

ORIGINAL

NO. 2011-1631

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. 530885

STATE OF OHIO,

Plaintiff-Appellee

-vs-

ANTHONY SOWELL,

Defendant-Appellant

MOTION TO DISMISS FOR LACK OF JURISDICTION

Counsel for Plaintiff-Appellant

BILL MASON
CUYAHOGA COUNTY PROSECUTOR

KATHERINE MULLIN (0084122)
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Counsel for Defendant-Appellee

JOHN P. PARKER
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FILED
OCT 26 2011
CLERK OF COURT
SUPREME COURT OF OHIO

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Anthony Sowell was convicted of the aggravated murders of 11 women and sentenced to death on August 12, 2011. Prior to sentencing, the trial court issued a journal entry capping the attorney's fees to be paid to Sowell's trial counsel at \$150,000. Trial counsel filed a motion with the Eighth District requesting a pre-hearing conference pursuant to Local Rule 20 for purposes of mediation. Counsel likewise filed notice with this Court that he would appeal the judgment capping attorney's fees on September 26, 2011.

LAW AND ARGUMENT

In 1995, the Ohio General Assembly amended R.C. 2953.02 to grant this Court original jurisdiction over direct appeals in cases in which the death penalty has been imposed. This Court upheld the constitutionality of this amended statute in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. This amended statute, however, does not grant this Court original jurisdiction over every aspect of every appeal filed by a death row inmate or his attorneys. This Court recently held in *State v. Davis*, Slip Opinion No. 2011-Ohio-5028, ¶¶ 21-22, that the court of appeals retains jurisdiction to review final judgments rendered in death penalty cases except for the entry containing the weighing exercise that lead to the imposition of the death sentence. Because defense counsel is not appealing the defendant's conviction, this action is not properly before this Court.

Defense counsel should not be permitted to shotgun his appeal of the trial court's judgment capping attorney fees onto Anthony Sowell's direct appeal of his

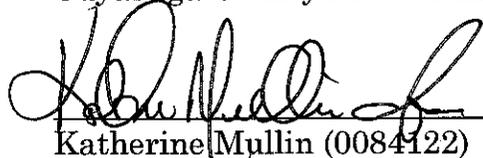
death sentence. This action does not allege a deprivation of Sowell's rights and different counsel has been appointed to represent Sowell's interests on direct appeal. Sowell's trial counsel has initiated an appeal of the trial court's order limiting attorney's fees in this case to the Eighth District and the Eighth District has not yet had the opportunity to rule on this matter. As such, his appeal to this Court should be dismissed. See *City of Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, 25, 213 N.E.2d 179 (this Court will not pass upon any question unless the record demonstrates that the question was presented to and ruled upon by the lower court).

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully submits that this Honorable Court dismiss trial counsel's appeal of the trial court's judgment capping attorney fees.

Respectfully submitted,

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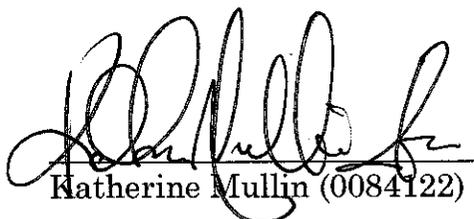
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CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Dismiss was sent by regular U.S. mail this 25th day of October, 2011 to John P. Parker, 988 E. 185th St., Cleveland, Ohio 44119.


Katherine Mullin (0084122)