IN THE SUPREME COURT OF OHIO

08-1746

Case No. _____

HABEAS CORPUS

original action

WENDELL BURNETT
Petitioner,

vs.

Warden, EDWIN C. VOORHIES, JR
Respondent

PETITIONER'S MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF HABEAS CORPUS

Pro se, Petitioner:
Wendell Burnett
N.C.I
15708 McConnelsville Rd.
Caldwell, Ohio 43724

Counsel for Respondent

Attorney General, Ohio
150 E. Gay St., 16Th floor
Columbus, Ohio 43215-6001

RECEIVED
SEP 02 2008
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 02 2008
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF THE
COMPLAINT FOR A WRIT OF
HABEAS CORPUS

CASE NO.

COMPLAINT FOR A WRIT
OF HABEAS CORPUS

Inmate number* 426-150
Petitioner, WENDELL BURNETT
V.
Warden, EDWIN C. VOORHIES, JR
Respondent

COUNSEL FOR PETITIONER:
PRO SE, PETITIONER,
WENDELL BURNETT.

VERIFICATION AND AFFIDAVIT

STATE OF OHIO
NOBLE COUNTY : S.S.

The above statement, are made petitioner, being duly sworn, says that these fact (contained in these three pages), the complaint and application are true.

_____, Affiant.

_____

NOTARY

Sworn to and subscribed befor me, this 27th day of August, 2008 in Noble County, Ohio.

_____, Notary Public, Ohio

NOTARIAL SEAL
STATE OF OHIO

LILLIAN R. WILSON
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires 2-22-11

WENDELL BURNETT
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

Pititioner in this original action

-VS-

Warden, EDWIN C. VOORHEES, JR
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

Respondent in this original action

TO: Pracipe

Clerk of Court of Supreme Court
30 East Broad Street
Columbus, Ohio 43215-3431

Dear Clerk (Greetings

Please issue a case number, make service upon the Respondent and this action immediately to the court's attention, the required Three [3] Copies and an additional copy for service upon Respondent. Please time stamp and return one copy.

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF WENDELL BURNETT	CASE NO. COMPLAINT FOR A WRIT OF HABEAS CORPUS

Inmate Number #429-150

Petitioner,

To the Honorable Justices of the Supreme Court of Ohio:

1. Pro se Petitioner is without counsel, and state that he is unlawfully restrained of his liberty by the warden of this correctional facility, (Noble Correctional Inst.), without legal authority, and in violation of Petitioner's Constitutional rights, but under the color of a pretended commitment, a true copy of which is attached.

2. Petitioner was sentenced on or about July 19, 2002 in the Franklin County, Court of Common Pleas

3. It is well settled that a writ of habeas corpus will not lie where an adequate remedy at law exists. Singer, supra. In Singer, as heretofore stated, a motion to dismiss was made after indictment on speedy trial grounds. the order overruling the motion to dismiss was interlocutory inasmuch as the defendant retained his right of appeal from Singer's conviction, the Supreme Court of Ohio discharged the defendant because of a denial of his speedy trial rights. In the interim Singer spent two years in custody because he originally had an "adequate"

remedy at law. This is an "injustice" which should not be Countenanced by the courts and must be remedied either by the legislature or, if neccessary, judicial legisilation. Appeal is not an adequate remedy of law where there is a possibility that a person might be illegally confined as in the singer situation.

2. Confinement in Violation of RC. 2945.71 (C)(1) and (2) is directly in Violation of the mandatory provision of R.C. 2945.73 (A) and (B) these Sections Confer Substantive rights to the accused. State V. Westbrook (1975), 47 Ohio App. 2d 211, 1 O.O.3d 284, 353 N.E 2d 637.

If the time limits for a preliminary hearing have been exceeded the state may nevertheless prosecute by way of original indictment, the dismissal of the orgral charge or charges because of the expiration of the time limitations has the effect of a nolle prosequi.

3. Petitioner seeks to have the finding that his sentence was imposed in Violation of the United States sixth and fourteenth Amendments and Ohio's Constitution section 5.10, by this court for reasons and grounds So stated in his orginal complaint

He then seek to have the unconstitutional sentence vacated as a "null and Void, action". (see Unconstitutional act found null and Void; And no state shall make or enforce any laws that violation the rights, or encroach upon the constitutional rights of any citizen. And they may not enjoy the fruits of any such unlawful act.

4. This court must accept, and the Petitioner has a right to redress his unlawful and unconstitutional incarceration, as there in now no other remedy for redress of this greivance. (see Article 1, sect. 1,2,8)

5. As said sentence is void, and found unconstitutional, Petitioner is being held in this institution against his will and in violation of the Constitutions of both Ohio and the United States.

6. In support of this Complaint and Original Action, Petitioner does now submit his Memorandum in Support.

RESPECTFULLY SUBMITTED

_____, Prose

MEMORANDUM IN SUPPORT

I STATEMENT OF THE CASE:

On April 30, 2001, Petitioner-Wendell Burnett was arrested for possession of drugs, first degree, Pursuant to 2925.11. The following day May 1, 2001 Petitioner had a initial appearance brought under case number 2001 CRA 010526 and formally charged on the aforsaid charge. Petitioner pleaded not guilted bond was set at one hundren thousand dollars with the next schedule hearing set for May 10, 2001, Petitioner remand in custody intill the following hearing and the was not provided pursuant to 2945.71 - 2945.72 - 2945.73, Petitioner remanded in jail. The following night at 3:00 Am May 11, 2001 Petitioner was release on the facts of a dismissal without Petitioner or appointed Counsel present, or with or without prejudice. On September 26, 2001 the Petitioner was arrested in Lima Ohio with a possession of drugs warrant issued from September 9, 2001 from Franklin County Ohio city Columbus. On October 3, 2001 Petitioner pleaded not guilty bond was set at Twenty five hundrend dollars Petitioner remand in Custody in the above case, Petitioner was brought before the Jugde Judge Jennifer L. Brunner the State was represented by Prosecuting Attorney Jeffrey Reichel and the Petitioner was represented by Attorney Frederick Benton. The case was tried by a jury which was hung May 17 2002 because the jury was unable to reach a verdict and the court declared a mistrial. The case was trial again July 19, 2002 finding Petitioner guilty of the following: Possession of Cocaine, In violation of section 2945.11 being a felony of the 1st degree.

Petitioner was held in custody before the franklin county municiple Court for possession of cocaine. The Petitioner was arrested on April 30, 2001 and charged. On May 10, 2001 the date set for his preliminary hearing, the court dismissed the complaint for want of prosecution and, on September 9, 2001 a indicment was filed which asserted same facts and charge against Petitioner as has resulted in his arrest on April 30, 2001 in the absance of a Continéance, 90-day period prescribe by statue within which Petitioner should have have been trieo. commenced on date of his orriginal arrest and not date of the filing of the indictment against Petitioner, and thus trial court was without jurisdiction over Petitioner when its decision was rendered on July 19, 2002. see attached Exhibit(A)'s

II THE TRIAL COURT DENIED PETITIONER COUNSEL AT A CRITICAL STAGE OF THE PROCEEDING VIOLATING CRIM. R. 48(A) BY DISMISSING CASE WITHOUT PETITIONER OR APPOINTED COUNSEL PRESENT BRING ABOUT PLAIN ERROR THIS IS A VIOLATION OF THE 6 AND 14 AMENDMENT OF UNITED STATES CONSTITUTION.

CLAIM I

The trial court denied Petitioner counsel at a critical stage of the proceeding commited plain error. On about May 10, 2001 Petitioner was scheldoled a preliminary hearing and the case was dismissed without appointed counsel or Petitioner present.

This argument deals with a dismissal of a preliminary hearing a critical stage of a preceeding held or not held, Petitioner had no right to represent himself at these critical stages of the proceeding. Without appointed counsel to defend Petitioner Constitutional rights to a speedy trial, appointed counsel or Petitioner couldnt object to prosecutorial miscondoct; This is a plain error violation.

A counsel's failure to object to prosecutorial misconduct constitutes defective performance when that failure is due to clear inexperience of lack of knowlege of controlling law rather then reasonable trial stategy: Gravley V. Mill 87 F.3d 779 (6TH)

Petitioner never had counsel to secure these violations of his Constitutional Rights. See Exhibit (A)'s.

For its through counsel that the accused secures his rights U.S V. Cronic 104 S.CT at 2045, of all the right an accused has, the rights to be represent by counsel is by far the most peravasive, for it effects his ability of assert any other rights he may have. The constitutional guarantee of counsel, howeve, "cannot be satisfied by mere formal appointment. Notice of plain error under Crim.R 52(B) is to be taken with the utmost caution under exceptinal circumstances and only to prevent a manifest miscarring of justice: State V. Long 53 Ohio St.2d 91 7 Ohio op. 3d 178, 372 N.E.2d 804 (1978).

To constitute plain error, the error must be obvious on the record, palpable and fundamental, so that it should have been apparent to the coort without objection: State V. Marinello, Cuyahoga App. Nos 86028 and 86113 2006-Ohio-292, 40 An error is not prejudical for the purpose of plain error review unless, " but for the error, the outcome of the trial clearly would have been otherwise " state V. Long (1987), 53 Ohio Std 91.

By difinition a per se violation of defendant rights to effective assistance of counsel does not require the defendant to preserve the error: Powell 287 U.S. AT 57-58, 53 S.CT. 55. Strickland V. Washington N466 U.S. 668, 104 S.CT. 2052, Geders V. U.S. 425 U.S 80, 96 S.CT. 1330 (holding that the rights to counsel encompasses the right to confer with counsel during the critical pretrial stage of the State's preceeding against him, he was entitle to a presumption of ineffective assistance under "Cronic".

III THE COURT DENIED PETITIONER DUE PROCESS OF LAW UNDER THE 14 AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

Claim II:

The trial court erred by dismissing preliminary hearing a critical stage of the criminal process during which a defendant fundamental rights to counsel is protected by U.S. Const Amend VI AND XIV: STATE V. Spates 595 N.E.2d 351 (1992). Preliminary hearing or examination speedy trial delays prohibited prejudice due to failure to give accused a prompt preliminary hearing can result when delay reaches such proportions at to serve as a postponement to trial and thus infringe upon right under this clause to the speedy trial; U.S. ex rel Williams VS. Russel, E.d, PA (1967) 264 F. Supp 505.

A prosecutor commits error prejudical to the substantial rights of an accused when he prosecutes him without service of criminal complaints or accords him the right of a preliminary hearing on the charge. Time for trial, under R.C. 2945.71 C(1)(2) runs from the date of original arrest, not from date of refiling after dismissal for want of prosecution; State Vs. Justice 358 N.E.2d 1382 (1976). See Exhibit(A)'s

Claim III:

The trial court erred by violating the speedy trial clause. Where the charge upon which an accused is held must be tried according to the provisions of R.C. 2945.71 and such charge base on fact which

are identical to these in a charge previously dismissed for want of prosecution, if no continuance has been granted Pursuant to R.C. 2945-72(H) he must be brought to trial within 90 days after his arrest or sevice of summons. A state granted rights to be tried within a certain time cannot be denied or abridged without due process of law.

A state court defendant is not, however, entitled to notice and a hearing before the prosecution is granted a continuance to a time beyond the statutory time for trial where the defendant is given notice and an opportunity to object to the continuance with in a short time following expiration of the statutory period. Johnson Vs. Overbend 639 F. 2d 326 (6Th cir 1981). See Exhibit(A)'s

RELIFF SOUGHT

Petitioner in this matter pray that this Petition release him from this unconstitutional confinement.

Respect fully Sumitted

Wendell Burnett

Wendell Burnett

15708 McConnelsville Rd.

Caldwell, Ohio 43724.

IV CONSTITUTIONAL AND STATUTORY VIOLATION:

Petitioner Wendell Burnett bring this matter before the court deals with a violation of the Ohio Revised Code as well the statutoirly provision that was handed down by the Supreme Court of Ohio. Petitioner bring this attention to this court. This argument deals with a proceeding that was terminated due to a motion to dismiss pending felony on the 10 of May 2001, see Exhibit (A)'s. On about April 30, 2001 Petitioner was arrested for Possession of Cocaine under the Franklin County Municipal Court case Number 2001 CRA-010526. On about May 1, 2001 Petitioner was provided a initial appearing Pursuant to Criminal rules of Ohio procedure Rule 5.

THE PETITIONER WILL DEMONSTRATE 3 PONITS WITHIN HIS HABEAS THESE VIOLATION BY THE TRIAL COURT NOT BEING IN COMPLIANCE WITH THE REVISED CODESOR STATUTE OF THE OHIO AND UNITED STATES CONSTITUTION, 6 AND 14 AMENDMENT.

I Crim.R. 5 Initia Appearance,

Procedure upon initial appearance. When a defendant first appear before a Judge or Magistrate, the Judge or Magistrate shall permit the accused or his counsel to read the complaint or a copy thereof, and shall inform the defendant.

A(2) That he has a right to counsel and the right to reasonable continuance in the proceedings to secure counsel, and Pursuant to

Crim. R. 44 Assignment of Counsel.

Denying Petitioner counsel to protect his Constitutional rights prevented him failure to object to improper question or comment as to Petitioners pretrial silence or failure to testify as constituting waiver of right to complain of error - Modern cases 32 ALR 4Th 531.

The record will not show that Petitioner made a fully informed waiver of counsel.

Assignment of Counsel

(A) Counsel in serious offenes. Where a defendant charge with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceeding from his initial appearance before a court through appeal as of right unless the defendant after being fully advised of his right to assigned counsel knowingly, intelligently and voluntarily waive his right to counsel

A(2),

of his right to a preliminary hearing in a felony case when his initial appearance is not pursuant to indictment. When the statue and the rule are read in pari materia it become evident that the reference in the rule is to a direct indictment: i.e., one returned independent of a bindover order (as a result of a preliminary hearing or waiver of same). In that instance the accused is not arrested untill after the indictment is returned by the grand jury, and thus there is no danger that an individual will be incarcerated for an indefinite period of time without probable cause for the detention having been established. see Exhibit (A)'s

II: R.C. 2945.71

C(1) A person against whom a charge of felony is pending:
Shall be accorded a preliminary hearing within 10 days after his arrest.
Under the law stated a person with serious crime and held in jail in lieu of bail must be discharged unless they are accorded either a preliminary hearing or are indicted both within 10 days of their arrest
C(2) Shall be brought to trial within two hundred seventy days after his arrest
D For purpose of computing time under division (A)(B) and (C) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.
In the case subjudice it is not disputed that Petitioner spent 10 days in jail then discharge from custody and from the requirement of bail or any other condition before a determination of probable cause was finally made, at which time Petitioner was bound over to the common plea court.
It is therefore inaccurate to suggest that, under the present circumstance, the indictment could cure the error committed by the state when if filed Petitioner indictment beyond the prescribed time limits. see Exhibit (A)s

III: R.C. 2945.73
A) A charge of felony shall be dismissed if the accused is not accorded a preliminary hearing within the time required by sections 2945.71 and 2925.72 of the Revised Code.

In the instant cause, even though the Petitioner was indicted 104 days after his arrest the charge against Petitioner was dismissed and proceeding against him was not reinstituted after he was denied a timely preliminary hearing or indicted.

Therefore, the proceeding following the tainted hearing and indictment were invalid. Because these proceeding were invalid, Petitioner was not brought to trial within the terms of the speedy trial statute, and he must be discharged unless he waived his statutory right.

Petitioner did not forfeit that right pursuant to R.C. 2945.71 and 2945.73 the Petitioner did not waive his right by pleading at the indictment following the tainted hearing.

Furthermore, this opinion would cause the Petitioner to be discharge from custody, even though his trial was free of error. He could not be retried because of Constititutional proscriptions against double jeopardy. See. Exhibit(A)6

These Violations was made by the state of Ohio.

The Petitioner in this matter ask this court is these the law of the Ohio Revised Code. If this is the case Petitioner ask this court to cure these Violations of his rights by law

This case was dismissed because of the state not meeting the requirment of the Ohio Revised Code;

see, Also, 2945.73 (A)

and section 2945.71 C (1)(2) and 2945.72 (H).

These violations commenced threw the absence of a continuance and the absence of the indictment within the statutory times for hearing and trial, see Ohio Revised code.

The state of Ohio based it decision on an unnecessarily strained interperetation of R.C. 2945.73 A and D which ignores the statutory mandate that charges be dismissed and which effectively reads the requirement of a timely preliminary hearing or indictment out of the statue.

The language of R.C. 2945.73(A) is clear. It mandate that charges against a defendant be dismissed. It is not necessary to read that mandate out the statute in order to give effect to R.C. 2945.73(D), the latter provision tempers the effect of the former one, but it does not nagate it. See Exhibit (A)s

ORIGINAL JURISDICTION, REQUIREMENT TO HERE WRIT OF HABEAS CORPUS

On January 12, 2006, the Ohio Supreme Court issued it ruling in the Writ of Habeas Corpus case of Hernandez V. Kelly - Ohio St. 3d - 2006 - Ohio - 126. In that matter the court found that:

A Writ of Habeas Corpus is warranted in certain extraordinary circumstances. Where there is an unlawful restraint of a persons liberty and their is no adequate remedy in the ordinary course of law: Johnson V. Timberman Cooper (2001) 93 Ohio St. 3d 614, 616, 757 N.E. 2d 1153, quoting Pegan V. Crawmer (1996) 76 Ohio St. 3d 97, 99, 666 N.E. 2d 1091.

Plain and simple the Petitioner has been denied due process effective assistance of Counsel, meaninful review, all under Color of state authorities, especially the Judicial Branch that must not aford him this only means to redress to seek and gain relief from the the unlawful and UnConstitutional confinement this is, has and was inflicted by the states court's and the condoned over the years.

Prior to the decision in Pugh Supra, the Supreme Court of Ohio in In Re Singer(1976). 45 Ohio St.2d 130, 74 O.O.2d 253, 341 N.E. 849, held that While a case is pending in the Common Pleas Court a petition for habas corpus is not available to determine whether a defendat was tried within the nineth days mandate under R.C. 2945.71 (B)(2)(D) and (E). The Court reasoned that the petitioner had an adequate remedy of law by way of appeal. Akin to the singer decision, Supra, was the holding in State V. Washington (1986) 30 Ohio App.3d 98, 30 OBR 197, 506 N.E.2d 1203, wherein the court found that the finding of probable cause by a court conducting a preliminary hearing was not appealable. The court noted that a subsequent indictment by the grand jury renders any defects in the preliminary hearing moot. Id. at 99, 30 OBR At 197, 506 N.E.2d at 1204. Following indictment, therefore, any errors committed in the preliminary stages would not be subject to collateral or direct attacks. Id. Citing Common Wealth V. Borden (1978), 254 Pa. Super, 267.272, 385 A.2d 1013, 1015.

This leaves us with the question as to whether habeas Corpus proceeding may be had for violation of the time constraints for preliminary hearings prior to a bindover and/or indictments for reasons stated

herein we find, as to the facts herein, Habeas Corpus to be the proper remedy, there being no adequate remedy at law available to prevent what may Constitute unlawful incarceration under the statutory framework of R.C. 2945.71 to 2945.73.

Under the equal Protection Clause and all Due Process and Constitutional Rights of both the United States and Ohio Constitution's This Petitioner does so submit this Petition for a Writ of Habeas Corpus.

V. PRAYER FOR RELIEF:

As this Honorable court is a Superior court to the Court of Common Pleas, it is prayed for this Writ of Habeas Corpus to be issued for:

1 An evidentiary hearing pursuant to Coulson v. Coulson (1983), 5 Ohio St.3d 12, 16 448 N.E.2d 809, to fairly adjudicate the Constitutional claims, and the statutory violations raised in the redress Petition that renders the aforementioned judgment void. State v. R. Franklin App. No 06AP-245, 2006 Ohio-6429. Three [3] Exhibits Attached.

General Inquiry

New Search...

Summary | Parties | Events | Dockets | Fields | Notes | Disposition | Costs

CRIMINAL - Summary

2001 CR A 010526 CITY OF COLUMBUS vs. BURNETT JR, WENDELL COL

Ticket Number 726221

Jurisdiction COLUMBUS

Defendant

Full Name BURNETT JR, WENDELL

D.O.B. 09/24/1967

Address

1413 MCCULLOCK ST

City/State/Zip FORT WAYNE IN 46803

Gender	M	**Race**	BLACK
Height	6'1"	**Weight**	195
Hair	BLACK	**Eyes**	BROWN

Employer

Attorney(s)

Case Information

Offense Date 04/30/2001

Haz. Mat. Unk.

Points 0

Prior Convictions

Vehicle Year

State Code

License Code

License No.

Vehicle Code

Plate Number

Primary Str. 813 KELTON AVE

Secondary Str.

Officer Code PETTENGILL, HOWARD A.

License Taken ☐ **Accident** ☐ **Insured** ☑

Speed Limit **Speed**

Case Comments

Case Attributes

Number 2001 CR A 010526

Status CLOSED

Filed 04/30/2001

Incomplete ☐

Charge(s)

Charge	Action Code	Indict Charge	Amd Charge	Disposition Code	Counts
1	POSSESS COCAINE			DISMISSED	

Exhibit A

CourtView 2000

General Inquiry

New Search...

Summary | Parties | Events | Dockets | Fields | Notes | Disposition | Costs

Docket Search

2001 CR A 010526 CITY OF COLUMBUS vs. BURNETT JR, WENDELL COL

Search Criteria

Docket Desc. ALL

Begin Date

End Date

Sort
- ○ Ascending
- ◉ Descending

Search

Search Results 5 Docket(s) found matching search criteria.

Docket Date	Docket Text	Amount	Amount Due	Images
05/10/2001	DISMISSED Case disposed with disposition of OTHER DISMISSAL on 05/10/2001.		0.00	
05/01/2001	100,041	0.00	0.00	
05/01/2001	PRELIMINARY HEARING DATE SCHEDULED Event: PRELIMINARY HEARING Date: 05/10/2001 Time: 10:00 am Judge: AR4D, COURTROOM 4D Location: 4D LOCATED ON THE 4TH FLOOR	5.00	0.00	
04/30/2001	ARREST INFORMATION Arrest Bond Added to Case with: Action Code: POSSES COCAINE Arrest Date: 04/30/2001 Custody Location: MAIN JAIL Arrest # Type: SLATE Number: 0114102 Bond Status: ACTIVE Status Date: 04/30/2001 Blanket Bond: No Okay to Apply: No Bond Type: NO BOND	0.00	0.00	
04/30/2001	ARRAIGNMENT SCHEDULED BASIC COURT COST $25.00 Event: ARRAIGNMENT - NO STATE FEES & FELONY CASE Date: 05/01/2001 Time: 9:00 am Judge: AR4D, COURTROOM 4D Location: 4D LOCATED ON THE 4TH FLOOR	25.00	0.00	

Exhibit A

FILED
FRANKLIN CO. MUNI. COURT
MAY 10 2001
PAUL M. HERBERT
By _____ Deputy

IN THE FRANKLIN COUNTY MUNICIPAL COURT

State of Ohio,
Plaintiff,
VS.
WENDELL BURNETT JR

2001 CR A 010526
POSSES COCAINE

MOTION TO DISMISS PENDING FELONY

The undersigned Franklin County Prosecutor moves the court to dismiss this matter because:

☐ The Franklin County Grand Jury has returned an indictment against the defendant on this matter on _____

☒ This matter is dismissed at the request of the Franklin County Prosecutor.

10 MAY 2001
Date

Caroline Worley
Franklin County Prosecutor

Entry

This matter was scheduled for a preliminary hearing. The court makes the following findings:

☐ Preliminary Hearing waived, defendant bound over to Franklin County Grand Jury.

☒ Case dismissed at the request of the Prosecutor:

- ☐ Defendant indicted by the Grand Jury.
- ☒ Case dismissed.

☐ Preliminary hearing held and

- ☐ Probable cause found, defendant bound over to Franklin County Grand Jury.
- ☐ Probable cause not found - case dismissed.

Further, _____

10 MAY 2001
Date

Judge

Exhibit A