Supreme Court of Ohio Clerk of Court - Filed October 09, 2015 - Case No. 1995-0042

In the Supreme Court of Ohio

State of Ohio,	:	
Plaintiff-Appellee,	:	**Case No. 1995-0042**
	:	
v.	:	
Jeffrey Wogenstahl,	:	
Defendant-Appellant.	:	**This Is A Capital Case.**

JEFFREY WOGENSTAHL'S MOTION TO VACATE HIS EXECUTION DATE AND TO RE-OPEN HIS DIRECT APPEAL

Execution Date: November 16, 2016

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Appellant Jeffrey Wogenstahl moves this Court to vacate his pending execution date of November 16, 2016, and to reopen his direct appeal before this Court.

This Court has held that under the prior version of R.C. 2901.11, a trial court does not have jurisdiction over a case in which the defendant is charged with murder unless the murder itself occurred in the State of Ohio. *State v. Yarbrough,* 104 Ohio St.3d 1, 10 (2004). As the prosecutor acknowledged in this case, the murder occurred in the State of Indiana and not the State of Ohio. Consequently, the trial court lacked jurisdiction with respect to the count in the indictment charging aggravated murder with death penalty specifications.

Appellant has attached a memorandum which he incorporates into this motion.

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER

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MEMORANDUM IN SUPPORT

I. Introduction

In *State v. Yarbrough*, 104 Ohio St.3d 1, (2004), the defendant and an accomplice kidnapped two college students in Steubenville, Ohio, drove across the Ohio-Pennsylvania border towards Pittsburgh, and shot and killed the two students in a wooded area off the highway. *Id.* at 2. This Court held that allowing Ohio jurisdiction over the homicides would be to overlook the plain language of R.C. § 2901.11(B) that strictly defines the "element" of the offense in homicide cases as either the act or physical contact that causes death or the actual death. *Id.* at 10. Although the kidnapping and other charges of robbery and burglary began in Ohio, this Court found sufficient evidence that the actual homicides occurred in Pennsylvania. *Id.* at 8. As a result, this Court noted, "it is our duty to reverse the convictions of aggravated murder and vacate the death sentences imposed on defendant-appellant." *Id.* at 1.

The identical facts exist here. The State of Ohio did not have jurisdiction over the charged homicide in this case because the victim's body was found in Indiana, and the evidence conclusively proves that the victim's death occurred in Indiana. Thus, it is this Court's obligation, as it was this Court's duty in *Yarbrough*, "to reverse the conviction[] of aggravated murder and vacate the death sentence[] imposed on defendant-appellant." *See id.*

II. Argument: the State's case at trial establishes the victim's death took place in Indiana.

1. Subject-matter jurisdiction can never be waived.

Issues of subject-matter jurisdiction may be raised at any time and therefore cannot be waived. *State v. Wilson*, 73 Ohio St. 3d 40, 46 (1995). In *Wilson*, the defendant was seventeen-years-old at the time of the offense and was tried and convicted in Common Pleas Court without being properly bound over from Juvenile Court, which otherwise had exclusive jurisdiction. *Id.* at 44. Twelve years after his conviction, Wilson filed a motion to vacate his conviction because the Juvenile Court had not relinquished its jurisdiction. This Court held that subject-matter jurisdiction could never be waived and that the judgment against him was *void ab initio*. *Id.* "A party's failure to challenge a court's subject matter jurisdiction cannot be used, in effect, to bestow jurisdiction on a court where there is none." *Id.* at 46. Similarly, Wogenstahl cannot be found to have waived this argument by not raising it sooner.

This Court in *Wilson* also rejected the argument that Wilson's post-conviction relief motion was barred by the doctrine of *res judicata*. It held that the doctrine only applies to judgments of conviction not judgments void for lack of jurisdiction. *Id.* at 45. Similarly, the doctrine of *res judicata* cannot preclude Wogenstahl's current challenge to the judgment of his homicide conviction because it is void for lack of subject-matter jurisdiction.

2. Ohio's jurisdiction statute in 1991 did not allow for jurisdiction over homicides that occurred in another state.

At the time of the offense in 1991, Ohio's jurisdiction statute outlined the general requirements for subject-matter, or territorial, jurisdiction over crimes in the state. That statute narrowed those requirements for homicide. The relevant portions of R.C. § 2901.11, as it read in 1991, are as follows:

> (A) A person is subject to criminal prosecution and punishment in this state if any of the following occur:
>
> (1) The person commits an offense under the laws of this state, any element of which takes place in this state.
>
> ...
>
> (B) In homicide, ***the element referred to in division (A)(1) of this section is either the act that causes death, or the physical contact that causes death, or the death itself. If any part of the body of a homicide victim is found in this state, the death is presumed to have occurred within this state***. *Id.*
>
> ...
>
> (D) When an offense is committed under the laws of this state, and it appears beyond a reasonable doubt that the offense or any element of the offense took place either in this state or in another jurisdiction or jurisdictions, but it cannot reasonably be determined in which it took place, the offense or element is conclusively presumed to have taken place in this state for purposes of this section.
>
> R.C. § 2901.11 (1974).

Thus, as this Court affirmed in *Yarbrough*, at the time of the offense in this case, the language of the statute was clear that unless one of the specific elements of the homicide occurred in the state, there could be no jurisdiction in the State of Ohio. The statute further delineated that the death is presumed to have occurred in Ohio if any part of the victim's body is found within the borders of Ohio. R.C. § 2901.11(B). Here, the victim's body was found at least four miles into Indiana, so that presumption is not applicable in this case. In fact, the opposite presumption should apply – because the body was discovered in Indiana, it should be presumed that the homicide occurred there.

Because the presumption does not apply in this case, it must be determined whether any "element" of the homicide (either 1) the act or physical contact that caused death, or 2) the actual death itself) was, or could reasonably be, proven to have occurred in Ohio. Here, the State did not prove at trial that Amber Garrett was either killed, or died, in Ohio. In fact, the State's arguments at trial and again on appeal were that the victim was killed in Indiana. This Court, relying upon the State's witnesses' testimony as well as the prosecutor's declarations at trial, concluded the same on direct appeal. *See State v. Wogenstahl*, 75 Ohio St.3d 344 *1-*14 (1996)

The State also cannot prove beyond a reasonable doubt (or by any standard) that either element occurred in Ohio. The timeline provided by the State's witnesses at trial make it impossible for the victim to have been killed and/or to have died anywhere but in the state of Indiana.

Ohio Revised Code § 2901.11(D) does provide an exception; jurisdiction may lie where it cannot be reasonably determined in which jurisdiction (i.e. which state) the offense occurred. However, as will be laid out in the following sections of this motion, the only reasonable conclusion based on the facts in this case is that the victim's death occurred in Indiana. And "if it can reasonably be determined in which jurisdiction an offense took place, and that jurisdiction is not Ohio, then the crime is properly prosecuted in that other jurisdiction." *State v. Rydbom*, 1998 Ohio App. LEXIS 1652, at *10 (Ohio Ct. App. 4th Dist. 1998).[1]

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[1] Following this Court's decision in *Yarbrough*, the General Assembly amended R.C. § 2901.11 to grant jurisdiction to the State of Ohio over homicides that occurred outside of Ohio if the "course of conduct" began in Ohio. However, the statute was only amended *prospectively* in 2005. *See Yarbrough*, 104 Ohio St.3d at 10. *See* R.C. 2901.11(B) (eff. 7-13-05) ("The General Assembly hereby declares that it intends by the amendments made by Sections 1 and 2 of this act to prospectively overrule the decision of the Ohio Supreme Court in *State v. Yarbrough*...").

3. This Court previously determined that the victim was killed in Indiana.

This Court previously determined the relevant facts at issue. *See State v. Wogenstahl*, 75 Ohio St.3d 344 *1-*14 (1996). Of particular importance, in that opinion, this Court found 1) Wogenstahl was seen driving down State Street in the direction of Bright, Indiana with the victim in his car, 2) that within the span of minutes, several eyewitnesses placed Wogenstahl and his car in Indiana at the time that the homicide was alleged to have occurred, and 3) that the victim's body was undeniably found in a wooded ravine next to where Wogenstahl was allegedly seen, in Dearborn County, Indiana. *Id.*

Further, in that same decision, when reviewing the evidence specific to the aggravating circumstance of kidnapping, this Court specifically found:

> Appellant physically restrained Amber and bound her arms in the clothing she was wearing. A knife was held to Amber's neck. ***She was transported in appellant's vehicle across the Ohio-Indiana border.***
>
> See *Wogenstahl*, 75 Ohio St.3d at *55. (Emphasis added).

Obviously, in order for the transportation of the victim across the Ohio-Indiana border to have been part and parcel of the offense of kidnapping, the victim would have necessarily had to have been alive during the time of transport.

Thus, the law of the case, as this Court previously decided, is that victim was killed and resultantly died in Indiana.

4. The State's theory was that the victim was killed in Indiana.

The State's theory at trial was consistent this Court's factual determination that the victim's death occurred in Indiana. The State proved that the timeframe between when the victim was last seen alive (in Indiana) and when multiple witnesses say they saw Wogenstahl (in Indiana) near where the body was found is too small of a window for the death to have occurred

in Ohio. As Prosecutor Deters detailed in closing argument at the mitigation phase, the State proved "a very tight timeframe." Tr. vol. 19, 2838, March 2, 1993.

5. The State argued to the jury that the victim was killed in Indiana.

The State never contested the fact that the death occurred in Indiana. In closing arguments, defense counsel questioned the State's case and asked why the defendant would "take her to a place in Indiana and snuff out her life and get rid of the body." Tr. vol. 17, 2538. The prosecutor's response was telling. Instead of challenging this statement, the prosecutor, in closing arguments, agreed with it and told the jury, "as [the victim] lay on that hillside [where the body was found in Indiana] and that tiny little heart beat its last beat and those little lungs drew that last breath . . . All [the victim] had were the limbs of that juniper tree and the branches of that blackberry bush. . . ." Tr. vol. 19, 2802, March 3, 1993.

6. The State on direct appeal to this Court continued to endorse the fact that the death occurred in Indiana.

On direct appeal to this Court, Wogenstahl asserted that the above argument was improper. The State responded, "There is nothing improper in the prosecutor's language. It is a mere straight forward recitation of ***the facts***." See Appellee's Brief at p. 48 (emphasis added).

7. The facts of this case demonstrate that the victim was not killed, nor died, in the State of Ohio.

The facts here are identical to the facts in Yarbrough – the victim was both killed and died outside of the state of Ohio. It is important to note initially that State Street is the dividing line between Harrison, Ohio and West Harrison, Indiana. The western half of the street is in

Indiana and the eastern half of the street is in Ohio, with the state line passing down the middle of the road. Tr. vol. 13, 1790, Feb. 12, 1993; *see also* Attached Exhibits 1-4.[2]

a. At 3:15 a.m. the victim was seen alive in a vehicle traveling south in the direction of Jamison road

Vickie Mozena, an employee of the United Dairy Farmers (UDF) store located on State Street in Harrison, Ohio, testified that at 3:15 a.m. she saw a vehicle, later identified as Wogenstahl's, driving south down State Street ***on the Indiana side of the street***. She saw a silhouette of a man driving and of a young girl in the front seat who was "getting up and stretching and then laying back on the vehicle door asleep." Tr. vol. 11, 1445, Feb. 16, 1993. According to the State, this young girl was the victim, Amber Garrett. State Street continues south along the Ohio-Indiana border for a short stretch before it veers west further into Indiana and becomes Jamison Road. Jamison Road is a winding and hilly two-lane road that travels along Jamison Creek. At no point does State Street, at this point, or Jamison Road, at any point, veer into Ohio. *See* Exhibits 2, 4.

b. At 3:20 a.m., the same vehicle with only a single occupant was seen proceeding in northerly direction on Jamison Road

At approximately the same time that Ms. Mozena saw this brown car with two silhouettes, Harold Borgman awoke at his residence at 1755[3] Jamison Road, Bright, Indiana. Tr. vol. 13, 1645, Feb. 18, 1993. After going to the bathroom and returning to bed for about five

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[2] Exhibit 1 shows the state line running down the middle of State Street, separating Harrison, Ohio and West Harrison, Indiana; Exhibit 2 shows an aerial view of State Street as it turns further into Indiana as it becomes Jamison Road; Exhibit 3 shows a close-up aerial view of the property owned by Harold Borgman on Jamison Road; Exhibit 4 shows an aerial view of the area; the yellow highlighted property is Harold Borgman's property, in Indiana.

[3] The transcript cites 1755 Jamison Road as Mr. Borgman's address, but from the description and property records the address appears to be 1772 Jamison Road. 1755 Jamison Road does not exist, at least at this current time.

minutes, he saw a vehicle driving slowly from the direction of Bright, Indiana towards Harrison, Ohio. The same vehicle then parked in front of his house along Jamison Road. Based upon his testimony that he woke at exactly 3:13a.m., this vehicle appeared in front of his house around 3:20 a.m. Since the vehicle was seen coming from the direction of Bright, Indiana, and not Harrison, Ohio, it necessarily follows that the driver had to have driven west beyond Mr. Borgman's house and then turned around and driven back east in the other direction. It was the State's theory at trial that Wogenstahl traveled approximately four miles from State Street, West Harrison, Indiana to past Mr. Borgman's home on Jamison Road, and then back in the direction of Harrison, Ohio, all in the span of about five minutes. Given this short time span, it logically follows that all travel during this time occurred entirely in Indiana, not Ohio. After Mr. Borgman observed the car remain parked with its lights off for about three to four minutes, he went back to bed.

c. At 3:40 a.m., the same vehicle with a single occupant, remained in the same location

No more than about fifteen minutes later, at approximately 3:40 a.m., three other witnesses – Brian Noel, Frederick Harms, and Kathy Roth – all testified they saw a vehicle and a man later identified as Wogenstahl parked in the same location and facing in the same direction as Mr. Borgman testified. Tr. vol. 12, 1511-17, 1548-52, 1556-63, Feb.17, 1993. All three State's witnesses testified that the man appeared to be alone.

Mr. Noel testified that when he drove by, he saw the man looking inside the trunk of the vehicle, apparently retrieving something from the trunk. *Id.* at 1515; *Wogenstahl*, 75 Ohio St.3d at *5. The State's theory of the case, as this Court noted in its decision on direct appeal, was that that Wogenstahl beat the victim with a scissors jack handle. A scissor jack was recovered, missing the handle, from the trunk of the vehicle. *Wogenstahl*, 75 Ohio St.3d at *10-11. This

sighting necessarily implies that when Mr. Noel saw this man retrieving something (the jack handle) from his truck, the victim was still alive.

d. At 3:45 a.m., the same vehicle with a single occupant, was seen at the car wash across the street from the UDF in West Harrison, Ohio.

Ms. Mozena testified that she then saw the same vehicle again between 3:45 a.m. and 4 a.m. at the car wash across the street from the UDF in West Harrison, Indiana. After a few minutes, the same car then proceeded to the UDF where she worked. Tr. vol. 11, 1147. She identified the man who exited the vehicle and entered the store as Wogenstahl.

e. The State's tight timeframe offers but one conclusion – Amber Garrett was killed, and died, in Indiana.

According to the State's theory of the case and the testimony of the State's witnesses at trial, the victim was allegedly killed in the front passenger seat of Wogenstahl's vehicle. The only possible time this could have occurred and fit within the established facts is when the vehicle was parked along Jamison Road, in Indiana, between the time Mr. Borgman went back to bed (approximately 3:25 a.m.) and the time Wogenstahl was identified, alone, on the side of Jamison Road by not one, not two, but three different State's witnesses at around 3:40a.m.[4]

Indeed, it is impossible for the homicide to have occurred in Ohio given the twenty minute time span between when Mr. Borgman saw the vehicle and Noel, Harms, and Roth saw the same vehicle. For the victim to have been killed in Ohio, the offender would have had to 1) driven four miles back into Ohio (into a much more populated and well-lit residential and business area) without being seen by Ms. Mozena or anyone else, 2) bludgeoned and stabbed the

[4] The State could argue that the victim was killed in the car between when Ms. Mozena saw Wogenstahl and the victim (alive) driving south on State Street and when the car was then spotted again by Mr. Borgman approximately five minutes later. However, this argument, even if true, bears no consequence to the argument at issue since all of the travel after Ms. Mozena saw Wogenstahl with the victim would have had to have been in Indiana.

victim, 3) returned to the same vicinity on Jamison Road where the vehicle had been seen parked, 4) turned the vehicle around and parked again in the exact same manner facing the same exact direction, 5) removed the body from the car, 6) carried the body through the blackberry brambles and down into the ravine, 7) placed the body under the Juniper tree where the victim was later discovered, and 8) returned to the side of the road where he was seen by oncoming traffic all in that fifteen minute window. This scenario is implausible. The greater weight of the evidence proves that the victim was killed either in the car or on the side of the road, in Indiana, and it would be unreasonable to conclude otherwise based on the timeline in this case. As the State stressed, it had proved "a very tight timeframe." Tr. vol. 19, 2838, March 2, 1993.

8. Venue and jurisdiction are distinct, yet are often confused, as they were here.

Venue and jurisdiction are often confused. As this Court found in *Yarbrough*, the prosecutor and trial judge mistakenly relied on Ohio's venue statute, R.C. § 2901.12, and used Yarbrough's "course of criminal conduct" as the basis for the State of Ohio's jurisdiction over the homicide in that case. That was error. *See Id.* The exact same error occurred here.

All parties – defense counsel, the prosecution, and the trial court – confused the concepts of venue and subject jurisdiction. Defense counsel only moved for an acquittal based on lack of "venue," arguing the offense did not occur in Ohio, but Indiana. Tr. vol. 16, 2198, Feb. 23, 1993. The State similarly confused the two concepts when it argued that the law of venue "is clear that if any part of any one of these crimes begins in Hamilton County, and the series of crimes is, of course, a conduct as we have here, venue appropriately lies in Hamilton County." *Id.* at 2199. The trial court, in denying trial counsel's Rule 29 motion concerning the "venue statute", found that "Hamilton County is clearly the place where this case could be prosecuted." Tr. vol. 15, 2200, Feb. 22, 1993. The State then claimed in closing argument that any argument

by the defense that says that "venue" did not lie in Hamilton County was misleading and incorrect. Tr. vol. 17, 2425-26.

The trial court instructed the jury that "when an offender commits more than one offense in different jurisdictions as part of a course of criminal conduct the jury may find that the venue for all of the offenses occurred in any one county where one of the offenses or any element of one of the offenses occurred." Tr. vol. 17, 2611, Feb. 24, 1993. The court further instructed the jury that a "course of criminal conduct" for purposes of the venue statute, includes offenses involving the same victim, offenses committed as part of a chain of events, or offenses committed along the same line of travel regardless of point of origin or destination. *Id.* at 2612; *see also* R.C. 2901.12.

It is clear that the issue of "venue" raised at trial should have been the issue of jurisdiction. Venue was never actually an issue in this case. Jurisdiction, on the other hand, specifically addresses which state has authority over the criminal charges. And here, at the time of the offense, and as the jurisdiction statute was written in 1991, Indiana, not Ohio, had jurisdiction over this homicide.[5]

III. The Ohio and United States Constitution demand that an individual be prosecuted in the state where the offense was committed.

Both the United States and the Ohio Constitutions require that the state prosecute an individual in the jurisdiction in which the offense was committed. Subjecting Wogenstahl to a trial in the State of Ohio, when the state lacked jurisdiction denied Wogenstahl his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

[5] Any argument that Ohio has concurrent jurisdiction with Indiana over State Street is unfounded. Ohio only has concurrent jurisdiction over issues that occur on the Ohio River. In *City of Cincinnati v. Dryden*, the court held that the Ohio statute granting concurrent jurisdiction only pertained to incidents "on" the river's waters, and not to disputes concerning the lands below or fixtures spanning across the river. 91 Ohio Misc. 2d 235, 238 (1998).

Constitution and Article I, Section 10 of the Ohio Constitution. Indeed, the United States Constitution twice protects this right of criminal defendants. Article III, § 2, cl. 3, instructs that "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." In addition, the Sixth Amendment guarantees an individual "an impartial jury of the State and district wherein the crime shall have been committed." *Id.*; see also *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013) ("Because jurisdiction over Magnan's crimes rests exclusively with the United States, rather than the State of Oklahoma, Magnan is 'in custody in violation of the ... laws ... of the United States.'").

Further, in a state-court capital prosecution, the state must adhere to its own rules in a fair manner in order to comport with the edicts of the Fourteenth Amendment to the United States Constitution. *See also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause.") The State violated Wogenstahl's right to due process of law when it subjected him to a trial on the homicide offense when it lacked jurisdiction over that offense.

IV. Conclusion.

The State failed to prove beyond a reasonable doubt that jurisdiction was properly lodged in Ohio. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *see also State v. Hubbard*, 2001-Ohio-4193 (Ohio Ct. App. 12th Dist. 2001) (A court must dismiss a case for lack of jurisdiction unless "reasonable minds could reach different conclusions as to whether jurisdiction over the offense has been proven beyond a reasonable doubt."). Reasonable minds could not differ as to the jurisdictional issue; the facts point to only one conclusion – this homicide occurred in Indiana.

Wogenstahl moves this Court to vacate his pending execution date of November 16, 2016. He further moves this Court to order his direct appeal be re-opened to either address the jurisdictional issue, or, in the alternative, to remand this case for an evidentiary hearing on the jurisdictional issue.

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **JEFFREY WOGENSTAHL'S MOTION TO VACATE HIS EXECUTION DATE AND TO RE-OPEN HIS APPEAL** was posted in the United States mail addressed to Philip Cummings (0041497), Hamilton County Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on this 9th day of October, 2015.

By: /s/ Kimberly S. Rigby
Kimberly S. Rigby (0078245)
Counsel for Defendant

Dearborn County, IN

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Overview

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- Incorporated Areas

Political Townships

- CAESER CREEK
- CENTER
- CLAY
- HARRISON
- HOGAN
- JACKSON
- KELSO
- LAWRENCEBURG
- LOGAN
- MANCHESTER
- MILLER
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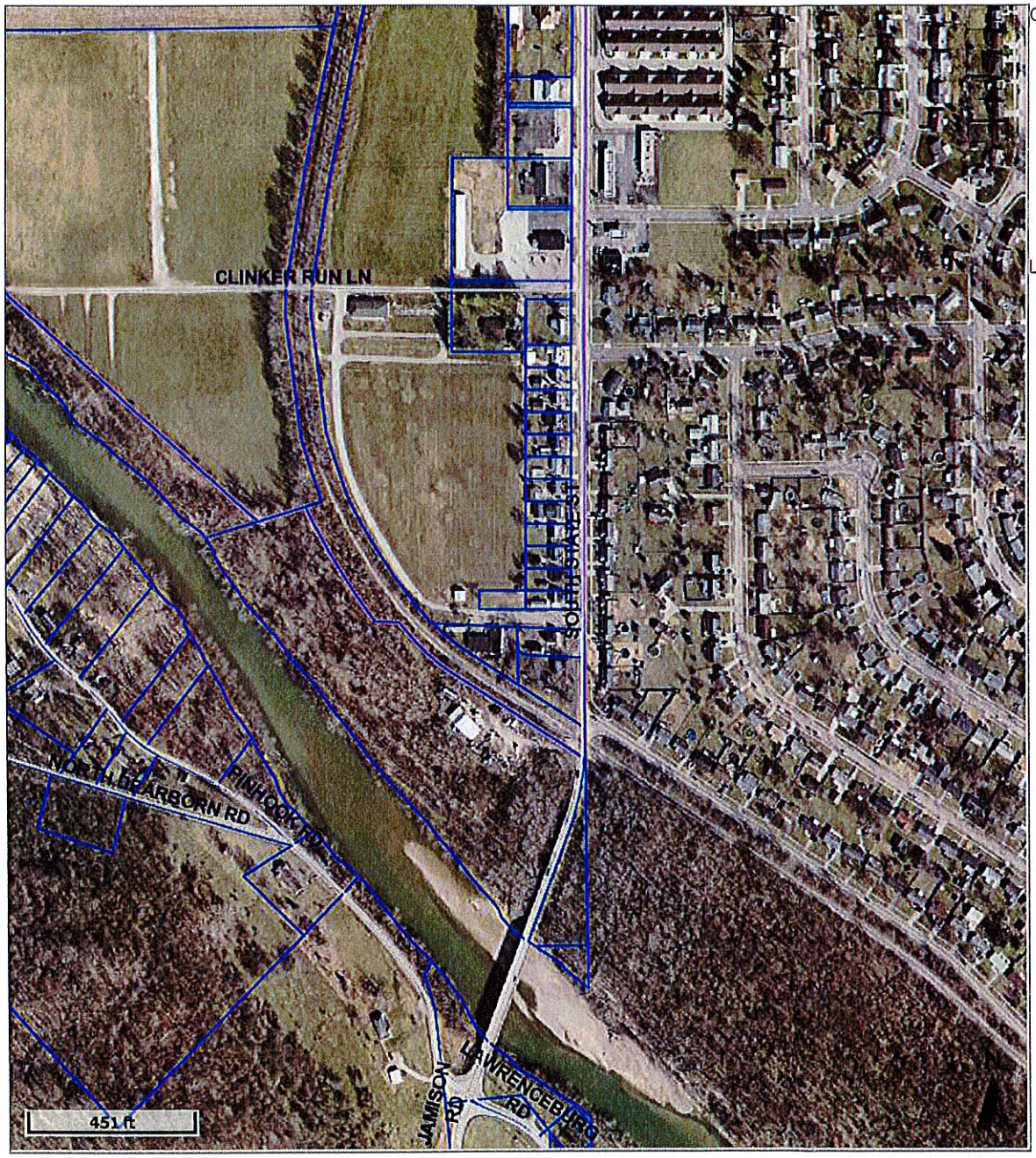

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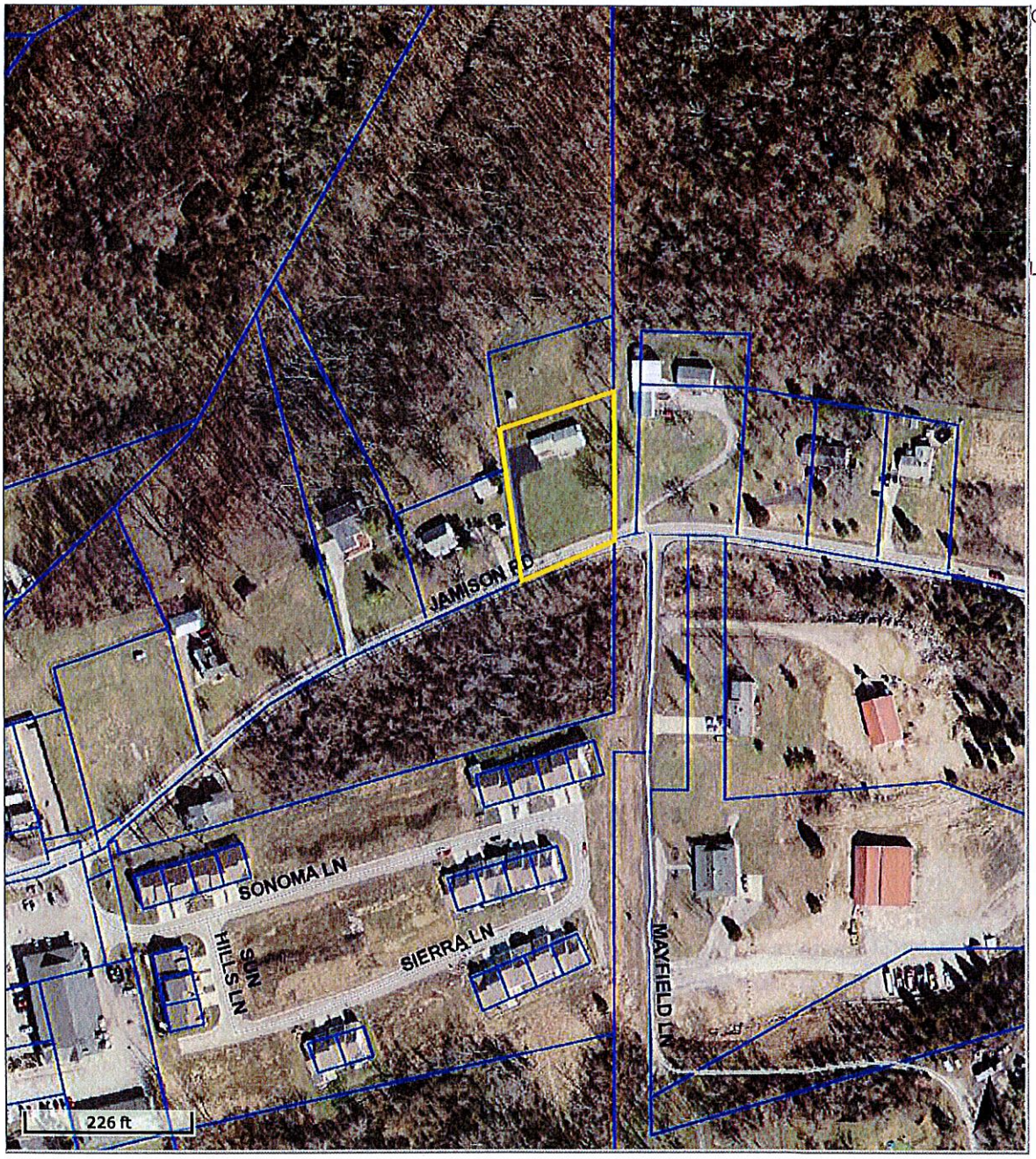

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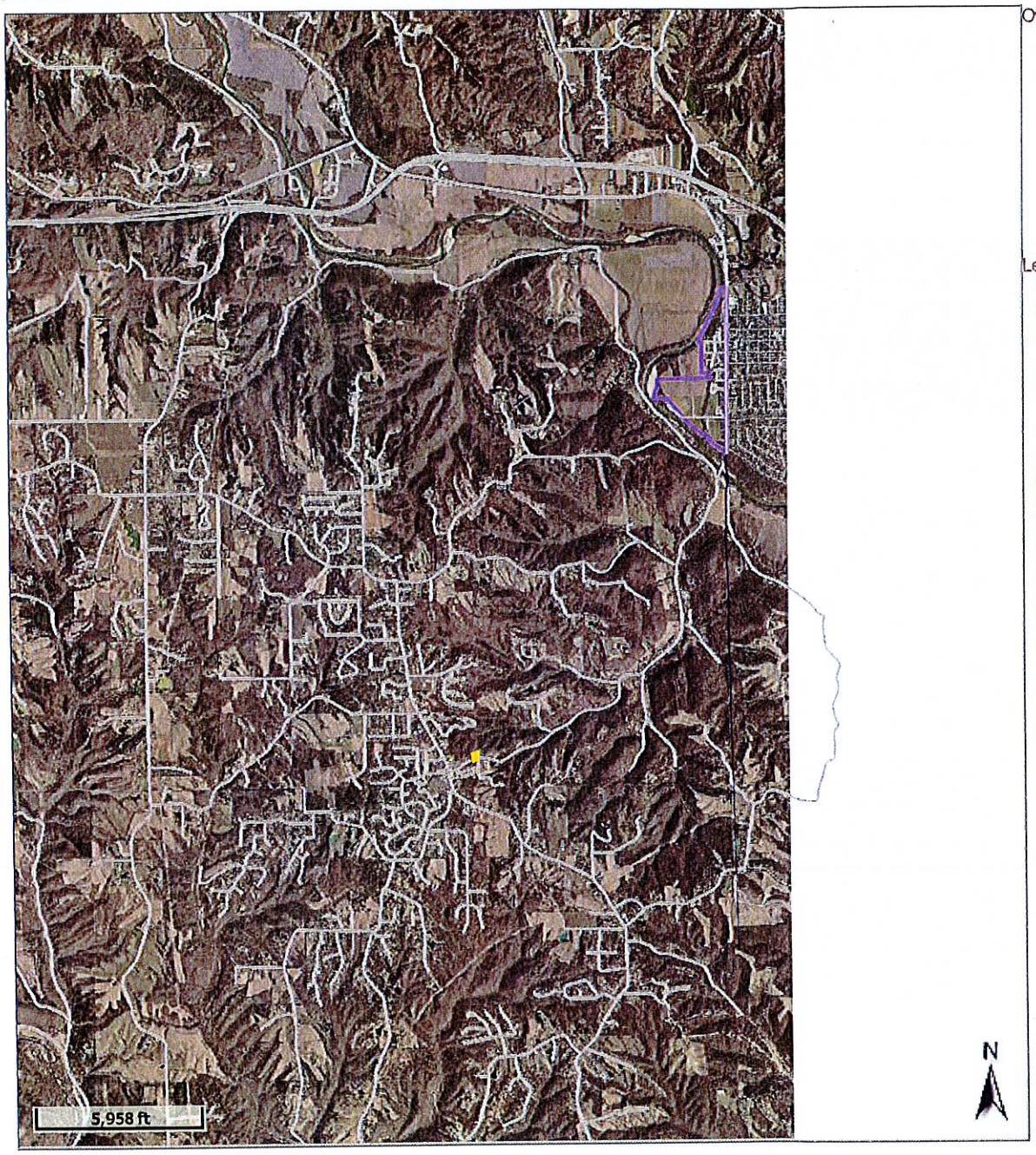

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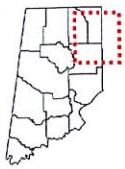

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