

[Cite as *State v. Shutway*, 2015-Ohio-2432.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CHAMPAIGN COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2013-CA-55
	:	
v.	:	T.C. NO. 2013-CRB-993
	:	
JAN E. SHUTWAY	:	(Criminal appeal from
	:	Champaign County Municipal Court)
Defendant-Appellant	:	
	:	

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**OPINION**

Rendered on the 19th day of June, 2015.

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BREANNE PARCELS, Atty. Reg. No. 0089370, Champaign County Municipal  
Prosecutor’s Office, 205 South Main Street, Urbana, Ohio 43078  
Attorney for Plaintiff-Appellee

JAN E. SHUTWAY, 573 East Church Street, Urbana, Ohio 43078  
Defendant-Appellant, *pro se*

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DONOVAN, J.

{¶ 1} Defendant-appellant Jan E. Shutway, pro se, appeals her conviction and sentence for violating an order of the Champaign County Health District (hereinafter “the Health District”) to vacate her residence after it had been condemned due to her failure to have the potable water service reconnected, in violation of R.C. 3707.48, a minor

misdemeanor. Shutway filed a timely notice of appeal with this Court on November 7, 2013.

{¶ 2} The incidents which form the basis for the instant appeal began on July 16, 2013, when the Billing Department for the City of Urbana instructed the Water Department to shut off the water service to Shutway's residence located at 573 East Church Street. Shutway failed to remit payment for her outstanding water bill, and in early August, the Health District condemned her residence pursuant to Housing Maintenance Regulation, Section 1008.3, which states as follows:

A dwelling unit shall be considered to be condemnable by the Champaign County Board of Health whenever a utility which is required under this regulation is discontinued for non-emergency or non-repair purposes.

{¶ 3} The notice of condemnation provided Shutway with forty-eight hours to vacate the residence, pay her outstanding bill to have the water service reconnected, or provide the Health District with notice that she had secured another potable water supply. Shutway, however, ignored the notice and continued to live in the house with her husband and child until mid-October. On September 10, 2013, Shutway was arrested by deputies from the Champaign County Sheriff's Office pursuant to R.C. 3707.48 for violating the order from the Health District requiring her and her family to vacate the condemned residence, pay the outstanding balance to have her water service reconnected, or procure a new source of potable water.

{¶ 4} The case was scheduled for a bench trial on October 10, 2013. Shutway represented herself at the trial. Ultimately the trial court found Shutway guilty of the

charged offense and ordered her to pay a fine of \$100.00 and court costs. In an entry filed on November 6, 2013, the trial court granted a motion to stay the imposition of the sentence pending the outcome of the instant appeal.

{¶ 5} It is from this judgment that Shutway now appeals.

{¶ 6} We note that Shutway filed her appellate brief on December 22, 2014. One day later, on December 23, 2014, Shutway filed an addendum to her appellate brief which contains an entry filed by the trial court in Case No. 2013-CRB-1144, regarding a motion to suppress filed by John Shutway in that case. The entry issued by the trial court is clearly outside the record in the instant appeal, which originated from Case No. 2013 CRB 0993. Accordingly, the addendum is hereby stricken from the appellate record in the instant case.

{¶ 7} Shutway's first assignment of error is as follows:

THE CLERK OF THE TRIAL COURT ERRED BY COMMENCING PROSECUTION OF THE COMPLAINTS WITHOUT THE REQUIRED REVIEW BY [A] PROPER OFFICIAL (R.C. 2935.09). SEE COMPLAINT BY RUSS WELLMAN, SEE TRANSCRIPT OF ARRAIGNMENT OF SEPTEMBER 27<sup>TH</sup>, 2013 PAGE 3 LINES 4 AND 5, AND LINES 16, 17, 18, AND PAGE 4, LINES 1-10.

{¶ 8} In her first assignment, Shutway contends that the prosecution against her was improperly commenced because Health Inspector Wellman failed to follow the procedure required by R.C. 2935.09 and did not present the complaint to a prosecutor or judge as a "reviewing official" before commencing prosecution. Shutway asserts that because the proper procedure was not followed regarding the complaint under R.C.

2935.09, her entire prosecution was flawed from its inception and therefore, invalid.

**{¶ 9}** Initially, we note that in order to constitute a valid complaint, Crim. R. 3 contains the following requirements, to wit: 1) a written statement of the essential facts constituting the offense charged; 2) the numerical designation of the applicable statute or ordinance; and 3) it must be made upon oath before any person authorized by law to administer oaths. *Id.* The complaint filed by Wellman states in pertinent part:

R.C. 3707.48 VIOLATION OF HEALTH DISTRICT ORDERS 3707.48  
Minor Misdemeanor

Complainant being duly sworn states that: Jan E. Shutway, at 573 E. Church Street, City of Urbana, Champaign County, Ohio, on or about August 24th 2013, did violate an order of the Champaign Health District by willfully and illegally omitting to obey said order issued by the Champaign County Health District 1008.2.3, i.e. failed within 48 hours to either vacate or correct said violation i.e. shut off water.

In violation of Ohio Revised Code Section 3707.48, a minor misdemeanor.

**{¶ 10}** Wellman signed his name as the complainant. Below his signature, the deputy clerk signed her name after the language “[s]worn to and subscribed before me by Russ Wellman on 8-29, 2013.”

**{¶ 11}** Upon review, we conclude that the complaint in this case satisfies the three requirements of Crim. R. 3: 1) it set forth a written statement of the facts constituting the essential elements of the offense charged; 2) it stated the numerical designation of the Revised Code section, i.e. R.C. 3707.48, which Shutway allegedly violated; and 3) it was

made under oath before a person authorized by law to administer oaths since the complaint here was sworn to before a deputy clerk of court for the Champaign County Municipal Court. See *State v. Palider*, 9th Dist. Summit No. 12557, 1987 WL 6964 (Feb. 18, 1987) (a complaint before a deputy clerk of court authorized to administer oaths is valid). Accordingly, the complaint charging Shutway with violating an order of the Health District clearly informed her of the nature of the offense with which she was charged. Therefore, the complaint is valid under Crim. R. 3. See *State v. Jones*, 11th Dist. Portage Nos. 2010-P-0051, 2010-P-0055, 2011-Ohio-5109.

**{¶ 12}** R.C. 2935.09 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 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 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. \*\*\*

**{¶ 13}** In the instant case, the complaint was signed and filed by Wellman, who the State concedes, is not a law enforcement or peace “officer” under R.C. 2935.09. Rather, Wellman filed the complaint as a “private citizen.” A private citizen, to “cause [a] prosecution” under R.C. 2935.09(D), must file an affidavit with a “reviewing official” for the purpose of review in order to determine if a complaint should be filed by the prosecutor. The record in the instant case establishes that, contrary to the required statutory procedure, Wellman directly filed the complaint with the deputy clerk, who accepted and processed it without forwarding the document for review by a “reviewing official,” i.e. a prosecutor or judge. Clearly, the proper procedure under R.C. 2935.09 was not followed in this case. Thus, even though the complaint in this case meets the requirements of Crim. R. 3 for a valid charging instrument, it does not meet the requirements of R.C. 2935.09 since the complaint was filed by Wellman as a private citizen. Our analysis, however, does not end here.

**{¶ 14}** In *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025, a wife filed a complaint of domestic violence against her husband without the complaint first being reviewed by a reviewing official pursuant to R.C. 2935.09. The *Mbodji* court concluded that “a complaint that meets the requirements of Crim. R. 3 invokes the subject matter jurisdiction of a trial court.” *Id.* at ¶ 12. The court further held that when a defendant challenged the fact that the complaint was not reviewed by a reviewing official before its filing, he was challenging a procedural defect in the prosecution of the case. *Id.* at ¶ 19. Crim. R. 12(C) requires that objections based on the defects in the institution of

the prosecution be raised prior to trial. *Id.* “When a criminal complaint and affidavit are signed by a private citizen but not reviewed by a reviewing official before filing pursuant to R.C. 2935.09, the defect is not jurisdictional but may be the subject of a Crim. R. 12(C) motion before trial.” *Id.* at ¶ 2 of the syllabus.

{¶ 15} On October 3, 2013, Shutway filed a pre-trial motion to dismiss pursuant to Crim. R. 12(C). However, Shutway did not challenge the complaint on the basis that Wellman, as a private citizen, did not comply with the proper procedure under R.C. 2935.09(D) when he filed the complaint. Shutway has raised this argument for the first time on appeal. Therefore, because Shutway failed to object to the complaint on this basis prior to trial, she has waived any deficiencies regarding the institution of the prosecution in this regard. See *Jones*, ¶ 51 (“[c]onstruing the instant complaint as filed by Mr. Willard as a private citizen, we conclude a valid complaint meeting the requirements of Crim. R. 3 has been filed \*\*\*. [The defendant] waived any deficiencies regarding the institution of the prosecution by failing to raise the issue before trial.”)

{¶ 16} Shutway’s first assignment of error is overruled.

{¶ 17} Shutway’s second assignment of error is as follows:

THE CLERK OF THE COURT ISSUED A WARRANT WITHOUT ATTEMPTING SERVICE FOR THE REQUIRED 28 DAYS BY OTHER MEAN SUCH AS REGULAR MAIL, CERTIFIED MAIL, OR BY BAILIFF, OR PROCESS SERVER AND ON THE 11<sup>TH</sup> DAY AFTER ISSUANCE OF SUMMONS. FAILURE TO PROVIDE DUE PROCESS.

{¶ 18} Upon review, we find that the issue of whether the arrest warrant issued by the deputy clerk was invalid is not properly before us because Shutway failed to raise the

warrant issue in the trial court in Case No. 2013-CRB-0993, which is the case currently before this Court on appeal. Therefore, Shutway has waived the issue for the purposes of the instant appeal.<sup>1</sup>

{¶ 19} Shutway’s second assignment of error is overruled.

{¶ 20} Shutway’s third assignment of error is as follows:

AS A MATTER OF LAW, THE CHAMPAIGN COUNTY HEALTH DISTRICT FAILED TO PROVIDE THE DUE PROCESS OF LAW WHEN IT FAILED TO SERVE “NOTICE” UPON THE DEFENDANTS PURSUANT TO HEALTH DISTRICT REGULATION OF A CLAIMED VIOLATION AND PLACED A “CONDEMNED” PLACARD ON THE APPELLANTS’ HOUSE.

{¶ 21} In his third assignment, Shutway argues that the record establishes that the Health District did not provide her proper service of notice that she had violated Champaign County Housing Maintenance Regulation, Section 1008.3. Specifically, Shutway contends that the State failed to adduce any evidence that service of notice was provided pursuant to Housing Maintenance Regulation 1012.3, which states in pertinent part:

1012.3 Service of Notice

Service of notice to vacate shall be as follows:

- (1). By delivery to the owner personally, or by leaving the notice at the usual place of abode of the owner with a person of suitable age and discretion; or

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<sup>1</sup> We note that Shutway’s husband, John, filed a motion to suppress the allegedly defective warrant in Case No. 2013-CRB-1144. We further note that in a written entry issued on May 13, 2014, the trial court found that although the warrant was, in fact, invalid, the arresting officer acted in good faith reliance that the warrant executed by the deputy clerk was proper. The trial court held that the exclusionary rule did not apply and upheld Shutway’s arrest.

(2). By depositing the notice in the US Post Office addressed to the owner at his last known address with postage prepaid thereon; or

(3). By posting and keeping posted for twenty-four hours a copy of the notice in placard form in a conspicuous place on the premises to be vacated.

{¶ 22} Upon review, we conclude that the State adduced sufficient testimony at trial which established that the Health District complied with Housing Maintenance Regulation 1012.3, which is evidenced by the following exchange between the prosecutor and Wellman:

The State: Okay. And can you tell me how you became involved with the Defendant Jan Shutway regarding the water shut-off at her residence at 573 East Church Street?

Wellman: We were notified by the Water Department that the water is shut – was shut off. And at that time we go to the residence and verify that the water is shut off and leave a notice that they have 48 hours to get it turned back on or they have to move out.

Q: Okay. And if you were to take a look at Exhibit B there in front of you, is that a copy of the notice that you left there at the Church Street address?

Or if you were notified the City had shut off the water?

A: Yes.

Q: Okay. And is that your handwriting on that document?

A: Yes.

Q: Okay. And does it indicate after, uh, that the property address is in your

handwriting, is that dear Mr. Shutway or dear Ms. Shutway?

A: The top is Jan Shutway. Dear Ms. Shutway is what that – And my handwriting is probably pretty bad, too.

Q: Okay. And then after your signature down there at the bottom, does it say in your handwriting someone living there, left notice?

A: Right.

Q: Okay. How did you leave that notice there?

A: I knocked on the door and rang the doorbell but nobody would come to the door so we leave [sic] the notice in the door.

Q: Okay. And did you have to make subsequent attempts to serve the property owner the notice that their – that they were in violation of the Champaign Health District order?

A: We had. Yes.

\*\*\*

Q: Okay. When were you able to officially serve in person Ms. Shutway and let her know about the violations of the Health Department order?

A: \*\*\* They were in court here on the 20th. And a deputy served it at that time.

**{¶ 23}** Shutway failed to present any evidence at trial to refute the testimony of Wellman regarding her receipt of notice of the violation from the sheriff's deputy while she was at the municipal courthouse with her husband on August 20, 2013, and the proper posting of the condemnation placard at the Shutway residence. Thus, the record sufficiently establishes that Shutway was properly served notice of the violation pursuant

to Housing Maintenance Regulation 1012.3.

{¶ 24} Shutway's third assignment of error is overruled.

{¶ 25} Shutway's fourth assignment of error is as follows:

AS A MATTER OF LAW, THE CHAMPAIGN COUNTY HEALTH BOARD'S HOUSING MAINTENANCE REGULATION 1008 IS UNREASONABLE, UNLAWFUL AND UNCONSTITUTIONAL AS IT DESIGNATES A HOUSE CONDEMNABLE WITHOUT REQUIREMENT FOR PRIOR INSPECTION AND VALIDATION OF THE CLAIMED VIOLATION.

{¶ 26} In her fourth assignment, Shutway argues that Housing Maintenance Regulation 1008 is an unconstitutional "Bill of Attainder, Bill of Pains and Penalties" because it allows the health inspector to condemn an individual's private residence without first inspecting the home and finding that the home is "unfit for human habitation."

{¶ 27} "It is well-settled that courts will presume the constitutionality of a municipal ordinance and that the party challenging a legislative act of a municipality bears the burden of demonstrating its unconstitutionality." *City of Kettering v. Lamar Outdoor Advertising, Inc.*, 38 Ohio App.3d 16, 17, 525 N.E.2d 836 (2d Dist. 1987). Furthermore, a municipal ordinance passed under the authority of Sections 3 and 7 of Article XVIII of the Ohio Constitution, providing for the legitimate exercise of local police power, is valid if it bears a real and substantial relationship to the health, safety, morals, or general welfare of the public and is neither unreasonable nor arbitrary. *Hudson v. Albrecht, Inc.*, 9 Ohio St.3d 69, 71, 458 N.E.2d 852 (1984). "Whether such legislation bears a real and substantial relation to the public health, safety, morals or general welfare and whether it is reasonable or arbitrary are questions committed in the first instance to the judgment and

determination of the legislative body, and the decisions of the legislative body on those questions will not be disturbed unless they appear to be clearly erroneous.” *Kettering*, 38 Ohio App.3d at 17, 525 N.E.2d 836, citing *Curtiss v. Cleveland*, 170 Ohio St. 127, 163 N.E.2d 682 (1959).

**{¶ 28}** R.C. 3709.21 provides in pertinent part:

3709.21 Orders and regulations of board of general health district

(A) The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. \*\*\* All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded, and certified as are ordinances of municipal corporations and the record thereof shall be given in all courts the same effect as is given such ordinances \*\*\*.

**{¶ 29}** As defined by the U.S. Supreme Court, a bill of attainder is “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” *State v. Williams*, 88 Ohio St.3d 513, 528, 728 N.E.2d 342 (2000), citing *U.S. v. Brown*, 381 U.S. 437, 445, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). A bill of pains and penalties is similar except that the “punishment is less severe.” *Black’s Law Dictionary*, 88 (5th Ed.1983). Such bills are prohibited by the U.S. Constitution. U.S. Constitution, Article I, Section 10, cl. 1.

**{¶ 30}** We conclude that this argument is without merit since Shutway was afforded the protection of a trial prior to the imposition of a punishment. *See Village of St.*

*Paris v. Galluzzo*, 2d Dist. Champaign No. 2014-CA-4, 2014-Ohio-3260, ¶ 20.

{¶ 31} Additionally, it was unnecessary for Wellman to enter Shutway’s home for inspection because he was able to identify from extrinsic conditions that Housing Maintenance Regulation 1008.3 had been violated because the potable water service had been disconnected based on appellant’s failure to pay her outstanding water bill. HMR 1008.3 specifies that condemnation can occur when any utility is disconnected “for non-emergency or non-repair purposes.” In order to avoid criminal liability, Shutway could have vacated the condemned premises, paid the outstanding bill to have the water service reconnected, or provided the Health District with notice that she had secured another potable water supply. Shutway, however, ignored the notice and continued to live in the house with her husband and child. By violating the condemnation order, Shutway became subject to imposition of a minor misdemeanor penalty under R.C. 3707.48.

{¶ 32} Shutway’s fourth assignment of error is overruled.

{¶ 33} Shutway’s fifth assignment of error is as follows:

PROSECUTOR BREANNE PARCELS DID NOT FILE THE COMPLAINT AND COMMITTED PLAIN ERROR BY ALLOWING RUSS WELLMAN TO FILE THE COMPLAINT AND THEN PROSECUTED THE COMPLAINT, SHE IS DERELICT IN HER DUTIES AS A PROSECUTOR.

{¶ 34} Breanne Parcels, the attorney who prosecuted Shutway for violation of R.C. 3707.48, is not a party to the instant case in her personal capacity and therefore could not have erred, plainly or otherwise. To the extent that Shutway’s fifth assignment can be understood as a challenge to the complaint pursuant to R.C. 2935.09, that issue was

waived as previously stated in our analysis of the first assignment of error.

**{¶ 35}** Shutway's fifth assignment of error is overruled.

**{¶ 36}** Shutway's sixth assignment of error is as follows:

AS A MATTER OF LAW, THE CHAMPAIGN COUNTY MUNICIPAL COURT COMMITTED PLAIN ERROR WHEN THE COURT REFUSED, OVER-RULED [sic] AND THEN DISMISSED THE APPELLANT'S LAWFUL DEMURRER WITHOUT HOLDING THE REQUIRED HEARING PURSUANT TO OHIO REVISED CODE 2941.62 WHERE A DEMURRER EXISTS IN LAW AS A CONSTITUTIONAL MEANS TO CHALLENGE JURISDICTION AND THE SUFFICIENCY OF AN ACCUSATORY PLEADING. THE CHAMPAIGN COUNTY MUNICIPAL COURT COMMITTED PLAIN ERROR WHEN THE COURT ERRONEOUSLY PROCEEDED TO TRIAL WITHOUT ESTABLISHING PROOF OF JURISDICTION ON THE RECORD IN VIOLATION OF THE APPELLANT'S DUE PROCESS AND OTHER CONSTITUTIONALLY GUARANTEED, INALIENABLE RIGHTS.

**{¶ 37}** In her sixth assignment, Shutway contends that the trial court erred when it overruled her notice of demurrer. In support of her argument, she cites R.C. 2941.62, which she contends requires a hearing on a request for demurrer. The prosecution correctly asserts that demurrers were abolished by Crim. R. 12(A), which provides, "[p]leadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. \* \* \*."

{¶ 38} Demurrers “were previously abolished in misdemeanor cases by R.C. 2937.04, and exceptions to the complaint that could have been made thereunder were consolidated into a motion to dismiss the complaint.” *Galluzzo* at ¶ 10, citing 2 Katz & Giannelli, *Criminal Law*, Section 47.2, fn. 2 (2009). We, therefore, conclude that the trial court did not err in striking the demurrer. In addition to her “notice of demurrer,” Shutway filed a motion to dismiss the complaint which the trial court overruled, as it did not raise the purported defect in the institution of the complaint pursuant to R.C. 2935.09. Hence, this argument has been waived as discussed in the first assignment.

{¶ 39} Shutway’s sixth assignment of error is overruled.

{¶ 40} All of Shutway’s assignments of error having been overruled, the judgment of the trial court is affirmed.

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FAIN, J., and WELBAUM, J., concur.

Copies mailed to:

Breanne Parcels  
Jan E. Shutway  
Hon. Gil S. Weithman  
(successor of Judge Susan Fornof-Lippencott)