IN THE CLEVELAND MUNICIPAL COURT
CLEVELAND, OHIO

IN RE:	)	
	)	
AFFIDAVITS RELATING TO	)	JUDGE RONALD B. ADRINE
TIMOTHY LOEHMANN &	)	
FRANK GARMBACK	)	JUDGMENT ENTRY

On June 9, 2015, Dr. Jawanza Colvin, Mr. Bakari Kiwana, Mr. Edward Little, Jr., Ms. Julia Shearson, Ms. Rachelle Smith, Dr. R.A. Vernon, Dr. Rhonda Williams and Mr. Joseph Worthy, jointly and severally, filed with the Cleveland Municipal Court affidavits accusing Cleveland Police Patrol Officers Timothy Loehmann and Frank Garmback with crimes arising from the shooting death of 12 year-old Tamir Rice on November 22, 2014, within the City of Cleveland.

Each of the affiants alleged, in separate parts of their respective affidavits, that each of the accused, by their actions, committed the following violations of the law during the events that resulted in Tamir's death:

1. Aggravated Murder, in violation of R.C. 2903.01
2. Murder, in violation of R.C. 2903.02
3. Involuntary Manslaughter, in violation of R.C. 2903.04(B)
4. Reckless Homicide, in violation of R.C. 2903.041
5. Negligent Homicide, in violation of R.C. 2903.05
6. Dereliction of Duty, in violation of R.C. 2921.44

Generally, the initiation of criminal proceedings in the State of Ohio is the preserve of the prosecuting authority within a given jurisdiction. However, state law does provide an avenue for a private citizen having knowledge of facts to initiate the criminal process.

R.C. 2935.09 provides private citizens the ability to bring forward accusations by affidavit to cause an arrest or prosecution. As relevant to the situation now before this bench, that section reads in pertinent part:

> "(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.

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> (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...."

"Knowledge of the facts," within the meaning of the R.C. 2935.09, clearly indicates a legislative intent to restrict and define the type of knowledge which a private citizen must possess before being authorized to sign an affidavit. *South Euclid v. Clapacs* (1966), 213 N.E.2d 828. The phrase "knowledge of the facts" has a rather definite meaning in criminal law. In the general parlance of the court room, it means firsthand knowledge acquired by a witness through the utilization of one of his five senses (sight, hearing, smell, taste and touch), that is to say that the witness has perceived the event, incident, or thing about which he is testifying by seeing, hearing, smelling, tasting or touching it. True enough, the word "knowledge" sometimes encompasses information which has been acquired from others. However, when the phrase "of the facts" is added to describe the type of "knowledge" required, it would seem that the entire phrase "knowledge of the facts" was intended to mean factual or firsthand knowledge acquired through the use of one of the five senses. *South Euclid v. Clapacs* (1966), 213 N.E.2d 82.

In each of the affidavits filed with the court in this matter, the affiants related that they had the opportunity to view the surveillance video taken at the time of the complained of event. They each reported that they relied upon their review of the surveillance video to provide them with, "knowledge of the subsequent events from one or more of [their] five natural senses." Finally, every affiant indicated that they had attached a copy of the video relied upon, in two forms, to their affidavit.

The video in question in this case is notorious and hard to watch. After viewing it several times, this court is still thunderstruck by how quickly this event turned deadly. The relevant portion covers 18 seconds immediately preceding the point where Tamir Rice suffers the wound, doubles-up and falls to the ground. On the video, the Zone Car containing Patrol Officers Loehmann and Garmback is still in the process of stopping when Rice is shot.

Following the shooting, four additional minutes pass, during which neither officer approaches Tamir as he lies wounded on the ground. At close to four minutes, a young lady, who news reports have since identified as Tamir's

sister arrives on the scene and is restrained from going to her brother's side. Nearly eight minutes go by before paramedics arrive at the location. During that same time, approximately six other members of the Cleveland Division of Police join the first two and appear on the video.

It is difficult to discern, because of the quality of the tape, what, if any, first aid anyone renders to Rice during these eight minutes. Nearly fourteen minutes ultimately expire between the time that Tamir is shot and the time that he is removed from the park.

The video depicts Rice approaching the Zone Car just as it pulls into the park but it does not appear to show him making any furtive movement prior to, or at, the moment he is shot. Again, because of the quality of the video, the young man's arms are barely visible, but they do not appear to be raised or out-stretched. In the moments immediately before, and as the Zone Car approaches, the video does not display the toy gun in Tamir's hands. There appears to be little if any time reflected on the video for Rice to react or respond to any verbal or audible commands given from Loehmann and Garmback from their Zone Car between the time that they first arrived and the time that Rice was shot. Literally, the entire encounter is over in an instant.

Beyond the videos presented as exhibits, each affidavit sets forth the statutory language of each offense alleged. It is unquestionably sufficient to charge felony crimes in the words of the statutes. Crim.R. 7(B) states in part:

> The indictment * * * shall contain a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the applicable section of the statute as long as the words of that statute charge an offense, or in any words sufficient to give the accused notice of all the elements of the offense with which he is charged. *State v. White-Barnes*, 1992 WL 368844 (Ohio App. 4 Dist.).

Logically speaking, affidavits filed that allege misdemeanor violations should not be subject to stricter standards of scrutiny than indictments charging felonies. *State v. White-Barnes*, 1992 WL 368844 (Ohio App. 4 Dist.). Therefore, it is permissible for those, too, to be framed in statutory language.

None of the affidavits in this matter provide any other factual basis to justify their requests for the issuance of the respective complaints. In order for this

court to be in the position to adequately assess the validity of the accusations found therein, those affidavits must be reviewed to determine if they present, at minimum, the three requirements essential for issuance of a criminal complaint: 1) they must set forth a written statement of facts that constitute the essential elements of the offense charged. The essential elements of a given offense are those facts that must be proven to obtain a conviction, 2) they must state the numerical designations of the Revised Code Sections allegedly violated, and 3) they must be made under oath before a person authorized to administer oaths. *State v. Jones* (2011) 2011 WL 4553117, *State v. Patterson* (1988), 1998 Ohio Lexis 2289.

Upon completion of this review, the court finds that each of the documents before it meets these minimum requirements.

According to the statute, once the reviewing official is presented the affidavits called for by R.C. 2935.09, the official is required to make a determination as to the appropriate actions needed to substantiate or debunk the allegations contained in each document.

At the beginning of this review, this court is mindful that despite any conclusions it draws from the evidence found in the affidavits, its role here is advisory in nature. The actual issuance of misdemeanor complaints by the City of Cleveland, following the court's review, may be based upon the court's determination that such charges should issue. That decision is completely within the discretion of the City's prosecuting authority.

The City Prosecutor may also decide to issue felony complaints in the Cleveland Municipal Court based upon his acceptance of the court's determination that there is probable cause to believe certain accusations found in the affidavits posited against these Patrol Officers. However, those felony charges and perhaps some, or all, of the misdemeanor charges must ultimately be delivered to the Cuyahoga County Prosecuting Attorney and, will then be subject to ***his*** discretion, and resolved in the Cuyahoga County Court of Common Pleas.

Resort to this statutory process does not provide an "end around" either the City or the County Prosecutor. The statute provides this court the ability to review affidavits filed by private citizens for sufficiency and good faith. It utilizes the standard of probable cause, the lowest standard of proof required in any criminal proceeding for the conduct of that review. That statutory schema does not, however, provide the court the ability to require that its determination be substituted for the discretion of either the City or the County Prosecuting authorities.

In *State ex rel. Boylen v. Harmon,* 107 Ohio St.3d 370, 2006-Ohio-7, 839 N.E.2d 934, ¶6 (per curiam), the Supreme Court of Ohio determined that the procedure calling for a probable cause hearing under Crim.R. 4(A) was applicable where affidavits are filed ***with a valid criminal complaint*** under Crim.R. 3. It concluded that Crim.R. 4(A) ***does not apply*** where no complaints and (as here) ***only affidavits*** are filed under R.C. 2935.09. Boylen, supra, at ¶ ¶ 9 & 10.

In point of fact, close examination of the applicable statues and criminal rules reveals that the trial court does not have the option of unilaterally issuing a warrant on its own initiative in these private citizen initiated cases.

Prior Version of R.C. 2935.09

R.C. 2935.09 provides for the initiation of a criminal action by a "peace officer" or "private citizen." The statute was revised in 2006.

The prior version stated:
"In all cases not provided by sections 2935.02 to 2935.08, inclusive, 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 file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney."

In *State v. Jones*, 2011 WL 4553117 (Ct. App. 11th Dist. Portage County 2011) the court, interpreting (the prior version) of R.C. 2935.09, explained the statute as follows:
" * * * [A] police officer or a private citizen may employ either of two methods 'in order to cause the arrest or prosecution of a person charged with committing an offense[.]' First, the complainant may allege that an offense has been committed by filing an affidavit with a judge, clerk of court of record, or magistrate. Second, the complainant may file such an affidavit with a prosecuting attorney. * * *. In the former scenario, the affidavit is the charging instrument and, in effect, becomes the complaint. Under the latter scenario, the prosecuting attorney files a formal complaint and attaches the affidavit thereto." Patterson at *8, citing 2 Katz & Giannelli, Criminal Law (1996) 2-3, Section 35.3.

Under the prior version of the statute, there were two ways that a prosecution could be initiated by a private citizen; the first method was by the filing of an affidavit with a judge or clerk of a court of record, and the second was by filing an affidavit with the prosecuting attorney who, in turn, would file a complaint. *State v. McNeese* (Oct. 23, 1995), 12 th Dist. No. CA93-12-108, 1995 Ohio App. LEXIS 4665, *14, 1995 WL 617589 citing *State v. Maynard* (1964), 1 Ohio St.2d 57, 58–59, 203 N.E.2d 332.

Current Version of R.C. 2935.09

The General Assembly amended R.C. 2935.09, effective June 30, 2006. Am.H.B. No. 214, 151 Ohio Laws, Part III, 5973. The current version of the statute states, in pertinent part:

"(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 comparison of the two versions shows that, under the amended statute, the ability of a private citizen to "cause prosecution" by filing an affidavit is now limited. Under the prior version, either a peace officer or a private citizen may file an affidavit with the judge or a clerk of court to commence prosecution. *State v. Hooper* (1971), 25 Ohio St.2d 59, 61, 267 N.E.2d 285. Under the current version of the statute, a "peace officer" may still "cause prosecution" by filing an affidavit with a "reviewing official" (i.e., a judge or a prosecutor) or the clerk of a court. R.C. 2935.09(C). However, a private citizen, to "cause prosecution," now must file an affidavit with a "reviewing official" for **the purpose of review** to determine **if** a complaint should be **filed by the prosecutor**. R.C. 2935.09(D).

Regarding the ability of a private citizen to initiate the criminal process, R.C. 2935.09 sets forth the "what." R.C. 2935.10 sets forth the "how." The Ohio Supreme Court has consistently held that R.C. 2935.09 does not mandate prosecution of all offenses charged by affidavit. *State ex rel. Boylen v. Harmon,* 107 Ohio St.3d 370, 2006-Ohio-7, 839 N.E.2d 934, ¶ 6 (per curiam). R.C. 2935.09 " 'must be read *in pari materia* with R.C. 2935.10, which prescribes the subsequent procedure to be followed.' " *Id.*

Under R.C. 2935.10 (A) in those cases where the charge that the private citizen seeks to have initiated is a felony, the statute provides that upon a finding of probable cause, the reviewing official shall issue a warrant for the arrest of the person charged in the affidavit, unless the hearing official finds that the affidavit "was not filed in good faith." The language used, "shall," is mandatory, and would seem to suggest no discretion in the trial court, once a determination of both probable cause and good faith is made.

However, the statute's mandatory requirement that the trial court issue a warrant solely based upon the existence of the facts contained in an affidavit puts the statute at odds with the provisions of Crim.R. 4 (A). Crim.R. 4 (A)(1) governs criminal warrant, summons and arrest procedures. It reads, as relevant to this discussion:

> **(A) Issuance**
>
> (1) *Upon complaint.* If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by a judge, magistrate, clerk of court, or officer of the court designated by the judge, to any law enforcement officer authorized by law to execute or serve it.

Such conflicts between statutes and the Supreme Court of Ohio's Rules of Court are subject to a provision of the Ohio State Constitution. Article IV, Section 5 (B) of the Ohio Constitution provides, in pari materia, that, "All laws in conflict with such rules shall be no longer in effect after such rules have taken effect." Therefore, the warrant provision of R.C. 2935.10 (A) is superseded by Crim.R. 4(A)(1). The rule requires that there be a complaint, (or a complaint accompanied by an affidavit or affidavits) filed with the court

before a warrant may issue, and is now the only legitimate vehicle by which a felony warrant can result.

Therefore, pursuant to obligation imposed upon this court by R.C. 2935.09 with regard to review of the affidavits presented, the court determines the following:

1. Identical accusations concerning six criminal violations are made by all of the affiants against each of the accused in the various affidavits filed with the court. For purposes of disposition, the identical criminal charges made against each accused by each affiant are consolidated according to the respective criminal charges. All affidavits alleging allegations of a specific criminal violation are consolidated into one allegation and disposed of accordingly based upon the court's review of the conduct of each accused.

2. As such, the court further finds that all of the affidavits presented were executed in good faith.

3. With regards to the accusation of Aggravated Murder, in violation of R.C. 2903.01, against the accused, FRANK GARMBACK, the court finds that the accusation lacks probable cause.

4. With regard to the accusation of Aggravated Murder, in violation of R.C. 2903.01, against the accused, TIMOTHY LOEHMANN, the court finds the accusation lacks probable cause.

5. With regard to the accusation of Murder, in violation of R.C. 2903.02, against the accused, FRANK GARMBACK, the court finds the accusation lacks probable cause.

6. With regard to the accusation of Murder, in violation of R.C. 2903.02, against the accused, TIMOTHY LOEHMANN, the court finds that probable cause exists for the accusation.

7. With regard to the accusation of Involuntary Manslaughter, in violation of R.C. 2903.04(B), against the accused, FRANK GARMBACK, the court finds the accusation lacks probable cause.

8. With regard to the accusation of Involuntary Manslaughter, in violation of R.C. 2903.04(B), against the accused, TIMOTHY LOEHMANN, the court finds that probable cause exists for the accusation.

9. With regard to the accusation of Reckless Homicide, in violation of R.C. 2903.041, against the accused, FRANK GARMBACK, the court finds the accusation lacks probable cause.

10. With regard to the accusation of Reckless Homicide, in violation of R.C. 2903.041, against the accused, TIMOTHY LOEHMANN, the court finds that probable cause exists for the accusation.

11. With regard to the accusation of Negligent Homicide, in violation of R.C. 2903.05, against the accused, FRANK GARMBACK, the court finds that probable cause exists for the accusation.

12. With regard to the accusation of Negligent Homicide, in violation of R.C. 2903.05, against the accused, TIMOTHY LOEHMANN, the court finds that probable cause exists for the accusation.

13. With regard to the accusation of Dereliction of Duty, in violation of R.C. 2921.44, against the accused, FRANK GARMBACK, the court finds that probable cause exists for the accusation.

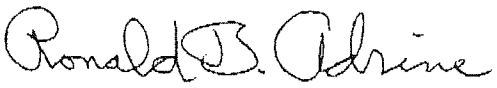
14. With regard to the accusation of Dereliction of Duty, in violation of R.C. 2921.44, against the accused, TIMOTHY LOEHMANN, the court finds that probable cause exists for the accusation.

Having completed its review of all of the affidavits in this matter, pursuant to the requirements of R.C. 2935.09, this court determines that complaints should be filed by the Prosecutor of the City of Cleveland and/or the Cuyahoga County Prosecutor, in re: the accusations levied in the said affidavits against the accused, Frank Garmback, in re: Negligent Homicide and Dereliction of Duty. This determination shall be communicated and forwarded to both prosecutors' offices immediately contemporaneous with its announcement.

Having completed its review of all of the affidavits in this matter, pursuant to the requirements of R.C. 2935.09, this court also determines that complaints should be filed by the Prosecutor of the City of Cleveland and/or the Cuyahoga County Prosecutor, in re: the accusations levied in the said affidavits against the accused Timothy Loehmann, for Murder, Involuntary Manslaughter, Reckless Homicide, Negligent Homicide and Dereliction of Duty. This determination shall be communicated and forwarded to both prosecutors' offices immediately contemporaneous with its announcement.

To reach these determinations, this court applies the standard of probable cause, i.e., more than a mere suspicion but less than the quantum of evidence required for conviction. The prosecutors, however, are ethically required to decide whether, applying the highest standard of proof required by law, to wit: beyond a reasonable doubt, it is more likely than not that a reasonable trier of fact will hold the individuals accused in these affidavits accountable for these, or any other crimes that might be alleged. This court reaches its conclusions consistent with the facts in evidence and the standard of proof that applies at this time.

IT IS SO ORDERED.



Judge Ronald B. Adrine