

CASE NUMBER: 2008-1942

IN THE SUPREME COURT OF OHIO

APPEAL FROM

THE COURT OF APPEALS OF THE THIRD
APPELLATE JUDICIAL DISTRICT OF OHIO
UNION COUNTY - NO. 14-07-20

STATE OF OHIO

Plaintiff-Appellant

vs.

RAYNELL ROBINSON

Defendant-Appellee

MEMORANUM OPPOSING MOTION

TO STRIKE OR DISMISS

Counsel for the Defendant-Appellee

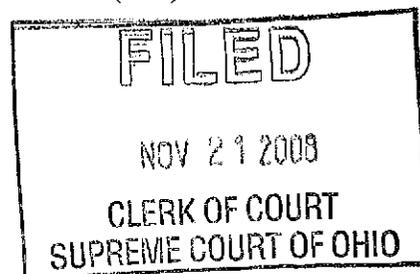
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There is no reason for this Court to determine whether Appellant, State of Ohio, served the Ohio Public Defender's Office with copies of the Notice of Appeal and Notice of Certified Conflict as required by Ohio S.Ct. Prac. Rule XIV Section 2(D)(2) in Case Numbers 2008-1942 and 2008-2170. It did not. No amount of explanation can change that fact, and the Appellant can only state that it was not intentional. The only decision for this Court then is whether the movant, the Office of the Ohio Public Defender, was so adversely affected as to warrant striking both notices and dismissing the cases. Respectfully Appellant maintains that the movant was not sufficiently adversely affected to require the draconian remedy of striking both documents and dismissing the cases.

The Appellant, upon notice of its failure to comply with the rule on service of the Notices, immediately served movant with both documents by ordinary U.S. Mail. The Court, by rule, can order the document to be served, which it has been, and can impose a new deadline for filing a responsive pleading. Appellant requests that the Court do just that.

Appellant filed its discretionary appeal in Case No. 08-1942 on October 2, 2008 in anticipation that the Third District might not certify the conflict. The Appellant also expected that if the Third Appellate District certified the conflict, this Court would consolidate the appeals and determine whether a conflict actually existed. Therefore, the discretionary appeal was not the significant appeal; the significant appeal was the certified conflict case. This is critical because the Appellant filed its Notice of Certified Conflict in Case Number 2008-2170 on Friday, November 7, 2008. Approximately, six days later on Thursday, November 13, 2008, the movant filed its Motion to Strike and to Dismiss Both Cases. The movant's motion was filed prior to this Court determining whether to allow the discretionary appeal, whether a conflict existed, whether to consolidate the cases, and if appropriate, to set a briefing

schedule. The only prejudice the Office of the Ohio Public Defender suffered as a result of the Appellant's failure to serve it with each respective Notice was its inability to file a Memorandum in Support and/or Opposition to Jurisdiction on the Appellant's Notice of Appeal. The Movant's time to file a Memorandum expired on or about November 2, 2008. Furthermore, as far as the Appellant can ascertain, there is no pleading that is permitted to be filed in response to a Notice of Certified Conflict. The Appellant respectfully suggests that the appropriate remedy to its service failure is to permit the Office of the Public Defender to have additional time to file a Memorandum in Case Number 2008-1942.

Nonetheless, to argue that the Notice of Appeal and the Notice of Certified Conflict should be stricken and the cases dismissed is contrary to the case law. The Ohio rules of criminal procedure and civil procedure contain mechanisms to allow aggrieved parties to address procedural complaints through the court system. Typically, Appellate Courts have favored a more measured response to a party's failure to comply with procedural requirements; Appellate Courts have determined that the most draconian and least favored response of Trial Courts to procedural irregularities is to dismiss the case. The philosophy of a more measured response to procedural violations is evident in this Court's decisions cited in the movant's motion. (See *State v. Martello*, 96 Ohio St. 3d 1482, 2002-Ohio-4448 (legal counsel was appointed and leave to file an appellee's brief allowed and *State v. Sanchez*, 118 Ohio St. 3d 1528, 2008-Ohio-3627 (the Ohio Public Defender's Office was given leave to file a brief after the time for response had expired)).

The fact remains that the Third District has certified its decision in *State v. Robinson* to be in conflict with three other Appellate Districts. In those three other appellate districts, defendants may be successfully prosecuted for disrupting public services by destroying a

private telephone or cell phone. In the counties encompassing the Third Appellate District, defendants may not. To suggest that the Appellant would suffer no real prejudice if this Court dismissed the Notice of Appeal and Notice of Certified Conflict is inaccurate. While it is true that the Appellee, Raynell Robinson, is serving a sentence for Intimidation of an Attorney, Witness or Party which runs concurrently with his sentence for Disruption of Public Services, the Appellant certainly is prejudiced if this Court dismisses its Notice of Appeal or Notice of Certified Conflict. For this exact issue to arise again, a County Prosecutor in the Third Appellate District would have to ignore the decision in *State v. Robinson*, indict a Defendant on a charge of Disruption of Public Services for the destruction of a single cellular or land line telephone, convict the Defendant on that charge and defend the conviction on the inevitable appeal. The Ohio Public Defender should welcome the opportunity to argue to this Court that the Third District is correct and the other three districts are wrong. The issue here is not whether a particular defendant will gain or lose anything; the question is - what constitutes the disruption of public services in the State of Ohio.

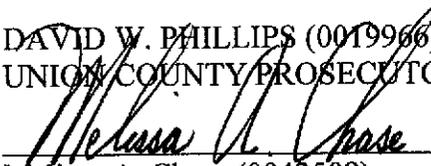
While the Appellant did not comply with the technical service requirement of the Supreme Court Rules of Practice in a timely fashion, it has now served the Office of the Ohio Public Defender with a copy of each Notice with the attachments by ordinary mail. Appellant did serve a copy of each Notice on the Defendant's appellate counsel, who could protect the Defendant's rights. Because of its remedial measures and the fact that the Appellant's error was inadvertent rather than deliberate or intentional, the drastic response of dismissing the cases is inappropriate. A more measured response to the Appellant's failure to serve the Office of Public Defender would be to allow the Public Defender additional time to file a Memorandum in Opposition or Support of Jurisdiction. The Appellant would suffer prejudice

if the Notices were dismissed because it would have to wait for another jurisdiction to decide the issue in accordance with the Third Appellate District before the conflict would arise again.

WHEREFORE, for the reasons set forth in more detail above, the Appellant respectfully requests that the Court overrule the movant's motion.

Respectfully Submitted,

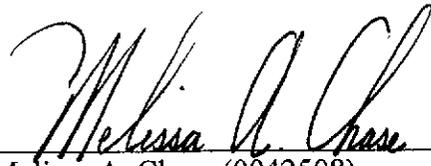
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opposing Motion to Strike and Dismiss was served upon Alison Boggs, Legal Counsel for the Defendant-Appellee at her business address of 240 West Fifth Street, Suite A, Marysville, Ohio 43040 and upon Stephen P. Hardwick, Assistant Public Defender, Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215 by ordinary U.S. Mail, postage prepaid, this 21st day of November, 2008.



Melissa A. Chase (0042508)
Assistant Prosecuting Attorney