

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

IN RE: : Case No. 15CA23
:
CRIMINAL CHARGES AGAINST : DECISION AND JUDGMENT
KEVIN T. GROVES AND : ENTRY
C. DAVID WARREN :
: **Released: 06/27/16**

APPEARANCES:

Melanie A. Ogle, Rockbridge, Ohio, Pro Se Appellant.

Kyle C. Henderson, Hocking County Prosecutor, and William L. Archer, Jr.,
Assistant Hocking County Prosecutor, Logan, Ohio, for Appellee.

McFarland, J.

{¶1} Melanie A. Ogle appeals the Hocking County Common Pleas Court’s decision dismissing this action. In this matter, Appellant filed an affidavit pursuant to R.C. 2935.09 alleging that a Hocking County sheriff’s deputy and a Hocking County special prosecutor engaged in criminal behavior and should be charged with felony offenses. Appellant sets forth two assignments of error. Having reviewed the record and pertinent law, we find the trial court did not follow the proper procedure pursuant to R.C. 2935.10. We therefore sustain Appellant’s assignments of error and reverse the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} In August 2011, Appellant was convicted by a jury in the Hocking County Court of Common Pleas of assault on a peace officer. Her conviction was affirmed. See *State v. Ogle*, 4th Dist. Hocking Nos. 11CA29, 11CA32, 12CA2, 12CA11, 12CA12, 12CA19, 2013-Ohio-3420. On May 11, 2012, Appellant was convicted of criminal damaging, a second-degree misdemeanor. This conviction was also affirmed by this court in *State v. Ogle*, 4th Dist. Hocking Nos. 11CA29, 11CA32, 12CA2, 12CA11, 12CA12, 12CA19, 2013-Ohio-3420.

{¶3} On October 20, 2015, she filed an affidavit pursuant to Revised Code 2935.09. The affidavit specifically alleged that Kevin Groves, a former Hocking County sheriff's deputy, and C. David Warren, a Hocking County special prosecutor, had engaged in criminal conduct and that the State was required to file felony charges against them. In the October 27, 2015 entry, the trial court held that: (1) the claims against the deputy were barred by res judicata; and (2) the claims against the prosecutor were barred by sovereign immunity. The trial court denied Appellant a probable cause hearing and dismissed the matter.

{¶4} Appellant filed a second affidavit on October 28, 2015 requesting the trial judge recuse himself. On October 30, 2015, the trial

court filed a second entry, setting forth in more detail the basis for the court's October 27, 2015 decision. This timely appeal followed.

ASSIGNMENTS OF ERROR

“I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING AFFIANT’S AFFIDAVIT SUBMITTED PURSUANT TO THE OHIO REVISED CODE 2935.09 AND 2935.10 ON THE BASIS OF RES JUDICATA.”

“II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO COMPLY WITH OHIO REVISED CODE 2935.10 BY NOT EITHER ISSUING A WARRANT OR REFERRING THE MATTER TO A PROSECUTOR FOR INVESTIGATION AS REQUIRED BY THE STATUTE.”

LEGAL ANALYSIS

{¶5} We consider Appellant’s assignments of error jointly. In the October 27, 2015 judgment entry, the trial court stated:

“After examination of the affidavit, this court believes that the claims are not meritorious. * * * [Regarding the claims against Kevin Groves], the court finds that the claims of Ms. Ogle are barred by res judicata. * * * As to the claims made against C. David Warren, these claims arise out of Mr. Warren’s actions as a prosecutor in the investigation and presentation of possible charges. He is immune.”

{¶6} Appellant argues the dismissal of her affidavit is in direct violation of R.C. 2935.10 and this Court’s ruling in *State ex rel. Brown v. Jeffries*, 4th Dist. Ross No. 11CA3275, 2012-Ohio-1522. The State of Ohio argues this court should affirm the trial court’s decision as, based on the applicable doctrines of res judicata and governmental immunity, there was

no legal basis for which to proceed on the affidavit filed against Groves and Warren.

{¶7} R.C. 2935.09 provides the legal mechanism for which a private individual may bring about charges of criminal conduct. The statute provides 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 a private citizen having knowledge of the facts shall comply with this section.

* * *

(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.

{¶8} The procedure for filing the affidavit is set forth in 2935.10 as follows:

(A) Upon the filing of an affidavit or complaint as provided by section 2935.09 of the Revised Code, if it charges the commission of a felony, such judge, clerk, or magistrate, unless he has reason to believe that it was not filed in good faith, or the claim is not meritorious, shall forthwith issue a warrant for the

arrest of the person charged in the affidavit, and directed to a peace officer; otherwise he shall forthwith refer the matter to the prosecuting attorney or other attorney charged by law with prosecution for investigation prior to the issuance of warrant.

{¶9} “While R.C. 2935.09 provides that a ‘private citizen having knowledge of the facts’ shall file with a judge, clerk of court, or magistrate an affidavit charging an offense committed in order to cause the arrest or prosecution of the person charged, it must be read *in pari materia* with R.C. 2935.10, which prescribes the subsequent procedure to be followed.” *State ex rel. Boylen v. Harmon*, 107 Ohio St.3d 370, 2006-Ohio-7, at ¶ 6, quoting *State ex rel. Strothers v. Turner*, 79 Ohio St.3d 272, 273, 680 N.E.2d 1238 (1997), citing *State v. Holbert*, 38 Ohio St.2d 113, 117, 311 N.E.2d 22 (1974). Appellant also cites our previous decision in *State ex rel. Brown v. Jeffries*, 4th Dist. Ross No. 11CA3275, 2012-Ohio-1522, wherein this Court held that where a private citizen charges a criminal offense as set forth in R.C. 2935.09(D) and the offense is a felony, R.C. 2935.10(A) requires the judge, clerk, or magistrate to **either** issue a warrant for the arrest of the person charged in the affidavit **or** refer the matter to the prosecuting attorney. (Emphasis added.) See also *Evans v. Evans*, 4th Dist. Scioto No. 14CA3647, 2015-Ohio-378, ¶ 29. Our decision in *Brown*, *supra*, was recently cited in *Hillman v. Larrison*, 10th Dist. Franklin No. 15AP-730, 2016-Ohio-666, wherein the trial court, as in the case sub judice, dismissed

the action without making the determinations required by R.C. 2935.09 and 2935.10. The *Hillman* court at ¶ 14, citing *Brown*, observed:

“[W]hen ‘R.C. 2935.10 applies [it] affords the reviewing official only two options: 1) issue a warrant or 2) refer the matter to the prosecutor for investigation if there is a belief that the affidavit lacks a meritorious claim, i.e. probable cause, or was not made in good faith.’ *Id.* at ¶ 9, citing *Boylen, supra*, at ¶ 7. See also *State ex rel. Capron v. Dattilio*, 7th Dist. No. 15 CO 008, 2015-Ohio-1900, ¶ 5, citing *In re Slayman*, 5th Dist. No. 08CA70, 2008-Ohio-6713, ¶ 21 . * * * ‘R.C. 2935.10 does not provide the trial court with the third option of summarily dismissing the matter.’ *Brown* at ¶ 10. Because the trial court in the present case summarily dismissed appellant's affidavit, we must remand the matter to the trial court to follow the procedures set forth in R.C. 2935.09”

{¶10} While the doctrines of res judicata and governmental immunity may have application to the underlying facts, procedurally the reviewing official did not have, as in the cases cited, a third option to dismiss Appellant’s affidavit. The Supreme Court of Ohio and this Court have clearly set forth the required procedure under R.C. 2935.10. Based on the authority of *Boylen and Brown, supra*, we find the trial court should have referred the matter to the prosecuting attorney for further investigation. We sustain Appellant’s assignments of error, reverse the judgment of the trial court, and remand for proceedings consistent with this opinion.

**JUDGMENT REVERSED AND
REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT
WITH THIS OPINION.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION and that Appellant recover of Appellee any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.