

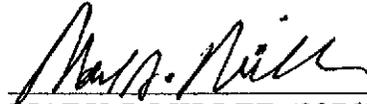
IN THE SUPREME COURT OF COURT

STATE ex rel. EDWARD PAYNE, :
Petitioner, : Case No. 07-1924
v. :
THE HONORABLE CARRIE GLAEDEN, :
Respondent. :

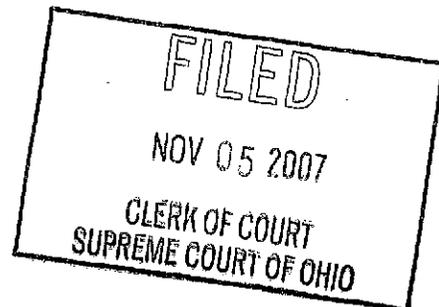
**PETITIONER'S MEMORANDUM CONTRA RESPONDENT'S MOTION TO
DISMISS PETITION FOR WRIT OF HABEAS CORPUS**

Now comes Petitioner Edward Payne, by and through undersigned counsel, and hereby respectfully requests this Court to deny Respondent's Motion to Dismiss Petitioner's Writ of Habeas Corpus. Petitioner's reasons are fully explained in the accompanying Memorandum in Support.

Respectfully submitted,



MARK J. MILLER (0076300)
SHAW & MILLER
555 City Park Avenue
Columbus, Ohio 43215
Phone: (614) 227-0007
Fax: (614) 227-0001
Counsel for Petitioner



MEMORANDUM IN SUPPORT

I. BACKGROUND

On October 18, 2007, Petitioner filed his Petition for Writ of Habeas Corpus against Respondent, alleging that Respondent abused her discretion and lacked jurisdiction in issuing a temporary protection order against Petitioner on August 10, 2007. In his petition, the Petitioner specifically asserts that the temporary protection order is a restraint on his liberty. See Petition, p. 3, para. 2. Also, a copy of the temporary protection order issued against Petitioner is attached to his petition.

On October 25, 2007, the Respondent filed her motion to dismiss the Petitioner's Writ of Habeas Corpus, pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure. In her motion to dismiss, the Respondent sets forth three main arguments. First, Respondent asserts that the Petitioner is not entitled to relief because he is not physically confined in some manner. See Motion to Dismiss, p. 3. Second, Respondent alleges that habeas corpus is not appropriate because Petitioner has an adequate remedy at law. *Id.* Finally, Respondent believes that Petitioner's writ should be dismissed because Petitioner failed to attach a copy of the commitment. *Id.* at pp. 3-4.

For all of the reasons below, the Respondent's motion to dismiss should be denied. The Petitioner respectfully requests this Court to accept this novel case and grant Petitioner's requested relief.

II. STANDARD OF REVIEW

For a defendant to prevail on a motion to dismiss pursuant to Civil Rule 12(B)(6), it must appear beyond doubt from the complaint or petition that the plaintiff can prove no set of facts entitling relief. *Cincinnati v. Beretta U.S.A. Corp.* (2002), 95 Ohio St. 3d

416. This Court must presume that all factual allegations set forth in the complaint are true and must make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St. 3d 190. To satisfy the standard under Civil Rule 12(B)(6), it is not necessary for a party to make an allegation regarding every fact which might be relevant to the claim for relief; rather, a party is only required to allege some operative facts as to each material point which must be proven for the relief to be granted. *McIntyre v. Rice*, 8th Dist. No. 81339, 2003-Ohio-3940.

III. LAW AND ARGUMENT

A. Petitioner's writ of habeas corpus is appropriate because Petitioner is in fact unlawfully restrained of his liberty and freedom of movement.

In her motion to dismiss, Respondent incorrectly asserts that habeas corpus relief is solely designed for individuals who are incarcerated and seek immediate release from prison. While a writ of habeas corpus may certainly be filed by those who seek release from prison, it is also an appropriate remedy for those who are unlawfully restrained of their liberty and/or have their freedom of movement restricted. R.C. 2725.01 specifically states “whoever is *unlawfully restrained of his liberty* may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment, *restraint or deprivation.*” (emphasis added). As such, habeas corpus is not strictly limited for those individuals who seek release from prison.

Here, it is obvious that Petitioner's liberty and movement are restricted. As set forth in the temporary protection order, the Petitioner has been ordered to stay away from the protected person named in the order and not to be within 500 feet of the protected person, wherever the person may be found, even with this person's permission. See page 2 of temporary protection order, attached as Exhibit A. This is one of just several orders

set forth in the temporary protection order restricting the Petitioner's liberty and movement. For example, the protection order also prohibits Petitioner from entering the protected person's place of employment and residence and orders the Petitioner to depart immediately if he accidentally comes into contact with the other person. *Id.*

The temporary protection order issued by Respondent on August 10, 2007 obviously restricts Petitioner's movement and his liberty to a significant degree. The Petitioner has sufficiently alleged this in his petition and the temporary protection order he attached to his petition specifically sets forth the orders restraining his liberty.

B. Petitioner's writ of habeas corpus is appropriate because he has no other adequate remedy at law, as the temporary protection order issued on August 10, 2007 is not a final appealable order.

Respondent also argues that Petitioner's writ should be dismissed because he has an adequate remedy at law, namely, an appeal to the Tenth District Court of Appeals. Motion, p. 3. However, the Respondent fails to recognize that the temporary protection order cannot be appealed, as it is not a final judgment or a final appealable order.

This Court has previously held that orders establishing pretrial conditions of release (such as the temporary protection order in this case) are interlocutory in nature and are not final appealable orders. See *State v. Bevacqua* (1946), 147 Ohio St. 20. In *Bevacqua*, this Court held that habeas corpus is a proper remedy to contest excessive pretrial bail. Similar to bail, a temporary protection order is a pretrial condition of release. Specifically, R.C. 2919.26(E) states that a temporary protection order is a "a pretrial condition of release" in addition to bail under Criminal Rule 46.

Petitioner directs this Court's attention to *State v. Dawson* (Oct. 18, 1979), Franklin App. No. 79 AP-565 (attached as Exhibit B), a Tenth District Court of Appeals

case directly on point. In *Dawson*, the trial court issued a temporary protection order and ordered the defendant prohibited and restrained from visiting or approaching his wife or her place of residence and employment. The defendant filed an appeal with the Tenth District and the State moved the court of appeals to dismiss the appeal for lack of subject matter jurisdiction, contending that the appeal was not from a final order or judgment.

On appeal, the Tenth District dismissed the defendant's appeal, finding that as a pretrial condition of release, the temporary protection order was not a final appealable order. As the court stated, "an order establishing pretrial conditions of release in a criminal case is interlocutory and not a final appealable order." *Id.* at *2. The court found that "since the temporary protection order is specifically designed as a pretrial condition of release, it can be challenged only in the same manner as other pre-trial conditions of release in a criminal case." *Id.*

Here, the Respondent believes that Petitioner has an adequate remedy at law, in that he can file an appeal with the Tenth District Court of Appeals. However, pursuant to the Tenth District holding in *Dawson*, if Petitioner actually did file an appeal, it would be dismissed by the Tenth District, as a temporary protection order is not a final appealable order. *Dawson* specifically states that a protection order may be challenged only in the same manner as other pretrial conditions of release, i.e., by filing a writ of habeas corpus.

It is also important to note that the Petitioner has taken all other available remedies at his disposal in this case. Before he filed his petition for writ of habeas corpus, the Petitioner filed a motion to dismiss the temporary protection order with the trial court. See Petition, p. 5, para. 12. This motion was subsequently denied by the trial

court. Petition, p. 6, para. 14. This has left the Petitioner with no other remedy at law, other than to file his petition for writ of habeas corpus with this Court.

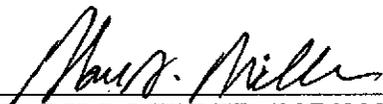
Based on the foregoing, it is clear that Petitioner has no other adequate remedy at law. As such, this Court must deny Respondent's motion to dismiss.

C. Petitioner's application for a writ of habeas corpus is not defective for failing to attach a copy of the commitment.

Finally, Respondent argues that Petitioner's application for a writ of habeas corpus should be dismissed because he failed to attach a copy of the commitment pursuant to R.C. 2725.04. Motion, pp. 3-4. Again, Respondent fails to recognize that habeas corpus is not solely for those incarcerated and trying to be released from prison. The requirement of attaching a copy of the commitment is applicable to those actually incarcerated. Here, while Petitioner is not incarcerated, habeas relief is appropriate because his liberty and freedom of movement are restrained in a number of ways, as evidenced by the orders stated in the temporary protection order. Petitioner attached a copy of the temporary protection order to his petition and his petition was properly verified and notarized. As such, Respondent's argument lacks merit and her motion to dismiss should be denied.

IV. CONCLUSION

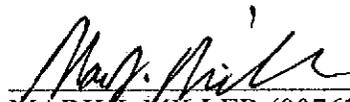
For all of the foregoing reasons, Petitioner respectfully requests this Court to deny Respondent's Motion to Dismiss in its entirety.



MARK J. MILLER (0076300)
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Columbus, Ohio 43215
Phone: (614) 227-0007
Fax: (614) 227-0001

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum
Contra was served upon Mr. Glenn Redick, Counsel for Respondent, 90 W. Broad Street,
Room 200, Columbus, Ohio 43215, via ordinary mail, this 5th day of November, 2007.



MARK J. MILLER (0076300)

Order of Protection

Per ORC 2919.26 (G) (2), this order is indexed at:
Office of the Clerk of Court, Franklin County Municipal
Court, Columbus, Ohio

(614) 645-4604 or (614) 462-3548

Time Stamp

STATE OF OHIO v.
EDWARD T. PAYNE
DEFENDANT

CASE NO. 07 / 19943
JUDGE GLADEN

- CRIMINAL TEMPORARY PROTECTION ORDER (ORC 2919.26)
- CRIMINAL STALKING PROTECTION ORDER (ORC 2903.213)

PERSON (S) PROTECTED BY THIS ORDER:

ALLEGED VICTIM: BENTLEY, CINDY J. AGE: 27

ALLEGED VICTIM'S FAMILY OR HOUSEHOLD MEMBERS:

_____ AGE: _____

_____ AGE: _____

_____ AGE: _____

ABOVE NAMED DEFENDANT IDENTIFIERS: Address Where Above Named Defendant May be Found: <u>241 ELDON AVE</u> <u>COLUMBUS, OH 43204</u>	SEX	RACE	HT	WT
	<u>M</u>	<u>W</u>	<u>6'0"</u>	<u>240</u>
	EYES	HAIR	SSN	
	<u>BLUE</u>	<u>BLOND</u>	<u>280-70-1505</u>	
	DOB	DRIVERS LIC NO AND EXP DATE		
	<u>10-27-74</u>			
VEHICLE LICENSE NO.			STATE	
DISTINGUISHING FEATURES				

BRADY - DISQUALIFIED (18 USC 922 (d) (8) requires all "yes" to disqualify subject from purchasing a handgun:

- Does the order protect an intimate partner or child? Yes No
- Did suspect/defendant have opportunity to participate in hearing regarding order? Yes No
- Does order find subject a credible threat or explicitly prohibit physical force? Yes No

IS DEFENDANT BRADY DISQUALIFIED? YES NO

COURT ORIGINATING AGENCY IDENTIFIER: OH 25343 J

FIREARMS ACCESS - PROCEED WITH CAUTION

This cause came to be heard on the motion of the State of Ohio pursuant to R.C. 2919.26 / R.C. 2903.213. The Court finds that the motion for a Temporary Protection Order is well taken. The Court finds that the safety and protection of the protected persons named in this order may be impaired by the continued presence of Defendant. Therefore, the following orders, which are designed to ensure the safety and protection of the protected persons named in this order, are issued to Defendant as pretrial conditions of release in addition to any bail set under Criminal Rule 46. All the following orders apply to the defendant including any orders that are specifically marked in any box below:

1. DEFENDANT SHALL NOT ABUSE THE PROTECTED PERSONS NAMED IN THIS ORDER by harming, attempting to harm, threatening, molesting, following, stalking, bothering, harassing, annoying, or forcing sexual relations upon them. [NCIC 01 and 02]
2. DEFENDANT SHALL NOT ENTER the buildings, grounds, and parking lots of the residences, schools, businesses, and places of employment or day care centers of protected persons named in this order. [NCIC 04]
3. DEFENDANT SHALL STAY AWAY FROM THE PROTECTED PERSONS NAMED IN THIS ORDER and shall not be within 500 feet or _____ (distance) of protected persons, wherever protected persons may be found, or any place the Defendant knows or should know the protected persons are likely to be, even with protected persons' permission. If Defendant accidentally comes into contact with protected persons in any public or private place, Defendant must depart immediately. This order includes encounters on public and private roadways, highways and thoroughfares. [NCIC04]
4. DEFENDANT SHALL NOT INTERFERE with protected persons' right to occupy the residence through actions such as canceling utilities or insurance and interrupting phone service, mail delivery, or the delivery of any other documents or items. Defendant shall surrender all keys and garage door openers as follows: [NCIC 03]

5. DEFENDANT SHALL NOT INITIATE OR HAVE ANY CONTACT WITH PROTECTED PERSONS NAMED IN THIS ORDER. This includes, but is not limited to, contact by telephone, fax, e-mail, voice mail, delivery service, writing or communications by any other means in person or through a person with their residences, schools, businesses, day care centers, baby sitters and places of employment. [NCIC 05]
6. DEFENDANT SHALL NOT CAUSE OR ENCOURAGE ANY OTHER PERSON to do any act prohibited in Paragraphs 1 through 5 above.
7. DEFENDANT IS ADVISED THAT VISITATION ORDERS DO NOT PERMIT DEFENDANT TO VIOLATE ANY OF THE TERMS OF THIS ORDER.
8. DEFENDANT SHALL NOT POSSESS, USE, CARRY, OR OBTAIN ANY DEADLY WEAPON. [NCIC07]
9. DEFENDANT SHALL NOT REMOVE, HIDE, DISPOSE OF, DAMAGE OR INJURE ANY PETS owned or possessed by the protected persons named in this Order.
10. DEFENDANT MAY PICK UP CLOTHING and personal items from the residence only in the company of a uniformed law enforcement officer within 7 days of the filing of this Order or the date of defendant's release on bond in connection with this charge, whichever is later, and between the hours of _____
11. DEFENDANT SHALL NOT ILLEGALLY CONSUME, USE, OR POSSESS controlled substances or beverages containing alcohol.
12. IT IS FURTHER ORDERED:

THIS ORDER REMAINS IN EFFECT: (1) until modified by this court; or (2) until the criminal proceedings arising out of the complaint upon which these orders were issued is disposed of by this court or by the common pleas court to which the defendant is bound over for prosecution; or (3) until the court issues a Civil Protection Order (CPO) arising out of the same activities as those that were the basis of the complaint filed in this action.

NOTICE TO DEFENDANT: THE PERSONS PROTECTED BY THIS ORDER CANNOT GIVE LEGAL PERMISSION TO CHANGE OR VIOLATE THIS ORDER. IF YOU CONTACT OR GO NEAR THE PROTECTED PERSONS, EVEN WITH THEIR PERMISSION, YOU MAY BE ARRESTED. ONLY THE COURT CAN CHANGE THIS ORDER. IF THERE IS ANY REASON WHY THIS ORDER SHOULD BE CHANGED, YOU MUST ASK THE COURT TO CHANGE IT. YOU ACT AT YOUR OWN RISK IF YOU DISREGARD THIS WARNING.
IT IS SO ORDERED.

DATE: 8/14/07

[Signature]
JUDGE

Certificate of Service

I personally served a copy of the foregoing Order of Protection on the above named defendant on the 10th day of AUGUST, 2007.

James K. Mantel
Signature of Person Making Service to Defendant

GAHANJA PROSECUTOR'S OFFICE
Agency/ Department/ Badge#

WARNING TO DEFENDANT: See the warning printed on the back of page 2 of this Order.

NOTE: THIS IS PAGE TWO OF A TWO PAGE ORDER WHICH IS INCORPORATED BY REFERENCE
FORM 10.02-A CRIMINAL ORDER OF PROTECTION

TPO Sept 2004

(Violence Against Women Act 18 U.S.C. 2265 Federal Full Faith & Credit Declaration. Registration of this form is not required for enforcement)

Westlaw.

Not Reported in N.E.2d
 Not Reported in N.E.2d, 1979 WL 209389 (Ohio App. 10 Dist.)
 (Cite as: Not Reported in N.E.2d)

Page 1

CState of Ohio v. Dawson.

Ohio App. 10 Dist., 1979.

Only the Westlaw citation is currently available.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
 County.

State of Ohio, Plaintiff-Appellee,

v.

Richard Dawson, Defendant-Appellant.
 No. 79AP-565.

October 18, 1979.

MR. GREGORY S. LASHUTKA, City Attorney,
 MR. RONALD J. O'BRIEN, City Prosecutor, MR.
 DAVID E. TINGLEY, Assistant, 375 South High
 Street, 7th Floor, Columbus, Ohio, For Plaintiff-
 Appellee.

MR. DOMINIC J. CHIEFFO, 529 South Third
 Street, Columbus, Ohio, For Defendant-Appellant.

DECISION

McCORMAC, J.

*1 Appellee has moved the court to dismiss the
 appeal for lack of subject matter jurisdiction,
 contending that the appeal is not from a final order or
 judgment.

The state applied to the Franklin County Municipal
 Court for a temporary protection order against
 Richard Dawson on behalf of his wife, Judy Dawson.
 The application was pursuant to R. C. 2919.26.

After a cursory hearing, the court sustained the
 motion of the state for the temporary protection order
 and ordered defendant prohibited and restrained from
 visiting or approaching Judy Dawson or her place of
 residence and employment, without first obtaining
 the consent of the court to be in effect until the
 disposition of the criminal proceedings arising out of
 a complaint filed under Section 2919.25, Ohio
 Revised Code, or the issuance of a protection order
 pursuant to Section 3113.31, Ohio Revised Code.

The court further ordered defendant to post \$200 cash
 bail with the clerk of courts.

The complaint referred to in the court's order is an
 allegation by Judy Dawson that Richard Dawson had
 committed the charge of domestic violence on June 5,
 1979, by knowingly causing physical harm to Judy
 Dawson, his wife, by means of hitting her in the face
 with his fist and kicking her in the left leg causing
 bruises. The complaint shows that both Richard and
 Judy Dawson reside at the same address.

One of the effects of the trial court order is that
 Richard Dawson is restrained from visiting or
 approaching his own place of residence without
 consent of court.

R. C. 2919.26 permits a judge to issue a temporary
 protection order as a pretrial condition of release with
 respect to a charge of domestic violence in violation
 of R. C. 2919.25.

As a pretrial condition of release, the temporary
 protection order differs from a temporary order
 issued pursuant to R. C. 3113.31 or a peace bond
 order issued pursuant to R. C. 2933.02 to 2933.10,
 both of which may be considered issued in a special
 proceeding essentially civil in nature.

However, a temporary protection order differs from a
 pretrial condition of release pursuant to Crim. R.
 46(C) restricting the accused's associations or place
 of abode during release only in purpose. A Crim. R.
 46(C) condition is to assure the defendant's
 appearance at trial, and a R. C. 2919.26 temporary
 protection order is to secure the safety and protection
 of family members. The danger to the safety of others
 is recognized as a reason to deny immediate pretrial
 release by Crim. R. 46(D).

*2R. C. 2919.26(E) expressly provides that a
 temporary protection order is "a pretrial condition of
 release" in addition to bail under Civ. R. 46.
 Therefore, an order imposing a pretrial condition of
 release pursuant to R. C. 2919.26 should be
 considered on the same basis as an order imposing
 conditions for pretrial release pursuant to Crim. R.
 46(C). An order establishing pretrial conditions of
 release in a criminal case is interlocutory and not a
 final appealable order. See State v. Bevacqua (1946),
 147 Ohio St. 20. The result should not vary because

the condition is a special one established by statute rather than by Crim. R. 46.

Since the temporary protection order is specifically designated as a pretrial condition of release, it can be challenged only in the same manner as other pretrial conditions of release in a criminal case.

Accordingly, the motion to dismiss is sustained and the appeal is dismissed for want of a final appealable order.

Motion sustained; appeal dismissed.

WHITESIDE and MOYER, JJ., concur.
Ohio App. 10 Dist., 1979.
State v. Dawson
Not Reported in N.E.2d, 1979 WL 209389 (Ohio App. 10 Dist.)

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