ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. EMANUEL NEWELL,

RELATOR,

Case No. 2013-0862

-vs-

JUDGE WILLIAM E. MAHON, ET AL.,

RESPONDENTS.

RESPONDENT JUDGE FUERST'S NOTICE OF DEFENDANT'S FILING OF STATEMENT OF PROCEEDINGS PURSUANT TO APP.R. 9(C)

Counsel for the Honorable Nancy Fuerst

TIMOTHY J. MCGINTY
Cuyahoga County Prosecuting Attorney
James E. Moss (0061958)
Assistant Prosecuting Attorney
The Justice Center, Courts Tower
1200 Ontario St., 8th Floor
Cleveland, Ohio 44113
(216) 443-7806
(216) 443-7602 *fax*
jmoss@cuyahogacounty.us *email*

Emanuel Newell, Pro Se, Inmate # 206453
Allen Correctional Institution
P.O. Box 4501, 2338 North West Street
Lima, Ohio 45801

Ohio Attorney General Mike DeWine
Ohio Attorney General's Office
30 East Broad Street, 14th Floor
Columbus, Ohio 43215

RECEIVED
JUN 14 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUN 14 2013
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE EX REL. EMANUEL NEWELL,
RELATOR,

Case No. 2013-0862

-vs-

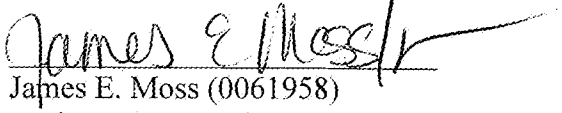
JUDGE WILLIAM E. MAHON, ET AL.,
RESPONDENTS.

Now comes Cuyahoga County Prosecuting Attorney Timothy J. McGinty on behalf of respondent Judge Nancy Fuerst, by and through his undersigned assistant, and respectfully submits the Respondent's Notice of Defendant-Appellant's Statement of the Proceedings Pursuant to App.R. 9(C). Please take note that Relator, through counsel, filed A Statement of the Proceedings Pursuant to App.R. 9(C) on April 24, 1989, in Cuyahoga County Court Of Common Pleas case number CR-10-543910-A, the case underlying Relator's Complaint For Writ of Prohibition and Mandamus presently before this Court. A certified copy of Defendant-Appellant's Statement of the Proceedings Pursuant to App.R. 9(C) is attached as Exhibit A.

Respondent Judge Fuerst is providing notice of the filing of Defendant-Appellant's Statement of the Proceedings Pursuant to App.R. 9(C) to this Court since it includes information that has an impact on the Court's ruling in the instant case.

Respectfully Submitted,

TIMOTHY J. MCGINTY
Cuyahoga County Prosecuting Attorney



James E. Moss (0061958)
Assistant Prosecuting Attorney
1200 Ontario St., 8th Floor
Cleveland, Ohio 44113
(216) 443-7800
(216) 443-7602 *fax*
jmoss@cuyahogacounty.us *email*

CERTIFICATE OF SERVICE

A copy of the foregoing Respondent's Notice of Defendant-Appellant's Statement of the Proceedings was mailed this 13th day of June, 2013, by regular U.S. Mail to Emanuel Newell, Pro Se, Inmate # 206453, at Allen Correctional Institution, P.O. Box 4501, 2338 North West Street, Lima, Ohio 45801, and to Ohio Attorney General Mike DeWine, counsel for respondents Judges of the Eighth Appellate District Court of Appeals of Ohio, at the Ohio Attorney General's Office, 30 East Broad Street, 14th Floor, Columbus, Ohio 43215.

James E. Moss (0061958)
Assistant Prosecuting Attorney

FILED
CRIMINAL DIVISION
MAR 24 1 11 PM '89
GERALD E. FUERST
CLERK OF COURTS

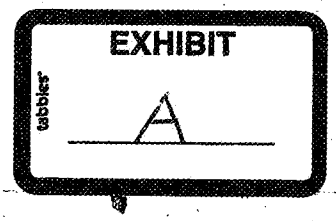
IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	CASE NO. 226066
Plaintiff-Appellee	:	JUDGE WILLIAM E. MAHON
-vs-	:	
EMANUEL NEWELL	:	DEFENDANT-APPELLANT'S STATEMENT OF THE PROCEEDINGS PURSUANT TO APP. R. 9(C)
Defendant-Appellant	:	

The defendant, Emanuel Newell, was indicted by the Cuyahoga County Grand Jury on March 30, 1988 for one count of Felonious Assault with a gun and a peace officer specification, and one count of Having a Weapon While Under Disability with a gun specification. Mr. Newell pleaded not guilty at his arraignment on May 13, 1988. He was found to be indigent and Mr. Mark Stanton was appointed as defense counsel. On June 20, 1988 Mr. Stanton filed a motion to withdraw as counsel. That same day, Mr. Stanton's motion was granted and Mr. Brian Corrigan was assigned.

On August 22, 1988, Mr. Corrigan also filed a motion to withdraw as counsel. On August 22, 1988 Mr. Corrigan's motion was granted and the public defender was appointed as counsel for trial.

The state's first witness was Mr. Albert Covington. Mr. Covington testified that on March 11, 1988 he was living at 12912 Revere Avenue, Cleveland. At approximately 8:00 PM, Mr. Covington was seated on his love seat in his living room



Filed 4/24/85

watching television. His attention was drawn to the sound of sirens getting progressively louder. Mr. Covington testified he was shaken from his seat when an auto struck the west side of his house.

Upon hearing this thud, he immediately stood up. As he was rising from his couch, he heard four or more gun shots. From his window, he could see the top of a patrol car and the front of the suspect's car, a red Toyota. He could not see any movement in his driveway. Mr. Covington eventually went out on his front porch to investigate. According to his testimony, the police cruiser only had its parking lights on. The red Toyota resting against his house had both headlights and windshield wipers on. Mr. Covington testified he did not remember seeing any overhead lights working on the police cruiser.

Mr. Covington estimated that for the next two to four minutes, no one moved in either car parked in his driveway. Within five minutes, however, eight to twelve police cars were on the scene. Mr. Covington described his house as command central.

Patrolman Terrence McHugh of the Cleveland Police Department testified that he and his partner, Shawn Coneri, monitored a radio broadcast of a car chase in the vicinity of Lee and Harvard shortly after 8:00 PM. Patrolman McHugh, while keeping abreast of the chase, was directed to East 123rd Street and Revere. Although he estimated that he arrived on Revere within five minutes, he testified he was not the first Cleveland Police zone car on the scene. When he arrived on Revere, there were three

Cleveland Police cars and two Warrensville Heights police cars already there.

Patrolman McHugh testified that his partner talked to the victim, Warrensville Heights Patrolman Vincent Dillion. From that conversation, he learned that the suspect was a black make, six feet tall, 180 pounds, medium build, short cropped hair, wearing a three-quarter length black leather jacket, blue jeans and tennis shoes. McHugh admitted that no radio broadcast with that description was ever made.

Patrolman McHugh testified that Officer Dillion's car had its overhead takedown and grill headlights on when he arrived on the scene.

Patrolman Tommie Long testified that on March 11, 1988 he was assigned to the Fourth District, Cleveland Police Department. He and his partner, Marlon Dennis, responded to East 123rd Street and Revere within one to two minutes after hearing the initial radio broadcast. Patrolman Long testified that he heard a description broadcast over the radio describing the suspect as a black male, six feet tall, wearing a leather waist-length jacket.

After arriving on the scene, Officer Long was instructed to tour the area for two other unknown suspects. Shortly thereafter, he accompanied a Warrensville Heights detective to the defendant's brother's house on Judson Avenue in Cleveland.

Reviewed 4/24/88

Officer Long testified that there he and three Warrensville Heights detectives interviewed Richard Newell. According to Officer Long, while he was in the Judson Avenue home, the defendant phoned his brother Richard and expressed his desire to turn himself in. Officer Long further testified that while speaking to Richard Newell, the defendant denied being involved in a shooting and would turn himself in if given the necessary assurances of his safety. Richard Newell further related to Officer Long that Emanuel Newell had borrowed the car the day before and had reported to him that the car had been stolen earlier that evening. A further description of the defendant, Emanuel Newell, was obtained from Richard Newell.

The state's next witness, Detective Daniel Bambrick of the Warrensville Heights Police Department, testified he responded to East 130th and Revere to assist his fellow officer Vincent Dillion. When he arrived on the scene, Patrolman Dillion was already seated in Lt. Pollock's car. Pollack also worked for the Warrensville Heights Police Department. Detective Bambrick immediately ran the registration number of the red Toyota that had crashed into Mr. Covington's home. From that registration number, Detective Bambrick learned the name of the owner, Paulette Newell, the defendant's sister-in-law, 15505 Judson Avenue.

With the name and an address of the owner of the suspect's car, Detective Bambrick, along with other police officers, drove to the Judson address and observed the area for approximately five minutes before announcing their presence. Having

failed to observe any activity, Detective Bambrick and other Cleveland police officers approached Paulette Newell's home with their weapons drawn. They were met there by Richard Newell, the defendant's brother, who after asking them to put their weapons away, escorted them into his house. Detective Bambrick further testified that after a brief conversation with the Newell family, he broadcast the defendant's name and further descriptions of the suspect's possible clothing.

Detective Donald Ferris of the Cleveland Police Homicide Unit testified next for the state. According to Detective Ferris' testimony, he was in charge of the crime scene on East 130th and Revere. He first arrived at the scene at 8:40 PM. His duties included interviewing officers, photographing the complete crime area, preparing a crime scene sketch, and processing and preserving the evidence. Detective Ferris testified that photographic exhibits 6 through 54 accurately reflected the crime scene on the night of March 11, 1988. Excluding the duplicates, those crime scene photographs were admitted into evidence.

Also admitted into evidence was Exhibit 57, the crime scene sketch and various bullet fragments recovered from the police cruiser's door. Detective Ferris testified that Exhibit 58, a Mossburg pump shotgun, was recovered on March 29, 1988 at the home of Latrice Weedon by the Cleveland S.W.A.T. Unit.

Detective Ferris also testified that it is not normal Cleveland Police policy to preserve the dispatch tapes for longer

than 30 days. He admitted that it was his responsibility to order them saved, however, he decided not to request their preservation in this case.

The state's next witness was Latrice Weedon. Miss Weedon testified that on March 11, 1988 she was living at 12205 Revere Avenue. During direct examination, over strenuous defense objections, the state played in open court a recorded statement made by Miss Weedon on May 9, 1988.

In her recorded statement, Miss Weedon stated that the defendant came to her house on March 11, 1988 between the hours of 7:00 and 8:00 PM, and told her that he was wanted by the police. She described him as wearing tennis shoes, blue pants and a blue shirt. During her taped statement, she described her fear of the defendant and her children's fears. She indicated that the defendant always took one of her children as his protection when he left her home. Miss Weedon further testified that the defendant forced her to purchase a Mossburg pump shotgun, Exhibit 58, from Land Gun and Tackle Shop.

While still on direct examination, Miss Weedon testified that she had been threatened into making that recorded statement and denied the accuracy of its contents. She denied that the defendant lived there and further indicated that Detective Rose of the Cleveland Police Department had threatened her with going to jail for harboring a fugitive if she failed to cooperate with the Cleveland S.W.A.T. Unit. Miss Weedon's sworn statement contradicted her recorded statement.

S.W.A.T. Officer Gannon testified that on May 9, 1988 he and other members of the Cleveland S.W.A.T. Unit executed an entry into Miss Weedon's home at 12205 Revere. Entry was made at 1:50 PM in the two family house. The defendant was arrested, without resistance, on the second story front porch. Officer Gannon also testified that the Mossburg pump shotgun was recovered in the downstairs suit between a bed and a bedroom wall.

Lieutenant James Brown of the Warrensville Heights Police Department also testified he assisted the Cleveland S.W.A.T. Unit on May 9, 1988. According to Lt. Brown, he was contacted by North Randall detective Harry Rose and informed that the defendant was staying with Ms. Weedon and her children on Revere Avenue. On May 9, 1988, Lt. Brown interviewed Miss Weedon after the entry and arrest of the defendant, Emanuel Newell. Lt. Brown transported Miss Weedon to the Warrensville Heights Police Department.

Lieutenant Brown indicated during his testimony that Miss Weedon was advised of her rights and voluntarily and knowingly made the tape recorded statement. After that interview, Lt. Brown was convinced that Miss Weedon was in actual fear of her life and therefore should not be charged in connection with the felonious assault charge against the defendant, Emanuel Newell.

The state's next witness was Detective Harry Rose of the North Randall Police Department. Detective Rose testified that he knew Latrice Weedon from a 1987 North Randall shoplifting

case. According to Det. Rose., Miss Weedon phoned him on May 7 and wanted to meet with him at the Camelot on Miles Avenue. During their meeting Miss Weedon allegedly related that she was in fear of her life and her children's lives, and she was unsure of what to do.

Detective Rose testified that following this conversation, he telephoned Warrensville Heights Police and talked to Lt. Brown. He then instructed Miss Weedon to return home and to act as normal as possible. The following Monday, he phoned her and indicated that everything looked good.

That afternoon, a S.W.A.T. Unit was organized and the defendant was arrested on the front porch of Miss Weedon's home on Revere Avenue.

The victim, Officer Vincent Dillion, was the state's final witness. Officer Dillion testified that on the night of March 11, 1988 while on routine patrol in Warrensville Heights, he observed a red Toyota with three black males run a red light at Miles and Grandwood. Officer Dillion activated his overhead lights and began pursuit. A high speed chase followed, ending at 12908 Revere Avenue, Cleveland.

As the red Toyota pulled in the driveway on Revere, it struck the house located at that address. Officer Dillion, following some 50 to 60 feet behind, drove across the lawn and parked his car diagonally across the driveway, blocking any exit.

According to Officer Dillion's direct testimony, as he was exiting his patrol car, the driver of the red Toyota also

exited that car and immediately raised his right arm and fired three shots directly at Officer Dillion. Without his gun drawn, Officer Dillion dove back onto the floor of his patrol car. As the suspect ran past the police car, two more shots were fired into the seat.

According to the Warrensville Heights dispatcher tapes admitted into evidence, Officer Dillion, although unharmed, did not broadcast anything further for the next three and one-half minutes. When he finally did broadcast his condition to his dispatcher, he indicated that one of the suspects fled southbound and he was unsure of the other two. Officer Dillion further testified that at no time did he broadcast a description of any of the suspects. He did testify, however, that a verbal description of the driver was given to a black female Cleveland Police Officer that arrived first on the scene.

According to Officer Dillion, he remained in his lieutenant's police car for approximately 40 minutes following the shooting. Officer Dillion was then transported to the Justice Center where he compiled his written statement that night. On Monday, two days later, Officer Dillion was shown five photos from which he identified #4, Emanuel Newell, as the suspect responsible for the shooting of March 11, 1988. Officer Dillion admitted during the eyewitness suppression hearing that Detective Ferris told him the name "Emanuel Newell" and that the police had a suspect prior to him viewing the photo array. No line-up was ever conducted in this case.

Following the renewal of all of the defendant's objections and motions for mistrial, the state's exhibits, including the photo array, crime scene photos, bullets, crime scene sketch, Mossburg shotgun and the rights waiver signed by Latrice Weedon, were admitted into evidence.

Chief Dispatcher Coyle of the Cleveland Police Telecommunications Division was the first witness called by the defendant. Dispatcher Coyle testified that no dispatcher tapes were ordered saved in connection with the shooting of March 11, 1988. Without such an order, the tapes are reused within 45 to 60 days. In addition to the radio broadcast tapes, individual cards are kept to record the police cars and their activities. According to Officer Coyle, defendant's exhibits B through K indicated that numerous cars were dispatched to East 130th and Corlett on March 11, 1988. The evidence clearly indicated that no description was recorded on any of the dispatcher cards from Cleveland police.

Defendant's next witness was his brother, Richard Newell. Richard testified that the police arrived at his home on Judson on March 11, 1988 with their guns drawn. Richard Newell indicated after he insisted that they put their guns away he invited the police into his home. Richard testified that he told the police that Emanuel had borrowed his wife's car on March 10, 1988. When asked by the police, Richard described his brother as looking just like himself, only thicker. Richard further testified that prior to the police arriving, Emanuel had telephoned

and reported that their Toyota had been stolen at Randall Park Shopping Mall.

Richard testified that while the police were still in his house, Emanuel telephoned again. Richard indicated he became upset and questioned Emanuel about any shooting. Richard testified that Emanuel denied being involved in any shooting and would turn himself in if the police agreed not to shoot him. After assuring Emanuel that nothing would happen, Richard and the police waited for two to three hours. No one showed.

Paulette Newell testified that she is the defendant's sister-in-law. She also was at her home on Judson the night of March 11, 1988. According to Paulette, the police questioned her that night because the Toyota was registered to her. She testified that the police wanted a picture of the defendant and a detailed physical description. She did provide them with a photograph. Paulette also confirmed that the defendant, Emanuel Newell, telephoned while the police were there. However, she did not listen to the conversation and could not testify to its contents.

During the trial, Emanuel Newell's counsel made timely objections to:

1. Testimony regarding the arrest of the defendant 65 days after the alleged felonious assault.

2. The overruling of defendant's motion for separation of counts.

3. The state's failure to comply with defendant's motion to compel discovery. One day before trial was to begin the prosecutor provided defense counsel with the name of Detective Harry Rose of North Randall Police.

4. The overruling of defendant's motion to dismiss the indictment because of the destruction of exculpatory evidence, i.e., dispatcher tapes from the Cleveland Police Department.

5. The overruling of the defendant's motion to suppress the eyewitness testimony of Officer Dillion and the subsequent admission of the highly suggestive photo array into evidence.

6. The overruling of the defendant's motion for mistrial based on Officer Tommie Long's direct comment during direct examination concerning the defendant's prior arrest record.

7. The overruling of the defendant's motion for a mistrial based on the use and admission into evidence of Latrice Weedon's tape recorded statement during the state's direct examination of Latrice Weedon. This statement was used under the guise of refreshing her recollection. However, it was nothing more than a direct impeachment of the state's own witness without any of the proper foundation.

8. The overruling of the defendant's motion for mistrial as a result of the prosecutor pounding on the witness stand during closing arguments while stating that if the defendant had anything to say why didn't he take the state and say them. This comment was in response to an outburst by the defendant in front on the jury.

9. Objections to the prosecutor's direct comments about "returning the defendant to the street" which is an inference to punishment which is only within the providence of the court.

10. Objections to the court's failure to consider the defendant's timely proposed jury instruction concerning eyewitness testimony.

11. Objections to the state's failure to timely comply with discovery. The 25 minutes of dispatcher tape from Warrensville Heights was not provided to the defendant until the fourth day of trial.

On October 26, 1988 the jury found Emanuel Newell guilty of felonious assault with a gun against Officer Vincent Dillion, a police officer, as charged in the first count of the indictment. The court hearing the second count without a jury also found the defendant guilty of Having Weapon While Under Disability in the second count of the indictment. On October 26, 1988 the defendant was sentenced to two three-year sentences for the same gun and 15 to 25 years on count one, and one year on count two, which was to be served concurrently with count one.

Date

Approved
JUDGE WILLIAM E. MAHON

BY: Richard L. Gedeon
RICHARD L. GEDEON
Defense Counsel

AND: DAVID L. DOUGHTEN
Counsel on Appeal
WALSH AND DOUGHTEN INC., L.P.A.
1040 Standard Building
1370 Ontario Street
Cleveland, OH 44113
(216) 696-6938

CC 90/1758

The State of Ohio, }ss.
COUNTY OF CUYAHOGA

Common Pleas Court within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Journal APPELLANT'S STATEMENT OF THE PROCEEDINGS APP R. 9C of the proceedings of the Common Pleas Court within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal STATEMENT EMANUEL NEWELL CR 226066 and that the same is a correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially and affix the seal of said Court, at the Court House in the City of Cleveland, in said County, this 12TH day of, JUNE, A.D. 20 13

GERALD E. FUERST, Clerk of Courts

By R. Cuthbert Deputy Clerk