

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-08-036

Appellee

Trial Court No. 01-CR-726

v.

Michael Lather

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2009

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Michael Lather, pro se.

* * * * *

WILLAMOWSKI, J.

{¶ 1} Appellant, Michael Lather, an incarcerated person acting pro se, appeals the judgment of the Sandusky Court of Common Pleas. For the following reasons, we affirm.

{¶ 2} After criminal charges resulted in Lather's conviction and incarceration,¹ the state filed a forfeiture action against Lather's property seized upon his arrest. The forfeiture action was assigned to Lather's sentencing judge. While the forfeiture action was pending, Lather filed a motion in that action requesting public records pursuant to R.C. 149.43. In the motion, Lather asserted that he wanted the public records because he suspected that "there [was] evidence his attorney of record was aware existed, or the prosecution in his criminal case knew existed, that would exonerate [him], or bring into question the validity of his conviction and sentence." He further claimed that the documents he requested were required for claims of ineffective assistance of counsel or a prosecutorial misconduct claim.

{¶ 3} The trial court denied Lather's motion without opinion. It also ordered forfeiture of Lather's property.

{¶ 4} From those two judgments, Lather appealed and assigns the following errors for review:

{¶ 5} "Assignment of error No. I: The trial court erred and abused its discretion when it failed to grant the Defendant-Appellant's Motion for Public Records pursuant to R.C. 149.43(B)(8), when the Defendant-Appellant demonstrated a justiciable claim, itemized the list of Public Records, and what the Public Records would demonstrate [sic].

{¶ 6} "Assignment of error No. II: The trial court erred and abused its discretion by not issuing findings of fact and conclusions of law when denying the Defendant's

¹*State v. Lather*, 171 Ohio App.3d 708, 2007-Ohio-2399.

Motion for Access to Public Records. The trial court did not order the clerk of court to serve the Defendant a copy of the court's Order timely, thereby foreclosing the Defendant's right to Appeal, or, to seek the required Findings of fact and conclusions of Law pursuant to Civil Rule 52, of the Court denial of Defendant's Motion for Access to Public Records, thus denying the Defendant's Due Process and Appellate rights guaranteed by the U.S. Constitution and Ohio's Constitution, Article I, sections 10 & 16 [sic]."

{¶ 7} Because Lather has not filed a transcript of the forfeiture proceedings or filed assignments of error challenging the forfeiture order, the forfeiture order must be affirmed. We proceed to review only the order denying Lather's request that he be allowed access to public records. We consider the assigned errors jointly.

{¶ 8} R.C. 149.43(B)(8) provides:

{¶ 9} "A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction * * * to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution * * *, 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 * * *, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person."

{¶ 10} Inmates are prohibited from accessing otherwise public records absent a finding from their sentencing judge that the records are necessary to support a justiciable claim. Absent such a judicial finding, an action in mandamus against a public person responsible for public records is barred. "R.C. 149.43(B)(4) clearly sets forth heightened requirements for inmates seeking public records. The General Assembly's broad language clearly includes offense and incident reports as documents that are subject to the additional requirement to be met by inmates seeking records concerning a criminal investigation or prosecution. The General Assembly clearly evidenced a public-policy decision to restrict a convicted inmate's unlimited access to public records in order to conserve law enforcement resources." *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, ¶ 14.

{¶ 11} In *State ex rel. Rittner v. Barber*, 6th Dist. No. F-05-020, 2006-Ohio-592, this court held that an inmate may seek appellate review of a judicial determination that requested public records are not necessary to support a justiciable claim. Such orders are reviewed for an abuse of discretion. *Id.* at ¶ 31.

{¶ 12} Here, Lather followed each of the steps listed in *Rittner*: He filed a motion with his sentencing court that listed which (alleged) public records he requested, and he stated why he believes the public records are necessary to support a justiciable claim. He obtained a determination that the records are *not* necessary to support a claim. Then, he appealed that decision. *Id.* at ¶ 41.

{¶ 13} Upon review, however, we find no abuse of discretion in the trial court's determination. Lather filed his request in a civil forfeiture action, but he specifically claimed that the alleged public records are necessary to support his claims of ineffective assistance of counsel and prosecutorial misconduct related to his criminal trial. These claims are unrelated to the civil forfeiture action in which Lather sought the records.

{¶ 14} R.C. 149.43(B)(8) does not specify in which action an inmate must file his request. However, in order to facilitate a sentencing judge's determination as to whether the requested records are necessary – and in order to facilitate appellate review – the request must be filed in the underlying criminal case related to the asserted claims. Here, Lather's asserted claims of ineffective assistance of counsel and prosecutorial misconduct depend on review of his original criminal trial.

{¶ 15} In procedurally similar cases, where the inmate sought appellate review of his sentencing judge's determination that access to alleged public records was unwarranted, the appellate courts found no abuse of discretion in the sentencing judge's determinations that the documents were unnecessary to support a justiciable claim. In *State v. Gibson*, 2d Dist. No. 06CA37, 2007-Ohio-7161, the court held that the inmate must have identified "pending proceedings with respect to which the documents would be material." *Id.* at ¶ 14. *Gibson* also held that the inmate's guilty plea rendered "irrelevant any claims pertaining to factual guilt" and made the requested documents unnecessary to claims of fabricated evidence or withheld evidence. *Id.* at ¶ 15. The same result occurs

where the defendant pled no contest. *State v. Totten*, 10th Dist. Nos. 05AP-278, 05AP-508, 2005-Ohio-6210, ¶ 15.

{¶ 16} In *Gibson* and *Totten*, both inmates seeking public records filed their requests with their sentencing judge in their original criminal action. See, also, *State v. Lofton*, 2d Dist. No. 20923, 2006-Ohio-4651. Filing the motion in the original criminal action allows the sentencing judge and the appellate court access to the appropriate record and facilitates review of the request. Here, since Lather requested documents which he alleged were necessary for claims unrelated to the matter in which they were filed (the forfeiture action), the trial court did not err in denying the motion. Therefore, inmates following the procedure proscribed by *Rittner* must also file the motion requesting access to public records with their sentencing judge in the appropriate action in order to enable review. Lather's first assigned error is not well-taken.

{¶ 17} We also find no abuse of discretion in the order's lack of findings of fact, as no rule requires findings of fact to support a judicial determination pursuant to R.C. 149.43(B)(8) or *Rittner*. Further, Civ.R. 52, governing when findings of fact must be issued, is not applicable to motions made pursuant to R.C. 149.43(B)(8). In *Rittner*, this court held that a sentencing judge's determination of an inmate's request pursuant to R.C. 149.43(B)(8) must show their "facts and reasons" or "attendant facts and circumstances" supporting the denial in order to facilitate appellate review. Demonstrating the exercise of discretion differs, however, from the requirements of Civ.R. 52. Because findings of

fact were not required by statute or rule, Lather was not prejudiced. His second assignment of error is not well-taken.

{¶ 18} We expressly make no determination as to whether the requested documents are, in fact, "public records" pursuant to R.C. 149.43. We also expressly decline to determine whether the requested documents are necessary to support Lather's asserted claims.

{¶ 19} Accordingly, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

John R. Willamowski, J.
CONCUR.

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.