

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY

CIVIL

Clifford Devaughn Owensby

2049 Rustic Rd.

Dayton, Oh 45405

Plaintiff,

VS

The Dayton Police Department

130 West Second St.

Dayton, Oh 45402

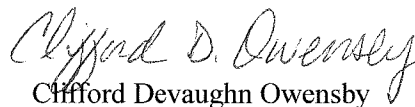
Defendant

Now comes Plaintiff pursuant to O.R.C 2737 moves the court to issue an order directing the Defendants to release the Plaintiff's property of ten thousand/\$10,000 cash. On or about the month of April of 2008 the Plaintiff was stopped by the Dayton Police. Upon a search of his person and vehicle the police removed and seized the Plaintiff's cash.

The Plaintiff had a large amount of cash on him. The money was not taken for a tax assessment, fine pursuant to statute, or seized under execution of judgement. It was merely a large amount of cash.

Further, during the course of the stop, the Defendant claimed that the Plaintiff would be contacted at a later date. It has been well over six years and the Plaintiff has not been contacted nor received notice from the Defendant in reference to when his property can be made available.

Due to the number of years this property has been held, and the Defendants failing to notify the Plaintiff an order to the defendant releasing said property should be issued.


Clifford Devaughn Owensby

2049 Rustic Rd

Dayton, Ohio 45405

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

CLIFFORD DEVAUGHN OWENSBY,

CASE NO.: 2016 CV 00772

Plaintiff(s),

JUDGE DENNIS J. ADKINS

-vs-

DAYTON POLICE DEPARTMENT,

**DECISION, ORDER, AND ENTRY
SUSTAINING MOTION TO DISMISS**

Defendant(s).

This matter is before the Court on a *Motion to Dismiss for Lack of Jurisdiction/Failure to Name a Suable Entity* (“*Motion to Dismiss*”), filed by Dayton Police Department (“Defendant”), on March 3, 2016. On March 18, 2016, Clifford Owensby (“Plaintiff”), *pro se*, filed *Plaintiff’s Response in Opposition to Defendant’s Motion to Dismiss* (“*Opposition*”). This matter is now properly before the Court.

I. Facts and Procedural History

The facts at issue arise out of a *Complaint*, filed by Plaintiff on February 10, 2016. *See* Docket. Therein, Plaintiff alleges that he was stopped by the Dayton Police in April of 2008 and, following a search of his person and vehicle, \$10,000.00 of Plaintiff’s cash was seized. *Complaint* at 1. Accordingly, Plaintiff requests that the Court issue an order, releasing the money.

In its *Motion to Dismiss*, Defendant first states that the United States Drug Enforcement Administration took possession of the funds at issue and, therefore, this Court lacks jurisdiction over the instant action. *Motion to Dismiss* at 1. Additionally, Defendant argues that it is a police department and, therefore, does not have the capacity to be sued. *Id.* at 1-2. Therefore, Defendant requests that the Court grant its *Motion to Dismiss*.

Conversely, in his *Opposition*, Plaintiff contends that Defendant “had no basis for turning the money over to the federal government.” *Opposition* at 2. Therefore, Plaintiff maintains that the Court should overrule Defendants’ *Motion to Dismiss*, and order that Plaintiff’s money be returned to him. *Id.*

II. Law and Analysis

Pursuant to Ohio Civ. R. 12(B)(1), dismissal of a complaint is allowed when a court lacks jurisdiction over the subject matter of the litigation. *Goodwin v. T.J. Schimmoeller Trucking*, 3d Dist. Wyandot County Case Number 16-07-08, 2008-Ohio-163, ¶8. A trial court may consider any pertinent evidentiary materials when determining its own jurisdiction under this rule, and is not confined to the allegations of the complaint. *Klein v. Glas*, 8th Dist. Cuyahoga No. 72551, 1998 Ohio App. Lexis 2090, 4 (May 7, 1998). The standard of review when a complaint is dismissed under Civ. R. 12(B)(1) is “whether any cause of action cognizable by the forum has been raised in the complaint.” *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641, 644 (1989).

Additionally, pursuant to R.C. 2744.02(A)(1), political subdivisions, including police departments, are not liable for injury, death, or loss to persons or property that occurred during the course of the performance of a governmental or proprietary function. *See also Marshall v. Montgomery County Children Servs. Bd.*, 2d Dist. Montgomery County C.A. Case No. 17856, 2000 Ohio App. LEXIS 1326.

In the instant case, the Court first finds that it does not have jurisdiction over this matter because the property at issue was turned over to a federal entity. Moreover, an affidavit submitted by Defendant establishes that, after taking possession of the property, the United States Drug Enforcement Administration initiated a Federal Forfeiture Action, and disbursed the money in accordance with federal law. Therefore, any claims relating to the property are no longer within this Court’s jurisdiction.

Moreover, the Court notes that, according to statements by both parties, the money at issue was seized during a traffic stop. Such a stop is part of Defendant’s performance of a governmental function and, therefore, Defendant cannot be held liable for Plaintiff’s loss.

III. Conclusion

Based upon the foregoing, the Court **SUSTAINS** Defendant’s *Motion to Dismiss* in its entirety.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE DENNIS J. ADKINS

To the Clerk of Courts:

Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

JOHN C MUSTO
(937) 333-4116
Attorney for Defendant, Dayton Police Department

Copies of this document were sent to all parties listed below by ordinary mail:

CLIFFORD DEVAUGHN OWENSBY
2049 RUSTIC RD
DAYTON, OH 45405
Plaintiff, Pro Se.

Bob Schmidt, Bailiff (937) 496-7951 schmidtr@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision

Case Number: 2016 CV 00772

Case Title: CLIFFORD DEVAUGHN OWENSBY vs DAYTON POLICE
DEPARTMENT

So Ordered

In The Common Pleas Court of Montgomery County, Ohio
Civil Division

Clifford Owensby,
Plaintiff

vs

Dayton Police Dept
Defendant

Case No. 2016 CV 00772

Judge Dennis Adkins

Plaintiff's Response in opposition to
Defendant's Motion to Dismiss

Plaintiff Clifford Owensby, Pro'se hereby submits the attached memorandum to the Defendant's Motion to Dismiss for lack of jurisdiction/failure to name a suable entity, filed March 3, 2016. The reason defendants Motion to Dismiss should be denied are set forth in the attached Memorandum.

Respectfully submitted,

Clifford Owensby

Pro'se

2049 Rustic Rd.

Dayton, Ohio 45402

Certificate of Service

I, hereby certify that a copy of this memorandum was sent by regular U.S. Mail this ___ day of March 2016 to:

Assistant City Attorney

John C. Musto

101 West Third Street

Dayton, Ohio 45401

Memorandum in Support

Clifford Owensby, Plaintiff and a passenger Jasmine Hughes were stopped by the Dayton Police on April 7, 2008 for a dark tint.

During the course of the stop the police smelled marijuana and began a search. A small bag of marijuana was found and \$10,000 U.S. Currency. Plaintiff, was written a ticket for dark tint the passenger a ticket for the marijuana and the currency was confiscated from the Plaintiff.

Plaintiff never heard anything more in reference to his money. Plaintiff filed a Replevin an asked this court to issue an order to the Dayton Police to release the above mentioned currency. The Defendant responded with a Motion to Dismiss. Defendant states that the DEA took possession of the currency through the adoptive forfeiture and the currency forfeited pursuant to 19 U.S.C Section 1607.

Plaintiff asserts that the Defendant had no basis for tuning the currency over to the federal government in the first instance when Plaintiff was merely ticketed for dark tint on his vehicle which would not support forfeiture under Ohio Law.

I.R.S manual 9.7.2 (07-28-2015) under Adoptions states that (2. Adoptive seizures are only those seizures where 100% of the pre-seizure activity and related investigations are performed by the state or local seizing agency before a request is made for adoption. There must be a state violation in order for seizure to be true adoption.) The Defendant should have completed a full investigation before requesting an Adoptive forfeiture.

The Defendant also states that the DEA seized the currency pursuant to 21 U.S.C. Section 881. This is a broad statute and Plaintiff can not address and argue each subsection of this statute. However, to simplify it for the court none of the statue pertains to the Plaintiff. When applying each sub section of 21 U.S.C 981 the government can not by preponderance of evidence prove that the currency was used to help facilitate a crime or were the proceeds of a crime. As stated in 18 U.S.C 983 (c)(3).

Further, Plaintiff submits that since agents of the DEA seized the currency Plaintiff can only surmise that the seizure was based on the marijuana found on Jasmine Hughes the passenger. Plaintiff asserts that no where in either stature 21 U.S.C 981 or 19 U.S.C 1607 does it state that a passenger given a marijuana ticket is cause for a request for adoptive forfeiture.

A Writ of Replevin issues when the petitioner demonstrates a legal right of immediate possession of specific property that is held wrongfully or unlawfully by another. State ex rel. Jividen V. Toledo Police Dept. (1996), 112 Ohio App. 3d 458, 459, citing Auto.Fin.Co.V Munday (1940), 137 Ohio St. 504, 521.

It is for the reasons stated above that Defendants Motion to Dismiss should be overruled and Plaintiff's Replevin should issue.

Respectfully Submitted,

Clifford Owensby