[Cite as *State ex rel. Cioffi v. Stuard*, 2010-Ohio-829.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO ex rel. ANTHONY CIOFFI, JR.,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2009-T-0057**
- vs -	:	
JUDGE JOHN M. STUARD, et al.,	:	
Respondents.	:	

Original Action for Writ of Mandamus.

Judgment: Writ denied.

Anthony Cioffo, Jr., PID: #332-078, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Relator).

Dennis Watkins, Trumbull County Prosecutor, and *Jeffrey D. Adler*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondents).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for final disposition of the summary judgment motion of respondents, Court Reporter Mary Ann Mills, Judge John M. Stuard of the Trumbull County Court of Common Pleas, and Trumbull County Clerk of Courts Karen Infante Allen. As the primary basis for their motion, respondents maintain that relator, Anthony Cioffi, Jr., is not entitled to a writ of mandamus because they have no legal obligation to satisfy a public record request when the record at issue

does not actually exist. For the following reasons, we conclude that summary judgment is warranted under the undisputed facts of this action.

{¶2} Relator is an inmate at the Lake Erie Correctional Institution in Ashtabula County, Ohio. His present incarceration is based upon criminal convictions in two cases before Judge Stuard, Trumbull C.P. Nos. 95-CR-696 and 96-CR-599. As part of each case, relator pled guilty to various sexual offenses, and was ultimately sentenced to an aggregate term of ten to twenty-five years.

{¶3} After completing approximately fifty-one months of his prison term, relator moved Judge Stuard under both cases to set aside both convictions and allow him to withdraw his guilty pleas. Initially, an evidentiary hearing on this motion was scheduled for May 31, 2001. However, the matter had to be continued, and the final hearing was not held until January 31, 2002. Forty days later, Judge Stuard rendered a judgment in which relator's motion to set aside was denied. This determination was subsequently affirmed by this court in *State v. Cioffi*, 11th Dist. Nos. 2002-T-0037 and 2002-T- 0039, 2003-Ohio-2374.

{¶4} Nearly seven years after the issuance of Judge Stuard's ruling regarding the motion to set aside, relator mailed a written correspondence to Judge Stuard's court reporter, Mary Ann Mills. In this letter, relator inquired as to whether it would be feasible for him to obtain written transcripts for the scheduled proceedings on May 31, 2001, and November 29, 2001. He further asked Court Reporter Mills to notify him of the reason for any continuance if no hearing was actually held on either of those two dates.

{¶5} Court Reporter Mills sent her initial written response to relator on February 25, 2009. As to the purported November 29, 2001 hearing, she stated that no transcript

was available for that proceeding because no "record" had been taken. However, as to the May 31, 2001 proceeding, Court Reporter Mills indicated that a status conference had been held on that date, and that a transcript of the matter was available.

{¶6} In light of the statements contained in Court Reporter Mills' first response, relator sent her a check in the amount of $20 for a written transcript of the May 31, 2001 proceeding. Yet, even though Court Reporter Mills received that check, she did not go forward on the project. Instead, on March 16, 2009, she sent a second correspondence to relator, in which she admitted that she had made an incorrect statement in her initial response. Specifically, Court Reporter Mills indicated that, upon reviewing the matter again, she had "discovered" that no record of any May 31, 2001 proceeding existed. As to this point, the correspondence emphasized that, while a hearing may have originally been scheduled for that date, she had not taken any record at that time. Finally, Court Reporter Mills stated that, unless relator wanted a transcript of a proceeding from 1996, she would return his check immediately.

{¶7} Dissatisfied with the assertions in the second correspondence, relator filed a new motion before Judge Stuard on April 17, 2009. In that motion, relator sought the issuance of an order which would compel Court Reporter Mills and Clerk of Courts Allen to provide to him a copy of the transcript of the May 31, 2001 proceeding. According to him, such an order was justified because the failure to produce the requested transcript had resulted in a violation of his statutory right to have access to public records under R.C. 149.43.

{¶8} When Judge Stuard had not gone forward on the new motion within two months, relator instituted the instant action for a writ of mandamus. As the grounds for

his sole claim for relief, relator raised the same contention that had formed the basis of his new motion before Judge Stuard; i.e., he asserted that all three respondents, Court Reporter Mills, Clerk of Courts Allen, and Judge Stuard, had not satisfied their legal duty concerning the production of a transcript for the disputed proceeding. Again citing R.C. 149.43, relator maintained that each respondent had a duty to ensure that the transcript was promptly prepared and made available to him. In relation to Judge Stuard, relator also alleged that a writ of mandamus should lie to compel him to enter final judgment against Court Reporter Mills and Clerk of Courts Allen on the pending motion.

{¶9} In lieu of an answer to relator's mandamus petition, respondents moved to dismiss the sole claim under Civ.R. 12(B)(6). As part of our initial review of the motion to dismiss, this court noted that, in addition to discussing the standard for relief under Civ.R. 12(B)(6), respondents also referenced the standard for summary judgment under Civ.R. 56(C). We further noted that respondents had attached evidentiary materials to their motion, including the affidavit of Court Reporter Mills.

{¶10} Given respondents' reliance upon the evidentiary materials, this court held that it would be inappropriate to allow respondents to proceed under Civ.R. 12(B)(6). As a result, we issued a judgment which expressly informed both sides to the litigation that the motion to dismiss would be converted to a motion for summary judgment under Civ.R. 56(C). The judgment also gave relator the opportunity to file a second response in light of the alteration of respondents' dispositive motion.

{¶11} As to the actual merits of the motion itself, this court would begin our legal analysis by noting that, in seeking final judgment on the mandamus claim, respondents have not challenged relator's contention that Court Reporter Mills would be responsible

for the production of any written transcript regarding an oral hearing which was held in the underlying criminal cases. Instead, they assert that, in this particular instance, Court Reporter Mills cannot produce a transcript of any proceeding on May 31, 2001 because a review of her various papers has shown that she did not "record" any hearing on that specific date. Based upon this, respondents maintain that they are not obligated to take any additional steps in regard to this matter because R.C. 149.43 does not impose any duty to produce and maintain a written transcript when no record of the hearing exists.

{¶12} In support of their argument, respondents have attached to their summary judgment motion copies of the various written correspondences which were exchanged between relator and Court Reporter Mills. Included in these materials is a copy of Ms. Mills' letter of March 16, 2009, in which she informed relator that, even though a hearing may have been scheduled for May 31, 2001, no record was taken of any proceeding on that date. In addition, respondents have submitted Ms. Mills' own affidavit, in which she averred the following: (1) her review of her personal papers indicates that no hearing was actually conducted on the date in question; (2) her papers further show that she did not make a record of any proceeding on that date; and (3) since no "record' exists, she is not able to produce a written transcript for relator.

{¶13} In responding to the summary judgment motion, relator has focused upon the propriety of the first statement in Court Reporter Mills' affidavit. Specifically, relator submits that Ms. Mills is simply incorrect in asserting that no hearing ever took place on May 31, 2001. According to relator, he can present substantial evidence to show that a proceeding did go forward before Judge Stuard on that date, and that Ms. Mills was in attendance at that time. In light of this, he argues that a writ of mandamus should issue

because logic dictates that a written transcript must always be obtainable whenever a court reporter is present at any type of court proceeding.

{¶14} In attempting to create a factual dispute concerning whether the disputed hearing actually occurred, relator relies primarily upon the affidavits of his sister, Elsie Jones, and his father, Anthony Cioffi, Sr. Our review of these two submissions readily indicates that both affiants made the following general statements: (1) on May 31, 2001, they attended a court proceeding in Judge Stuard's courtroom; (2) also in attendance at this proceeding were Judge Stuard, Court Reporter Mills, two attorneys who appeared on behalf of relator, and a representative from the county prosecutor's office; (3) at the outset of the proceeding, one of relator's attorney moved to continue the hearing for the reason that relator was not present; and (4) Judge Stuard granted the attorney's request on that basis. As part of her affidavit, Elsie Jones further asserted that the proceeding only lasted for approximately twenty minutes.

{¶15} Besides the foregoing two items, relator also attached his own affidavit to his response brief. In this separate submission, relator has averred that, at some point after the denial of his motion to set aside his conviction, he was "informed" by one of his attorneys that a "partial" hearing had been held before Judge Stuard on May 31, 2001. He has further asserted that the attorney told him that the "partial" hearing in question was continued when it became evident that no arrangements had been made for him to be present at the proceeding. Finally, relator has averred that, while the litigation on his motion to set aside was going forward, he expressly told his attorney that a hearing on the matter should not be allowed to proceed unless he was present and able to testify on his own behalf.

{¶16} Taken as a whole, the various averments in the affidavits of relator's sister and father are sufficient to raise a factual dispute concerning whether some form of oral proceeding took place before Judge Stuard on the date in question. Nevertheless, this court would further note that relator's evidentiary materials do not set forth any assertion that Judge Stuard heard or accepted any actual evidence during the course of the May 31, 2001 proceeding. Rather, his materials only indicate that, although a full evidentiary hearing had been scheduled for that date, a true "hearing" never took place at that time. That is, once it was determined that no one had arranged for relator to be present, the scheduled hearing was continued until a subsequent date.

{¶17} As noted above, the affidavit of Court Reporter Mills did contain a specific statement that no "hearing" was ever held on May 31, 2001. In making this statement, it is feasible that Ms. Mills only meant that no "evidentiary hearing" was conducted at that time, and that no recording had been needed because the actual merits of the motion to set aside were never addressed. To this extent, it is certainly arguable that the parties actually agree as to the exact nature of the events on the disputed date; i.e., although some type of limited proceeding occurred, it was not an "evidentiary hearing" because no evidentiary intake was had.

{¶18} Still, since our review of the Mills affidavit shows that she did not provide any explanation regarding her "no hearing" statement, the foregoing assumption cannot be made for purposes of the present analysis. Given that, in the context of a summary judgment exercise, all evidentiary materials must be construed in a manner that is most favorable to the non-moving party, this court must assume that Ms. Mills has taken the position that no proceeding of any form was held on the disputed date.

{¶19} Notwithstanding the foregoing discussion, this court would emphasize that the existence of a factual dispute in a summary judgment exercise will only be deemed dispositive of the matter when the disputed fact is "material" to the ultimate resolution of the case. In regard to the question of materiality, the Supreme Court of Ohio has noted that "'the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Turner v. Turner*, 67 Ohio St.3d 337, 340, 1993-Ohio-176, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶20} As was noted above, relator instituted the instant action pursuant to R.C. 149.43, which governs the availability of public records. Under subsection (B)(1) of this statute, any person who is responsible for the records of a public office has a legal duty to prepare, maintain, and make available for inspection by the public any record which is not exempt from review. The subsection also states that the responsible person has an obligation to provide a copy of a record at cost upon receipt of a proper request.

{¶21} In delineating the parameters of the express duty under R.C. 149.43(B)(1), the Supreme Court of Ohio has indicated that a public official is not required to create or provide access to a "record" or document which never existed. *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, at ¶15. As part of its analysis in *Lanham*, the Supreme Court specifically held that a writ of mandamus could not issue against a police chief when the uncontroverted evidence showed that the chief had never prepared a police report concerning an alleged criminal act. Id. See, also, *State ex rel. Bardwell v. Cleveland State Univ.*, 8th Dist. No. 91077, 2008-Ohio-2819, at ¶15.

{¶22} In light of the *Lantham* holding, logic dictates that the dispute concerning

the extent or nature of the May 31, 2001 proceeding would only be material to the final outcome of this litigation if an actual record of that proceeding had been made. That is, if the evidentiary materials before this court ultimately did support a finding that a record of the disputed proceeding has never existed, it would then be incumbent to also decide the nature of that proceeding, inasmuch as that point would be pertinent to the extent of Ms. Mills' legal duty in producing the transcript. On the other hand, if it is demonstrated that no record of the May 31, 2001 proceeding was taken by Ms. Mills, the exact extent of that proceeding is no longer relevant under the governing case law.

{¶23} Pursuant to the following discussion, this court concludes that, even when the parties' respective evidentiary materials are interpreted in a manner most favorable to relator, those materials establish that a record of the disputed proceeding was never made at that time. Under such circumstances, it follows that the exact extent or nature of the May 31, 2001 proceeding is not material to our final ruling on relator's mandamus claim.

{¶24} In relation to the "record" issue, this court would indicate that the affidavits attached to relator's response brief do not contain any assertion that the proceedings of May 31, 2001 were actually recorded by Court Reporter Mills. As part of their separate affidavits, relator's sister and father did expressly aver that Ms. Mills was present during the proceeding before Judge Stuard. However, the affidavits do not state that they saw Ms. Mills taking any stenographer notes or performing any other necessary act to record the proceeding in question. Similarly, the sister and father never aver that Judge Stuard made a statement indicating that he intended to "go on the record" for the purposes of delineating his reasons for continuing the hearing.

{¶25} As part of the argumentation in his brief, relator maintains that Ms. Mills' mere presence at the disputed proceeding supports an inference that she recorded the events of that date. However, when considered in the context of the other assertions in relator's evidentiary materials, her presence only indicates that an evidentiary hearing had originally been scheduled for that time. In order to show that an actual record was made of the decision to continue the hearing, it would have been necessary for relator's sister or father to further aver that Ms. Mills was actually seen taking notes or recording the discussion in another manner. Since their affidavits do not have such an averment, they do not contradict respondents' basic assertion that no "record" of the May 31, 2001 proceeding was made.

{¶26} In attempting to create a factual dispute regarding whether a record of the disputed proceeding ever existed, relator again emphasizes that when Court Reporter Mills initially told him that a transcript of the proceeding could be produced, she stated that this transcript would only cost $20. After noting that a $20 transcript would be very short, relator submits that a transcript of such a limited size would be consistent with the averments of his sister and father as to what occurred during the proceeding. In light of this, he argues that Ms. Mills' reference to the cost of the alleged transcript also raises an inference that a record of the proceeding truly existed.

{¶27} As to this point, this court would reiterate that, in both her second letter to relator and her affidavit before us, Court Reporter Mills indicated that her reference to a possible transcript in her original letter was due to a mistake she had made in reviewing her personal papers. In responding to the pending summary judgment motion, relator has been unable to present any materials which directly refute Ms. Mills' averment that

a mistake was made. In the absence of any contradictory material, relator's assertion as to the meaning of the "$20" costs does not constitute a logical inference based upon an undisputed fact in the case. Instead, his assertion is mere speculation which would not be viewed as reliable by a reasonable person.

{¶28} In discussing the standard for determining whether a genuine issue of fact exists for purposes of summary judgment under Civ.R. 56, the Supreme Court of Ohio has phrased the nature of the inquiry in the following way: "Does the evidence present 'a sufficient disagreement to require submission to a jury' or is it 'so one-sided that one party must prevail as a matter of law[?]'" *Turner*, 67 Ohio St.3d at 340, quoting *Anderson*, 477 U.S. at 251-252. Consistent with the foregoing analysis, this court holds that relator's evidentiary materials are insufficient to demonstrate the requisite degree of disagreement to warrant any further proceedings in the instant case. Stated differently, respondents have established that they cannot be compelled to provide a transcript of the May 31, 2001 proceeding to relator because, pursuant to the affidavit of Court Reporter Mills, it is undisputable that a record of the proceeding has never existed.

{¶29} As a final point, relator asserts that if no record of the disputed proceeding was ever made, it would then follow that Judge Stuard violated the requirements of Crim.R. 22 by failing to ensure that all proceedings in a underlying criminal action were recorded. The question of whether Judge Stuard violated Crim.R. 22 is not properly before this court within the context of a petition for mandamus.

{¶30} To prevail on a motion for summary judgment under Civ.R. 56, the moving party is obligated to establish that: "(1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds

can reach only one conclusion, which is adverse to the party against whom the motion is made, such party being entitled to have the evidence construed most strongly in his favor." *Spatar v. Avon Oaks Ballroom*, 11th Dist. No. 2001-T-0059, 2002-Ohio-2443, at ¶15 (citation omitted). In light of the foregoing discussion, this court ultimately concludes that respondents have satisfied this standard in relation to relator's mandamus claim under R.C. 149.43. That is, all three respondents have established that, under the undisputed facts of this case, they do not have a legal duty to give relator a transcript of the May 31, 2001 proceeding because Court Reporter Mills never made a record of that proceeding. Therefore, since relator will never be able to meet all elements for a writ of mandamus, respondents are entitled to final judgment as a matter of law.

{¶31} Similarly, given that Court Reporter Mills and Clerk of Courts Allen have not violated their legal duty under R.C. 149.43, it also follows that Judge Stuard had no separate legal duty to enter judgment against them, as relator had sought in his motion of April 17, 2009.

{¶32} Accordingly, respondents' motion for summary judgment is granted. It is the order of this court that final judgment is hereby entered in favor of respondents as to relator's entire mandamus petition.

MARY JANE TRAPP, P.J., DIANE V. GRENDELL, J., CYNTHIA WESTCOTT RICE, J., concur.