

IN THE SUPREME COURT OF OHIO

CITY OF ZANESVILLE
Appellant,

v.

RONALD T. ROUSE, JR.,
Appellee

CASE NO. 09-1282

On Appeal from the Muskingum
County Court of Appeals,
Fifth Appellate District.

Court of Appeals
Case No. CT08-0035

APPELLEE RONALD T. ROUSE, JR.'S MOTION FOR RECONSIDERATION

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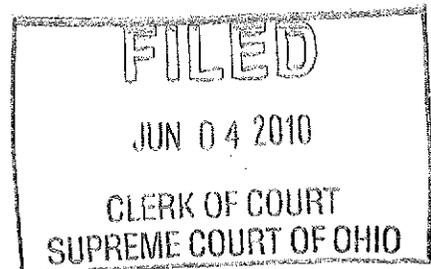


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MOTION FOR RECONSIDERATION

Pursuant to S.Ct. Prac. R. 11.2(A) and (B)(4), Appellee Ronald T. Rouse Jr. (hereinafter “Rouse”), by and through counsel, respectfully asks this Court to reconsider its May 26, 2010 decision¹ that reversed the June 3, 2009 judgment of the Fifth District Court of Appeals, and reinstated the judgment of the Zanesville Municipal Court.

Rouse presents two major grounds for reconsideration of this Court’s decision:

(1) Rouse asserts that he presented seven different assignments of error in his Fifth District Court of Appeals case, and that there exist arguments discussed by Rouse in his Appeal beyond the “file-stamping” issue this Court chose to examine. By way of example but not limitation, Rouse argued in the Fifth District Court of Appeals that the Temporary Protection Order in the case, which, of course, was also not “file-stamped”², was equally not docketed or journalized³, in violation of this Court’s decisions in *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 686 N.E.2d 267 (1997) and *Lima v. Elliot* (1964), 6 Ohio App.2d 243, 245-246, 35 O.O.2d 427, 429, 217 N.E.2d 878, 881, and therefore the T.P.O. was void.⁴ The Fifth District Court of Appeals reviewed all of Rouse’s Assignments of Error in light of Rouse’s Second Assignment of Error, that the trial court lacked subject matter jurisdiction, as the charging instrument was not properly filed. This Court has concluded that the complaint in this case was filed because there was evidence that it was “received” by the Clerk of Court.⁵ But there were other issues presented in his

¹ *Zanesville v. Rouse*, Slip Opinion No. 2010-Ohio-2218, App.p.73

² See Exhibit C, Order of Protection, App.p.64

³ See Exhibit A, Clerk’s electronic “print-out”, App.p.1, and Exhibit B, online public version of the electronic “print-out”, App.p.2.

⁴ See *Appeal Brief of Defendant-Appellant Ronald T. Rouse, Jr.*, 9-23-08, *passim*, and *Appellant’s Reply Brief*, 4-2-09, p.10-11.

⁵ *Zanesville v. Rouse*, Slip Opinion No. 2010-Ohio-2218 at ¶ 11.

case on appeal to the Fifth District Court of Appeals. On April 13, 2006, Defendant attempted to plead guilty to the offense, but as explained in his earlier brief, the Court never invoked Defendant's Sixth Amendment right to counsel, or determined whether the so-called plea was voluntary, intelligent and knowing, or inquired if he understood that he was waiving his right to a trial, confrontation, compulsory process, and so on.⁶ Rouse contends that in the interests of justice, rather than summarily reversing the Fifth District's opinion, and affirming the decision of the Zanesville Municipal Court, this Court should at minimum *remand* the case back to the Fifth District Court of Appeals, to consider Rouse's *other* arguments, beyond whether the charging instrument in the case was ever "file-stamped".

(2) Rouse asserts that by this Court declaring that:

"1. A document is "filed" when it is deposited properly for filing with the clerk of courts. The clerk's duty to certify the act of filing arises only after a document has been filed."

and

"2. When a document lacks an endorsement from the clerk of courts indicating that it has been filed, filing may be proved by other means."
Zanesville v. Rouse, Syllabus –

that this Court includes all manner of "documents" – judgment entries, affidavits of indigency, sentencing entries, court orders, jury verdicts, transcripts, and all manner of charging instruments – tickets, complaints, bills of information, and indictments, in its decision. The Court goes on to say that "proof of filing" of all "documents" may be located by inspection of the "electronic docket".⁷ This Court has previously ruled that a

⁶ See *Appeal Brief of Defendant-Appellant Ronald T. Rouse, Jr.*, p. 21-22, filed 9-23-08, and *Transcript 4-13-2006 Hearing*, p.7, l.7-25 to p.8, l.1-19

⁷ *Zanesville v. Rouse*, Slip Opinion No. 2010-Ohio-2218 at ¶ 11.

docket and journal are not synonymous⁸, and that the record of a case is located in the journal. Rouse respectfully suggests that this Court has confused docket and journal, and that this mistake in nomenclature is significant enough to have caused it to inadvertently dispense with the precedent of the necessity of charging documents being “upon record” as discussed in the venerable case of *Hurtado v. People of California*, 110 U.S. 516 (1884).

“And referring to Coke's comment, that “no man shall be taken,” *i.e.*, restrained of liberty by petition or suggestion to the King or his Council unless it be by indictment or presentment, he says (p. 122):

‘By petition or suggestion can never be meant of the King's Bench, for he himself had preferred several here; that is meant only of the King alone, or in Council, or in the Star Chamber. In the King's Bench the information is not a suggestion to *the King*, but to **the court upon record.**”

And he quotes 3 Inst. 136, where Coke modifies the statement by saying, “The King cannot put any to answer, but his **court** must be apprized of the crime by indictment, presentment, or **other matter of record,**” Lord Coke on the Magna Carta as discussed in *Hurtado* at 525.

WHEREFORE, Rouse prays that this Court reconsider its decision of May 26, 2010. A Memorandum in Support of this Motion is attached hereto and incorporated herein.

Respectfully submitted,



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⁸ *State ex rel. White v. Junkin*, 80 Ohio St.3d 335 686 N.E.2d 267 (1997) and *Lima v. Elliot* (1964), 6 Ohio App.2d 243, 245-246, 35 O.O.2d 427, 429, 217 N.E.2d 878, 881

MEMORANDUM IN SUPPORT

Pursuant to S.Ct. Prac. R. 11.2, the Appellee, Ronald Rouse Jr., respectfully requests this Honorable Court reconsider its judgment filed May 26, 2010 in which the Court overruled the Fifth Appellate District and reaffirmed the decision of the Zanesville Municipal Court. The Appellee urges the Court to remand the decision so that the Fifth District Court of Appeals may consider all of the other arguments, beyond whether the charging instrument was ever “file-stamped”, that Rouse presented in his Fifth District Court appeal. Appellee further respectfully implores this Court to recognize a mistake of fact relied upon by this Court in reaching its decision.

(1) The Validity and Enforceability of the Temporary Protection Order in this case, and other concerns. From the Trial court’s decision Rouse presented seven assignments of error to the Fifth District Court of Appeals. The Fifth District ruled in favor of Rouse on Rouse’s Second Assignment of Error, “II. THE TRIAL COURT ABUSED ITS DISCRETION BY LITIGATING A MATTER WITH WHICH THE TRIAL COURT DID NOT ENJOY SUBJECT-MATTER JURISDICTION.” Based on the Fifth District’s decision on this issue the Appeals court concluded that without a valid criminal complaint having been filed, a valid TPO could not have issued.

Having found in Appellant's second assignment of error, supra, the complaint in the instant matter was never filed, we find the temporary protection order was not filed in compliance with R.C. 2919.26; therefore, is void.

Zanesville v. Rouse, 2009-Ohio-2689, at ¶ 21, Appendix p. 65.

The Fifth District Court did not address the issue of whether the Temporary Protection Order in the case, was journalized and enforceable *regardless* of whether the Complaint was filed, per the decision of this court. Further, the Fifth District did not reach Defendant's Assignments of Error I, III, and IV, as they were found moot in light of their decision on Assignment of Error II. Under App R. 12(A)(1)(c), "On an undismissed appeal from a trial court, a court of appeals shall do the following: Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision." These assignments of error are no longer moot and the Appellee Rouse is entitled to a decision on these issues. Further, Assignments of Error V, VI and VII were decided based on only one of *many* different offered arguments -- the one concerning the non-file-stamped undocketed charging instrument that this Court has rejected. Consequently, this case should be remanded back to the Fifth District Court of Appeals to address the Defendant's Assignments of Error I, III, and IV, as they are no longer moot and on Assignments of Error V, VI, and VII, in light of this Court's decision that the Complaint in the underlying case was filed.

(2) What needs to be on the Journal of the Trial Court, and a Docket and Journal are not synonymous. Appellee urged this Court to find that the complaint against him was never filed because it was lacking the appropriate file stamp and because the docket/journal of the case failed to journalize the filing of the complaint. This Court found that the clerk's duty to certify the act of filing arises only after a document has been filed⁹. This Court reasoned that the clerk's affidavit explained it was clear from her

⁹ See *Zanesville v. Rouse*, Slip Opinion No. 2010-Ohio-2218 p. 3 at ¶ 7

records that the complaint was filed on February 28, 2006 because the electronic docket of the case indicates a “filing date” of February 28, 2006 and that that it was the clerk’s practice to create a new case file and corresponding electronic docket upon receipt of a complaint and such a file and docket were created¹⁰. Thus, this Court relied upon the complaint actually being recorded on the journal; it was not.

While the Zanesville Municipal Court electronic case printout does indicate a “file date” in the *case summary*, there is no evidence of the complaint being entered on the *docketing journal*.¹¹ When one examines the Clerk’s electronic “print-out”, the docket/journal appears in the middle of the sheet, and begins, “has been in jail since July...” When one examines the public on-line “docket entry” published by the Zanesville Municipal Court online, as it appeared in 2008, the FIRST entry that appears is “10-26-06. HAS BEEN IN JAIL SINCE JULY, STILL WANTS TO DO THE PROGRAM.”¹² This may appear to be a minute distinction; it is not, and it was a mistake of fact that this honorable Court relied upon in reaching its decision. Appellee has argued in this case that there are three conditions that must be met for a document to be considered filed with the Clerk of Court: The document must be deposited with the clerk, the document must be time or date stamped, and the document must be entered on the court docket/journal. This Court has decided that the document was deposited with the Clerk, and that the document need not be time or date stamped as the clerk’s duty to certify the act of filing arises only after a document has been filed. However, it appears

¹⁰ See *Zanesville v. Rouse*, Slip Opinion No. 2010-Ohio-2218 p. 5 at ¶ 11

¹¹ See Appellee Exhibit A, the Clerk’s electronic “print-out”. The docket/journal appears in the middle of the sheet, and begins, “has been in jail since July...”

¹² See Appellee Exhibit B, the public online “print-out” of the “docket entry” for Criminal Case No. CRB 0600319 as of 2008, which duplicates the middle of Exhibit A.

that this Court relied upon the charging document being “filed” because the Court thought that it was actually reflected on the docket/journal of the case and it was not.

Rouse argued in his *Reply Brief* in the Fifth District Court:

The difference between a docket and a journal was explained in *White v. Junkin*, 80 Ohio St.3d 335 (1997), in which the defendant was charged with domestic violence. The charge was amended to disorderly conduct and, after a hearing, the trial judge accepted the defendant's no contest plea and found him guilty. The judge sentenced the defendant to ten days in jail, suspended the sentence, and fined him \$100 plus court costs. The judge recorded his oral decision on the case file jacket and initialed his decision. **An official in the clerk's office entered the case file notations in the computerized docket system and the defendant paid his fine and court costs.** The next day, however, the trial judge issued a journal entry vacating his decision, setting trial on the original domestic violence charge and ordering that the fine and costs be refunded to the to the defendant. The defendant then filed a complaint for a writ of prohibition to prevent the judge from vacating his disorderly conduct conviction and sentence and proceeding on the original charge. The Ohio Supreme Court reversed the judgment of the court of appeals issuing the writ. The Supreme Court stated,

"the clerk's placement of information from the September 30, 1996 decision on the computerized docket was NOT tantamount to journalization of the decision. Dockets and journals are distinct records kept by clerks." *Id.* "Thus," the court continued, "the undisputed evidence establishes that the September 30, 1996 file entry was never journalized by the clerk. Since the decision was never journalized, appellants did not patently and unambiguously lack jurisdiction to vacate that decision and proceed on the original charge of domestic violence." *Id.* at 338. (emphasis added).

Similarly, **a court speaks only through its journal, not through its computer-generated docket sheet.** See *Anderson v. Garrick* (Oct. 12, 1995), 8th Dist. No.68295 WL 601096.¹³ Similarly, *State v. Harmon*,

¹³ See R.C. 2303.12 ("The clerk of court of common pleas shall keep at least four books [:] * * * the appearance docket, trial docket * * *, journal, and execution docket."); see, also, R.C. 1901.31(E). A docket is not the same as a journal. *Lima v. Elliot* (1964), 6 Ohio App.2d 243, 245-246, 35 O.O.2d 427, 429, 217 N.E.2d 878, 881.

Court of Appeals No. I-05-1078 Trial Court No. CR-03-2914, September 1, 2006, held:

“Initially, we must mention that the docket notes the panel imposed costs on appellant; however, there is no journalized judgment entry indicating that the court actually did so. It is well-established that a court speaks through its journals and an entry is effective only when it has been journalized. Crim.R. 32(B). “To journalize a decision means that certain formal requirements have been met, i.e., the decision is reduced to writing, it is signed by a judge, and it is filed with the clerk so that it may become a part of the permanent record of the court.” *State v. Ellington* (1987), 36 Ohio App.3d 76, 78.

The Ohio Rule of Superintendence Rule 26(B)(4) states that a journal is a “verbatim record of every order or judgment of the court.” Sup. R. 26(B)(4).¹⁴

In the Rouse case, as in *White*, there is no docket/journal indicating the charging instrument had been filed.

Further, and separately, in the Rouse case, as in *White*, the Temporary Protection Order was an entry and judgment of the court, and as such, must be journalized to be enforceable. This did not happen in this case¹⁵. The most that can be said for the TPO here is that it was handed to the Clerk of Court, placed in a file, and a notation was placed on the docket summary that states, “TPO ISSUED” without a date. The TPO is not entered on the actual docket farther down the same page under the heading “DOCKET/JOURNAL”. As this court stated in *White*, “**a court speaks only through its journal, not through its computer-generated docket sheet.**” Consequently, the Temporary Protection Order was not valid and enforceable against the Appellee.

¹⁴ *Appellant's Reply Brief*, 4-2-09, p.10-11.

¹⁵ See Exhibit A.

These are a few examples of arguments presented by Rouse to the Fifth District Court of Appeals that that Court did not feel the need to address given its finding regarding the charging instrument.

CONCLUSION AND REQUEST FOR RELIEF

Wherefore, Appellee herein, Mr. Rouse, based upon all the facts, law and evidence stated herein, does respectfully request that this Court reconsider its May 26, 2010 decision in this matter. Rouse contends that in the interests of justice, rather than summarily reversing the Fifth District's opinion, and affirming the decision of the Zanesville Municipal Court, this Court should at minimum *remand* the case back to the Fifth District Court of Appeals, to consider Rouse's *other* arguments beyond the issue of whether a valid criminal complaint was ever filed in this case.

Rouse further requests that this Court reconsider its holding that the Complaint in the lower case had been "docketed" and respectfully offers that the terms docket and journal are not synonymous. Finally, Rouse requests that this Court grant him such other relief that Rouse has previously requested in his Appellant and Appellee Briefs and/or that he may be entitled to under the laws of this State and of the United States, and under the facts, law and argument set forth herein.

Respectfully submitted,


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CERTIFICATE OF SERVICE

Undersigned hereby certifies a true copy of the foregoing document, was served upon Scott Hillis, City Law Director, City of Zanesville, at 825 Adair Avenue, Zanesville, OH 43701 by ordinary U.S. Mail postage prepaid on this the 4th day of June, 2010.



ELIZABETH N. GABA (0063152)
Attorney at Law

ZANESVILLE MUNICIPAL COURT TRAFFIC/CRIMINAL DOCKET

06CRB00319-A CHARGE :537.14 DOMESTIC VIOLENCE ORIG: RECEIPT DATE AMOUNT JUDGE : WILLIAM DRAKE JOSEPH
 ZANESVILLE POLICE DEPARTMENT FILE DATE : 02/28/2006 FINES: BD0033 04/14/2006 1000.00 ATTY :
 VS DATE HEARD: SUSP: OFFICER: SHEETS, TERRY W
 ROUSE, RONALD T, JR VIOL DATE : 02/27/2006 COSTS: 0.00 JAIL :
 915 MAPLE AVE (UPSTAIRS) FINDING : CREDIT: JAIL TM:
 PLEA : NG TOTAL: LIC SUS:
 PLEA DATE : 02/28/2006 INS SUS:
 P-T SUS:
 PROBATH:
 CONDITN: TPO ISSUED.
 CONDITN:

ZANESVILLE, OH 43701
 170-60-0971 TKT#:09447
 05/06/1979 INC#:0601188

***** STATUS HISTORY *****
 ***** BOND HISTORY *****
 ARRAIGNMENT 02/28/2006 AMOUNT : 1000.00 DT REC:04/14/2006
 HEARING 04/05/2006 REFUND : 1000.00 RECT#:BD003359
 BW ISSUED-INDIVIDUAL 04/05/2006 FORFEIT: 0.00 REF/FR:04/14/2006
 BW RET'D-I.JUDGE-PTA 04/13/2006 CTY FEE: 0.00 CHECK#:10471
 CASE HEARD 04/13/2006 RECT# :
 CONTINUANCE 10/26/2006
 CONTINUANCE 07/05/2007

***** DOCKET/JOURNAL *****
 02/23/2007

STILL IN COUNTY JAIL, NEW FELONY CHARGES IN COUNTY. WILL NOT BE
 ATTENDING RESPONSE. MORTIMER IS THIS ATTY FOR ROUSE IN THIS CASE

10/26/2006

HAS BEEN IN JAIL SINCE JULY, STILL WANTS TO DO THE PROGRAM. GETS OUT
 OF JAIL IN DECEMBER. TO COMPLETE ANGER MANAGMENT AT RESPONSE

I hereby certify this to be a true copy of case docket
 taken from the Zanesville Municipal Court records, Zanesville, Ohio.

Dated this 16 day of July 2007
 Clerk/Dep Clerk

Kristine Redson
 Clerk

Zanesville Municipal Court

Docket entry on criminal case number CRB 0600319

[Click for case information](#)

Case Number: CRB 0600319
Defendant(s): Rouse, Ronald T, Jr

10-26-2006

- HAS BEEN IN JAIL SINCE JULY, STILL WANTS TO DO THE PROGRAM.
- OF JAIL IN DECEMBER. TO COMPLETE ANGER MANAGMENT AT RESPONSE

02-23-2007

- STILL IN COUNTY JAIL, NEW FELONY CHARGES IN COUNTY. WILL NOT
- ATTENDING RESPONSE. MORTIMER IS THIS ATTY FOR ROUSE IN THIS

07/06/2007

- WARRANT WAS RECALLED
- REASON -
- NOTICE OF APPEARANCE OF COUNSEL FOR DEFT RONALD ROUSE FILED
- ELIZABETH GABA AND JAMES D MILLER

07-20-2007

- DEFTS MOTION TO DISMISS CASE W/ PREJUDICE OR IN THE ALTERNAT
- DISMISS COMPLAINT FOR VIOLATION OF STATUTORY SPEEDY TRIAL RI
- FIND THAT TPO FILED IN THIS CASE IS VOID FOR CAUSES SHOWN HE

08-01-2007

- MOTION CONTRA TO MOTION TO DISMISS FILED BY ATTY FOR PLAINTF
- COURTS FILE STAMP SHOWS THE DATE OF JULY 32, 2007 STAMPED ON
- ENTRY AS MONTH HAD CHANGED AND DATE HAD NOT.

08-06-2007

- DEFENDANT'S RESPONSE TO STATES JULY 32, 2007 FILED MOTION CO

08-24-2007

- PLAINTIFF, CITY OF ZANESVILLE'S RESPONSE TO DEFENDANTS RESP
- STATE'S JULY 32, 2007 FILED MOTION CONTRA.
- MOTION FOR LEAVE TO PLEAD FILED BY ATTY FOR PLAINTIFF.

08-31-2007

- MOTION FOR LEAVE TO PLEAD GRANTED. WDJ
- ALLEGED DEFENDANTS RESPONSE TO STATES AUGUST 24, 2007 FILED
- LEAVE TO PLEAD FILED BY ATTY FOR DEFT.
- ALLEGED DEFENDANTS RESPONSE TO STATES AUGUST 24, 2007 FILED
- FILED BY ATTY FOR DEFENDANT TOGETHER WITH CERT OF SERVICE

09-17-2007

- SET DOWN FOR HRG ON MOTIONS 10/9/07 @ 10:30 AM

09-25-2007

- MOTION FOR CONTINUANCE FILED BY ATTY FOR PLAINTIFF TOGETHER
- MEMORANDUM IN SUPPORT

09-30-2007

- MOTION GRANTED. HEARING ON MOTIONS SET DOWN FOR 11/6/07 AT 1
- NOTICE MAILED TO ATTY FOR DEFT. PLAINTIFFS NOTICE PLACED IN
- ATTY BOX.

11/13/2007

- MOTION TO CONVEY DEFT FOR 11/27/07 HRG FILED WITH WARRANT

W. H. FR

○ FOR REMOVAL & ENTRY TO CONVEY. MOTION GRANTED 11/16/07 WDJ

11/20/2007

○ HEARING-11/27/2007 11:00 AM - MOTION HRG

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IN THE FIFTH DISTRICT COURT OF APPEALS
ZANESVILLE MUNICIPAL COURT
MUSKINGUM COUNTY OHIO

FILED
FIFTH DISTRICT
COURT OF APPEALS
SEP 23 2008
MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

STATE OF OHIO
CITY OF ZANESVILLE
Plaintiff-Appellee

CA NO 2008 0035

Vs.

RONALD T. ROUSE, JR.
Defendant-Appellant.

On Appeal from the Zanesville
Municipal Court of Muskingum
County

Judge James J. Fais
Sitting by Assignment

Trial Court No. 06 CRB00319

APPEAL BRIEF OF DEFENDANT-APPELLANT RONALD T. ROUSE, JR.

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II.

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THE TRIAL COURT ABUSED ITS DISCRETION BY LITIGATING A MATTER WITH WHICH THE TRIAL COURT DID NOT ENJOY SUBJECT-MATTER JURISDICTION.

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V. IN THE ABSENCE OF AN UNDERLYING CRIMINAL COMPLAINT HAVING BEEN FILED IN THIS CASE, THE LOWER COURT EXCEEDED ITS JURISDICTION UPON A FAILURE TO COMPLY WITH R.C. § 2919.26 IN ITS ATTEMPT TO ISSUE A TEMPORARY PROTECTION ORDER AND THUSLY, THAT ATTEMPT IS VOID.

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VI. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THAT THE TEMPORARY PROTECTION ORDER WAS NEVER FILED IN THIS COURT, AND THUSLY HAD NO FORCE OR EFFECT.

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VII. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THAT THE TEMPORARY PROTECTION ORDER WAS INVALID BECAUSE NO MOTION FOR THE TEMPORARY PROTECTION ORDER WAS EVER FILED.

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ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT'S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE COMPLAINT HAD NEVER BEEN FILED IN VIOLATION OF DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY LITIGATING A MATTER WITH WHICH THE TRIAL COURT DID NOT ENJOY SUBJECT-MATTER JURISDICTION.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT'S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE APPELLANT'S STATUTORY RIGHT TO A SPEEDY TRIAL HAD BEEN VIOLATED.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT'S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL AND PROTECTIONS UNDER CRIMINAL RULES 11 AND 44 HAD BEEN VIOLATED.

V. IN THE ABSENCE OF AN UNDERLYING CRIMINAL COMPLAINT HAVING BEEN FILED IN THIS CASE, THE LOWER COURT EXCEEDED ITS JURISDICTION UPON A FAILURE TO COMPLY WITH R.C. § 2919.26 IN ITS ATTEMPT TO ISSUE A TEMPORARY PROTECTION ORDER AND THUSLY, THAT ATTEMPT IS VOID.

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THAT THE TEMPORARY PROTECTION ORDER WAS NEVER FILED IN THIS COURT, AND THUSLY HAD NO FORCE OR EFFECT.

VII. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THAT THE TEMPORARY PROTECTION ORDER WAS INVALID BECAUSE NO MOTION FOR THE TEMPORARY PROTECTION ORDER WAS EVER FILED.

STATEMENT OF FACTS

On or about February 27, 2006 the herein named Defendant-Appellant Ronald T. Rouse, Jr. was apparently arrested upon an allegation of a violation of Zanesville Municipal Code § "537.14A," Domestic Violence. That allegation was set forth upon a document labeled "Summons after Arrest without Warrant and Complaint upon such Summons." See Exhibit A. As evidenced by that document, it was never filed in the Clerk of Court's Office as shown by the absence of a file stamp or other indicia of filing upon its face. See Exhibit A. Nevertheless, Defendant was compelled to appear in the Zanesville Municipal Court on or about February 28, 2006.¹ Defendant was forced to "appear", as he had been jailed, and he entered a plea of not guilty. The Municipal Court accepted that plea and set the matter for a trial date of April 5, 2006. The Court released Defendant on his own recognizance.² Defendant failed to appear for the April 5, 2006 date.³ Defendant, however, subsequently appeared on April 13, 2006. On that date, according to a filed Judgment Entry and the Transcript of the 4-13-2006 Hearing, the defendant attempted to change his plea from not guilty to guilty. See Exhibit B and Transcript, 4-13-2006 Hearing, p. 8, l.20 to p.9 l.7. As evidenced upon that Entry and the statements made at that hearing the Court refused that plea. As evidenced by the Transcript of that Hearing and the documents "contained in the file", the Court NEVER followed Criminal Rule 11 regarding the so-called "change of plea".⁴ Indeed the Court NEVER throughout the history of the case, until undersigned counsel got on board in

¹ There is no written, audiotape or videotape record of that hearing except for Judge Joseph's testimony at Mr. Rouse's felony trial of his recollection of the event, State of Ohio v. Ronald T. Rouse Jr., No. CR 2007 0012, filed in the Appeal of that case as part of the record, Case No. 2007-Ohio-0036.

² According to the Docket, Exhibit E, this document was never filed with the Court.

³ Defendant stated on 4-13-2006 that he had been involved in an accident and was hospitalized with a groin injury at that time. See Transcript, 4-13-2006 Hearing, p.7, l.7-25 to p.8, l.1-19.

⁴ See Transcript, 4-13-2006 Hearing, p.7, l.7-25 to p.8, l.1-19.

July 2007, invoked Defendant's Sixth Amendment right to counsel. The trial court erred to the prejudice of the appellant in accepting a plea from the appellant when the appellant was not fully informed as to all the consequences of said plea pursuant to criminal rule 11, and in failing to inquire and determine whether appellant's plea was entered voluntarily, intelligently and knowingly, and in failing to inquire regarding Defendant's Sixth Amendment right to counsel. The Court then stayed the case until October 26, 2006 as to allow the Defendant to complete an Anger Management Program at Response.

At that October 26, 2006 hearing, the Court acknowledged that Defendant was confined in jail on other issues since July of 2006 and was to be released in December of 2006. According to this Court's Entry, the Court apparently stayed this case until July 6, 2007 as to allow the Defendant to complete the Anger Management Program at Response. Said Entry is attached as Exhibit C.

After a review of the transcript of the April 13, 2006 hearing, and the many unfiled documents as contained in the file of this Court⁵ there is the disquieting absence of any proof that Defendant voluntarily signed away any rights, including his right to counsel, and his right to a speedy trial. See Certified Docket/Journal attached as Exhibit E. On July 6, 2007, Defendant again appeared, this time with undersigned Counsel and orally moved the Court to dismiss this case. Defendant through Counsel on July 20, 2007, filed a *Motion to Dismiss Case With Prejudice or in the Alternative Dismiss Complaint for Violation of Speedy Trial Right and Find that TPO Filed in this Case is*

⁵ There was also, inter alia, a Temporary Protection Order signed by the Judge in this case. That supposed Order was not filed in this case. As the Court is aware that document and the ramification thereof was used against the Defendant by the State in a felony proceeding in the Muskingum County Court of Common Pleas. The validity of that document will be addressed infra.

Void for Causes Shown Herein. Defendant expressly stated that he did not voluntarily submit to the jurisdiction of the Court and that his appearance was limited to the purposes stated in the Motion. He moved the Court pursuant to Crim.R. 48(B) and the inherent power of the Court to dismiss the Case and declare all entries and orders *void ab initio*. After a Response filed by the State, Defendant on August 31, 2007, filed *Alleged Defendant's Response to State's August 24, 2007 Filed Response*.

After continuances, so that the original Judge on the case, Judge Joseph, could recuse himself and another Judge, Visiting Judge Fais, could be appointed, the case was set for final hearing on June 9, 2008.

Judge Fais overruled all of the Defendant's motions, found him guilty, sentenced him to 10 days suspended, 50 dollar fine suspended. See *Amended Judgment Entry*, 6-13-08, Exhibit F.

Judge Fais found that the "Complaint" in this case was "filed" in the Court. Transcript, 6-10-2008 hearing, p. 18, 1.25. He states that it is a "de facto, de jure" issue:

"Now, defendants [sic] now filed a motion to dismiss claiming that it was a lack of subject matter jurisdiction with this court because the complaint filed with the court was not time stamped by the clerk. So the question is de facto de jure. In other words, in fact, the defendant did appear. In fact, the defendant entered a plea and requested that the matter be continued so that he could do a program of some type.

That appears to be what, in fact, happened. At some point the Court issued also a protection order and that was apparently served upon the defendant. Now, that is, in fact, what appears to be the facts in this case.

The Court is going to overrule the motion to dismiss, is going to overrule the motion for lack of a speedy trial, and got forward now at this stage which appears to be a need to address his plea of guilty. The Court is going to accept the plea and enter a finding of guilty against the defendant and proceed at this time with sentencing."

Transcript, 6-10-08 hearing, p.19, 1.24 to p.20, 1.19.

Judge Fais filed an Entry on June 9, 2008, from which Defendant appealed, and then an Amended Entry on June 13, 2008, from which Defendant appealed – those two documents were consolidated as one case.

ARGUMENT – ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT'S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE COMPLAINT HAD NEVER BEEN FILED IN VIOLATION OF DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

Contained in the case file of the lower court, there is a document that purports to be a "Complaint" of a violation of the Municipal Ordinances of the City of Zanesville leveled against Appellant. The document is titled "Summons in lieu of Arrest Without Warrant, and Complaint upon such Summons". See Exhibit A. The first hint that this document is without force is that there is no file stamp anywhere on its face as proof that it was in fact filed with or in the lower court. That absence of filing is undeniably sustained upon a review of the lower court's Docket and/or Journal of said cases. That Docket and/or Journal does not contain any mention or notation of a "complaint" having been filed. See Exhibit E.

Nonetheless, the State of Ohio, by and through the City Prosecutor's Office, could only compel Appellant to appear before the Zanesville Municipal Court through a verified complaint that was or had been *filed* with or in that Court.⁶ A criminal complaint is the only means whereby the criminal jurisdiction and conferred power thereof of the lower court could have been wielded against Appellant. The filing of a valid complaint is a necessary prerequisite to a court acquiring subject-matter jurisdiction. See Columbus v. Jackson (1952), 93 Ohio App. 516, 518, 114 N.E.2d 60; Newburgh Heights v. Hood, 8th

⁶ Numerous Ohio courts have held that a time-stamp or file-stamp is necessary in order to confer jurisdiction upon the court. See, e.g., State v. Callihan (4th Dist., Sept. 14, 1993), Lawrence App. No. 93CA1, 1993 WL 373788 (dismissing an appeal for lack of jurisdiction where "[n]either the front nor the back of the complaint [in the form of a Uniform Traffic Ticket charging appellant with a violation of R.C. § 4511.25] contains a file-stamp nor any other indicia of if and/or when it was filed with the trial court clerk"); State v. Griffin (4th Dist., June 17, 1991), Washington App. No. 90 CA 8, 1991 WL 110225 (dismissing an appeal for lack of jurisdiction based on purported court documents that did "not bear either a time stamp or other evidence that it had been filed with the Clerk of the Marietta Municipal Court").

Dist. No. 84001, 2004 Ohio 4236, ¶ 5 citing cases ; also State v. Human, (1978) 56 Ohio Misc. 5, 381 N.E.2d 969 (Criminal jurisdiction is statutory and must be strictly construed whether one is dealing with a court of general jurisdiction or a court of limited jurisdiction such as a municipal court); (Jurisdiction is the power of a court to hear and determine a cause and it is *coram judice* whenever a case is presented that brings this power into action); (No cause or case arises involving the criminal jurisdiction of a court until a complaint or information is filed or an indictment returned). Id. Syllabus ¶¶ 4-6 (emphasis added). Further, the Zanesville Municipal Court would need a properly filed complaint to hold a hearing or a trial, and for that matter, to even have the authority to render a valid judgment. See State v. Villagomez (1974), 44 Ohio App.2d 209, 211, 337 N.E.2d 167. Succinctly stated, absent a filed valid complaint, the Zanesville Municipal Court lacked subject-matter jurisdiction from the outset, and thusly, did not ever have the authority to go forward with the supposed case below, hold hearings on the matter, render judgments or convictions on the matter, including a "Temporary Protection Order" or take any judicial action whatsoever in light of the lack of subject-matter jurisdiction. Accordingly, the judgment rendered against Appellant was, and continues to be, void as a matter of law. Further, the denial of Appellant's motion to dismiss and render void filed in the court below was an abuse of discretion. Any Order, Judgment, or otherwise that has been rendered or could have been rendered or that may be rendered, that was or could be directed toward Appellant is or would be void *ab initio*. See State v. Whitner, (6-26-98) 6th District No. L-97-1253 (attached) citing Patton v. Diemer (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, ("If a court acts without jurisdiction, then any proclamation by that court is void *ab initio*." Syllabus); see also Freeland v.

Pfeiffer (1993), 87 Ohio App.3d 55, 58, 621 N.E.2d 857; State ex rel. Lawrence Dev. Co. v. Weir (1983), 11 Ohio App. 3d 96, 97, 11 Ohio B. 148, 463 N.E.2d 398. In essence, the Zanesville Municipal Court, under the law of this State, is and has been without any legal authority to hold, demand or adjudicate any issue against Appellant, because it lacks and/or lacked judicial power to do so.

The lower court has an inherent power to decide whether the subject matter jurisdiction of the court has or had been properly invoked by the State of Ohio. Cf. State ex rel. Hummel v. Sadler, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, at ¶ 21. In fact, in the face of the evidence presented herein, the court could have at any time raised the issue of whether it had jurisdiction *sua sponte*. In re Graham, 147 Ohio App.3d 452, 2002-Ohio-2407, at ¶ 29; see Civ.R. 12(H)(3); Fox v. Eaton (1976), 48 Ohio St.2d 236, 238, 358 N.E.2d 536, *overruled on other grounds*, Manning v. Ohio State Library Bd. (1991), 62 Ohio St.3d 24, 29, 577 N.E.2d 650.

Beside the inherent power of this Court, procedurally, this Court can dismiss this case pursuant to Ohio Rules of Criminal Procedure, Rule 48. Crim.R. 48(B) states: "(B) Dismissal by the court. If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal." Crim.R. 48(B) recognizes by implication that a trial court *sua sponte* may dismiss a criminal action over the objection of the state because the rule sets forth a procedure for doing so. State v. Busch, 76 Ohio St.3d 613, 615, 1996-Ohio-82. Crim.R. 48 "does not limit the reasons for which a trial judge might dismiss a case, and the Supreme Court of Ohio has held that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interest of justice." Columbus v. Storey, Franklin App. No.

03 AP-743, 2004-Ohio-3377, at ¶ 8, citing Busch, at 615. (Footnote omitted.) "However, the trial court must state on the record its findings of fact and reasons for the dismissal." Storey, at ¶ 8. (Footnote omitted.) See, also, State v. Today's Bookstore, Inc. (1993), 86 Ohio App.3d 810, 824, cause dismissed, 66 Ohio St.3d 1522, citing State v. Sutton (1980), 64 Ohio App.2d 105 ("... a court has inherent power to dismiss with prejudice only where it is apparent that the defendant has been denied either a constitutional or statutory right, the violation of which would, in itself, bar prosecution"). The procedure for filing a document is specifically laid out in the statutory law of this State. See R.C. § 1901.31(E)(entry in journal); R.C. § 2303.08 ("... shall indorse on each pleading or paper in a cause filed in the clerk's office the **time of filing**,..."); and § 2303.10, ("... shall indorse upon every paper filed with him the **date of the filing** thereof, ...").⁷ Evidence of the filing is sustained by the time stamp or an endorsement by the Clerk as to what date and time the document was received. Ins. Co. of N.M. v. Reese Refrig., (1993) 89 Ohio App.3d 787, ("The endorsement upon the document by the clerk of the fact and date of filing is evidence of such filing.) *Id.* (citing cases).⁸ Ohio Courts have consistently held that, "[A] judge speaks as the court only through journalized judgment entries." See William Cherry Trust v. Hoffmann (1985), 22 Ohio App.3d 100, 103 (citing cases). Absent a journalized entry, such order has no force or effect. *Id.* at 105; ("[I]n order to be 'effective,' a court's judgment, whatever its form may be, must be filed with the trial court clerk for journalization." Proper journalization requires "some indication on the document

⁷ R.C. §§ 2303.08 and 2303.10 are made applicable to the Municipal Clerk of Court through § 2303.31. "The duties prescribed by law for the clerk of the court of common pleas shall, so far as they are applicable, apply to the clerks of other courts of record."

⁸ The Ohio Supreme Court has specifically held that "filed" means that the document must be delivered to the Clerk and must be indorsed by the Clerk of Court i.e. time-stamped. See State v. Gipson, (1998) 80 Ohio St.3d 626, 634, 1998-Ohio-659 at syllabus.

that it was filed with the trial court clerk and, most importantly, when)." Hoffmann, supra, at 106. Further, absent a time stamp or endorsement by the Clerk, a document cannot be considered a part of the record. See Buckley v. Personnel Support Sys., Inc., (12-15-1999) Hamilton No. C-990159 (unpublished) (attached). (documents that are not properly filed cannot be considered by an appellate court) *Id. passim*, cases cited. Further, as also stated in Buckley, "A party may not rely on unfiled documents in support of his or her claims." *Id.* (Cases cited).

In the unreported case Villa v. Elmore, 2005-Ohio-6649, the Sixth Appellate District addressed the requirements of journalization and filing. In Villa v. Elmore, the Appellant brought a suit against multiple people for a newspaper story that revealed the Appellant was arrested for impersonating a police officer. The Appellant claimed that there had been a valid expungement order filed and consequently the references to his arrest were never properly removed from the Trial Court file. The Trial Court dismissed the Appellant's complaint on Summary Judgment finding that the expungement was never properly journalized or filed. The Appellate Court agreed, holding that the existence of an order for expungement signed by the Municipal Court judge but not file stamped, combined with filed documents referring to the expungement *do not constitute a validly journalized and filed order*. The Sixth Appellate District held:

In considering whether the expungement statutes were violated by the clerk of the Sylvania Municipal Court, the trial court found there was no evidence in the record that the 1977 order to expunge the impersonating offense was ever journalized. Civ.R. 58(A), effective July 1, 1970, states that "[a] judgment is effective only when entered by the clerk upon the journal." Appellant calls the court's attention to several documents which he claims raise a question of fact as to whether the order was journalized, including a letter from an official with the Ohio Attorney General's office that referred to a copy of the order;

a memo from the Lucas County clerk of courts that referred to a certified copy of the expungement order; and a document purported to be written by Sylvania Municipal Clerk of Courts Bonnie Chromik regarding her search for appellant's expungement documents. Upon review, however, we find that none of the documents offered by appellant show that the order was in fact journalized. Accordingly, the trial court properly found that the order expunging the impersonating conviction was not journalized and appellant's second assignment of error is not well-taken.

Having determined there was no evidence that the order was journalized, the trial court found that it was therefore not valid and enforceable. In his third assignment of error, appellant asserts the judgment was valid and enforceable regardless of whether it was journalized. Appellant appears to argue the order is valid and enforceable because he relied on its validity. Appellant also attempts to gloss over the absence of a file-stamped and journalized order by citing to some documents in the case file which referred to the order. The documents cited by appellant, set forth above in paragraph 20, do not constitute proof that the order was valid. The issue before the trial court was not whether there were other documents indicating some people believed the order to be valid, or whether appellant relied on the order's validity. The question before the trial court, which it correctly answered in the negative, was whether the expungement order was journalized. See *Villa v. Elmore*, 2005-Ohio-6649.

In the present case the mere existence of a document called "Summons After Arrest Without Warrant and Complaint upon such Summons" that is not file stamped or even referenced in the certified case docket a year and a half after the Appellant's arrest, combined with the filed documents referring to the complaint does not prove that the complaint was ever filed. In short, the fact that a case presumably went forward against the Appellant absent a filed complaint is not evidence that the complaint was ever properly filed and journalized. Most illustrative of the fact the complaint was never filed, is Exhibit E, a certified true copy of the case docket dated July 6th, 2007, which does not contain a journalized entry of the complaint having been filed.

The State, four days after being informed the court lacked jurisdiction, tried to back date the filing of the complaint by having the Clerk of the Zanesville Municipal Court, Kris Dodson, swear out an affidavit on July 24th, 2007. (Exhibit G) Clerk of Court Kris Dodson swore that she knows, a complaint purportedly filed over 17 months ago, was in fact filed and further was handled in accordance with the procedures and practices

of the Zanesville Municipal Court, despite the fact that the complaint was not time-stamped. Kris Dodson goes on to swear in the Affidavit that the filing of the complaint generated a file and the filing date of February 28, 2006 is indicated in the Court's Docket/Journal, despite the fact that a copy of the Docket/Journal certified by Kris Dodson on July 6th 2007, makes no mention of a complaint being filed. Succinctly put, absent a filed valid complaint, the Trial Court lacked subject-matter jurisdiction and thusly, never had the authority to go forward with the case. Further, under the facts herein stated, any Order, Judgment, or otherwise that has been rendered that was directed toward Mr. Rouse is or would be void *ab initio*.

Further, any argument as to the timeliness of the motion to dismiss would be without legal basis. As a matter of law, an objection that is based upon the lack of subject-matter jurisdiction may be raised at any stage of the proceedings and can never be waived. See United States v. Cotton (2002), 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860; State ex rel. Tubbs Jones v. Suster (1998), 84 Ohio St.3d 70, 75, 1998 Ohio 275, 701 N.E.2d 1002; In re Byard (1996), 74 Ohio St. 3d 294, 296, 1996 Ohio 163, 658 N.E.2d 735; also Crim.R. 12(C)(2) ("...failure to show jurisdiction in the court ... which ... shall be noticed by the court at any time during the pendency of the proceeding).

Finally, any argument that would be hinged upon the unrepresented appearances of Mr. Rouse before the lower Court, in that those appearances in some form or fashion conferred subject-matter jurisdiction in this case would also, as a matter of law - fail. Under the controlling law of this State any such attempt must be overruled. See State ex rel. Lawrence Dev. Co. v. Weir, supra at 97 ("...subject matter jurisdiction may not be

conferred upon a court by agreement of the parties, nor may lack of subject matter jurisdiction be waived”).

II. THE TRIAL COURT ABUSED ITS DISCRETION BY LITIGATING A MATTER WITH WHICH THE TRIAL COURT DID NOT ENJOY SUBJECT-MATTER JURISDICTION.

Under Crim . R. 4(A)(3), the following, in relevant part is found:

(3) By law enforcement officer without a warrant. In misdemeanor cases where a law enforcement officer is empowered to arrest without a warrant, the officer may issue a summons in lieu of making an arrest, when issuance of a summons appears reasonably calculated to ensure the defendant's appearance. The officer issuing the summons shall file, or cause to be filed, a complaint describing the offense. No warrant shall be issued unless the defendant fails to appear in response to the summons, or unless subsequent to the issuance of summons it appears improbable that the defendant will appear in response to the summons.

Emphasis added.

Next, we must turn to the duties of the Municipal Court Clerk as enunciated within R.C.

§ 1901.31(E), which states:

(E) The clerk shall do all of the following: ...In the docket, the clerk shall enter, at the time of the commencement of an action, the names of the parties in full, the names of the counsel, and the nature of the proceedings. Under proper dates, the clerk shall note the filing of the complaint, issuing of summons or other process, returns, and any subsequent pleadings. The clerk also shall enter all reports, verdicts, orders, judgments, and proceedings of the court, clearly specifying the relief granted or orders made in each action.

Emphasis added.

Further, “[t]he duties as prescribed by law for the clerk of the court of common pleas shall, so far as they are applicable, apply to the clerks of other courts of record.”

See R.C. § 2303.31 (Effective Date: 10-01-1953). As such, under the duties of the Clerk of Court of Common Pleas, the following is found:

The clerk of the court of common pleas shall **indorse on each pleading or paper in a cause filed in the clerk’s office the time of filing**, enter all orders, decrees, judgments, and proceedings of the courts of which such

individual is the clerk,The clerk of the court of common pleas shall file together and carefully preserve in his office all papers delivered to him for that purpose in every action or proceeding. R.C. § 2303.09, "Filing and preserving papers," Effective Date: 10-01-1953; and, ...The clerk of the court of common pleas **shall indorse upon every paper filed with him the date of the filing thereof**, and upon every order for a provisional remedy and upon every undertaking given thereunder, the date of its return to his office. R.C. § 2303.10 "Indorsement of papers," Effective Date: 10-01-1953.

Emphasis added.

The Courts of this State, in furtherance of their respective jurisdictions have consistently upheld this caveat as to what the definition of "filed" with a court means.

In *Ins. Co. of N.M. v. Reese Refrig.*, (1993) 89 Ohio App.3d 787, that Court construed the duties of the Clerk of Court under R.C. §§ 1901.31, 2303.08 and 2303.10 concerning the "filing" of a document in civil matter. That case involved an appeal of the dismissal of a complaint that was time barred. The Court stated:

The endorsement upon the document by the clerk of the fact and date of filing is evidence of such filing. Penn, 43 Ohio St. at 61, 1 N.E. at 87. **Because clerks generally file-stamp papers immediately upon delivery and receipt, the file-stamp date is usually indicative of the date the paper was filed.** See *In re Hopple* (1983), 13 Ohio App.3d 54, 55, 13 OBR 58, 58-59, 468 N.E.2d 129, 130; *Toledo v. Fogel* (1985), 20 Ohio App.3d 146, 149, 20 OBR 180, 182, 485 N.E.2d 302, 305. **Moreover, R.C. 1901.31(E), 2303.08 and 2303.10 require the clerk of courts to endorse the date of filing on each pleading or other document filed in a case, thereby creating a presumption that the file-stamped date reflects the date of the filing.**

Id. passim. (Emphasis added).

In *State v. Bolden*, (1-20-2004) Preble No. CA2003-03-007 (unreported) the Court there faced a question as to when, under a criminal statute, an affidavit of indigency was "filed" involving R.C. § 2929.18, specifically that Court stated:

"The filing of an affidavit of indigency by a defendant does not automatically entitle the defendant to a waiver of the mandatory fine. Id. The Ohio Supreme Court has held that the requirement that an

affidavit must be filed with the court prior to sentencing means that "the affidavit must be delivered to the clerk of court for purposes of filing and must be indorsed by the clerk of court, i.e., time-stamped, prior to the filing of the journal entry reflecting the trial court's sentencing decision." *Id.* at syllabus.

Id. at ¶¶ 33-35. (Emphasis added).

In *State v. Callihan* (9-14-1993) Lawrence No. 93CA1 (unpublished) the Fourth District Court of Appeals, when faced with a question of appellate jurisdiction noted that:

Prior to a consideration of the merits of this appeal, we must determine whether we possess the requisite jurisdiction. The record here includes a complaint in the **form of a uniform traffic ticket** charging appellant with the R.C. 4511.25 traffic offense and a signed notation on the back of the ticket dated "12-1-92" which apparently finds him guilty and fines him \$25. **Neither the front nor the back of the complaint contains a file-stamp nor any other indicia of if and/or when it was filed with the trial court clerk.** Furthermore, the transcript of docket and journal entries only notes "Defendant Found Guilty" on "December 1, 1992" but fails to indicate that a judgment entry of conviction and sentence was filed on that date.

All judgment entries, and other papers, must be file-stamped on the date they are filed; just as a judgment entry that has not been journalized, or filed with the clerk for journalization, is not a final appealable order, so a judgment entry that has not been file-stamped by the trial court clerk is not a final appealable order. Griffin, supra; In re Hopple (1983), 13 Ohio App.3d 54, 55; see, also, Brackmann Communications, Inc. v. Ritter (1987), 38 Ohio App.3d 107, 109; State v. Jones (Nov. 29, 1988), Pickaway App. No. 87CA9, unreported.

As succinctly noted by the Supreme Court of Ohio, an appellate court lacks subject-matter jurisdiction over the merits of an appeal when the judgment entry has not been file-stamped by the trial court clerk. *State v. Domers* (1991), 61 Ohio St.3d 592; see, also, *Akron v. Perry* (May 27, 1992), Summit App. No. 15278, unreported, citing *Domers*. Since the purported judgment entry was not file-stamped, we sua sponte dismiss this appeal for lack of jurisdiction.

Id. passim.

In fact, a document that is merely in the court file, but is absent a time stamp or endorsement that such was received by a Clerk of Court and/or is not through notation contained upon the docket or journal of a court, is not a part of the record of that case.

See Buckley v. Personnel Support Sys., Inc., (12-15-1999) Hamilton No. C-990159 (unpublished). The Court there stated:

Our examination of the record in this case reveals that numerous documents necessary to the resolution of the issues are not part of the record on appeal. **The reason for these omissions is that these documents were never properly filed and time-stamped in the trial court, and, therefore, they never became part of the record.** See App.R. 9(A). Though the trial court apparently saw the missing documents, simply sending a document to the court does not constitute a "filing." **It must be actually delivered to and received by the official custodian, who has a duty to endorse the date of filing on each document.** *Fulton v. State ex rel. General Motors Corp.* (1936), 130 Ohio St. 494, 497-500, 200 N.E.2d 636, 637-638; *Ins. Co. of N. Am. v. Reese Refrig.* (1993), 89 Ohio App.3d 787, 790-791, 627 N.E.2d 637, 638-639; *Rhoades v. Harris* (Oct. 15, 1999), Hamilton App. No. C-981000, unreported. **A party may not rely on unfiled documents in support of his or her claims.** See *LaMar v. Marbury* (1982), 69 Ohio St.2d 274, 278, 431 N.E.2d 1028, 1031; *Crabtree v. Burnley* (July 6, 1988), Medina App. No. 1638, unreported.

Id. passim, cases cited. (Emphasis added).

Conversely, when a document bears a file stamp it is considered filed. See *City of Dayton v. Ferrugia*, (3-1-2002) Montgomery No. 18747 (unreported) (Crim. R. 4.1(D) citation bore time stamp of date and time of filing); *State v. Bunnell* (6-7-2002) Lucas No. L-02-1015 (unreported) (attached) (Crim. R. 7, indictment bore time stamp, therefore filed, *Id.* ¶ 5-6). In the instant matter, pursuant to Crim. R. 4(A)(3), the Police Officer who set forth the Summons and Complaint was under a mandatory duty signified by the use of the word "shall" file, or cause to be filed, a complaint describing the offense. The Clerk of Court, then upon accepting the charging instrument, under the duties as

mandated by R.C. § 1901.31(E), was to make, *inter alia*, an entry upon the docket of the case noting the filing of the charging instrument and date that the same was filed. Further, the Clerk was to “endorse” on the charging instrument the time of and the date of filing. R.C. §§ 2303.08 and 2303.10. However, the Summons and Complaint (Exhibit A) is completely absent a time stamp or for that matter any indication of an endorsement as to on what date or what time that the Municipal Clerk of Court accepted this document in compliance with R.C. §§ 1901.31(E), 2303.08 or 2303.10.⁹ Further, when we examine the “Docket-Journal” of this case (Exhibit E), we must find that the filing of the Summons and Complaint is not noted upon that document in compliance with R.C. § 1901.31(E). Accordingly, the lower court should have found that the State failed to comply with Crim. R. 4(A)(3) in that it had and/or has failed to file a charging instrument against Appellant in accordance with R.C. §§ 1901.31(E), 2303.08 and 2303.10.

The filing of a valid charging instrument was a necessary prerequisite in order for the lower court to acquire criminal subject-matter jurisdiction of Appellee’s allegation. See Columbus v. Jackson (1952), 93 Ohio App. 516, 518, 114 N.E.2d 60; Newburgh Heights v. Hood, 8th Dist. No. 84001, 2004 Ohio 4236, ¶ 5 citing cases; also State v. Human, (1978) 56 Ohio Misc. 5, 381 N.E.2d 969. Without a properly filed charging instrument, the lower court was foreclosed from holding any hearing¹⁰ or trial and did

⁹ The Clerk of Court complied with § 1901.31(E) in part in that the clerk shall enter, at the time of the commencement of an action, the names of the parties in full, the names of the counsel, and the nature of the proceedings. See Exhibit E.

¹⁰ In fact, a Court may not issue an arrest warrant until a complaint has been filed. See R.C. § 2935.08 (“Upon the filing of an affidavit or complaint as provided in sections 2935.05 or 2935.06 of the Revised Code such judge, clerk, or magistrate shall forthwith issue a warrant ...”); also R.C. § 2935.10. Further, it may not hold an arraignment hearing until a complaint has been filed. See § 2937.02 (“When, after arrest, the accused is taken before a court or magistrate, or when the accused appears pursuant to terms of summons or notice, the affidavit or complaint being first filed, the court or magistrate shall, before proceeding further:...”)

not have the authority to render judgment. See State v. Villagomez (1974), 44 Ohio App.2d 209, 211, 337 N.E.2d 167; Human, supra.

Thus, the subsequent sentencing entry was void *ab initio* due to the lack of subject matter jurisdiction upon Appellee's failure to file, in accordance with law, a valid charging instrument. See Patton v. Diemer (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, (If a court acts without jurisdiction, then any proclamation by that court is void *ab initio*) *Id.* syllabus; Freeland v. Pfeiffer (1993) 87 Ohio App.3d 55, 58, 621 N.E.2d 857; State ex rel. Lawrence Dev. Co. v. Weir (1983), 11 Ohio App. 3d 96, 97, 11 Ohio B. 148; also State v. Whitner, (6-26-98) 6th District No. L-97-1253 *citing Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941; accord State v. Miller (1988), 47 Ohio App.3d 113, 114, 547 N.E.2d 399, 400, ("In the absence of a sufficient formal accusation, a court acquires no jurisdiction whatever, and if it assumes jurisdiction, a trial and conviction are a nullity"). See, also, Stewart v. State (1932), 41 Ohio App. 351, 353-354, 181 N.E. 111, 111-112; Cf. Akron v. Meissner, 92 Ohio App.3d 1 (1993)(Crim.R. 3 & 4, Officer failed to file a sworn original, conviction void); Stoll v. State, 724 So.2d 90 (Ala. Crim. App. 1998) (Absence of evidence that Uniform Traffic Ticket Complaint ["UTTC"] had been filed, Court lacked subject-matter jurisdiction). That Court also rejected the argument that because the ticket had been handed to the alleged defendant it conferred jurisdiction, *Id.* pp. 91-92. The charging instrument is not a part of the record of this case for the reasons as set forth in Buckley, supra.

Any argument that would be hinged upon the compelled appearances of Appellant before the lower court, in that those appearances in some form conferred subject-matter jurisdiction in this case and/or an argument that he failed to object to the

sentence and/or proceedings would also, as a matter of law, fail. See State ex rel. Lawrence Dev. Co. v. Weir (1983), 11 Ohio App. 3d 96, 97, (“...subject matter jurisdiction may not be conferred upon a court by agreement of the parties, nor may lack of subject matter jurisdiction be waived”). Patton v. Diemer (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus. United States v. Cotton (2002), 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860; State ex rel. Tubbs Jones v. Suster (1998), 84 Ohio St.3d 70, 75, 1998 Ohio 275, 701 N.E.2d 1002; In re Byard (1996), 74 Ohio St. 3d 294, 296, 1996 Ohio 163, 658 N.E.2d 735; Cf. Wilkins v. Wilkins (6-18-2004) Champaign County App. 2004-Ohio-3139 (holding that the mandates of R.C. 3113.31 provide a jurisdictional limitation on Common Pleas Courts, the failure to comply with those mandates cannot be waived) Id. at paragraph 27 – 31.

Accordingly, the trial court abused its discretion by litigating an action for which it did not enjoy subject-matter jurisdiction, and such error must be reversed by this Court. The trial court had proper jurisdiction, either through its inherent power or through Crim. R. 48(B), to vacate the void entries, including the Temporary Protection order and then to dismiss this case, and it abused its discretion by failing to do so, and thus this Court must reverse.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT’S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE APPELLANT’S STATUTORY RIGHT TO A SPEEDY TRIAL HAD BEEN VIOLATED.

On one of the three documents actually filed in this case, there is a notation that Defendant was to “complete Anger Management Counseling at Response.” See April 13, 2006, filed Judgment Entry, Exhibit B. A reasonable inference can be drawn here, that

the Prosecutor in this case gave consent for the defendant to enter into a pre-trial diversion program at Response. The mandates of such a program are contained in Ohio Revised Code § 2935.36, which states in pertinent part:

* * * *

(B) An accused who enters a diversion program shall do all of the following:

(1) Waive, in writing and contingent upon the accused's successful completion of the program, the accused's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the accused, and arraignment, unless the hearing, indictment, or arraignment has already occurred; Effective Date: 09-26-2003, Emphasis added.

The defendant herein was alleged to have committed a violation of Zanesville Municipal Ordinance § "537.14A," which reads in relevant part:

(a) No person shall knowingly cause or attempt to cause physical harm to a family or household member. **** a **violation of subsection (a) or (b) of this section is a misdemeanor of the first degree.** Emphasis added.

As is generally known, the Sixth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment, as well as Article I, Section 10 of the Ohio Constitution dually affords a defendant the right to a speedy trial. See Klopfer v. North Carolina (1967), 386 U.S. 213, 222-223, 18 L. Ed. 2d 1, 87 S. Ct. 988 (federal rights); and State v. O'Brien (1987), 34 Ohio St.3d 7, 8, 516 N.E.2d 218 (State right). In Ohio, the right to a speedy trial is statutorily defined within Ohio Revised Code §§ 2945.71-2945.73. The statutory speedy trial right of a person accused of a misdemeanor is contained in Revised Code § 2945.71(B)(2), which states in pertinent part:

(B) Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows:

* * * *

(2) **Within ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree**, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days. Emphasis added.

Said Revised Code Section 2945.71, as a matter of law, shall be strictly construed against the State and shall be strictly enforced by the courts of this State. State v. Pachay, (1980) 64 Ohio St.2d 218, 222; State v. Reeser (1980), 63 Ohio St.2d 189, 191; State v. Rockwell (1992), 80 Ohio App.3d 157, 165 (The prosecution must strictly comply with R.C.2945.71 and 2945.73). If an accused waives his right to a speedy trial, the waiver must be "**expressed in writing or made in open court on the record**" to be effective. State v. King (1994), 70 Ohio St. 3d 158, 1994 Ohio 412, 637 N.E.2d 903, syllabus, following State v. O'Brien (1987), 34 Ohio St.3d 7, 516 N.E.2d 218 and State v. Mincy (1982), 2 Ohio St.3d 6, 2 Ohio B. 282, 441 N.E.2d 571. The argument is very simple. Defendant was accused of committing a violation of Zanesville Municipal Code § "537.14A" which is a misdemeanor of the first degree. ¹¹ Municipal Code § 537.14(2). The Prosecutor accepted the defendant into a diversion program at Response. This fact is sustained by this Court's own Journal Entry of April 13, 2006. See Exhibit B.

According to O.R.C. § 2935.36(B)(1) any waiver of the speedy trial right of the defendant **had to be in writing and filed with the Court**. The Court Docket of this case however, is absent such a waiver – filed or unfiled. See Exhibit E. In a case such as this, when a speedy trial waiver has not been filed with the clerk of court there is no valid waiver and the time is therefore not tolled. See State v. Zeger, (September 1, 2005) 5th

¹¹ The "complaint" in this case, a true copy attached as Exhibit A, is absent a file stamp. As such, this Court does not have jurisdiction.

Dist. No. 2003-CA-109, 2005 Ohio 4717; 2005 Ohio App. LEXIS 4262 at *8-*9, attached; also Village of Ottawa Hills v. Afjeh (June 23, 2000), 6th Dist. No. L-99-1074, 2000 Ohio App. LEXIS 2803 (attached)(waiver not signed by defendant is not a valid waiver). Defendant was arrested on the allegation of violating Municipal Code § "537.14A" on February 27, 2006. The law in this State is that the right to a speedy trial time starts to run the day after arrest. See R.C. 2945.71 and State v. Stamps (1998), 127 Ohio App.3d 219, 223, 712 N.E.2d 762, (The date of the arrest does not count against the state). According to Revised Code § 2945.71(B)(2) the State was required, in the absence of a signed waiver of his speedy trial right, to bring the defendant to trial within ninety-days. The ninety-day mark, would have expired on or about May 30, 2006 (March, 31 days, April, 30 days, May 31 days)¹². However, in this case defendant failed to appear on April 5, 2006, but did appear on April 13, 2006, signifying nine days. These days are excluded under Ohio Revised Code § 2945.72(D), which states:

The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

* * * *

(D) Any period of delay occasioned by the neglect or improper act of the accused;

* * * *Effective Date: 11-01-1978

Accordingly, the ninety-day mark expired on June 8, 2006 (May 30, 2006 (31 days in May) plus nine-days equals June 8, 2006). The law is clear, when the statutory speedy trial right of an accused is violated, R.C. § 2945.73 controls. Revised Code § 2945.73 states in pertinent part:

¹² Date of arrest is not included in the speedy trial computation. See R.C. § 1.14; Crim.R. 45; State v. Steiner (1991), 71 Ohio App.3d 249, 250-251

“(B) Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code.

* * * *

(D) When a charge of felony is dismissed pursuant to division (A) of this section, such dismissal has the same effect as a nolle prosequi. **When an accused is discharged pursuant to division (B) or (C) of this section, such discharge is a bar to any further criminal proceedings against him based on the same conduct.** Effective Date: 01-01-1974, Emphasis added.

Defendant has set forth a *prima facie* case that his statutory speedy trial right has been violated. See State v. Howard (1992), 79 Ohio App.3d 705, 707. If there is any ambiguity in the record of this supposed case, this Court must construe the record in favor of the accused. State v. Singer (1977), 50 Ohio St.2d 103, 109, 362 N.E.2d 1216; State v. Mays (1996), 108 Ohio App.3d 598, 609, 671 N.E.2d 553. It is now upon the State of Ohio to rebut such proof. See State v. Geraldo (1983), 13 Ohio App.3d 27, 28. If the State cannot rebut the facts and law as stated herein, this Court must discharge the Defendant in accordance with the mandate of § 2945.73(B) of the Code.

IV. **THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT'S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL AND PROTECTIONS UNDER CRIMINAL RULES 11 AND 44 HAD BEEN VIOLATED.**

The trial court erred to the prejudice of Appellant and in violation of rights conferred by Article I, Section 10 of the Ohio Constitution in accepting a plea from Rouse when Rouse was not fully informed as to any or all the consequences of said plea pursuant to Crim.R. 11, in failing to inquire and determine whether Rouse's plea was entered voluntarily, intelligently and knowingly, and in failing to appoint an attorney for Rouse or have a voluntary, knowing and intelligent waiver of attorney.

Crim.R. 11 sets forth distinct procedures, depending upon the classification of the

offense involved.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

Whether one construes the domestic violence charge as a serious or petty offense, here, the record shows that the trial court never informed Appellant of the effect of his change of plea. Further, a voluntary, knowing, and intelligent plea of guilty cannot be presumed from a silent record. Instead, the trial court merely went on with the finding of guilt. Finally the record is silent as to the defendant being fully advised, pursuant to Criminal Rule 44 and the Sixth Amendment of his right to assigned counsel, or that he knowingly, intelligently or voluntarily waived his right to counsel. Criminal Rule 44(C) states that waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing. There is absolutely no recordation of a waiver of counsel, oral or written, in this case. As such, Appellant's rights under Criminal Rule 11, Criminal Rule 44, and the Sixth Amendment to the U.S. Constitution were violated, and the entire proceedings should be declared void *ab initio*.

V. IN THE ABSENCE OF AN UNDERLYING CRIMINAL COMPLAINT HAVING BEEN FILED IN THIS CASE, THE LOWER COURT EXCEEDED ITS JURISDICTION UPON A FAILURE TO COMPLY WITH R.C. § 2919.26 IN ITS ATTEMPT TO ISSUE A TEMPORARY PROTECTION ORDER AND THUSLY, THAT ATTEMPT IS VOID.

As previously shown, the record of this case indicates that there has never been a criminal complaint filed in this case. Defendant incorporates the arguments as stated above, herein as if fully rewritten. Further, what also falls from the court file of this case is a 3-page document titled "Order of Protection" ("document"). A true and accurate copy of that document is attached hereto as Exhibit D. As evidenced by Exhibit D, that document states that it is a "Criminal Temporary Protection order (TPO)" ("TPO") and then alludes to "R.C. 2919.26". It also contains the above captioned case number. Further, it also contains the Judge's signature and a date of "2/28/06."

What sets this document apart from what it contains, and what it does not contain, is that it is also absent a time stamp signifying that it was filed in the lower court. See Exhibit D. In that regard, a thorough review of the Court docket of this alleged case sustains that in fact – it was never filed, because absent from that docket is any mention of a TPO. See Exhibit E.

Admittedly, this Court is cloaked with the authority to issue a temporary protection order under R.C. § 2919.26 by the General Assembly of this State. See R.C. § 1901.18(A)(9)¹³. As fully evidenced upon D, this "Order of Protection" document was pursued under R.C. § 2919.26. Revised Code Section 2919.26, unequivocally states in pertinent part:

¹³ 1901.18 Subject matter jurisdiction.

(A) Except as otherwise provided in this division or section 1901.181 of the Revised Code, subject to the monetary jurisdiction of municipal courts as set forth in section 1901.17 of the Revised Code, a municipal court has original jurisdiction within its territory in all of the following actions or proceedings and to perform all of the following functions:

(9) In any action concerning the issuance and enforcement of temporary protection orders pursuant to section 2919.26 of the Revised Code or protection orders pursuant to section 2903.213 of the Revised Code or the enforcement of protection orders issued by courts of another state, as defined in section 2919.27 of the Revised Code;

(A)(1) **Upon the filing of a complaint** that alleges a violation of section 2909.06, 2909.07, 2911.12, or 2911.211 of the Revised Code if the alleged victim of the violation was a family or household member at the time of the violation, ... the complainant, the alleged victim, or a family or household member of an alleged victim may file, or, if in an emergency the alleged victim is unable to file, a person who made an arrest for the alleged violation or offense under section 2935.03 of the Revised Code may file on behalf of the alleged victim, a motion that requests the issuance of a temporary protection order as a pretrial condition of release of the alleged offender, in addition to any bail set under Criminal Rule 46. **The motion shall be filed with the clerk of the court that has jurisdiction of the case at any time after the filing of the complaint.**

Emphasis added.

When the General Assembly signs into law a statute and that statute becomes effective, this Court is constrained by the intent of the General Assembly as announced in that statute. *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, 274, 744 N.E.2d 719, 723-724; *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463, 465. (Absent any ambiguity, this Court must give full force to the words used in the statute when it was enacted by the legislature). In that same line, in utilizing a statute this Court is not free to read additional words into a statute that is clear on its face. *Bailey v. Republic Engineered Steels, Inc.* (2001), 91 Ohio St.3d 38, 39-40, 741 N.E.2d 121, 123; *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus. In this case, the intent of the General Assembly in enacting that Statute is clear. A temporary protection order cannot be issued until such time that a criminal complaint has been filed with the Court. Defendant has unequivocally shown beyond any reasonable doubt that there has never been a criminal complaint filed in this case. See assignments of error I and II, *supra*. Absent that criminal complaint, this Court's constraint of jurisdictional power to attempt to even make such a document under R.C. § 2919.26 is also clear:

"[W]here jurisdiction of the subject matter exists, but a statute has prescribed the mode and particular limits within which it may be exercised, a court must exercise jurisdiction in accordance with the statutory requirements; otherwise, although the proceedings are within the general subject-matter jurisdiction of the court, any judgment rendered is void because the statutory conditions for the exercise of jurisdiction have not been met."

Ohio Jurisprudence 3d (2003), Courts and Judges, Section 243, citing State ex rel. Parsons v. Bushong (1945), 92 Ohio App. 101, 109 N.E.2d 692, paragraph three of the syllabus, and citing generally, Article IV, Ohio Constitution.

As such the "Order of Protection" apparently set into the Court file of this supposed case ¹⁴ was made without jurisdiction to do so in the face of the absence of an underlying criminal complaint as required by R.C. § 2919.26. As a result, as a matter of law, that "Order" has no legal effect. Further, that document is a mere nullity and is to be declared void by any Court of this State. Patton v. Diemer (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus. The effect of a void judgment is clear, "[i]t is as though such proceedings had never occurred" Tari v. State, (1927), 117 Ohio St. 481, 494, 159 N.E. 594, 597-598, 5 Ohio Law Abs. 824; 31 Ohio Jurisprudence 2d 706, Judgments, Section 250. Further, the parties are in the same position as if there had been no judgment. 30A American Jurisprudence 198, Judgments, Section 45"; see also State v. Abner, Cuyahoga App. No. 81023, 2002-Ohio-6504 (attached)

Any argument here, that Mr. Rouse through his compelled appearances before this Court and his undeniable failure to object to that supposed "Order" has somehow waived this instant action – would be without merit. A party cannot waive jurisdictional requirements of a court. See Wilkins v. Wilkins (6-18-2004) Champaign County App. 2004-Ohio-3139 (holding that the mandates of R.C. 3113.31 provide a jurisdictional

¹⁴ This "Order of Protection" was never issued by this Court, due to the fact that it was never filed in this Court. That issue will be addressed in Section C, 3 infra by the Defendant.

limitation on Common Pleas Courts, the failure to comply with those mandates cannot be waived) Id. at paragraph 27 – 31 (attached).

Furthermore in the face of the overwhelming proof that there has never been a criminal complaint filed, and thusly this Court is without subject-matter jurisdiction, any order, i.e. the TPO, is and has been void *ab initio*. See Patton v. Diemer (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, "If a court acts without jurisdiction, then any proclamation by that court is void *ab initio*." Id. syllabus; Freeland v. Pfeiffer (1993), 87 Ohio App.3d 55, 58, 621 N.E.2d 857; State ex rel. Lawrence Dev. Co. v. Weir (1983), 11 Ohio App. 3d 96, 97, 11 Ohio B. 148, 463 N.E.2d 398.

Therefore, this Court having failed to comply with the requirements of R.C. § 2919.26, any TPO is void and thereby unenforceable.

VI. **THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THAT THE TEMPORARY PROTECTION ORDER WAS NEVER FILED IN THIS COURT, AND THUSLY HAD NO FORCE OR EFFECT.**

In considering the preceding section, *supra*, if this Court would somehow find that there was a complaint filed in this case, still the Temporary Protection Order has no force or effect – because the document was never filed in this court. This fact, can be easily sustained by a microscopic review of that document, which bears no time stamp. See Exhibit D. This fact is further sustained by another microscopic review of the docket and/or journal of this supposed case, it contains no mention of a TPO or for that matter the filing of that TPO. See Exhibit E. The law is clear.

"[A] judge speaks as the court only through journalized judgment entries." William Cherry Trust v. Hoffmann (1985), 22 Ohio App.3d 100, 103. "[I]n order to be 'effective,' a court's judgment, whatever its form may be, must be filed with the trial court

clerk for journalization." (Emphasis in original.) Id. at 105. Proper journalization requires "some indication on the document that it was filed with the trial court clerk and, most importantly, when." (Emphasis added.) Hoffmann, supra, at 106. A supposed order that is not filed with the Clerk has no force or effect.

The result of the failure to file the "Order of Protection" in this case renders that document unenforceable, because it has no probative force. Horner v. Toledo Hosp. (1993), 94 Ohio App.3d 282, 289, quoting Coe v. Erb (1898), 59 Ohio St. 259, 263 ("[A]bsent such entry, a 'judgment' that is merely pronounced is inchoate only. 'Though possessing the character of potentiality, it lacks the character of actuality, and hence is without probative force.'"); Cf. Cox v. Fogle (1948) 84 Ohio App. 179 82 N.E.2d 875 (probation order not filed); Civ.R. 58(A) "A judgment is effective only when entered by the clerk upon the journal).

Any argument that this Court orally pronounced this so termed "Order of Protection" in an effort to give it value would also be without merit because, as is the law of this State, "A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum." Schenley v. Kauth (1953), 160 Ohio St. 109, paragraph one of the syllabus; State ex rel. Worcester v. Donnellon (1990), 49 Ohio St.3d 117, 118.

Appellant filed an appeal to this Court in a separate case, State v. Rouse, 2007-Ohio-0036. Part of that appeal stemmed in part from the Temporary Protection Order issued in the present case. One of the issues presented in that appeal was the fact that the TPO issued in the Municipal Court in this case lacked a file stamp and therefore was not properly filed. This Court, relying on State v. Otte, 94 Ohio St. 3d 167, 2002-Ohio-343,

761 N.E. 2d 34, held that the Appellant failed to show that the protection order was not filed. This Court in reaching their conclusion relied on the fact that the TPO showed a certification by the Zanesville Municipal Court Clerk that the TPO was a true copy taken from the Zanesville Municipal Court record, the TPO was signed by Appellant agreeing to be bound by its terms, and Zanesville Municipal Court Judge William D. Joseph verified under oath that the original order is contained in the court file. This Court went on to say, "Nothing on the face of State's Exhibit 16 (the Temporary Protection Order) indicates that the signed order was *not* filed in the trial court. At most, it can be said that the protection order appears to lack a contemporaneous file stamp." See *State v. Rouse*, 2007-Ohio-0036 p11. (Parenthesis added, italics original)

But *Otte* is not analogous to the facts of this case, and can be distinguished. The facts of *Otte* are detailed in his federal case, *Otte v. Houk* (N.D. Ohio 2-12-2008) Gary Otte, Petitioner, v. Marc C. Houk, Warden, Respondent, Case No. 1:06CV1698. United States District Court, N.D. Ohio, Eastern Division.

"Otte next asserts that the trial court lacked jurisdiction to hear his case because it did not comply with the requirements of Ohio Revised Code § 2945.05. Specifically, the trial court failed to time stamp the jury waiver form prior to trial. Otte signed a written waiver of his right to a jury trial on June 25, 1992. **Although the trial commenced on September 16, 1992, the written waiver was not filed until September 22, 1992.** Thus, Otte asserts, the trial court did not comply with § 2945.05 and had no jurisdiction to hear his case. Consequently, Otte claims, his trial violated his Fourteenth Amendment right to due process of law and the right to a fundamentally fair trial." *Otte*, 1:06CV1698, p.38, Emphasis added.

The Ohio Supreme Court in *State v. Otte*, 94 Ohio St. 3d 167, 2002-Ohio-343, 761 N.E. 2d 34. stated that "had Otte's appellate counsel raised the *Pless* issue, there is no reasonable probability that the result would have been different; Otte would have lost anyway..... (Footnotes omitted)." 94 Ohio St.3d at 169, 2002-Ohio-343, 761 N.E.2d at 36.

All right, but the written jury waiver in *Otte* was actually filed, with a file-stamp, in the court file, not just contemporaneous in time with the trial – i.e., it sat in the clerk’s office, presumably in a basket, until the clerk got to it, six days late. There is not an issue of a “non-contemporaneous filing” in the Rouse case – the Temporary Protection Order was NEVER FILED, period. Therefore, in the absence of a filed TPO, the lower Court cannot attempt to enforce such document.

VII. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THAT THE TEMPORARY PROTECTION ORDER WAS INVALID BECAUSE NO MOTION FOR THE TEMPORARY PROTECTION ORDER WAS EVER FILED.

As fully evidenced upon D, this “Order of Protection” document was pursued under R.C. § 2919.26. Revised Code Section 2919.26, unequivocally states in pertinent part:

(A)(1) Upon the filing of a complaint that alleges a violation of section 2909.06, 2909.07, 2911.12, or 2911.211 of the Revised Code if the alleged victim of the violation was a family or household member at the time of the violation, ... the complainant, the alleged victim, or a family or household member of an alleged victim may file, or, if in an emergency the alleged victim is unable to file, a person who made an arrest for the alleged violation or offense under section 2935.03 of the Revised Code may file on behalf of the alleged victim, a motion that requests the issuance of a temporary protection order as a pretrial condition of release of the alleged offender, in addition to any bail set under Criminal Rule 46. The motion shall be filed with the clerk of the court that has jurisdiction of the case at any time after the filing of the complaint.
(B) The motion shall be prepared on a form that is provided by the clerk of the court, which form shall be substantially as follows: ¹⁵Emphasis added.

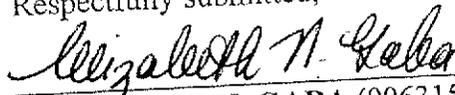
There is absolutely no evidence in the record that a motion for temporary protection order was filed in this case. The Prosecuting Witness never requested a temporary protection order. Transcript, 6-10-2008 Hearing, p. 22, l.21-25. As such, a Temporary Protection Order should not have issued, and any such Order is void *ab initio*.

¹⁵ See attached Exhibit H, Motion for Temporary Protection Order, ORC.2919.26

CONCLUSION AND REQUEST FOR RELIEF.

The alleged Defendant-Appellant herein, Mr. Rouse, based upon all the facts, law and evidence stated herein, does respectfully request the following relief: That this Court reverse the findings and conclusions of the Trial Court and dismiss this case under Crim. R. 48(B) and *Patton v. Diemer*, that this Court find, the following: that the Statutory Speedy Trial right of the Defendant, in the absence of waiver, has been violated and that it order the discharge of the Defendant in accord with R.C. § 2945.73(B); that the appellant's Constitutional right to counsel, and his rights and protections under Criminal Rules 11 and 44, in the absence of waiver, have been violated and that it order the discharge of the Defendant; that in the absence of a criminal complaint having been filed, and in the absence of a motion for TPO having been filed, the TPO issued in this case is void *ab initio* upon a failure to comply with R.C. § 2919.26; that the TPO was not filed in this case, and therefore has no force or effect and is void, and for such other relief that the Appellant may be entitled to under the law of this State and of the United States, and under the facts, law and argument set forth herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Undersigned hereby certifies a true copy of the foregoing document, was served upon Susan Small, Assistant City Law Director, City of Zanesville, at 825 Adair Avenue, Zanesville, OH 43701 by ordinary U.S. Mail postage prepaid on this the 23rd day of September, 2008.

Elizabeth N. Gaba

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Attorney for Appellant, Ronald Rouse

IN THE FIFTH DISTRICT COURT OF APPEALS
ZANESVILLE MUNICIPAL COURT
MUSKINGUM COUNTY OHIO

STATE OF OHIO
CITY OF ZANESVILLE
Plaintiff-Appellee

CA NO 2008 0035

Vs.

RONALD T. ROUSE, JR.
Defendant-Appellant.

On Appeal from the Zanesville
Municipal Court of Muskingum
County

Judge James J. Fais
Sitting by Assignment

Trial Court No. 06 CRB00319

REPLY BRIEF OF APPELLANT RONALD T. ROUSE, JR.

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APPELLEE'S STATEMENT OF FACTS IS INCORRECT

A Complaint was never filed with the Zanesville Municipal Court on February 28, 2006. Inspection of the "Complaint" indicates that it was sworn before a deputy clerk of court on February 27, 2006.¹ We argue that it was not filed at all, but certainly if it was "presented to the clerk", which Appellee claims is all one needs for filing, this happened on February 27, 2006, not February 28, 2006². On April 13, 2006, Defendant attempted to plead guilty to the offense, however, the Court never invoked Defendant's Sixth Amendment right to counsel, or determined whether the so-called plea was voluntary, intelligent and knowing, or inquired if he understood that he was waiving his right to a trial, confrontation, compulsory process, and so on.³

I. THE COMPLAINT WAS NOT FILED

Appellee leans on a non-statutory source for the definition of "file" and a 17-months-later affidavit of the Zanesville Municipal Court Clerk for their procedures and practices. The Rules of Superintendence for the Courts of Ohio provides for the "fair, impartial, and speedy resolution of cases without unnecessary delay" Sup. R. Preface. These rules "are applicable to all courts of appeal, courts of common pleas, municipal courts, and county courts in this state." Sup. R. 1(A). During the relevant times of this appeal, February 28, 2006, the Records Retention Schedule in the Ohio Rules of Superintendence set forth the procedures and practices for filing case documents in all

¹ See Exhibit A, Appendix to *Appeal Brief of Defendant-Appellant Ronald T. Rouse, Jr.*, p. 32, filed 9-23-08.

² Equally, the "Summons After Arrest without Warrant and Complaint Upon Such Summons" was not filed with the Zanesville Municipal Court at all, and certainly was not filed on February 28, 2006, again as indicated by the document itself, the clerk notarized it on the 27th day of February, 2006

³ See *Appeal Brief of Defendant-Appellant Ronald T. Rouse, Jr.*, p. 21-22, filed 9-23-08, and *Transcript 4-13-2006 Hearing*, p.7, l.7-25 to p.8, l.1-19.

Municipal Courts in Ohio: Municipal and County Courts--Records Retention Schedule
RULE 26.05 B (2): "Upon the filing of any paper or electronic entry permitted by the
municipal or county court, a stamp or entry shall be placed on the paper or electronic
entry to indicate the day, month, and year of filing."⁴ This rule mandates a "file
mark" upon filing by the Clerk of Court . The Ohio Supreme Court has provided the
definition of file in Sup. R. 44(E) which states: "'File' means to deposit a document
with a clerk of court, upon the occurrence of which the clerk time or date stamps
and docket the document."⁵ The Ohio Supreme Court clearly and unambiguously
requires three conditions be met for a document to be considered *filed* with the Clerk of
Court. The document must be deposited with the clerk, the document must be time or
date stamped, and the document must be entered on the court docket. Even presuming
the Complaint at issue (and the T.P.O.) was properly deposited and docketed with the
clerk, the Complaint has not been filed; it lacks a time or date stamp. Consequently,
subject-matter jurisdiction was never conferred on the court.

Appellee somehow thinks that all the cases cited by Appellant stand for the
proposition that documents must be time-stamped to be filed; Appellee attacks
Appellant's use of *Columbus v. Jackson* (1952), 93 Ohio App. 516, 518, 114 N.E.2d 60;
Newburgh Heights v. Hood, 8th Dist. No. 84001, 2004 Ohio 4236, ¶ 5 and *State v.*
Human, (1978) 56 Ohio Misc. 5, 381 N.E.2d 969. All of these cases stand for the
proposition that the filing of a valid complaint is a necessary prerequisite to a court
acquiring subject-matter jurisdiction. Appellee attacks Appellant's use of *State v.*
Callihan and *State v. Griffin*. In *Callihan* the record included a complaint in the form of

⁴ Sup. R. 26.05(B)

⁵ Sup. R. 44(E)

a uniform traffic ticket. The back of the ticket had a signed notation dated "12-1-92" and found the Appellant guilty and fined him \$25. The Fourth District Court of Appeals notes in the opinion, "[n]either the front nor the back of the **complaint** contains a **file-stamp** nor any other indicia of **if and/or when it was filed** with the trial court clerk." State v. Callihan (4th Dist., Sept. 14, 1993), Lawrence App. No. 93CA1, 1993 WL 373788. In Callihan the Court is troubled by the fact the complaint lacks a time-stamp and the notation on the back of the complaint (that court viewed as an attempted judgment entry) also lacks a time stamp, and the court dismisses the case on the basis that the "purported judgment entry" lacks a time stamp; thus the Court of Appeals lacked subject-matter jurisdiction. The court goes on to state that **all papers** must be file stamped to be considered filed.⁶ State v. Griffin stands for the similar proposition found in Callihan, that a judgment entry must be file stamped to be considered filed, but as in Callihan the court in Griffin goes on to make the statement that **all papers** must be file stamped to be considered filed.⁷ Appellant made these same and similar arguments in his underlying motions, attached hereto and incorporated, *Defendant's Motion to Dismiss Case with Prejudice*, filed July 20, 2007, and *Alleged Defendant's Response to State's August 24, 2007 Filed Response*, filed August 31, 2007⁸.

In State v. Gipson, (1998), 80 Ohio St.3d 626, 632, 687 N.E.2d 750

⁶ "[a]ll judgment entries, **and other papers, must be file-stamped on the date they are filed;** just as a judgment entry that has not been journalized, or filed with the clerk for journalization, is not a final appealable order, so a judgment entry that has not been file-stamped by the trial court clerk is not a final appealable order." State v. Callihan (4th Dist., Sept. 14, 1993), Lawrence App. No. 93CA1, 1993 WL 373788 citing; State v. Griffin (June 17, 1991), Washington App. No. 90CA8; In re Hopple (1983), 13 Ohio App.3d 54, 55; see, also, Brackmann Communications, Inc. v. Ritter (1987), 38 Ohio App.3d 107, 109; State v. Jones (Nov. 29, 1988), Pickaway App. No. 87CA9, unreported

⁷ State v. Griffin (4th Dist., June 17, 1991), Washington App. No. 90 CA 8, 1991 WL 110225.

⁸ Attached as Exhibit, Appendix p. 80-203

the Court stated as follows: (emphasis added)

"We hold that the requirement of former R.C. 2925.11(E)(5) (and the current analogous provisions of R.C. 2929.18[B][1]) that an affidavit of indigency must be "filed" with the court prior to sentencing means that the affidavit must be delivered to the clerk of court for purposes of filing **and must be indorsed by the clerk of court, i.e., time-stamped, prior to the filing of the journal entry reflecting the trial court's sentencing decision.** We reach this conclusion based, in part, upon a number of our recent decisions involving an analogous requirement of R.C. 2945.05 that a jury waiver form must be "filed" in a cause and made part of the record to effectuate a valid waiver of the right to trial by jury. Specifically, in a series of recent cases, **we have definitively determined that the requirement in R.C. 2945.05 that a jury waiver form must be "filed in said cause and made a part of the record thereof" means that the form must be time-stamped and included in the record.** See *State v. Pless* (1996), 74 Ohio St.3d 333, 658 N.E.2d 766; *State v. Haught* (1996), 76 Ohio St.3d 645, 670 N.E.2d 232; and *State v. Loesser* (1997), 80 Ohio St.3d 419, ___ N.E.2d ___. By analogy, R.C. 2929.18(B)(1) and former R.C. 2925.11(E)(5) are clear and unambiguous in requiring that an affidavit of indigency must be "filed" with the court prior to sentencing, and ***the act of filing certainly includes the concept of time-stamping.*** See, also, R.C. 2303.08 ("The clerk of the court of common pleas shall indorse on each pleading or paper in a cause filed in the clerk's office the time of filing."); and R.C. 2303.10 ("***The clerk of the court of common pleas shall indorse upon every paper filed with him the date of the filing thereof.***").

In the case now before us, the record clearly indicates that Gipson's affidavit of indigency was never formally filed with the court until it was submitted to the court as part of a motion to abate the mandatory fine. The motion to abate the mandatory fine was filed July 26, 1995, more than two weeks after the trial court had verbally pronounced sentence and more than a week after the filing of the trial court's sentencing entry. Therefore, as Judge Patton noted in his concurring and dissenting opinion in the court of appeals, "Defendant did not file his affidavit of indigency with the trial court prior to sentencing. In fact, defendant did not file his motion to abate the fine until eight days after sentencing. Although the transcript of the sentencing shows defendant offered an affidavit at that time, he did not file that affidavit in compliance with the statute. '***Filing***' for purposes of the statute requires the clerk of the court to indorse the time of filing on each pleading or filing. * * * Because the affidavit was not timely filed, the trial judge should not have considered the affidavit in the first instance."

In Appellee's discussion of *State v. Otte* (2002) 94 Ohio St.3d 167, 179, 761 N.E.2d 34 and *State ex. Rel. Larkins v. Baker* (1995) 73 Ohio St.3d 658, 653 N.E.2d 701, 660. Appellee concludes, "[t]he Ohio Supreme Court has determined that a file

stamp is a formality that is not necessarily prerequisite to jurisdiction.”⁹ *Otte* and *Larkins* do not state that a time stamp is a ‘formality’ but rather evidence of whether a jury waiver was in fact filed. The issue of jurisdiction in these cases is in the context of continuing jurisdiction for a court to proceed with a bench trial after a jury waiver. In *State v. Pless*, 658 N.E.2d 766 (Ohio 1996), the Ohio Supreme Court fused its previous strict compliance cases, disregarding earlier opinions that appear not to have required rigid compliance with the statute to effectuate jury waiver. The *Pless* court held that, “[a]bsent strict compliance with the requirements of R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury.” *Id.* at ¶ 1 of the syllabus.

Rouse is not a 2945.05 jury waiver case. This is a case where the court never acquired subject matter jurisdiction—the charging instrument was not file marked, indorsed, file stamped, date stamped, nor was it properly listed in the journal of the court, therefore there was never a properly filed instrument sufficient to confer jurisdiction from the very beginning. To clarify further, the *Otte* issue was not that the jury waiver was never time stamped but rather the trial court failed to time stamp the jury waiver form prior to trial. *Otte v. Houk* (N.D. Ohio 2-12-2008) at 39.

II. SUBJECT-MATTER JURISDICTION

Judge Fais concluded that the subject matter jurisdiction of a court is invoked when personal jurisdiction is acquired over an accused, ie, no charging instrument is necessary¹⁰. *Simpson v Maxwell*, 1 Ohio St. 2d 71 (1964) and *State ex rel Clark v Allamon*, 87 Ohio App. 101 (1950), stand for the principle that the subject matter

⁹ Appellee’s Brief, p. 6

¹⁰ “So the question is de facto, de jure. In other words, in fact, the defendant did appear. In fact the defendant entered a plea and requested that the matter be continued so that he could do a program of some type.” *Transcript*, 6-10-08 hearing, p.19, 1.24 to p.20, 1.19.

jurisdiction of the court is invoked only when a complaint is filed. A charging instrument must be properly filed to invoke the subject matter jurisdiction of a court.¹¹ In *State v Lanser*, 111 Ohio St. 23, 27, the court stated: "The filing of the affidavit is pre-requisite to the issuing of the warrant, and without the filing of a proper affidavit no jurisdiction is acquired." *State v Villagomez*, 44 Ohio App. 2d 209 (1974), cited by Appellee, actually supports Appellant, the court stating, "It is, of course, recognized as fundamental that the **jurisdiction** of the trial court must be properly invoked" and holding the affidavit **filed** therein was sufficient for that purpose. In *Van Hoose, In re.*, footnote 9, the court **rejected** the argument that a plea of guilty was sufficient to confer **jurisdiction** since it was, in effect, a waiver. The court noted the familiar principle that **subject matter jurisdiction** is to be distinguished from **jurisdiction** over the person, the latter being waivable but the former not. Judge Fais seems to find an express waiver of the filing of the complaint ("**de facto, de jure**"). The compelled appearance of the Defendant and an attempt at a plea are not sufficient to confer subject matter jurisdiction of the court where it had not been invoked as provided by law. Judge Fais seems to state the basic issue is one of personal jurisdiction and not subject matter jurisdiction since no question exists that the Municipal Court possessed jurisdiction as to the domestic violence offense. However, the focus must be on whether the subject matter jurisdiction reposed in the Municipal Court was invoked by law to allow the court to proceed.

III. ROUSE'S PLEA

¹¹ Other cases stating the jurisdiction of a lower court is invoked only by the filing of an affidavit or complaint are *State v Zdove*, 106 Ohio App. 481 (1958); *State v Titak*, 79 Abs. 430 (1955) App.; *City of Columbus v Jackson*, 93 Ohio App. 516 (1952); *Van Hoose, In re.*, 61 Abs 256 (1951) (App.); *State v Hayes*, 29 O.O. 203 (1943) (C.P.). 1943 WL 3238

Appellee argues that Defendant "at any time ...could have withdrawn his plea of guilty and asserted his right to a trial....Defendant did not attempt to exercise any of his rights." *Appellee's Brief*, p.14. Defendant *did* move to withdraw his plea¹²; the Court refused Defendant's desire to change his plea, nor was a hearing held.

IV. DUTIES OF THE CLERK OF COURT

Appellee cites *Kloos v. Ohio Department of Rehabilitation and Correction* (Franklin, 1988) 1988 WL 44745 (unreported) for the proposition that Clerks make mistakes and the court must look at the facts or intent presented in other forms. In *Kloos*, the plaintiff's complaint was file-stamped beyond the period permitted by the statute of limitations. Because the plaintiff produced a certified mail receipt card showing his complaint was timely delivered to the Court of Claims' office and received by an agent for the court, the file-stamp date on the complaint was not permitted to serve as the basis for barring the plaintiff's claim. There was evidence the complaint was delivered and received within the statute of limitations. The facts in *Kloos* are easily distinguished from this case. *Kloos* is a civil case where the complaint was *in fact time stamped* and the issue was one of *how much weight* should be given to that date in the face of contrary evidence. Finally, the Court of Claims is not required to time stamp documents as part of the filing process under the Rules of Superintendence, *supra*, but are specifically exempted, R. Sup. 1 Commentary, "The Rules of Superintendence for the Courts of Ohio are intended to apply to all trial and appellate courts, except the Court of Claims."

¹² *Transcript*, 6-10-08 hearing, p.21, l.13-19

The Twelfth District Court in *State v. Ginocchio*¹³ reviewed the requirements for journalization of a judgment entry as required by Crim. R. 32(B) renamed Crim. R.

32(C):

Whether it be a municipal, county, or common pleas court, the same basic procedural formalities must be followed ...in all criminal cases appealed to this court, a formal final journal entry or order must be prepared which contains the following:... 5. a time stamp indicating the filing of the judgment with the clerk for journalization.

State v. Ginocchio (1987), 38 Ohio App.3d 105.

The Appeals Court in *Ginocchio* is concerned with the Trial Court's unambiguous compliance with the requirements of journalization of a final appealable order to ensure the Appellate Court has jurisdiction and to provide clear notice to the Defendant his window to timely appeal. *Ginocchio* deals with a judgment entry and not a criminal complaint; the reasoning behind requiring a time stamp on both documents is the same. The filing of a valid complaint ensures the Trial Court has jurisdiction over the case and informs the court and the Defendant when the Defendant's right to a speedy trial has begun, and his 4th, 5th, 6th, and 14th Amendment rights begin. The requirement of a time stamp in *Ginocchio* is not "a mere formality" as stated by the Appellee but rather is strictly required. In *State v. Charlton*, the Twelfth District Court of Appeals dismissed an appeal on the sole grounds that the Appellate court lacked jurisdiction for failure to adhere to the requirements laid out in *Ginocchio* where the judgment entry only lacked a time stamp:

"In terminating any criminal case, a trial court must issue a formal judgment entry which satisfies five basic requirements. One such requirement is that the entry must be time stamped for the purpose of indicating that the entry has been filed with the clerk for journalization. See *State v. Ginocchio* (1987), 38 Ohio App.3d 105. In this case, although it is apparent that the trial

¹³ *State v. Ginocchio* (1987), 38 Ohio App.3d 105.

court intended to take the necessary steps to render a final judgment, the final step in the process has not been completed: i.e., the trial court's judgment entry has not been time-stamped. Until this last step has taken place, a proper final judgment has not been issued in the underlying case, and the running of the thirty-day period for the filing of the notice of appeal has not commenced. *State v. Charlton*, Unpublished Decision (7-14-2006) 2006-Ohio-3643.

In Appellee's response to the Sixth Assignment of Error the State contends that the TPO issued on 2/28/2006 was valid because it was "filed" (though not stamped). In support of this contention the State points to a computer printout which the State refers to as the "Court's Docket/Journal". The Appellee then goes on to cite *William Cherry Trust v. Hoffman* (Lucas County, 1985) 22 Ohio App. 3d 100; 489 N.E.2d 832; 22 Ohio B. Rep. 288, for the proposition that a court speaks only through its journal. However, a careful reading of the computer printout, shows in fact the TPO was never journalized on the "Docket/Journal" as propounded by Appellee. The difference between a docket and a journal was explained in *White v. Junkin*, 80 Ohio St.3d 335 (1997), in which the defendant was charged with domestic violence. The charge was amended to disorderly conduct and, after a hearing, the trial judge accepted the defendant's no contest plea and found him guilty. The judge sentenced the defendant to ten days in jail, suspended the sentence, and fined him \$100 plus court costs. The judge recorded his oral decision on the case file jacket and initialed his decision. An official in the clerk's office entered the case file notations in the computerized docket system and the defendant paid his fine and court costs. The next day, however, the trial judge issued a journal entry vacating his decision, setting trial on the original domestic violence charge and ordering that the fine and costs be refunded to the to the defendant. The defendant then filed a complaint for a writ of prohibition to prevent the judge from vacating his disorderly conduct

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conviction and sentence and proceeding on the original charge. The Ohio Supreme Court reversed the judgment of the court of appeals issuing the writ. The Supreme Court stated,

"the clerk's placement of information from the September 30, 1996 decision on the computerized docket was NOT tantamount to journalization of the decision. Dockets and journals are distinct records kept by clerks." Id. "Thus," the court continued, "the undisputed evidence establishes that the September 30, 1996 file entry was never journalized by the clerk. Since the decision was never journalized, appellants did not patently and unambiguously lack jurisdiction to vacate that decision and proceed on the original charge of domestic violence." Id. at 338. (emphasis added).

Similarly, **a court speaks only through its journal, not through its computer-generated docket sheet.** See *Anderson v. Garrick* (Oct. 12, 1995), 8th Dist. No.68295 WL 601096.¹⁴ Similarly, *State v. Harmon*, Court of Appeals No. L-05-1078 Trial Court No. CR-03-2914, September 1, 2006, held:

"Initially, we must mention that the docket notes the panel imposed costs on appellant; however, there is no journalized judgment entry indicating that the court actually did so. It is well-established that a court speaks through its journals and an entry is effective only when it has been journalized. Crim.R. 32(B). "To journalize a decision means that certain formal requirements have been met, i.e., the decision is reduced to writing, it is signed by a judge, and it is filed with the clerk so that it may become a part of the permanent record of the court." *State v. Ellington* (1987), 36 Ohio App.3d 76, 78.

The Ohio Rule of Superintendence Rule 26(B)(4) states that a journal is a "verbatim record of every order or judgment of the court." Sup. R. 26(B)(4). And filing in county courts is required by R.C. 2303.08. The clerk of court is required to **"indorse on each pleading or paper in a cause filed in the clerk's office the time of filing * ***

¹⁴ See R.C. 2303.12 ("The clerk of court of common pleas shall keep at least four books [:] * * * the appearance docket, trial docket * * *, journal, and execution docket."); see, also, R.C. 1901.31(E). A docket is not the same as a journal. *Lima v. Elliot* (1964), 6 Ohio App.2d 243, 245-246, 35 O.O.2d 427, 429, 217 N.E.2d 878, 881.

*." R.C. 2303.08.¹⁵ Here the TPO was never filed, indicated by a lack of any endorsement by the Clerk indicating it was in fact filed nor was it journalized as an Order of the court. The computer printout referenced in this case clearly states at the top of the page, "Zanesville Municipal Court Traffic/Criminal Docket"; below this are notations indicating the parties, charge, file date, violation date, plea date, judge, arresting officer, etc. Below this and separated by asterisks are "Status History" and "Bond History" and to the right of this is the TPO notation referred to in Appellee's brief as their purported evidence of Journalization of the TPO, "CONDITN: TPO ISSUED." The relationship of this notation to "Zanesville Municipal Court Traffic/Criminal Docket" or "Status History" or "Bond History" is unclear. However, what is clear is that the TPO notation does not relate to the heading separated from the rest of the page by asterisks, which states, "Docket/Journal". Underneath this heading are four dates with a sentence underneath each date. *The journal contains no entry referencing the issuance of a TPO by the trial court nor does it contain an entry referencing the filing of a complaint.* The only journal entry which even references the TPO is dated 07/20/2007 as part of the title of Defendant's Motion to Dismiss. This notation in the journal was made 15 months after the TPO was supposedly issued. The face of the TPO lacks any mark indicating when it was supposedly filed, the notation of the TPO in the docket lacks any indication of when

¹⁵ The statutory powers and duties of a clerk of courts are set forth primarily in R.C. Chapter 2303. n3 See e.g., R.C. 2303.05 (appointment of deputy clerks); R.C. 2303.07 (authority to administer oaths and to take and certify affidavits and other written instruments); R.C. 2303.08 (requiring the clerk, in part, to "indorse on each pleading or paper in a cause filed in the clerk's office the time of filing, enter all orders, decrees, judgments, and proceedings of the courts of which such individual is the clerk, make a complete record when ordered on the journal to do so, and pay over to the proper parties all moneys coming into the clerk's hands as clerk"); R.C. 2303.09 (duty to "file together and carefully preserve in his office all papers delivered to him for that purpose in every action or proceeding"); R.C. 2303.14 (duty to "keep the journals, records, books, and papers appertaining to the court and record its proceedings").

the TPO was issued, and the Court Order was never journalized giving it force and effect; it was never valid.

CONCLUSION AND REQUEST FOR RELIEF

Wherefore, the alleged Defendant-Appellant respectfully repeats his Conclusion and Request for Relief as originally stated in his Appeal Brief. Based upon all the facts, law and evidence stated herein, he does respectfully request that this Court reverse the findings and conclusions of the Trial Court and dismiss the underlying case, that this Court find that a valid criminal complaint was never filed in this case and therefore any purported judgment rendered has no force or effect and is void, that the purported Temporary Protection order was never filed and is void, and for such other relief that he may be entitled to under the law of this State and of the United States, and under the facts, law and argument set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned hereby certifies a true copy of the foregoing Reply Brief, was served upon Susan Small, Assistant City Law Director, City of Zanesville, at 825 Adair Avenue, Zanesville, OH 43701 by ordinary U.S. Mail postage prepaid on this 2nd day of April, 2009.

Elizabeth N. Gaba

ELIZABETH N. GABA (0063152)

Attorney at Law.

Order of Protection

Case No. 06CRB 00319

Judge/ ~~Magistrate~~ WILLIAM D. JOSEPH

County MUSKINGUM State OHIO

CRIMINAL TEMPORARY PROTECTION ORDER (TPO)
 (R.C. 2919.26)

New Order Modification of Previous Order

per ORC 2919.26(G)(2), this order is indexed at

ZANESVILLE POLICE DEPARTMENT
 LAW ENFORCEMENT AGENCY WHERE INDEXED

(740) 455-0700
 PHONE NUMBER

STATE OF OHIO/CITY OF ZANESVILLE

Ronald T. Roush Jr.
 DEFENDANT

ALLEGED VICTIM:

PERSON(S) PROTECTED BY THIS ORDER:

Alleged Victim: JONI L. BOCOOK DOB: 7/11/79
 Alleged Victim's Family or Household Member(s):
 _____ DOB: _____
 _____ DOB: _____
 _____ DOB: _____
 _____ DOB: _____

JONI L BOCOOK
 First Middle Last

DEFENDANT:

RONALD T ROUSE
 First Middle Last

DEFENDANT IDENTIFIERS

SEX	RACE	HT	WT
<u>M</u>	<u>B</u>	<u>506</u>	<u>150</u>
EYES	HAIR	DATE OF BIRTH	
<u>BRN</u>	<u>BLK</u>	<u>5/6/79</u>	
DRIVERS LIC NO. & EXP. DATE			STATE

Address where Defendant can be found:

Distinguishing Features: _____

WEAPONS ACCESS - PROCEED WITH CAUTION

Order TPO Granted: 2/28/06 Date Issued _____
 Granted: _____ Date Issued _____

Violence Against Women Act, 18 U.S.C. 2265, Federal Full Faith & Credit Declaration: Registration of this form is not required for enforcement.)

COURT HEREBY FINDS:

has jurisdiction over the parties and subject matter, and the Defendant has been or will be provided with reasonable notice and opportunity to be heard within the time required by Ohio law. Additional findings of this order are set forth below.

COURT HEREBY ORDERS:

The above named Defendant be restrained from committing acts of abuse or threats of abuse against the Alleged Victim and other named persons named in this order, as set forth below.
 Additional terms of this order are set forth below.

WARNING TO DEFENDANT: See the warnings page attached to the front of this Order.

EXHIBIT D

35

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF ZANESVILLE

Plaintiff-Appellee

-vs-

RONALD T. ROUSE, JR.

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Julie A. Edwards, J.

Case No. CT08-0035

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Zanesville Municipal Court
of Muskingum County, Case No.
06CRB00319

JUDGMENT:

Vacated

DATE OF JUDGMENT ENTRY:

June 3, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

SCOTT HILLIS
Zanesville City Law Director

ELIZABETH N. GABA
1231 East Broad Street
Columbus, Ohio 43205

By: SUSAN E. SMALL
Assistant Law Director
825 Adair Avenue
Zanesville, Ohio 43830

Hoffman, P.J.

{¶1} Defendant-appellant Ronald T. Rouse, Jr., appeals the June 13, 2008 Amended Judgment Entry entered by the Zanesville Municipal Court, which overruled his motion to dismiss. Plaintiff-appellee is the City of Zanesville.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 27, 2006, Appellant was arrested for domestic violence, in violation of Zanesville Ordinance 537.14A. Appellant was issued a document captioned, "Summons after arrest without warrant and complaint upon such summons". Appellant entered a plea of not guilty at his arraignment on February 28, 2006. The trial court scheduled the matter for trial on April 5, 2006. The trial court also issued a protection order. Appellant appeared before the trial court on April 13, 2006, and entered a plea of guilty to the charge. The trial court stayed the matter until October 26, 2006, to allow Appellant to complete an anger management program.

{¶3} Appellant did not complete the anger management program as he was incarcerated in July, 2006, on unrelated charges. Appellant informed the trial court he still wished to complete the program. Appellant was scheduled to be released from jail in December, 2006. The trial court stayed the matter until July 6, 2007, again giving Appellant time to complete the anger management program.

{¶4} On July 20, 2007, Appellant filed a motion to dismiss, alleging the trial court lacked subject matter jurisdiction to entertain the State's prosecution as a criminal complaint had never been filed. Appellant further argued the temporary protection order was void or unenforceable as a result. The City filed a memorandum contra. Appellant

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filed a response thereto, which was followed by the City's response. The trial court conducted a hearing on the motions on June 9, 2008. Via Judgment Entry filed the same day, the trial court overruled Appellant's motion to dismiss.¹ The trial court then proceeded to enter a finding of guilty on Appellant's plea and sentenced him to ten days in jail and imposed a fine of \$50.00. The trial court suspended the jail time and fine as Appellant was serving a fifteen year sentence in a state correctional facility. The trial court memorialized its finding of guilt and sentence via Judgment Entry also filed June 9, 2008.

{15} It is from this conviction Appellant appeals, raising the following assignments of error:

{16} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT'S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE COMPLAINT HAD NEVER BEEN FILED IN VIOLATION OF DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

{17} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY LITIGATING A MATTER WITH WHICH THE TRIAL COURT DID NOT ENJOY SUBJECT-MATTER JURISDICTION.

{18} "III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT'S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE APPELLANT'S STATUTORY RIGHT TO A SPEEDY TRIAL HAD BEEN VIOLATED.

¹ The trial court filed an Amended Judgment Entry on June 13, 2008, which did not substantially effect the June 9, 2008 Judgment Entry.

{¶9} “IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS APPELLANT’S CASE WITH PREJUDICE, BASED UPON THE FACT THAT THE APPELLANT’S CONSTITUTIONAL RIGHT TO COUNSEL AND PROTECTIONS UNDER CRIMINAL RULES 11 AND 44 HAD BEEN VIOLATED.

{¶10} “V. IN THE ABSENCE OF AN UNDERLYING CRIMINAL COMPLAINT HAVING BEEN FILED IN THIS CASE, THE LOWER COURT EXCEEDED ITS JURISDICTION UPON A FAILURE TO COMPLY WITH R.C. §2919.26 IN ITS ATTEMPT TO ISSUE A TEMPORARY PROTECTION ORDER AND THUSLY, THAT ATTEMPT IS VOID.

{¶11} “VI. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THAT THE TEMPORARY PROTECTION ORDER WAS NEVER FILED IN THIS COURT, AND THUSLY HAD NO FORCE OR EFFECT.

{¶12} “VII. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THAT THE TEMPORARY PROTECTION ORDER WAS INVALID BECAUSE NO MOTION FOR THE TEMPORARY ORDER WAS EVER FILED.”

II

{¶13} For ease of discussion, we shall address Appellant’s second assignment of error first. In his second assignment of error, Appellant maintains the trial court lacked subject matter jurisdiction as the charging instrument was not properly filed.

{¶14} This Court recently addressed this exact issue in *State v. Sharp*, Knox App. Nos. 08CA000002, 08CA000003, 08CA000004, 2009-Ohio-1854. In *Sharp*, we vacated the appellant’s conviction and sentence, finding the trial court did not have

subject matter jurisdiction because the charging document was not noted on the docket nor file stamped.

{¶15} In accordance with *State v. Sharp*, supra, we sustain Appellant's second assignment of error.

I, III, IV

{¶16} In light of our disposition of Appellant's second assignment of error, we find assignments of error I, III, and IV to be moot.

V, VI, VII

{¶17} Because Appellant's remaining three assignments of error involve the temporary protection order, we shall address said assignments of error together. In his fifth assignment of error, Appellant maintains the trial court exceeded its jurisdiction in attempting to issue a temporary protection order when an underlying criminal complaint had not been filed. Appellant concludes the attempt is void. In his sixth assignment of error, Appellant asserts the trial court abused its discretion in failing to find the temporary protection order was never filed; therefore, had no force or effect. In his seventh assignment of error, Appellant argues the trial court abused its discretion in failing to find the temporary protection order was invalid because a motion for such order was never filed.

{¶18} The document at issue herein is captioned "Criminal Temporary Protection Order (TPO) (R.C. 2919.26)".

{¶19} R.C. 2919.26 provides:

{¶20} "Upon the filing of a complaint that alleges a violation of section 2909.06, 2909.07, 2911.12, or 2911.211 of the Revised Code if the alleged victim of the violation

was a family or household member at the time of the violation, a violation of a municipal ordinance that is substantially similar to any of those sections if the alleged victim of the violation was a family or household member at the time of the violation, any offense of violence if the alleged victim of the offense was a family or household member at the time of the commission of the offense, or any sexually oriented offense if the alleged victim of the offense was a family or household member at the time of the commission of the offense, the complainant, the alleged victim, or a family or household member of an alleged victim may file, or, if in an emergency the alleged victim is unable to file, a person who made an arrest for the alleged violation or offense under section 2935.03 of the Revised Code may file on behalf of the alleged victim, a motion that requests the issuance of a temporary protection order as a pretrial condition of release of the alleged offender, in addition to any bail set under Criminal Rule 46. The motion shall be filed with the clerk of the court that has jurisdiction of the case at any time after the filing of the complaint.”

{¶21} Having found in Appellant's second assignment of error, supra, the complaint in the instant matter was never filed, we find the temporary protection order was not filed in compliance with R.C. 2919.26; therefore, is void.

{¶22} We note in this Court's previous opinion in *State v. Rouse*, Muskingum App. No. CT2007-0036, 2008-Ohio-2975, we found nothing on the face of State's Exhibit 16 indicated, “The signed protection order was *not* filed in the trial court. At most, it can be said that the protection order appears to lack a contemporaneous file stamp.” *Id.* at para. 40. However, the panel which ruled on that case did not have the benefit of the full record from the municipal court. The record herein affirmatively

demonstrates neither the domestic violence complaint nor the temporary protection order was filed.

{¶23} Based upon the foregoing, we sustain Appellant's V, VI, and VII assignments of error.

{¶24} The judgment of conviction and sentence of the Zanesville Municipal Court is vacated, and the temporary protection is vacated.

By: Hoffman, P.J.

Wise, J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Zanesville v. Rouse*, Slip Opinion No. 2010-Ohio-2218.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2010-OHIO-2218

THE CITY OF ZANESVILLE, APPELLANT, v. ROUSE, APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Zanesville v. Rouse*, Slip Opinion No. 2010-Ohio-2218.]

A document is "filed" when it is deposited properly for filing with the clerk of courts. The clerk's duty to certify the act of filing arises only after a document has been filed --- When a document lacks an endorsement from the clerk of courts indicating that it has been filed, filing may be proved by other means.

(No. 2009-1282 — Submitted March 9, 2010 — Decided May 26, 2010.)

APPEAL from the Court of Appeals for Muskingum County,
No. CT08-0035, 2009-Ohio-2689.

SYLLABUS OF THE COURT

1. A document is "filed" when it is deposited properly for filing with the clerk of courts. The clerk's duty to certify the act of filing arises only after a document has been filed.

2. When a document lacks an endorsement from the clerk of courts indicating that it has been filed, filing may be proved by other means.

LANZINGER, J.

Case Background

{¶ 1} The appellee, Ronald T. Rouse Jr., was charged with a misdemeanor offense of domestic violence as a violation of a Zanesville ordinance. The clerk of the Zanesville Municipal Court received the complaint against Rouse, but failed to date stamp or time stamp the complaint. The complaint is physically located in the record, but bears no mark from the clerk's office indicating when it was filed.

{¶ 2} Rouse entered a plea of not guilty. Before his sentencing, he filed a motion to dismiss the charges against him on grounds that the charging complaint had not been properly filed. The city of Zanesville filed a response and attached an affidavit of the clerk and a printout of the case docket as proof that the complaint had been filed.

{¶ 3} The trial court overruled the motion, found Rouse guilty, sentenced him to a jail term, and imposed a fine.

{¶ 4} The court of appeals reversed the judgment of the trial court, reasoning that the complaint had not been filed and thus the jurisdiction of the trial court had never been invoked. The court of appeals held the judgment against Rouse to be void for lack of subject-matter jurisdiction, relying on *State v. Sharp*, Knox App. Nos. 08 CA 000002, 08 CA 000003, and 08 CA 000004, 2009-Ohio-1854. We reverse the judgment of the court of appeals.

Analysis

{¶ 5} The filing of a complaint invokes the jurisdiction of the municipal court. See *State v. Miller* (1988), 47 Ohio App.3d 113, 114, citing *State v. Brown* (1981), 2 Ohio App.3d 400, 2 OBR 475, 442 N.E.2d 475. It follows that if a

complaint is not filed in a case, the trial court has not obtained jurisdiction over it. Thus, the question before us is whether a complaint against Rouse actually was filed. Rouse urges us to declare that because the complaint does not bear the appropriate file stamp, the complaint was not filed and concomitantly the judgment against him is void.

{¶ 6} Under several Ohio statutes, the clerk of a municipal court is required to maintain a docket for each case, enter when each document is filed, the date of filing for each document on that docket, and endorse (statutes use the word “indorse”) the time or date of filing on each document. See R.C. 1901.31,¹ 2303.08,² and 2303.10.³ Similarly, Sup.R. 26.05(B)(2) requires that “[u]pon the filing of any paper or electronic entry permitted by the municipal or county court, a stamp or entry shall be placed on the paper or electronic entry to indicate the day, month, and year of filing.” The Zanesville Municipal Clerk failed in this case to properly endorse the complaint with the time or date of filing.

{¶ 7} We observe, however, that the filing of a document does not depend on the performance of a clerk’s duties. A document is “filed” when it is deposited properly for filing with the clerk of courts. The clerk’s duty to certify the act of filing arises only after a document has been filed. This is implicit in the

1. {¶ a} R.C. 1901.31(E) provides: “The [municipal court] clerk shall do all of the following: file and safely keep all journals, records, books, and papers belonging or appertaining to the court * * *

{¶ b} “The clerk shall prepare and maintain a general index, a docket, and other records that the court, by rule, requires, all of which shall be the public records of the court. In the docket, the clerk shall enter, at the time of the commencement of an action, the names of the parties in full, the names of the counsel, and the nature of the proceedings. Under proper dates, the clerk shall note the filing of the complaint, issuing of summons or other process, returns, and any subsequent pleadings.”

2. R.C. 2303.08 provides: “The clerk of the court of common pleas [and every other clerk of a court of record, see R.C. 2303.31] shall indorse on each pleading or paper in a cause filed in the clerk’s office the time of filing * * *.”

3. R.C. 2303.10 provides: “The clerk of the court of common pleas [and every other clerk of a court of record, see R.C. 2303.31] shall indorse upon every paper filed with him the date of the filing thereof * * *.”

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statutes and rules regarding filing. See R.C. 1901.31, 2303.08, 2303.10, and 2303.31, and Sup.R. 26.05 and 44. For instance, Sup.R. 44(E) provides that “[f]ile” means to deposit a document with a clerk of court, *upon the occurrence of which* the clerk time or date stamps and docket the document.” (Emphasis added.) Thus, a party “files” by depositing a document with the clerk of court, and then the clerk’s duty is to certify the act of filing. In short, the time or date stamp does not cause the filing, the filing causes the certification.

{¶ 8} This court has long recognized the difference between filing and certification of filing by the clerk. In *King v. Penn* (1885), 43 Ohio St. 57, 1 N.E. 84, we held that “[w]hen a paper is in good faith delivered to the proper officer to be filed, and by him received to be kept in its proper place in his office, it is ‘filed.’ The indorsement upon it by such officer of the fact and date of filing is but evidence of such filing.” *Id.* at 61. Furthermore, when a document is filed, the clerk’s failure to file-stamp it does not create a jurisdictional defect. *State v. Otte* (2002), 94 Ohio St.3d 167, 169, 761 N.E.2d 34, citing *State ex rel. Larkins v. Baker* (1995), 73 Ohio St.3d 658, 653 N.E.2d 701. That the clerk’s duties were not carried out properly in this case does not mean that the complaint was not, in fact, filed.

{¶ 9} Nevertheless, certification by a clerk on a document attests that it was indeed filed. Had the complaint been endorsed with “the fact and date of filing” by the clerk, this would be evidence of the filing. *King v. Penn* at 61.

{¶ 10} But in the absence of a time or date stamp from the clerk, the question is whether there is sufficient evidence from which a court may determine that the document actually was filed. In *Ferrebee v. Boggs* (1969), 18 Ohio St.2d 87, 88, 47 O.O.2d 237, 247 N.E.2d 753, the appellant had filed her bill of exceptions (containing the evidence submitted to the trial court), but the clerk had failed to “officially stamp” it. We held that the lack of the clerk’s stamp did not prevent the court of appeals from considering the contents of the bill, because it

was “clear from the record, the briefs and oral argument” that the bill had been filed. *Id.* When a document lacks an endorsement from the clerk of courts indicating that it has been filed, filing may be proved by other means. Here, there is sufficient evidence that the complaint was deposited with the clerk of courts.

{¶ 11} When the named defendant filed his motion to dismiss based upon lack of jurisdiction, Zanesville responded with a brief and exhibits including a printout of the electronic docket sheet and an affidavit from the clerk of courts as proof that that the case had been filed. The clerk’s affidavit explains that it is clear from her records that the complaint was filed on February 28, 2006, because the electronic docket for this case indicates a “filing date” of February 28, 2006. Furthermore, it was the clerk’s practice to create a new case file and corresponding electronic docket upon receipt of a complaint, and such a file and docket was created. In short, the docketing of the case shows that the clerk actually received the complaint. Based on these facts, the trial court correctly determined that the complaint had been filed and correctly overruled Rouse’s motion to dismiss.

Conclusion

{¶ 12} For the foregoing reasons, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

Judgment reversed.

PFEIFER, LUNDBERG STRATTON, O’CONNOR, and CUPP, JJ., concur.

O’DONNELL, J., concurs separately.

BROWN, C.J., not participating.

O’DONNELL, J., concurring.

{¶ 13} I concur and would reverse the judgment of the court of appeals based on the holding in *King v. Penn* (1885), 43 Ohio St. 57, 61, 1 N.E. 84, which stands for the proposition that “[w]hen a paper is in good faith delivered to the

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proper officer to be filed, and by him received to be kept in its proper place in his office, it is 'filed.' The indorsement upon it by such officer of the fact and date of filing is but evidence of such filing."

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