

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2010-0819
Plaintiff-Appellee : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
MOR MBODJI : Court of Appeals
Defendant-Appellant : Case Number C-090384

MEMORANDUM IN RESPONSE

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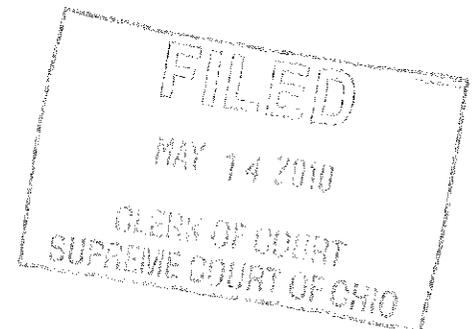
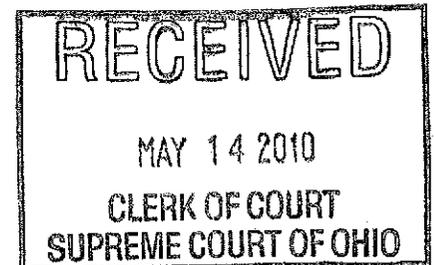


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Explanation of why this case is not a case of public or great general interest and does not involve a substantial constitutional question

The question that Mor Mbodji suggests to this Court is whether R.C. 2935.09 was properly followed. But that question is irrelevant. Even if it is presumed that Mbodji's argument that it was not properly followed are taken as true it would not affect the outcome of this case. That is because the real question that is raised in this case is whether a defendant can confer personal jurisdiction to a court.

In Ohio, personal jurisdiction is not merely waived by failing to raise it at the very first general appearance, but it is actually acquired by or conferred upon the court through the voluntary appearance and submission of the defendant or his legal representative. The first time that Mbodji raised any arguments about whether the trial court had personal jurisdiction over his case was in his direct appeal.

The question in this case revolves around personal jurisdiction. The law is settled that, unless it is raised at the first opportunity, that it is acquired by or conferred upon the trial court. Because that is settled law, this case does not present a question that merits this Court's attention.

Statement of the case and facts

One morning, Mbodji got into a yelling match with his wife, Katrina McCall. At some point, McCall threw an iPhone at Mbodji, missing him.

After picking up the phone, Mbodji started towards the door. McCall blocked the door to keep him from leaving. Mbodji sat down on their couch, told McCall that he was going to leave and that he was not going to give her phone back.

Mbodji got off the couch as he argued with McCall over whether she was getting her phone back. Suddenly, he grabbed her, slammed her down, and started throwing punches at her. Mbodji then got up, yelled at McCall's daughter, and left.

McCall quickly tried to calm her daughter down before she went to the neighbors home to call the police. Officer Strong responded to the call and showed up at McCall's home a few minutes later. McCall was upset and agitated. She told him what happened and he could see that she had at least one bruise.

Officer Strong later spoke to Mbodji. He told Officer Strong that he and McCall had gotten into an argument and that it moved into a wrestling match.

Based on those facts, Mor Mbodji was found guilty of domestic violence after a bench trial. He was sentenced to a suspended jail sentence, fines and costs, eight months of probation, and any treatment or counseling probation might recommend.

Argument against Mbodji's Proposition of Law

State's Proposition of Law

Revised Code 2935.09 must be read in conjunction with R.C. 2935.10, which was properly followed in this case. Even if that were not true, this is an issue of personal jurisdiction which had to be raised at the very first general appearance with the trial court.

Though the complaint and affidavit were filed with the clerk who subsequently issued the warrant for his arrest, Mbodji argues that R.C. 2935.09 and 10 were not followed and that the trial court lacked jurisdiction. A review of the law shows that he is wrong.

Revised Code 2935.09 was changed in 2006, apparently with the intent of limiting private citizens from being able to file an affidavit alleging crimes with clerks and, instead, requiring that complaints be reviewed by a judge, magistrate, or prosecutor. Left untouched, however, was R.C. 2935.10, which set forth the procedure to be followed after a complaint was filed under R.C. 2935.09. That section still states that, "(B) If the offense charged is a misdemeanor . . . such judge, clerk, or magistrate may: (1) Issue a warrant for the arrest of such person"

Also left untouched was Crim. R. 4(A)(1). That rule states, "[i]f it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by a judge, magistrate, clerk of court, or officer of the court designated by the judge, to any law enforcement officer authorized by law to execute or serve it."

This Court, relying on its decisions dating back to the 1970s, has said that 2935.09 "must be read *in pari materia* with R.C. 2935.10, which prescribes the subsequent procedure to be followed."¹

¹*State ex rel. Boylen v. Harmon*, 107 Ohio St. 3d 839, 2006-Ohio-7, 839 N.E.2d 934, ¶ 6, quoting *State ex rel. Strothers v. Turner* (1997), 79 Ohio St. 3d 272, 273, 680 N.E.2d 1238, citing *State v. Holbert* (1974), 38 Ohio St. 2d 113, 117, 311 N.E.2d 22.

"When the legislature amends an existing statute, the presumption is that it is aware of [the Ohio Supreme Court's] decisions interpreting it."² Under that presumption, the Legislature knew that this Court had ruled that R.C. 2935.10 has to be considered in conjunction with R.C. 2935.09. Thus, if the Legislature wanted to remove the ability of clerks to issue warrants it should have also amended R.C. 2935.10. Having failed to do so, clerks are still authorized to issue warrants after a private citizen files a complaint.³

Yet even if that were not true it would not undermine Mbodji's conviction. Whether R.C. 2935.09 and 10 were properly filed deals only with whether personal jurisdiction was conferred upon the municipal court. Unlike subject matter jurisdiction, personal jurisdiction can be waived.⁴ Indeed, personal jurisdiction is not merely waived by failing to raise it at the very first general appearance, but it is actually acquired by or conferred upon the court through the voluntary appearance and submission of the defendant or his legal representative.⁵ As the Seventh District has stated, "it is well-established that a defendant who appears before the court and enters a not guilty plea at arraignment waives any issues of personal jurisdiction. . . ."⁶

The first time that Mbodji has argued that the trial court lacked personal jurisdiction over him was in his direct appeal. Mbodji, therefore, waived any issues relating to personal jurisdiction when he did not raise it with the trial court. As such, even if R.C. 2935.09 and 10 were not properly followed, he conferred jurisdiction to the court.

²*State v. Hassler*, 115 Ohio St. 3d 322, 2007-Ohio-4947, 875 N.E.2d 46, ¶ 16

³See *State v. Baker*, 1st Dist. Nos. C080157 & C080159, 2009-Ohio-4188, ¶ 54.

⁴See *Fox v. Eaton Corp.* (1976), 48 Ohio St. 2d 236, 358 N.E.2d 536.

⁵See *Maryhew v. Yova* (1984), 11 Ohio St. 3d 154, 156, 464 N.E.2d 538.

⁶*State v. Smith*, 7th Dist. No. 05MA219, 2007-Ohio-3182, ¶ 22.

Conclusion

The issue in this case is not whether R.C. 2935.09 was followed. The question is whether the trial court had personal jurisdiction over Mbodji. Since Mbodji did not raise this issue until his direct appeal, the trial court had personal jurisdiction.

Because this case can be resolved using settled law, this Court should decline jurisdiction over this matter.

Respectfully,

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Certificate of Service

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Robert Hastings Jr., Hamilton County Public Defender's Office, 230 E. 9th Street, Suite 2000, Cincinnati, Ohio 45202, counsel of record, this 13th day of May, 2010.

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