

IN THE SUPREME COURT OF OHIO
2012

ORIGINAL

RODNEY D. ZEUNE
ROSS CORRECTIONAL INSTITUTION
P.O. BOX 7010
CHILLICOTHE, OHIO 45601

Relator,

vs.

12-0555

JUDGE JOHN BENDER
FRANKLIN COUNTY COMMON PLEAS COURT
345 SOUTH HIGH STREET
COLUMBUS, OHIO 43215

Respondent.

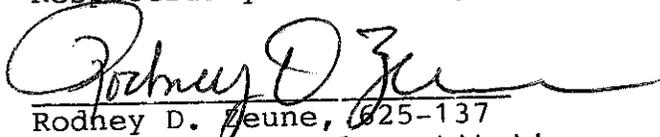
MANDAMUS TO COMPEL
JUDGE JOHN BENDER
TO COMPLY WITH
STATUTE AND CARRY
OUT HIS CLEAR LEGAL
DUTY.

Here comes Relator, Pro Se, to bring this Mandamus To Compel Respondent to comply with statute, R.C. 2701.03, Disqualification of a Judge, and demand Respondent to carry out his clear legal duty to abide by statutes as does the humblest citizen of the state.

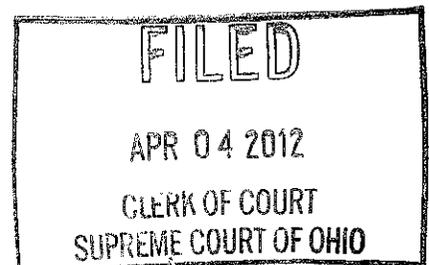
In the performance of the duties of his office, a judge of the Common Pleas Court is bound by the statutes as the humblest citizen of the state, he can neither amend or repeal a statute. Hunt v. State, 5 OCCNS 621, 27 OCC 16, affd without op 72 643, 76 NE 1132.

Relator supports this Mandamus in the following Memorandum In Support.

Respectfully submitted,



Rodney D. Zeune, 625-137
Ross Correctional Institution
P.O. Box 7010
Chillicothe, Ohio 45601



MEMORANDUM IN SUPPORT

In 2701.03 (A), the statute reads as follows: If a judge of a municipal or county court allegedly is interested in a proceeding pending before the judge, allegedly is related to or is bias or prejudice for or against a party to a proceeding pending before the judge or to a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the judge, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the court in which the proceeding is pending. The affidavit of disqualification must meet certain criteria prior to the clerk accepting the affidavit. The criteria that must be met when filing such affidavit are: (1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the fact supporting each of those allegations; (2) The jurat of a notary public; (3) A certificate indicating that a copy of the affidavit has been served on the judge; and (4) The date of the next scheduled hearing in the proceeding. This affidavit is to be filed seven (7) days prior to the next scheduled hearing. The clerk of courts cannot accept affidavit if not timely filed or the above criteria is not met. However, once the clerk of courts in which a proceeding is pending accepts an affidavit of disqualification, the affidavit deprives the judge of whom the affidavit was filed of any authority to preside in the proceeding until the judge who was notified pursuant to statute, rules on the affidavit.

On January 18, 2012, Relator filed an affidavit of disqualification against Respondent. The affidavit was timely filed and met all criteria for such filing. The clerk of courts accepted Relator's affidavit and Respondent was served by both the

clerk of courts and the Relator. Relator had a de novo sentencing hearing scheduled for January 25, 2012. Relator filed his affidavit based on allegations of bias and prejudice prior to his trial, during his trial, and at his first illegal sentencing hearing.

In this Mandamus, Relator does not have to support his claims brought forth in his affidavit of disqualification, but he need only to demonstrate that Respondent did not comply with statute or carry out his clear legal duty.

By the filing an affidavit containing one or more of the causes for disqualification of a judge under the statute, it is not the existence of any of those causes, but the filing of affidavit, which disqualifies the judge. *Ashland Bank & Sav. Co. v Housman*, 5 O App 165. On January 25, 2012, the trial court held Relator's sentencing hearing and rendered a judgment. Whether an affidavit is properly or timely filed is to be determined by the presiding judge and the trial judge has no authority to make such determination contained in RC 2701.03. Until such determination is made and the issue of disqualification is passed upon, the trial judge is without authority to enter judgment, which would make an unauthorized entered judgment "void". *Walker v. Stokes* 54 O App 2d 119, 8 O Ops 3d 237, 375 NE2d 1258.

During Relator's sentencing hearing, Relator's counsel reminded Respondent, Judge Bender, of the affidavit filed against him. Rather than following proper procedure, Respondent made claim that Relator's affidavit of disqualification was not properly filed. However, that determination is to be made by the clerk of courts and, then, the judge that the clerk assigns to the cause. Respondent made claim that since Relator filed

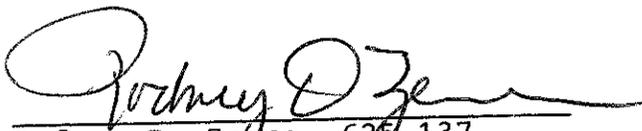
the affidavit, and not his counsel, the affidavit was not properly filed. The Respondent referred to the affidavit as a "motion" and not an affidavit. Regardless of the terminology, Respondent was not authorized to make that determination because RC 2701.03 states that a party or party's counsel can file an affidavit of disqualification.

If Relator's affidavit of disqualification was in question, Respondent should have allowed Relator to enter testimony regarding the affidavit. It is true that so long as the affidavit of disqualification is on file, and the issue of disqualification thereby raised remains undecided, the judge is without authority to determine the cause or hear any matter affecting the substantive rights of the parties, and whenever a party asserts a claim of bias or preconceived judgment on the part of the judge, such person must be afforded an opportunity to support his claim by the introduction of testimony. *Moore v. State*, 118 OS 487, 161 NE 532. Relator's counsel address the court and requested that Relator speak upon the cause of filing his affidavit of disqualification and Judge Bender denied Relator the opportunity to speak. Moreover, during the sentencing hearing, Judge Bender disregarded the decision of the Tenth District Court of Appeals and declared the hearing one of not de novo in fashion, which was the assignment of error that Relator's case was remanded for.

Wherefore, Relator respectfully requests that this Court grant his Mandamus and order Judge John Bender to comply with RC 2701.03 and carry out his clear legal duty to adhere to statute. Furthermore, Relator moves this Court to render the judgment that was entered on February 6, 2012 "void" and set it aside until the presiding judge rule on Relator's affidavit of disqual-

ification that was filed on January 18, 2012. A declaration by the judge in open court of his intention to proceed with the proceedings notwithstanding the filing of an affidavit of bias and prejudice was sufficient ground for a proceeding in mandamus and injunction. *State ex rel. Wulle v Dirlam*, 7 OCC NS 457, 28 OCC 69, affd 75 OS 566, 80 NE 1132.

Respectfully submitted,

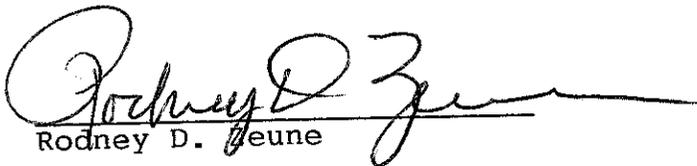


Rodney D. Zeune, 625-137
Ross Correctional Institution
P.O. Box 7010
Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Mandamus was served upon Judge John Bender, Franklin County Common Pleas Court, 345 South High Street, by the way of US Mail, on this _____ day of March, 2012.

Respectfully submitted,



Rodney D. Zeune

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY

STATE OF OHIO

PLAINTIFF,

Case No. 09CR4919

VS

RODNEY D. ZEUNE

JUDGE BENDER

DEFENDANT.

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2012 JAN 18 AM 11:11
CLERK OF COURT

AFFIDAVIT OF DISQUALIFICATION

I, RODNEY D. ZEUNE, BEING FIRST DULY SWORN, ACCORDING TO LAW STATE THE FOLLOWING:

1. I WAS INDICTED ON ONE COUNT OF DRUG TRAFFICKING IN MARCH OF 2009, AND RETAINED ROBERT KRADENIC AS MY COUNSEL. (EXHIBIT 1, INDICTMENT).
2. ON AUGUST 3, 2010, I WENT TO TRIAL. ON THE FIRST DAY OF TRIAL, THE STATE ELECTED TO PROCEED WITH THE THEORY OF COMPLICITY, TO CONVICT A PERSON OF TRAFFICKING IN VIOLATION OF R.C. 2925.03, THE STATE MUST PROVE THAT THE PERSON KNOWINGLY SOLD OR OFFERED TO SELL A CONTROLLED SUBSTANCE. HERE, THE STATE PROCEEDING UNDER R.C. 2923.03(F), COMPLICITY. THE COMPLICITY STATUTE, R.C. 2923.03 PROVIDES: "NO PERSON, ACTING WITH THE KIND OF CULPABILITY REQUIRED FOR THE COMMISSION SHALL DO ANY OF THE FOLLOWING: AID OR ABET ANOTHER IN COMMITTING THE OFFENSE" R.C. 2903.03 (A)(2). TO SUPPORT A CONVICTION FOR COMPLICITY BY AIDING OR ABETTING PURSUANT TO R.C. 2923.03 (A)(2), THE EVIDENCE MUST SHOW THAT THE DEFENDANT SUPPORTED, ASSISTED, ENCOURAGED, COOPERATED WITH, ADVISED, OR INTICED THE PRINCIPAL IN THE COMMISSION OF A CRIME, AND THAT THE DEFENDANT SHARED THE SAME CRIMINAL INTENT AS THE PRINCIPAL. STATE V JOHNSON, 93 OHIO ST. 3d, 240, 245, 2001-OHIO 1336.
3. DURING THE DIRECT EXAMINATION OF CONFIDENTIAL INFORMANT, AYMAN MUSLEH, THE STATE ESTABLISHED I

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,

Termination No. 5 By DB

Plaintiff,

vs.

Case No. 09CR-4919 (Bender,

Rodney Zeune,

Defendant.

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2012 FEB -6 PM 3:50
CLERK OF COURTS

RE-SENTENCING ENTRY
(Prison Imposed)

On July 29, 2010, the State of Ohio was represented by Assistant Prosecuting Attorney Jennifer Hunt and the Defendant was represented by Attorney, Dennis Pusateri. The case was tried by a jury which returned a verdict finding the Defendant guilty of Count One of the Indictment, to wit: Trafficking in Cocaine, in violation of Section 2925.03 of the Revised Code, a Felony of the Third Degree.

The Court found the Defendant guilty of the charge to which the plea was entered.

The Court ordered and received a pre-sentence investigation.

On October 21, 2010, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Assistant Prosecuting Attorney Jennifer Hunt and the Defendant was represented by Attorney, Robert Krapenc.

The Court imposed a sentence on October 21, 2010, however, the sentence has been reversed and remanded to this Court for re-sentencing by the Opinion rendered on October 6, 2011, by the Court of Appeals of Ohio, Tenth Appellate District.

In accordance with the Opinion rendered on October 6, 2011, by the Court of Appeals of Ohio, Tenth Appellate District, this Court is required to resentence the Defendant. At the sentencing hearing, the State was represented by Assistant Prosecuting Attorney, Jennifer Hunt, and the Defendant was represented by Attorney, Craig Jaquith.

Defendant was indicted and convicted of one count of Trafficking in Cocaine in an amount of 20 grams or more but less than 27 grams, to wit: 25.5 grams, in violation of R.C. 2925.03. When Defendant was sentenced the offense was a Felony of the Third Degree punishable by a mandatory sentence of one, two, three, four or five years in prison.

After the original sentence was imposed, H.B. 86 was enacted effective September 30, 2011. Under H.B. 86, the offense of Trafficking in Cocaine in an amount of 20 grams or more but less than 27 grams is a Felony of the Second Degree, punishable by two, three, four, five, six, seven or eight years in prison.



If the penalty, forfeiture or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as reenacted or amended. R.C. 1.58(B). However, R.C. 1.58 does not apply to give a criminal defendant the benefit of a reduced sentence if, by applying it, the court alters the nature of the offense of which the defendant was found guilty. *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, syllabus.

Therefore, since the degree of the offense and the penalty range for the offense of which the Defendant was convicted are more severe under H.B. 86 than they were when he was originally sentenced, the Defendant must be sentenced in accordance with the statutory penalties in effect prior to the enactment of H.B. 86. R.C. 1.58(B) does not apply here.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term is mandatory pursuant to R.C. 2929.13(F).

The Court hereby imposes the following sentence: FOUR (4) YEARS, mandatory, at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS. Sentence is to be served CONSECUTIVE to Knox County, Ohio Case No. 09-0022. It is further ordered that the Defendant's Ohio Bureau of Motor Vehicles Driver's License [REDACTED] four (4) years without work driving privileges.

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: Defendant shall pay a mandatory fine in the amount of \$5,000.00. Defendant shall pay court costs in an amount to be determined. Defendant shall pay restitution in the amount of \$1,000.00 to DEA/Columbus District Office, 500 South Front Street, Suite 612, Columbus, Ohio 43215.

The total fine and financial sanction judgment is \$6,000.00 plus costs.

The Court notified the Defendant pursuant to R.C. 2929(B)(3) that the applicable period(s) of post-release control is three (3) years mandatory.

The Court finds that the Defendant has 444 days of jail credit and hereby certifies the time to the Ohio Department of Rehabilitation and Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.



JOHN F. BENDER, JUDGE

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**IN THE OHIO SUPREME COURT
2012**

RODNEY D. ZEUNE

Relator,

vs.

JUDGE JON BENDER

Respondent.

AFFIDAVIT OF RODNEY D. ZEUNE

ROSS COUNTY)
)
STATE OF OHIO)

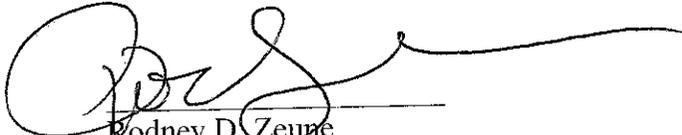
I, Rodney D. Zeune, being first duly sworn according to law, state the following:

1. On January 18, 2012, I filed an Affidavit of Disqualification, of Judge John Bender, pursuant to R.C. 2701.03, in the the Franklin County Clerk of Courts.
2. I filed the affidavit because of bias and prejudice before my trial, during my trial, after my trial and during my first illegal sentence. Trial transcripts show that my attorney, Robert Krapenc and the Prosecutor were friends and Mr. Krapenc was a camping partner of the prosecutor's husband. The transcripts also shows that key evidence was withheld during trial. Due to the relationship with the prosecutor, my attorney did not ask for this evidence to be turned over to spare her from sanctions or a mistrial. Judge Bender did not request that prosecution turn over this evidence either. I was informed by Mr. Krapenc to take a plea because he was Judge Bender's campaign manager and it would be in my best interest to forget about the evidence and take a plea. I informed Mr. Krapenc that I wanted him to request a mistrial and he told me that the judge would not "sell him down the river". After all, Mr. Krapenc was the judge campaign manager. Mr. Krapenc informed me that he spoke to the judge and the judge informed him that I must take a plea or I would be penalized. Due to this unorthodox behavior, I proceeded with the trial and informed the court I was misled by Mr Krapenc. I was convicted and sentenced to four years on a first drug offense. Mr. Krapenc told me that I violated elements of R.C. 2925.11, possession of drugs and not R.C. 2925.03, Trafficking drugs. So, I felt it was best for me to continue with the trial rather that be forced into a plea.
3. In November, 2011, The appellate court remanded my case for an illegal sentence. After two continuances of the re-sentencing hearing, I filed the Affidavit of Disqualification in a timely manner and it was accepted by the clerk of courts. Such affidavit prevents a judge from holding the next scheduled hearing until the presiding judge rules the affidavit. Judge Bender ignored statute and held the hearing in non-compliance of R.C. 2701.03.
4. I hereby state that all claims made in the attached Mandamus and memorandum is true and

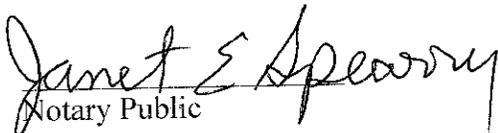
accurate.

5. I have all the supporting evidence, affidavit and documentation in my Affidavit of disqualification to constitute a proper review.

Further affiant sayeth naught.


Rodney D. Zeune

Sworn to and subscribed in my presence on the 1st day of April, 2012.


Notary Public



Janet E. Speary
Notary Public - Ohio
My Commission Expires 8-25-2013

RODNEY D. ZEUNE

Relator,

v.

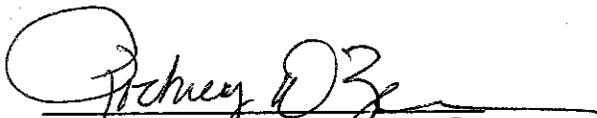
Judge John Bender

Case NO. _____

Respondent.

AFFIDAVIT OF INDIGENCY

I, Rodney D. Zeune, do hereby solemnly swear that I have presently this 25th day of March, 2012, no means of financial support and no assets on any value and, therefore, cannot afford to pay any legal services, fees or costs in the above-styled case.


Rodney D. Zeune, Pro Se
Institutional No. 625-137
Ross Correctional Institution
P.O. Box 7010
Chillicothe, Ohio 45601

Sworn and subscribed in my presence 25 day of March,
2012.


NOTARY PUBLIC



Janet E. Spearry
Notary Public - Ohio
My Commission Expires 8-25-2013