

Table of Contents

Table of Authorities	iii
Statement of Facts	1
Argument	1
Proposition of Law II: O.R.C. §2941.35 and the rules of statutory construction authorize a misdemeanor trial in absentia where the service and pleading requirements of O.R.C. §2941.47 have been met.	1
Proposition of Law III: O.R.C. §2938.12 and Crim.R. 43 are not relevant considerations as O.R.C. §2941.47 is determinative.	4
Conclusion	9
Appendix	A-1
Notice of Appeal to Supreme Court	A-2
Opinion of Eighth District Court of Appeals	A-5
Judgment Entry of Housing Court	A-12
O.R.C. §2938.12	A-14
O.R.C. §2941.35	A-15
O.R.C. §2941.47	A-16
Article IV, Section 5 of the Ohio Constitution	A-17
Crim.R. 3	A-19
Crim.R. 43	A-20

Table of Authorities

Cases

<i>Boyer v. Boyer</i> (1976), 46 Ohio St.2d 83, 346 N.E.2d 286	5
<i>City of Lima v. Ward</i> (1966) 8 Ohio App.2d 177, 220 N.E.2d 843 overruled on other grounds, 10 Ohio St.2d 137, 226 N.E.2d 737	2
<i>City of Solon v. Crapser</i> , 1977 WL 201183 (Ohio App. 8 Dist.)	3
<i>City of Toledo v. Cousino</i> , 1984 WL 14423 (Ohio App. 6 Dist.)	2, 3
<i>State ex rel. Cordray v. Midway Motor Sales Inc</i> (2009), 122 Ohio St.3d 234, 910 N.E.2d 432	2
<i>State ex rel. Shisler v. Ohio Public Employees Retirement System</i> (2009) 122 Ohio St.3d 148; 909 N.E.2d 610	2
<i>State v. Foley</i> , 1982 WL 9260 (Ohio App. 1 Dist.)	3
<i>State v. Gundlach</i> (1960) 112 Ohio App. 471, 174 N.E.2d 267	3
<i>State v. Ross</i> (1973), 36 Ohio App.2d 185, 304 N.E.2d 396	3
<i>State v. Slatter</i> (1981), 66 Ohio St.2d 452, 423 N.E.2d 100	5
<i>State v. Weber</i> (1997), 125 Ohio App.3d 120, 707 N.E.2d 1178	5
<i>State v. Whitt</i> (1964) 3 Ohio App.2d 278, 210 N.E.2d 279	2

Constitutions

Section 5(B), Article IV Ohio Constitution	3-7
--	-----

Statutes and Rules

Crim.R. 3	3
Crim.R. 43	1, 4, 6-9
O.R.C. §1.41	5
O.R.C. §1.47	6, 8

O.R.C. §1.51	6, 9
O.R.C. §1.52	6
O.R.C. §1.59	5
O.R.C. §2935.17	3, 4
O.R.C. §2938.12	1, 4-6, 8-9
O.R.C. §2941.35	1- 4, 9
O.R.C. §2941.47	1-9

Statement of Facts

On April 7, 2008, the Cleveland Municipal Housing Court held a trial in absentia against the defendant Washington Mutual Bank. (Doc 19, and p. 1 of transcript of proceedings, hereinafter Tr.). At that trial, the clerk of courts entered a not guilty plea on behalf of the Appellee Washington Mutual Bank NA as no officer or attorney was present on their behalf. (Tr. p. 2). Testimony was taken from Inspector Lori Williams from the City of Cleveland's Department of Building and Housing. (Tr. pp. 2-9). As a result of the testimony, the Court found Appellee guilty as charged and sentenced them to a fine of \$100,000. (Tr. pp. 9-12, Doc 19).

Appellee appealed the decision of the Housing Court to the Eighth District Court of Appeals (hereinafter, 8th District). (Doc 21). The 8th District overruled the decision of the Housing Court finding that O.R.C. §2941.47 did not apply to misdemeanor complaints and that Crim.R. 43 and O.R.C. §2938.12 only allowed for trial in absentia when there was an express waiver by the defendant or if the defendant voluntarily absented himself after the commencement of trial.

Argument

Proposition of Law II: O.R.C. §2941.35 and the rules of statutory construction authorize a misdemeanor trial in absentia where the service and pleading requirements of R.C. 2941.47 have been met.

In its ruling in the case below, 8th District, looking to the language of O.R.C. §2941.47, determined that it did not apply to misdemeanor complaints because it referenced only indictments and informations. Based on that observation, the Court found that the statute did not apply to misdemeanor complaints in Housing Court and that a trial in absentia could not be held. The 8th District erred in its interpretation.

It is well settled that statutes must be considered “in pari materia”, i.e. statutes covering the same subject matter are to be construed together.¹ O.R.C. §2941.35 titled “Prosecutions for misdemeanor” states:

Prosecutions for misdemeanors may be instituted by a prosecuting attorney by affidavit or such other method as is provided by law in such courts as have original jurisdiction in misdemeanors. Laws as to form, sufficiency, amendments, objections, and exceptions to indictments and as to the service thereof apply to such affidavits and warrants issued thereon.²

O.R.C. §2941.47 provides, among other things, requirements for the service of an indictment or information upon a corporation. Pursuant to O.R.C. §2941.35, laws as to the service of indictments or informations apply to misdemeanors in courts that have original jurisdiction over misdemeanors.³

Numerous courts have used O.R.C. §2941.35 to analyze statutes that on their face appear to apply solely to indictments or informations and have applied them to misdemeanor prosecutions. In *City of Lima v. Ward* (1966), 8 Ohio App.2d 177, 220 N.E.2d 843 overruled on other grounds, 10 Ohio St.2d 137, 226 N.E.2d 737, the Third District found that the test for the sufficiency of an affidavit charging an offense was the same as that for testing an indictment citing O.R.C. §2941.35 as the basis for that finding.⁴⁵ In *City of Toledo v. Cousino*, 1984 WL 14423 (Ohio App. 6 Dist.), the Court found that O.R.C. §2941.30, which governs any amendments to an indictment, information or bill of particulars, applied to a misdemeanor criminal complaint by virtue

¹ *State ex. rel. Cordray v. Midway Motor Sales Inc.*, (2009) 122 Ohio St. 3d 234, 238, 910 N.E.2d 432, 436; *State ex. rel. Shisler v. Ohio Public Employees Retirement System*, (2009) 122 Ohio St. 3d 148, 150; 909 N.E.2d 610, 613-614.

² O.R.C. §2941.35 emphasis added.

³ *Id.*

⁴ *Lima*, supra, at 178, 220 N.E.2d at 844.

⁵ See also, *State v. Whitt* (2nd District, 1964) 3 Ohio App.2d 278, 210 N.E.2d 279, applying the same analysis when the charging instrument was a complaint.

of O.R.C. §2941.35.⁶ Similar rulings can be found in the 1st⁷, 8th⁸, 9th⁹, and 10th District¹⁰ Courts of Appeal.¹¹ Finally, this Court has made the same finding in *City of Cleveland v. Ely* (1963), 174 Ohio St. 403, 404, 189 N.E.2d 724, 725.

The 8th District's finding that the lack of the word "complaint" in O.R.C. §2941.47 makes it inapplicable to misdemeanor complaints ignores decades of well settled case law.

It is relevant to address the charging instrument filed by the City of Cleveland (hereinafter, "the City") in this case. Based on the current status of the law, it is clear that an affidavit is virtually identical to a complaint.¹²

Pursuant to O.R.C. §2935.17 titled "Affidavit forms; authority of Supreme Court to prescribe", an affidavit is a sworn statement setting out the offense signed by the clerk of courts¹³, while a complaint is submitted by and signed by a prosecuting attorney¹⁴. Pursuant to Crim.R. 3, a complaint is a sworn statement setting out the essential elements of the offense.¹⁵ Pursuant to Article IV, Section 5(B) of the Ohio Constitution, the Supreme Court is charged with promulgating rules, and such rules to the extent that they

⁶ *Cousino*, supra, at pp. 1-2

⁷ *State v. Foley*, 1982 WL 9260 (Ohio App. 1 Dist.), Court found that test for sufficiency of affidavit is same for that of indictment pursuant to O.R.C. §2941.35.

⁸ *City of Solon v. Crapser*, 1977 WL 201183 (Ohio App. 8 Dist.), Court found test for sufficiency of indictment applies to affidavits by virtue of O.R.C. §2941.35.

⁹ *State v. Gundlach* (1960), 112 Ohio App.471, 474, 174 N.E.2d 267, 269, statutes with respect to sufficiency of indictment apply equally to affidavits for misdemeanors pursuant to §2941.35.

¹⁰ *State v. Ross*, (1973), 36 Ohio App.2d 185, 206, 304 N.E.2d 396, 409 Court found that O.R.C. §§2941.26 and 2941.30 apply to misdemeanor prosecution by virtue of O.R.C. §2941.35.

¹¹ This is not an exhaustive list.

¹² Copy of the Affidavit, attached as Exhibit A.

¹³ O.R.C. §2935.17(A)

¹⁴ O.R.C. §2935.17(B)

¹⁵ Crim.R. 3

do not interfere with substantive rights take precedent over any other statutory provision.¹⁶ Consequently, the City's charging instrument was a valid complaint. By form, however, it is exactly the same as the affidavit described in O.R.C. §2935.17. There is no valid reason to distinguish between a complaint and an affidavit, and the Courts that have considered the issue have not done so.

In its analysis, the 8th District failed to consider O.R.C. §2941.35 and its affect on O.R.C. §2941.47. By failing to do this, the interpretation of O.R.C. §2941.47 in the decision below is inaccurate and cannot stand. Further it is clear that a complaint and affidavit are virtually indistinguishable and consequently the City's complaint is entitled to the same treatment under O.R.C. §2941.35 as an affidavit.

Proposition of Law No. III: O.R.C. §2938.12 and Crim.R. 43 are not relevant considerations as O.R.C. §2941.47 is determinative.

In the decision below, the 8th District looked to §2938.12 and Crim.R. 43 to determine whether a trial in absentia was possible. The Court decided that a trial in absentia may be held only where the defendant makes an express waiver or when he voluntarily absents himself after the trial commences. The Court never reached the application of these laws to O.R.C. §2941.47 because it found that that statute did not apply to misdemeanor complaints in municipal court. The 8th District erred in making this finding.

Article IV, Section 5(B) governs the rule making authority of the Supreme Court and the application of such rules when they conflict with statutes:

The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify

¹⁶ Article IV, Section 5(B) Ohio Constitution

any substantive right.... All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts have further fleshed out this area to state that rules govern procedure while statutes govern substantive rights.¹⁷

“‘Substantive’ means that body of law which creates, defines and regulates the rights of the parties.” In general, “procedural” refers to the methods of enforcing such rights or obtaining redress.¹⁸

Courts have recognized that the distinction between substantive and procedural is “artificial and illusory” because there really is no distinction between the right itself and the method by which the right is enforced.¹⁹ However, the two terms continue to be used in the law.²⁰

In addition to the guidelines for comparing a rule to statutes, this Court must consider statutory construction when two statutes seem to conflict. Because the 8th District decided that O.R.C. §2941.47 does not apply to misdemeanors they never reached the question of whether that section conflicts with O.R.C. §2938.12 nor did they resolve how any conflict, if found, should be resolved.

Statutory construction is outlined in Chapter 1 of the Ohio Revised Code, specifically sections 1.41 through 1.59 inclusive.²¹ It is presumed when a statute is enacted that the legislature intends it to comply with the state and federal constitutions; that the entire statute is intended to be effective; that a just and reasonable result is

¹⁷ *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 86, 346 N.E.2d 286, 288; *State v. Slatter* (1981), 66 Ohio St.2d 452, 454, 423 N.E.2d 100, 101-102.

¹⁸ *State v. Weber* (1997), 125 Ohio App.3d 120, 130, 707 N.E.2d 1178, 1185, citations omitted.

¹⁹ *Weber, supra.*

²⁰ *Id.*

²¹ O.R.C. §1.41

intended and that a result feasible of execution is intended.²² If a general provision conflicts with a special provision, they shall be construed, if it is possible, so that both are given effect.²³ If they are found to be irreconcilable, the special provision prevails and is an exception to the general provision, unless the general provision has a later adoption date **and** the manifest intent is that the general provision is to prevail.²⁴

How should Crim.R. 43, O.R.C. 2938.12 and O.R.C. 2941.47 be construed with respect to each other?

Pursuant to Article IV, Section 5(B) of the Ohio Constitution, the Court should first determine how the rule applies to O.R.C. §2941.47. Crim.R. 43 states, in pertinent part:

- (1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.
- ...
- (3) The defendant may waive, in writing or on the record, the defendant's right to be physically present under these rules with leave of court.^{25,26}

²² O.R.C. §1.47(A) through (D)

²³ O.R.C. §1.51

²⁴ Id.

²⁵ Crim.R. 43(A)(1) and (3)

²⁶ Crim.R. 43 was amended recently with an effective date 7/1/2008. The previous version did not reference a waiver, stating: The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been

By virtue of Article IV, Section 5(B), a rule promulgated by the Supreme Court of Ohio does not “abridge, enlarge, or modify any substantive right.”²⁷ Consequently, Crim.R. 43 cannot be interpreted to give a defendant a substantive right to be present. To the extent that a procedural law exists with respect to a substantive right, the procedure outlined in Crim.R. 43(A)(1) only applies to a corporation to the extent that a corporation has a substantive right to be present. As it is black letter law that statutes govern substantive rights and substantive law, it is clear by O.R.C. §2941.47 that a corporation does not have a substantive right under Ohio law to be present at trial. O.R.C. §2941.47 states:

When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of “not guilty.” Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information. (Emphasis added)

commenced in his presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

²⁷ Article IV, Section 5(B) of the Ohio Constitution.

Consequently, to the extent that Crim.R. 43 can be said to require the presence of a corporate defendant at all stages of the proceedings it attempts to enlarge a substantive right that, pursuant to O.R.C. §2941.47, a corporation does not have. Crim.R. 43 is therefore inapplicable to this case and should not have been a basis for reversal.

Next, this Court should compare O.R.C. §2938.12 and O.R.C. §2941.47 and determine whether they conflict and if they do how they can be reconciled. O.R.C. §2938.12 creates a procedure by which a defendant may request to be absent from proceedings in court. Interestingly, O.R.C. §2938.12 specifically states that it does not create a substantive right to a trial in absentia. Further this section is permissive, it clearly states an option a defendant “may” take. By contrast, O.R.C. §2941.47 is mandatory. It does not state what the court may do, or how the defendant may act, it states clearly that the court “shall” conduct itself in a particular manner when a duly served corporate defendant fails to appear.

Of these two statutes, it is clear that O.R.C. §2941.47 is a specific statute, while O.R.C. §2938.12 is a general statute. O.R.C. §2941.47 deals with a specific subset of defendants and the specific procedure when that type of defendant fails to appear, while O.R.C. §2938.12 provides a method for waiving presence for all defendants. Pursuant to O.R.C. §1.47, it is presumed that when the legislature enacted O.R.C. §2941.47 that they intended the entire statute to be effective. Further, if O.R.C. §2938.12 and §2941.47 conflict, the legislature is presumed to have intended to give effect to both, according to O.R.C. §1.51. O.R.C. §2938.12 and §2941.47 do not conflict. O.R.C. §2938.12 does not create a right to be present, it simply creates a method by which a defendant who is present may waive that right when before the court. By contrast, O.R.C. §2941.47 deals

solely with the situation when a corporation fails to appear. As these two statutes do not conflict, no further analysis is necessary under statutory construction.

Even if these two statutes are found to conflict, O.R.C. §2941.47 will still be found to prevail. Pursuant to O.R.C. §1.51, if a special and general statute are found to conflict, the special statute prevails. If however, the general statute has a later effective date then the general statute prevails, if and only if, the manifest intent is for the general statute to prevail. O.R.C. §2941.47 dates back to the first codified ordinances to 1953, while O.R.C. §2938.12 was enacted in 1960. Consequently, §2938.12 prevails if it is clear from the face of the statute that it was intended to prevail over any special provisions. As there is nothing in O.R.C. §2938.12 that specifically prevents any portion of O.R.C. §2941.47, it cannot be argued that the general statute was intended to prevail.

As neither Crim.R. 43 or O.R.C. §2938.12 operate to prevent the application of §2941.47, this Court should find that the 8th District erred in its finding and should reverse the decision.

Conclusion

The 8th District erred when it refused to consider O.R.C. §2941.47 and its application to a misdemeanor complaint in municipal court. It is well settled that O.R.C. §2941.35 applies a wide variety of statutes that seemingly apply solely to indictments and informations to complaints and affidavits. Furthermore, the 8th Districts analysis of Crim.R. 43 and O.R.C. §2938.12 was incomplete as it did not consider O.R.C. §2941.47 rule construction and statutory construction. For the foregoing reasons, the decision of the 8th District should be overruled.

Respectfully submitted,
ROBERT J. TRIOZZI (0016532)
Director of Law

By: 
Karyn J. Lynn (0065573)
Assistant Director of Law
City of Cleveland Law Department
601 Lakeside Avenue E Rm 106
Cleveland, OH 44114
(216) 664-4504
(216) 420-8291 facsimile
klynn@city.cleveland.oh.us

Certificate of Service

It is hereby certified that a copy of the foregoing was sent to the following by regular mail on this 20th day of August, 2009:

Vladimir Belo
Bricker and Eckler LLP
100 South Third Street
Columbus, OH 43215


Karyn J. Lynn (0065573)

Appendix

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND

Appellant

v.

WASHINGTON MUTUAL BANK, A
DIVISION OF JP MORGAN
CHASE NA

Appellee

Case No.: **09-0441**

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District

Court of Appeals
Case No. 91379

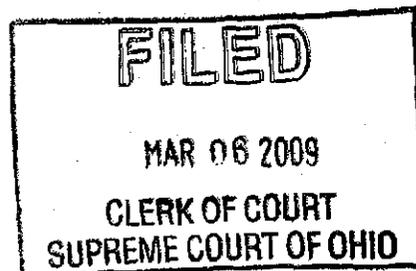
NOTICE OF APPEAL OF APPELLANT CITY OF CLEVELAND

ROBERT J. TRIOZZI (0016532)
DIRECTOR OF LAW
By: Andrew A. Meyer (0081016) Counsel of Record
Assistant Director of Law
City of Cleveland,
Department of Law
601 Lakeside Avenue, Rm. 106
Cleveland, Ohio 44114-1077
TEL: (216) 664-4304
FAX: (216) 420-8291
ameyer@city.cleveland.oh.us

COUNSEL FOR APPELLANT CITY OF CLEVELAND

Benjamin J. Carnahan (0079737)
Shapiro & Felty, LLP
1500 West Third Street, Suite 400
Cleveland, Ohio 44113
(216) 373-3131

COUNSEL FOR APPELLEE
WASHINGTON MUTUAL BANK
A DIVISION OF JP MORGAN CHASE NA



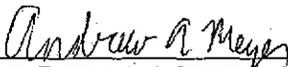
Notice of Appeal of Appellant City of Cleveland

Appellant City of Cleveland hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 91379 on January 22, 2009, captioned *City of Cleveland v. Washington Mutual Bank*.

This case is one of public or great general interest.

Respectfully submitted,

ROBERT J. TRIOZZI
DIRECTOR OF LAW



ANDREW A. MEYER (0081016)

COUNSEL FOR APPELLANT
CITY OF CLEVELAND

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed by U.S. regular mail, postage prepaid to the following on March 5, 2009.

Benjamin D. Carnahan
Attorney for Defendant-Appellee
Shapiro & Felty, LLP
1500 West Third Street, Suite 400
Cleveland, Ohio 44113

By: Andrew A Meyer
Andrew A. Meyer (0081016)

COUNSEL FOR APPELLANT
CITY OF CLEVELAND

[Cite as *Cleveland v. Washington Mut. Bank*, 179 Ohio App.3d 692, 2008-Ohio-6956.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91379

CITY OF CLEVELAND,

APPELLEE,

v.

WASHINGTON MUTUAL BANK,

APPELLANT.

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2007 CRB 005057

BEFORE: Rocco, J., Sweeney, A.J., and Boyle, J.

RELEASED: December 31, 2008

JOURNALIZED:

Robert J. Triozzi, Cleveland Director of Law, and Andrew A. Meyer, Assistant Director of Law, for appellee.

Shapiro, Van Ess, Phillips & Barragate, L.L.P., and Benjamin D. Carnahan, for appellant.

KENNETH A. ROCCO, Judge.

{¶ 1} Defendant-appellant, Washington Mutual Bank, appeals from its misdemeanor conviction under the city's codified ordinances for building and housing code violations. Appellant contends that the court erred by proceeding with a trial in absentia, by finding that the evidence was sufficient to support its conviction, by failing to adequately consider all of the relevant sentencing factors, and by imposing an excessive sentence. Appellant further argues that it received ineffective assistance of counsel. We agree that the court erred by trying appellant in absentia. Therefore, we vacate the judgment and remand for further proceedings.

{¶ 2} The record in this case reveals that appellant was cited in a complaint filed in the Cleveland Municipal Court with (1) failing to comply with the order of the director of building and housing as stated in a violation notice dated August 29, 2006, and (2) violation of Cleveland Codified Ordinance sections 369.13 and 369.15. A summons was issued February 7, 2007, commanding the defendant to appear on May 1, 2007. A United States Postal

Service return receipt indicates that it was received by Deanne Kessler at Washington Mutual, c/o "CSC-Lawyers Inc. Ser" (sic), 50 Broad Street, Suite #1800, Columbus, Ohio 43215, on February 12, 2007. Appellant apparently did not appear, and a *capias* was issued, bond being set at \$10,000.

{¶ 3} On November 13, 2007, the court entered a judgment entry scheduling this matter for trial on November 26, 2007, and instructing the clerk to appear at the hearing and enter a not-guilty plea on this organizational defendant's behalf if the defendant did not appear. The court further stated that it would proceed to trial immediately. However, for reasons not apparent on the record, the court entered a not-guilty plea for the defendant and continued the matter for pretrial on December 7, 2007. A pretrial was held on that date, and the matter was continued again to January 18, 2008.

{¶ 4} On January 18, 2008, attorney Romi T. Fox moved the court for an order allowing her to withdraw from the case, indicating that she had been unable to make contact with appellant and that appellant no longer owned the property. The court granted this motion. It then scheduled the matter for trial in absentia on February 11, 2008. On February 11, the court continued the matter again to March 3, 2008, instructing the clerk to reissue a summons to the appellant for that date. A summons apparently was issued, addressed to "Washington Mutual Corp. Service, 50 Broad St. Suite #1800, Columbus, OH

43215.” It is not clear how the summons was served. Another capias was issued after appellant failed to appear on March 3, 2008.

{¶ 5} The matter was set for trial again on April 7, 2008, again accompanied by an order that if the defendant did not appear, a not-guilty plea would be entered on its behalf and the court would proceed to trial. On April 7, 2008, a trial was conducted, after which the court found appellant guilty and fined it \$100,000.

{¶ 6} In its first assignment of error, appellant complains that the court erred by proceeding to trial in absentia, emphasizing its right to be present at all stages of the trial. See Crim.R. 43. The city urges that appellant’s failure to appear by an officer or by counsel in response to the summons authorized it to proceed to trial in absentia pursuant to R.C. 2941.47.

{¶ 7} R.C. 2941.47 provides: “When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk,

treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of 'not guilty.' Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information."

{¶ 8} R.C. 2941.47 does not apply here. Appellant was not charged by indictment or information (a procedure reserved for felony prosecutions, see Crim.R. 7). It was charged by a complaint. Therefore, R.C. 2941.47 does not apply.

{¶ 9} R.C. 2938.12 describes the circumstances under which the court may conduct a trial in absentia in a misdemeanor case: "A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial

commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present.” See also R.C. 2945.12.

{¶ 10} Crim.R. 43 also informs our decision. This rule was recently amended, effective July 1, 2008, after the trial and judgment in this case. We quote the pertinent part of the rule in effect at the time of trial: “The defendant shall be present at the arraignment and every stage of the trial * * *, except as otherwise provided by these rules. In all prosecutions, the defendant’s voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.”

{¶ 11} These provisions allow a trial in absentia to occur either at the express request of the misdemeanor defendant or upon the defendant’s voluntary absence after trial has begun. They do not allow the court clerk to enter a plea on the defendant’s behalf, nor do they allow for a trial of a corporate defendant in absentia when the defendant has never appeared in the case.¹ Accordingly, we must vacate the judgment of conviction and sentence and the not-guilty plea

¹We recognize that this decision leaves a difficult gap in the law: there is neither a provision for enforcing a summons issued to a corporate defendant in a misdemeanor case (as there is for individual defendants, see R.C. 2935.11), nor is there a provision for proceeding in absentia. However, we cannot issue advisory opinions, and therefore we can provide no guidance on this issue.

entered on appellant's behalf by the clerk, and remand for further proceedings.

Judgment vacated
and cause remanded.

SWEENEY, A.J., and BOYLE, J., concur.

CLEVELAND MUNICIPAL COURT

Rev. 4/07

Court Date: 04/07/2008
STATE of OHIO/CITY of CLEVELAND

MUTUAL CORP. SERVICE, WASHINGTON
AKA:

Docket code: PD23
Assigned to Judge:
DOB:
SSN: --

GENERATED: APRIL 04, 2008
CASE NO.: 2007CR0005057
COUNTS: 1

Count Charges	Short Description	Status	PNG	NGWNC	PG	Prosecutor Amends Charge	FG	Court Entry FNG	NOL	DWP	Fine	Days	Suspended Fine	Days	P
A BDV	BUILDING CODE VIOLATION	ADT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	\$100,000				
			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					
			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					
			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					
			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					

MENT ENTRY RECEIVED
JOURNALIZATION
APR 7 2008
EARLE B. TURNER, CLERK

CAPIAS
 CAPIAS Recalled
 Warrant Fee Waived
 BF CAPIAS
 Bond Forfeiture Vacated
 Warrant Block Release
 TTP CAPIAS
 Original Bond Reinstated
 Interpreter Requested
 Bond Set At \$ _____
 Advise re: Atty

CONT. To: _____ At _____ M.
 At: CODR COPR COCR PFS
 For: Pretrial Trial Jury Trial Motion SPW
 TTP Until _____
 Final JDA
 P.D. Atty. _____
 Examination: W/BO H/BO CFTS
 Demanded RSW
 CONT. To: _____ (Days)
 At _____ A.M.

Refer to Probation: PFS/PSI SIP Screen SIP CO. To: _____ At _____ M.
 Probation Duration _____ MO _____ YRS Active Inactive
 CWS In lieu of Fine _____ Hours _____ Date _____
 Probation Conditions _____

JUN - 6 2008
 EARLE B. TURNER, Clerk
 ATJ DV [A] [C] MADD # _____ SAT SA [A] [C] AA _____ x per wk.
 H: Had Waived Prob. Continue Until _____ Probation Terminated
 Defendant Found Not Found In Violation Of Probation SRS

Found Indigent Cost Suspended
 Sentence Satisfied as to Cost
 Credit for Time Served _____
 SS (Sentence Suspended)
 SOE (Sentence Ordered Executed) \$100,000 F _____ Days
(This amount must be paid and/or days(s) must be served by the defendant.)
 Sentence Stayed Until _____ Mandatory Days _____
 City Cost Suspended
 Cost Partially Suspended \$ _____
 SE (Sentence Executed)
 FCE (Fine & Costs Executed)

Motion To: _____
 Granted Denied Pay \$ _____ per day for stay
 Trial Had Jury Sworn Jury Waived / Form Signed
 Trial in Progress CONT. To: _____ At _____ M.

Ohio Driver's License Suspended from Date of Arrest _____ or
 From _____ To _____
 Immobilization _____ Days Vehicle Forfeited
 ALS Term. CFRL FRNS ODPG ALS Appeal

Notes: Clerk entered plea of not guilty. Trial had. Dept. found guilty. Fine \$100,000. Costs. SOE.

DUI # _____ Within 6 years

JUDGMENT ENTRY
 NO. 11
 COUNTY DIV. 04/07/2008
 STATE OF OHIO/CITY OF CINCINNATI
 VS
 MUTUAL DORE
 AKA:

Assigned to Judge:
 DOB:
 SEN: --

CASE NO.: 2007CRB009057
 COUNTS: 1

Short Description	Status	PNG	NGW	NC	PG	Prosecutor Amends Charge		Court Entry				Suspended			
						FG	FNG	NOL	DWP	Fine	Days	Fine	Days	PROB	
LOADING CODE VIOLATION	ACT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	\$100,000				<input type="checkbox"/>				
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					<input type="checkbox"/>

CAPIAS BF CAPIAS TTP CAPIAS Bond Set At \$ _____
 CAPIAS Recalled Bond Forfeiture Vacated Original Bond Reinstated
 Warrant Fee Waived Warrant Block Release Interpreter Requested Advise re:Atty

CONT. To: _____ At _____ M. PFS TTP Until _____
 At: CODR COPR COCR SPW Final JDA
 For: Pretrial Trial Jury Trial Motion P.D. Atty. _____

Examination: W/BO H/BO CFTS _____ (Days)
 Demanded RSW CONT. To: _____ At _____ A.M.

Refer to Probation: PFS/PSI SIP Screen SIP CO. To: _____ At _____ M.
 Probation Duration _____ MO _____ YRS Active Inactive

CWS In lieu of Fine _____ Hours _____ Date _____
 Probation Conditions _____

ATJ DV [A] [C] MADD # _____ SAT SA [A] [C] AA _____ x per wk.

PVH: Had Waived Prob. Continue Until _____ Probation Terminated
 Defendant Found Not Found In Violation Of Probation SRS

Judge: _____ DUI # _____ Within 6 years

Found Indigent Cost Suspended City Cost Suspended
 Sentence Satisfied as to Cost Cost Partially Suspended \$ _____
 Credit for Time Served _____ SE (Sentence Executed)
 SS (Sentence Suspended) FCE (Fine & Costs Executed)
 SOE (Sentence Ordered Executed) \$100,000 F _____ Days
(This amount must be paid and/or days(s) must be served by the defendant.)
 Sentence Stayed Until _____ Mandatory Days _____

Motion To: _____
 Granted Denied Pay \$ _____ per day for stay

Trial Had Jury Sworn Jury Waived / Form Signed
 Trial in Progress CONT. To: _____ At _____ M.

Ohio Driver's License Suspended from Date of Arrest _____ or
 From _____ To _____

Immobilization _____ Days Vehicle Forfeited
 ALS Term. CFRL FRNS ODPG ALS Appeal

Notes: Clerk entered plea of not guilty trial had. Det. found guilty. Fine \$100,000 + costs. SOE. ~~Dismissed~~

C

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2938. Trial--Magistrate Courts

▣ Practice and Procedure

→ **2938.12 When accused may be tried in his absence**

A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present.

CREDIT(S)

(128 v 97, eff. 1-1-60)

Current through 2009 File 8, of the 128th GA (2009-2010), apv. by 7/16/09 and filed with the Secretary of State by 7/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2941. Indictment

▣ Misdemeanor

→ **2941.35 Prosecutions for misdemeanor**

Prosecutions for misdemeanors may be instituted by a prosecuting attorney by affidavit or such other method as is provided by law in such courts as have original jurisdiction in misdemeanors. Laws as to form, sufficiency, amendments, objections, and exceptions to indictments and as to the service thereof apply to such affidavits and warrants issued thereon.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 13437-34)

Current through 2009 File 8, of the 128th GA (2009-2010), apv. by 7/16/09 and filed with the Secretary of State by 7/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Amos)

▣ Chapter 2941. Indictment

▣ Miscellaneous Provisions

→ **2941.47 Summons on indictments against corporations**

When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of "not guilty." Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 13438-12)

Current through 2009 File 8, of the 128th GA (2009-2010), apv. by 7/16/09 and filed with the Secretary of State by 7/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

▣ Article IV. Judicial (Refs & Annos)

→ **O Const IV Sec. 5 Powers and duties of supreme court; superintendence of courts; rules**

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

CREDIT(S)

(1973 SJR 30, am. eff. 11-6-73; 132 v HJR 42, adopted eff. 5-7-68)

Current through 2009 File 8, of the 128th GA (2009-2010), apv. by 7/16/09 and filed with the Secretary of State by 7/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

A-18

Westlaw

Crim. R. Rule 3

Page 1

C

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Criminal Procedure (Refs & Annos)

→ **Crim R 3 Complaint**

The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths.

CREDIT(S)

(Adopted eff. 7-1-73)

Current with amendments received through 5/8/09

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

A-19

C

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Criminal Procedure (Refs & Amos)
→ **Crim R 43 Presence of the defendant**

(A) Defendant's presence

(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(2) Notwithstanding the provisions of division (A)(1) of this rule, in misdemeanor cases or in felony cases where a waiver has been obtained in accordance with division (A)(3) of this rule, the court may permit the presence and participation of a defendant by remote contemporaneous video for any proceeding if all of the following apply:

- (a) The court gives appropriate notice to all the parties;
- (b) The video arrangements allow the defendant to hear and see the proceeding;
- (c) The video arrangements allow the defendant to speak, and to be seen and heard by the court and all parties;
- (d) The court makes provision to allow for private communication between the defendant and counsel. The court shall inform the defendant on the record how to, at any time, communicate privately with counsel. Counsel shall be afforded the opportunity to speak to defendant privately and in person. Counsel shall be permitted to appear with defendant at the remote location if requested.
- (e) The proceeding may involve sworn testimony that is subject to cross examination, if counsel is present, participates and consents.

(3) The defendant may waive, in writing or on the record, the defendant's right to be physically present under these rules with leave of court.

(B) Defendant excluded because of disruptive conduct

Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence or by remote contemporaneous video, and judgment and sentence may be pronounced as if the defendant were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-08)

Current with amendments received through 5/8/09

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

A-21