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| **STATE OF OHIO** | ) | **CASE NO. CR-15-601689-A** |
| **Plaintiff** | ) | **JUDGE PAMELA A. BARKER** |
| **v.** | ) | **OPINION AND JOURNAL ENTRY ON MOTION FOR RECONSIDERATION ON PREVIOUSLY FILED MOTION FOR RETURN OF PROPERTY** |
| **FRANK BROWN** | ) | |
| **Defendant** | ) | |

A hearing on Defendant's Motion For Reconsideration On Previously Filed Motion For Return Of Property was held on August 3, 2016. At the hearing, "the State, admittedly, belatedly, raised the issue of whether this closed criminal case was the proper forum for Brown to obtain the return of seized property."[1] The Court permitted the State to file a brief in support of its position that a replevin action is the only avenue Defendant can pursue to obtain the relief he seeks, and permitted Defendant to file his brief in opposition thereto. On August 5, 2016, the State filed its Supplemental Briefing, and on August 10, 2016, Defendant filed his Supplemental Brief In Support Of His Motion For Return Of Property.

The Court, first, will address the issue of whether or not a replevin action is the only avenue Defendant can pursue to obtain the return of his property, i.e., a trial court does not have jurisdiction to consider a motion for return of property in a closed and dismissed criminal case. It is the State's position, based upon Fifth District[2] and Sixth District[3] Courts of Appeals' precedent, as well as the Eighth District Court of Appeals' decision in *State v. Sherrills*, 8th Dist.

[11] State's Supplemental Briefing, filed 8/5/2016, at page 1.
[2] *State v. Young*, 5th Dist. Richland, No. 2810, 1991 Ohio App. LEXIS 2390, 1991 WL 87203 (May 3, 1991)
[3] *State ex Rel. Green v. Toledo Police Dept.*, Lucas *Cty.* App. No. L-99-12-7, 1999 Ohio App. LEXIS 5765, 1999 WL 1102687 (Nov. 18, 1999).

No. 86478, 2006-Ohio-1074, that a replevin action is the exclusive remedy available to Defendant to attempt to secure the return of his property.

The State properly cites *State v. Young* for its proposition. However, as Defendant points out, that case pre-dates the enactment of Chapter 2981 and is at odds with Eighth District precedent cited by Defendant.[4]

The State also properly cites, and quotes in relevant part from, *State ex Rel. Green v. Toledo Police Dept.* Defendant asserts that "*Green* simply held that a writ of mandamus was not an appropriate mechanism for seeking the return of property because there was an available legal remedy in the form of a replevin action."[5] While acknowledging that in *Green*, the court did not consider the specific issue presently before this Court, i.e., whether replevin is the exclusive remedy or whether a motion for return of property could be filed in the underlying criminal case, the court therein did unequivocally state that "[t]he proper action to reclaim possession of property based on unlawful seizure or detention is an action for replevin. [Citations omitted.]" Nonetheless, *Green*, like *State v. Young*, pre-dates the enactment of Chapter 2981 and is at odds with Eighth District precedent cited by Defendant. And, in *State v. Harris*, Franklin App. No. 99AP-684, 2000 Ohio App. LEXIS 818, on this issue, the Tenth District Court of Appeals reached a conclusion contrary to the conclusion reached by the Fifth and Sixth Districts Courts of Appeals in *State v. Young*, and *Green*, respectively. In doing so, the Tenth District interpreted Eighth District Court of Appeals' precedent,[6] and relied thereon, for its assertions, respectively, that "[c]ourts have also entertained such motions [for the return of

[4] Defendant's Supplemental Brief, at page 4.
[5] *Id.*
[6] *State v. Kassoff*, 1983 Ohio App. LEXIS 13785 (Aug. 25, 1983), Cuyahoga App. No. 46107, unreported (motion for return of video game machine filed after criminal complaint had been dismissed); and *Johnson v. City of Cleveland*, 1988 Ohio App. LEXIS 134 (Jan. 14, 1988), Cuyahoga App. No. 53241.

property] filed in criminal cases even after the criminal charges have been dismissed," and "[i]n fact....one court has even held that the denial of a criminal defendant's post-dismissal motion for return of property because defendant failed to appear at the hearing on that motion collaterally estopped defendant's efforts to recover the seized property in a subsequently filed replevin action."[7]

This Court is bound by Eighth District Court of Appeals' precedent. Indeed, Defendant properly cites the Eighth District Court of Appeals' decisions in *State v. Ali*, 119 Ohio App.3d 766, 769-70, and *State v. Lenard*, 8th Dist. Nos. 96975 and 97570, 2012-Ohio-1636, ¶¶78-83, to support his position that this Court has jurisdiction to consider a motion for return of property in a dismissed and closed criminal case. Although the State relies upon the Eighth District Court of Appeals decision in *State v. Sherrills*, that case is distinguishable from this case or does not support the State's position, as well explained by Defendant at page 5 of his Supplemental Brief.

For the reasons set forth above, this Court finds that it does have jurisdiction to consider Defendant's Motion for Return of Property, even though the criminal case has been dismissed and is closed. Having so found, this Court will now address whether or not Defendant's Motion For Reconsideration of its prior decision denying Defendant's Motion for Return of Property is well-taken and should be granted.

No evidence was presented or adduced at the hearing on August 3, 2016. No documentation was submitted to demonstrate, and indeed, no representation was made, that

[7] *State v. Harris, supra*, at *5.

the State is going to re-indict Defendant,[8] or that the property or materials might have evidentiary value in another case or another jurisdiction's officials are in the process of possibly issuing subpoenas for the items.[9] The State represented that there is an ongoing investigation, that the devices on Defendant's computer are encrypted, and that the last time an attempt to access the information on Defendant's computer was May 9, 2016. Defendant, through counsel, represented or argued that the State has had Defendant's computer since December, 2015 and nothing has been found on the computer. And, per Defendant's counsel, it is improper for the State to rely upon the search warrant issued in the now-dismissed criminal case.

Upon consideration of the record, the Court finds Defendant's position to be well-taken. Accordingly, Defendant's Motion For Reconsideration is **GRANTED**, meaning that Defendant's Motion For Return Of Property is **GRANTED**.

**IT IS SO ORDERED.**

Pamela A. Barker 8-18-16

**Judge Pamela A. Barker** **Dated**

[8] This fact distinguishes this case from *State v. Bates*,6th Dist. No. WM-11-007, 2012-Ohio-1397, cited and relied upon by the State in its Brief In Opposition To Defendant's Motion For Return Of Property. In *Bates*, the State's argument that the computer at issue was being held for evidence and to aid in an ongoing investigation was unchallenged by the defendant and there was ample documentation in the record that the state was going to re-submit the case to the grand jury and had the intent to bring a new indictment.

[9] This fact distinguishes this case from *State v. Patton*, 2nd Dist. No. 2013-CA041, 2014-Ohio-3000, cited and relied upon by the State in its Brief In Opposition To Defendant's Motion For Return Of Property. In *Patton*, the State made unchallenged representations that the materials may have evidentiary value in a Colorado case and that Colorado officials were in the process of possibly subpoenaing the items.