

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE EX REL., DONALD RICHARD, :
Relator, :
v. : No. 112433
CUYAHOGA COUNTY JUDGE JOHN D. SUTULA, ET AL., :
Respondents. :

JOURNAL ENTRY AND OPINION

JUDGMENT: WRIT DENIED
DATED: June 23, 2023

Writ of Mandamus and Procedendo
Motion Nos. 563049 and 564327
Order No. 564955

Appearances:

Donald Richard, *pro se*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and James E. Moss, Assistant Prosecuting Attorney, *for respondents*.

MARY J. BOYLE, J.:

{¶ 1} Relator, Donald Richard, seeks writs of mandamus and possibly procedendo directing respondents, Judge John D. Sutula, Judge Brendan Sheehan, and Judge Mark R. Majer, to take various actions. Respondents' motion for

summary judgment is granted, Richard's motion for summary judgment is denied, and Richard's request for writs of mandamus and procedendo are denied. Respondents' request to declare Richard a vexatious litigator pursuant to Loc.App.R. 23 is also denied.

I. Background

{¶ 2} On February 23, 2023, Richard filed a complaint that was captioned “writ of mandamus.” However, on the same page below the caption, Richard stated that he was seeking writs of mandamus and procedendo. Relator asks this court to (1) compel Sutula to instruct the clerk of courts to serve him with a decision issued approximately a decade ago, (2) to compel Sheehan to act on an “affidavit of accusation” relator alleges he sent to Sheehan by certified mail, and (3) to compel Majer to reinstate a civil case that he claims former Judge Dick Ambrose improperly dismissed. Relator's complaint also includes numerous allegations of misconduct, both ethical and criminal, against numerous people, including present and former Ohio lawyers, judges, justices, and others. These largely incoherent baseless allegations are outside the jurisdiction of this court to address in a mandamus action. *See* Ohio Constitution, Article IV, Section 3(B). Therefore, the allegations and requested relief will be limited to those that this court may address in an original action in mandamus.

{¶ 3} Richard's claims flow from a 1987 murder conviction for which he claims he is wrongly imprisoned. *See State v. Richard*, 8th Dist. Cuyahoga No. 54228, 1998 Ohio App. LEXIS 4242 (Oct. 20, 1988) (“*Richard I*”). Over the

years, Richard has attempted to attack his conviction numerous times.¹ *See State v. Richard*, 8th Dist. Cuyahoga No. 101135, 2014-Ohio-4838, ¶ 2 (“*Richard II*”) (“Over the course of 25 years, Richard has had nine appeals or original actions rejected by this court. In his filings, Richard claims to be the object of a vast conspiracy of judges, prosecuting attorneys, and other officials who have exerted their influence against him, both at trial and in postconviction proceedings.”). One of those attempts was an application for DNA testing Richard alleges to have filed on October 28, 2013. Richard further alleges that Sutula denied the application on February 27, 2014, but failed to direct service of the judgment on Richard as required by Civ.R. 58(B).² Richard argues that as a result, there is no final, appealable order in the case until Sutula directs the clerk to serve Richard with a copy of the judgment. Richard further alleges that the appeal he perfected from this judgment, *Richard II*, is a nullity because this court lacked jurisdiction to hear the appeal. He asks this court to direct Sutula to serve this judgment so that he may properly appeal the denial of his application.

{¶ 4} Next, Richard alleges that at some point in 2021, he sent an “affidavit of accusation” to Sheehan by certified mail. In his complaint, Richard asserts that

¹ Richard has often argued that his conviction was the result of criminal activity of numerous attorneys, judges, politicians, and others.

² The application for DNA was previously denied, but that decision was reversed on appeal and remanded because the judge did not give reasons to support the decision. *See State v. Richard*, 8th Dist. Cuyahoga No. 99449, 2013-Ohio-3918. On remand, Sutula denied the application for DNA testing and provided reasons in support. It is this denial that Richard references in this complaint.

the document he sent alleged that 18 or 19 people should be prosecuted for obstruction of justice, jury tampering, and other crimes.³ Richard alleges that Sheehan has taken no action on his document.

{¶ 5} Richard also asserts that he filed a civil action, *Richard v. Stojanovic*, Cuyahoga C.P. CV-19-920873, which was allegedly improperly dismissed by former Judge Dick Ambrose. Judge Ambrose has since retired. On April 22, 2022, Richard alleges he filed a motion for relief from judgment that sought to reinstate the case. At the time of the filing, Majer had taken over Judge Ambrose's cases. Richard alleges that Majer has a duty to reinstate the dismissed case and requests that this court direct Majer to do so.

{¶ 6} On March 23, 2023, respondents filed a joint motion for summary judgment. The motion addressed many of Richard's wider concerns that he raised in the complaint and those specifically mentioned above. Sutula argued that Richard already appealed the denial of his application for DNA testing and this court affirmed his decision in *Richard II*. Because Richard filed a timely appeal, any argument made about Sutula's failure to direct the clerk to serve the judgment is moot.

{¶ 7} In the motion for summary judgment, Sheehan characterizes Richard's mailing as an affidavit of disqualification, which is solely within the jurisdiction of the Chief Justice of the Supreme Court of Ohio to decide and outside

³ The affidavit was not included in Richard's complaint, and Richard's description of the affidavit is not sufficiently clear to state its contents.

respondent's jurisdiction. Sheehan also argued that Richard previously litigated the claims raised in his affidavit of accusation, citing to *State v. Richard*, 8th Dist. Cuyahoga No. 85407, 2005-Ohio-3723.

{¶ 8} On summary judgment, Majer argued that Richard's civil action against his criminal defense attorney and others in *Richard v. Stojanovic*, Cuyahoga C.P. No. CV-19-920873 was dismissed by now-retired Judge Dick Ambrose on April 30, 2020. For some time, Majer was presiding over cases that were previously overseen by Judge Ambrose, but at the time the instant mandamus complaint was filed Majer was not presiding over this case and had no ability, and thus no legal duty, to reinstate the case. Majer asserted that he is currently a judge on the Cleveland Municipal Court.

{¶ 9} Respondents also argued that Richard failed to file a necessary affidavit pursuant to R.C. 2969.25(C). However, Richard paid the filing fee in this action, meaning he does not need to comply with this statutory provision that is only mandatory when an inmate in a state prison institution files a civil action against a governmental agency or employee and seeks to waive the filing fee.

{¶ 10} Finally, in their motion for summary judgment, respondents requested that this court find Richard to be a vexatious litigator and restrict his future filings.

{¶ 11} On May 12, 2023, Richard filed a combined brief in opposition to respondents' motion for summary judgment and his own motion for summary judgment. There, Richard again alleged several allegations of fraud and impropriety

by various judges, justices, state and local officials, attorneys, and others. He also reiterated his argument that Sutula was required to instruct the clerk to serve the 2014 judgment. He also pointed out Sheehan's incorrect analysis of the mailing sent to him. Richard claimed that this was not an affidavit of disqualification, but of accusation. Finally, Richard asserted that Majer was a judge on the common pleas court and submitted docket information in a news publication from January 2023 in support. Respondents did not file a brief in opposition to Richard's motion for summary judgment.

II. Law and Analysis

{¶ 12} A writ of mandamus may issue when relators show by clear and convincing evidence that (1) they possess a clear legal right to the requested relief, (2) respondents have a clear legal duty to provide that relief, and (3) relators possess no other adequate remedy at law. *State ex rel. McQueen v. Court of Common Pleas*, 135 Ohio St.3d 291, 2013-Ohio-65, 986 N.E.2d 925, ¶ 7, citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6. A writ of procedendo has similar requirements but the specific legal duty is limited to a court to proceed to judgment. *See State ex rel. Culgan v. Collier*, 135 Ohio St.3d 436, 2013-Ohio-1762, 988 N.E.2d 564, ¶ 7.

{¶ 13} The complaint caption and argument include claims for writs of mandamus, but two other places in the complaint, including the front page, also reference procedendo. In one of those places, relator acknowledges that “[a]lthough procedendo is [a] more appropriate remedy * * * mandamus will lie when a trial

court refuses to render, or unduly delays in rendering a judgment * * *.” Complaint at page 17. The distinction between writs of mandamus or procedendo are immaterial to the outcome because they have similar requirements as it relates to this case. *See Collier* at ¶ 7. Therefore, we will address the claims for mandamus.

{¶ 14} The matter is before the court on cross-motions for summary judgment. “Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Humphrey v. Bracy*, 166 Ohio St.3d 334, 2021-Ohio-3836, 185 N.E.3d 1045, ¶ 7, citing *State ex rel. Holman v. Collins*, 159 Ohio St.3d 537, 2020-Ohio-874, 152 N.E.3d 238, ¶ 4; Civ.R. 56(C).

A. Duty to Instruct a Clerk to Issue Notice of a Civil Judgment

{¶ 15} Richard argues that Sutula has a duty to direct the clerk to serve him with a copy of the 2014 judgment denying his 2013 motion for DNA testing. Within this claim, Richard also makes several allegations of fraud and impropriety by judges, court reporters, attorneys, and others. These allegations do not sound in mandamus as it relates to Sutula, the named respondent related to his first claim for relief in his complaint, with the exception of the claim that Sutula has a duty to direct the clerk to serve Richard with a copy of a judgment. Therefore, only that claim will be addressed in Richard’s first claim for relief listed in his complaint.

{¶ 16} Civ.R. 58(B) provides in part, “When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the

journal.” The rule goes on to state that “[t]he failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A).”

{¶ 17} This court has held that postconviction remedies are civil in nature and Civ.R. 58(B) applies to decision granting or denying relief. *State ex rel. Ford v. McClelland*, 8th Dist. Cuyahoga No. 100014, 2013-Ohio-4379. This includes applications for DNA testing under R.C. 2953.70 et seq. *State v. Waver*, 8th Dist. Cuyahoga No. 107502, 2019-Ohio-1444. Therefore, Sutula was required to direct the clerk of courts to serve notice of the judgment on Richard and the clerk was required to note service of the decision on the appearance docket as required by Civ.R. 58(B).

{¶ 18} This court recently addressed a similar situation and granted a limited writ of mandamus to direct a trial judge to comply with Civ.R. 58(B). *State ex rel. Perry v. Santoli*, 8th Dist. Cuyahoga No. 112118, 2023-Ohio-720. In that case, Perry filed a postconviction-relief petition, which was denied in 2017. *Id.* at ¶ 8. However, the judgment did not contain the language required by Civ.R. 58(B). *Id.* In 2021, Perry filed a motion for proper notice and asked the trial judge to issue findings of fact and conclusions of law because without them Perry was not able to appeal the judgment. *Id.* at ¶ 9. The trial judge granted the motion, issued findings of fact and conclusions of law, and directed the clerk to serve Perry with the 2021 judgment. *Id.* at ¶ 10. Perry then appealed from this 2021 judgment. This court dismissed the appeal because the trial court was without jurisdiction to issue

findings of fact and conclusions of law because the 2017 decision was a final order. *Id.* at ¶ 11-12. Perry then filed a complaint for writ of mandamus seeking to compel the trial judge to issue findings of fact and conclusions of law and to comply with Civ.R. 58(B). *Id.* at ¶ 1. This court denied mandamus relief for the issuance of findings of fact and conclusions of law because the trial judge had no authority, and thus no duty, to issue findings of fact and conclusions of law. *Id.* at ¶ 20. However, this court granted a limited writ of mandamus directing the trial judge to comply with Civ.R. 58(B) and direct the clerk to serve the 2017 judgment on Perry. *Id.* at ¶ 22. We determined that the time to appeal the 2017 judgment had not begun to run because of the lack of compliance with Civ.R. 58(B). *Id.* at ¶ 19, 22. Because of this, Perry could take a timely appeal of the 2017 judgment.

{¶ 19} The claim for mandamus against Sutula in the present case is very similar to that presented in *Perry*. However, Richard's situation is different in at least one important respect. Perry had not taken a timely appeal from the 2017 order denying his postconviction-relief petition. Here, Richard took a timely appeal from the decision denying his postconviction motion for DNA testing and this appeal was heard on the merits. *See Richard II*. Perry had not taken an appeal, so meaningful relief was available to him in the mandamus action. This court directed the respondent to direct the clerk to serve the judgment on Perry to start the 30-day period within which an appeal must be filed. *Perry* at ¶ 22. Richard has already perfected that appeal. Therefore, no meaningful relief can be afforded Richard for this claim.

{¶ 20} Richard argues the appeal he took from the judgment denying his application for DNA testing was a nullity because this court lacked a final, appealable order necessary to hear his appeal. Richard is mistaken. The failure of a judge to direct service of a civil judgment does not affect the finality of the judgment, it merely tolls the time within which a party must appeal under App.R. 4. This is explicitly stated in Civ.R. 58(B). *See also Miller v. Nelson-Miller*, 132 Ohio St.3d 381, 2012-Ohio-2845, 972 N.E.2d 568 (holding that the failure of a judge to comply with the ministerial duties of Civ.R. 58(A) resulted in a judgment that was voidable, not void); *State ex rel. Caldwell v. Gallagher*, 8th Dist. Cuyahoga No. 98317, 2012-Ohio-4608 (denying writ of mandamus against a clerk of courts for failure to send notice of judgment because the remedy was to file a notice of appeal).

{¶ 21} Here, Richard appealed the judgment and the appeal was heard on the merits. Richard was entitled to file a timely appeal at any time until 30 days after service of the judgment. That relief has already been afforded to Richard in that his appeal of the judgment was heard and decided on the merits in *Richard II*. Richard has received the relief to which he is entitled regarding this claim. Therefore, this claim for relief in mandamus is moot. Respondents' motion for summary judgment is granted for the first claim for relief in Richard's complaint.

B. Duty to Act on an Affidavit of Accusation

{¶ 22} In this second claim for relief, Richard argues that Sheehan has a duty to cause the arrest or investigation of various individuals.

{¶ 23} Pursuant to R.C. 2935.09, a private citizen may file a complaint or affidavit of accusation with a common pleas judge. R.C. 2935.09(D). Once filed, R.C. 2935.10 governs the procedure in reviewing the affidavit or complaint. For felony offenses such as those alleged by Richard, this statute provides,

Upon the filing of an affidavit or complaint as provided by section 2935.09 of the Revised Code, if it charges the commission of a felony, such judge, clerk, or magistrate, unless the judge, clerk, or magistrate has reason to believe that it was not filed in good faith, or the claim is not meritorious, shall forthwith issue a warrant for the arrest of the person charged in the affidavit, and directed to a peace officer; otherwise the judge, clerk, or magistrate shall forthwith refer the matter to the prosecuting attorney or other attorney charged by law with prosecution for investigation prior to the issuance of warrant.

R.C. 2935.10(A). Once a proper affidavit is filed,

the judge, clerk, or magistrate may: (1) issue a warrant for the arrest of the person charged in the affidavit, if the judge, clerk, or magistrate has no reason to believe that it was not filed in good faith or the claim is not meritorious, or (2) refer the matter to the prosecuting attorney for investigation prior to the issuance of a warrant, if the judge, clerk, or magistrate has reason to believe that it was not filed in good faith or the claim is not meritorious.

Hillman v. Larrison, 10th Dist. Franklin No. 15AP-730, 2016-Ohio-666, ¶ 10.

{¶ 24} If “R.C. 2935.10 applies [it] affords the reviewing official only two options: 1) issue a warrant or 2) refer the matter to the prosecutor for investigation if there is a belief that the affidavit lacks a meritorious claim, i.e., probable cause, or was not made in good faith.” *State ex rel. Brown v. Jeffries*, 4th Dist. Ross No. 11CA3275, 2012-Ohio-1522 ¶ 9, citing *State ex rel. Boylen v. Harmon*, 107 Ohio St.3d 370, 2006-Ohio-7, 839 N.E.2d 934, ¶ 7. *See also State ex rel. Capron v.*

Dattilio, 7th Dist. Columbiana No. 15 CO 008, 2015-Ohio-1900, ¶ 5, citing *In re Slayman*, 5th Dist. Licking No. 08CA70, 2008-Ohio-6713, ¶ 21.

{¶ 25} Richard does not describe the document he alleges to have sent by certified mail as a complaint and claims to have mailed the document to Sheehan directly, not filed with the clerk of courts. Richard refers to the document as an affidavit. Therefore, we will presume that Richard mailed an affidavit of accusation under R.C. 2935.09 rather than a complaint.

{¶ 26} In respondents' motion for summary judgment, Sheehan refers to the document Richard mailed as an affidavit of disqualification. However, Richard's complaint, motion for summary judgment, and opposition to respondents' motion for summary judgment do not indicate that he filed an affidavit of disqualification. In his complaint, he asserted that he sought the prosecution or investigation of various individuals, including judges. Therefore, Sheehan may have a duty to act on the affidavit pursuant to R.C. 2935.10 and Sheehan's mischaracterization of the affidavit does not impact that duty.

{¶ 27} However, Richard must show by clear and convincing evidence that Sheehan has a clear legal duty to act. *See State ex rel. Clough v. Franklin Cty. Children Servs.*, 144 Ohio St.3d 83, 2015-Ohio-3425, 40 N.E.3d 1132, ¶ 10. Richard must demonstrate that he filed a properly sworn affidavit that sufficiently alleges that crimes were committed by those named in the affidavit. Relator's complaint

fails to sufficiently describe the nature and form of the document he sent to Sheehan and fails to detail the allegations contained within.⁴

{¶ 28} In a similar case where a relator failed to establish that the accusations he made were in the form of a properly executed affidavit, the Supreme Court of Ohio found that the statutory duty imposed by R.C. 2935.10 was not triggered. *State ex rel. Evans v. Tieman*, 157 Ohio St.3d 99, 2019-Ohio-2411, 131 N.E.3d 930, ¶ 13, citing *State ex rel. Dew v. Vivo*, 7th Dist. Mahoning No. 12 MA 94, 2012-Ohio-3423, ¶ 7 (denying mandamus relief because R.C. 2935.09(D) requires the filing of an affidavit, not a complaint or other pleading); *State ex rel. Muff v. Wollenberg*, 5th Dist. Perry No. 08-CA-11, 2008-Ohio-4699, ¶ 12 (same).

{¶ 29} Richard did not attach a copy of the affidavit he allegedly sent to Sheehan, nor does he allege that the document he sent was a properly sworn affidavit. Sheehan may have a duty to review and act on a properly submitted affidavit or complaint of criminal activity filed pursuant to R.C. 2935.09, but Richard has not demonstrated that Sheehan has a clear legal duty to act on the mailing Richard references in his complaint. On the record before this court, we find that relator has not shown that Sheehan has a legal duty to act on the document Richard sent. Therefore, the second claim for relief in mandamus is denied. Respondents' motion for summary judgment is granted regarding this claim.

⁴ Richard makes many claims of illegal activity of various individuals in his complaint, opposition to summary judgment and motion for summary judgment, but he does not state which of those, if any, were included in the document he alleges to have sent to Sheehan.

C. Duty to Reinstate Dismissed Civil Action

{¶ 30} Richard claims that respondent Majer has a duty to reinstate a civil case that was dismissed in 2020.

{¶ 31} As a preliminary matter, the parties disagree whether respondent Majer is an active judge on the Cuyahoga County Common Pleas Court. Majer asserts in his motion for summary judgment that he is no longer a judge on the Cuyahoga County Common Pleas Court. Majer states that he is currently a judge on the Cleveland Municipal Court. In his motion for summary judgment, Richard claims that Majer is still a common pleas court judge and cites to a January 2023 Court Legal News article.

{¶ 32} App.R. 29(C) allows for the automatic substitution of a party sued in their official capacity when, during the pendency of the proceedings, the named individual is replaced by another in that capacity. If Majer is not the currently sitting judge that inherited the dismissed case of *Stojanovic*, Cuyahoga C.P. No. CV-19-920873, this court could substitute that judge for respondent Majer pursuant to App.R. 29(C). Respondent Majer claims that he is a Cleveland Municipal Court judge and was not a common pleas court judge at the time the complaint was filed. Therefore, it is unclear if App.R. 29(C)(1) applies. However, because of the way in which the claims against respondent Majer are resolved, substitution is not necessary, and this court does not need to resolve Richard's allegation that Majer remains a common pleas court judge despite Majer's statements to the contrary and

the fact that Majer's appointment to the Cleveland Municipal Court was widely reported.

{¶ 33} Assuming Richard is correct and Majer remains a Cuyahoga County Common Pleas judge despite the evidence to the contrary, Majer, or his successor should one exist, has no authority to order the reinstatement of Richard's civil action. Richard seeks a writ directing the reinstatement of a civil action that was dismissed in 2020. Richard is not asking this court to direct a ruling on a pending motion he has filed, but to order the reinstatement of the case. In fact, Richard's complaint states that he filed a Civ.R. 60(B) motion for relief from judgment that Majer denied prior to the filing of the instant complaint. The complaint does not state that there are any pending motions before Majer.

{¶ 34} Richard has not identified a source of legal authority that would allow Majer or his successor to reinstate the case, let alone a legal duty that requires Majer to do so. A trial judge has no authority, except as provided by rule or statute, to disturb a final order. *Maxwell v. Univ. Hosps. Health Sys.*, 8th Dist. Cuyahoga No. 104100, 2016-Ohio-7401, ¶ 5. Richard claims his case was improperly dismissed in 2020. That dismissal is a final order that deprives a judge of jurisdiction to act absent some source of authority. None has been identified by Richard in his complaint or combined brief in opposition to and motion for summary judgment. Richard has failed to identify a legal duty on the part of Majer that would entitle Richard to relief in mandamus. Therefore, Richard is not entitled

to a writ ordering the reinstatement of his dismissed civil case. Respondents' motion for summary judgment is granted for the third claim in Richard's complaint.

D. Vexatious Litigator

{¶ 35} In their motion for summary judgment, respondents ask this court to declare Richard a vexatious litigator pursuant to Loc.App.R. 23. This rule provides in part,

If the Eighth District Court of Appeals, sua sponte or on motion by a party, determines that an appeal, original action, or motion is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose on the person who signed the appeal, original action, or motion, a represented party, or both, appropriate sanctions. The sanctions may include an award to the opposing party of reasonable expenses, reasonable attorney fees, costs or double costs, or any other sanction the Eighth District Court of Appeals considers just.

It goes on to define a frivolous appeal or original action as one that is “not reasonably well-grounded in fact, or warranted by existing law, or by a good faith argument for the extension, modification, or reversal of existing law.” If the conduct persists or becomes habitual, this court may declare an individual to be a vexatious litigator and impose restrictions as outlined in Loc.App.R. 23(B) and a party must seek leave to institute any appeal or original action pursuant to Loc.App.R. 23(C).

{¶ 36} The complaint filed in this case contains many spurious and unfounded claims, but we find that two of the three claims outlined above are not frivolous. Sutula does have a duty to comply with Civ.R. 58(B) and Sheehan may have a duty to act on a properly submitted affidavit of accusation. However, for the reasons explained above, relief in mandamus is not warranted. Respondents also

have not demonstrated a recent history of persistent or habitual frivolous claims or filings. The complaint and briefing filed in this case do not support the labelling of Richard as a vexatious litigator at this juncture. However, in the future, should Richard continue to engage in the filing of appeals and original actions that are based on frivolous claims or claims that have previously been adjudicated, Richard's conduct may be deemed to be habitual and Richard may be designated as a vexatious litigator pursuant to Loc.App.R. 23(B).

III. Conclusion

{¶ 37} Respondents' motion for summary judgment is granted. Richard's motion for summary judgment is denied. Richard's claims for relief in mandamus and procedendo are denied. Respondents' request to find Richard to be a vexatious litigator is denied. Costs assessed against relator. The clerk is directed to serve on the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

MARY J. BOYLE, JUDGE

ANITA LASTER MAYS, A.J., and
EILEEN T. GALLAGHER, J., CONCUR