[Cite as *State ex rel. Dreamer v. Mason*, 2007-Ohio-271.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 89249 and 89250

STATE OF OHIO EX REL. KATHLEEN DREAMER

RELATORS

vs.

WILLIAM MASON, CUYAHOGA COUNTY PROSECUTOR

RESPONDENT

JUDGMENT:
WRIT GRANTED IN PART

WRIT OF MANDAMUS
MOTION NOS. 392183, 392301 and 392302
ORDER NO. 392588

RELEASE DATE: January 22, 2007

[Cite as *State ex rel. Dreamer v. Mason*, 2007-Ohio-271.]

ATTORNEYS FOR RELATOR:

Roger M. Synenberg
Dominic J. Coletta
Synenberg & Associates, LLC
55 Public Square
Suite 1200
Cleveland, Ohio 44113

Robert J. Rotatori
Cara L. Santosuosso
Rotatori, Bender, Gragel, Stoper &
Alexander Co., LPA
800 Leader Building
526 Superior Avenue, N.E..
Cleveland, Ohio 44114

Dominic J. Vitantonio
Argie, D'amico & Vitantonio
6449 Wilson Mills Road
Cleveland, Ohio 44143-3402

ATTORNEYS FOR RESPONDENT:

William D. Mason
Cuyahoga County Prosecutor
By: Charles E. Hannan
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ANTHONY O. CALABRESE, JR., P.J.,

{¶ 1} In December 2004, the Cuyahoga County Board of Elections ("Board") -- relator in Case No. 89250 -- conducted a recount of the November 2004 general election. Relators in Case No. 89249 -- Kathleen Dreamer, Rosie Grier and

Jacqueline Maiden ("employees") -- were employed by the Board during the November 2004 election and the December 2004 recount. A grand jury investigation regarding the December 2004 recount ensued.

{¶ 2} Respondent, William Mason, is the prosecuting attorney for Cuyahoga County. In August 2005, the court of common pleas granted Mason's request to appoint Kevin Baxter as a special prosecutor with respect to the grand jury investigation of the December 2004 recount. In August 2005, February 2006 and June 2006, the employees were indicted in Cuyahoga County Court of Common Pleas Case Nos. CR-470245, 477610 and 480237. Trial is set for January 22, 2007 in Case No. CR-470245 (which has been consolidated with Case No. CR-477610) and January 16, 2007 in Case No. CR-480237.

{¶ 3} Mason serves as legal adviser to the Board.[1] Counsel for Dreamer in the criminal proceedings requested and received a waiver of the attorney-client privilege from the Board for purposes of Dreamer's criminal matter.

{¶ 4} Thereafter, her attorney requested that Mason make available to him the records of the prosecuting attorney's office pertaining to the recount of the November 2004 election. Mason's office responded that the request was not proper because the records pertain to a pending criminal proceeding. Counsel for Dreamer issued a subpoena duces tecum to the prosecuting attorney's office. The

[1] R.C. 309.09(A).

prosecuting attorney's office filed a motion to quash. The court of common pleas granted the motion to quash and instructed the special prosecutor to submit the requested documents under seal for in camera inspection. The parties do not dispute that Baxter has made available to the employees a significant portion of the records.

{¶ 5} In Case No. 89249, the employees request that this court issue a writ of mandamus ordering Mason to provide them with the files of the prosecuting attorney's office relating to the 2004 general election. In Case No. 89250, the Board requests that this court issue a writ of mandamus ordering Mason to provide the Board -- as Mason's client -- with the files of the prosecuting attorney's office relating to the 2004 general election.

{¶ 6} Respondent has filed a motion to dismiss in each case as well as a motion to strike the complaint in Case No. 89250. Respondent argues that relators are seeking public records which are only available through discovery in the underlying criminal proceedings.[2] Respondent argues that this court should strike the complaint in Case No. 89250, because the counsel who filed the complaint do not have the authority to represent the Board.[3]

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[2] Crim.R. 16. See, also, *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83.

[3] See R.C. 309.09(A) and 305.14(A).

{¶ 7} Relators have filed briefs in opposition to respondent's motions. Relators contend that respondent mischaracterizes their request by insisting that relators are seeking public records. Rather, relators describe their claims as being a request by a client (or the client's designee) for an attorney's file regarding the attorney's representation of the client.

{¶ 8} This court granted relators' motion for oral hearing and has consolidated these cases for hearing and disposition. A hearing was held on January 11, 2007 at which counsel for the parties presented argument.

{¶ 9} The fundamental criteria for issuing a writ of mandamus are well-established:

> **"In order to be entitled to a writ of mandamus, relator must show (1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State, ex rel. National City Bank v. Bd. of Education* (1977), 52 Ohio St.2d 81, 369 N.E.2d 1200."**[4]

Of course, all three of these requirements must be met in order for mandamus to lie.

{¶ 10} In Case No. 89250, respondent has challenged the authority of relators' counsel to purport to bring an action on behalf of the Board.

> **"The prosecuting attorney shall be the legal adviser of the *** board of elections ***. The prosecuting attorney shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the**

[4] *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St.2d 41, 42, 374 N.E.2d 641.

> **county, except as provided in section 305.14 of the Revised Code."**[5]

{¶ 11} Case No. 89250 was not, however, brought by the prosecuting attorney on behalf of the Board.

> **"The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity."**[6]

The record in this action does not reflect compliance with the statutory requirements for bringing an action on behalf of the Board.

{¶ 12} Counsel for the employees argue that, because the employees are county officers under the employ of the Board,[7] they have the authority to bring this action in the name of the Board. Although we recognize that the employees' counsel make this argument in good faith, it is evident that the Board per se has not commenced Case No. 89250. We may not permit an action to proceed to the merits if the record does not substantiate that the nominal relator has indeed authorized the action. Furthermore, relators' counsel has not provided this court with any

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[5] R.C. 309.09(A).

[6] R.C. 305.14(A).

[7] See *State ex rel. Attorney Gen. v. Brennan* (1892), 49 Ohio St. 33, 38-39, 29 N.E. 593.

controlling authority for the proposition that an employee of a public entity has the authority to commence an action in the name of that entity without appropriate authorization. As a consequence, we grant respondent's motion to strike or, in the alternative, to dismiss Case No. 89250.

{¶ 13} In Case No. 89249, the employees assert that the Board's waiver of the attorney-client privilege for purposes of the criminal proceedings against the employees permits them the same access to the these records as the Board would have as respondent's client. Respondent does not effectively refute the employees' assertion, however, that they are entitled to have access to the records as the Board's designee. Rather, respondent merely attempts to characterize this case as a request by the employees for public records.

> **"Information, not subject to discovery pursuant to Crim.R. 16(B), contained in the file of a prosecutor who is prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43 and is specifically exempt from release as a trial preparation record in accordance with R.C. 149.43(A)(4)."**[8]

Respondent argues, therefore, that *Steckman* forbids the release of the disputed records.

{¶ 14} The employees contend, however, that the disputed records are not contained in the file of the prosecuting attorney for the purpose of prosecuting a criminal matter. Rather, the employees argue, they are in the prosecutor's

[8] *Steckman*, supra, par. 3 of the syllabus.

possession because he is legal counsel to the Board. Because the Board has delegated to the employees the right to examine the file, the employees insist that they are entitled to the same access as would be the Board or any other client.

{¶ 15} Respondent has not satisfactorily refuted the employees' contention that a client is entitled to review its attorney's file regarding that attorney's representation of the client -- even a client which is a public entity with a public official as counsel. Similarly, respondent has not refuted the assertion of the employees (or the Board, if it were properly before this court) that they do not have a plain and adequate remedy in the ordinary course of the law to secure access to respondent's file for the representation of the Board with respect to the November 2004 election and ensuing recount.

{¶ 16} We hold, therefore, that the employees are entitled to relief in mandamus in order to have access to respondent's file for the representation of the Board with respect to the November 2004 election and ensuing recount. We recognize that this case presents unique and challenging facts. As a consequence, our judgment in this case is specifically limited to the circumstances of this case.

{¶ 17} Accordingly, respondent's motion to dismiss Case No. 89250 is granted. Respondent's motion to dismiss Case No. 89249 is denied. In Case No. 89249, we enter judgment for the employees and issue a writ of mandamus ordering Mason to provide the employees with the files of the prosecuting attorney's office relating to the 2004 general election and ensuing recount. Respondent shall make

available to the employees and their counsel all disputed records and provide the employees and their counsel copies of all disputed records forthwith. Respondent to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal.[9]

Writ granted in Case No. 89249 only. Complaint dismissed in Case No. 89250.

ANTHONY O. CALABRESE, JR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., CONCURS;
PATRICIA ANN BLACKMON, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION

PATRICIA ANN BLACKMON, J., DISSENTING:

{¶ 18} I respectfully dissent from the Majority Opinion; however, I agree with its resolution in Case No. 89250. When all the dust is cleared and the muddy landscape is washed away, the only issue in this case is whether the information sought to be obtained implicates the public record law exempting trial preparation records.[10]

{¶ 19} Before I address that issue, I must say that I do not believe that the relators-employees are Board of Elections' designees as the Majority Opinion so

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[9] Civ.R. 58(B).

[10] R.C. 149.43(A)(g).

defines them. There is no question that Kathleen Dreamer asked the Board of Elections to waive its attorney-client privilege, and the Board of Elections did so by giving her a letter to that effect. Later, the Board of Elections sent a letter to respondent-prosecutor asking for its file. The respondent-prosecutor failed to release the file and these actions ensued.

> The Majority Opinion concludes that the lawyers in this case were not authorized by law to file this action on behalf of the Board of Elections; consequently, the Board of Elections' pursuit of the documents is not before us. The Majority Opinion avoids this quandary by concluding that the relators-employees stand in the shoes of the Board of Elections in order to obtain the file or documents. Because of the nature of this case, I ponder whether the Board of Elections would be entitled to the file. In any event, the sole issue remains whether these files, regardless of the waiver, are exempted public records and not subject to a mandamus order. A mandamus is appropriate only when the following exists:
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> **"In order to be entitled to a writ of mandamus, relator must show (1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty of perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State, ex rel. National City Bank v. Bd. of Education* (1977), 52 Ohio St.2d 81, 369 N.E.2d 1200."**[11]

[11] *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St.2d 41, 42 374 N.E.2d.

{¶ 20} Of course, all three of these requirements must be met in order for this court to issue a mandamus. The relators-employees have not established as a matter of law that they have a clear right to the file.

{¶ 21} They argue that the Board of Elections has a clear right, and since they stand in its shoes, they have a clear right. I remain unconvinced. The relators-employees have not argued that when the Board of Elections, a public entity, waived its attorney-client privilege regarding the file, this single act made the records public. In fact, they are steadfast that this is not a public records request. In fact, they argue that this is a simple matter of a client seeking its file. If it is that simple, then the plain and adequate remedy is for the client to seek its file by attachment in the trial court or some other relief under the rules of ethics and professionalism.

{¶ 22} I am reminded that the relators-employees have by order of the trial judge in these criminal cases received all but 87 pages of the file sought; so they have by Crim.R. 16 exercised an adequate remedy at the trial court level. This fact alone establishes that they have an adequate remedy that they have pursued. Thus, no mandamus may be ordered.

{¶ 23} If the relators-employees are dissatisfied with the trial court's ruling, they may challenge the propriety of that ruling on appeal.[12] An appeal is an adequate remedy despite the potential for delay.[13] .

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[12]See, e.g., *State ex rel. Edwards v. Curran* (June 5, 1997), Cuyahoga App. No. 71226.

{¶ 24} Additionally, the relators-employees have not shown that respondent-prosecutor has a clear legal duty to provide the information.

> **"Information, not subject to discovery pursuant to Crim.R. 16(B), contained in the file of a prosecutor who is prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43 and is specifically exempt from release as a trial preparation record in accordance with R.C. 149.43(A)(4)."**[14]

{¶ 25} The respondent-prosecutor argues that this is at best a discovery matter, not subject to release under the public records law, because the file is not defined as a public record. I agree. Therefore, the relators-employees have not established the necessary elements for a mandamus order.

{¶ 26} As a side note, I want to reiterate that the Majority Opinion maintains that the Board of Elections delegated to the relators-employees the right to examine the file. I read the record differently. The Board of Elections waived its attorney-client privilege and, thereafter, sent a letter to the respondent-prosecutor requesting delivery of the file to Director Vu. Neither the Board of Elections, nor Director Vu, has asked this court to order the prosecutor to turn over the file. Thus, I see nothing in this record that establishes this designation.

{¶ 27} This brings me to my final thought. I recognize that this case has two compelling, competing interests – the right of the accused to exculpatory information

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[13] *State ex rel. Davet v. McMonagle* (Jan. 13, 2000), Cuyahoga App. No. 77054.

[14] *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83,

and the right of the prosecution to protect the integrity of its investigatory product. Nevertheless, both interests are best served by the building of a record for an appellate court to review, not the authoring of speculations of what might be contained in documents seen only to this date by a select few.

{¶ 28} I would deny the writ and demand that the integrity of the criminal proceedings be upheld.

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paragraph three of the syllabus.