

[Cite as *State ex rel. Capron v. Dattilio*, 2015-Ohio-1900.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO, ex rel.,
JOHN F. CAPRON , III

RELATOR,

- VS -

ANTHONY J. DATTILIO, et al.

RESPONDENTS.

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CASE NO. 15 CO 008

OPINION
AND
JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS:

Petition for Writ of Mandamus

JUDGMENT:

Petition Dismissed

APPEARANCES:

For Relator:

John F. Capron, III, Pro-se
331 Woodsend Drive
Salem, Ohio 44460

For Respondent:

Attorney Robert L. Herron
Prosecuting Attorney
Attorney Andrew A. Beech
Asst. Prosecuting Attorney
Columbiana County Courthouse
105 S. Market Street
Lisbon, Ohio 44432

JUDGES:

Hon. Mary DeGenaro
Hon. Cheryl Waite
Hon. Carol Robb

Dated: May 13, 2015

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PER CURIAM:

{¶1} Relator, John F. Capron, III, filed a pro-se Petition for a Writ of Mandamus pursuant to R.C. 2935.09, seeking an order compelling Respondents, Anthony J. Dattilio, Columbiana County Clerk of Courts, and Robert Herron, Columbiana County Prosecutor, to charge and prosecute a named individual for perjury. Respondents filed a Motion to Dismiss on April 2, 2015, arguing that Relator is seeking to mandate Respondent Clerk and Respondent Prosecutor to exercise their respective discretion, which is inappropriate. Relator filed his opposition to the Motion to Dismiss on April 8, 2015. For the following reasons, we grant Respondents' motion, deny the Writ and dismiss the Petition.

{¶2} This court has jurisdiction to hear an original mandamus action pursuant to Article IV, Section 3(B)(1) of the Ohio Constitution and R.C. 2731.02. In order to be entitled to a writ of mandamus a relator must establish: (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent(s) to provide such relief, and (3) the lack of an adequate remedy in the ordinary course of law. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211, 663 N.E.2d 639. The burden is on the relator to establish the elements to obtain the writ. *State ex rel. Dehler v. Sutula*, 74 Ohio St.3d 33, 34, 656 N.E.2d 332 (1995).

{¶3} R.C. 2935.09 does not mandate prosecution of all offenses charged by affidavit. Although R.C. 2935.09 provides that a "private citizen having knowledge of the facts" shall file with the judge, clerk of court, or magistrate an affidavit charging an offense committed in order to cause the arrest or prosecution of a 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. Strothers v. Turner*, 79 Ohio St.3d 272, 273, 680 N.E.2d 1238 (1997).

{¶4} Under R.C. 2935.10(A), if the affidavit filed under R.C. 2935.09 charges a felony, the judge, clerk, or magistrate with whom the affidavit is filed must issue a warrant for the arrest of the person charged in the affidavit unless the judge, clerk, or magistrate "has reason to believe that it was not filed in good faith, or the claim is not meritorious." In that event, the clerk "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.” R.C. 2935.10(A).

{¶5} As Relator alleges a charge of perjury, a third degree felony, R.C. 2935.10 applies and 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. *In re Slayman*, 5th Dist. No. 08CA70, 2008-Ohio-6713, ¶ 21.

{¶6} In the present matter, Relator mailed a complaint and affidavit, alleging perjury, to the Clerk of Court in Lisbon, Ohio. It was not filed with the court, but instead given to an assistant prosecuting attorney at the court for review. In mid-February Relator received notice from the prosecutor’s office informing him that there was not a sufficient basis to justify the filing of criminal charges.

{¶7} The proper procedure was followed pursuant to R.C. 2935.10. A prosecuting attorney will not be compelled to prosecute except when the failure to do so constitutes an abuse of discretion. *State ex rel Master v. Cleveland*, 75 Ohio St.3d 23, 27, 1996-Ohio-228, 661 N.E.2d 180. Capron did not allege sufficient facts in his petition evidencing that the prosecutor abused his discretion by determining that the charges lacked probable cause.

{¶8} Accordingly, Respondents’ Motion to Dismiss is granted, the Writ is denied and the Petition is dismissed. Costs taxed against Relator. Final order. Clerk to serve notice as provided by the Civil Rules.

DeGenaro, J. concurs
Waite, J. concurs
Robb, J. concurs