

In The Supreme Court of Ohio

State <i>ex rel.</i>	:	Case No. 2020-1498
Kimani Ware,	:	
	:	
Relator,	:	
	:	
v.	:	
	:	
Donna Crawford,	:	
	:	Original Action on Mandamus
Respondent.	:	

RESPONDENT'S MEMORANDUM IN OPPOSITION TO RELATOR'S MOTION FOR RELIEF FROM JUDGMENT, FILED ON AUGUST 9, 2022

DAVE YOST (0056290)
Ohio Attorney General

KIMANI WARE, #A470743
Trumbull Correctional Inst.
P.O. Box 901
Leavittsburg, OH 44430
Pro se Relator

D. CHADD McKITRICK (0073750)
MARCY VONDERWELL (0078311)
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Co-Counsel for Respondent

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NOW COMES the Respondent, Donna Crawford, by and through counsel, and hereby states the following as her response to Relator, Kimani Ware’s, Motion for Relief from Judgment filed on August 9, 2022.

I. STATEMENT OF THE CASE AND FACTS

This matter concerns a petition for a writ of mandamus filed by Relator on December 10, 2020. The petition requested the Court to order or instruct Respondent to produce certain documents to Relator based upon public records requests purportedly made on April 9, 2020, and April 29, 2020. On March 17, 2021, the Court issued an alternative writ that instructed the parties to submit evidence in support of their positions and further issued a briefing schedule. Both parties submitted evidence in support of their positions and later filed briefs pertaining to the issues at hand.

On February 8, 2022, the Court issued an Opinion and Entry issuing a writ of mandamus against Respondent, mandating she produce to Relator, Kimani Ware, a response to an April 9, 2020, public records request made by Relator, i.e., the informal complaints identified as TCI0220000336 and TCI030000844. Respondent was further fined \$1,000.00 as statutory fees for her failure to respond fully to the April 9, 2022, public records request from Relator. *See, State ex rel. Ware v. Crawford*, 2022-Ohio-295.

On March 11, 2022, after the Court issued its Opinion in this matter, former counsel of record, Tony Shang, left the employment of the Corrections Litigation Unit within the Criminal Justice Section of the Office of the Ohio Attorney General. Unfortunately, the Unit Coordinator, the individual responsible for assigning cases to attorneys and coordinating attention to lawsuits and other pending actions, had also left the Corrections Litigation Unit on February 11, 2022, days after the Court issued its Opinion in this matter.

On March 16, 2022, more than one month after the Court issued its final Order and Entry on this matter, Relator filed a motion to compel Respondent to comply with the Court's February 8, 2022, Order. Though the motion contained a certificate of service, the records for the undersigned's office did not indicate that it was received by our office.

On June 8, 2022, the Court issued a Show Cause Order to Respondent instructing Respondent to show cause as to why she should be held in contempt for failing to comply with the Court's June 8, 2022, Opinion and Entry. Similarly, the records for the undersigned's office do not indicate that the Court's June 8th order was received by the same. Unfortunately, Respondent did not timely file a response to the Show Cause Order. It was not the intention of Respondent or the undersigned to delay compliance with the Court's order; the administrative oversight was not in bad faith or meant as to cause any prejudice towards Relator.

The undersigned has since been assigned as the Unit Coordinator for the Corrections Litigation Unit. In re-assigning cases and through other administrative follow-up, the undersigned and other staff learned there had been additional filings in this matter subsequent to the Court's February 8, 2022, Opinion and Entry, which normally would have indicated final disposition of the matter. Immediately upon learning of pending activity in this matter, the undersigned researched the pending Show Cause Order and communicated with Respondent and ODRC in order to follow-up with compliance with the mandamus writ. On August 11, 2022, Respondent mailed and hand delivered the informal complaints identified as TCI0220000336 and TCI030000844, the documents that were the subject to the mandamus writ. Demonstration of compliance with the mandamus writ is being attached hereto for the Court's reference as Exhibit A.

Relator now seeks relief from the Court's February 8, 2022, Opinion and Entry. For the reasons stated herein, the Court should deny Relator's motion for relief from judgment.

II. LAW AND ARGUMENT

Relator seeks relief from judgment denying a writ of mandamus ordering Respondent to produce documents and other information requested by Relator in an April 29, 2020, public records request. In the Court's opinion, it made the following finding of fact:

Ware's rebuttal evidence challenges certain aspects of Cimmento's summary of the certified-mail process at the prison. Ware also submitted copies of certified-mail receipts, cash-withdrawal slips, and the envelope in which he sent his public-records requests to show his knowledge of the certified-mail tracking number. But Ware does not rebut Cimmento's key point that the certified-mail tracking number is unknown to the inmate until after the envelope containing the mailed items is sealed. Ware does not explain how he could have written the certified-mail tracking number on his April 29 public-records requests when the requests would have been sealed in an envelope before the number was assigned.

Thus, Ware has not proved by clear and convincing evidence that he sent the public-records requests identified above as Request II and Request III.

See, State ex rel. Ware v. Crawford, 2022-Ohio-295 at ¶¶ 21 and 22. This finding was based on an affidavit submitted by Frank Cimmento, Jr., who, at the time of the relevant events, was the mail screener at Trumbull Correctional Institution (“TCI”). Already a part of the record, this affidavit is being attached hereto for the Court so as to reference the same at its convenience as Exhibit B.

Within Mr. Cimmento’s affidavit, he stated that due to his position at TCI, he was able to identify and describe the postal procedures and requirements for insured, certified and other postal options. (*See*, Cimmento Affidavit at ¶ 3). Mr. Cimmento then went on to describe the process, practice, and custom used at TCI for mailing inmate mail through certified mail. (*Id.* at ¶¶ 4 – 10). At no time did Mr. Cimmento state or acknowledge that the process, practice, and customs used to process inmate certified mail was a written policy, regulation, or other written procedure.

Relator contends relief from the judgment is warranted because he purportedly discovered new evidence that contradicts this finding by the Court. More specifically, Relator contends that Mr. Cimmento identified within this affidavit a written policy regarding inmate certified mail. Relator contends that he further researched and confirmed there is no written policy regarding the use of certified mail for inmate mail. In turn, Relator contends Mr. Cimmento provided false statements within his affidavit that a written policy or procedure exists, alleging that no such written policy exists.

Relator is simply incorrect in his belief that he has uncovered a false statement by Mr. Cimmento within his affidavit. *NOWHERE* in Mr. Cimmento’s affidavit did he state there was a written policy. Respondent confirms no written policy exists regarding the processing of inmate certified mail at TCI. Because a written policy does not exist, this does not mean a process, practice, or custom is not routinely followed by mail staff at TCI in processing inmate certified

mail. It was these processes, practices, and customs that were correctly identified by Mr. Cimmento in making the statements within his affidavit.

It is true that under Ohio Civ.R. 60(B)(2), a court may grant relief from judgment due to the result of newly discovered evidence that may have a direct effect on the outcome of the disposition of a matter. In order to grant relief from judgment on the basis of Ohio Civ.R. 60(B)(2), a movant must also demonstrate that the purported newly discovered evidence could not have been discovered using ordinary due diligence during the relevant time period prior to disposition of the matter. *Michelakis v. Big Little Farms, Inc.*, 11th Dist. Trumbull No. 2018-T-0095, 2019-Ohio-2799, ¶ 20 (July 8, 2019) (citation omitted).

Here, Relator failed to produce any newly discovered evidence that was not previously known or acknowledged by the Court. Nor did Relator demonstrate that he was unable to discover the purported newly discovered evidence using ordinary due diligence prior to the Court's disposition of this matter in its February 8, 2022 Opinion. As a result, Relator is not entitled to relief from judgment on the basis of newly discovered evidence.

Relator also references that his motion for relief from judgment is also based upon Ohio Civ.R. 60(B)(5), which serves somewhat of a "catch-all" basis when no other specific provision of Ohio Civ.R. 60(B) is applicable. However, Relator neither explores nor explains why he should be granted relief from judgment based upon the catch-all provision and not any other provision of Ohio Civ.R. 60(B). Instead, Relator only discusses within his memorandum that he has newly discovered evidence that would affect the disposition of this matter. The catch-all provision is not to be used as a substitute when any other provision under Ohio Civ.R. 60(B) would apply. *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 448 N.E.2d 1365 (1983).

Because Relator has not explained any other basis on why he should be granted relief from

judgment other than the basis of newly discovered evidence, the Court should deny his motion for relief from judgment on the grounds of Ohio Civ.R. 60(B)(5).

III. CONCLUSION

Relator failed to demonstrate he is entitled to relief from judgment under any of the grounds or provisions of Ohio Civ.R. 60(B), the Court should deny his motion. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of syllabus.

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ D. Chadd McKitrick

D. CHADD McKITRICK (0073750)

MARCY VONDERWELL (0078311)

Senior Assistant Attorneys General

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Corrections Litigation Unit

30 East Broad Street, 23rd Floor

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Counsel of Record for Respondent

Marcy.Vonderwell@OhioAGO.gov

Office: (614) 644-8742/Fax: 866-474-4985

Co-Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2022, a copy of *Respondent's Response In Opposition of Relator's Motion for Relief from Judgment* was filed electronically. Notice of this filing will be sent by prepaid, U.S. Mail to Pro se Relator Kimani Ware, #A470-743, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, Ohio 44430.

/s/ D. Chadd McKitrick
D. CHADD MCKITRICK (0073750)
Senior Assistant Attorney General

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Ware,

Relator,

v.

Crawford,

Respondent.

Case No. 2020-1498

I, Sarah Pierce, being first duly cautioned and sworn, depose and state as follows:

1. I have personal knowledge of the facts contained in this Affidavit. I am competent to testify to the matters stated herein.
2. The attached letter and records were sent to Mr. Ware by U.S. mail and hand-delivery on August 11, 2022.
3. Mr. Ware signed for receipt of the attached.

FURTHER, AFFIANT SAYETH NAUGHT.



Sarah Pierce, Staff Attorney
Ohio Dept. of Rehabilitation and Correction

Sworn to in my presence and subscribed before me this 12 day of August, 2022,
County of August, in the State of Ohio.


NOTARY PUBLIC

Margaret Moore
Attorney At Law
Notary Public, State of Ohio
My Commission has no expiration date
Sec. 147.03 R.C.



Department of
Rehabilitation & Correction

Mike DeWine, Governor
Annette Chambers-Smith, Director

August 11, 2022

Kimani Ware (A470743)
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, OH 44430
Sent via U.S. mail and hand delivery

RE. *State ex rel. Ware v. Crawford*, Slip Opinion No. 2022-Ohio-295

Dear Mr. Ware,

Please find enclosed copies of complaint numbers TCI0220000336 and TCI030000844.

These are being sent to you in accordance with the case noted above.

Sincerely,

Sarah Pierce

Sarah E. Pierce
Staff Counsel

Encl.

Ref# TCI0320000844	Housing:B14E122T	Date Created:03/10/2020
ID#: A470743	Name:WARE,KIMANI	
Form:Informal Complaint	Subject:Cashiers Office	Description:Improper charge
Urgent:No	Time left:n/a	Status:Closed

Original Form

3/10/2020 11:44:53 AM : (a470743) wrote

On 3/6/20 charge me for postage of \$2.20 for leag mail that you mailed out, this mail legal returned to me by the mailroom on 3/5/20 see cashsilk dated 2/20/20 addressed to the supreme court of ohio. i want to be refunded the \$2.20 that you wrongfully charged me.

Communications / Case Actions

3/10/2020 11:44:53 AM : (a470743) wrote

Form has been submitted

3/10/2020 3:16:21 PM : (Lori Beggs) wrote

We only charge what is written on the cash slip from the mailroom. If you have an issue with the postage you need to consult with the mailroom. We did not receive anything from the mailroom for a returned envelope for you. We can not refund the money without them confirming you are owed the \$2.20.

Thank you,
Cashier's Office

3/10/2020 3:16:26 PM : (Lori Beggs) wrote

Closed incarcerated individual form

Ref# TC1022000336	Housing:B14E122T	Date Created:02/21/2020
ID#: A470743	Name:WARE,KIMANI	
Form:Appeal	Subject:Cashiers Office	Description:Improper charge
Urgent:No	Time left:n/a	Status:Closed

Original Form

2/21/2020 6:52:49 AM : (a470743) wrote

I made out a cashsilt(dated 2/19/20) to the supreme court of ohio, to pay for postage charges and you charged me \$6.65 and then you charged me \$0.85 for something I never made a cashsilt for ! I have a deadline to meet with the supreme court of ohio and because I was over charged by you i will not be able to pay the postage cost and I will miss my dead line on march 2,2020 with the supreme court of ohio.

Communications / Case Actions

2/21/2020 6:52:49 AM : (a470743) wrote

Form has been submitted

2/24/2020 9:40:40 AM : (Lori Beggs) wrote

According to the postage placed on your cash slip you owed \$6.65 and .85 for a total of \$7.50 That was sent to Clerk of Court, Supreme Court of Ohio. If you need to please review the cash slip you received back.It is all written on the cash slip for you.

Thank you

2/24/2020 9:40:45 AM : (Lori Beggs) wrote

Closed incarcerated individual form

3/5/2020 5:07:00 PM : (a470743) wrote

Escalated to Grievance

3/5/2020 5:07:00 PM : (a470743) wrote

on made out a cash-silt dated 2/19/20 for postage and i was over charged, i then informed the cashier that because it had over charged me i would not be able to pay the postage cost, and because you over charge me I would my deadline with the supreme court of ohio on march 2, 2020, the cashier failed to mail out my mail to the supreme court of ohio, my cashier silt that dated 2/20/20, i was call over to the mail today(march 5, 2020) at 10:30 am to pick my legal mail that should have been mail on february 20,2020, it took the cashier office 8 days to return my legal mail causing me to miss my deadline on march 2, 2020 claiming that I have insufficient funds (NSF). this injury was caused by the cashier's office and/or staff , and the mailroom. and i will seek statutory damages in the amount of \$2,000 for that injury.

3/19/2020 10:11:28 PM : (System) wrote

Closed incarcerated individual form

3/20/2020 11:58:14 AM : (a470743) wrote

Escalated to Appeal

3/20/2020 11:58:14 AM : (a470743) wrote

the inspector here at trumbull correctional institution waived right to respond, so i appeal , this matter to this office to resolve this matter on the merits, to which my rights were infact violated, the cashier office here at trumbull me to miss my deadline with the supreme court of ohio when failed to mail-out my brief on february 21,2020, and it held on to my legal mail until march 5,2020, then it claimed that i had insufficient funds to mail out my brief which caused me to miss my deadline on march 2,2020, and infact i made to cashier office a where of this fact on the above dated in the body of my ICR. the cashier caused an injury to me by its actions, therefore, i'm entitled to statutory damages in the amount of \$2,000.00, the amount that I would have been entitled to if my brief would have been filed on time, but do to the cashier's actions i missed my deadline on march 2,2020.

3/31/2020 1:18:42 PM : (Marc Bratton) wrote

The office of the Chief Inspector is in receipt of your informal complaint, disposition of grievance and your appeal to this office. Your unresolved grievance has been redirected to the Inspector for further investigation. Please be advised that the Inspector is reconsidering your complaint and will issue a supplemental disposition. This appeal is hereby MODIFIED with an additional response required

3/31/2020 4:29:44 PM : (Donna Crawford) wrote

Supplemental Grievance response to Ware a470-743 Mail

This Office is in receipt of your Grievance dated 3/20/2020. In your complaint you state that you were overcharged for postage on a cash slip dated 2/19/2020. In overcharging you, you missed your deadline to file in the US Supreme Court because you had insufficient funds.

In reviewing your grievance I reviewed your inmate demand statement and the cash slip and i spoke with Ms. Beggs Cashiers Office Supervisor. I reviewed 59-LEG-01

Ref# TCI0220000336	Housing: B14E122T	Date Created: 02/21/2020
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Upon reviewing your cash slip dated 2/19/2020 the amount charged for your Legal Mail was \$7.50. I then reviewed your demand statement and on 2/20/2020 you were charged \$6.65 and .85 for a total of \$7.50. The total on the cash slip dated 2/19/2020 to be charged is \$7.50. After the cash slip was processed your balance remaining was .60. The cash slip showing the insufficient funds was then forwarded to the mailroom to return to you.

In 59-LEG-01 Inmate Access to Court and Counsel it states only indigent inmates (D.2) An indigent inmate is also entitled to free first-class mail to courts of law only. You were not indigent so you did not qualify for the free first class mail.

I found that the cashier did nothing wrong in this case. No rule or procedure or law was broken and everything was done according to DRC Policies.

Your grievance TCI0220000336 is denied

3/31/2020 4:39:39 PM : (Donna Crawford) wrote

Closed incarcerated individual form - Disposition: Denied

4/1/2020 9:35:47 AM : (a470743) wrote

Escalated to Appeal

4/1/2020 9:35:47 AM : (a470743) wrote

the ICR that was forward back the inspector, is clearly in violation of ODRC policies. 1: the cashier's office over charged for postages cost, 2: do to that over charge, the cashier's office cause me to miss my deadline with the supreme court of ohio on: march 2,2020, which I put the cashiers's office on notice on 2/20/20, in my ICR. on march 5,2020 i was call over tot the mailroom, and I was giving back my legal mail that should have been mailed out on: 2/21/2020, there was no cash-slip giving back to me on that date(3/5/2020), the mailroom clerk informed that the cashier's office still had the cash-slip, it was never marked insufficient funds, I was giving the cash-slip back 14 days later stating postage was paid, I was charged for legal mail that was never mailed out of this institution, \$2.20, check the cash-slip dated 2/20/2020 recorded in the cashier's office and baccuse of this I missed my deadline with the supreme court of ohio, causing an injury to me, and i'm entitled to \$2,000.00 in statutory damages !

4/6/2020 8:35:44 AM : (Marc Bratton) wrote

The office of the Chief Inspector is in receipt of your Appeal to the Chief Inspector. A thorough review of your appeal has been completed that included application of the following factors:

- Procedural requirements
- Proper investigation of your grievance
- Applicable policies, procedures, administrative rules, directives and ODRC operating manuals
- Documentation and related evidence
- Additional or refuting information presented in your appeal to support your claim

Based on this review, the decision rendered by the Inspector is hereby: **AFFIRMED**

Comments: The Inspector investigated your complaint which did not yield proof to support your claim of a that you were denied access to the courts with respect to the mailing of your legal mail as outlined in AR-5120-9-18.

The cash slip dated 02/19/2020, gave ODRC the authority to collect all available funds until the cash slip is paid off.

Furthermore, your request for financial compensation cannot be pursued through the Inmate Grievance Procedure.

This office will take no further action on this matter at this time.

4/6/2020 8:35:57 AM : (Marc Bratton) wrote

Closed incarcerated individual form - Disposition: Affirmed

4/6/2020 8:36:45 AM : (Marc Bratton) wrote

Closed incarcerated individual form - Disposition: Affirmed



Department of
Rehabilitation & Correction

Mike DeWine, Governor
Annette Chambers-Smith, Director

August 11, 2022

Kimani Ware (A470743)
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, OH 44430
Sent via U.S. mail and hand delivery

RE. *State ex rel. Ware v. Crawford*, Slip Opinion No. 2022-Ohio-295

Dear Mr. Ware,

Please find enclosed copies of complaint numbers TCI0220000336 and TCI030000844.

These are being sent to you in accordance with the case noted above.

Sincerely,

Sarah Pierce

Sarah E. Pierce
Staff Counsel

Encl.

received
K. Ware
470743
8/11/22

In The Supreme Court of Ohio

State <i>ex rel.</i>	:	Case No. 2020-1498
Kimani Ware,	:	
	:	
Relator,	:	
	:	
v.	:	
	:	
Donna Crawford,	:	
	:	
Respondent.	:	Original Action on Mandamus

AFFIDAVIT OF FRANK CIMMENTO, Jr.

STATE OF OHIO :
: SS
TRUMBULL COUNTY :

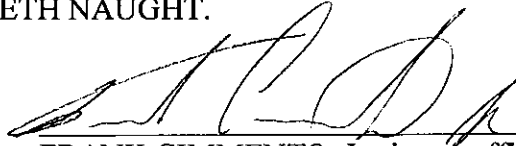
Now comes FRANK CIMMENTO, Jr., having been first duly sworn, states and affirms as follows:

1. I have personal knowledge of the information set forth in this Affidavit and I am competent to testify to the matters stated herein.
2. I am employed by the Ohio Department of Rehabilitation and Correction (“ODRC”). I have been employed with ODRC for over four (4) years. I have been assigned to Trumbull Correctional Institution (TCI) the entire time.
3. I am currently a Mail Clerk Screener at the Trumbull Correctional Institution (“TCI”), Trumbull County, Ohio. I have held this position for over two (2) years. My job duties and responsibilities include considerable knowledge of agency and federal postal regulations; able to explain postal procedures and requirements for insured, certified and other postal options.

4. The procedure in place at TCI for Inmates to send Certified Mail are as follows:
 1. The Inmate places item to be sent by certified mail in a sealed, addressed envelope with request to the mailroom staff to be sent certified mail.
 2. The Institutional Mailroom staff completes a cash slip for the cost of postage and submits it to the Cashier's office for approval and withdrawal from said Inmate's institution account.
 3. Once the cost of postage is approved and deducted from the Inmate's institution account, the mailroom staff completes the certified mail slip and green card, if requested, and attaches to the previously seal envelope and delivered to U.S. Post Office for processing.
 4. The U.S. Post Office stamps the certified mail slip with postmark and sends back to TCI for delivery to inmate through the routine mail process.
5. The tracking number of a certified mail article is not known until the certified mail slip is retrieved from stock and affixed to the envelope.
6. It is my routine to write the certified mail tracking number on the bottom of the cash slip prior to sending it to the Cashier's Office.
7. Once the requested cost of postage is approved by Cashier's Office, the Inmate will receive a carbon copy of the cash slip submitted by the Institutional Mail Room on their behalf. This would be first time an Inmate may learn of the certified mail tracking number and the cost to mail the certified mail article.
9. At no time prior to the Inmate receiving the carbon copy of the cash slip would they know the tracking number of the certified mail being processed/sent.
10. Once the certified mail article is received by the mail room it does not get returned to the Inmate unless the Cashier's Office denies the request for postage, due to insufficient funds.

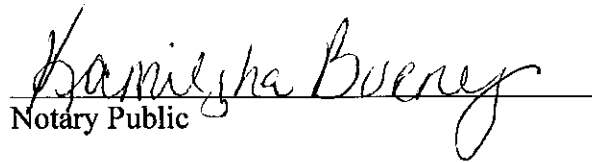
11. If a certified mail request is denied, the envelope returned to the Inmate does not contain any certified mail attachments.

FURTHER, THE AFFIANT SAYETH NAUGHT.



FRANK CIMMENTO, Jr., in my official capacity.

Sworn to in my presence and subscribed before me this 1st day of April
2021, in the County of Trumbull , City of Leavittsburg, State of Ohio.


Notary Public

KAMILYHA RENEE BURNEY
Notary Public
State of Ohio
My Comm. Expires
September 28, 2025