

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, IN
SUPPORT OF APPELLANT MOR MBODJI**

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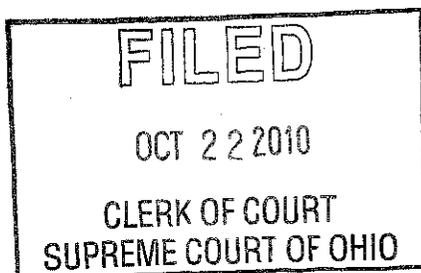


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STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of the case and facts set forth by Defendant-Appellant Mor Mbodji.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency charged with the task of representing criminal defendants throughout the State of Ohio. In addition to trial and appellate advocacy, OPD also focuses its efforts on positively influencing Ohio statutory law and procedural rules. When necessary, OPD is determined to change laws, rules, and practices in order to provide a more effective and efficient defense system.

OPD's interest in the instant case is the clarification of R.C. 2935.09 and R.C. 2935.10. This Court's decision regarding Mor Mbodji will influence how affidavits are filed and warrants are issued. As amicus curiae, the Office of the Ohio Public Defender offers its expertise in criminal proceedings as an influential aid so that this Court may reach a just decision.

This Court has not ruled on the amended version of R.C. 2935.09. However the State of Ohio is relying on *State ex rel. Boylen v. Harmon*, 107 Ohio St.3d 370, 2006-Ohio-7, which was decided several months prior to the amendment of R.C. 2935.09. The State's analysis fails to incorporate the substantive amendments or the legislative intent that are the basis for the amendment of R.C. 2935.09.

ARGUMENT

Proposition of Law No. I:

To allow clerks to issue warrants for arrests upon retrieval of an affidavit from a private citizen is contrary to R.C. 2935.09 and the intent of the legislature.

A. R.C. 2935.09 and R.C. 2935.10

Revised Code Section 2935.09 states in pertinent part:

(A) As used in this section, “**reviewing official**” means a judge of a court of record, the prosecuting attorney or attorney charged by law with the prosecution of offenses in a court or before a magistrate, or a magistrate. (Emphasis added.)

(D) A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate. A private citizen may file an affidavit charging the offense committed with the clerk of a court of record before or after the normal business hours of the reviewing officials if the clerk’s office is open at those times. A clerk who receives an affidavit before or after the normal business hours of the reviewing officials shall forward it to a reviewing official when the reviewing official’s normal business hours resume.

Revised Code Section 2935.10 states in pertinent part:

(A) Upon the filing of an affidavit or complaint as provided by section 2935.09 of the Revised Code, if it charges the commission of a felony, such judge, clerk, or magistrate, unless he has reason to believe that it was not filed in good faith, or the claim is not meritorious, shall forthwith issue a warrant for the arrest of the person charged in the affidavit, and directed to a peace officer; otherwise he shall forthwith refer the matter to the prosecuting attorney or other attorney charged by law with prosecution for investigation prior to the issuance of warrant.

(B) If the offense charged is a misdemeanor or violation of a municipal ordinance, such judge, clerk, or magistrate may:

(1) Issue a warrant for the arrest of such person, directed to any officer named in section 2935.03 of the Revised Code but in cases of ordinance violation only to a police officer or marshal or deputy marshal of the municipal corporation...

Mor Mbodji was charged with domestic violence, a misdemeanor of the first degree on April 16, 2009. The affidavit and complaint filed with the clerk of courts for Hamilton County Municipal Court were both signed by the complaining witness, Katrina McCall, private citizen. Neither the affidavit nor the complaint was reviewed by a judge, a magistrate, or a prosecutor before they were filed.¹ Therefore, the clerk did not follow the procedure governing the filing of affidavits.

In the court of appeals, the State conceded that R.C. 2935.09 was amended in 2006 with the intent that private citizens' affidavits would be reviewed by judges, magistrates, or prosecutors and that R.C. 2935.09 plainly excluded clerks from sharing the same privileges as those "reviewing officials."^{2,3} However, R.C. 2935.10, which dictates procedures for R.C. 2935.09, was not amended and includes a provision whereby clerks may "issue a warrant,"⁴ and conduct other such actions that are now reserved for "reviewing officials."⁵

B. Legislative Intent

R.C. 1.49 states in pertinent part that, "[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:...(C) the legislative history..."⁶

¹ Brief of Appellant, p. 1.

² Brief of Appellee, p. 10, filed Jan. 28, 2010, Court of Appeals 1st Dist.

³ Am. H.B. 214 126th General Assembly

(http://www.legislature.state.oh.us/analysis.cfm?ID=126_HB_214&ACT=As%20Enrolled&hf=analyses126/h0214-rs-126.htm).

⁴ R.C. 2935.10(B)(1).

⁵ Brief Appellee, p. 10, filed Jan. 28, 2010, Court of Appeals 1st Dist.

⁶ R.C. 149.

The intent of the legislature was reported by the Ohio Legislative Service Commission's

Bill Analysis of Am. H.B. 214:

BILL SUMMARY

- Modifies a private citizen's authority to file an affidavit charging an offense.
- Retains the authority of a private citizen to file an affidavit charging an offense with the judge of a court of record, a prosecuting attorney or other attorney charged by law with prosecuting offenses, or a magistrate (reviewing officials) but specifies that the purpose of the filing is for review to determine if the prosecutor should file a complaint.
- Modifies a private citizen's authority to file an affidavit charging an offense with the clerk of a court of record so that the private citizen may file the affidavit with the clerk only before or after the normal business hours of the reviewing officials if the clerk's office is open at those times and requires the clerk to forward the affidavit to a reviewing official when the official's normal business hours resume.

CONTENT AND OPERATION

Filing an affidavit to cause an arrest or prosecution

Under existing law, in all cases not provided by R.C. 2935.02 to 2935.08 (Text omitted.), a peace officer or a private citizen having knowledge of the facts, in order to cause the arrest or prosecution of a person charged with committing an offense, must file an affidavit charging the offense with the judge or clerk of a court of record or with a magistrate. The peace officer or private citizen also has the option of filing the affidavit with the prosecuting attorney or other attorney charged by law with prosecuting offenses for the purpose of having the prosecuting or other attorney file a complaint. (R.C. 2935.09.)

The bill revises the existing procedures for causing the arrest or prosecution of a person in cases not provided by R.C. 2935.02 to 2935.08. Regarding peace officers, the bill authorizes a peace officer who has knowledge of the facts and seeks to cause an arrest or prosecution to file an affidavit charging an offense with a "reviewing official" or the clerk of a court of record. As used in the bill, "reviewing official" means a judge of a court of record, a magistrate, or the prosecuting attorney or other attorney charged by

law with prosecuting offenses in a court or before a magistrate. (R.C. 2935.09(A) and (C).)

Regarding private citizens, the bill authorizes a private citizen who has knowledge of the facts and seeks to cause an arrest or prosecution to file an affidavit charging the offense committed only with a "reviewing official" for the purpose of review to determine if the prosecuting attorney or other attorney charged by law with prosecuting offenses should file a complaint in the court or before the magistrate. A private citizen may file an affidavit charging an offense with the clerk of a court of record before or after the normal business hours of the reviewing officials if the clerk's office is open at those times. A clerk who receives an affidavit before or after the normal business hours of the reviewing officials must forward it to a reviewing official when the reviewing official's normal business hours resume. (R.C. 2935.09(A), (B), and (D).)⁷

Prior to June 30, 2006, this process did not have a "reviewing official" requirement, yet from April 21, 2005 to November 15, 2005, the 126th General Assembly vigorously debated this amendment.⁸ And from those debates, the Ohio Legislative Commission's Bill Analysis of Am. H.B. 214 mentions the defined term "reviewing official" ten times. Ultimately, that same defined term appears in the amended R.C. 2935.09 seven times. Therefore, the legislature left little doubt that it expressly intended to limit a private citizen's ability to file an affidavit charging an offense without review by a "reviewing official."

⁷ Am. H.B. 214.

⁸ Id.

Proposition of Law No. II:

Clerks are not permitted to issue warrants for arrests upon retrieval of an affidavit from a private citizen, when R.C. 2935.10 is read *in pari materia* with the amended R.C. 2935.09.

As stated above, the court of appeals in its holding, and the State of Ohio in its brief in the court of appeals, relied on this Court's decision in *Boylen*. However, this Court reviewed those sections five and one-half months before the amended R.C. 2935.09 became effective on June 30, 2006.

It is not disputed that prior to the June 30, 2006 amendment of R.C. 2935.09, that R.C. 2935.09 was to be read *in pari materia* with R.C. 2935.10. The latter section prescribed the procedure in which R.C. 2935.09 was to be executed.⁹ That procedure did not exclude clerks from issuing a warrant. However, the substantive amendments to R.C. 2935.09 have changed how the amended R.C. 2935.09 and R.C. 2935.10 should be construed together. Because the legislative intent is clear this Court does not need to read these statutes *in pari materia*.¹⁰ But if this Court is to hold that the amended R.C. 2935.09 and R.C. 2935.10 are to be read *in pari materia*, then this Court should take account of the legislature's substantial changes.

A "fundamental rule of statutory construction [is] that statutes relating to the same subject matter should be construed together."¹¹ This principle demands that, whenever relevant, criminal and civil statutes operate in relation to one another.¹² Further, "statutes relating to the same subject or matter, although passed at different times and making no reference to each other,

⁹ *State ex rel. Boylen v. Harmon*, 107 Ohio St.3d 370, 2006-Ohio-7, at ¶6.

¹⁰ *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 466.

¹¹ *Ohio v. Leichty*, 68 Ohio St.3d 37, 39, 1993-Ohio-215.

¹² *Maple Hts. Teachers Assn. v. Maple Hts. Bd. Of Edn.* (1983), 6 Ohio St.3d 314, 317.

are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent."¹³(Emphasis sic.)

Ohio Revised Code Section 2935.09 addresses filing affidavits, while R.C. 2935.10 addresses procedures after an affidavit has been filed. In *Boylen*, this Court held R.C. 2935.09 must be read *in pari materia* with R.C. 2935.10.¹⁴ As such, those two statutes are read in conjunction.¹⁵ And “[w]here statutes or rules upon the same subject matter are to be construed, the doctrine of *in pari materia* favors consistent, as opposed to inconsistent, construction.”¹⁶(Emphasis sic.) As such, the statutes should be construed in a manner that complements one another.¹⁷

This is where the court of appeals in Mr. Mbodji’s case lost its way. In relying on the *Boylen* analysis that predates the substantive changes to R.C. 2935.09, the court of appeals construed the statutes in such a way that caused an inconsistent and contradictory reading of R.C. 2935.09. and R.C. 2935.10.

Reading statutes *in pari materia* precludes any contradictions that might arise when the statutes are construed together. In light of the substantive changes to R.C. 2935.09, this Court should rely on its *in pari materia* analysis in *Leichty*. In *Leichty*, the appellant was driving a tractor with a disk planter attached to the back. The disk planter extended over the center line and into the left lane of the highway and an oncoming car struck the planter. The appellant was issued a citation for driving left of the center line, in violation of R.C. 4511.25, but the charge was dismissed based on R.C. 5577.05, which excluded farm machinery from maximum width,

¹³ *Pratt at 466.*

¹⁴ *Boylen*, at ¶6.

¹⁵ *State v. Mbodji*, 1st Dist. No. C90384, at ¶2.

¹⁶ *Austin v. Miami Valley Hospital* (1984), 19 Ohio App.3d 231.

¹⁷ *Id.*

height, and length requirements for vehicles operating on the highway. In *Leichty*, this Court affirmed, that farm vehicles were exempted from R.C. 4511.25, and that R.C. 5577.05 governed farming-vehicle regulations. Thus, it would have been contradictory to hold the appellant criminally liable for crossing over the lane.¹⁸ In the instant case, the same reasoning can be applied analogously to R.C. 2935.09 as it plainly excludes clerks from filing a complaint without an “official review.”¹⁹

This Court has held that the *in pari materia* analysis is a tool to ascertain the intent of the legislature.²⁰ But here, the intent of the legislature is clear as reported in the Ohio Legislative Service Commission Bill Analysis.²¹

Ultimately, it would be inconsistent and wholly contrary to the intent of the legislature for this Court to hold that clerks are permitted to issue warrants for arrest when clerks are expressly excluded in amended R.C. 2935.09. Although this Court has held that R.C. 2935.10 is the *governing* statute, its governance is limited to the guidelines placed in R.C. 2935.09, which excludes clerks from the class of “reviewing officials,” thus precluding clerks from exercising the powers enjoyed by that class.²²

¹⁸ *Leichty* at 37.

¹⁹ R.C. 2935.09(D).

²⁰ *Pratt* at ¶466.

²¹ Am. H.B. 214.

²² *Boyles* at ¶10.

CONCLUSION

The legislature did not intend for clerks to be imbued with the authority to issue warrants under the amended R.C. 2935.09 or R.C. 2935.10. Also, if those statutes are to be read *in pari materia*, they must be consistent and complementary. Accordingly, the Office of the Ohio Public Defender, as amicus curiae, urges this Court to reverse the judgment of the court below.

OFFICE OF THE OHIO PUBLIC DEFENDER



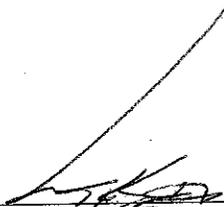
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, IN SUPPORT OF APPELLANT MOR MBODJI was forwarded by regular U.S. Mail, postage prepaid to Joseph T. Deters, Hamilton County Prosecutor, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45402 and Robert Hastings, Jr., Counsel for Defendant-Appellant, Hamilton County Public Defender's Office, 230 E. Ninth Street, Suite 2000, Cincinnati, Ohio 45202, this 22nd day of October, 2010.



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