

IN THE SUPREME COURT OF OHIO

The State of Ohio ex rel  
Robert W. Russell (453-749)  
P.O. Box 540  
St. Clairsville, OH 43950

Relator,

Judge John S. Collier  
Henry County Court of Common Pleas  
660 N Perry St # 301  
Napoleon, OH 43545

and,

Kim Stouffer, Clerk  
Henry County Clerk of Courts  
660 N. Perry St. Suite 302  
Napoleon OH 43545

and,

Henry County Common Pleas Court  
660 N. Perry St. Suite 302  
Napoleon OH 43545

Respondents.

Supreme Court No. 19-0877

ORIGINAL ACTION IN PROHIBITION

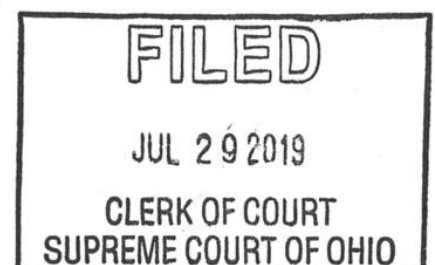
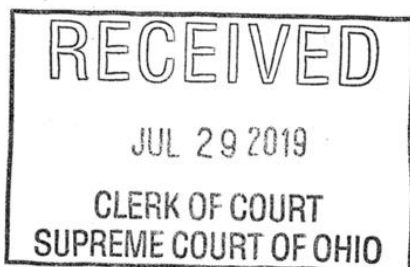
MEMORANDUM CONTRA TO STATE’S MOTION TO  
DISMISS WRIT OF PROHIBITION

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MEMORANDUM CONTRA TO STATE'S MOTION TO  
DISMISS WRIT OF PROHIBITION

The relator does not challenge the fact that Common Pleas Courts have original jurisdiction of all crimes and offenses. However, the Relator does challenge that if not properly invoked in the first instance, the court is wholly, patently and unambiguously without jurisdiction. In the instant case the court failed to follow the statutorily mandated procedural method as set forth as follows.

**2935.09 Person having knowledge of offense to file affidavit - official review before complaint filed.**

(A) As used in this section, "reviewing official" means a judge of a court of record, the prosecuting attorney or attorney charged by law with the prosecution of offenses in a court or before a magistrate, or a magistrate.

(B) In all cases not provided by sections 2935.02 to 2935.08 of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer or a private citizen having knowledge of the facts shall comply with this section.

(C) A peace officer who seeks to cause an arrest or prosecution under this section may file with a reviewing official or the clerk of a court of record an affidavit charging the offense committed.

(D) A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate. A private citizen may file an affidavit charging the offense committed with the clerk of a court of record before or after the normal business hours of the reviewing officials if the clerk's office is open at those times. A clerk who receives an affidavit before or after the normal business hours of the reviewing officials shall forward it to a reviewing official when the reviewing official's normal business hours resume.

There is no record in the instant case that that anyone with first hand knowledge filed an affidavit charging that an offense was committed to invoke the court's jurisdiction.

The state must follow the particular mode and form set forth in the statutes that provide jurisdiction. The Due Process protections of the federal constitution apply where the state has established a "liberty interest" for its citizens, even if the protection goes beyond that required by the federal constitution.

The Sixth Circuit Court acknowledged the importance of this interest and has therefore set standards for recognizing such an interest. In *Coe v. Bell*, 161 F.3d 320, 351-352 (6th Cir. 1998), the Court specified that to qualify as producing a state-created liberty interest:

"a statute setting up procedures must put specific limits on official discretion. An implicit requirement recognized by the Supreme Court is including 'explicitly mandatory language,' i.e., specific directives to the decision-maker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." *Kentucky Dept of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (promulgating those requirements in the context of prisons). (Emphasis added) *Coe*, 161F.3d at 351-352.

Ohio's constitution and statutes establish a liberty interest in a defendant's right to have a grand jury indictment procured in a specific mode or form and preclude any other method.

Obtaining an indictment by any means other than by the statutorily mandated procedure results in a deprivation of the liberty interest established by the Ohio Constitution and, thereby, violates due process rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

The Supreme Court of Ohio has addressed the issue of how an Ohio Trial Court's subject matter jurisdiction is invoked on many occasions, stating that, "...the jurisdiction is invoked by the return of a valid indictment." *Brown v. Maxwell* (1962), 186 N.E.2d 612; *Click v. Eckle* (1962), 186 N.E.2d 731; *Mack v. Maxwell* (1963), 189 N.E.2d 156; *Simpson v. Maxwell* (1964), 203 N.E.2d 324. In the event of the return of a constitutionally and/or statutorily invalid indictment such as the one in the instant case, the converse is true; no jurisdiction is invoked upon the Trial Court rendering all subsequent actions of the court *void ab initio*.

As stated by the Court in *Stewart v. State* (1932), 41 Ohio App. 351 at 353-354, 181 N.E. 111,

"The rule laid down by our Supreme Court is the well-settled law. 'There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence thereof the court acquires no jurisdiction whatever, and if it assumes jurisdiction, a trial and conviction are a nullity. The accusation must charge an offense; it must charge the particular offense for which accused is tried and convicted; and it must be made in the particular form and mode required by law. \*\*\*In most jurisdictions, if not in all, a formal accusation, or an accusation in a particular mode or form, is expressly required by constitutional or statutory provisions, or by both, and these provisions must of course be followed.'" 31 Corpus Juris, 559.

In the case sub judice, the state violated the Petitioner's right to Due Process under the Fourteenth Amendment to the United States Constitution, where the indictment(s) filed in this case were not procured in the statutorily mandated procedure.

"[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9<sup>th</sup> Cir. 1993), cert. denied, 513 U.S. 914, 115 S.Ct. 290, 130 L.Ed.2d 205 (1999). Accord *Lambright v. Stewart*, 167 F.3d 477, 482 (9<sup>th</sup> Cir. 1999); *Ballard v. Estelle*, 937 F.2d 453, 456 (9<sup>th</sup> Cir. 1991).

Once a state has established a liberty interest, as Ohio has with its constitutional grand jury protections, it cannot be ignored. In *Hicks v. Oklahoma* (1980), 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175, the United States Supreme Court held as much.

For example, the Court in *Hicks* found that where a state has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law.

The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See

Vitek v. Jones, 445 U.S. 480, 488-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552, citing Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935; Greenholtz v. Nebraska Penal Inmates, supra; Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484. Hicks, 447 U.S. at 346.

As a further example, the Due Process protection regarding liberty interest has been recognized in the capital arena by Ohio's Sixth Circuit Court of Appeals. In *Fox v. Coyle*, 271 F.3d 658, 665 (6<sup>th</sup> Cir. 2001), the Sixth Circuit specified that a defendant's due process rights may be infringed upon a state's failure to adhere to its own sentencing laws. The opinion cited *Hicks v. Oklahoma*, supra, in reaching this conclusion. In *Fox*, the Court found that the state's reliance on a sentencing factor outside of the Ohio statutory sentencing scheme was impermissible. Id at 666.

The power for a court to do an act in a particular mode and course of law does not give it the power to perform the act in any other mode. The issue here is not one of a court having jurisdiction of the subject matter and person erroneously exercising jurisdiction, but it is a failure to invoke subject matter jurisdiction in the first instance.

"It is well settled that the jurisdiction of a court lies dormant until exercised; it must be invoked in some manner and the action commenced in the regular course of judicial procedure." 21 Am.Jur.2d (1981) 603, Criminal Law, Section 351.

R.C. 2935.09 clearly states in all cases an affidavit and complaint must be filed to commence prosecution in the State of Ohio, the lack of any other statutes providing jurisdiction make this provision mandatory, and the only exceptions are R.C. 2935.02 to R.C. 2935.08. None of which provide any reference to substituting an indictment for an affidavit and complaint. Therefore, there is no statute that allows the indictment to be the initial charging instrument in a criminal prosecution; it is but a step in the process of properly invoking the court's jurisdiction which lies dormant until invoked on a case by case basis.

"The return of an indictment is but an incident in the progress of the prosecution." State v. Morrow, 1 Ohio App. 95, 24 Ohio C.D. 140, 1913 VJL 379. "The

prosecution is commenced in the common pleas court by the filing of the transcript from the magistrate court." Id @ 110.

"The constitution confers no jurisdiction whatever on the court of common pleas, either in civil or criminal cases. It is made capable of receiving jurisdiction in all such cases, **but can exercise none, until conferred by law.**" Stevens v. State (1854). 3 Ohio St. 453 (Emphasis added)

"The constitution creates judicial power, but does not prescribe any jurisdiction in criminal matters. There can be no judicial power without jurisdiction. No criminal jurisdiction being conferred on the common pleas court by the constitution, it can exercise none until conferred by statute." Constitution, Article IIV, Section 1 & 4. "Judicial power in civil matters is exercised according to the course of common law. Judicial power in criminal cases must be exercised strictly in accord with statutes, without regard to common law. In Ohio, common law crimes and procedure have been abrogated, taking away all judicial power existing by common law, not specifically provided for by statute." Ex parte Steinmetz, 172 N.E.2d 623. (Emphasis added)

A prosecutor cannot simply grab facts from the air to present to a grand jury to obtain an indictment. He/she must have obtained the required knowledge through a complaint or affidavit that was either filed in a municipal court, and bound over to the court of common pleas or through a complaint or affidavit filed directly with him/her by a peace officer or private citizen. In either case, the prosecutor must then file his/hers own complaint based upon the complaint filed by the peace officer or private citizen. Then the prosecutor's complaint must not only be filed in court, which in this case there is no record of such, but the prosecutor's complaint must state the source of his knowledge.

R.C. 2937.02, and other revised codes and rules, prescribe the filing of a complaint as a prerequisite to the court's jurisdiction before proceeding further.

It is a well-established rule of construction that, in looking to the face of a statute to determine legislative intent, significance and effect should be given to every word, phrase, sentence, and part thereof. *State v. Wilson* (1997), 77 Ohio St.3d 334, 336-37, 673 N.E.2d 1347.

Furthermore, it is a basic tenet of statutory construction that Ohio's General Assembly is not presumed to do vain or useless things, and that when language is inserted in a statute (or rule) it is inserted to accomplish some definite purpose." *State ex rel. Cleveland Elec. Illum. Co. v. Euclid* (1959), 169 Ohio St. 476, 8 O.O.2d 480, 482, 159 N.E.2d 756, 759.

Words used in a statute must be accorded their usual, normal or customary meaning. *State ex rel. Hawkins v. Pickaway City Bd. of Elections* (1996), 75 Ohio St.3d 275 277, 662 N.E.2d 17, 19; See, also, R.C. 1.42.

**CRIMINAL RULE 12. Pleadings and Motions Before Trial: Defenses and Objections (A) Pleadings and motions.** Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

The Criminal Rule is clear and unambiguous. The use of the conjunctive "and" denotes that both the complaint and the indictment are required, not one or the other. The use of the word "shall" make the provision mandatory. The mandatory provisions in criminal rules cannot be disregarded by trial courts pursuant to well settled case law.

In the instant case the Trial Court's jurisdiction was never properly invoked in the first instance, consequently, the trial court is without jurisdiction to perform any action whatsoever other than to declare its lack of jurisdiction and dismiss the indictments.

Wherefore, this court should deny the States Motion to Dismiss and grant the Relator's request for a Writ of Prohibition.

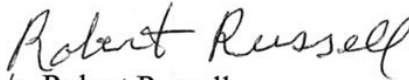
Respectfully submitted,

  
/s Robert Russell

Robert Russell  
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Relator, Pro Se

#### CERTIFICATE OF SERVICE

I do hereby certify that I sent a true and correct copy of the foregoing instrument by ordinary mail on this 23<sup>rd</sup> day of July to Gwen Howe-Gebbers (0041521), Henry County Prosecuting Attorney, 660 N. Perry St. Suite 101, Napoleon OH 43545.

  
/s Robert Russell