

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : S.C. Case No. 2011-0685
Plaintiff-Appellant : On Appeal from the Montgomery County
Court of Appeals, Second Appellate District
v :
TRACY B. DAVIS, SR. : Court of Appeals
Case No. CA 23585
Defendant-Appellee :

MEMORANDUM IN RESPONSE BY DEFENDANT-APPELLEE TRACY B. DAVIS SR.

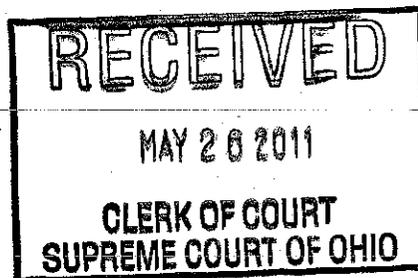
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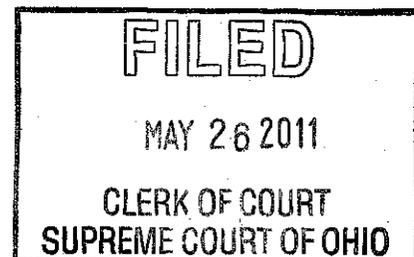


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EXPLANATION OF WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED AND WHY THIS IS NOT A CASE OF GREAT PUBLIC AND GENERAL INTEREST

Plaintiff-Appellant seeks to have certified the following question: Whether a conviction for witness intimidation under R.C. 2921.04(B) is sustainable when threats against a witness are made after law enforcement officers have begun to investigate a reported crime, but before a legal proceeding has commenced in court.

Defendant-Appellee Tracy B. Davis Sr. (hereinafter "Defendant") believe the Court has addressed this issue in *State v. Malone*¹, when it determined that a criminal action or proceeding implies a formal process involving a court.² It also did so when it implicitly overturned *State v. Gooden*³ and *State v. Hummell*⁴, by stating that neither is grounded in R.C. 2921.04, because the statute "simply does not apply to witnesses or attorney who *might* become involved in a criminal action or proceeding. It applies only to witnesses and attorneys who are involved in a criminal action or proceeding."⁵ It also did so when it specifically noted that the coupling of attorneys and witnesses indicates that the statute does not apply until there is some process that requires their participation.⁶

While Defendant disagrees with the State assertions regarding the necessity for a felony-level offense to deter witness intimidation, Defendant suggests that the appropriate forum for the State to redress its grievances with the current witness intimidation statute is through the legislature. Its is that body that set a clear distinction between intimidation of a witness and intimidation of a victim, and it is that body that should amend the law if it shares the State's

¹ 121 Ohio St.3d 244, 2009-Ohio-310

² *Id.* at 18

³ 2001-Ohio-2699

⁴ Morrow App. No. CA-851, 1998 WL 355511

⁵ *Malone* at ¶25

⁶ *Id.* at ¶26

concerns. As it stands, the legislature has provided the State with the ability to prosecute those accused of behaviors as those alleged in the instant case, and that is through the aggravated menacing statute.

Therefore, as no true ambiguity exists and the state does have other methods of redress, no matter of public and great general interest exists, and Defendant respectfully requests this Court decline to accept jurisdiction in this matter.

ARGUMENT IN SUPPORT OF APPELLEE'S POSITION

AS "CRIMINAL ACTION OR PROCEEDINGS" HAS BEEN DETERMINED TO REQUIRE A FORMAL PROCESS INVOLVING A COURT, A DEFENDANT CANNOT BE CONVICTED OF INTIMIDATION OF A WITNESS PRIOR TO A FORMAL PROCESS INVOLVING A COURT COMMENCING.

Intimidation of a witness is defined as knowingly and by force or by unlawful threat of harm to any person or property, did attempt to influence, intimidate or hinder the victim of a crime in the filing or proceeding of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.⁷

While this Court has acknowledged that intimidation of a witness should not be countenanced and does real harm to the administration of justice, it has held that Ohio's statutory scheme does not protect a witness in a potential criminal action through R.C. §2921.04.⁸ The statute requires a witness's *involvement* in a criminal action or proceeding, not his or her potential involvement.⁹ The statute simply does not apply to witnesses or attorneys who *might* become involved in a criminal action or proceeding.¹⁰ It applies only to witnesses and attorneys

⁷ RC §2921.04(B)

⁸ *Malone* at ¶21

⁹ *Id.* (emphasis sic)

¹⁰ *Id.* at ¶25 (emphasis sic)

who *are involved* in a criminal action or proceeding.¹¹ “Criminal Action or Proceeding” implies a formal process involving a court.¹²

In *Malone*, this Court determined that that because the intimidation occurred after the criminal act but prior to any proceedings flowing from the criminal act in a court of justice, insufficient evidence existed to convict *Malone* for intimidation of a non-victim witness.¹³

In the instant case, even assuming Davis made the alleged threat, no evidence was presented that the threat was made in the course of a criminal action or proceeding. Regardless of the definition of criminal action or proceeding, the alleged threats occurred prior to Ms. Nelson’s involvement with any law enforcement personnel. At that time, she was still just a person who *might* become a witness involved in a criminal proceeding. She was not actually involved with the criminal proceeding.

This argument aside, the State is attempting to read ambiguity as to the definition of “criminal action of proceeding” where there is none. This Court clearly indicated that:

As demonstrated in Ohio’s statutory scheme and in this Court’s case law, “a criminal action or proceeding” implies a formal process involving a Court. There is no indication in R.C. 2921.04(B) that “criminal action or proceeding” should be interpreted any way other than what is common used in the Ohio Revised Code and as those words have been interpreted by this Court.¹⁴

This Court further stated that the coupling of witnesses with attorneys in the statute indicates that the statues does not apply until there is some process initiated that requires their participation.

The paragraph to which the State alleges creates the ambiguity, paragraph 30, simply applies this proposition to the facts of *Malone*. It does not alter the above statement of the law.

¹¹ *Id.* (emphasis sic)

¹² *Id.* at ¶18(quotations added)

¹³ *Id.* At 249

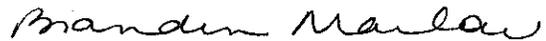
¹⁴ ¶ 18

The *Malone* decision clearly expresses what constitutes a criminal action or proceeding, and the conclusion statement included by the Court should not be interpreted to create ambiguity.

CONCLUSION

The *Malone* decision unambiguously determined that a criminal action or proceeding requires a formal Court proceeding. Without a criminal action or proceeding pending, and without actual participation by the witness in the criminal action or proceeding, Defendant could not have intimidated the non-victim witness as alleged. Since a criminal action or proceeding had not commenced, Defendant is not guilty of intimidation of a witness. For that reason, Defendant respectfully requests this Court decline jurisdiction in this matter.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Response was mailed by regular U.S. Mail to the following on May 25, 2011:

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