

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO EX REL.

LEWIS LEROY MCINTYRE, JR. )

Relator )

v. )

SUMMIT COUNTY COURT OF )  
COMMON PLEAS, et. al. )

Respondents )

CASE No. 2015-0080

ORIGINAL ACTION IN PROHIBITION,  
MANDAMUS, AND PROCEDENDO

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**RESPONDENTS' MEMORANDUM IN OPPOSITION TO RELATOR'S MOTION TO  
SHOW CAUSE**

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Attorney for Relator

Now come the Respondents specifically named in the motion to show cause, Summit County Court of Common Pleas, and Judge Thomas Teodosio, through undersigned counsel, and respectfully requests this Court deny Relator's motion to show cause. Relator acknowledges that a journal entry was issued on February 3, 2016. This journal entry has appealed to the ninth district. A memorandum in opposition is attached that further details the inappropriateness of Relator's latest motion.

Respectfully submitted,

**SHERRI BEVAN WALSH**  
Prosecuting Attorney

/s/ Colleen Sims

Colleen Sims

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Attorney for Respondents

## MEMORANDUM IN OPPOSITION

### I. STATEMENT OF FACTS

Included in Relator's motion to show cause appendix is a six page journal entry by Respondent Judge Teodosio in response to the writ issued by this Court on December 23, 2015. The writ directed "the county to issue a final, appealable order disposing of all the charges against McIntyre." (at ¶ 11). In response to this order, a journal entry was filed on February 3, 2016. Also included in the appendix is a journal entry from the Ninth District Court of Appeals, filed March 17, 2016, provisionally determining that the February 3<sup>rd</sup> order is final judgment of conviction, bearing in mind the arguments raised by the Relator.

Attached hereto as Respondents' exhibit A is a copy<sup>1</sup> of a certified copy of an application for disposition of exhibits admitted during Relator's 1991 criminal trial, filed on July 27, 2010. Attached hereto as Respondents' exhibit B is a copy<sup>1</sup> of a certified copy of the affidavit of destruction of evidence signed by the Summit County Clerk of Court's Evidence Officer and filed on September 17, 2010. The passage of time between the trial and order for destruction had been no less than eighteen years. The Clerk of Courts Evidence Officer incorrectly stated there was no pending appeal at the time, however, Relator's pending appeal was subsequently denied thirteen days later on September 30, 2010. *State v. McIntyre*, 9th Dist. Summit No. 25292, 2010-Ohio-4658. In the September 30<sup>th</sup> decision, the Ninth District Court of Appeals acknowledged that the trial court, in September of 1991, stated "the eight year minimum shall be a period of actual incarceration" for the felonious assault conviction as contained in count one. *Id.* citing

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<sup>1</sup> This Response was filed through the Ohio Supreme Court E-Filing Portal and counsel possesses the actual certified copies.

*State v. McIntyre*, 9th Dist. Summit No. 15348, 1992 WL 125251 (May 27, 1992) *cause dismissed*, 66 Ohio St.3d 1478, 612 N.E.2d 329 (1993) and *aff'd*, 67 Ohio St.3d 1509, 622 N.E.2d 656 (1993). The appellate court also noted this was stated at his sentencing hearing and affirmed on appeal. *Id.*

## II. LAW AND ARGUMENT

### A. Relator Fails To Show How Respondents Are in Contempt.

The Relator claims the actions of Respondent Teodosio amount to contemptuous actions under R.C. 2705.02(A) because, in the opinion of the Relator, he disobeyed this Court's Order, dated December 23, 2015. This court previously discussed the meaning and reason behind holding a party in contempt.

“contempt of court” as “disobedience of an order of a court. It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.” *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 56 O.O.2d 31, 271 N.E.2d 815, paragraph one of the syllabus, followed in *South Euclid Fraternal Order of Police, Lodge 80 v. D'Amico* (1987), 29 Ohio St.3d 50, 29 OBR 398, 505 N.E.2d 268.

*Denovchek v. Bd. of Trumbull Cty. Commrs.*, 36 Ohio St.3d 14, 15-16, 520 N.E.2d 1362, 1363-64 (1988). A party has been found guilty of contempt under R.C. 2705.02(A) for refusing to grant police officers' requests for vacation leave *credits State ex rel. Adkins v. Sobb*, 39 Ohio St.3d 34, 35, 528 N.E.2d 1247, 1248 (1988). Finding of contempt under this section has been found for advising another not to follow a court order. *In re Hards*, 11th Dist. No. 2006-L-158, 175 Ohio App.3d 168, 181, 2008-Ohio-630, 885 N.E.2d 980, 990, ¶ 55. Contempt has also been found for failing to transfer ownership titles pursuant to a consent decree. *Pugh v. Pugh*, 15 Ohio St.3d 136, 137, 472 N.E.2d 1085, 1086 (1984).

Civil contempt sanctions are designed for remedial or coercive purposes and are often employed to compel obedience to a court order. *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 555, 2001-Ohio-15, 740 N.E.2d 265, 269 (2001), citing *Shillitani v. United States* (1966), 384 U.S. 364, 370. Criminal contempt sanctions are punitive in nature and are designed to vindicate the authority of the court. *Id.* citing *Denovchek v. Trumbull Cty. Bd. of Commrs.*, 36 Ohio St.3d at 15, 520 N.E.2d at 1363. A contempt action with the purpose to compel a party to follow a court order is generally considered civil. *Id.* at 555. In *State ex rel. Ventrone v. Birkel*, 65 Ohio St.2d 10, 417 N.E.2d 1249 (1981), an action for contempt was filed in the Ninth District Court of Appeals against certain Summit County officials for failing to abide with previous court orders. The appellate court refused to find the officials in contempt. *Id.* The Court found that the actions of the officials satisfied the court orders. *Id.* The Ohio Supreme Court went on to state they were not suggesting the actions, which amounted to calculating sums, were correct, but the matter of whether the sums calculated were correct was not presently before them. *Id.* The February 3<sup>rd</sup> journal entry was issued in order to comply with this Court's instructions. As further argued below in section B, any errors in the February 3<sup>rd</sup> entry should be addressed through the court of appeals. An error, if any, does not equate to contempt.

Court orders are not without limits. A party cannot be ordered to give specific performance beyond its power to deliver. *Chef Italiano Corp. v. Kent State University et al.*, 44 Ohio St.3d 86 (July 12, 1989). Judges must apply the law as they are written and cannot go outside the statutory scheme. *State v. Anderson*, 143 Ohio St.3d 173, 175, 2015-Ohio-2089, 35 N.E.3d 512, 514-15, ¶ 10 (2015), citing *State v. Fischer*, 128 Ohio

St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 22, citing Griffin & Katz, *Ohio Felony Sentencing Law*, Section 1:3, at 4, fn. 1 (2008), and *Woods v. Telb*, 89 Ohio St.3d 504, 507–509, 733 N.E.2d 1103 (2000). The writ at issue was granted because the case lacked one document that disposed of all the charges contrary to the Baker Rule. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 17. In response to this decision Respondent Teodosio issued a journal entry that encompassed all the charges, supplements, convictions, sentences and dismissals pertaining to criminal case No. 1991-01-0135.

Relator is incorrect that the case reverted back to a pre trial mode with the granting of the writ. Mr. McIntyre went to trial in 1991. His two convictions were affirmed in *State v. McIntyre*, 9th Dist. No. 15348, 1992 WL 125251 (May. 27, 1992) *cause dismissed*, 66 Ohio St. 3d 1478, 612 N.E.2d 329 (1993) and *aff'd*, 67 Ohio St. 3d 1509, 622 N.E.2d 656 (1993). On May 21, 1992, Mr. McIntyre pled guilty to aggravated assault and received a one and a half year prison sentence which he never directly appealed. When Relator appealed in 2010, *State v. McIntyre*, 9th Dist. Summit No. 25292, *supra*, requesting a new sentence, his plea and sentence to the amended charge of aggravated assault as contained in count one of supplement six is not mentioned in the decision. The only charge that could arguably have been a pre trial charge was the felonious assault charge in which the trial court, with approval from the prosecutor's office, thought had been permanently disposed of in 2012. In February of 2016 another journal entry was issued in response to the granting of the writ that dismissed the felonious assault count as amended.

**B. Sentencing Errors Are To Be Addressed Through the Appellate Process.**

Relator admits, through the inclusion of February 3<sup>rd</sup> and March 17<sup>th</sup> journal entries, that there is an appeal of the February 3<sup>rd</sup> order and that appeal has not reached a conclusion. The alleged errors that Relator addresses in his motion to show cause should be addressed in the pending appeal. Once an appeal is taken, the trial court is divested of jurisdiction over the matter that has been appealed. *State ex rel. State Fire Marshal v. Curl, Judge, et al.* 87 Ohio St.3d 568, citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 9 O.O.3d 88, 90, 378 N.E.2d 162, 165; *Haller v. Borrer* (1995), 107 Ohio App.3d 432, 436, 669 N.E.2d 17, 19.

In *Berthelot v. Dezso*, 1999-Ohio-100, 86 Ohio St. 3d 257, 259, 714 N.E.2d 888, 890, a mandamus action was brought against Summit County Domestic Relations Judge Dezso claiming she failed to follow the mandate of the Court of Appeals. This Court found that the any errors committed by Judge Dezso will be remediable on appeal. *Id.* citing *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 109, 637 N.E.2d 319, 324. Just as a statute can be subject to more than one interpretation, a decision based on convoluted facts such as those presented in this case can be interpreted differently. In *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 392, 122 S.Ct. 1516, 1518, 152 L.Ed.2d 589 (2002), the U.S. Supreme Court noted that a statute can be interpreted in different ways. In our case, Relator has blindly assumed Respondents' journal entry must be a contemptuous act because it does not coincide with his wishes in this matter. Instead of waiting for a decision from the court of appeals, Relator attempts to usurp the established process and filed a contempt action before this Court.

In the order granting the writ the Court points out, at paragraph 6, an error in Respondent Teodosio's prior journal entry where he dismissed the felonious assault charge as indicted. Respondent Teodosio's journal entry did not reflect the fact that the charge had subsequently been amended. On page 5 of the February 3<sup>rd</sup> journal entry Respondent Teodosio acknowledged that his June 28, 2012, order did not correctly note the amendment that had been made to the charge. Obviously the court was trying to dispose of the count as it existed after the amendment. To believe the court was only addressing the original indicted count while ignoring its amended form would be an exercise in futility. Correcting this prior mistake in the February 3<sup>rd</sup> journal entry is acceptable and permissible. "[N]unc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide." *Ferraro v. B.F. Goodrich Co.*, 9th Dist. No. 01CA007887, 149 Ohio App.3d 301, 306, 2002-Ohio-4398, 777 N.E.2d 282, 286, ¶ 9, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164, 656 N.E.2d 1288. Clerical mistakes may be corrected at any time. *State v. McIntyre*, 9th Dist. Summit No. 25292, 2010-Ohio-4658, ¶ 7, citing Crim. R. 36.

**C. Destruction of Evidence is Not Relevant to this Matter and Is a Desperate attempt to show bias**

Relator's counsel suggests the exhibits ordered destroyed in 2010 were done purposely despite the fact there was a pending appeal. However the documents attached to this memorandum show that the clerk's office mistakenly represented that there was no appeal pending. Courts have not penalized parties that have inadvertently destroyed evidence within twenty-four hours let alone after eighteen years. *State v. Geeslin*, 116

Ohio St.3d 252, 254, 2007-Ohio-5239, 878 N.E.2d 1, 3, ¶ 8 (2007). Additionally whether or not the evidence was prematurely destroyed is not directly related as to the purpose of the writ of mandamus, which was to issue one document that disposed of all indicted and amended matters.

Additionally, Relator's counsel, in his affidavit that is part of the motion to show cause appendix, describes his feelings and tries to reflect negatively on the Respondents by noting who did not notarize his affidavit. Respondents respectfully request the affidavit be stricken, or in the alternative, portions of the affidavit be stricken as the statements about his feelings, and how many people counsel asked to notarize his affidavit is an attempt to suggest incorrect conduct without any substantial proof.

### III. CONCLUSION

WHEREFORE, it is respectfully requested, for the above-stated reasons, that the Ohio Supreme Court dismiss Relator's motion to show cause.

Respectfully submitted,  
**SHERRI BEVAN WALSH**  
Prosecuting Attorney  
*/s/ Colleen Sims*  
Colleen Sims  
Reg. No. 0069790  
Assistant Prosecuting Attorney  
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Attorney for Respondents

**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was sent via electronic mail to: Stephen Hanudel, Attorney for Relator, 124 Middle Ave., Suite 900, Elyria, Ohio 44035, this Monday, May 16, 2016.

*/s Colleen Sims*

**COLLEEN SIMS (0069790)**

Assistant Prosecuting Attorney

Attorney for Respondents

COPY

DANIEL M. HERRIGAN

2010 JUL 27 PM 3:59

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

SUMMIT COUNTY  
CLERK OF COURTS  
State of Ohio

CR 91-01-0135

Case No. \_\_\_\_\_

250

Vs.

CA #15348

LEROY McINTYRE

**APPLICATION FOR DISPOSITION OF EXHIBITS**

The above case has met the requirements for destruction of exhibits, depositions, or transcripts. The Summit County Clerk of Courts, Evidence Division, makes application to dispose of the property listed on the attached Exhibit List pursuant to our policy and procedure. The exhibits will be sold at auction if of any value; otherwise, destroyed by fire, rendered inoperable, thrown in the trash, shredded, or if the exhibit is a firearm or contraband, to be destroyed by the Summit County Sheriff's Dept.

Pursuant to section 26(F) of the Rules of Superintendence notification to retrieve the items(s) was made more than sixty days ago by publication or otherwise to the party who submitted the exhibit(s), the notification specified the item(s) would be destroyed if not retrieved, specified the location of the item(s) for retrieval, and the party so notified has not retrieved the item(s).

The Clerk of Courts represents that the direct Ohio appeal process has been completed and that no Ohio appeal is currently pending. The Ohio Dept. of Corrections records reflect defendant has been released or has served the sentence.

Date 7/26/10  
M. Randles  
Mary Randles, Director of Evidence

Mary Ann Fowal  
Assistant Summit County Prosecutor

**ORDER**

Pursuant to Rule 26(F) of the Rules of Superintendence, it is hereby ordered that the property in the attached exhibit list be disposed of in the manner designated.

Date 7/27/10

[Signature]  
Judge, Court of Common Pleas



I certify this to be a true copy of the original  
Sandra Kurt, Clerk of Courts.  
[Signature]  
Deputy Clerk

IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

MAY 11 1992

Term 19

92

THE STATE OF OHIO

vs.

CLK.

No.

CR 91 01 0135

JOURNAL ENTRY

LEROY L. MCINTYRE

aka LeROY TYSON

PAGE ONE OF TWO

1513 494

THIS DAY, to-wit: The 21st day of May, A.D., 1992, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, LeROY L. MCINTYRE aka LeROY TYSON, being in Court with counsel, THOMAS CIOCOLINI, and said Defendant was fully advised of his Constitutional rights and his rights as required under Rule 11 of the Ohio Rules of Criminal Procedure.

Upon Motion of the Prosecuting Attorney on behalf of the State of Ohio, the Court hereby amends One (1) Count of the Supplement Six to Indictment to the lesser and included offense of AGGRAVATED ASSAULT..

Thereupon, said Defendant retracts his plea of Not Guilty heretofore entered, and for plea to said Indictment, says he is GUILTY of the crime of AGGRAVATED ASSAULT, as contained in the amended Count Six (6) of the Indictment, which plea, voluntarily made and with a full understanding of the consequences, was accepted by the Court. IT IS FURTHER ORDERED that the charge of FAILURE TO APPEAR, as contained in Count One (1) of the Supplement Three to Indictment, the charge of FELONIOUS ASSAULT, as contained in Count One (1) of the Supplement Four to Indictment, with SPECIFICATION ONE TO COUNT ONE OF SUPPLEMENT FOUR, and the charge of HAVING WEAPON WHILE UNDER DISABILITY, as contained in Count Two (2) of the Supplement Four to Indictment, with SPECIFICATION ONE TO COUNT TWO OF SUPPLEMENT FOUR, the SPECIFICATION ONE TO COUNT ONE OF SUPPLEMENT FIVE, and the charge of FELONIOUS

*submitted*

Journal \_\_\_\_\_ Page \_\_\_\_\_  
 No. \_\_\_\_\_  
**COMMON PLEAS COURT**  
 COUNTY OF SUMMIT  
**JOURNAL ENTRY**  
 THE STATE OF OHIO  
 vs.  
 Entered \_\_\_\_\_  
 Hon. \_\_\_\_\_  
 Judge Presiding

1562 495

ASSAULT, as contained in Count Two (2) of the Supplement Six (6) to Indictment, with SPECIFICATION ONE TO COUNT TWO OF SUPPLEMENT FIVE, be DISMISSED.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THIS COURT that the Defendant, LEROY L. McINTYRE aka LEROY TYSON, be committed to the Lorain Correctional Institution at Grafton, Ohio, for a definite period of One and one half (1 1/2) Years for punishment of the crime of AGGRAVATED ASSAULT, Ohio Revised Code Section 2903.12, a felony of the fourth (4th) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio 44308.

IT IS FURTHER ORDERED, pursuant to the above sentence that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the sentence imposed in Count One (1) of the

COPY

IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

MAY

Term 19 92

THE STATE OF OHIO

No. CR 91 CI 0135

vs.

LeROY L. McINTYRE

JOURNAL ENTRY

aka LeROY TYSON

PAGE TWO OF TWO

1543 496

Supplement Six to Indictment be served CONCURRENTLY and not consecutively with the sentence imposed in Court One (1) of the Indictment and Court One (1) of the Supplement Two to Indictment.

IT IS FURTHER ORDERED that the Defendant be given credit for all time served locally while awaiting disposition of this case.

APPROVED:  
May 21, 1992  
ja

MARY F. SPICER, Judge  
Court of Common Pleas  
Summit County, Ohio

cc: Prosecutor Lynne Lambert  
Attorney Thomas Ciccolini  
Criminal Assignment  
Grand Jury  
Booking  
SIU  
Court Convey

COPY

STATE OF OHIO  
V.  
LEROY McINTYRE

CASE NO. 91-1-133  
CA NO. DIANA ZALESKI

# 15348

EXHIBITS  
Nov 22 10 57 AM '91

<u>STATE'S EXHIBITS:</u>	<u>CLERK OF COURTS</u>	<u>MARKED</u>	<u>ADMITTED</u>
* No. 1 (Jacket) - set to Pres. 11/20/92		38	189
No. 2 (Photos)		39	189
Nos. 3, 4, 5, 6 (Photos)		78	189
No. 7 (Photo)		154	189
No. 8 (Shotgun shells)		182	189
No. 9 (Photo)		183	189
No. 10 (Medical records)		218	218
No. 11 (Journal Entry)		360	360

15348

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RELEASED  
FROM PRISON



[No Menu inside the Offender Search.]

### Ohio Department of Rehabilitation and Correction Offender Search Results

[<< Search Page](#)

Results for: Last Name begins with MCINTYRE, First Name begins with LEROY, N

Photo *	Name	Number	DOB	Status
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**Your search returned no records.**

\* Generally, photos are not available for inmates released prior to 1998.

Any person, agency or entity, public or private, who reuses, publishes or communicates the information available f responsible for any claim or cause of action based upon or alleging an improper or inaccurate disclosure arising fr communication, including but not limited to actions for defamation and invasion of privacy.

Questions concerning the information contained in these documents should be sent via the U.S. Mail to the approp Office. Addresses are available at this link: [INSTITUTIONS](#).

DANIEL M. HERRIGAN

2010 SEP 17 PM 2:04

SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

STATE OF OHIO

CR 1991-01-0135  
CASE NO. \_\_\_\_\_ 251  
CA 15348

Plaintiff)

vs.

LEROY MCINTYRE

AFFIDAVIT OF EXHIBIT  
DESTRUCTION

(Defendant)

Now comes Jackie Ludle, Evidence Officer, for the Summit County Clerk of

Courts Office and affirms that the exhibits in the above case have been destroyed in accordance with the court order.

I hereby swear and affirm that the information set forth in this affidavit is true and accurate.

*Jackie Ludle*  
\_\_\_\_\_  
AFFIANT

Sworn to and subscribed before me this 17<sup>th</sup> day of Sept, 2009. 2010.

*[Signature]*  
\_\_\_\_\_  
Notary Public/Deputy Clerk

I certify this to be a true copy of the original  
Sandra Kurt, Clerk of Courts.

\_\_\_\_\_  
Deputy Clerk

