[Cite as *Henderson v. Vivo*, 2020-Ohio-698.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

ERICULO LA ROSS HENDERSON

Relator,

v.

ANTHONY VIVO, MAHONING COUNTY CLERK OF COURT,

Respondent.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0053

Writ of Mandamus

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Dismissed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Gina DeGenova Zawrotuk*, Assistant Prosecuting Attorney, Civil Division, 21 West Boardman Street, 5th Floor, Youngstown, Ohio 44503, for Respondent

Ericulo La Ross Henderson, Pro se, Inmate No. 672336, Southeastern Correctional Institute, 5900 B.I.S. Road, Lancaster, Ohio 43140.

Dated: February 20, 2020

PER CURIAM.

{¶1} Relator Ericulo La Ross Henderson, proceeding on his own behalf, has filed a petition for a writ of mandamus against Respondent Anthony Vivo, Mahoning County Common Pleas Court Clerk of Courts, requesting we compel Respondent to comply with his request for production of documents relating to his criminal conviction under the Public Records Act so that he can prepare a federal habeas corpus action. Respondent has filed a motion to dismiss the petition pursuant to Civ.R. 12(B)(6) for failure to state a claim. Respondent highlights the improper captioning as a procedural deficiency in Relator's complaint. Substantively, Respondent argues Relator had an adequate remedy at law by appealing the trial court's denial of his public records request for failure to assert a justiciable claim.

{¶2} In June of 2015, a jury convicted Relator of second-degree felonious assault in violation of R.C. 2903.11(A)(1)(D), second-degree felony child endangering in violation of R.C. 2919.22(B)(3)(E)(1)(3), and third-degree felony child endangering in violation of R.C. 2919.22(A)(E)(1)(2)(c). The parties agreed the offenses were allied offenses of similar import and the verdicts merged. The state elected to have Relator sentenced on the second-degree felony child endangering verdict. The state recommended a six year sentence; Relator asked for community control sanctions. The trial court sentenced Relator to eight years in prison. Relator appealed and this Court affirmed his conviction and sentence. *State v. Henderson*, 7th Dist. Mahoning No. 15 MA 0137, 2018-Ohio-2816, *reconsideration denied*, 7th Dist. Mahoning No. 15 MA 0137, 2018-Ohio-3424, ¶ 8, and *appeal not allowed sub nom. State v. Laross-Henderson*, 153 Ohio St.3d 1497, 2018-Ohio-4092, 108 N.E.3d 1105.

Procedural Deficiency

{¶3} This Court is vested with jurisdiction to hear an original mandamus action pursuant to Article IV, Section 3(B)(1) of the Ohio Constitution and R.C. 2731.02. There are three specific requirements for the filing of an application for a writ of mandamus. The application (1) must be by petition, (2) in the name of the state on the relation of the person applying, and (3) verified by affidavit. R.C. 2731.04. Here, as Respondent points out, Relator's petition does not meet the second requirement—it is not captioned in the name of the state on the relation of the person applying.

{¶4} If a respondent alerts a relator of their failure to properly caption a mandamus action and the relator does not seek leave to amend his or her complaint to comply with R.C. 2731.04, the mandamus action must be dismissed. *Blankenship v. Blackwell,* 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 36, citing *Litigaide, Inc. v. Lakewood Police Dept. Custodian of Records*, 75 Ohio St.3d 508, 664 N.E.2d 521 (1996). Here, Respondent alerted Relator of his failure to properly caption his mandamus action by way of its motion to dismiss. Although Relator has responded to the motion, he did not seek leave to amend his complaint to comply with R.C. 2731.04. Therefore, Relator's omission is sufficient grounds to dismiss his mandamus action. *Blankenship, supra*.

Substantive Merits

{¶5} Turning to Relator's present petition for writ of mandamus, a writ of mandamus is an extraordinary remedy which should be exercised by this Court with caution and issued only when the right is clear. *State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 11. Entitlement to

a writ of mandamus requires the relator to demonstrate: (1) they have a clear legal right to the relief, (2) the respondent has a clear legal duty to provide that relief, and (3) relator has no adequate remedy at law. *State ex rel. Taxpayers for Westerville Schools v. Franklin Cty. Bd. of Elections*, 133 Ohio St.3d 153, 2012-Ohio-4267, 976 N.E.2d 890, ¶ 12.

{¶6} In invoking the Public Records Act, R.C. 149.43 et seq., Relator argues Respondent is under a duty to send to him all of his pertinent commitment papers so that he can prepare a federal habeas corpus cause of action. Relator relies specifically on R.C. 149.43(B)(8) and R.C. 149.43(C).

{¶7} Preceding subsection (B)(8) of R.C. 149.43, is subsection (B)(1) which, in general, provides that when a person makes a request for public records, the public office or person responsible for the public records shall promptly prepare the documents and make them available for inspection by the requestor at all reasonable times during regular business hours. Or, as here, if a requestor requires copies of the documents, the public office "shall make copies of the requested public record[s] available to the requester at cost and within a reasonable period of time."

{¶8} R.C. 149.43(C) provides that a person who allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to them for inspection in accordance with division (B) may pursue an action for denial of access to public records under R.C. 2743.75 by filing a complaint with the clerk of the court of claims or the clerk of the court of common pleas, or commence a mandamus action, as Relator did here.

{¶9} Specifically concerning the duty requirement for a mandamus action, R.C. 2303.08 sets forth the general duties of the clerk of the court of common pleas:

> The clerk of the court of common pleas shall indorse on each pleading or paper in a cause filed in the clerk's office the time of filing, enter all orders, decrees, judgments, and proceedings of the courts of which such individual is the clerk, make a complete record when ordered on the journal to do so, and pay over to the proper parties all moneys coming into the clerk's hands as clerk. The clerk may refuse to accept for filing any pleading or paper submitted for filing by a person who has been found to be a vexatious litigator under section 2323.52 of the Revised Code and who has failed to obtain leave to proceed under that section.

{¶10} Additionally, R.C. 2303.09 states "[t]he clerk of the court of common pleas shall file together and carefully preserve in his office all papers delivered to him for that purpose in every action or proceeding."

{¶11} As the aforementioned statutes illustrate, Respondent has a legal duty to provide access to these public records for inspection to any person at all reasonable times per R.C. 149.43(B). In applying and interpreting this section, this Court held the clerk of courts does not have a legal duty to mail copies of public records to the person requesting them. *State ex rel. Hudson v. Vivo*, 7th Dist. Mahoning No. 99-CA-87, 1999 WL 436724, *2-3, (June 24, 1999), citing *State v. Fenley v. Ohio Historical Soc.*, 64 Ohio St.3d 509, 597 N.E.2d 120 (1992), *State ex rel. Nelson v. Fuerst*, 66 Ohio St.3d 47, 607 N.E.2d 836 (1993) and *State ex rel. Iacovone v. Kaminski*, 81 Ohio St.3d 189, 690 N.E.2d 4 (1998).

{¶12} Subsequent to this Court's decision in *Hudson*, the General Assembly enacted Am.Sub.H.B. No. 78, effective December 16, 1999, amending R.C. 149.43(B) to require a public office to transmit copies of a public record through the United States mail if so requested, but adding that the public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage and other supplies used in the mailing. R.C. 149.43(B)(1), (6), and (7)(a). R.C. 149.43(B)(7)(b) provides "[a]ny public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail * * *." In this instance, the Court takes judicial notice of Respondent's public records request policy which is consistent with what the Public Records Act mandates and allows, and states in relevant part: "Requesters may ask that documents be mailed to them. They will be charged the actual cost of the postage and mailing supplies. Costs must be paid in advance prior to transmission."

{¶13} It is worth mentioning here that Relator is requesting copies of the documents be mailed to him in prison, implicitly at no cost to him; he has not alleged prepayment of costs associated with the request in compliance with Respondent's policy which is consistent with R.C. 149.43(B)(1), (6) and (7)(a). The Ohio Supreme Court has expressly held R.C. 149.43 does not require a public-records custodian to provide copies of records free of charge; instead, the Public Records Act requires only that copies of public records be made available at cost. R.C. 149.43(B)(1); *State ex rel. Edwards v. Cleveland Police Dept.*, 116 Ohio App.3d 168, 169, 687 N.E.2d 315 (8th Dist.1996); *State ex rel. Dehler v. Mohr*, 129 Ohio St.3d 37, 2011-Ohio-959, 950 N.E.2d 156, ¶ 3 (2011)

(affirming court of appeals dismissal of mandamus action based upon relator's refusal to submit prepayment for their cost).

{¶14} Not long after adding the mailing provision to the Public Records Act, the General Assembly amended R.C. 149.43(B) again, setting forth heightened requirements for a person who is incarcerated pursuant to a criminal conviction seeking public records:

> A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

1999 H.B. 471, effective July 1, 2000, adopted as former R.C. 149.43(B)(4) and later moved, verbatim, to current R.C. 149.43(B)(8) with the passage of Am.Sub.H.B. No. 9, effective September 29, 2007.

{¶15} The Second District clearly explained R.C. 149.43(B)(8)'s heightened requirements for inmates as a predicate to seeking mandamus relief:

> Thus, although any member of the public may file a mandamus to compel, for example, a county clerk, to release public records, an inmate must first obtain a "finding" from his or her sentencing judge that the documents are "necessary to support a justiciable claim or defense" before making the request to the public official or office, who must then refuse, before the inmate may file a mandamus. Inmates who file mandamus petitions demanding alleged public records have their petitions routinely dismissed due to their failure to obtain the required finding from their sentencing judge. This is understandable in cases where the inmate seeks a mandamus to compel a county clerk or other governmental office to act, without first obtaining permission from the sentencing judge. See, *Watson v. Foley,* 2d Dist. No. CA20970, 2005-Ohio-2761 (clerk of court); *State ex rel. Cohen v. Mazeika,* 11th Dist. No.2004-L-048, 2004-Ohio-3340 (clerk of court); *State ex rel. Becker v. Ohio State Highway Patrol,* 10th Dist. No. 02AP-918, 2003-Ohio-1450.

State ex rel. Rittner v. Barber, 6th Dist. Fulton No. F-05-020, 2006-Ohio-592, ¶ 14.

{¶16} At the end of its decision in *Rittner*, *supra*, at ¶ 41, the Sixth District Court of Appeals enumerated a helpful list of steps for an inmate seeking access to public records to follow:

> (1) file a motion with the court in which he was sentenced, listing which (alleged) public records are requested, and stating why, pursuant to R.C. 149.43(B)(4), the documents are necessary to support a claim or defense;

> (2) obtain an order from the sentencing judge which finds, pursuant to R.C. 149.43(B)(4), whether the documents are "necessary to support a justiciable claim or defense"; (3) if permission is granted, present the order to the "person responsible" for the records as defined by R.C. 149.43(B)(1); (4) if the "person responsible" refuses to release the public records according to the methods prescribed by statute, then institute a mandamus proceeding in the trial court; *or* (5) if the sentencing judge does *not* grant permission by finding that the documents are *not* necessary to support a justiciable claim or defense, then follow the proper appeal procedure of that order pursuant to R.C. 2505.02 and the Ohio Rules of Appellate Procedure, including filing a timely notice of appeal.

{¶17} In this instance, Relator filed a motion with the court in which he was sentenced, listing which public records he requested, but did not adequately state why, pursuant to R.C. 149.43(B)(4), the documents are necessary to support a claim or defense. Therefore, the trial court denied Relator's public records request for failure to assert a justiciable claim. A sentencing court's determination upon an inmate's request pursuant to R.C. 149.43(B)(4) constitutes a final, appealable order under R.C. 2505.02 (B)(2). *Id*. at ¶ 32-38.

{¶18} Since Relator did not attempt an appeal of the sentencing court's decision denying his public records request, his mandamus petition is precluded. As previously indicated, in order to avail himself or herself of mandamus, a relator must demonstrate that there is no plain and adequate remedy available at law. *State ex rel. Taxpayers for Westerville Schools v. Franklin Cty. Bd. of Elections*, 133 Ohio St.3d 153, 2012-Ohio-

4267, 976 N.E.2d 890, ¶ 12. In the instant case, Relator could have appealed the sentencing court's denial of his public records request and could have filed an assignment of error regarding this issue. Relator's failure to appeal the order containing the sentencing court's denial of the public records precludes mandamus relief as the appellate process was available. A mandamus filing is not a substitute for an appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 57, 295 N.E.2d 659 (1973).

{¶19} Accordingly, Respondent's motion is granted and Relator's petition for a writ of mandamus is dismissed. Final Order. Costs taxed against Relator. Clerk to serve a copy of this order to the parties as provided by the civil rules.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE DAVID A. D'APOLITO