

[Cite as *State v. Thornton*, 2009-Ohio-5049.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23291
Plaintiff-Appellee	:	
	:	Trial Court Case Nos. 1995-CR-1860
v.	:	1996-CR-1699
	:	2000-CR-0280
MARK THORNTON	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	
	:	

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OPINION

Rendered on the 25<sup>th</sup> day of September, 2009.

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MATHIAS H. HECK, JR., by CARLEY J. INGRAM, Atty. Reg. #0020084, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422  
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Defendant-Appellant, *pro se*

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BROGAN, J.

{¶ 1} Mark Thornton, Jr., appeals from the trial court’s refusal to grant his request to obtain a copy of certain public records. Thornton was convicted in 1995

of possession of cocaine (1995-CR-01860), in 1996 of possession of cocaine (1996-CR-01699), and in 2000 of possession of cocaine (2000-CR-00280). After serving a prison sentence in Ohio, Thornton is presently incarcerated in a federal prison in Kentucky.

{¶ 2} Thornton asked the court, pursuant to R.C. 149.43(B)(4) for permission to receive a copy of the arrest affidavit, the plea agreements, and the sentencing hearing transcripts in the three cases in which he was convicted in Montgomery County. Thornton stated he was prepared to pay the clerk of courts any costs of copying and forwarding such records to him.

{¶ 3} The State requested that the trial court overrule Thornton's motion because he made no claim that these public records were necessary to advance a colorable claim. The trial court overruled Thornton's motion summarily.

{¶ 4} Thornton argues that the trial court's order denies him his United States Fifth and Sixth Amendments right to due process and that these records are public records which have not been ordered sealed. He contends he is preparing to challenge his convictions because he was denied the effective assistance of counsel and was the victim of prosecutorial misconduct.

{¶ 5} The State argues that we should affirm the trial court's order because Thornton was required to file a mandamus petition, not an appeal to compel compliance with R.C. 149.43 and, in any event, he failed to advance a colorable claim for which the records were necessary to support, citing *State ex rel Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio -5858.

{¶ 6} R.C. 149.43(B)(4) provides in part:

{¶ 7} “A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction \* \* \* to obtain a copy of *any public record concerning a criminal investigation or prosecution* \* \* \*, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge’s successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.” (Emphasis added.)

{¶ 8} We agree that mandamus is the appropriate remedy to compel compliance with R.C. 149.43. *State ex rel Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 426-427. We do not agree that Thornton was required to file a petition for a writ of mandamus when the sentencing judge did not find that the information was necessary to support a justiciable claim. Since a public office or public records keeper is not required to permit a prisoner to obtain a copy of any public record concerning a criminal investigation or prosecution until the sentencing judge makes the required finding, it would be futile to bring a mandamus action against the public office or public records keeper. *State ex rel Russell v. Thornton*, supra. It is also fundamental that mandamus may not be used as a substitute for appeal when a direct appeal would provide an adequate remedy. *Luchene v. Wagner*, 12 Ohio St.3d 37, 38. An appeal will provide Thornton an adequate remedy and he has chosen it.

{¶ 9} Although Thornton tells us in his appellate brief that he needed the requested material to pursue a claim he was denied the effective assistance of counsel

and a prosecutorial misconduct claim, he did not inform the trial court why he needed the requested records. The trial court, therefore, did not err in finding that Thornton had not satisfied the requirements of R.C. 149.43(B)(4). Thornton's assignment of error is Overruled. The judgment of the trial court is Affirmed.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

- Mathias H. Heck, Jr.
- Carley J. Ingram
- Mark Thornton
- Hon. Timothy N. O'Connell