ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. EDWIN DAVILA,	:	
Relator/Appellant,	:	Case No. 2011-1911
v.	:	On appeal from the Logan County Court of Appeals, Third Appellate District Case No. CA 8 11 01
THE CITY OF BELLEFONTAINE, *et al.*,	:	
Respondents/Appellees.	:	

MEMORANDUM OF RESPONDENTS/APPELLEES CITY OF BELLEFONTAINE, MAYOR ADAM BRANNON, AND CHIEF OF POLICE BRAD K. KUNZE IN OPPOSITION TO JURISDICTION

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I. EXPLANATION OF WHY THIS CASE DOES NOT CONCERN A PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION[1]

Defeated at every turn and lacking in precedent to support his position, Relator Edwin Davila now turns to this Court and claims his case evokes some public or great general interest. Even a cursory review of the underlying facts and the applicable law must inevitably lead this Court to the same conclusion reached by the courts below.

The lower courts granted and affirmed summary judgment because Davila made an overly broad, unenforceable public records request. Davila seeks only to have this Court remedy what he claims is an error by the trial court. Even though the trial court allowed him full discovery, Davila now suggests the trial court erred by not offering, *sua sponte*, some sort of evidentiary hearing. Neither law nor procedure requires such a step. As a result, Davila cannot and does not offer a "thorough explanation of why a substantial constitutional question is involved [or] why the case is of public or great general interest . . .," so leave to appeal should not be granted. See S.Ct. Prac. R. 3.1 (B)(2).

This Court already had the opportunity to accept jurisdiction on the same public records request and legal arguments associated with this case brought by the very same Relator, but it refused. See *State ex rel. Edwin Davila v. The City of East Liverpool*, Case No. 2011-0705 (jurisdiction declined and reconsideration denied). Instead of filing on the same issue this Court already denied, Davila instead attempts a new maneuver. He hopes to invoke this Court's jurisdiction to review whether an immediate alternative writ must have been granted to allow for

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[1] Although Davila proposed that his case raised a substantial constitutional question in the title, he never briefed that issue in his Memorandum in Support. As a result, Bellefontaine has not addressed this prong of the Court's jurisdictional analysis.

an evidentiary hearing before the parties proceeded with discovery. The Court should not even entertain his request because it lacks merit and he never raised it below.

Notwithstanding Davila's waiver on this issue, courts may grant an immediate peremptory writ, alternative writ, or allow the issues to proceed to discovery. Davila cites no authority holding that an alternative writ is mandatory in these circumstances. Even recently, this Court has granted alternative writs and immediately schedule briefing to decide the case on its merits; however, no evidentiary hearing was ever held. See, *e.g.*, *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 129 Ohio St.3d 1472, 2011-Ohio-4751, 953 N.E.2d 839; *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Comm'rs*, 115 Ohio St.3d 1418, 2007-Ohio-5231, 874 N.E.2d 536. If the parties can agree to the record, there is often no need to undergo costly, time-consuming hearings to resolve issues of law that may be briefed.

On the other hand, courts sometimes choose to grant an alternative writ that allows for an evidentiary or show cause hearing based upon the initial filings. See, *e.g.*, *State ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St.3d 37, 550 N.E.2d 464; *State ex rel. Miller v. Brady*, 123 Ohio St.3d 255, 2009-Ohio-4942, 915 N.E.2d 1183. In *Mazzaro*, the Court even granted the peremptory writ, then held an evidentiary hearing to assess attorneys' fees and costs. *Mazzaro*, 123 Ohio St.3d at syllabus, 550 N.E.2d 464. In *Miller*, the appellate court granted an alternative writ to show cause without ever holding a hearing. *Miller*, 123 Ohio St.3d, 2009-Ohio-4942, 915 N.E.2d 1183, at ¶¶ 8, 12. In these proceedings, a court had serious questions regarding the substance of the requests, but still did not schedule any live hearing.

Bellefontaine actually filed a Motion to Dismiss under Civ.R. 12(B)(6), which the Court denied on the basis that discovery was necessary to rule upon the issues involved. Importantly,

one of the issues raised by Bellefontaine in this initial pleading was whether Davila made a sufficient request and his claims were ripe in the first place. This Court does not need to accept jurisdiction to order courts to hold immediate hearings because such courts should retain the discretion to determine when these writs are granted and control how cases proceed before them.

Further, Davila raises no question of public or great general interest when he seeks that which he already received throughout months of discovery. His facts do not support his proposition of law. Rather than a situation where the trial court immediately decided the case on the briefs against him, Davila received the opportunity to conduct significant discovery, such as:

a) service of Request for Interrogatories, Requests for Production, and Requests for Admissions;

b) the opportunity to review all 911 tapes still in Bellefontaine's possession on a reel-to-reel tape player with his legal counsel; and,

c) depositions of Mayor Adam Brannon and former Chief of Police Brad Kunze.

Davila sought no discovery that he was denied, nor did he ever object on the basis that Bellefontaine's responses were insufficient.[2] Given Davila's active participation in discovery, the Court should not consider this case as representative of other cases that may come.

What Davila seeks this Court to order has already occurred. Through the discovery taken above, Bellefontaine sought judgment as a matter of law from the trial court on several bases, including that Davila's request was overly broad and therefore unenforceable. The parties fully briefed these issues for the Court by pointing the Court to specifically places in the record that supported their respective positions. As a result, this Court should not accept jurisdiction to

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2 Davila contested the timeliness of Bellefontaine's responses to Requests for Admissions; however, he never claimed that he was improperly denied any substance in the responses.

review whether the trial court erred by never giving Davila the opportunity to "present evidence and cross examine witnesses to develop the facts of the case." He already had such an opportunity.

This Court has no reason to create the mandatory mandamus procedure like Davila suggests. In fact, a finding that Davila must receive an immediate evidentiary hearing if he so requests would only encourage relators to file immediate lawsuits, rather than follow the meet-and-confer obligations imposed upon both parties under R.C. 149.43(B)(2). The General Assembly's language encourages those requesting public records and public offices responding to the requests to cooperate when deciding what the requester truly seeks. These procedures help the requester get the record; they help the public office save time in responding and avoid potential litigation. What Davila wants is the ability to make a request, then file a lawsuit seeking immediate clarification without engaging in the statutorily-mandated meet-and-confer process. Rather than amend his overly broad request, Davila simply reiterated his demands and furthered his cause by filing this lawsuit. The General Assembly showed no such intentions through the language in R.C. 149.43(B)(2).

Davila, Rhodes, and their fellow, self-proclaimed "public records police" continue to seek multi-million dollar forfeitures related to public records across the State. Rather than acknowledge that Davila's case against East Liverpool resolved all potential issues here, Davila has attempted to continue his litigation by asking this Court to accept jurisdiction. Without any new issues that remain unresolved, this Court should decline to accept jurisdiction.

II. STATEMENT OF THE CASE AND FACTS

A. Davila makes public records requests to Bellefontaine for reel-to-reel tapes

Davila requested reel-to-reel audio recordings of telephone calls and radio traffic from an unspecified time period, including both the primary and back-up tapes.[3] Affidavit of Police Chief Brad Kunze, ¶ 4; Deposition of Edwin Davila, pp. 9-11. Davila refused to provide any time limits: "I wanted them from the time in which they commenced using it to the time in which they stopped using it." Davila Depo. at 22-23. Davila had no idea how many tapes he actually sought, but he assumed that Bellefontaine should produce all 730 tapes that he thought the City made each year. *Id.* at 22-23, 25.

1. Bellefontaine seeks clarification regarding Davila's requests

Within eight days, and following the process provided in R.C. 149.43, Bellefontaine responded to Davila's requests to seek clarity based upon his very broad requests after reviewing its potentially responsive public records. Kunze Affd. at ¶ 6. To assist with its response, Bellefontaine asked Davila to provide clarification regarding the specific tapes that he sought because he had failed to provide any time limits. *Id.* at Ex. 2. Bellefontaine initially estimated that it still had more than 160 tapes responsive to Davila's requests, so Bellefontaine asked Davila to clarify his requests and explicitly added that it had not denied his requests. *Id.* Bellefontaine even forwarded a second letter when it heard nothing from Davila. *Id.*. at ¶¶ 7, 30.

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[3] Davila also requested all entries of incoming and outgoing calls for service that were placed on the Bellefontaine Police Department's log for the reel-to-reel tapes that he requested. Kunze Affd. at ¶ 5.

2. Davila refuses to clarify his broad requests for all tapes

In his response, Davila argued that the tapes he sought involved more than the 160 tapes that Bellefontaine had offered to provide. *Id.* at Ex. 4. Davila acknowledged that the law requires discussions between the parties to work through clarification issues, as well as that he "remain[s] committed to working with your office to resolve this issue." *Id.* Finally, ostensibly recognizing his obligation to do so under the Public Records Act, Davila claimed he would try to make his request clearer. *Id.*

3. Bellefontaine again seeks clarification and offers to help Davila review the records it believed he sought

Bellefontaine responded by explaining to Davila that it needed further clarification regarding his broad requests. Kunze Affd., Ex. 5. Bellefontaine explained that its Veritrac 9000 tape machine was out of use and broken due to circumstances outside Bellefontaine's control. *Id.* As a result, Bellefontaine inquired whether Davila had the means to review the tapes or whether he would obtain the means to review them. *Id.*; Kunze Affd. at ¶ 18. During this time, Chief Kunze also contacted a repair company to determine whether the out-of-date and obsolete Veritrac 9000 could be repaired. Kunze Affd. at ¶¶ 19-20. Kunze also continued to look for another working machine to assist Davila. *Id.* at ¶ 21.

Bellefontaine also explained how the time period of the requested tapes would determine how it would produce its responses. Kunze Affd., Ex. 5. Bellefontaine began using a new digital media system in 2007. Kunze Affd. at ¶ 17. Because of the different formats, Bellefontaine needed to know the time period of the requests. More recent time periods could be made produced more quickly than periods where the Veritrac 9000 was utilized.

4. Davila files his Complaint instead of working with Bellefontaine while it tried to meet his requests

Rather than continuing with the meet-and-confer process under R.C. 149.43(B)(2), Davila instead filed a mandamus action and forfeiture claim regarding his requests. See Complaint. Davila falsely alleged that Chief Kunze "informed DAVILA that the police department could not provide access to the '911 style' reel-to-reel audio recordings it possessed because the department's reel-to-reel tape no longer worked." *Id.* at ¶ 36. But Davila never attempted to review any records at the Police Department to determine whether he could clarify his request. See *id.* Chief Kunze never refused the requests. See *id.*

5. Bellefontaine seeks dismissal of Davila's claims

In its responsive pleading, Bellefontaine asked the trial court to dismiss Davila's claims under Civ.R. 12(B)(6) by alleging that Davila's claims were overly broad and not ripe. After an oral hearing where counsel presented arguments, the trial court issued a written decision denying Bellefontaine's Motion to Dismiss because it required evidence to rule upon the issues. Subsequently, the trial court conducted a pretrial conference where the parties set a case schedule for discovery and dispositive motions. The trial court then dismissed Davila's claims after ruling upon both parties' dispositive motions. Now Davila claims he was entitled to more from the trial court, even though he never petitioned for any evidentiary or show cause hearing.

B. Six other lawsuits brought with identical claims (many involving Davila)

Davila's lawsuit does not stand alone. Davila and his associates have brought nearly identical claims in other cases, including:

a) *State ex rel. Davila v. City of East Liverpool*, Columbiana County Court of Appeals Case No. 10-CO-16;

b) *State ex rel. Todd v. City of Canfield*, Mahoning County Common Pleas Case No. 2009CV2107;

c) *State ex rel. Davila v. City of Willard*, Huron County Common Pleas Case No. CVH 2009 0565;

d) *State ex rel. Davila v. City of Bucyrus*, Crawford County Common Pleas Case No. 09CV0303;

e) *State ex rel. Davila v. Martins Ferry*, Belmont County Common Pleas Case No. 09CV274; and,

f) *Timothy Rhodes v. City of New Philadelphia*, Supreme Court of Ohio, Case No. 10-0963.

All cases involve requests essentially the same facts and arguments. Notably, they all contain similar facts and arguments already resolved by the Court this year. See *Rhodes v. The City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782.

III. ARGUMENTS AGAINST DAVILA'S PROPOSED PROPOSITION OF LAW

Response to Appellant's Proposed Proposition of Law: Davila neither requested an evidentiary hearing, nor should the Court require mandatory evidentiary hearings at the onset of a mandamus proceeding.

For both procedural and substantive reasons, this Court should not accept Davila's proposed proposition of law for review. This Court has consistently observed that failure to raise arguments in courts below waives a right to raise it before the Ohio Supreme Court. Then, even if this Court declines to apply its previous holdings as to waiver, Ohio courts already appropriately handle such a situation so that the issue fails to be an issue of public or great general interest. For these reasons, the Court should deny Davila's request to accept jurisdiction.

A. Davila never raised issues concerning an alternative writ or evidentiary hearing below, so those arguments are waived.

Nothing requires the Court to even examine the merits of Davila's jurisdictional memorandum because he never raised this issue below. This Court has held that "it is well settled that '[a] party who fails to raise an argument in the court below waives his or her right to raise it here.'" *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, at ¶ 34 (citing *State ex rel. Zollner v. Indus. Comm'n* (1993), 66 Ohio St.3d 276, 278, 611 N.E.2d 830). In *Zollner*, this Court precluded the appellant from arguing issues beyond the argument on appeal that there was no evidence supporting the commission's decision. *Zollner*, 66 Ohio St.3d at 278, 611 N.E.2d 830. The Court held that *res judicata* applied to "not only defenses which were considered and determined *but also to those defenses which could properly have been considered and determined.*" *Id.* (emphasis in original).

B. Davila lacks any legal authority suggesting that any court must hold an immediate evidentiary hearing on a mandamus claim.

Davila provides absolutely no legal authority to support his proposition that the trial court must hold an evidentiary hearing in order to rule on a mandamus claim related to public records. In essence, Davila wants this Court to accept jurisdiction to review whether trial courts have a mandatory obligation to hold an evidentiary hearing on every mandamus claim before rendering judgment. Courts should be given the latitude to decide whether to hold an evidentiary hearing or allow the parties to engage in discovery, as happened in this case.

Davila errs in articulating the various relief that must be afforded to a relator who seeks mandamus. Under R.C. 2731.06, a court may allow peremptory mandamus "[w]hen the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for

not doing it." State law then provides that "[i]n all other cases an alternative writ must first be issued on the allowance of the court, or a judge thereof." R.C. 2731.06 (emphasis added). Nothing in Ohio law provides that Davila must immediately receive an alternative writ from the face of the complaint. To find otherwise removes the necessary discretion from the trial court to evaluate a potential mandamus issue. Without any authority to support such a proposition for which Davila seeks this Court's jurisdiction, there is no significant issue for review.

Davila conveniently disregards that he had plenty of opportunity to learn about Bellefontaine's evidence and defenses through discovery. Through his discovery efforts, the Court afforded Davila the ability to obtain significantly more information to prosecute his claims than he would have received through an evidentiary hearing. Thus, this case does not concern a public or great general interest, nor does it even provide the factual background suitable for this Court's review.

Rather than acknowledge the significant discovery that took place, Davila incorrectly suggests that the Court must issue some kind of writ from the outset in a mandamus case. This is plainly incorrect. Under R.C. 2731.04, a Court has three choices on how to proceed:

1) allow the writ without notice;

2) grant an order to do the requested action or show cause why they did not do so by a given day; and,

3) require notice of the petition to be given to the defendants before issuing any writ and listen to evidence by the defendants at a scheduling hearing on why the writ should not be granted.

State ex rel. Am. Legion Post 25 v. OCRC (2006), 171 Ohio App.3d 476, 2006-Ohio-5509, 871 N.E.2d 1198, at ¶ 30; *State ex rel. Gill v. Winters* (May 5, 1987), 4th Dist. No. 6672, 1987 Ohio App. LEXIS 6672, at *6. As #3 above provides, both parties filed for summary judgment. Both

parties agreed to proceed with briefing on the merits before trial, if necessary. Davila never objected to this process, nor did he ever request an evidentiary or show cause hearing before seeking jurisdiction at this Court. To the extent that Davila now challenges the procedure that he agreed to, this case is not one that the Court should accept for further review.

Even under his argument that an alternative writ allows him to be heard before judgment is rendered, Davila lacks any reason why he was not heard. He prevailed on a motion to dismiss, engaged in significant discovery with Bellefontaine, and then fully briefed both his own dispositive motion and opposition to Bellefontaine's dispositive motion. One struggles to imagine what more he could have received from an evidentiary hearing at any stage in the litigation that he did not already receive. Thus, no prejudice can be shown.

Similarly, Davila also lacks any legal or legislative authority to explain his contention that the General Assembly intended the words "allegedly aggrieved" in R.C. 149.43(C)(1) to provide for an evidentiary hearing. Without any reference to a hearing, Davila wants this Court create a statutory right to an immediate evidentiary hearing after the filing of a mandamus action under R.C. 149.43(C)(1). Although "Relator believes that the legislative intent was to provide for an evidentiary show cause hearing," he provides absolutely no support for such a supposition. Thus, the Court should deny his efforts for this Court to accept jurisdiction on such unsupported, conclusory statements.

The answer is simple for relators in Davila's position: keep working with the public entity to determine what is available before attempting to enforce an overly broad request. This is much less extreme than Davila's suggestion that legal counsel is now required to be involved in making a public records request. As Bellefontaine has made clear when responding to

Davila's request, it had 160+ tapes available that Davila never sought to review until after he filed his lawsuit. Bellefontaine made clear that no other records were available, so Davila should have realized that it was impossible for his requested to be fulfilled as drafted. But he still failed to limit his request after being advised on at least two occasions that it was overly broad.

The Third District's decision provides no disincentive to public offices to assist records requesters with properly clarifying their request. Under R.C. 149.43(B)(2), public offices already have the duty to properly advise a person who makes an overly broad request how the public office maintains its records. The requester then has an opportunity to revise the request. Davila incorrectly suggests that "[t]hose seeking to block access can now claim that a flawed request has not obliged them to respond." Memorandum in Support of Jurisdiction, p. 2. No such risk exists, especially when public offices such as Bellefontaine adequately advised Davila on at least two occasions how he could properly limit his request to records available under its records retention schedule.

To the extent that Davila has argued against the logic of the Third District's decision, this fails to meet his burden of establishing why the Court should accept his case. For example, Davila argued that Bellefontaine never offered evidence to support that his request was unduly burdensome or interfered with the office's official duties. See Memorandum in Support of Jurisdiction, p. 4. On the contrary, Bellefontaine calculated the hundreds of years that it would take to review the records that Davila requested, so the burden and interference was quite apparent. Regardless of this outcome, reasons like this alone fail to justify why this Court should accept jurisdiction when he seeks this Court's jurisdiction merely to correct a perceived error.

IV. CONCLUSION

This Court should deny Appellant *State ex rel.* Edwin Davila's request for a discretionary appeal because Davila cannot prove how this case qualifies as a case with public or great general interest and involves a constitutional question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on the following by regular U.S. Mail on December 9, 2011:

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