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Objections to Transfer of Case, Motion to Reassign the Docket of Kathleen Sutula According to Random Draw (with supporting materials)

Stephanie Tubbs Jones
Cuyahoga County Prosecutor

Marilyn B. Cassidy
Cuyahoga County Assitant Prosecutor

Patrick J. Murphy
Cuyahoga County Assistant Prosecutor

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FILED

AUG 13 11 51 AM '96

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ALAN DAVIS, SPECIAL ADMINISTRATOR	:	CASE NO. 312322
	:	
Plaintiff,	:	
	:	JUDGE: SUSTER
v.	:	
	:	
STATE OF OHIO,	:	<u>OBJECTIONS TO TRANSFER OF</u>
	:	<u>CASE, MOTION TO REASSIGN TO</u>
Defendant.	:	<u>THE DOCKET OF KATHLEEN</u>
	:	<u>SUTULA ACCORDING TO RANDOM</u>
	:	<u>DRAW</u>

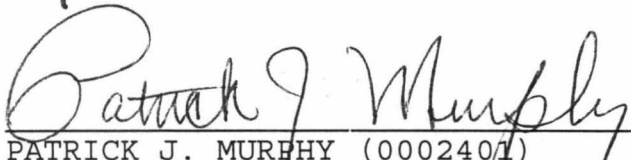
Defendant, State of Ohio, by and through counsel, Stephanie Tubbs Jones, Prosecuting Attorney for Cuyahoga County, and Assistant Prosecuting Attorneys, Patrick Murphy and Marilyn Cassidy, object to the transfer of the above captioned case to the docket of Judge Suster. The transfer is based upon the representation to the clerk of courts that there exists a pending or closed related case: specifically, Case No. CR 64571. The murder case, State of Ohio v. Samuel Sheppard is not a related case inasmuch as the pending action for wrongful incarceration is civil,

as is set forth more fully in the memorandum attached hereto and expressly incorporated herein by reference.

Respectfully submitted,

STEPHANIE TUBBS JONES, Prosecuting
Attorney of Cuyahoga County, Ohio


MARILYN BARKLEY CASSIDY (0014647)


PATRICK J. MURPHY (0002401)
Assistant Prosecuting Attorneys
Courts Tower - Eighth Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7785
ATTORNEYS FOR THE STATE OF OHIO

MEMORANDUM IN SUPPORT OF OBJECTIONS

INTRODUCTION AND PROCEDURAL HISTORY

The estate of Samuel Sheppard initially filed it's petition for a determination of wrongful incarceration on or about October 19, 1995. The petition was filed with the clerk of the court of common pleas, criminal division under the criminal case number, CR 64571, and was assigned to Hon. Ronald Suster. The state of Ohio has continuously asserted that actions for wrongful incarceration are civil actions and require the filing of a complaint with the clerk of court, civil division, and service of process. Accordingly, petitioner filed such a petition on or about July 24, 1996. However, petitioner represented to the clerk, by way of the designation sheet, attached hereto as Exhibit A, that there exists a pending or closed related case, that being State of Ohio v. Sheppard, Case No. 64571, assigned to Judge Suster.

The state of Ohio objects to the characterization of the criminal prosecution of Samuel Sheppard for murder as a related case. Moreover, there is ample legal authority, including authority from the Eighth Appellate District which explicitly

states that there is no relationship between the criminal prosecution and the civil action for wrongful incarceration.

Accordingly, the State respectfully requests that the case be transferred back to the docket of Hon. Kathleen Sutula where it was lawfully assigned under the local rules according to random draw.

LAW AND ARGUMENT

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

Walden v. State, (1989) 47 Ohio St. 3d 47 at 51.

The Eighth Appellate District has ruled that assignment of the civil case for wrongful incarceration is governed by C.P. Loc.R.15.

"C.P. Loc. R. 15 sets forth the procedure for case assignment and for the transfer of cases. There was no reason for this civil case to be transferred inasmuch as the subject matter of this case is distinct from the prior criminal prosecution and the rules of discovery and burden of proof are different. . .

. . . reliance on Superintendence Rule 4 is misplaced. Superintendence Rule 4 provides for a system of assigning cases, whereby a case is assigned by chance to a judge of the court who becomes primarily responsible for the determination of that case. The scope of the rule did not compel the assignment of Cotton's civil case to Judge Griffin. The purpose of the rule is to prevent the forum shopping of judges. Cotton's request to have Judge Griffin hear his civil case goes against the intent and purpose of Superintendence Rule 4."

Milton Cotton v. State of Ohio, Eighth Appellate District, Case No. 67403, April 6, 1995. (Attached) (Emphasis added)


In the case at bar, plaintiff has erroneously represented to the clerk of courts that there exists a pending or closed case related to the case herein. Ohio authority is abundantly clear that actions seeking a determination of wrongful incarceration are distinct and separate from the underlying criminal prosecutions. For the foregoing reasons, defendant, State of Ohio respectfully requests that the within action be returned to the docket of the Honorable Kathleen Sutula where it was lawfully assigned pursuant to C.P. Loc. R. 15.

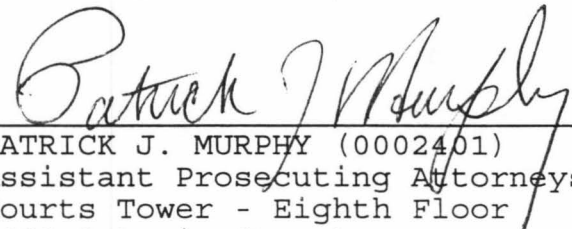
CONCLUSION

In light of the foregoing facts and principles of law, defendant ,
State of Ohio, respectfully requests that it's objections be
sustained and its motion granted.

Respectfully submitted,

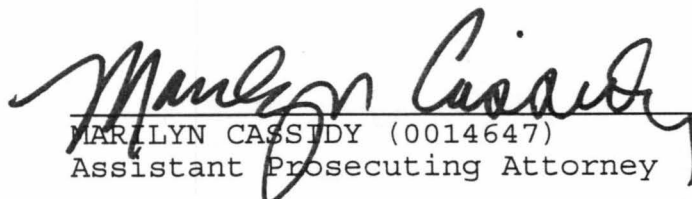
STEPHANIE TUBBS JONES, Prosecuting
Attorney of Cuyahoga County, Ohio


MARILYN BARKLEY CASSIDY (0014647)


PATRICK J. MURPHY (0002401)
Assistant Prosecuting Attorneys
Courts Tower - Eighth Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7785
ATTORNEYS FOR THE STATE OF OHIO

CERTIFICATE OF SERVICE

A copy of the foregoing Objection has been served by
regular U.S. mail, postage prepaid to Terry Gilbert, Friedman &
Gilbert at 1700 Standard Building, 1370 Ontario Street, Cleveland,
Ohio 44113 this 13th day of August, 1996.


MARILYN CASSIDY (0014647)
Assistant Prosecuting Attorney

TO INDICATE THE CATEGORY OF THE CAUSE

Jul 24 2 27 PM '96
Alan J. Davis, Special Administrator of
the Estate of Samuel H. Sheppard
GERALL TUERST
CLERK OF COURTS
CUYAHOGA COUNTY

No. _____
304 KATHLEEN A. SUTULA
Judge

State of Ohio

312322

Has this case been previously filed and dismissed? Check one Yes [] No [] If yes, list case number and judge.

Pending or Closed Related Case(s) list case number and judge.

STATE V. SHEPPARD

64571 - JUDGE JUST

Civil Categories: Place (X) in ONE CATEGORY ONLY.

TORT

- 1310 ☐ MOTOR VEHICLE ACCIDENT
1330 ☐ PRODUCT LIABILITY
1311 ☐ MEDICAL MALPRACTICE
1312 ☐ LEGAL MALPRACTICE
1313 ☐ OTHER MALPRACTICE
1314 ☐ CONSUMER RELIEF (O.R.C. 1345)

1350 ☒ MISCELLANEOUS

REAL PROPERTY

- 1460 ☐ FORECLOSURE
1470 ☐ QUIET TITLE
1480 ☐ PARTITION
1481 ☐ OTHER _____

MISCELLANEOUS

- 1500 ☐ REPLEVIN/GARNISHMENT
1501 ☐ OTHER _____

CONTRACT

- 1382 ☐ BUSINESS
1384 ☐ REAL ESTATE
1390 ☐ COGNOVIT
1391 ☐ OTHER _____

ADMINISTRATIVE APPEALS

- 1540 ☐ EMPLOYMENT SERVICES
1550 ☐ WORKMEN'S COMPENSATION
1551 ☐ OTHER _____

AMOUNT OF CONTROVERSY

- ☐ 500 - 20,000
☐ 20,000 - 100,000
☐ 100,000 - 500,000
☐ OVER 500,000
☐ NONE STATED

PARTIES HAVE PREVIOUSLY ATTEMPTED
ONE OF THE FOLLOWING DISPUTE
RESOLUTION METHODS BEFORE FILING

- ☐ ARBITRATION
☐ EARLY NEUTRAL EVALUATION
☐ MEDIATION
☐ NONE

I certify that to the best of my knowledge the within case is not related to any now pending or previously filed, except as noted above.

Friedman & Gilbert

Firm Name (Print or Type)

1700 Standard Building
1370 Ontario Street

Address Cleveland, OH 44113

(216) 241-1430

Telephone

Terry H. Gilbert (0021948)

Attorney of Record (Print or Type)

Signature

Terry H. Gilbert

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JAMES M. PORTER, J.,

Plaintiff-appellant Milton Cotton appeals from the judgment of the Common Pleas Court that he was not a wrongfully imprisoned person entitled to compensation from the State, defendant-appellee, pursuant to R.C. 2743.48. Plaintiff claims the court's ruling was contrary to the law and the evidence, that he was entitled to summary judgment and proper answers to his request for admissions, and that the case should have been transferred to the judge who conducted his criminal trial. We find no merit to the appeal and affirm the result below.

Cotton was indicted on four counts for receiving stolen property (R.C. 2913.51) and related crimes arising out of events that occurred on September 10, 1987.

On that date, Cleveland Police Detectives investigated a complaint of criminal activity occurring at 9828 Elwell Avenue, Cleveland, Ohio. The detectives went to that address and found three cars and a pick-up truck in the driveway. A blue pick-up truck, a blue Cadillac were parked in the backyard of the location the spot where the original two car garage once stood. A gray Cadillac was parked in the driveway behind the blue Cadillac and Cotton's vehicle was parked behind the gray Cadillac. The blue pick-up truck and the blue Cadillac were not visible from the street.

When the detectives arrived, they found Atlas Phillips, who lives at that address, standing next to the driver's door of a gray

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1978 Cadillac, the second car from the street. Cotton's car was parked closest to the street and had been backed into the driveway. Inside the gray Cadillac the detectives found Cotton working beneath the steering column with some tools. The steering column had been peeled to allow a person to bypass the ignition lock and start the car without an ignition key. The paint identification plate was missing from the car's firewall under the hood. The vehicle identification number (VIN) on the dashboard indicated a 1977 Cadillac. With the permission of Phillips and Cotton, the police looked at the other vehicles in the driveway.

The third car from the street, a blue 1978 Cadillac, also had its steering column peeled. Its dashboard had been damaged and its radio removed. The VIN, normally found on the dashboard near the windshield on the driver's side, was missing.

Next to the pick-up truck on the ground were found various mechanic's tools and a steering column which had been painted to match the damaged steering column of the gray Cadillac. None of the three vehicles had license plates, although the gray Cadillac had a temporary tag on the back bumper.

Cotton and Phillips were arrested and the cars and pick-up truck were towed to a police impound lot for further investigation. It was determined that: (1) the VIN number found on the gray Cadillac did not match the actual model year of the car; (2) the gray Cadillac had been reported stolen in Alabama from its registered owner; and (3) the pick-up truck was registered to a

Townville, Pennsylvania owner, but had been reported stolen in Cleveland on May 24, 1987.

Prior to the start of trial, the court denied Cotton's renewed motion to suppress the evidence found at the crime scene. At the close of the State's case, the court granted Cotton's motion for acquittal pursuant to Crim. R. 29, on: Count One, Receiving Stolen Property (the gray Cadillac); Count Three, Receiving Stolen Property (the blue Cadillac); and Count Four, Possession of Criminal Tools (the mechanic's tools). The trial court granted Cotton's motion due to the State's failure to present any evidence that the Cadillacs were actually stolen. Cotton presented no witnesses. The jury convicted Cotton on the sole remaining charge of receiving stolen property, the 1978 Chevrolet pick-up truck. His post-conviction motions were denied. On November 3, 1988, Cotton was sentenced to a term of two to ten years.

On appeal to this Court, his conviction on the pick-up truck was reversed and he was discharged. *State v. Cotton* (April 12, 1990), Cuyahoga App. No. 56775, unreported. This Court held that Cotton was improperly indicted and the evidence adduced at trial did not demonstrate that appellant had possession of the pick-up truck for the purpose of disposing of it or to withhold it permanently from the owner, nor was there evidence to show he knew it was stolen. *Id.* at 11. The Court stated: "At best, the evidence infers that appellant was guilty of unauthorized use of a vehicle" with which he was not charged. The jury's verdict was

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not reversed due to a lack of evidence of criminal activity, but more from the trial court's improper instructions to the jury and the State's failure to prove its case beyond a reasonable doubt.

Plaintiff brought a civil action under R.C. 2305.02 and 2743.48 to recover compensation from the State for being a person wrongfully imprisoned until he was discharged by the Court of Appeals order. The case was submitted by agreement on the briefs, transcript of the criminal trial and Cotton's deposition.

At his deposition, Cotton denied any knowledge of stolen vehicles or the existence of any criminal activity. Cotton testified he did not find it odd to observe several vehicles in Phillips's driveway without license plates and intact steering columns. On the day of the arrest, Cotton went over to Phillips's house to work on his own vehicle. He saw Phillips working on a broken steering column and, due to his prior knowledge of steering columns, he decided to lend a hand. Cotton, who is a certified mechanic with certificates from both Mansfield Reformatory and Marion Correctional Institute, testified that he has worked on "quite a few columns in [his] time."

The trial court found that "There is no evidence before this Court that proves the claimant's innocence of the crime he was convicted of, as well as any lesser included offenses by a preponderance of the evidence." The trial court determined that Cotton was engaged in criminal activity at the time of his arrest.

The court found Cotton was not wrongfully imprisoned and dismissed the case on May 9, 1994. This appeal timely ensued.

We address plaintiff's assignments of error in the order asserted.

- I. THE DECISION OF THE COMMON PLEAS COURT TO REFUSE TO DECLARE THE PLAINTIFF A WRONGFULLY IMPRISONED PERSON IS CONTRARY TO LAW AND CONTRARY TO THE EVIDENCE.
- II. THE COURT ERRED IN NOT GIVING PRECLUSIVE EFFECT IN THE JUDGMENT OF THE COURT OF APPEALS.
- III. THE COURT COMMITTED PREJUDICIAL ERROR IN NOT GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF.

Plaintiff Cotton contends that because his conviction for receiving stolen property was reversed by this Court, it follows that he was wrongfully imprisoned, as a matter of law, and entitled to compensation. We disagree.

In 1986, the Ohio Legislature enacted R.C. 2305.02 which granted jurisdiction to Courts of Common Pleas to determine whether or not a person has been wrongfully imprisoned as the term is defined in R. C. 2743.48.

R.C. 2743.48(A)(1)-(5) provides in pertinent part, as follows:

(A) As used in this section, a "wrongfully imprisoned individual" means an individual who satisfied each of the following:

(1) He was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.

(2) He was found guilty of, but did not plead guilty to, the particular charge of a lesser-

included offense by the court or jury involved, and the offense of which he was found guilty was an aggravated felony or felony.

(3) He was sentenced to an indefinite or definite term of imprisonment in a state penal or reformatory institution for the offense of which he was found guilty.

(4) The individual's conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

(5) Subsequent to his sentencing and during or subsequent to his imprisonment, if was determined by a court of common pleas that the offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person.

In *Walden v. State* (1989), 47 Ohio St.3d 47, the Supreme Court held that in a proceeding for wrongful imprisonment under R.C. 2305.02, the claimant bears the burden of proving innocence by a preponderance of the evidence not simply as a result of an acquittal or reversal of a conviction in the underlying criminal case. "In enacting Section 2305.02, the General Assembly intended that the Court of Common Pleas actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability." *Id.* at 52. Since the State is unable to appeal a final verdict in a criminal case, the issue of whether or not the

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plaintiff was truly an innocent person is another reason for determining wrongful imprisonment by a preponderance of the evidence. *Id.* "Claimants seeking compensation for wrongful imprisonment must prove that at the time of the incident for which they were initially charged, they were not engaging in any other criminal conduct arising out of the incident for which they were initially charged." *Gover v. State* (1993), 67 Ohio St.3d 93, syllabus.

So it is that the Walden Court held that where a person claiming compensation for wrongful imprisonment has obtained a judgment of acquittal, ~~that judgment is not to be given preclusive effect in a proceeding under R.C. 2305.02.~~ *Walden*, paragraph two of syllabus. We find the same principle should apply whether he was acquitted at trial or, as here, the conviction was reversed on appeal. *Chandler v. State* (1994), 95 Ohio App.3d 142; see, also, *Mueller v. State* (Dec. 12, 1988), Warren App. No. CA88-05-037, unreported.

This Court in *State v. Cotton*, No. 56775 at page 10:

*** the evidence infers that appellant was guilty of unauthorized use of a vehicle. R.C. 2913.03. *State v. Boyce* (1986), 33 Ohio App.2d 295. However, appellant was not charged with that offense.

Since this Court has previously acknowledged that the evidence permitted inference of Cotton's culpability under a lesser included offense, there was sufficient evidence to overcome plaintiff's

claim that the offense charged "was not committed by him or was not committed by any person." See R.C. 2743.48(A)(5).

The inferences drawn from all of the evidence before the court established the plaintiff's culpability: (1) he was working on cars with peeled steering columns and changed VIN plates; (2) he was underneath the peeled column of the gray Cadillac when the police arrived on the scene and found him working on the column; (3) tools were scattered about the area where Cotton was working and three stolen vehicles were situated. It does not take much imagination to conclude that Cotton was engaged in some kind of illegal conduct whether or not the State failed to prove it beyond a reasonable doubt.

The totality of the circumstances must be considered in a case such as this. There was sufficient evidence, if believed by the trial court, to establish that defendant was not truly innocent and was wrongfully incarcerated as a pure victim of circumstances. There was sufficient evidence in the record to show that appellant or some other person were engaged in criminal conduct in working on the peeled steering columns of stolen vehicles.

These assignments of error are overruled.

IV. THE COMMON PLEAS COURT FAILED TO GRANT JUDGMENT TO THE PLAINTIFF BECAUSE THE REQUEST FOR ADMISSIONS WAS NOT PROPERLY ANSWERED.

This assignment of error is without merit. The record reveals that the State provided the plaintiff with a timely response to his discovery request. Had the plaintiff been dissatisfied with the

response, he should have filed a motion to compel pursuant to Civ. R. 37, which was not done.

From the record and trial briefs below, this issue was not raised or otherwise brought to the court's attention. We will not address an assignment of error not raised in the trial court. *Lakewood v. All Structures, Inc.* (1983), 13 Ohio App.3d 115; *State v. Williams* (1977), 51 Ohio St.2d 112, 117. See, also, *State ex rel. Athens Cty. Dept. of Human Serv. v. Wolf* (1991), 77 Ohio App.3d 619, 622.

Assignment of Error IV is overruled.

V. THE COURT COMMITTED PREJUDICIAL ERROR IN NOT TRANSFERRING THIS CASE TO THE JUDGE WHO CONDUCTED THE CRIMINAL CASE.

The plaintiff filed a motion to transfer this case from Judge McGinty's docket to that of Judge Burt W. Griffin for the reason that Judge Griffin had presided at the criminal trial involving the plaintiff. However, plaintiff cites no authority requiring the transfer of this civil case to the original trial judge. C.P. Loc. R. 15 sets forth the procedure for case assignment and the transfer of cases. There was no reason for this civil case to be transferred inasmuch as the subject matter of this case is distinct from the prior criminal prosecution and the rules of discovery and burden of proof are different.

Cotton's reliance on Superintendence Rule 4 is misplaced. Superintendence Rule 4 provides for a system of assigning cases, whereby a case is assigned by chance to a judge of the court who

- 11 -

becomes primarily responsible for the determination of that case. The scope of the rule did not compel the assignment of Cotton's civil case to Judge Griffin. The purpose of the rule is to prevent the forum shopping of judges. Cotton's request to have Judge Griffin hear his civil case goes against the intent and purpose of Superintendence Rule 4.

Assignment of Error V is overruled.

Judgment affirmed.

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It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

RECEIVED FOR FILING

APR 06 1995

JAMES D. SWEENEY, P.J., and

O'DONNELL, J., CONCUR.

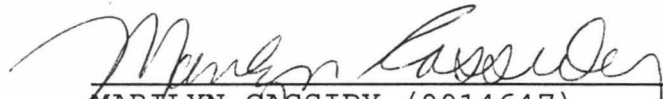
GERALD E. FUERST, CLERK
BY CM DEP.

James M. Porter
JAMES M. PORTER
JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

CERTIFICATE OF SERVICE

A copy of the foregoing Motion has been served by regular U.S. mail, postage prepaid to Terry H. Gilbert, 1700 Standard Building, Cleveland, Ohio 44113 this 8th day of August, 1996.



MARILYN CASSIDY (0014647)
Assistant Prosecuting Attorney