

[Cite as *State ex rel. Smith v. Cuyahoga Cty. Prosecutor*, 2016-Ohio-3066.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103637

**STATE OF OHIO, EX REL.
DARRYL W. SMITH**

RELATOR

vs.

CUYAHOGA COUNTY PROSECUTOR, ET AL.

RESPONDENTS

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion Nos. 490867 and 490644
Order No. 496064

RELEASE DATE: May 18, 2016

FOR RELATOR

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MELODY J. STEWART, J.:

{¶1} Relator, Darryl Smith, petitions this court for a writ of mandamus to compel respondents Cuyahoga County prosecutor, Cleveland City prosecutor, and Cleveland police chief to arrest, charge, and indict several individuals who he alleges made false complaints, and committed crimes against him that resulted in his convictions in *Cleveland v. Smith*, Cleveland M.C. No. 2015 CRB 012064 (the “municipal court case”). Respondents have moved for summary judgment. Relator has not opposed the motions. For the reasons that follow, the motions for summary judgment are granted, and the petition is denied.

{¶2} In the municipal court case, Smith was charged with aggravating menacing and contempt. The court granted a motion for temporary restraining order preventing him from having any contact with the victim in the case.

{¶3} In July 2015, Smith pled no contest to aggravated menacing and consented to a finding of guilt. The court imposed a sentence but suspended it and placed Smith on five years of probation.

{¶4} Smith later attempted to withdraw his plea and moved to strike slanderous statements. The court denied both motions. The court held a hearing in August 2015 to address a capias that was issued when Smith escaped from the Cleveland House of Corrections. The court found Smith guilty of contempt of court and imposed a 30-day sentence. The court terminated his probation and ordered his suspended sentence into execution.

{¶5} Respondents argue that Smith's petition should be denied for failure to establish the requirements for mandamus relief.

{¶6} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

Mandamus is not a substitute for appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973); and *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerningham v. Gaughan*, 8th Dist. Cuyahoga No. 67787, 1994 Ohio App. LEXIS 6227 (Sept. 26, 1994). Mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977).

{¶7} The standard for compelling enforcement of a criminal ordinance is set forth in *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 661 N.E.2d 180 (1996). *See State ex rel. April Mgt., Ltd. v. Mayfield Hts.*, 8th Dist. Cuyahoga No. 100084, 2013-Ohio-5465, ¶ 11.

A prosecuting attorney will not be compelled to prosecute a complaint except when the failure to prosecute constitutes an abuse of discretion. Therefore, the decision whether to prosecute is discretionary, and not generally subject to judicial review. * * * An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable. (Citation omitted.)

April Mgt., Ltd. at ¶ 11, quoting *Master* at 27.

{¶8} Smith has not presented any evidence¹ to support the allegations of his complaint and his accusations about the individuals he seeks to have arrested and prosecuted. Accordingly, Smith has not established that he is clearly and convincingly entitled to mandamus relief. *Accord April Mgt., Ltd.* at ¶ 12. This court has previously held “that a prosecutor does not abuse his discretion by failing to prosecute charges made by a convict in a matter in which the convictions remain in full force and effect.” *Id.* at ¶ 14, citing *State ex rel. Murr v. Meyer*, 34 Ohio St.3d 46, 516 N.E.2d 234 (1987); *State ex rel. Drake v. Fuerst*, 8th Dist. Cuyahoga No. 76001, 1999 Ohio App. LEXIS 2323 (May 20, 1999); *State ex rel. Robinson v. Cuyahoga Cty. Prosecutor’s Office*, 8th Dist. Cuyahoga No. 82517, 2003-Ohio-2655. Smith does not dispute that his convictions remain in full force and effect. Smith is not entitled to mandamus relief.

¹Smith cited various other cases as “relevant evidence” and referred to Evid.R. 201, which governs judicial notice of adjudicative facts. Beyond providing general references to the lawsuits, Smith failed to provide any indication of what facts he claims are subject to judicial notice in support of this writ.

{¶9} Respondent McGinty additionally maintains that Smith’s petition should also be denied for failure to comply with R.C. 2969.25(A) and (C), and Civ.R. 10. Smith’s petition does not contain a certified statement setting forth the balance in the inmate account for the preceding six months as required by R.C. 2969.25(C), he did not provide a notarized affidavit describing each civil or appeal of a civil action that he has filed in the previous five years in any state or federal court as required by R.C. 2969.25(A), and he did not list the addresses of the parties in the caption of his petition as required by Civ.R. 10. There is authority that petitions may be dismissed for these defects and that provides additional grounds for denying the petition. *E.g.*, *State ex rel. Young v. Clipper*, 142 Ohio St.3d 318, 2015-Ohio-1351, 29 N.E.3d 977, ¶ 9 (“[t]he failure to comply with the mandatory requirements of R.C. 2969.25(C) is not curable by subsequent amendment.”); *Hazel v. Knab*, 130 Ohio St.3d 22, 2011-Ohio-4608, 955 N.E.2d 378, ¶ 1; *see also State ex rel. Hightower v. Russo*, 8th Dist. Cuyahoga No. 82321, 2003-Ohio-3679, ¶ 5; *State ex rel. Tate v. Callahan*, 8th Dist. Cuyahoga No. 85615, 2005-Ohio-1202, ¶ 7.

{¶10} Accordingly, this court grants respondents’ motions for summary judgment and denies the petition for a writ of mandamus. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶11} Writ denied.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
EILEEN T. GALLAGHER, J., CONCUR