

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO EX REL., A.N., :

Relator, :

No. 109848

V. :

CUYAHOGA COUNTY PROSECUTING
DEPARTMENT, ET AL., :

Respondents. :

JOURNAL ENTRY AND OPINION

JUDGMENT: WRIT DENIED

DATED: December 7, 2020

Writ of Mandamus
Motion Nos. 540567 and 540691
Order No. 542483

Appearances:

A.N., *pro se.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and James E. Moss, Assistant Prosecuting Attorney, *for respondent* Cuyahoga County Prosecutor's Office.

Michael R. Gareau, Jr., Director of Law, and Bryan P. O'Malley, Assistant Director of Law, *for respondent* City of North Olmsted.

PATRICIA ANN BLACKMON, J.:

{¶ 1} A.N., the relator, has filed a complaint for a writ of mandamus. A.N. seeks an order from this court that requires the respondents, the Cuyahoga County Prosecutor's Office ("Prosecutor") and the city of North Olmsted ("City"), to file criminal charges, consisting of felonious assault (R.C. 2903.11), aggravated assault (R.C. 2903.12) and endangering children (R.C. 2919.22), against his two parents. For the following reasons, we decline to grant a writ of mandamus.

I. Facts

{¶ 2} The following facts are gleaned from the complaint for a writ of mandamus, the Prosecutor's motion for summary judgment, the City's motion to dismiss, and the briefs in opposition to the motion for summary judgment and motion to dismiss. In 2019, A.N. filed two charging affidavits in Cuyahoga C.P. Nos. SD-19-077947 and SD-19-077951, pursuant to R.C. 2935.09 and 2935.10. In the affidavit filed in SD-19-077947, A.N. alleged that he was assaulted in 2001 and required medical attention and sutures. On May 7, 2019, the trial court issued a journal entry noting receipt of the charging affidavit, and upon review of the affidavit and supporting documents, held that the "affidavit charges the commission of [a] felony and that filing of the affidavit was filed in good faith. As a result and for good cause, the court orders that the matter be referred to the Cuyahoga County Prosecuting Attorney's office for investigation pursuant to R.C. 2935.10."

{¶ 3} The second affidavit, filed in SD-19-077951, alleged that from 1997 to 2010, A.N.'s parents subjected him to unwarranted discipline and the loss of

personal property. On May 9, 2019, the trial court issued a journal entry that indicated it had received the charging affidavit, and following a review of the affidavit and supporting documents, the affidavit “charges the commission of [a] felony and * * * was filed in good faith. As a result and for cause shown, the court hereby orders that the matter be referred to the Cuyahoga County Prosecuting Attorney’s office for investigation pursuant to R.C. 2935.10.”

{¶ 4} On May 30, 2019, the Prosecutor forwarded a letter to the trial court indicating that “[t]his is to advise you that after review of the materials provided by the Court and other materials we obtained, we decline prosecution in both matters.” On June 25, 2019, the trial court issued orders in SD-19-077947 and SD-19-077951 that stated

[f]ollowing the completion of the court-ordered investigation pursuant to R.C. 2935.10, the court was advised by the prosecutor’s office via a correspondence that the prosecutor’s office is declining to prosecute this matter. Said correspondence is attached to this entry for the record. As a result, the court declines to issue a warrant regarding this matter and hereby removes this case from the active docket.

{¶ 5} On July 12, 2019, A.N. filed a timely appeal from the judgment rendered by the trial court in SD-19-077947. *See* 8th Dist. Cuyahoga No. 108787. On July 16, 2019, A.N. filed a timely notice of appeal from the judgment rendered in SD-19-077951. *See* 8th Dist. Cuyahoga No. 108801. On July 17, 2019, the appeals filed in 8th Dist. Cuyahoga Nos. 108787 and 108801 were consolidated for briefing, hearing, and disposition. On January 23, 2020, this court dismissed A.N.’s

consolidated appeal on the basis of mootness. *See A.N. v. Affidavit of Criminal Complaint*, 8th Dist. Cuyahoga Nos. 108787 and 108801, 2020-Ohio-192.

{¶ 6} On July 23, 2020, A.N. filed this complaint for a writ of mandamus. On August 14, 2020, the Prosecutor filed a motion for summary judgment. On August 20, 2020, the City filed a motion to dismiss. On August 24, 2020, A.N. filed a brief in opposition to the Prosecutor's motion for summary judgment. On August 31, 2020, A.N. filed a brief in opposition to the City's motion to dismiss.

II. Mandamus Requirements and Analysis

{¶ 7} In order for this court to issue a writ of mandamus, A.N. must demonstrate that: (1) he possesses a clear legal right to have his parents charged with the criminal offenses of felonious assault, aggravated assault, or endangering children; (2) the Prosecutor possesses the clear legal duty to charge A.N.'s parents with the criminal offenses of felonious assault, aggravated assault, or endangering children; and (3) A.N. possesses or possessed no plain and adequate remedy in the ordinary course of the law. *State ex rel. Kerns vs. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430; *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 451 N.E.2d 225 (1983). Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and granted only when the right is clear. Mandamus will not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (8th Dist.1993).

A. Doctrine of Res Judicata

{¶ 8} Initially, we find that A.N. is not entitled to a writ of mandamus based upon the application of the doctrine of res judicata. The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel. Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter. Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. Issue preclusion applies even if the causes of action differ. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 692 N.E.2d 140 (1998); *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995).

{¶ 9} The issue of charging A.N.'s parents with criminal offenses, pursuant to R.C. 2935.09 and 2935.10, has already been litigated by the trial court, reviewed by the Prosecutor and the City, and reviewed on appeal. Thus, the doctrine of res judicata bars any further review of the issue of charging the parents of A.N. through R.C. 2935.09 and 2935.10. *State ex rel. Peoples v. Schneider*, Slip Opinion No. 2020-Ohio-1071; *Jackson v. Johnson*, 135 Ohio St.3d 364, 2013-Ohio-999, 986 N.E.2d 989.

B. Statute of Limitations

{¶ 10} In addition, the statute of limitations applicable to the offenses of felonious assault, aggravated assault, and endangering children have already run and criminal charges may not be brought against the parents of A.N., based upon the facts raised by A.N. R.C. 2901.13(A)(1) provides that a six-year statute of limitations applies to the offenses of felonious assault, aggravated assault, and child endangering. The date of the act, that allegedly constituted the basis for the alleged criminal offenses, occurred on April 1, 2001. Thus, the statute of limitations commenced on April 1, 2001, and expired on April 1, 2007. Even assuming that the statute of limitations did not begin to run until A.N. reached the age of majority of 18 years of age, the statute of limitations still ran, because A.N. turned 18 years old on December 23, 2011, and the six-year statute of limitations applicable to the offenses of felonious assault, aggravated assault, and endangering children ran on December 23, 2017. The statute of limitations begins to run when a child reaches the age of 18. *State v. McGraw*, 8th Dist. Cuyahoga No. 65202, 1994 Ohio App. LEXIS 2599 (June 16, 1994); R.C. 3109.10. *See also State v. Bess*, 126 Ohio St.3d 350, 2010-Ohio-3292, 933 N.E.2d 1076. We further find that A.N. has failed to affirmatively establish that he is afflicted with a developmental disability, Asperger's Syndrome that would invoke tolling under R.C. 2901.13(J).

C. Abuse of Discretion

{¶ 11} Finally, we find no abuse of discretion on the part of the Prosecutor or the City in deciding to forego prosecution of A.N.'s parents. The decision to seek an indictment is within the sound discretion of the prosecutor. *State ex rel. Steele v. McClelland*, 154 Ohio St.3d 574, 2018-Ohio-4011, 116 N.E.3d 1267; *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064. A prosecuting attorney can be compelled to prosecute an individual only when the failure to prosecute constitutes an abuse of discretion. *State ex rel. Evans v. Tieman*, 157 Ohio St.3d 99, 2019-Ohio-2411, 131 N.E.3d 930; *Mootipaw v. Eckstein*, 76 Ohio St.3d 383, 667 N.E.2d 1197 (1996).

{¶ 12} The term “abuse of discretion” connotes more than an error of law or judgment; it implies that a decision or judgment is unreasonable, arbitrary or unconscionable. *Chester Twp. v. Geauga Co. Budget Comm.*, 48 Ohio St.2d 372, 358 N.E.2d 610 (1976); *Conner v. Conner*, 170 Ohio St. 85, 162 N.E.2d 852 (1959); *Steiner v. Custer*, 137 Ohio St. 448, 31 N.E.2d 855 (1940). Herein, we find no abuse of discretion on the part of the Prosecutor to decline to prosecute A.N.'s parents, based upon the affidavit, exhibit G, attached to the motion for summary judgment. The affidavit specifically provides that:

For the foregoing reasons, even assuming that A.N.'s claim that H.N. committed felonious assault in violation of R.C. 2903.11, aggravated assault in violation of R.C. 2903.12, and endangering children in violation of R.C. 2919.22 against A.N. on April 1, 2001 is true, the Prosecutor's Office is barred from prosecuting H.N. by the statute of limitations under both R.C. 2901.13(A)(1)(a) and R.C. 2901.13(J).

* * *

In his petition for writ of mandamus filed in case number CA-20-109848 A.N. also claims that A.N.'s father and mother committed felonious assault in violation of R.C. 2903.11, aggravated assault in violation of R.C. 2903.12, and/or endangering children in violation of R.C. 2919.22 when they allegedly committed the following acts: (a) screamed at A.N.'s sister; (b) caused A.N.'s sister to witness A.N.'s mother and father fighting and arguing; (c) threatened to call police on A.N.'s sister; (d) used the wrong comb on A.N.'s sister's hair causing her pain; (e) confused A.N.'s sister about her sleeping in her own bed; (f) caused A.N.'s sister to live in a bad environment; (g) failed to have A.N.'s sister's crooked teeth fixed; (h) called A.N. mentally ill in front of A.N.'s sister; (i) took unspecified "things" out of A.N.'s room; (j) "hid" A.N.'s sister from A.N.; and (k) did not permit A.N. to speak with A.N.'s sister.

After reviewing and examining the above claims and evidence submitted by A.N., including all pleadings and all print and video exhibits in *A.N. v. Cuyahoga County Prosecuting Department, et al.*, Eighth District Court of Appeals case number CA-20-109848, the Prosecutor's Office has concluded that there is insufficient evidence that A.N.'s mother or father committed felonious assault in violation of R.C. 2903.11, aggravated assault in violation of R.C. 2903.11, aggravated assault in violation of R.C. 2903.12, or endangering children in violation of R.C. 2919.22.

For the foregoing reasons, the Prosecutor's Office declines, for a second time, to prosecute either H.N. or V.N. for any of the above claims raised by A.N.

{¶ 13} Based upon the affidavit filed by the Prosecutor and all other material filed within this action for mandamus, we find no abuse of discretion on the part of the Prosecutor in declining to prosecute the parent's of A.N. It must be also noted that this court, in *[A.N.] v. Affidavit of Criminal Complaint, supra*, held that:

We apply the abuse of discretion standard to review a judge's decision not to issue a warrant following an accusation by affidavit filed pursuant to R.C. 2935.09 and 2935.10. *Hillman v. O'Shaughnessy*, 10th Dist. Franklin No. 16AP-571, 2017-Ohio-489, ¶ 7; *Johnson*, 2017-

Ohio-8209, at ¶ 10. An abuse of discretion is more than merely an error of judgment; it connotes a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983).

Applying the foregoing with regard to [A.N.'s] arguments that the trial court erred in accepting Prosecutor O'Malley's conclusions and refusing to proceed with the issuance of warrants, we find no abuse of discretion. In light of the serious nature of the allegations, the court, which is not an investigative body, acted reasonably in reliance upon the prosecutor's investigations. *State v. Hanson*, 2d Dist. Montgomery No. 28057, 2019-Ohio-3688, ¶ 25 ("[R]easonable authorities conduct a thorough investigation.").

* * *

In any event, the prosecutor's decision not to prosecute is discretionary and "not generally subject to judiciary review." *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 27, 1996-Ohio-228, 661 N.E.2d 180 (1996); *Leavell v. Wilson*, 6th Dist. Erie No. E-17-012, 2017-Ohio-1275, ¶ 14. To the contrary, a "prosecutor's decision not to file a complaint is not a final, appealable order of the trial court, and the trial court cannot be compelled to enter such a final order." *Nusbaum*, 152 Ohio St.3d 284, 2017-Ohio-9141, 95 N.E.3d 365, at ¶ 16, citing *Leavell*, 6th Dist. Erie No. E-17-012, 2017-Ohio-1275, at ¶ 14 and *Master* at ¶ 27.

A.N. v. Affidavit of Criminal Complaint, supra, ¶ 15.

{¶ 14} A.N. has failed to demonstrate that the Prosecutor has abused its discretion by failing to prosecute a complaint against his parents. *State ex rel. Master v. Cleveland, supra*; *Ohio Assn. of Pub. School Emp. Chapter 643, AFSCME/AFL-CIO v. Dayton City School Dist. Bd. of Edn.*, 59 Ohio St.3d 159, 572 N.E.2d 80 (1991).

{¶ 15} Accordingly, we decline to issue a writ of mandamus on behalf of A.N. and grant the Prosecutor's motion for summary judgment. In addition, we grant the City's motion to dismiss for failure to state a claim upon which relief can be granted.

Costs to A.N. The court directs the clerk of courts to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

{¶ 16} Writ denied.

PATRICIA ANN BLACKMON, JUDGE

MARY J. BOYLE, P.J., and
EILEEN A. GALLAGHER, J., CONCUR