

NO. 08-1452

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 89964

STATE OF OHIO,
Plaintiff-Appellant

-vs-

CLEVELAND CARGILE,
Defendant-Appellee

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Counsel for Plaintiff-Appellant

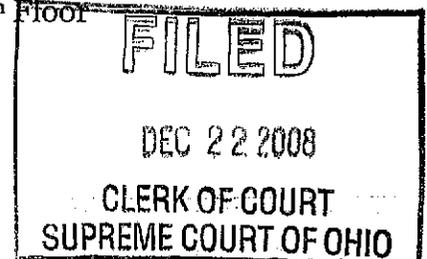
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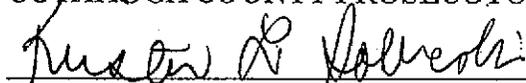
MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Now comes Cuyahoga County Prosecutor William D. Mason, by and through his undersigned assistant and on behalf of the State of Ohio, to respectfully request this Court deny the Ohio Public Defender's Motion to Strike Notice of Appeal and Dismiss Case. The grounds supporting the State's request are fully stated in the attached

Memorandum and are incorporated herein by reference.

Respectfully requested,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR



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MEMORANDUM

On December 3, 2008 this Court accepted the State's appeal in order to decide the issue of whether or not a defendant "knowingly conveys" in violation of R.C. § 2921.36 when (by nature of his or her arrest) the defendant conveys prohibited items into a detention facility.

On December 12, 2008 the Ohio Public Defender's Office moved this Court for an Order striking the Notice of Appeal in this matter and further requested this Court dismiss the case. Said motion is based on the undersigned prosecutor's failure to serve the office of the Ohio Public Defender with a copy of the Notice of Appeal and Memorandum in Support of Jurisdiction.

Rule XIV of this Court's rules of practice requires, "In a case involving a felony, when a county prosecutor files a notice of appeal under S. Ct. Prac. R. II or an order certifying a conflict under S. Ct. Prac. R. IV, the county prosecutor shall also serve a copy of the notice or order on the Ohio Public Defender." In the instant case, only the defendant's appellate counsel was served—not the office of the Ohio Public Defender.

While a failure to comport with the rules of practice is undeniably improper, the remedy that the Ohio Public Defender seeks is far too severe a sanction. The State requests this Court deny the motion to dismiss appeal.

As this Court is aware, the State's notice of appeal and memorandum in support of jurisdiction were considered and granted—even in the absence of an opposing brief or response on behalf of the appellee. In fact, this appeal was accepted on the Court's six to one vote, suggesting the Court's interest in addressing and settling the above-stated issue.

As further evidence of the ongoing conflict on this issue, the State submits the Eighth District Court of Appeals recent decision in *State v. Mario Cole*. In *Cole* the Eighth District relied on its opinion in the instant case when it again held that where a defendant's "presence at the detention facility was not the product of a voluntary act, his conduct with respect to the R.C. 2921.36(A)(2) violation with which he was charged cannot satisfy the requirement for criminal liability that R.C. 2901.21(A)(1) imposes." *State v. Cole*, Cuyahoga App. No. 91305, 2008-Ohio-6647, ¶ 9.

The State intends to appeal *Cole* to this Court, just as it has appealed *Cargile*—as there continues to be a conflict regarding whether or not a defendant "knowingly conveys" in violation of R.C. § 2921.36 when (by nature of his or her arrest) the defendant conveys prohibited items into a detention facility. As the issues in *Cole* and the instant case, *Cargile*, mirror one another, the State would also ask this Court to consolidate the cases at the appropriate time. Moreover, the State submits that an Assistant State Public Defender currently represents Cole and will have the opportunity via that appeal to submit the defense argument on this issue.

In conclusion the State submits that while the failure of service to the State Public Defender in this case was clearly erroneous, dismissal of this appeal is too severe a sanction. The State has demonstrated that a genuine issue exists regarding the interpretation and application of Ohio's illegal conveyance statute. In order to settle the conflicting interpretations, the State of Ohio respectfully requests this Court deny the motion by the Ohio Public Defender to dismiss this appeal.

CONCLUSION

The State of Ohio respectfully requests this Court deny the "Motion of the Ohio Public Defender to Strike Notice of Appeal and Dismiss Case."

Respectfully requested,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

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SERVICE

A true and accurate copy of the foregoing Brief in Opposition was sent by regular United States Mail this 19th day of December, 2008, to the following:

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