

ORIGINAL

NO. 2010-0819

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

NO. C-090384

STATE OF OHIO, APPELLEE

VS.

MOR MBODJI, APPELLANT

MOTION FOR RECONSIDERATION
SUBMITTED PURSUANT TO S.CT. PRAC. R. 11.2

The Appellant respectfully moves this Court to reconsider its decision entered in this case on June 21, 2011, where the Court held that where a criminal complaint and affidavit are signed by a private citizen but not reviewed by a reviewing official before filing pursuant to R.C. 2935.09, the defect is not jurisdictional but may be the subject of a Criminal Rule 12 (C) motion before trial.

Proposition of Law No. I:

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

The majority's opinion permits Criminal Rule 3 to invoke the subject matter jurisdiction of the trial court, which in effect, reduces the provisions of R.C. 2935.09 to a nullity even when the clerk of courts concedes that it has not complied with the statute. Further, when, as in this case, the provisions of the statute and the criminal rule do not conflict with one another, it is the statute governs.

RECEIVED
JUL 01 2011
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SUPREME COURT OF OHIO

FILED
JUL 01 2011
CLERK OF COURT
SUPREME COURT OF OHIO

When a Statute and Court Rule Do Not Conflict the Statute Governs

The provisions of R.C. 2935.09 set forth the procedures for the issuance of a private citizen complaint. These provisions in no way conflict with the provisions of Criminal Rule 3, which sets forth what a complaint must contain. Where there is no conflict between the statute and the rule, the statute shall govern the procedure for the filing of the complaint. Only if there is a conflict between the statute and the rule would the rule prevail in accordance of Article IV, Section 5 of the Ohio Constitution.

R.C. 2935.09 is Clear and Unambiguous

This Court rationalized its decision in Mbodji with an extensive analysis of legislative intent. However, as this Court has held, “when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply rules of statutory interpretation.”¹ Statutory interpretation, defined by this Court, “involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.”²

Moreover, the cases cited in Appellant’s Merit Brief, some of which were decided by this Court, clearly support the proposition that a private citizen has no right to have a complaint issued without a review official approving the filing of a complaint.³ This Court’s decision on Mbodji conflicts with this Court’s decision in *City of Zanesville v. Rouse*⁴, where it states in the

¹ *State v. Kreischer* (2006), 109 Ohio St. 3d 391; 2006 Ohio 2706; 848 N.E.2d 496; 2006 Ohio LEXIS 1855

² *Id.*; See also *State v. Muncie* (2001), 91 Ohio St.3d 440, 447, 2001 Ohio 93, 746 N.E.2d 1092; *Symmes Twp. Bd. of Trustees v. Smyth* (2000), 87 Ohio St.3d 549, 553, 2000 Ohio 470, 721 N.E.2d 1057.

³ See *State v. Sharp*, 2009 Ohio 1854, 2009 Ohio App. LEXIS 1561 (5th Dist. C/A 2009); *In re Slayman* 2008 Ohio 6713, 2008 Ohio App. LEXIS 5610 (5th Dist. C/A 2008); *City of Zanesville v. Rouse* (2010), 126 Ohio St.3d 1, 929 N.E.2d 1044, 2010 Ohio 2218; *State ex rel. Muff v. Wollenberg*, 2008 Ohio 4699, 2008 Ohio App. LEXIS 3942 (5th Dist C/A 2008).

⁴ *City of Zanesville v. Rouse* (2010), 126 Ohio St.3d 1, 929 N.E.2d. 1044.

first syllabus that “A document is ‘filed’ when it is deposited properly with the clerk of courts. The clerk’s duty to certify the act of filing arises only after a document has been filed.” In this case the affidavit was not reviewed by a reviewing official.

Two cases filed in the United States District Court for the Southern District of Ohio, Western Division demonstrate that the abuses set forth in the dissenting opinion are real and that they carry potential financial consequences for the clerk’s office if the statute is not followed as enacted by the legislature.

The first case, C-1-97-1041, involved a Consent Order regarding the use of an attorney referral that resulted in a warrant being issued by the clerk.⁵ The second case, 1:09cv915, involved the private complaint procedures set forth in R.C. 2935.09. In that case the parties entered into a settlement agreement after the subject of the complaint filed suit.⁶

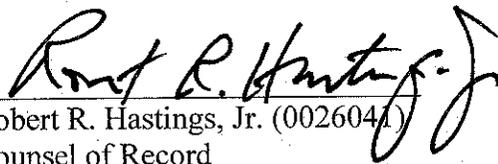
CONCLUSION

For all these reasons, Appellant asks this Court to reconsider its holding in this case and hold that the municipal court had no subject matter due to the fact that the complaint in this case was not properly deposited for filing by the clerk of courts.

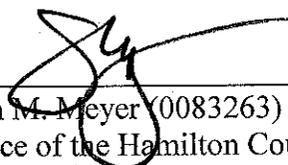
⁵ See attached Consent Order as Appendix A.

⁶ See Order and accompanying newspaper article, attached as Appendix B.

Respectfully submitted,



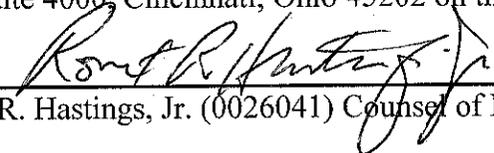
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Counsel for Appellant, Mor Mbodji

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand delivered to the Office Hamilton County Prosecutor, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on the 30th day of June 2011.



Robert R. Hastings, Jr. (0026041) Counsel of Record

APPENDIX A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

U.S. DISTRICT COURT
SOUTHERN DIST OHIO
WEST DIV CINCINNATI

ROBERT HAAS

Plaintiff,

v.

KENNETH PELLER, et. al.

Defendants

CASE NO. C-1-97-1041

District Judge Susan J. Dlott

LINDA LINDE

Plaintiff,

v.

KENNETH E. PELLER, et. al,

Defendants

CASE NO. C-1-98-0455

District Judge Susan J. Dlott

Judge	4919
Mag.	
Journal	✓
Issue	CMTc
Docketed	Ⓟ

CHRISTO LASSITER

Plaintiff,

v.

SHARLENE W. LASSITER, et. al.

Defendants

CASE NO. C-1-98-862

District Judge Susan J. Dlott

CONSENT ORDER

51

I. INTRODUCTION AND RECITALS

Plaintiffs in the three above captioned cases brought these actions originally against Hamilton County, Ohio, Defendant James Cissell (Defendant Cissell), in his individual capacity as Clerk of Courts for Hamilton County, Ohio, and against other private defendants who are not parties to this consent order.

Plaintiffs have alleged in their complaints that it has been the policy, practice and custom for many decades for the Clerk of Courts for Hamilton County to issue arrest warrants solely upon the authorization of private attorneys who represent the complaining parties without making an independent determination of probable cause. Plaintiffs have alleged further in their complaints that it was common knowledge among private attorneys that if law enforcement officials would not arrest an individual then the Clerk of Courts would issue an arrest warrant solely upon the authorization of an attorney written on his or her letterhead. Plaintiffs have alleged further in their complaints that law enforcement officers frequently advised complaining parties that their attorneys could authorize arrest warrants on their letterheads if they were not satisfied with the officer's decision not to make an arrest. Plaintiffs have alleged further in their complaints that it was the policy and practice of the Clerk of Courts that deputy clerks were not to make an independent determination of whether there was probable cause for an arrest warrant to be issued, but rather that the deputy clerk was to issue an arrest warrant solely upon the authorization of a private attorney and had no discretion as to whether or not to issue the warrant.

Plaintiffs have alleged in their complaints that the practice of relying upon private attorneys to make the determination of probable cause unconstitutionally delegated to those attorneys a power reserved to the courts and deprived them of rights protected by the Fourth

Amendment to the United States constitution. In *Lassiter v. Lassiter*, No. C-1-98-862, this Court found that the practice of issuing arrest warrants without making independent probable cause determinations constitutes a violation of the Fourth Amendment to the United States constitution. (Doc. 42).

Defendant Cissell denies many of the plaintiff's allegations and maintains that he did not change the procedures for issuance of arrest warrants that were in effect when he became Clerk of Courts. He further maintains that these policies and practices had existed under his predecessors for a period of approximately 30 years, conforming, in whole or in part, with local rules and formal instructions from the Municipal Court. Mr. Cissell maintains further that he was operating pursuant to court rules at all times, and neither initiated nor condoned knowingly any policies that violated the rights of any person. When the issue was brought to the personal attention of Defendant Cissell, he maintains that he discontinued the practice immediately and thereby removed any potential for abuse that may have occurred by virtue of attorney referrals.

The plaintiffs herein and Defendant Cissell, being desirous of settling this action by appropriate decree, agree to the jurisdiction of this Court over the respective parties and subject matter of this action. Defendant Cissell has always intended that the Clerk of Courts for Hamilton County be in full compliance with the United States Constitution. All parties desire to avoid protracted litigation and accept this decree as final and binding among the parties signatory hereto as to the issues resolved herein. This Decree, being entered with the consent of each party signatory hereto, shall not constitute any admission, adjudication or finding on the merits of the allegations of any party in these cases.

Upon his information and belief, Defendant Cissell acknowledges that:

- 1) The attorney referral process in Hamilton County was established by local

practice and local rules of court to assist in the equal treatment in the administration of criminal justice by providing an alternative to police procedures.

- 2) In regard to the attorney referral process in operation at the time of Plaintiffs' citation, arrest, and criminal proceedings, Defendant Cissell further acknowledges as recited above, that in *Lassiter v. Lassiter*, No. C-1-98-862, this Court found that the practice of issuing arrest warrants without making independent probable cause determinations constitutes a violation of the Fourth Amendment to the United States Constitution. (Doc. 42).
- 3) Defendants Kenneth Peller, James Linde, and Sharlene Lassiter availed themselves of the attorney referral process which, as recited above, that in *Lassiter v. Lassiter*, No. C-1-98-862, this Court found that the practice of issuing arrest warrants without making independent probable cause determinations constitutes a violation of the Fourth Amendment to the United States Constitution. (Doc. 42). Defendant Cissell further acknowledges that the warrants issued in these actions would not have been issued pursuant to the policies and procedures which have been implemented subsequent to the filing of these actions, because the warrants issued in these cases had been issued solely on the basis of an attorney's referral letter, with Sharlene Lassiter having used her position as an attorney to provide herself with a referral and Kenneth Peller having used his position as an attorney to provide James Linde with a referral.
- 4) The practice and procedure of the Hamilton County Clerk of Courts is to merely place of record the issuance of warrants of the type issued in these cases. No further action is taken on such warrants by the Office of the Clerk of Courts. No other policy or practice of the Office of the Clerk of Courts deals in any manner with the execution of such warrants upon the accused, after the warrants are issued by the clerk. Upon Defendant Cissell's information and belief, the immediate arrests of the Plaintiffs in these actions was a result of interaction between Defendants Sharlene Lassiter, Kenneth Peller, James Linde, and police.
- 5) Defendant Cissell is not aware of any other case where an attorney has obtained a warrant by utilizing the attorney referral process on his or her own behalf as a complainant.

INJUNCTION

It is hereby **ORDERED** that Defendant Cissell shall institute and enforce through his employees the following procedures when issuing arrest warrants, to the fullest extent consistent with the United States constitution and valid laws and rules of the court for the State of Ohio.

1. The Clerk of Courts shall not accept referrals from private attorneys as the sole basis for issuing arrest warrants.
2. Except as directed expressly by statute or rule of court, or in the case of a complaint dealing with domestic violence, the clerk or deputy clerks shall refer to the Private Complaint Mediation Service all private citizen complainants desiring to "prosecute" any alleged offense which is eligible for mediation as determined by court rule.
3. Pursuant to applicable rules of court and this consent decree, all misdemeanor complaints alleging interference with custody which are based solely upon alleged violations of visitation orders shall be referred to the Private Complaint Mediation Service for review prior to a warrant being issued. This paragraph is specifically intended to address situations in which a complainant seeks the arrest of custodial or non-custodial parent based solely upon alleged violations of visitation orders. Approval by the Private Complaint Mediation Service does not relieve the Clerk of Court from making a probable cause determination as set forth in paragraph four immediately below. A denial by the Private Complaint Mediation Service shall be taken into express consideration in the course of determining probable cause as set forth in paragraph four immediately below.
4. No Deputy Clerk shall issue an arrest warrant unless supported by a sworn and signed affidavit(s) setting forth sufficient facts, in the sole discretion of the Clerk or Deputy

Clerk, to support a finding of probable cause.

5. If it appears to the Clerk or Deputy Clerk, in his or her discretion, that the evidence in support of the complaint supports a finding that there is probable cause to believe an offense has been committed, and that the accused has committed it, the Clerk or Deputy Clerk, in his or her discretion, may issue either a warrant for the arrest of the accused, or a summons in lieu of arrest when a summons is legally permitted. The parties to this consent decree acknowledge that the constitutionality of the procedures described herein is not addressed by this order and nothing herein shall be construed as judicial approval of the issuance of warrants absent a judicial determination of probable cause.
6. No Deputy Clerk shall issue an arrest warrant or summons unless the clerk has first received training as to the legal and constitutional standards for determining the existence of probable cause as to the offense(s) alleged in the complaint.
7. This consent decree and the injunction contained herein shall not take effect until either January 1, 2001, or formal entry by the District Court, whichever ever occurs latter.

III. RELIEF

Without admitting or denying the presence of liability in the allegations of the parties' respective complaints, the parties agree and the Court so orders:

Defendant Cissell shall pay to plaintiff Robert Haas the sum of \$50,000.00 as compensation for the alleged injuries arising out of the alleged issuance of warrants for his arrest without a determination of probable cause by an independent Magistrate.

Defendant Cissell shall pay to plaintiff Linda Linde the sum of \$50,000.00 as compensation for the alleged injuries arising out of the alleged issuance of warrants for her arrest without a determination of probable cause by an independent Magistrate.

Defendant Cissell shall pay to plaintiff Christo Lassiter the sum of \$50,000.00 as compensation for the alleged injuries arising out of the alleged issuance of warrants for his arrest without a determination of probable cause by an independent Magistrate.

The plaintiffs' complaints in the above captioned actions are dismissed with prejudice as to Defendant Cissell only. Plaintiffs expressly reserve all of their rights and causes of action against defendants James Linde, Kenneth Peller and Sharlene Lassiter. The release is for the sole and exclusive benefit of Defendant Cissell, in his individual capacity and for no other person. The moneys paid by Defendant Cissell in accordance with this consent decree are exclusively in full satisfaction of plaintiffs' claims against Defendant Cissell arising out of the alleged unconstitutional issuance of arrest warrants absent a finding of probable cause and in no way affects any other claims by plaintiffs' against Defendants James Linde, Kenneth Peller, and Sharlene Lassiter.

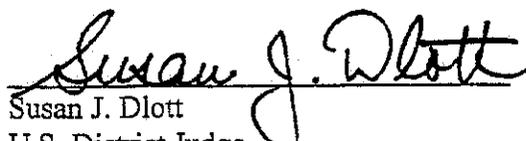
The plaintiffs hereby release Defendant Cissell for themselves, their heirs, legal representatives, executors, administrators, agents and assigns, do further hereby settle and release and forever discharge Defendant Cissell from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and in particular on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop, directly or indirectly, from the incidents, policies or practices alleged in the complaints. The parties to this Consent Decree further agree that the consideration described herein is given in full settlement, accord, and satisfaction of this disputed claim as to Defendant Cissell only, and all present and future claims against Defendant Cissell for damages or injuries from the incidents, allegations, or claims upon which the complaints in the cases captioned above are based and any other actions which could or should have been brought with it. No admission of either liability or damages is made by Defendant Cissell, by whom liability and damages are expressly denied.

IV. ATTORNEY FEES

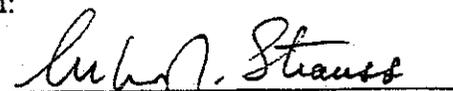
Plaintiffs are prevailing parties under 42 U.S.C. §1988. Defendant Cissell shall pay to Plaintiff's attorneys, Robert F. Laufman, Paul Laufman and Scott Greenwood, fair and reasonable attorney fees, which shall be determined by Court. Said fees shall include costs payable to prevailing parties' in accordance with precepts of Northcross v. Board Ed. Of Mrmphi Citye Schools, 611 F.2d 624 (6th Cir.1979) and its progeny.

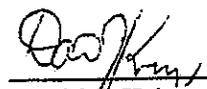
IT IS FURTHER ORDERED that this Court will retain jurisdiction to enforce the terms of this Consent Order.

ORDERED this _____ day of _____, 2001.


Susan J. Dlott
U.S. District Judge

Agreed:


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Trial Counsel for Defendant Cissell
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Robert F. Laufman

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Paul M. Laufman 0066667
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Scott T. Greenwood by R. LAUFMAN
PER AUTH

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Trial Attorney for Linda Linde
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APPENDIX B



IN THE COURT OF COMMON PLEAS
CIVIL DIVISION
HAMILTON COUNTY, OHIO

JOHN MEYER
6502 Parkview Circle
Mason, Ohio 45040

Case No: A0902559

Plaintiff

Judge: _____

vs.

CHRISTOPHER FINNEY
2623 Erie Avenue
Cincinnati, Ohio 45208

COMPLAINT WITH JURY DEMAND
ENDORSED HEREON

and

FINNEY, STAGNARO, SABA AND
PATTERSON, L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208

ORIG <u>COMP PARTIES</u> SUMMONS
() CERT MAIL () SHERIFF () WAVE
() PROCESS SERVER <u>DH</u> () NONE
CLERKS FEES _____ TIC
SECURITY FOR COST <u>498</u> _____
DEPOSITED BY <u>992</u> _____
FILING CODE <u>6366</u> _____

and

GLASS BUILDING
INVESTMENTS, LLC
C/O Jeffrey Stagnaro
2623 Erie Avenue
Cincinnati, Ohio 45208

Defendants

FILED
2009 MAR 12 P 12:31
PATRICIA M. CLANCY
CLERK OF COURTS
HAMILTON COUNTY, OH

Now comes the Plaintiff John Meyer by and through his attorney, James A. Whitaker, and for his Complaint alleges as follows:

WHITAKER & SHADE, LLC
ATTORNEYS AT LAW
226 READING ROAD
MASON, OHIO 45040
(513) 398-1910
FAX (513) 398-0181

ou, never know what the next shovelful
of dirt might reveal.'

Betty Campbell, site manager for the Rankin House State Memorial



Photos by Gary Landers/The Enquirer

...kneels to remove soil from an animal bone found at the John Rankin house in Ripley. An
...dig is being conducted before an underground HVAC system can be installed.

Pieces of puzzle' being g up at Rankin house

By Steve Kemme /skemme@enquirer.com

...EY, Ohio - With its legacy as a haven on the
...to freedom for hundreds of runaway slaves,
...hilltop home of the Rev. John Rankin and its
...ents attract continued interest from histori-
...urists.

...enter the pre-Civil War era when they step
...ple two-story house, built by Rankin in 1829
...50 miles upriver from Cincinnati.

...in observe the period furnishings and some of
...possessions, including the Rankin family Bi-
...eglasses, a first edition of Rankin's 1826 anti-
...ok and part of a letter he wrote.

...in look out the front windows, where lit cand-
...d fugitive slaves from the Kentucky side of
...river. They can walk down and back up the red-
...id 156-step stairway the fugitive slaves



A pencil that would have been used with a slate is one of the items found in the earth around the Rankin house. Also found were nails, pottery pieces and an arrowhead.

See DIG, Page D2

FORCE PREPARING REPORT

County reform advisers get more time

By Jessica Brown
jibrown@enquirer.com

...meetings of
...ent Reform
...open to pub-

...aturday.
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...ministra-

...138 E.
...wntown. In-
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A citizens task force whose recommendations could change the way Hamilton County's government is structured has more time to figure out what it wants to do.

Hamilton County commissioners unanimously voted Wednesday to extend the May 31 deadline for the 15-member Government Reform Task Force to submit recommendations. That extension relieves pressure on the conflicted group.

The new deadline is Sept. 8.

Meanwhile, a new opposition group is already protesting one option the task force is considering: recommending that the county's eight elected offices, including coroner, auditor and recorder, become appointed positions.

The task force was formed after historic county budget cuts. Its goal is to decide how Hamilton County's 1851 model of government could be restructured to save money and improve efficiency.

Its recommendations

would ultimately be put before voters. Commissioners had initially hoped to be able to put a restructuring issue on the November ballot. But some task force members remain divided and said the group needs more time to research options and reach a consensus.

The three commissioners also want to allay concerns they are pushing the group in any particular direction, as has been alleged by some people inside and outside of the

See REFORM, Page D2

FALSE-ARREST CASE

Retracted policy resurfaces at a cost

County settles for \$9,700 with claimant

By Jessica Brown
jibrown@enquirer.com

A policy in Hamilton County that allowed private citizens to file criminal charges against each other with little oversight - a policy recently rescinded - came back to haunt the government Wednesday.

County commissioners Wednesday approved doling out \$9,700 to settle a federal lawsuit in which John Meyer, a West Chester businessman, sued the county and several others. Meyer claimed that the complaint process resulted in his wrongful arrest in 2008 on a trespassing charge.

The charge was filed by Hyde Park attorney Christopher Finney, a member of the anti-tax group Coalition Opposed to Additional Spending and Taxes.

At the time, Meyer and Finney's law firm, Finney Stagnaro, Saba and Patterson, were embroiled in a civil dispute over work that Meyer's heating and air-conditioning company, Industrial Mechanical Inc., was doing for the law firm.

According to the civil suit, Meyer said the law firm owed his company \$86,000.

Finney said Meyer entered the Anderson Township business where the work was done despite being told multiple times that he was banned from the property.

Meyer said in the federal suit that a sheriff's deputy had given him permission to come onto the property. Meyer had called the deputy to the location so he could pick up his equipment.

At the time, Hamilton County's criminal complaint system allowed court clerks - rather than prosecutors or judges - to issue arrest warrants. The practice concerned judges and prosecutors who feared people were being jailed on baseless charges because of neighborhood squabbles.

Meyer claimed that's what happened to him.

The Enquirer reported on the practice in February. It had been changed about a month earlier.

Hamilton County Commission President David Pepper said he's glad the court stopped the practice, and added that, in this case, he thinks Finney took advantage of the system, costing the government time and money.

"This is the kind of nonsense that clogs up our system," said Pepper. "The process was inappropriate and the fact that he worked the system to get someone arrested is inappropriate."

Meyer said he doesn't hold the county at fault, but he's glad the policy was changed. "Hopefully someone really does have to be a criminal now to be arrested."

Neither he nor Finney would discuss details of the case citing confidentiality agreements.