

[Cite as *State ex rel. Kirin v. D'Apolito*, 2015-Ohio-3964.]
 STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO EX REL,)	CASE NO.15 MA 61
VICTOR J. KIRIN, JR.,)	
)	
RELATOR,)	
)	
VS.)	OPINION AND
)	JUDGMENT ENTRY
MAHONING COUNTY COURT 4)	
JUDGE DAVID D'APOLITO,)	
)	
RESPONDENT.)	

CHARACTER OF PROCEEDINGS: Petition for Writ of Mandamus

JUDGMENT: Denied.

APPEARANCES:

For Relator: Victor J. Kirin, Jr., *pro se*
 15 North Beverly Avenue
 Austintown, Ohio 44515

For Respondent: Atty. Paul J. Gains
 Mahoning County Prosecutor
 Atty. Gina DeGenova Bricker
 Assistant Prosecuting Attorney,
 Civil Division
 21 West Boardman Street, 5th Floor
 Youngstown, Ohio 44503

JUDGES:
 Hon. Carol Ann Robb
 Hon. Gene Donofrio
 Hon. Cheryl L. Waite

Dated: September 23, 2015

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PER CURIAM.

{¶1} Victor J. Kirin, Jr. (“Relator”) has filed a public records mandamus action against Mahoning County Court Judge David D’Apolito (“Respondent”). Relator alleges Respondent failed to grant motions filed in his criminal case for the production of transcripts from two hearings. For the following reasons, Respondent’s request for summary judgment is granted, and Relator’s request for a writ of mandamus is denied.

STATEMENT OF THE CASE

{¶2} Relator was a defendant in Mahoning County Court Case Number 2011 TR C 07955 assigned to Respondent. The case was set for a suppression hearing on June 27, 2012, but the hearing was rescheduled for August 22, 2012. On that date, the case was continued, again. According to Relator, the case was continued because the state trooper failed to appear.

{¶3} On August 29, 2012, Relator filed two motions requesting the trial court “to ORDER a full and complete copy” of the transcripts from the June 27, 2012 and August 22, 2012 proceedings. Each motion was entitled, “Motion for the Production of Hearing Transcripts under O.R.C. 2301.25.” (Original in all caps.) The motions claimed the “transcripts are mandated because of the false and misleading testimony that was given and used in making the Honorable Court’s decision in this matter.

{¶4} When the case was called for the suppression hearing on October 3, 2012, the prosecutor moved to dismiss the charges. Respondent issued a judgment entry the same day dismissing the charges (and ordering the state to pay costs). On April 21, 2015, two and one-half years after the case against him was dismissed, Relator filed this original action against Respondent.

{¶5} Relator’s complaint states that the transcripts were public records required to be released under R.C. 149.43. He asserts Respondent denied his “lawful request for public records” by failing to produce the transcripts in response to the motions filed pursuant to R.C. 2301.25. He claims entitlement to statutory

damages of \$100 for each day his request remains unfulfilled after the filing of this action.¹

{¶16} Respondent filed a motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. The motion referred to various items from the docket and/or case file in the underlying traffic case. We converted the motion to dismiss into a motion for summary judgment as permitted by Civ.R. 12(B). We allowed Respondent to supplement the motion and provided Relator fourteen days after the supplementation to respond. Respondent's supplemental motion contained an affidavit and certified copies of pertinent items from the criminal case.

{¶17} Respondent contends that Relator failed to show the elements for a mandamus action: a clear legal right to relief, a clear duty to perform, and the absence of a plain and adequate remedy in the ordinary course of law. Respondent notes that once a case is dismissed, any pending motions are presumed to have been denied and the presumed denial of those motions can be appealed. See *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198, 201 (1998). When the trial court issued the judgment entry of dismissal, then Relator had an adequate remedy at law, through appeal, which he failed to utilize.

¹ Besides containing a public records mandamus action under R.C. 149.43, Relator's complaint also set forth a count for destruction of public records under R.C. 149.351 and a negligence count seeking compensatory damages under which he cited R.C. 1907.57 for the principle that a county court judge shall not refuse, upon lawful demand, to deliver any docket, papers, files, or other matters to persons entitled to them. On June 4, 2015, this court sua sponte dismissed the latter two counts for lack of jurisdiction. See *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 684 N.E.2d 72 (1997) (appellate court may sua sponte consider its own jurisdiction). We explained that R.C. 149.351 specifies that an action for destruction of public records must be filed in the common pleas court. See R.C. 149.351(C). See also *Patriot Water Treatment, L.L.C. v. Ohio Dept. of Natural Resources*, 10th Dist. No. 13AP-370, 2013-Ohio-5398, ¶ 34. We also pointed out that the court of appeals cannot hear a tort action seeking compensatory damages. See Ohio Constitution, Article 4, Section 3(B). See also *State ex rel. American Outdoor Advertising Co., L.L.C. v. Abell*, 11th Dist. No. 2008-P-0073, 2010-Ohio-319, ¶ 53, citing *Williams v. Franklin Cty. Sheriff Dept.*, 10th Dist. No. 05AP-207, 2005-Ohio-4573, ¶ 14.

On June 11, 2015, Relator filed a document contesting our June 4, 2015 entry. He seems to believe that our decision granted a request by Respondent without providing him time to respond. However, Respondent's motion did not raise the jurisdictional issues regarding counts two and three. Our entry clearly expressed that it was a sua sponte dismissal for lack of jurisdiction and was not related to Respondent's motion, which is the subject of the present entry. We note that Appellant's submissions relevant to his public records claim contained in count one have been considered in making the present decision.

{¶18} Respondent alternatively posits that the right to receive copies of public records is dependent upon a request to the public office responsible for those records, citing R.C. 149.43(B)(1). Respondent concludes that Relator sought the records from the wrong person as the court reporter, not the judge, was the public official responsible for maintaining the records and producing the transcripts. See *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30, 33, 485 N.E.2d 706 (1985) (“When statutes impose a duty on a particular official to oversee records, that official is the ‘person responsible’ under R.C. 149.43(B).”).

ANALYSIS

{¶19} Upon request, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. R.C. 149.43(B)(1). In addition, upon request, a public office or person responsible for the records shall make copies of the requested public record available at cost and within a reasonable period of time. *Id.* A public records mandamus action can be commenced if a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection or any other failure to comply with an obligation in accordance with division (B). R.C. 149.43(C)(1). Statutory damages are fixed at \$100 per day from the day the mandamus action was filed, up to a \$1,000 maximum. *Id.* The public records mandamus action can be filed in the common pleas court, the appellate court, or the Ohio Supreme Court. *Id.*

{¶110} In the ordinary mandamus case, a relator must show: (1) a clear legal right to the action requested; (2) a corresponding clear legal duty of the respondent to perform the action; and (3) the absence of a plain and adequate remedy in the ordinary course of law. See, e.g., *State ex rel. Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 578, 757 N.E.2d 357 (2001). The third requirement does not apply in public records cases since R.C. 149.43 permits the filing of a mandamus action if the person has been denied public records which a public official had a duty to provide. See *id.* at 580; *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 426-427, 639

N.E.2d 83 (1994). In accordance, the mere fact that a relator possessed an adequate remedy at law does not bar a mandamus action filed under R.C. 149.43.

{¶11} Relator cites R.C. 2301.20 for the proposition that the trial court proceedings should have been recorded. Respondent cites the same statute for the principle that notes and electronic records shall be filed in the office of the official reporter and carefully preserved. See R.C. 2301.20. See *also* R.C. 2301.26 (notes and electronic records shall be carefully preserved in the office of the reporters). Although the statute specifically refers to actions in the common pleas court, Respondent states that procedural statutes are applicable to the county court where no procedure is specified for the county court in Chapter 1907. Relator does not contest this statement. In fact, Relator's motions for transcripts were filed under R.C. 2301.25, which provides in part:

When ordered by the prosecuting attorney or the defendant in a criminal case or *when ordered by a judge of the court of common pleas in either civil or criminal cases*, the costs of transcripts shall be taxed as costs in the case, collected as other costs, whether the transcripts have been prepaid or not, as provided by section 2301.24 of the Revised Code, paid by the clerk of the court of common pleas quarterly into the county treasury, and credited to the general fund. (Emphasis added.)

{¶12} This statute refers to R.C. 2301.24, which provides that compensation shall be paid to the reporter by the party for whom a transcript is made. It also states that compensation for transcripts requested by the prosecuting attorney, an indigent defendant in criminal cases, or by the trial judge in either civil or criminal cases shall be paid from the county treasury and taxed and collected as costs. R.C. 2301.24. Pursuant to R.C. 2301.23: "When notes have been taken or an electronic recording has been made in a case as provided in section 2301.20 of the Revised Code, if the court or either party to the suit requests written transcripts of any portion of the proceeding, the reporter reporting the case shall make full and accurate transcripts of the notes or electronic recording."

{¶13} We note that the Supreme Court has ruled that R.C. 149.43 may not be used to circumvent R.C. 2301.24, which provides that the compensation for court reporters shall be paid by the party for whose benefit the transcript is made. *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 2004-Ohio-4354, 814 N.E.2d 55, ¶ 4-8 (in addressing requests made by a prosecutor). *See also State ex rel. Slagle v. Rogers*, 106 Ohio St.3d 1402, 2005-Ohio-3040, 829 N.E.2d 1215 (on reconsideration to add a holding). R.C. 149.43 is a general statute addressing the public's right to access public records whereas R.C. 2301.23 is a specific statute requiring a designated fee to be paid to the court reporter when seeking transcripts. *State ex rel. Slagle*, 103 Ohio St.3d 89 at ¶ 15. Therefore, the cost of ordering transcripts from the court reporter "must take precedence" over the "at cost" provision in R.C. 149.43(B)(1). *Id.* at ¶ 6. *See also State ex rel. Slagle*, 106 Ohio St.3d 1402 at ¶ 19 (cannot circumvent payment of fees to the court reporter).

{¶14} One may freely inspect, without copying, transcripts of proceedings that are already on file as part of the public court file. *State ex rel. Slagle*, 106 Ohio St.3d 1402 at ¶ 19. *See also State ex rel. Slagle*, 103 Ohio St.3d 89 at ¶ 17 (can ask for a copy of a tape "at cost" as the phrase is used in the public records law). However, a party to a lawsuit cannot use the Ohio Public Records Act to obtain court transcripts at actual costs. *State ex rel. Slagle*, 103 Ohio St.3d 89 at ¶ 4, 14. "[I]f a party to an action seeks a transcription of an audiotape of a court proceeding, then that party is required to follow the procedure set forth in R.C. 2301.24 and to pay the designated fee to the court reporter." *Id.* at ¶ 17. *See also Lawrence v. Shaughnessy*, 8th Dist. No. 102616, 2015-Ohio-885, ¶ 6 (mandamus action against judge dismissed because "to the extent that Lawrence seeks to obtain a copy of his transcript at costs through R.C. 149.43, a public records mandamus may not be used to circumvent payment to the official court reporter of the fees designated by the court and statute.")

{¶15} The obligation to produce a transcript of proceedings under R.C. 2301.25 arises if the court or a party to the suit requests written transcript from the reporter. Respondent concludes that the court reporter, rather than the judge, was the person responsible for producing transcripts from the notes or electronic

recording of proceedings and that a proper request for transcription must be made in order to be entitled to the record. Relator did not request that the court reporter prepare the transcripts.

{¶16} We relied on the *Slagle* holdings in another original action filed by this Relator against Common Pleas Court judges presiding over a civil case in which Relator was the plaintiff. *State ex rel Kirin v. Judge Christian*, 7th Dist. No. 15MA62. We recognize that the case before us is a criminal case in a county court. However, the principle remains that there is a difference between a refusal to release transcripts already prepared and a decision by the court not to order transcripts for its own use. See generally *State ex rel. Slagle*, 103 Ohio St.3d 89. In this case, transcripts of the hearings at which continuances were granted had not been prepared. The procedure for ordering transcripts was not followed. Relator did not order transcripts with his request; rather, he asked the court to order the transcripts. Perhaps Relator made this request of the court based on his status as an indigent criminal defendant. However, an indigent criminal defendant's rights regarding costs for transcription are distinct from a public records action.

{¶17} Moreover, a request for a court to order the production of transcripts for canceled hearings due to a claim of false statements would rationally be considered moot once a judgment entry of dismissed on all charges was issued. What Relator now claims were public records requests were filed as motions with the trial court in a criminal case. The motions urged the transcripts would be needed by the court due to false or misleading testimony provided at the hearings. There is no clear legal duty within R.C. 2301.25 or R.C. 149.43 on the part of the trial court to order the production of transcripts for its own use. A writ of mandamus can require an inferior tribunal to exercise its judicial power or to proceed to discharge its function, but it cannot control judicial discretion. R.C. 2731.03. See also *State ex rel. Motley v. Capers*, 23 Ohio St.3d 56, 57-58, 491 N.E.2d 311 (1986) (in mandamus action seeking to compel judge to sign the proposed narrative statement under App.R. 9(C) or to order a transcript from the court reporter at public expense, Court held that

transcript is considered unavailable where civil party is indigent and ordered judge to perform App.R. 9(C) duty rather than order transcript).

{¶18} Finally, Relator makes various allegations unrelated to a public records mandamus action. He alleges conspiracy, obstruction of justice, and violations of disciplinary rules and judicial canons. Relator points to a statement by the prosecutor as to why dismissal of the charges was sought. Among other reasons, the prosecutor stated there was a request for additional information that was not available. Relator believes this statement referenced his motions for transcripts and was an admission that the public record was never made or was lost or destroyed.

{¶19} As to the latter statement, the destruction of public records claim brought pursuant to R.C. 139.351 was dismissed for lack of jurisdiction; the statute requires such a claim be brought in the common pleas court. See R.C. 139.351(A), (C). As to the suggestion that the proceedings were not recorded, this supposition would not fall within the rubric of a public records mandamus action. R.C. 149.43 deals with the failure to supply actual records. The statutory public records mandamus action does not implicate records that were never created. See, e.g., *State ex rel. Morabito v. Cleveland*, 8th Dist. No. 98829, 2012-Ohio-6012, ¶ 14 (the duty imposed by the public records statute is to supply records not to create records). See also R.C. 149.011(G) (defining records). In any event, there is no indication that the prosecutor's statement about unavailable information was a reference to the pro se motions asking the court to order transcripts of suppression hearings that were called and then continued.

{¶20} For the foregoing reasons, Respondent's request for summary judgment is granted, and Relator's petition for a writ of mandamus is denied. This case is hereby dismissed.

{¶21} Costs taxed against Relator. Final order. Clerk to serve notice as provided by the Civil Rules.

Robb, J., concurs.

Donofrio, P.J., concurs.

Waite, J., concurs.