

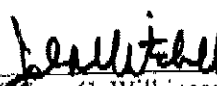
IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

ORIGINAL

STATE OF OHIO	)	20080821 P 2:07	CASE NO. CR-06-01348
)		
Plaintiff	)	COURT OF APPEALS NO. CL-06-1393	
)		
v.	)	JUDGE GENE ZMUDA	
)		
THOMAS W. NOE	)	THOMAS W. NOE'S MOTION FOR A	
	)	NEW TRIAL	
)		
Defendant.	)	(EVIDENTIARY HEARING REQUESTED)	

Thomas W. Noe hereby moves the Court, pursuant to Ohio Crim. R. 33, for a new trial on the grounds of juror misconduct. Because of this misconduct, Mr. Noe's conviction must be vacated under the United States and Ohio Constitutions, as explained in the attached memorandum.

Respectfully Submitted,



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LUCAS COUNTY, OHIO

STATE OF OHIO)	CASE NO. CR-06-01348
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Plaintiff,)	COURT OF APPEALS NO. CL-06-1393
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v.)	JUDGE GENE ZMUDA
)	
THOMAS W. NOE)	MEMORANDUM IN SUPPORT OF
)	THOMAS W. NOE'S MOTION FOR A
Defendant.	)	NEW TRIAL
)	
	)	(EVIDENTIARY HEARING REQUESTED)

I. STATEMENT OF THE FACTS

Mr. Noe was indicted on February 11, 2006 in a 53-count indictment alleging violations of Engaging in a Pattern of Corrupt Activity (Count 1), Theft (Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 21 and 30), Money Laundering (Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 20 and 31), Tampering with Records (Counts 22-29) and Forgery (Counts 32-53).

On Mr. Noe's motion, the Court consolidated Counts 4, 6, 8, 10, 12, 14, 16 and 18 into one count of theft, Count 2. The State nolleed Count 21 before trial.

Mr. Noe's trial began on October 10, 2006. Before closing argument, the State nolleed four forgery counts (Counts 47, 50-51 and 53). (T. 4016.) Counts 22-23 were amended to change the date to March 15, 2005. (T. 4017-4018.) As part of its prior consolidation of the theft charges, the Court amended Count 2 to include the time period from March 15, 1998 through September 15, 2003, and to allege that Mr. Noe stole an amount in excess of \$100,000. (T. 4015-4016.)

The jury returned a verdict on November 13, 2006. Mr. Noe was found guilty of Engaging in a Pattern of Corrupt Activity (Count 1), two counts of Theft (Counts 2 and 30), four counts of Money Laundering (Counts 7, 13, 17 and 20), four lesser included counts of

Tampering with Records (Counts 22, 24-26) and eighteen counts of Forgery (Counts 32-46, 48-49 and 52).

Mr. Noe was acquitted of seven counts of Money Laundering (Counts 3, 5, 9, 11, 15, 19 and 31) and four counts of Tampering with Records (Counts 23, 27-29). Thus, of the original 53-count felony indictment, Mr. Noe was ultimately convicted of 25 felony counts and 4 misdemeanors.

On November 20, 2006, the Court sentenced Mr. Noe to a term of 18 years of incarceration in an Ohio penitentiary, to be served consecutively with a federal sentence of 27 months for a prior conviction. The trial court fined Mr. Noe \$139,000, and also required him to make restitution in the amount of \$13,747,000 and to pay \$2,979,402.89 in reimbursement to the State as costs of his prosecution.

Mr. Noe timely filed his appeal on December 15, 2006. On February 25, 2008, the record was transmitted to the Court of Appeals.

II. LAW AND ARGUMENT

A. MR. NOE HAD A RIGHT TO HAVE HIS CASE DECIDED BY A FAIR AND IMPARTIAL JURY.

The Sixth Amendment to the United States Constitution mandates that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." See also: Section 10, Article I, Ohio Constitution, (establishing the right to "a speedy public trial by an impartial jury.") Beyond this, the United States Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to the United States Constitution as requiring that a defendant accused of a state criminal violation be tried before a panel of fair and impartial jurors. *Duncan v. Louisiana* (1968), 391 U.S. 145.

The right to trial by jury does not just require a fair and impartial jury, but also a verdict

based upon the evidence adduced at trial and the proceedings in open court. "The verdict reached by a jury in a criminal trial must be based solely on the evidence and argument presented in open court." *State v. Taylor* (1991), 73 Ohio App.3d 827 (citing *Patterson v. Colorado* (1907), 205 U.S. 454)("[t]he theory of our system is that the conclusions to be reached in a case will be introduced only by evidence and argument in open court, and not by any outside influence, whether private talk or public print.") Mr. Petiniot's affidavit (attached as Exhibit A) establishes that all of these constitutional principles were violated during Mr. Noe's trial.

B. UNDER CRIM. R. 33, MR. NOE IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY'S VERDICT WAS PREDICATED ON OUTSIDE INFLUENCES AND DECIDED BY JURORS WHO VIOLATED THEIR OATHS.

Crim.R. 33(A) provides that a new trial may be granted for "[m]isconduct of the jury" that materially affects the defendant's "substantial rights." Moreover, Crim.R. 33(F)(4) states, in relevant part, that "[a] misdirection of the jury" constitutes grounds for a new trial if "the defendant was or may have been prejudiced thereby."

"The Supreme Court of Ohio has held that a new trial may be granted for the misconduct of the jury when the substantial rights of the defendant have been materially affected." *State v. Lewis* (1993), 67 Ohio St.3d 200; *State v. Hipkins* (1982), 69 Ohio St.2d 80; See: R.C. § 2945.79; Crim.R. 33. If a juror refuses to consider the evidence or forms an opinion as to the guilt or innocence before all the evidence is presented, such activity constitutes juror misconduct. *Taylor*, 73 Ohio App. 3d 831 (citing *Carr v. State* (1926), 22 Ohio App. 78; *Busick v. State* (1850), 19 Ohio 198; and *State v. Carter* (1890), 11 Ohio Dec.Rep. 123.)

A claim of jury misconduct requires a two-step inquiry. First, there must have been misconduct by a juror. Second, the court must determine whether such misconduct materially affected the defendant's substantial rights. *Taylor*, 73 Ohio App.3d at 833.

Mr. Petiniot's affidavit demonstrates how Mr. Noc's worst nightmares about his ability to receive a fair trial in Lucas County came true.¹ Mr. Petiniot affidavit provides a disturbing glimpse into the deliberations that took place in Mr. Noe's case:

1. The jury did not reach a verdict based upon the evidence adduced at trial. Instead, numerous jurors ignored their oaths, and found Mr. Noe guilty of multiple offenses just to end the trial (Petiniot Aff. at ¶ 3a);
2. The jurors felt overwhelmed by the amount of material that they were expected to go through and were confused (*Id.*);
3. The jurors felt that the public would question them if they did not return a verdict after only a few days of deliberations (*Id.*);
4. Some of the jurors felt they had an obligation to convict (*Id.*);
5. Some of the jurors, including Mr. Petiniot, gave up, and did not vote their conscience (*Id.*); and
6. One of the jurors was watching press coverage about the trial, and another juror reprimanded her for doing so. (Petiniot Aff. at ¶ 3b.) This incident was not brought to the Court's attention.
7. The jury was aware of newspaper advertisements regarding Tim LaPointe's business that were not admitted into evidence. (Petiniot Aff at ¶ 3c.)

Importantly, Mr. Petiniot related how he violated his juror oath, stating:

I, myself, did that on the charge of engaging in a pattern of corrupt activity. I was convinced that the State had not presented evidence to establish Mr. Noc's guilt, but voted guilty just to end the deliberations. I should have signed the verdict form to show what I really believed, that Mr. Noc's guilt had not been proven. (Petiniot Aff. at ¶ 3a.)

Mr. Petiniot's conduct must be evaluated in light of the instructions provided by the trial court at the conclusion of the case. Prior to deliberations, the jury was instructed, in relevant part:

¹ Mr. Noe originally moved for a change of venue on May 19, 2006. The trial court denied his motion on July 3, 2006. Mr. Noe repeatedly supplemented his Motion for Change of Venue, cataloguing the unceasing media attack on him before and during his trial. Mr. Noe supplemented his Motion for Change of Venue with articles and CDs filed on May 19, 2006, August 31, 2006, September 22, 2006, November 11, 2006, November 20, 2006, and December 11, 2006.

“* * * Your duty is confined to the determination as to whether the State has proven each and every element of each and every offense against Mr. Noe by evidence beyond a reasonable doubt. * * *

* * * It is your duty to carefully weigh the evidence, to decide all the disputed questions of fact, and apply the instructions of the Court to your findings, and to render your verdicts accordingly.

Now, in fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your findings with intelligence and impartiality, and without bias, sympathy, or prejudice, so that both the State of Ohio and the defendant may feel that their case was fairly and impartially tried.

Now, at the commencement of this case, each of you took an oath to abide by the Court's instructions, and each of you will recall my daily admonitions to avoid daily media in this case. In what will be my last admonition in this respect, you must not allow anything that happens outside of this courtroom to affect your decision. You must not let any bias, sympathy, prejudice, media characterizations, or public opinion influence your decision.

* * * Each of you must decide this case for yourself, but you should only do so after discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender an honest conviction in order to be congenial or to reach a verdict solely because of the opinion of other jurors. * * *

(T. 4340-4343, attached as Exhibit B.)

The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to have his case heard by a fair and impartial jury. Yet, Mr. Petiniot, the jury foreman, described how Mr. Noe's jury simply did not perform its duty, and, as a result, Mr. Noe was convicted of offenses that the State did not prove.

C. MR. NOE IS ENTITLED TO A NEW TRIAL UNDER THE *TAYLOR* TEST.

The first prong of the *Taylor* test requires that there must have been misconduct by a juror. *Taylor*, 73 Ohio App.3d at 833. Nothing can be more compelling than Mr. Petiniot, the jury foreman, admitting that he did not perform his duty as a juror. (Petiniot Aff. at ¶ 3a.) Mr. Petiniot admitted that he voted guilty with regard to the Engaging of a Pattern of Corrupt Activity count just to end deliberations. (*Id.*) By his own admission, Mr. Petiniot did not find

Mr. Noe guilty because the State had satisfied its burden of proving each and every element of the Engaging of a Pattern of Corrupt Activity charge by evidence beyond a reasonable doubt. (*Id.*) Instead, he voted guilty just to end the case, and violated the trial court's instructions to decide the case fairly and impartially, and to not surrender honestly held opinions. (T. 4340, 4342-4343.) He was not alone, Mr. Petiniot explained how other jurors gave up and went along with others just to end the case. (Petiniot Aff. at ¶ 3a.)

Further, the jury improperly considered how the public would react if they did not return a timely guilty verdict. (*Id.*) In doing so, they violated the portion of the trial court's instructions where the trial court indicated that the jury must not "let any bias, sympathy, prejudice, media characterizations, or public opinion influence your decision." (T. 4342.)

The media presence even found its way into the jury room, with at least two jurors being aware of the its coverage. Despite the daily admonitions from the Court, at least one of the jurors watched the TV coverage. (Petiniot Aff. at ¶ 3b.) The jury also saw advertisements regarding Tim LaPointe's rare coin business that had not been introduced into evidence. (Petiniot Aff. at ¶3c; Attached as Exhibit C.)

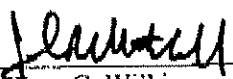
The second prong of the *Taylor* test requires that the court determine whether such misconduct materially affected the substantial rights of the defendant. *Taylor*, 73 Ohio App.3d at 833. Mr. Noe's substantial rights were effected in a number of ways: 1) his conviction was not based upon the evidence adduced at trial, but instead outside considerations; 2) some of the jurors felt that they had an obligation to convict Mr. Noe, and, therefore denied him a fair trial; and 3) he is serving 10 years for a crime that the jury foreman, Mr. Petiniot, believes was not proven by the State. *See*: 2929.14(D)(3)(a). In short, Mr. Noe may very well be sitting in prison because the jury did not do its job.

D. CONCLUSION

Mr. Noe moved for a change of venue because he believed that no jury would be able to impartially examine his case in the midst of a media firestorm designed to vilify him. He was right. Mr. Petiniot's affidavit reveals that the jury was unprepared for and overwhelmed by the task they were vested with. When it came time to decide Mr. Noe's fate, the jury turned its focus to outside considerations, not the evidence adduced at trial. In doing so, the jurors violated their oaths.

Our jury system will not work if jurors are unwilling to examine the evidence fairly and impartially and decide the case as they are instructed. Because Mr. Noe's jury violated its duties, its verdict is invalid. As such, Mr. Noe must be granted a new trial so that all Ohio citizens can be assured that one of the most fundamental constitutional protections--the right to a jury trial--will be respected.

Respectfully Submitted,



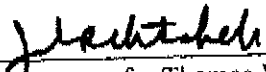
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Attorneys for Thomas W. Noe

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Defendant Thomas W. Noe's Motion for a New Trial was served this 21st day of August, 2008, via hand-delivery, to the Lucas County Prosecutor's Office, Lucas County Courthouse, Adams and Erie Streets, Toledo, OH 43624.



Attorney for Thomas W. Noe

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

STATE OF OHIO	)	CASE NO. CR-06-01348
)	
Plaintiff,	)	JUDGE THOMAS J. OSOWIK
)	
v.)	
	)	AFFIDAVIT OF JAMES PETINIOT
THOMAS W. NOE)	
)	
Defendant.)	

STATE OF OHIO)
COUNTY OF LUCAS) SS

Affiant, James Petiniot, of full age and having been duly sworn, states as follows:

1. I was the foreman of the jury in the case entitled State of Ohio v. Thomas W. Noe, CR-06-01348 tried in the Lucas County Court of Common Pleas. Judge Thomas Osowik conducted the trial and it commenced on October 10, 2006. The jury returned a verdict on November 13, 2006.
2. As part of my duties as jury foreman, I presided over the jury's deliberations.
3. During the course of the trial, I noticed that a number of violations that occurred while the jury was deliberating:
 - a. The jury did not deliberate and reach a verdict based upon the evidence presented at trial. I, and the rest of the jury, felt overwhelmed by the numerous exhibits that we were expected to go through. The jury had difficulty digesting the massive amount of materials admitted as exhibits. We were confused. After a couple of days of floundering with this material, the jury felt that the public would have questions about them if they did not come back with a verdict soon. By the end, a couple of the jurors felt they had an obligation to convict and just wanted to get it over with. In the end, a couple of jurors gave up and said they would just go along with what the others decided. I, myself, did that on the charge of engaging in a pattern of corrupt activity. I was convinced that the State had not presented evidence to establish Mr. Noe's guilt, but voted guilty just to end the deliberations. I should have signed the verdict form to show what I really believed, that Mr. Noe's guilt had not been proven. We ignored our juror oaths and succumbed to the pressure to convict Mr. Noe, not because of the evidence, but just to get the case finished.
 - b. One of the younger jurors indicated that she had watched TV stories about the trial. Another juror reprimanded her for watching TV.

c. The jury was exposed to a newspaper advertisement regarding Tim LaPointe, indicating that Mr. LaPointe was in business for himself selling rare coins. This advertisement was in one of the newspapers in the jury room and was not admitted into evidence.

4. Since the trial ended, I learned that State made a profit on its investments in the coin funds. If this information had been made available to the jury, it would have influenced our verdict.

5. Mr. Noe does not deserve 18 years in prison for committing the offenses of which he was convicted. I thought Mr. Noe's sentence is much harsher than it should have been.

FURTHER THE AFFIANT SAYETH NAUGHT.

James Petiniot
JAMES PETINIOT

Sworn to before me on this
31st day of ~~May~~ July, 2008

Thelma J. Arend
Notary Public



THELMA J. AREND
Notary Public, State of Ohio
My Commission Expires 10/02/2009

NOE118

4339

1 again, we're asking a special determination
 2 by you to be made, were or were not computer
 3 software, were or were not data, and again, a
 4 final determination of the amounts if you
 5 make that finding.

6 with respect to Count 29,
 7 again, another charge of tampering with
 8 records. We're asking you make another
 9 separate determination, were or were not
 10 computer software, were or were not data, and
 11 the amounts requested, amount of loss to the
 12 victim if you can make that determination.

13 with respect to Count 30, the
 14 charge is aggravated theft. In this case,
 15 we're asking you to make a determination if
 16 your finding is guilty on that charge, you
 17 will also have to make a determination as to
 18 the value involved. And again, there's a
 19 list of value here for you to -- for your
 20 determination. You will have to make that
 21 finding.

22 with respect to Count 31,
 23 another charge of money laundering, we simply

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4340

1 need you to make a determination on that
 2 charge.

3 Count 33, charge of forgery,

NOE118

4 Count 32, Count 34, Count 35, Count 36, Count
 5 37, Count 38, 39, 40, 41, 42, 43, 44, 45, 46,
 6 48, 49, and 52 are all counts of forgery.
 7 The definition has been provided to you, and
 8 in those counts you will simply have to make
 9 your determination and sign the verdict form
 10 accordingly.

11 when you have reached your
 12 verdicts, you will complete the form that
 13 will correspond to your decision, and again,
 14 all of you must sign this in ink.

15 You may not discuss or consider
 16 the subject of punishment. Your duty is
 17 confined to the determination as to whether
 18 the state has proven each and every element
 19 of each and every offense against Mr. Noe by
 20 evidence beyond a reasonable doubt. In the
 21 event you find the defendant guilty, the duty
 22 to determine the punishment is placed, by
 23 law, upon the Court.

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4341

1 You must not be influenced by
 2 any consideration of bias, sympathy, or
 3 prejudice. It is your duty to carefully
 4 weigh the evidence, to decide all the
 5 disputed questions of fact, and to apply the
 6 instructions of the Court to your findings,
 7 and to render your verdicts accordingly.

8 Now, in fulfilling your duty,
 9 your efforts must be to arrive at a just

NOE118

10 verdict. Consider all the evidence and make
11 your findings with intelligence and
12 impartiality, and without bias, sympathy, or
13 prejudice, so that both the state of Ohio and
14 the defendant may feel that their case was
15 fairly and impartially tried.

16 Now, at the commencement of
17 this case, each of you took an oath to abide
18 by the Court's instructions, and each of you
19 will recall my daily admonitions to avoid
20 daily media in this case. In what will be my
21 last admonition in this respect, you must not
22 allow anything that happens outside of this
23 courtroom to affect your decision. You must

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4342

1 not let any bias, sympathy, prejudice, media
2 characterizations, or any public opinion
3 influence your decision.

4 If, during the course of the
5 trial, the Court said or did anything that
6 you consider an indication of the Court's
7 view on the facts, you are instructed to
8 disregard it.

9 It may be difficult to remember
10 all these instructions, so therefore,
11 obviously, you'll be given copies. You may
12 refer to these instructions if you're in
13 doubt as to any point or instruction. I do
14 caution you, as indicated at the commencement

