

ORIGINAL

IN THE SUPREME COURT OHIO

10-0819

STATE OF OHIO, :

Appellee, :

vs. :

MOR MBODJI, :

Appellant. :

On Appeal from the Hamilton  
 County Court of Appeals,  
 First Appellate District  
 Court of Appeals  
 Case No. C-090384

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MEMORANDUM IN SUPPORT OF JURISDICTION  
 OF APPELLANT MOR MBODJI

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TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	3
 <u>Proposition of Law No. 1:</u>	
Where the complaint and affidavit are signed by a private citizen, without being reviewed by a reviewing official, the trial court is without jurisdiction to proceed against the defendant.	
CONCLUSION	4
PROOF OF SERVICE	5
APPENDIX	<u>Appendix Page</u>
Judgment Entry of the Hamilton County Court of Appeals – 3/24/10	6-11

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND DOES INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

This case presents the issue of whether the Court of Appeals correctly overruled the Appellant's eighth assignment of error by relying on the case of State ex rel. Boylan v. Harmon (2006) 107 Ohio St.3d 370, 2007-Ohio-7, 839 N.E.2d 934, when that case was decided by this court almost six months before the statute governing the issuance of private citizen's complaints and affidavits, Section 2935.09 of the Ohio Revised Code, was amended on June 30, 2006. The new procedure provides a review by a "reviewing official" before the clerk is authorized to file a complaint and/or affidavit and before a warrant can be issued, based solely on allegations filed by a private citizen. Appellant submits that the procedures are jurisdictional in nature and if they do not comply with the governing statute, the trial court has no authority to proceed with the prosecution of the accused. The Ohio legislature enacted the law in question, Section 2935.09 of the Ohio Revised Code, to avoid the abuses of private citizens making unsubstantiated allegations charging others with criminal matters. This case also involves an individual's right to Due Process which is guaranteed by the United States Constitution and the Ohio Constitution.

It is a question of great public importance because this Court has not interpreted the amended Section 2935.09 of the Revised Code which requires a "reviewing official" to approve a private citizen's complaint or affidavit before it filed with the clerk of courts. In order to have a consistent administration of justice regarding these complaints, it is submitted that this Court's decision regarding the proper procedures would inform the police, the clerks, the prosecutors, the defense counsel, and the judges of what is required to give the courts the authority to proceed on a criminal complaint involving a private citizen as the prosecuting witness.

## STATEMENT OF THE CASE AND FACTS

Appellant was charged with Domestic Violence, a misdemeanor of the first degree.

The complaint and affidavit filed with the clerk of courts on April 16, 2009 were both signed by the complaining witness, Katrina McCall, a private citizen. Neither the complaint nor the affidavit was reviewed by a judge, or a magistrate or a prosecutor before they were filed.

On April 30, 2009, the case proceeded to trial before the trial judge. The evidence established that the Appellant was residing with his wife, Katrina McCall. During an argument McCall threw her cell phone at the Appellant. Although the phone did not strike the Appellant, he did retrieve the phone and attempted to leave the couple's apartment. As the Appellant went toward the door, McCall blocked the doorway. McCall testified that the Appellant then threw her to the ground and attempted to punch her. These actions caused McCall to sustain a bruise, according to McCall. The Appellant testified that he moved McCall to the side so that could leave the apartment. He denied that he threw McCall to the ground or that he attempted to punch her.

The trial court found the Appellant guilty and sentenced him to eight months of Community Control. Appellant appealed to the First District Court of Appeals. That court affirmed his conviction and overruled the Appellant's eight assignments of error, including the eighth assignment that dealt with the issue of the trial court not having jurisdiction. Since the date that the Court of Appeals judgment was entered a motion to reconsider has been filed by Appellant. That motion is still pending.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law No. I:**

**Where the complaint and affidavit are signed by a private citizen, without being reviewed by a reviewing official, the trial court is without jurisdiction to proceed against the defendant.**

The Court of Appeals overlooked the fact that the case that they were relying upon, State ex rel. Boylen v. Harmon (2006) 107 Ohio St.3d 370, 2006 Ohio 7, 839 N.E.2d 934, was decided on January 11, 2006, which was several months before amended Section 2935.09 of the Ohio Revised Code was effective on June 30, 2006. The analysis by the Court of Appeals involved the prior statute and not the one that was in effect at the time that McCall, private citizen, was permitted to file a complaint and affidavit, without a reviewing official determining if a complaint should be filed in accordance with the provisions of Section 2935.09 (D) of the Ohio Revised Code.

When a complaint and/or an affidavit are filed by a private citizen, without the review specified in Section 2935.09 (D) of the Ohio Revised Code, it is submitted that the trial court is without jurisdiction to proceed and the case must be dismissed.

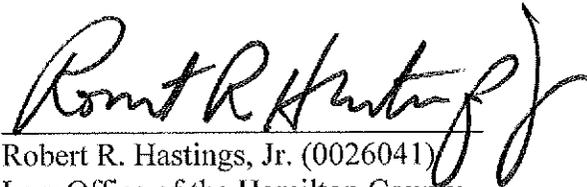
The issue that is presented by this case is one of great public interest due to the fact that this Court has not interpreted this particular statute which was enacted to prevent complaints and affidavits from being filed by private citizens if there is no basis for the criminal charge. In Appellant's case there was no review by a judge, magistrate or prosecutor before the private citizen was permitted to file the complaint and affidavit in this case. Appellant urges this Court to accept jurisdiction of this case so that there is a definitive holding as to the requirements of Section 2935.09 of the Ohio Revised Code for courts throughout Ohio.

Already there is a division of opinion in Hamilton County, Ohio as to whether the trial court has jurisdiction over complaints and affidavits that have not been properly reviewed before a complaint is filed. The City of Cincinnati has appealed a dismissal of a case based upon the Court of Appeals judgment entry in this case that was entered on March 24, 2010. Other courts believe that they should follow the statute while others believe they should follow the Mbodji judgment entry from the Court of Appeals.

**Conclusion**

Appellant respectfully requests that this Court accept jurisdiction of this matter for the reasons set forth above.

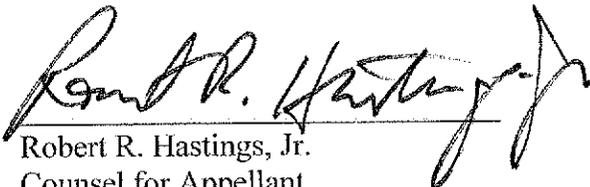
Respectfully submitted,



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Counsel for Appellant,  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was hand delivered to the Office Hamilton County Prosecutor, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on the 7<sup>th</sup> day of May, 2010.

  
Robert R. Hastings, Jr.  
Counsel for Appellant

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MOR MBODJI,

Defendant-Appellant.

APPEAL NO. C-090384  
TRIAL NO. C-09CRB-12152

*JUDGMENT ENTRY.*



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

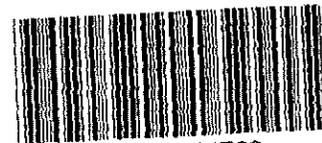
Defendant-appellant, Mor Mbodji, appeals the judgment of the Hamilton County Municipal Court convicting him of domestic violence. He was convicted after a bench trial.

Mbodji was residing with his wife, Katrina McCall. One morning the two had an argument, and McCall threw her cellular telephone at Mbodji. The telephone did not strike Mbodji, but Mbodji retrieved the telephone and attempted to leave the couple's apartment.

McCall blocked the door of the apartment. She testified that Mbodji had then thrown her to the ground and attempted to punch her. She stated that she had sustained a bruise as the result of Mbodji's actions.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.



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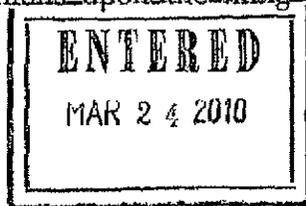
A police officer arrived on the scene shortly after the altercation. He testified that McCall had appeared agitated and had described the incident in terms consistent with her trial testimony. The officer saw a bruise on McCall's back, and he described it as approximately three inches in diameter.

Mbodji testified that, when McCall had blocked the door, he had merely moved around her so he could "squeeze by" and leave the apartment. He denied that he had thrown her to the floor, had attempted to punch her, or had otherwise caused her physical harm. The trial court found him guilty and sentenced him to probation.

We address Mbodji's eight assignments of error out of order. We begin with the eighth assignment of error, in which Mbodji argues that the trial court did not have jurisdiction to hear the case. Specifically, he argues that because the complaint and affidavit were filed by McCall and signed by the police officer but were not reviewed by a "reviewing official" within the meaning of R.C. 2935.09, the trial court did not possess jurisdiction.

R.C. 2935.09(C) states that a complaint filed by a private citizen must be filed with or reviewed by a "reviewing official," who is defined in R.C. 2935.09(A) as "a judge of a court of record, the prosecuting attorney or attorney charged by law with the prosecution of offenses in a court or before a magistrate, or a magistrate."

But the Supreme Court of Ohio has held that R.C. 2935.09 must be read in conjunction with R.C. 2935.10(B), which permits the clerk of courts to issue a warrant or summons upon the filing of a misdemeanor complaint by a private



citizen.<sup>2</sup> Thus, the trial court had jurisdiction, and we overrule the eighth assignment of error.

In his first assignment of error, Mbodji argues that the trial court erred in failing to ensure that his waiver of a jury trial was made knowingly and voluntarily. But as Mbodji concedes, the charge against Mbodji was a "petty offense" under Crim.R. 23(A). For petty offenses the defendant must file a jury demand to invoke his right to a jury trial. Mbodji did not do so, and the trial court was therefore not required to address the issue. And while Mbodji asks this court to abrogate Crim.R. 23, we are powerless to do so. We overrule the first assignment of error.

In his third assignment of error, Mbodji argues that the trial court erred in compelling McCall to testify after she had invoked her right not to incriminate herself under the Fifth Amendment to the United States Constitution. This assignment is without merit. McCall did initially assert her right not to testify, but after consulting with an attorney during trial, she elected to waive that right and to testify. Accordingly, we overrule the third assignment of error.

In his fourth assignment of error, Mbodji contends that the trial court erred in admitting McCall's out-of-court statement to the officer. He argues that the statement was inadmissible hearsay.

We find no merit in this argument. Under Evid.R. 803(2), there is a hearsay exception for statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

<sup>2</sup> See *State ex rel. Boylen v. Hammon*, 107 Ohio St.3d 370, 2006-Ohio-7, 839 N.E.2d 934, 16. See, also, Crim.R. 1(A)(1) and *State v. Baker*, 1st Dist. Nos. C-080157 and C-080159, 2009-Ohio-4188, ¶54, jurisdictional motion overruled, 122 Ohio St.3d 1416, 2009-Ohio 6816, 919 N.E.2d 215.

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Here, the officer testified that he had arrived at the residence shortly after the altercation had occurred and that McCall had appeared upset and agitated. Thus, the trial court did not err in concluding that her statement was admissible. And in any event, McCall's trial testimony was consistent with her statement to the officer, rendering the out-of-court statement merely cumulative.<sup>3</sup> Therefore, we overrule the fourth assignment of error.

In his sixth assignment of error, Mbodji argues that the trial court erred in failing to issue findings of fact and conclusions of law to support its finding of guilt. Under Crim.R. 23(C), the court is required to make only a general finding upon the trial of the case. We overrule the sixth assignment of error.

We address the seventh and fifth assignments of error together. In the seventh assignment of error, Mbodji argues that his conviction was against the manifest weight of the evidence. In his fifth assignment of error, he argues that the trial court erred in rejecting his claim of self-defense.

To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.<sup>4</sup>

The domestic-violence statute, 2919.25(A), provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member.

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MAR 24 2010

<sup>3</sup> See *State v. McGhee*, 1st Dist. No. C-080801, 2009-Ohio-4887, ¶17.

<sup>4</sup> *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

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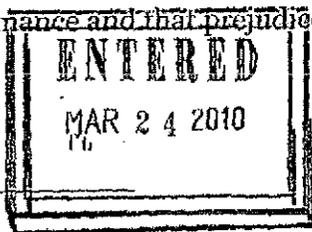
Here, the conviction was in accordance with the evidence. McCall's testimony indicated that Mbodji had pushed her to the floor and had attempted to punch her, and that his actions had caused a visible injury.

And there was no merit to Mbodji's claim of self-defense. To establish self-defense in a case involving nondeadly force, a defendant must prove by a preponderance of the evidence that (1) he was not at fault in creating the situation giving rise to the affray; (2) he reasonably believed that he needed to use force to defend himself against the imminent use of unlawful force by the victim; and (3) the force used was not likely to cause death or great bodily harm.<sup>5</sup>

In the case at bar, Mbodji failed to prove self-defense. McCall was simply blocking the door of the apartment; she was not using or threatening to use unlawful force against Mbodji. We overrule the fifth and seventh assignments of error.

Finally, in the second assignment of error, Mbodji contends that he was denied the effective assistance of trial counsel. He argues that counsel was deficient in failing to file a motion to dismiss the complaint; in failing to assert self-defense; in failing to seek discovery; in failing to make an opening statement; in failing to more aggressively contest the alleged hearsay testimony of the police officer; and in general failing to aggressively defend the case.

To establish ineffective assistance of counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable performance and that prejudice arose from counsel's performance.<sup>6</sup>



<sup>5</sup> See *State v. Roth*, 1st Dist. No. C-030303, 2004-Ohio-374, ¶12.

<sup>6</sup> *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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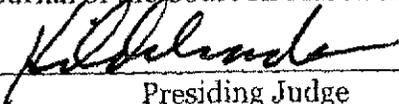
We have already held that the trial court had jurisdiction, that self-defense was not a viable argument, and that the testimony of the police officer was admissible. And because Mbodji has not demonstrated any prejudice to have arisen from the failure of his attorney to seek discovery and to make an opening statement, we cannot say that counsel's performance was ineffective. Counsel competently represented Mbodji, and we overrule the second assignment of error.

The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on March 24, 2010  
per order of the Court   
Presiding Judge

