a three-year firearm specification under R.C. 2941.141 (Count 1), one count of conspiracy to commit aggravated robbery in violation of R.C. 2923.01/R.C. 2911.01 with a three-year firearm specification under R.C. 2941.141 (Count 2), and one count of possessing criminal tools in violation of R.C. 2923.24.

2. On March 11,1992, Defendant, in open Court with his counsel present was fully advised of his constitutional rights. The public defender and Prosecutor Tony Kellon were present. On recommendation of the prosecutor, Count One of the indictment was amended by deleting the firearm specification. Defendant pled guilty to one count of attempted aggravated burglary in violation of R.C. 2923.02/R.C. 2911. Counts 2 and 3 were nolled! Judge Patricia Anne Gaughan signed the journal entry.

3. On April 13, 1992, Judge Patricia Anne Gaughan sentenced Defendant to four (4) to fifteen (15) years, execution of sentence suspended. Defendant was ordered to serve three (3) years of probation with conditions that he (1) be supervised by intensive special probation unit, (2) obtain employment within sixty (60) days, and (3) pay court costs at $15.00 per month.

4. On August 13, 1992, Judge Patricia Anne Gaughan held Defendant to be a probation violator. Defendant was sentenced to three (3) years to fifteen (15) years.

5. On July 7, 1993, Judge Patricia Anne Gaughan granted Defendant's motion to suspend further execution of sentence as provided for by R.C. 2944.061. Defendant was placed on five (5) years of probation with the conditions that he (1) be supervised by intensive special probation, (2) serve 100 hours community service, (3) obtain employment, and (4) pay court costs at the rate of $20.00 per month.

6. On May 31, 1994, at the request of Judge Kathleen Ann Sutula and Administrative Judge James J. Sweeney, a probation violation hearing regarding Defendant was transferred to Judge Kathleen Ann Sutula.

7. On June 14,1994, Judge Kathleen Ann Sutula held a probation hearing. The Court found Defendant to be a probation violator and sentenced Defendant to his original sentence.

Case No. CR-93-300402-D

8. On May 31, 1994, at the request of Judge Kathleen Ann Sutula and Administrative Judge James J. Sweeney, the case was transferred to the docket of Judge Kathleen Ann Sutula.

9. On May 31,1994, the State of Ohio, with leave and good cause shown, entered a nolle prosequi of the indictment for receiving stolen property. Judge Kathleen Ann Sutula signed the journal entry.

Case No. CR-94-305667-D

10. On May 31,1994, Defendant was present with his counsel, Attorneys Donald Butler and Alan Rossman, and was fully advised of his constitutional rights. Defendant pled guilty to aggravated murder, capital case, under R.C. 2903.01 as charged in count three (3) of the indictment. The plea was taken by a three judge panel consisting of Judge Kathleen Ann Sutula, Judge Patricia A. Cleary, and Judge James J. Sweeney. Prosecutor Richard Bombik represented the State of Ohio.

11. On June 14, 1994, the court conducted a sentencing hearing whereupon the court inquired of Defendant if he had anything to say as to why judgment should not be pronounced. Defendant stated he had nothing to offer other than what he had already said. As such, Defendant, present with counsel, was sentenced to life in prison by the three judge panel consisting of Judge Kathleen Ann Sutula, Judge Patricia A. Cleary, and Judge James J. Sweeney. Defendant was to be eligible for parole after thirty (30) years. Defendant was also sentenced to three (3) years on the gun specification to be served prior to and consecutive with the life sentence.

Case No. CR-94-307512-B

12. On May 31,1994, at the request of Judge Kathleen Ann Sutula and Administrative Judge James J. Sweeney, the case was transferred to the docket of Judge Kathleen Ann Sutula.

13. On May 31,1994, Defendant, present with counsel Attorneys Donald Butler and Alan Rossman, was fully advised of his constitutional rights. Prosecutor Richard Bombik represented the State of Ohio. Defendant pled guilty to aggravated robbery in violation of R.C. 2911.01 with a prior aggravated felony specification as charged in Count One of the indictment. The remaining counts were nolled.

14. On June 14,1994, the court inquired of Defendant, with counsel present, if he had anything to say as to why judgment should not be pronounced against him. Defendant had nothing to say but what had already been said and showed no good sufficient cause as to why judgment should not be pronounced. As such, Defendant was sentenced to fifteen (15) years to twenty-five years (25) with the sentence to run consecutive with the sentence in Case No. 305667.

The above contains the totality of this Court's App.R. 9(C) statement of the record or proceedings. The Court, in the interest of clarity, will note its deletions from Defendant's proposed statement of the record or proceedings.

H(l): Appellant Hunt pled guilty during a single proceeding to both cases.

The Court denies this statement. It is not this Court's regular practice to perform two pleas in a single proceeding when one requires a three judge panel and the other does not. Although the pleas took place on the same day, the journal entries were separate and distinct and do not reflect a single proceeding. Defendant did not submit evidence to the contrary.

H(2): Present for the proceeding, on behalf of Appellant Hunt, were Ms. Teona Latten, Melvin Hunt Sr., and Renee Hunt.

The journal entries do not indicate that any of these individuals were present at the proceeding. Defendant did not submit any testimony from these individuals, or any other evidence indicating their presence. Although Attorney William Norman testified that he constructed the statement of evidence or proceedings using the sworn testimony of Ms. Latten and Defendant, the testimony is absent from the filing. Even if attached, the testimony would be self-serving and unreliable for the purposes of this Court's adoption of the statements as truth.

H(3): Appellant Hunt was not informed of the elements of either offense charged.

Defendant did not submit evidence that he was uninformed of the elements of either offense charged. Even if Defendant proved the statement to be true, the court has no requirement to recite the elements of each charge. State v. Brown, 8th Dist. Cuyahoga No. 101367, 2017- Ohio-2850.

H(4): The Court did not require the prosecution to establish a factual basis.

Defendant did not submit evidence that this Court failed to require the prosecution to establish a factual basis. Even if Defendant proved the statement to be true, the Court is not required to do this. State v. Felder, 8th Dist. Cuyahoga No. 102780, 2015-0hio-4701.

H(5): No stipulation of facts or evidence was agreed to or joined in by defense counsel; and no stipulation of facts or evidence was provided to the Court.

Defendant did not submit evidence supporting this allegation. Even if Defendant proved the statement to be true, the Court is not required to do this.

H(6): Appellant Hunt's plea of guilty was the only evidence of guilt.

This statement is a redundancy. A guilty plea is a complete admission of guilt as set forth in Crim.R. 11(B)(1).

H(7): It was part of Appellant Hunt's plea, (acknowledged in open court), that the sentences for Case Nos. CR-94-305667 and CR-94-307512 would run concurrent.

The Court denies this statement. Defendant did not offer evidence of this allegation. The Court's journal entries speak for themselves and Defendant never challenged the journal entries on appeal. The Court speaks through its journal entries. State v. Brook, 113 Ohio St. 3d 199, 2007-0hio-1533, 863 N.E.2d 1024.

H(8): Appellant Hunt was not informed that the firearm specification included in the count to which he plead subjected him to a mandatory three-year term of imprisonment which was required to be ran consecutive to every other term, including the term imposed for capital murder.

The Court denies this statement. Defendant did not submit evidence supporting this allegation. In fact, the journal entry explicitly stated "Defendant sentenced to a term of three (3) years on gun specification, to be served prior to and consecutive with life sentence." Even if Defendant proved the statement to be true, the Court is not required to inform the defendant whether or not sentences imposed for separate crimes will run consecutively or concurrently. State v. Johnson, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988).

H(9): Appellant Hunt was not informed whether he was being prosecuted as a principle or under a complicity theory notwithstanding defense counsel's oral and written motion requesting notice of such.

Defendant did not submit evidence supporting this allegation. Even if Defendant proved the statement to be true, the Court is not required to inform Defendant of the elements of his crime. State v. Divens, 8th Dist. Cuyahoga No. 88808,2007-Ohio-3923.

H(10): During the open court plea proceeding, Appellant Hunt stated that he did not kill Inger Dawson, help kill Dawson, or know in advance that Dawson and his co-defendant had issues and that his co-defendant was carrying a firearm; that the "ridiculous dumb shit" which occurred was not planned; and that he did not know Dawson had been shot and died (from his wound) until the next day.

The Court denies this statement. Defendant did not submit evidence supporting this allegation. Further, Defendant never appealed his plea on this issue.

H(11): Without requiring elaboration, Judge Sutula told Appellant Hunt that "murder/robberies are horrible," and that he should "choose [his] paths better" and feel "lucky" that his plea called for "concurrent sentences."

The Court vehemently denies this statement. Defendant did submit any evidence supporting this spurious accusation. In fact, the journal entry explicitly stated "sentence to run consecutive with Case CR-305667." Defendant did not appeal this issue.

H(13): At the May 14,1994 sentencing hearing, the Court orally pronounced a sentence of 33 years to life for Case No. 94-CR-305667, and a sentence of 5 to 25 years for Case No. 94- CR-307512, to be served concurrent.

To begin, the two sentences were provided at two separate proceedings occurring on June 14,1994. The journal entry in 94-CR-305667 noted that the sentence was life in prison. The journal entry in 94-CR-307512 noted that the sentence was to be served consecutively. Defendant did not offer evidence supporting his allegation contrary to these journal entries. Further, Defendant never appealed these issues.

I: With regard to Case No. CR-91-273936, Appellant Hunt was sworn and deposed and provided counsel the following statement of events.

Defendant did not submit evidence establishing that a deposition took place, let alone what was actually stated in the deposition. The Court rejects this premise.

I(1): Appellant Hunt was not informed of the elements of his offense.

Defendant did not submit evidence supporting this allegation. Even if Defendant proved the statement to be true, the Court is not required to inform Defendant of the elements of his crime. State v. Divens, 8th Dist. Cuyahoga No. 88808,2007-Ohio-3923.

The Court has adopted those parts of the record for which evidence exists. Defendant only submitted two affidavits in support of his statement of the record or proceedings. First, Attorney Francisco E. Luttecke's affidavit asserted that he spoke with one of Defendant's attorneys about his/her recollection of the cases. Luttecke Aff. at para. 5. The affidavit offers nothing of value. Even the hearsay testimony of that unnamed attorney's recollection was not provided. Second, Defendant attached the affidavit of Attorney William Norman. Attorney Norman testified that he constructed the statement of the record or proceedings from "sworn statements from Appellant, and the mother of his children, Teona Latten who attended the proceedings." Norman Aff. at para. 5. The affidavit offers nothing of value. Attorney Norman did not provide the Court with any of the sworn statements

> upon which he relied. As such, Attorney Norman's statement is, at best, inadmissible hearsay. Even if Defendant and Ms. Latten submitted affidavits containing these assertions, the entirety of Defendant's evidence would consist of self-serving fabrications unworthy of evidentiary value because Defendant did not submit any reliable third party evidence corroborating them. This corroborating evidence is especially necessary when considering that Defendant's statements contradict the presumption of regularity surrounding the Court's proceedings and journal entries as set forth in the record.

The writ of mandamus was dismissed in *State ex rel. Hunt v. Sutula,* 8th Dist. Cuyahoga No. 106501, 2018-Ohio-753 as this Court appeared satisfied that Judge Sutula settled and approved a App. R. 9(C) statement. A direct appeal is now pending before this Court

LAW AND ARGUMENT

FIRST ASSIGNMENT OF ERROR: APPELLANT HUNT'S PANEL FATALLY ERRED, UNDER *STATE V GREEN,* 81 OHIO ST. 3D 100 (1998), BY ACCEPTING HIS GUILTY PLEA TO CAPITAL MURDER, WITH SPECIFICATIONS, ABSENT REQUIRING EVIDENCE, TESTIMONY, AND WITNESSES ESTABLISHING APPELLANT HUNT'S GUILT BEYOND A REASONABLE DOUBT, AND BY FURTHER FAILING TO ENTER A JOURNAL ENTRY REFLECTING *GREEN* COMPLIANCE.

To support Appellant's first assignment of error, Appellant argues that the three judge panel's failure to follow the special procedures when a defendant pleads guilty to a capital murder count invalidated Hunt's guilty plea. Appellant states that the three judge panel accepted Hunt's guilty plea to capital murder, with specifications, absent requiring any evidence, witnesses, or testimony establishing Hunt's guilty plea beyond a reasonable doubt. The factual premise of this assignment of error misstates or mischaracterizes the approved App. R. 9(C) statement. The trial court approved the following statement:

> 10. On May 31,1994, Defendant was present with his counsel, Attorneys Donald Butler and Alan Rossman, and was fully advised of his constitutional rights. Defendant pled guilty to aggravated murder, capital case, under R.C. 2903.01 as charged in count three (3) of the indictment. The plea was taken by a three judge

> panel consisting of Judge Kathleen Ann Sutula, Judge Patricia A. Cleary, and Judge James J. Sweeney. Prosecutor Richard Bombik represented the State of Ohio.
>
> 11. On June 14, 1994, the court conducted a sentencing hearing whereupon the court inquired of Defendant if he had anything to say as to why judgment should not be pronounced. Defendant stated he had nothing to offer other than what he had already said. As such, Defendant, present with counsel, was sentenced to life in prison by the three judge panel consisting of Judge Kathleen Ann Sutula, Judge Patricia A. Cleary, and Judge James J. Sweeney. Defendant was to be eligible for parole after thirty (30) years. Defendant was also sentenced to three (3) years on the gun specification to be served prior to and consecutive with the life sentence.

These entries comport with the journalized entries in Cuyahoga County Case No. CR-94-305667-D. The approved App. R. 9(C) and the associated journal entries do not affirmatively state that the trial court failed to follow the follow the procedures outlined in R.C. 2945.06. Even then those procedures may be waived. *State v. Turner,* 105 Ohio St. 3d 331, 2005-Ohio-1938, *State v. Korp,* 8th Dist. Cuyahoga No. 56132, 1989 Ohio App. LEXIS 5069.

Ordinarily, this argument had it been raised in a post-conviction proceeding or a motion to withdraw guilty plea, 20 years after the conviction, would be barred under the doctrine of res judicata. *State v. Nelson,* 10th Dist. Franklin No. 11AP-720, 2012-Ohio-1918. Thus, this Court should not concluded that the existing record affirmatively demonstrates a failure to comply with R.C. 2945.06. Instead, this Court must presume regularity.

It has been said that in Ohio, the appellant has the duty to file the transcript or such parts of the transcript that are necessary for evaluating the lower court's decision. The failure to file the transcript prevents an appellate court from reviewing the appellant's assignments of error. Thus, absent a transcript or alternative record, the appellate court must presume regularity in the proceedings below. See *State v. Ali,* 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510, ¶6.

In this case, Appellant obtained a delayed appeal more than 20 years after the conviction in Case No. CR-94-305667-D based, in part, upon the unverifiable claim that Appellant was not advised of his appellate rights in all of his criminal cases currently being appealed. See Motion for Delayed Appeal. Transcripts in Appellant's criminal cases can no longer be produced and the trial court has not affirmatively adopted the facts that forms the basis for the first assignment of error. Such a delay should be held against Appellant if he is at fault for the delay. Citing to *State v. Jones,* 71 Ohio St. 3d 293, 297, 643 N.E.2d 547 (1994) this Court in *State v. Wilson,* 8th Dist. Cuyahoga No. 72740, 1998 Ohio App. LEXIS 2174, 1998 WL 241933 (May 14, 1998) agreed that a defendant must suffer the consequences of nonproduction of an appellate record where such nonproduction is his own fault. Despite the fact that Appellant claimed that he was not advised of his right to appeal, which is unverified, a two decade delay in availing himself of his direct appeal remedy

Without a reliable record of what happened during Appellant's plea hearing, this Court should not review and reverse this assignment of error based upon the record that does exist. Instead, this Court must presume regularity. To the extent there was a fact that was not clearly posed to the trial court, this Court should not adopt facts in favor of the Appellant merely because the trial court did not address that particular fact. Finally, nothing in *State v. Green,* 81 Ohio St. 3d 100 (1997) requires a journal entry to contain certain language.

The first assignment of error should be denied.

SECOND ASSINGMENT OF ERROR: INSUFFICIENT EVIDENCE EXISTS TO SUSTAIN APPELLANT HUNT'S CONVICTION FOR CAPITAL MURDER, WITH SPECIFICATIONS.

For the same reasons explained in the first assignment of error, this Court should deny the second assignment of error. Absent a transcript or alternative record, the appellate court must

presume regularity in the proceedings below See *State v. Ali,* 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510, ¶6. Appellant cannot say that the existing record supports that the prosecutor "did not produce evidence, witnesses, and testimony establishing Appellant Hunt's guilt of capital murder, with specifications, beyond a reasonable doubt. In some instances a Defendant may stipulate to the relevant facts, alleviating the need to produce evidence. See *State v. Turner,* 105 Ohio St. 3d 331, 2005-Ohio-1938, *State v. Korp,* 8th Dist. Cuyahoga No. 56132, 1989 Ohio App. LEXIS 5069. Although not indicative of everything that occurred in court over 20 years ago, Appellant's proposed statement H-10, which was rejected by the court evidences that Appellant will claim that there was some discussion of the facts during the plea colloquy (at least from his perspective). Nevertheless, given the posture of this case, this Court must presume regularity and reject this assignment of error.

THIRD ASSIGNMENT OF ERROR: APPELLANT HUNT'S GUILTY PLEA TO CAPITAL MURDER WITH SPECIFICATIONS WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY AS REQUIRED BY ARTICLE I, SECTION 10, TO THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION.

Absent a transcript or alternative record, the appellate court must presume regularity in the proceedings below See *State v. Ali,* 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510, ¶6. Here the trial court agreed with the following fact and comports with the plea journal entry in this case:

> 10. On May 31,1994, Defendant was present with his counsel, Attorneys Donald Butler and Alan Rossman, and was fully advised of his constitutional rights. Defendant pled guilty to aggravated murder, capital case, under R.C. 2903.01 as charged in count three (3) of the indictment. The plea was taken by a three judge panel consisting of Judge Kathleen Ann Sutula, Judge Patricia A. Cleary, and Judge James J. Sweeney. Prosecutor Richard Bombik represented the State of Ohio.

Appellant's specific assertions that he was not informed of the elements of capital murder, that he was not informed of the range of allowable punishments, that he was not advised of the mandatory

minimum and consecutive sentences which applied, that he was not advised of his guilty plea and was not informed of the affirmative defense which applied have not been adopted by the trial court and are not part of the approved record in this case.

The third assignment of error should be denied.

FOURTH ASSIGNMENT OF ERROR: THE PANEL'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 REQUIRES VACATUR OF APPELLANT HUNT'S GUILTY PLEA TO CAPITAL MURDER, WITH SPECIFICATIONS.

For the same reasons argued above, there is no evidence that the trial court completely failed to comply with Crim. R. 11 in Case No. CR-94-305667-D. The record does not support this claim and in the absence of a transcript or other record supporting his claim, this Court must presume regularity in accordance with *State v. Ali,* 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510.

The fourth assignment of error should be denied.

FIFTH ASSIGNMENT OF ERROR APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICATION WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY, AS REQUIRED BY ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION

The record in this case does not affirmatively establish that the trial court in Case No. CR-94-305667-D did not inquire as to whether he understood the elements of aggravated robbery, with specifications; (b) the range of allowable punishments which attached; (c) each direct consequence of his guilty pela; (d) the effect of his guilty plea; (e) the mandatory three year consecutive term which attached; and (f) the affirmative defense which applied.

The record does not support this claim and in the absence of a transcript or other record supporting his claim, this Court must presume regularity in accordance with *State v. Ali,* 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510.

The fifth assignment of error must be denied.

SIXTH ASSIGNMENT OF ERROR: THE TRIAL COURT'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 WHEN ACCEPTING APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICAITON REQUIRES VACATUR OF HIS PLEA AND SENTENCE.

Appellant claims that the record approved and submitted, under App. R. 9(C) *establishes complete non-compliance* with Rule 11. This is not demonstrated by the trial court's approved statement of the record.

The record does not support this claim and in the absence of a transcript or other record supporting his claim, this Court must presume regularity in accordance with *State v. Ali,* 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510.

The sixth assignment of error must be denied.

SEVENTH ASSIGNMENT OF ERROR: APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED BURGLARY WAS KNOWING, INTELLIGENT, AND VOLUNTARY AS REQUIRED BY ARTICLE I, SECTION 10, TO THE OHIO CONSTITUTION, AND AMENDMENTS V AND XIV, TO THE UNITED STATES CONSTITUTION.

Appellant claims that the record approved and submitted by the trial court requires his guilty plea to Aggravated Burglary (in an unspecified case) to be vacated. Appellant claims that there was non-compliance with Crim. R. 11 and specifically that the trial court did not inquire as to whether he understood the elements of aggravated robbery, with specifications; (b) the range of allowable punishments which attached; (c) each direct consequence of his guilty pela; (d) the

effect of his guilty plea; (e) the mandatory three year consecutive term which attached; and (f) the affirmative defense which applied.

The record does not support this claim and in the absence of a transcript or other record supporting his claim, this Court must presume regularity in accordance with *State v. Ali,* 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510.

The seventh assignment of error should be denied.

EIGHTH ASSIGNMENT OF ERROR: THE TRIAL COURT'S COMPLETE FAILURE TO COMPLY WITH CRIM. R. 11 WHEN ACCEPTING APPELLANT HUNT'S GUILTY PLEA TO AGGRAVATED ROBBERY, WITH A FIREARM SPECIFICAITON REQUIRES VACATUR OF HIS PLEA AND SENTENCE.

Appellant claims that the record approved and submitted, under App. R. 9(C) *establishes complete non-compliance* with Rule 11. This is not demonstrated by the trial court's approved statement of the record.

The record does not support this claim and in the absence of a transcript or other record supporting his claim, this Court must presume regularity in accordance with *State v. Ali,* 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510.

The eighth assignment of error should be denied.

NINTH ASSIGNMENT OF ERROR: THE TRIAL COURT FATALLY ERRED AND DEPRIVED APPELLANT HUNT DUE PROCESS OF LAW, BY REJECTING HIS UNOPPOSED APP. R. 9(C) STATEMENT, AND SUBMITTING A RECORD WHICH LACKS AN INTELLIGENT BASIS IN FACT.

Appellant claims that he has suffered de facto life sentences for capital murder. The trial court denied Appellant's request for an approved App. R 9(C) statement before the State could respond. The State filed a response on November 29, 2017 after Jeimil Hunt again filed a motion to approve the record on November 15, 2017. The State could not agree with Hunt's claims.

It is important to note that the original Statement of the Evidence or Proceedings filed on November 30, 2017 failed to include any affidavits from the Appellant or other witnesses to support their "version of events". The only affidavits included in that filing were from attorneys indicating their efforts on the case. Appellant cannot now argue that the trial court was at fault for creating a record that did not have a basis in any sworn attestation.

The Appellant cites to no substantive case law to support his argument that the trial court erred in issue a journal entry that resolved the record. Furthermore, Appellant's reliance upon *State v. Polk*, 8th Dist. Cuyahoga No. 57511, 1991 Ohio App. LEXIS 900 is misplaced, because Appellant has not demonstrated that he is not without fault. The remedy in *Polk* could only be obtained where, *after an evidentiary hearing,* a record cannot be settled and it is determined that the appellant is not at fault. See also *Knapp v. Edwards Laboratories,* 61 Ohio St.2d 197, 400 N.E.2d 384 (1980). See also, *State v. Lawson,* 6th Dist. L-10-1204, 2011-Ohio-1140, 2011 Ohio App. LEXIS 950, ¶9 (remanding to the trial court only to decide whether the defendant was at fault).

Accordingly rejection of Appellant's App. R. 9(C) record does not provide Appellant the windfall of having all of his plea-convictions vacated. The ninth assignment of error should be denied.

CONCLUSION

Based upon the existing record, Appellant's claims are unsupported. This Court should presume regularity, reject all assigned errors and affirm the convictions in these cases.

Respectfully submitted,

MICHAEL O'MALLEY
Cuyahoga County Prosecuting Attorney

__/s/ Daniel T. Van_____
DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney
The Justice Center, 9th floor
1200 Ontario Street
Cleveland, Ohio 44113

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellee was filed using the Clerk of Court's electronic filing system and an electronic copy of this brief was sent to William Norman by operation of the court's electronic filing system on this 11th day of April, 2018.

__/s/ Daniel T. Van_____