

2022-1623

IN THE SUPREME COURT
OF OHIO

ORIGINAL ACTION IN MANDAMUS

STATE ex rel. CHARLES TINGLER,
Relator,

v.

LUCAS COUNTY SHERIFF'S OFFICE
Respondent.

RESPONDENT'S MOTION TO DISMISS

Charles Tingler
c/o 208 W. Main St.
God's Caring Heart Homeless Shelter
Bellevue, Ohio 44881
E-mail: charleslawrencetinglerohio@
gmail.com
Pro se Relator

Julia R. Bates
Lucas County Prosecuting Attorney
John A. Borell (0016461)
Kevin A. Pituch (0040167)
Assistant Prosecuting Attorneys
700 Adams Street, Suite 250
Toledo, OH 43624
Telephone: (419) 213-2001
Telecopy: (419) 213-2011
E-mail: jaborell@co.lucas.oh.us
E-mail: kpituch@co.lucas.oh.us
Counsel for Respondent
Lucas County Sheriff's Office

Respondent Lucas County Sheriff's Office hereby moves the Court, pursuant to *Sup. Ct. Prac. R.* 12.01(A)(2)(b) and 12.04(A)(1) and *Rule 12(B)(6), Ohio Rules of Civil Procedure*, to dismiss Relator Charles Tingler's *Complaint for Writ of Mandamus*. The grounds for the LCSO's motion are that none of the claims set forth in Tingler's *Mandamus Complaint* are cognizable in mandamus. As a result, the LCSO is entitled to dismissal since Tingler can prove no set of facts that would entitle him to mandamus relief and the LCSO asks the Court to dismiss his *Mandamus Complaint* with prejudice. The LCSO's motion is supported by the factual allegations of Tingler's *Mandamus Complaint* along with the exhibits attached thereto, certain matters of public record, and its memorandum of law below.

Respectfully submitted,

JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY

By: /s/ Kevin A. Pituch
John A. Borell (0016461)
Kevin A. Pituch (0040167)
Assistant Prosecuting Attorneys
Counsel for Respondent Lucas County Sheriff's Office

MEMORANDUM OF LAW

I. STATEMENT OF THE CASE AND FACTS

As mentioned in its previous motion to dismiss (Case No. 2022-1533), Relator Charles Tingler should acquire another hobby--one other than filing frivolous mandamus lawsuits. For example, just for December of 2022, by examining the Court's electronic "Case Docket", the Court will learn that he filed some 60 other mandamus claims. With this one, Tingler has again sued Respondents Lucas County Sheriff's Office (LCSO) and the City of Toledo Police Department regarding an alleged failure to investigate alleged criminal offenses supposedly committed by the Lucas County Prosecutor, Julia R. Bates and Assistant Lucas County Prosecutor, Jeffrey D. Lingo. See, *Mandamus Complaint*, Ohio Supreme Court Case No. 2022-

1623 (Dec. 27, 2022).

With his latest, Tingler alleges:

“On September 16th and December 26th 2022, Relator Contacted the Police and Sheriff to file a police report against Prosecutor Julia Bates and Jeffrey Ling [sic—should be Jeffrey Lingo] of the Lucas County Prosecutor’s Office for the crimes of Theft in Office and Complicity/ Conspiracy to Obstructing Justice. The allegations involve Prosecutor Bates embezzling money from the Furtherance of Justice Fund, and [Assistant] Prosecutor Lingo obstructing a legitimate criminal investigation from being conducted into the theft of a firearm committed by Judge Bruce Winters of the Ottawa County Common Pleas Court. Respondent has refused to file a police report or conduct a criminal investigation.”

Mandamus Complaint, supra. He now seeks a writ of mandamus from this Court ordering the LCSO and the City of Toledo Police Department to: “to file a police report, conduct a criminal investigation, request the appointment of a special prosecutor from the Lucas County Common Pleas Court” or “in the alternative, if the Police and Sheriff feel that they have a conflict, request the assistance of the Bureau Criminal Investigation of the Ohio Attorney General’s Office to conduct the investigation.” *Mandamus Complaint, supra.* Tingler seeks all this even though he has failed to comply with the requirements for such a mandamus action under Ohio law, failed to allege facts supporting his legal conclusion that criminal offenses have occurred, and even though he has an adequate remedy at law, under *Ohio Revised Code* §2935.09-10, for his claim, as a private citizen, to seek a criminal investigation and prosecution. As will be established in somewhat greater detail below, Tingler’s *Mandamus Complaint* does not state viable claims against the LCSO under Ohio law and the Court should dismiss it with prejudice.

II. LAW AND ARGUMENT

A. Introduction

1. Standard for granting a motion to dismiss pursuant to Civil Rule 12(B)(6).

A motion to dismiss, pursuant to *Rule 12(B)(6)* of the *Ohio Rules of Civil Procedure*, is a

procedural device for testing the sufficiency of a complaint or a petition filed in an original action with an appellate court. *State ex rel. Hanson v. Guernsey County Board of Commissioners*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). A motion to dismiss should be granted when, after examining the complaint, it appears beyond doubt that the non-moving party can prove no set of facts which would entitle him to the requested relief. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991). The Court must accept as true all of the factual allegations contained in the petition. *Mitchell v. Lawson Milk Company*, 49 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). However, conclusions of law are not considered admitted and are insufficient to withstand a motion to dismiss. *Mitchell*, 40 Ohio St.3d at 193, 532 N.E.2d at 756; *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639 (1989).

2. Writ of Mandamus

The purpose of a writ of mandamus is to compel a public officer to perform the duties imposed on that officer by law. *State ex rel. Brown v. Bd. of Cty. Comm'rs*, 21 Ohio St.2d 62, 65, 255 N.E.2d 244 (1970); *State ex rel. Scott v. Materson*, 173 Ohio St. 402, 404, 183 N.E.2d 376, 379 (1962). Thus, in order to grant a writ of mandamus, the Court must find, by clear and convincing evidence: (1) a clear legal right to the requested relief; (2) a clear legal duty on the part of respondents to provide it; and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Evans v. Tieman*, 157 Ohio St.3d 99, 101, 131 N.E.3d 930 (2019); *State ex rel. Walker v. State*, 142 Ohio St.3d 365, 368, 30 N.E.3d 947 (2015). Mandamus is an extraordinary remedy "to be issued with great caution and discretion and only when the way is clear." *State ex rel. Manley v. Walsh*, 142 Ohio St.3d 384, 387, 31 N.E.3d 608 (2014); *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 166, 364 N.E.2d 1 (1977).

B. Tingler's mandamus claims are not cognizable under Ohio law.

First, Tingler has an adequate remedy at law—via *Ohio Revised Code* §2935.09-10-- regarding his desire, as a private citizen, to have criminal charges brought against the Lucas County Prosecutor and her assistants. Sections 2935.09 and 2935.10 permit a private citizen to cause the arrest or prosecution of a person charged with committing an offense if the citizen complies with the requirements of these sections. *State v. Mbodji*, 129 Ohio St.3d 325, 326, 951 N.E.2d 1025 (2011); see also, *State ex rel. Whittaker v. Lucas Cty. Prosecutor's Office*, 164 Ohio St.3d 151, 152, 172 N.E.3d 143 (Lucas Co. 2021)(§2935.09 allows a private citizen to file an affidavit alleging a criminal offense); *State ex rel. Kirin v. Krichbaum*, 7th Dist. Mahoning No. 16 MA 0011, 2016-Ohio-887 ¶7 (“concerning Relator's desire to pursue criminal charges, he possesses an adequate remedy at law through §2935.09(D) which provides a formal mechanism by which a private citizen can seek to have criminal charges filed). Because he has an adequate remedy at law for his desire to see a criminal investigation commenced against the Lucas County Prosecutor, Tingler's *Mandamus Complaint* should be dismissed. See, *Evans, supra*; *Manley, supra*; *Walker, supra*.

Second, Tingler has failed to comply with *S. Ct. Prac. R.* 12.02(B)(1) and (2) as well as *Ohio Revised Code* §2731.04 when he failed to file his affidavit along with his *Mandamus Complaint*. While he insists, vigorously, that his affidavit is unnecessary, Ohio law, as proclaimed by this Court, is to the contrary. See, *Ohio Revised Code* §2731.04 (an application for the writ of mandamus “must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit”); *State ex rel. Maras v. LaRose*, --Ohio St.3d--, 2022-Ohio-3295, --N.E.3d-- ¶16 (a complaint in an original action before this Court must be supported by an affidavit specifying the facts on which the claim for relief is based); *State ex rel.*

Hackworth v. Hughes, 97 Ohio St.3d 110, 113, 776 N.E.2d 1050 (2002)(“we have routinely dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant’s personal knowledge”); *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 442-443, 857 N.E.2d 88 (2006)(*Hackworth, supra* followed). In this case, Tingler has failed to file the requisite affidavit with his *Mandamus Complaint* and the Court may dismiss it on that ground.

Third, Tingler has not even complied with the requirements of §2935.09-10 in that he has failed to provide the affidavit required for anyone seeking a criminal prosecution under §2935.09. *Mbodji*, 129 Ohio St.3d at 329, 951 N.E.2d 1025(“We emphasize, however, that R.C. 2935.09 is intended to govern the method by which a private citizen may cause the arrest or prosecution of a person”); *City of Washington Court House/State v. Myers*, 12th Dist. Fayette No. CA2018-12-027, 2019-Ohio-4914 ¶17-18(private citizen’s filing of complaint in municipal court against appellant failed to comply with the requirements of §2935.09(D) where he had not filed an affidavit with a reviewing official as required by this section); *Davis v. Davis*, 11th Dist. Geauga No. 2017-G-0129, 2018-Ohio-1889 ¶51(“Charles did not file an affidavit, but instead filed a motion to refer Sandra for prosecution and because Charles did not satisfy the statutory prerequisite in §2935.09(D), the trial court had no obligation to refer the matter for prosecution or to assess whether the allegations had merit”). A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official under 2935.09(A): “reviewing official” means a judge of a court of record, the prosecuting attorney or attorney charged by law with the prosecution of offenses in a court or before a magistrate, or a magistrate.

Fourth, in 2022, Tingler filed a similar mandamus action against Ottawa County

Prosecutor Gwen Howe-Gebers in the Sixth District Court of Appeals. The Sixth District summarily dismissed that action stating:

“Here, relator cannot demonstrate that respondent abused her discretion five years ago when she failed to seek an indictment against Sheriff Levorchick. In his complaint, relator nakedly alleges that Sheriff Levorchick committed the crime of theft in office. However, relator has not attempted to set forth any facts upon which his criminal allegation is based.

Thus, the entirety of relator's complaint can be summarized as: ‘I alleged a crime was committed, therefore you must prosecute.’

Without any facts or evidence—or even allegations of facts or evidence—upon which to evaluate whether a crime may or may not have occurred, we simply cannot say that respondent abused her discretion in declining to present a case against Sheriff Levorchick to the Ottawa County Grand Jury. Therefore, we find that relator cannot prevail on the facts alleged in the complaint, and relator's complaint is frivolous.”

State ex rel. Tingler v. Howe-Gebers, 6th Dist. Ottawa No. OT-22-028, 2022-Ohio-2237 ¶ 4-5.

In the same manner, Tingler's *Mandamus Complaint* does not contain factual allegations regarding the alleged criminal offenses it seeks to address. As a result, the Court may follow the example of the Sixth District Court of Appeals and dismiss Tingler's *Mandamus Complaint*.¹

III. CONCLUSION

Based upon the foregoing, the LCSO's motion to dismiss is well-taken and should be granted. Therefore, the LCSO moves the Court to dismiss Tingler's *Mandamus Complaint* with prejudice on the ground that it does not state a claim or cause of action in mandamus upon which relief can be granted.

¹ Given that the Court will likely be addressing a significant number of *Civil Rule 12(B)(6)* motions to dismiss regarding the 60 or so mandamus actions brought by Tingler, perhaps the Court should consider adopting, as a Rule of Practice, a rule similar to Sixth District Court of Appeals *Local Rule 6(B)*.

Respectfully submitted,

JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY

By: /s/ Kevin A. Pituch
John A. Borell
Kevin A. Pituch
Assistant Prosecuting Attorneys
Counsel for Respondent Lucas County Sheriff's Office

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Dismiss was sent by electronic mail on the 6th day of January, 2023 to:

Charles Tingler
C/o 208 W. Main St.
God's Caring Heart Homeless Shelter
Bellevue, Ohio 44881
charleslawrencetinglerohio@
gmail.com
Pro se Relator

Jeffrey B. Charles
City of Toledo Law Dept.
One Government Center Suite 2250
Toledo, Ohio 43604
jeffrey.charles@toledo.oh.gov
Counsel for Respondent City of Toledo
Police Department

By: /s/ Kevin A. Pituch
John A. Borell
Kevin A. Pituch
Assistant Prosecuting Attorneys
Counsel for Respondent Lucas County Sheriff's Office