

# Ohio Supreme Court Is Deaf, Dumb and Blind To Evidence Of Nancy Smith and Joseph Allen's Actual Innocence

By Hans Sherrer

Nancy Smith and Joseph Allen were convicted in November 1994 of multiple charges related to the alleged rape of children attending a Head Start program in Lorain, Ohio.

Smith was a Head Start school bus driver. The prosecution's theory was that after dropping off most of the kids at school she drove the bright yellow school bus to Allen's home in a residential neighborhood, where the sexual abuse occurred in the front yard and inside his home.

The prosecution's case was based on the testimony of several children and hearsay testimony by several adults about what other children had said. There was no incriminating physical or medical evidence, and no adult eyewitness corroborated any of the children's claims. So there was no verifiable evidence any crimes occurred.

The jury rejected Smith and Allen's protestations of innocence, and their claim that prior to being charged they had never met. Smith was sentenced to 15 to 90 years in prison. Allen was sentenced to 20 years to life in prison.

Over a period of years new evidence of Smith and Allen's innocence was discovered. Smith's lawyers chose the tactic of filing a motion in 2008 for resentencing under Ohio Criminal Rule 32(C) based on a defect in her sentencing order: the order didn't meet the requirement of stating she was convicted by a jury. Allen filed a similar motion. Their trial judge had retired, and a new judge assigned to their case could take a fresh look at the evidence and resentence them to time served.

During a hearing on February 4, 2009, Lorain County Common Pleas Court Judge James Burge went beyond resentencing Smith and Allen by unexpectedly vacating their convictions. After 15 years imprisonment Smith was immediately released on \$100,000 bail. Allen was released on \$100,000 bail on April 14, 2009.

The prosecution appealed, but the Ohio Court of Appeals upheld Judge Burge's au-



Nancy Smith

thority to vacate the convictions and sentences.

After Smith and Allen were convicted in 1994 they filed separate motions for acquittal under Ohio Criminal Rule 29(C) that were denied by their trial judge. During a hearing on June 24, 2009 Judge Burge reviewed the evidence presented at trial that the jury relied on to convict Smith and Allen. He then announced, "I have absolutely no confidence that these verdicts are correct." He then sua sponte ordered judgments of acquittal entered for Smith and Allen. He based the acquittal on his reconsideration of their Crim. R. 29(C) motions filed in 1994. He ordered the return of their bonds and they walked out of the courtroom free persons.

The State appealed Judge Burge's acquittal of Smith and Allen to the Ohio Court of Appeals. The Court upheld Judge Burge's acquittal of Smith, but ruled that Allen's Crim. R. 29(C) motion had been filed untimely in 1994 so it vacated his acquittal.

The State appealed the ruling upholding of Smith's acquittal to the Ohio Supreme Court. The State cited two grounds. One was that the original sentencing orders were not defective so there was no legal basis for Smith and Allen's motions for resentencing under Crim. R. 32(C). The second ground was that Judge Burge did not have the jurisdiction to acquit Smith and Allen as a remedy even if their sentencing orders were defective.

On January 27, 2011 the Ohio Supreme Court unanimously ruled the original sentencing orders for Smith and Allen were technically defective, but that Judge Burge only had the authority to add to the sentencing orders the missing words that Smith and Allen were convicted by a jury. (See, *State ex rel. DeWine v. Burge*, Slip Opinion No. 2011-Ohio-235)

The Court let stand the Court of Appeals order vacating Allen's acquittal, and ordered that Judge Burge vacate his acquittal of Smith and correct the clerical error in Smith and Allen's sentencing orders.

The Court's ruling did not take into consideration the rationale underlying Judge Burge acquittals of Smith and Allen – there is no credible evidence they committed their convicted crimes or that the crimes ever occurred.

Since Smith and Allen refuse to admit guilt, it is unlikely they will ever be paroled. So



Joseph Allen

barring future legal proceedings that successfully challenge their convictions or a pardon by Ohio's governor, the Ohio Supreme Court's order likely means that Nancy Smith and Joseph Allen will die in prison for crimes that they are not only innocent of committing – but which there is no evidence ever occurred.

Martin Yant, a Columbus, Ohio private investigator who has researched and investigated Smith and Allen's case for 14 years told the Lorain *Morning Journal* that the Ohio Supreme Court's ruling is "a classic example of how procedural rules in our criminal justice system sometimes get in the way of true justice. By that, I mean, that it's very obvious to the judge who has jurisdiction over the case that Nancy Smith and Joseph Allen are innocent. The rules and procedures prohibit him from executing that belief. And the net result is a travesty of justice. When you look at the totality of the case, there was nothing there. ... What this is, is hysteria. And hysteria can be a very frightening thing when it takes hold in the community and that's what happened in this case. When people take hold of hysteria, they suspend rationality and they jump to conclusions. When you get hysteria, you get scary judgments. People forget Jesus Christ was convicted by a mob. That's what we had here. A mob that started with one parent who had problems. This is a horrible injustice and a stain on Lorain County and it's continuing."

For additional information read "The Shame Of Lorain, Ohio – Nancy Smith And Joseph Allen Convicted Of Non-Existent Crimes," by Lona Manning, that was published in *Justice Denied* Issue 29, Summer 2005.

#### Sources:

State ex rel. DeWine v. Burge, Slip Opinion No. 2011-Ohio-235

"Fighting for their freedom: Support growing for Smith, Allen," *The Morning-Journal* (Lorain, OH), January 29, 2011.

**Visit Justice Denied's Website**

**[www.justicedenied.org](http://www.justicedenied.org)**

Back issues of *Justice: Denied* can be read, there are links to wrongful conviction websites, and other information related to wrongful convictions is available. JD's online Bookshop includes more than 70 wrongful conviction books, and JD's Video shop includes many dozens of wrongful conviction movies and documentaries.