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State of Ohio's Proposed Jury Instructions

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

2003 APR 11 10:17 AM

CHARLES MURRAY, Administrator
of the Estate of
SAMUEL H. SHEPPARD,

CASE NO. 312322

JUDGE RONALD SUSTER

Plaintiff,

vs.

**STATE OF OHIO'S PROPOSED
JURY INSTRUCTIONS**

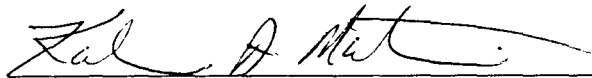
STATE OF OHIO,

Defendant.

Now comes the Defendant State of Ohio and respectfully moves that the attached instructions be included in the Court's charge to the jury.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County, Ohio



KATHLEEN A. MARTIN (0040017)
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ATTORNEYS FOR DEFENDANT

DEFENDANT'S REQUESTED INSTRUCTION NO. 1

INTRODUCTION

Members of the jury: you have heard the evidence and the arguments of counsel. It is now the duty of the Court to instruct you on the law which applies to this case. The Court and the jury have separate functions. You decide the disputed facts and I give the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law, nor to apply your own idea of what you think the law should be.

Source: 1 OJI 3.01.

DEFENDANT'S REQUESTED INSTRUCTION NO. 2

EVIDENCE AND INFERENCES

1. DEFINITION. Evidence is all the testimony received from witnesses (including depositions)(and the exhibits admitted during the trial)(and facts agreed to by counsel)(and any facts which the court requires you to accept as true).

2. Evidence may be direct or circumstantial, or both.

3. DIRECT EVIDENCE. Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. It includes exhibits admitted into evidence during the trial.

4. CIRCUMSTANTIAL EVIDENCE. Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts which naturally and logically follow, according to the common experience of mankind.

5. INFERENCE. To infer, or to make an inference, is to reach a reasonable conclusion of fact which you may, but are not required to, make from other facts which you find have been established by direct evidence. Whether an inference is made rests entirely with you.

You may infer a fact or reach a reasonable conclusion about a fact only from other facts that have been proved by the greater weight of the evidence, but you may not infer a fact or reach a conclusion about a fact from a speculative or remote basis that has not been established by the greater weight of the evidence.

6. STATISTICAL EVIDENCE. Statistics have been offered as evidence in this case. Statistics are one form of evidence that you may consider. To determine the usefulness and

reliability of the statistics you should evaluate them as you do any other kind of evidence, and you may consider the manner in which they were compiled and all of the surrounding facts and circumstances. This evidence is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

Source: 1 OJI 5.10

DEFENDANT'S REQUESTED INSTRUCTION NO. 3

EVIDENCE EXCLUDED

1. The evidence does not include the pleadings or any statement of counsel made during the trial, unless such statement was an admission or agreement admitting certain facts. The opening statements and the closing arguments of counsel are designed to assist you. They are not evidence.

2. **EVIDENCE STRICKEN.** Statements or Answers ordered stricken, or to which the court sustained an objection, or which you were instructed to disregard are not evidence and must be treated as though you never heard them.

3. **OBJECTIONS AND SPECULATION.** You must not guess why the court sustained the objection to any question or what the answer to such question might have been. You must not consider as evidence any suggestion included in a question that was not answered.

Source: 1 OJI 5.20.

DEFENDANT'S REQUESTED INSTRUCTION NO. 4
TRANSCRIPTS AND OTHER EVIDENCE

Some testimony was presented to you by video tape deposition and by the reading of transcripts from prior proceedings. This evidence is to be considered according to the same tests that are applied to other witnesses.

Source: 1 OJI 5.31

DEFENDANT'S REQUESTED INSTRUCTION NO. 5

OPINION TESTIMONY

1. Normally, a witness may not express an opinion. However, one who is in a profession or special line of work may express his opinion because of his education, knowledge and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

2. Questions have been asked of the expert witnesses based upon the underlying facts and data relied on by the expert witness. It is for you, the jury to decide if such facts or data on which the expert witnesses based their opinions are true, and then decide the weight to give such evidence.

3. As with other witnesses, on you alone rests the duty of deciding what weight to give the testimony of experts. In deciding its weight, consider the expert's skill, experience, knowledge, veracity, familiarity with the facts of the case, and the usual rules for testing credibility and deciding the weight to give to the testimony.

DEFENDANT'S REQUESTED INSTRUCTION NO. 6

CREDIBILITY

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence.

To determine the greater weight of the evidence, you must consider the credibility of the witnesses. You will use the tests of truthfulness which you use in your daily lives.

These tests include the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony, the opportunity he or she had to see, hear and know the things concerning which he or she testified; his or her accuracy of memory; frankness or lack of it; intelligence, interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Use these tests and assign to each witness' testimony, such weight as you think proper.

You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your duty to determine what testimony to believe and what testimony not to believe.

Source: 1 OJI 5.30

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

CONVICTION OF A CRIME

Evidence was introduced that Richard Eberling and Henry Fueher were each convicted of a felony. This fact may be considered by you for the purpose of helping you test the believability or weight given to the statements of those persons which were testified to by other witnesses or otherwise admitted into evidence.

The evidence that Richard Eberling and Henry Fueher each had a criminal conviction was not received, and you may not consider it, to prove the character of those persons. You may not infer from such evidence that either person had anything to do with the death of Marilyn Sheppard.

Source: 1 OJI 5.90
1 OJI 402.61

DEFENDANT'S REQUESTED INSTRUCTION NO. 8

PLAINTIFF'S CLAIM

In this case, the Plaintiff seeks a determination that Samuel H. Sheppard was a “wrongfully imprisoned individual”. This claim is governed by Ohio statutory law and case law interpretation.

Ohio’s statutory law defines a “wrongfully imprisoned individual” as one who satisfies all of the following:

1. He was charged with a violation of a section of the Revised Code by an indictment or information prior to, 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 or 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 term of imprisonment in a state correctional institution for the offense of which he was found guilty.
4. The individual’s conviction was vacated or 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, it 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.

I will now instruct you on the applicable law regarding that statute. As a general matter, I instruct you that the burden rests upon Charles Murray, Administrator of the Estate of Samuel H. Sheppard, as the Plaintiff in this case, to prove, by the greater weight of the evidence, that Samuel H. Sheppard was innocent of any criminal conduct associated with the death of Marilyn Sheppard.

As I previously instructed you, Samuel H. Sheppard had two criminal trials. They each considered different evidence than was presented in this trial and each involved different requirements of proof. Accordingly, you should not consider the fact that Samuel H. Sheppard was found guilty in one criminal trial and not guilty in the other criminal trial to indicate in one way or the other whether the Plaintiff has met its burden of proving to you the innocence of Samuel H. Sheppard.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 9

WRONGFUL IMPRISONMENT

The wrongful imprisonment statute is intended to compensate the innocent for wrongful imprisonment, it is not intended, however, to compensate those who have merely avoided criminal liability.

Unlike Samuel H. Sheppard's criminal case in which he needed only establish a reasonable doubt to prevail, in this wrongful imprisonment suit, the Plaintiff must prove by the greater weight of the evidence that Samuel H. Sheppard is not only not guilty, but that he is innocent of any and all criminal conduct connected with the death of Marilyn Sheppard.

Source: Walden v. State (1989), 47 Ohio St.3d 47
Gover v. State (1993), 67 Ohio St. 3d 93
Chandler v. State (Cuy. App. 1994), 95 Ohio App. 3d 142
Miller v. State (1997), Lucas Co. App. No. L-97-1009, 1997 Ohio App.
LEXIS 5271, unreported.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

INNOCENCE

In order to prove innocence, Charles Murray, the Administrator of the Estate of Samuel H. Sheppard, must prove the innocence of Samuel H. Sheppard by a preponderance of the evidence. The Plaintiff is required to produce more evidence of innocence than acquittal in the criminal case.

The Plaintiff's burden is not met simply as a result of an acquittal or a reversal of a conviction in the underlying criminal case. Since the State of Ohio was unable to appeal the verdict of acquittal in the criminal case, that acquittal does not answer the question of whether or not Samuel H. Sheppard was truly an innocent person.. A judgment of acquittal in the criminal case means that the State did not prove in that case guilt beyond a reasonable doubt. Unlike the underlying criminal case, in this civil case there is no presumption that Samuel H. Sheppard is innocent.

Additionally, the Plaintiff must prove by a preponderance of the evidence not only that Samuel H. Sheppard was innocent of the crime of murder but also that he was innocent of any other criminal conduct associated with the death of Marilyn Sheppard.

Source: Walden v. State (1989), 47 Ohio St.3d 47
Gover v. State (1993), 67 Ohio St. 3d 93
Chandler v. State (Cuy. App. 1994), 95 Ohio App. 3d 142
Miller v. State (1997), Lucas Co. App. No. L-97-1009, 1997 Ohio App
LEXIS 5271, unreported
Cotton v. State (1995), Cuy. Co. App. No. 67403, 1995 Ohio
LEXIS 1449, unreported
State v. Jackson (1994), Lorain Co. App. No. 93CA005724, 1994 Ohio App.
LEXIS 1737, unreported.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 11

OTHER CRIMINAL ACTS

MURDER. Murder occurs when a person purposely causes the death of another.

VOLUNTARY MANSLAUGHTER. Voluntary manslaughter occurs when a person, while under the influence of sudden passion or in a sudden state of rage, either of which is brought on by serious provocation by the victim that is reasonably sufficient to incite the person into using deadly force, knowingly causes the death of another.

INVOLUNTARY MANSLAUGHTER. An involuntary manslaughter occurs when a person causes the death of another as a proximate result of the person committing or attempting to commit another crime.

RECKLESS HOMICIDE. A reckless homicide occurs when a person recklessly causes the death of another.

FELONIOUS ASSAULT. A felonious assault occurs when a person knowingly causes or attempts to cause physical harm to another by means of a deadly weapon or dangerous ordnance.

AGGRAVATED ASSAULT. An aggravated assault occurs when a person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, knowingly causes serious physical harm to another or knowingly causes or attempts to cause physical harm to another by means of a deadly weapon or a dangerous ordnance.

ASSAULT. An assault occurs when a person knowingly causes or attempts to cause physical harm to another or when a person recklessly causes serious physical harm to another.

OBSTRUCTING JUSTICE. The crime of obstructing justice occurs when a person, with the purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for a crime or to assist another to benefit from the commission of a crime destroys or conceals physical evidence of the crime or induces any person to withhold testimony or information or communicates false information to any person.

OBSTRUCTING OFFICIAL BUSINESS. Obstructing official business occurs when a person, with the purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, does any act which hampers or impedes a public official in the performance of his lawful duties.

TAMPERING WITH EVIDENCE. Tampering with evidence occurs when a person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, alters, destroys, conceals, or removes any record, document, or thing, with the purpose to impair its value or availability as evidence in the proceeding or investigation or makes, presents, or uses any record, document, or thing, knowing it to be false and with the purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

Unless you find that Plaintiff has established by the preponderance of the evidence that Samuel H. Sheppard was truly innocent of all criminal activity as I have defined them for you, your verdict must be for Defendant State of Ohio.

Source: R.C. 2903.02
R.C. 2903.03
R.C. 2903.04
R.C. 2903.041
R.C. 2903.11
R.C. 2903.12
R.C. 2903.13
R.C. 2903.31
R.C. 2903.32
R.C. 2921.12

DEFENDANT'S REQUESTED INSTRUCTION NO. 12

BURDEN OF PROOF AND PREPONDERANCE

1. BURDEN ON PLAINTIFF. The burden of proof is on the plaintiff to prove the fact necessary for his case by a preponderance of the evidence.

2. DEFINITION. Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may, or may not, be identical with the greater number of witnesses.

3. CONSIDER ALL EVIDENCE. In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence, regardless of who produced it.

4. EQUALLY BALANCED. If the weight of the evidence is equally balanced, or if you are unable to determine which side of an issue has the preponderance, the party who has the burden of proof has not established such issue by a preponderance of the evidence.

Source: 1 OJI 3.10
1 OJI 3.50

DEFENDANT'S REQUESTED INSTRUCTION NO 13

CLOSING INSTRUCTIONS

GENERAL. The court has given you the instructions on the law applicable to this case. I will now instruct you on how to conduct your deliberations and prepare your verdict.

SELECTION OF (FOREMAN) (FOREWOMAN). When you go to the jury room, your first function will be to select one of your number to serve as a foreman or forewoman. The person you select to preside over your deliberations does not have any greater power nor does that person's vote have any more importance than others. He or she serves the purpose of helping to conduct your deliberations in an orderly manner and to give each of you the opportunity to express your opinion. One additional duty of the foreman or forewoman is to see to it that the verdict forms and any exhibits are returned to the court after you have reached a verdict.

VERDICT FORMS. I will now read the verdict forms and caution you not to make any inference by reason of the order in which I read them.

REQUIRED NUMBER TO REACH VERDICT. In order to conclude this case, it is necessary that at least six (6) members of the jury agree upon the verdict. The members of the jury agreeing upon the verdict must sign their names to the form of verdict to which they have agreed. The foreman or forewoman need not be among the six (6) jurors who have agreed in order to reach a verdict.

DISCUSSING VERDICT. You are warned not to discuss your verdict until it has been returned to the court, nor are you to discuss the status of your deliberations with anyone.

VERDICT SIGNED. When you have reached and signed a verdict, you will summon the bailiff who will return you to the courtroom at which time your verdict will be announced.

Source: I OJI 25.10

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 14

COMMON CLOSING REMARKS

1. The court cannot embody all the law in any single part of these instructions. In considering one portion, you must consider it in the light of and in harmony with all the instructions.

2. The court has instructed you on all law necessary for your deliberations. Whether or not certain instructions are applicable may depend upon the conclusions you reach on the facts by a preponderance of the evidence. For example, the court does not know whether you will need to apply the instructions on the measure of damages or comparative negligence since that would depend upon the verdict you reach. If you have an impression that the court has indicated how any disputed fact should be decided, you must put aside such an impression because that decision must be made by you, based solely upon the facts presented to you in this courtroom.

3. SYMPATHY. Circumstances in the case may arouse sympathy for one party or the other. Sympathy is a common, human emotion. The law does not expect you to be free of such normal reactions. However, the law and your oath as jurors require you to disregard sympathy and not to permit it to influence your verdict.

4. You must not be influenced by any consideration of sympathy or prejudice. It is your duty to weigh the evidence, to decide the disputed questions of fact, to apply the instructions of law to your findings and to render your verdict accordingly. Your duty as jurors is to arrive at a fair and just verdict.

5. Your initial conduct upon commencing deliberations is a matter of importance. It is not wise to express immediately a determination to insist upon a certain

verdict. Having so expressed yourself, your sense of pride may be aroused, and you may hesitate to give up your position even if shown that it is not correct.

6. Consult with one another in the jury room, and deliberate with a view to reaching an agreement if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself. You should do so, however, only after a discussion of the case with the other jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender your considered opinion concerning the weight of the evidence in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

Source: 1 OJI 25.20

DEFENDANT'S REQUESTED INSTRUCTION NO. 15

ALTERNATE JUROR(S)

1. Jurors selected as alternates are not permitted to participate in the jury's deliberations unless one or more of the regular jurors is unable to complete his or her service due to illness or other misfortune. It will not be necessary for the alternate to render further service in this case.

2. CAUTION TO ALTERNATE(S). Even though you will not be required to render further service in this case, the court must restrict you from discussing the case with anyone or revealing to anyone how you would have voted. After the jury has returned its verdict and it is announced in court, you are released from this restriction and at that time you may, if you wish, discuss the case.

3. After the jury retires to the jury room, you are to return to the jury assignment room for further instructions.

4. I want to acknowledge the valuable service rendered by the alternate(s) and express my thanks as well as the thanks of the community.

Source I OJI 25.30.

DEFENDANT'S REQUESTED INSTRUCTION NO. 16

FINAL CLOSING INSTRUCTIONS

1. The court reminds you that the foreman or forewoman of the jury will be responsible for the return to the court of the exhibits, if any, and the verdict forms.

2. Until your verdict is announced in open court, no juror is permitted to disclose to anyone the status of your deliberations or nature of your verdict. This order must be strictly obeyed.

3. After your verdict is returned and announced in court, you may discuss the case with anyone. You are not required to do so; it is a matter of your own free choice.

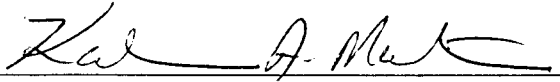
4. I want to thank you and express the appreciation of the citizens of this community of your services as jurors. By providing this service you have contributed toward continuing the unique system of justice which we enjoy in the United States of America.

5. JURY RETIRES. You will now retire to the jury room to deliberate upon your verdict. The bailiff will confer with you regarding any recess or adjournment.

Source: 1 OJI 25.40.

CERTIFICATE OF SERVICE

A copy of the foregoing State of Ohio's Proposed Jury Instructions was hand delivered to Terry H. Gilbert, counsel for plaintiff, this 6th day of April, 2000.



KATHLEEN A. MARTIN
Litigation Manager, Civil Division

Service: LEXSEE®

Citation: 1994 Ohio App. LEXIS 1737

1994 Ohio App. LEXIS 1737, *

STATE OF OHIO, Appellee v. NEIL S. JACKSON, Appellant

C.A. No. 93CA005725

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY

1994 Ohio App. LEXIS 1737

April 20, 1994, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF LORAIN, OHIO. CASE NO. 91CR040727

DISPOSITION: The trial court's judgment is affirmed.

CORE TERMS: imprisoned, imprisonment, wrongfully, criminal case, judgment of acquittal, civil action, innocence, claimant, innocent, assignment of error, journal entry, specification, sentenced

COUNSEL: GREGORY A. WHITE, Prosecuting Attorney, 226 Middle Ave., Elyria, OH 44035.

NEIL JACKSON, #242-441, 2075 S. Avon-Belden Road, Grafton, OH 44044.

JUDGES: REECE, COOK, DICKINSON

OPINIONBY: FOR THE COURT; JOHN W. REECE

OPINION: DECISION AND JOURNAL ENTRY

Dated: April 20, 1994

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

REECE, P.J. Plaintiff-appellant, Neil Jackson appeals the trial court's denial of his motion for a determination that he was wrongfully imprisoned pursuant to R.C. 2743.48. We affirm.

Jackson was indicted on August 20, 1991, on one count of escape, R.C. 2921.34(A), which carried a specification for a prior violent offense. On December 11, 1991, Jackson was convicted of escape with the specification and sentenced to a two-five year jail term. Jackson appealed his conviction to this court and reversed it for insufficient [*2] evidence. *State v. Jackson* (Oct. 21, 1992), Lorain App. No. 92CA005283, unreported. On August 30, 1993, Jackson moved for determination that he was wrongfully imprisoned. The motion was filed in the criminal case which included his original indictment. The trial court denied this motion. Jackson appeals, raising as his sole assignment of error the trial court's denial of this motion.

Initially, we note that an action for wrongful imprisonment cannot be brought by filing a motion for a determination of wrongful imprisonment in the criminal case in which the conviction occurred. An action brought pursuant to R.C. 2743.48 and R.C. 2305.02 for wrongful imprisonment is a civil action. **Walden v. State (1989), 47 Ohio St.3d 47, 53, 547 N.E.2d 962.** Civ.R. 3(A) requires that a civil action be commenced with the filing of a complaint. In re Investigation of Laplow (1993), 87 Ohio App.3d 59, 61, 621 N.E.2d 860. In this case, Jackson attempted to obtain a determination of wrongful imprisonment by filing this motion in his criminal case. This is an inappropriate avenue to seek the remedy he requests.

Even if Jackson had properly commenced this action, he has not met his burden of [*3] proving that he was wrongfully imprisoned. In a proceeding under R.C. 2305.02, a claimant must prove his innocence by a preponderance of the evidence. **Walden supra**, paragraph three of the syllabus. A claimant may not rely on the judgment of acquittal in his criminal case to prove the civil wrongful imprisonment claim **Id. at 51-52**. A judgment of acquittal is not necessarily a finding that an accused is innocent; rather it is a finding that the state did not prove its case beyond a reasonable doubt. *Id.* In reversing Jackson's conviction, we were holding that the state had not proved beyond a reasonable doubt that Jackson had escaped. It does not necessarily follow from that judgment that Jackson was innocent. Nor does it prove that he was wrongfully imprisoned under R.C. 2743.48. Thus, Jackson was required to produce more evidence of his innocence than the reversal of his conviction. This he failed to do.

It also appears that Jackson was incarcerated for separate offenses while he was imprisoned on the escape charge. In ruling on a motion to expunge this conviction from Jackson's record on February 22, 1993, the trial court found that Jackson was incarcerated on [*4] charges of aggravated trafficking and possession of criminal tools. If a defendant is sentenced for other offenses not related to the conviction of which he is acquitted, it is questionable whether he may be found to be wrongfully imprisoned pursuant to R.C. 2743.48(A)(1)-(5). Jackson's assignment of error is overruled.

The trial court's judgment is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to App.R. 22(E).

Costs taxed to Appellant.

Exceptions.

JOHN W. REECE, FOR THE COURT

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Service: **LEXSEE®**
Citation: **1995 Ohio app lexis 1449**

*1995 Ohio App. LEXIS 1449, **

MILTON COTTON, Plaintiff-Appellant -vs- STATE OF OHIO, Defendant-Appellee

NO. 67403

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1995 Ohio App. LEXIS 1449

April 6, 1995, DATE OF ANNOUNCEMENT OF DECISION

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas. Case No. 237587.

DISPOSITION: JUDGMENT: Affirmed

CORE TERMS: gray, pick-up, truck, wrongfully, stolen, column, blue, steering column, imprisonment, imprisoned, receiving stolen property, driveway, peeled, criminal activity, found guilty, civil case, steering, felony, parked, street, plate, criminal case, Superintendence Rule, sufficient evidence, criminal trial, preponderance, detectives, dashboard, claimant, mechanic

UNSEL: For Plaintiff-Appellant: PAUL MANCINO, JR., ESQ., 75 Public Square Building, Suite 1016, Cleveland, Ohio 44113.

For Defendant-Appellee: STEPHANIE TUBBS-JONES, Cuyahoga County Prosecutor, MICHAEL POKORNY, Assistant Prosecuting Attorney, 1200 Ontario Street, Cleveland, Ohio 44113.

JUDGES: JAMES M. PORTER, JUDGE. JAMES D. SWEENEY, P.J., and O'DONNELL, J., CONCUR.

OPINIONBY: JAMES M. PORTER

OPINION: JOURNAL ENTRY AND OPINION

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 [*2] 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 Ellwell 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 and a blue Cadillac were parked in the backyard of the location on 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 lived at the address, standing next to the driver's door of a gray 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 pass the ignition lock and start [*3] 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 [*4] 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 [*5] 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 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 [*6] 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 [*7] 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 [*8] 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, 547 N.E.2d 962, 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 [*9] 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 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, 616 N.E.2d 207, 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 the defendant was acquitted at trial or, as here, the conviction was reversed on appeal. *Chandler v. State* (1994), 95 Ohio App.3d 142, 641 N.E.2d 1382; see, also, *Mueller v. State* [*10] (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. 3d 295, 515 N.E.2d 982. 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 [*11] 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), [*12] 13 Ohio App.3d 115, 468 N.E.2d 378; *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 364 N.E.2d 1364. See, also, *State ex rel. Athens Cty. Dept. of Human Serv. v. Wolf* (1991), 77 Ohio App.3d 619, 622, 603 N.E.2d 252.

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 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.

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 [*13] 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.

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.

JAMES D. SWEENEY, P.J., and

O'DONNELL, J., CONCUR.

JAMES M. PORTER

GE

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 [*14] of the court and time period for review will begin to run.

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1997 Ohio App. LEXIS 5271, *

Morgan A. Miller, Appellant v. State of Ohio, Appellee

Court of Appeals No. L-97-1009

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS COUNTY

1997 Ohio App. LEXIS 5271

November 21, 1997, Decided

PRIOR HISTORY: [*1] Trial Court No. CI 93-1923.

DISPOSITION: JUDGMENT AFFIRME.

CORE TERMS: assignment of error, imprisonment, felony, aggravated, robbery, credible evidence, trier of fact, direct appeal, found guilty, new trial, incarceration, credibility, sentenced, complain, claimant, manifest, lesser, well-taken

COUNSEL: Richard M. Kerger, Jessica R. Kerger, and Daniel F. Marinik, for appellant.

Betty D. Montgomery, Attorney General, and Jeffrey W. Clark, Julia R. Bates, prosecuting attorney, and Dean P. Mandross, for appellee.

JUDGES: Peter M. Handwork, J., James R. Sherck, J., Richard W. Knepper, J. CONCUR.

OPINIONBY: JAMES R. SHERCK

OPINION: OPINION AND JUDGMENT ENTRY

SHERCK, J. This appeal comes to us from a judgment issued by the Lucas County Court of Common Pleas which denied a damage claim for statutory wrongful imprisonment. Because there was competent credible evidence to support the trial court's findings, we affirm.

In 1984, a jury convicted appellant, Morgan A. Miller, of felonious assault and aggravated robbery; appellant was also found guilty of firearm specifications attached to each charge. The court then sentenced appellant to an indeterminate term of twenty to forty-six years incarceration. On direct appeal, we affirmed his conviction. State v. Miller, 1985 Ohio App. LEXIS 6962 (July 19, 1985), Lucas App. No. L-84-235, unreported. A subsequent motion for a new trial was also rejected. State v. Miller, 1987 Ohio App. LEXIS 6650 (May 8, 1987), Lucas App. No. L-86-359, unreported. [*2]

In 1992, appellant filed a petition for delayed reopening of his direct appeal pursuant to State v. Murnahan (1992), 63 Ohio St. 3d 60, 584 N.E.2d 1204, arguing that his appellate counsel was ineffective. Appellant contended, inter alia, that his counsel on appeal should have attacked the trial court's decision not to permit the testimony of one who had confessed to and later recanted responsibility for the crimes of which appellant was accused. On this ground, we concluded that appellant had been denied the effective assistance of appellate counsel and that denial operated to his prejudice. As a result of that conclusion, we reversed appellant's conviction and remanded the matter to the trial court for a new trial. State v. Miller, 1992 Ohio App. LEXIS 6187 (Dec. 2, 1992), Lucas App. No. L-92-142, unreported. On remand, the Lucas County Prosecuting Attorney declined to retry appellant.

On July 8, 1993, appellant initiated an action against the state seeking damages for wrongful imprisonment pursuant to R.C. 2743.48. In December 1995, the matter proceeded to a bench trial. On December 3, 1996, the trial court issued a decision and judgment denying appellant relief. Appellant now brings this appeal, [*3] setting forth the following two assignments of error:

"Assignment of Error No. 1. The Decision of the Trial Judge Was Against the Manifest Weight of the Evidence.

"Assignment of Error No. 2. In A Case Tried to the Court, the Trial Judge May Not Accept Material Portions of a Witness's Testimony and Reject Portions Without Making Specific Findings as to the Reasons Supporting This Decision."

One who is wrongfully imprisoned is statutorily entitled to be compensated by the state for that imprisonment. See R.C. 2743.48(E)(2). To establish wrongful imprisonment, the claimant must show that he or she was (1) charged with a felony or aggravated felony, (2) found guilty, but did not plead guilty, to the charge or a lesser included felony or aggravated felony, (3) sentenced to a term of imprisonment in a state facility for that offense and (4) had the conviction vacated, dismissed or reversed on appeal with no further prosecution for acts associated with that conviction possible or contemplated by the prosecuting attorney. R.C. 2743.48(A)(1) - (4). Additionally, it must be determined before a court of common pleas that the offense of which appellant was found guilty, including [*4] any lesser included offense, was not committed by the claimant or was not committed by anyone. R.C. 2743.48(A)(5).

Appellant has satisfied the first four of these requirements. However, unlike his criminal trial in which appellant needed only establish a reasonable doubt to prevail, he must, in a wrongful imprisonment suit, prove by the greater weight of the evidence that he is not only not guilty, but that he is innocent of the crime for which incarceration was imposed. Gover v. State (1993), 67 Ohio St. 3d 93, 95, 616 N.E.2d 207; Walden v. State (1984), 47 Ohio St. 3d 47, 52, 547 N.E.2d 962.

In his first assignment of error, appellant complains that the judgment against him was against the manifest weight of the evidence. Judgments supported by some competent, credible evidence will not be reversed as against the manifest weight of the evidence. C.E. Morris v. Foley Constr. Co. (1978), 54 Ohio St. 2d 279, 376 N.E.2d 578, syllabus, Vogel v. Wells (1991), 57 Ohio St. 3d 91, 96, 566 N.E.2d 154. A party who has the burden of proof, " *** has little leave to complain if the finder of fact chooses not to believe some or all of his proofs." In re Scott (1996), 111 [*5] Ohio App. 3d 273, 276, 675 N.E.2d 1350, quoting Fantozzi v. Sandusky Cement Products, 1994 Ohio App. LEXIS 2760 (June 24, 1984), Erie App. No. E-93-31, unreported. As to the trial court's assessment of the credibility of the witnesses, the trier of fact is in the best position to weigh credibility. As a result, appellate courts are guided by the presumption that the findings of the trier of fact are correct. Seasons Coal Co., Inc. v. Cleveland (1984), 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273.

In this case, the trial court credited the testimony of two witnesses to the robbery. Each positively testified that appellant was the man who robbed them. These witnesses were in a position to observe the face of the robber and were, therefore, competent to testify to his identity. In contrast, the court discredited the testimony of other witnesses who attempted to place appellant elsewhere during the robbery. Therefore, the findings of the trial court are supported by some competent, credible evidence. Accordingly, appellant's first assignment of error is found not well-taken.

In his second assignment of error, appellant properly points out that the trial court chose to accept as true portions of witnesses' [*6] testimony while rejecting other portions. Appellant then suggests that the trial court is duty bound to make specific findings as to the court's reasons for this; its failure to do so, appellant argues, is error. Appellant, however, presents no authority in support of this proposition, nor is this court familiar with any such authority within or without the state of Ohio. Triers of fact are regularly selective in the evidence they choose to believe. We see no reason to make a burden of this practice by accepting appellant's point of view. Accordingly, appellant's second assignment of error is found not well-taken.

On consideration whereof, the court finds substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.