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Motion to Strike, or in the Alternative, Motion to Dismiss of the State of Ohio

Stephanie Tubbs Jones
Cuyahoga County Prosecutor

Marilyn B. Cassidy
Cuyahoga County Assistant Prosecutor

Patrick J. Murphy
Cuyahoga County Assistant Prosecutor

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12/28/95

CLERK OF COURTS
CUYAHOGA COUNTY
3 51 PM '95
FILED
CRIMINAL DIVISION

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO : CASE NO: CR64571
 :
Plaintiff, :
v. :
 : MOTION TO STRIKE, OR IN
 : THE ALTERNATIVE, MOTION
SAMUEL SHEPPARD, : TO DISMISS OF THE
 : STATE OF OHIO
Defendant. :

The State of Ohio by and through Counsel, Stephanie Tubbs Jones, Prosecuting Attorney for Cuyahoga County, and Assistant Prosecuting Attorneys, Marilyn Barkley Cassidy and Patrick J. Murphy, hereby move this Honorable Court to strike Sheppard's Petition for the reason that civil actions in Ohio are subject to the Ohio Civil Rules of Civil Procedure. Accordingly, Sheppard's Petition, filed under a criminal case number cannot satisfactorily invoke the jurisdiction of the Court. The grounds for this motion are set forth more fully in the brief attached hereto and expressly incorporated herein by reference.

Respectfully submitted,

STEPHANIE TUBBS JONES, Prosecuting
Attorney of Cuyahoga County, Ohio

Marilyn Barkley Cassidy
MARTLYN BARKLEY CASSIDY (0014647)
PATRICK J. MURPHY (0002401)
Assistant Prosecuting Attorneys
The Justice Center, Courts Tower
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(216) 443-7785
ATTORNEYS FOR THE STATE OF OHIO

overruled
2/28/96

BRIEF IN SUPPORT OF STATE'S MOTION TO STRIKE

INTRODUCTION

Alan J. Davis, Special Administrator of the Estate of Samuel Sheppard, through counsel, has requested the Cuyahoga County Court of Common Pleas, by way of petition under the case number in the criminal division, to make a determination that he is a wrongfully incarcerated individual pursuant to R.C. 2305.02 and 2743.48. The state asserts that the Ohio Rules of Civil Procedure apply to such proceedings. Alternatively, the state asserts that such a proceeding is one for declaratory judgment and subject to R.C. Section 2721 et. seq. Accordingly, this court lacks jurisdiction to make such a determination.

LAW AND ARGUMENT

I. THE OHIO RULES OF CIVIL PROCEDURE APPLY TO COURT PROCEEDINGS EXCEPT WHERE CLEARLY INAPPLICABLE PURSUANT TO CIVIL RULE 1.

Ohio law is clear that wrongful imprisonment proceedings are civil in nature. See Walden v. State, (1989) 47 Ohio St. 3d 47, where the court determined that the General Assembly intended to apply the usual preponderance of the evidence standard to civil proceedings under R.C. 2305.02. The court also cites Schrader v. Equitable Life Assurance Soc. (1985), 20 Ohio St. 3d 41 in differentiating an acquittal in a criminal trial as a determination

that the state has not met its burden of proof and a finding by a preponderance of the evidence that the accused is innocent.

Civil proceedings are subject to the Ohio Rules of Civil Procedure. Ohio Civil Rule 1 provides:

RULE 1. Scope of rules: applicability; construction; exceptions.

(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

(B) Construction. These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) Exceptions. These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

Under the foregoing, the civil rules apply to actions other than those specified and other "special statutory proceedings". Even where special statutory proceedings exist, the civil rules apply except to the extent that they are by their nature "clearly inapplicable".

With reference to wrongful incarceration proceedings pursuant to R.C. 2305.02 and R.C. 2743.48, the Ohio Supreme Court in Walden

v. State, supra, noted the qualitative differences between criminal prosecutions and civil litigation...:

"In the criminal proceeding, the burden of proof is upon the state...Moreover, self incrimination, privilege and discovery rules are different. In the criminal proceeding, the state may not depose the defendant nor require the defendant to testify involuntarily.

In a civil proceeding, not only is the burden of proof usually different, it is being placed upon the plaintiff . . . but also the rules concerning trial procedure, discovery, evidence and constitutional safeguards differ in important aspects."

Hence, the Ohio Supreme Court has clearly recognized those aspects of wrongful imprisonment proceedings which bear civil action characteristics . Logically, such proceedings are subject to the civil rules.

II. OHIO CIVIL RULE 3 GOVERNS COMMENCEMENT OF AN ACTION

Ohio Civil Rule 3 (A) provides that " a civil action is commenced by filing a complaint with the court," . Additionally, Rule 4 provides for issuance of a summons upon the filing of a complaint. Alternatively, were the court to view a wrongful imprisonment proceeding as a declaratory proceeding subject to R.C. 2721 et. seq., the Ohio Civil Rules are applicable. See Ohio Rule 57: "The procedure for obtaining a declaratory judgment . . . shall be in accordance with these rules." "In light of the wording of Rule 57, such matters as service, venue, discovery and trial shall be in accordance with these rules". Staff Note, Rule 57.

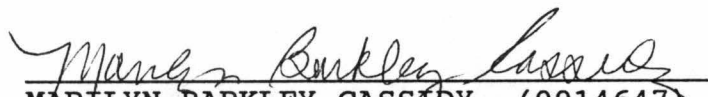
In the case before this court, no complaint or petition has been filed with the clerk of courts, civil division. No summons has issued. Clearly, the requisite elements for a civil action which involves motion practice, discovery, and potentially a civil trial have not been implemented. Accordingly, Sheppard's Petition should be stricken.

III. CONCLUSION

In light of the foregoing facts and principles of law, the State of Ohio respectfully requests that Sheppard's Petition be stricken from the files.


Respectfully submitted,

STEPHANIE TUBBS JONES, Prosecuting
Attorney of Cuyahoga County, Ohio


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ATTORNEYS FOR THE STATE OF OHIO

CERTIFICATE OF SERVICE

A copy of the foregoing Motion has been sent this 28th
day of Dec, 1995, to Terry H. Gilbert, Attorney at Law,
1700 Standard Building, 1370 Ontario Street, Cleveland, Ohio
44113.



MARILYN BARKLEY CASSIDY
Assistant Prosecuting Attorney