

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

Douglas Leavell

Court of Appeals No. E-17-012

Relator

v.

Luvada S. Wilson

DECISION AND JUDGMENT

Respondent

Decided: March 31, 2017

* * * * *

Douglas Leavell, pro se.

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PIETRYKOWSKI, J.

{¶ 1} This matter is before the court on relator’s, Douglas Leavell, petition for a writ of mandamus to compel respondent, Luvada Wilson, the Clerk of Courts for the Erie County Court of Common Pleas, to time-stamp and assign a case number to his “Affidavit Charging the Offense Committed,” and to follow proper procedure for such an

affidavit under R.C. 2935.09 and 2935.10. Because Leavell cannot establish that he has a clear legal right to the requested relief, we sua sponte dismiss his petition.

I. Introduction

{¶ 2} The facts alleged in the petition and attached materials are as follows. Near the end of August 2016, Leavell filed with the Erie County Court of Common Pleas an affidavit pursuant to R.C. 2935.09 charging that Detective Dana Newell committed perjury in a hearing involving Leavell. The clerk's office did not time-stamp Leavell's affidavit or assign it a file or case number. Rather, the clerk's office referred the affidavit to the prosecutor's office, and the prosecutor's office referred it to a special prosecutor from Ottawa County to avoid a conflict.

{¶ 3} The special prosecutor investigated the charges in Leavell's affidavit, and concluded that criminal prosecution was not warranted and no complaint should be filed. Specifically, Leavell alleged that Newell made false statements regarding a drug offense being committed in the vicinity of a school. Leavell determined that the enhancement of committing the drug offense near a school was the determining factor that prompted the trial court to order the forfeiture of Leavell's 2003 Chevy Avalanche. On the contrary, the special prosecutor found that while Newell did mention a school in his testimony, "a close reading of this passage (and indeed the rest of Detective Newell's testimony) yields no testimony about the proximity of the drug offense to a school." Furthermore, the special prosecutor noted that the trial court's concern at the forfeiture hearing was not the location or the degree of the drug offense, but rather its concern was limited to whether or

not there was a felony offense. As support, the special prosecutor pointed to the absence of any mention of a school zone in the trial court's judgment entry.

{¶ 4} In declining to pursue criminal charges against Newell, the special prosecutor cited the perjury statute, R.C. 2921.11, which states that “[n]o person, in any official proceeding, shall knowingly make a false statement under oath or affirmation, or knowingly swear or affirm the truth of a false statement previously made, when either statement is material.” The special prosecutor reasoned that there was no evidence of false testimony, and even if false testimony is assumed, the trial court's decision is clear that the testimony would not have been material.

{¶ 5} In his petition for a writ of mandamus, Leavell now seeks an order compelling Wilson to follow the procedures required under R.C. 2935.09 and 2935.10, and to comply with her duties under R.C. 2303.08.

II. Analysis

{¶ 6} A writ of mandamus is an extraordinary remedy. Generally, to be entitled to a writ of mandamus, a relator must establish (1) a clear legal right to the relief requested, (2) a clear legal duty to perform the requested act on the part of the respondent, and (3) that the relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Manson v. Morris*, 66 Ohio St.3d 440, 441, 613 N.E.2d 232 (1993). “Sua sponte dismissal without notice is warranted when a complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint.” *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947, 918 N.E.2d 515, ¶ 3.

{¶ 7} We will begin with Leavell’s request under R.C. 2935.09 and 2935.10.

{¶ 8} R.C. 2935.09 pertains to accusations by affidavit to cause an arrest or prosecution. Subsection (D) of that section provides,

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 for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate. A private citizen may file an affidavit charging the offense committed with the clerk of a court of record before or after the normal business hours of the reviewing officials if the clerk’s office is open at those times. A clerk who receives an affidavit before or after the normal business hours of the reviewing officials shall forward it to a reviewing official when the reviewing official’s normal business hours resume. R.C. 2935.09(D).

For purposes of the statute, “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.” R.C. 2935.09(A).

{¶ 9} “R.C. 2935.09 does not mandate prosecution of all offenses charged by affidavit.” *State ex rel. Boylen v. Harmon*, 107 Ohio St.3d 370, 2006-Ohio-7, 839 N.E.2d 934, ¶ 6, quoting *State ex rel. Evans v. Columbus Dept. of Law*, 83 Ohio St.3d 174, 175,

699 N.E.2d 60 (1998). “While R.C. 2935.09 provides that a ‘private citizen having knowledge of the facts’ shall file with a judge, clerk of court, or magistrate an affidavit charging an offense committed in order to cause the arrest or prosecution of the person charged, it must be read *in pari materia* with R.C. 2935.10, which prescribes the subsequent procedure to be followed.” *Id.*, quoting *State ex rel. Strothers v. Turner*, 79 Ohio St.3d 272, 273, 680 N.E.2d 1238 (1997).

{¶ 10} Under R.C. 2935.10(A),

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 he 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 he 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.

{¶ 11} Here, it is clear from the facts as alleged that Wilson complied with the requirements of R.C. 2935.09 and 2935.10. Upon receipt of Leavell’s affidavit, the clerk’s office forwarded the affidavit to the prosecutor’s office, and the prosecutor’s office forwarded it to a special prosecutor, who made the determination that a complaint should not be filed. *Compare State ex rel. Boylen v. Harmon*, 107 Ohio St.3d 370, 2006-Ohio-7, 839 N.E.2d 934, ¶ 4, 11 (court of appeals did not err in granting a writ of

mandamus where the clerk refused to accept for filing the relator's affidavits under R.C. 2935.09). Therefore, we find that a writ of mandamus ordering Wilson to comply with R.C. 2935.09 and 2935.10 is not warranted on these grounds as Leavell has already received the requested relief. *See State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947, 918 N.E.2d 515, ¶ 4 (mandamus complaint moot where respondent has done the act requested).

{¶ 12} We now turn to Leavell's related request for a writ of mandamus compelling Wilson to comply with R.C. 2303.08.

{¶ 13} R.C. 2303.08 provides,

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.

{¶ 14} Leavell argues that mandamus is warranted because Wilson's failure to time-stamp and assign a case number to his affidavit deprives him of his right to appeal the special prosecutor's decision not to file a complaint. However, Leavell does not have a clear legal right to appeal the special prosecutor's decision. The special prosecutor's decision not to file a complaint is not a final, appealable order of the trial court, and the trial court cannot be compelled to enter such a final order. *State ex rel. Brown v.*

Nusbaum, 4th Dist. Ross No. 16CA3572, 2017-Ohio-797, ¶ 15 (“We find nothing in R.C. 2935.10 that requires the trial court to conduct a probable cause hearing or to review a prosecutor’s decision not to pursue criminal charges. Because the trial court is under no obligation to hold a hearing or review the prosecutor’s decision, the court is likewise under no duty to issue a final order arising from such review.”). Furthermore, “the decision whether to prosecute is discretionary, and not generally subject to judicial review.” *State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 27, 661 N.E.2d 180 (1996).¹ Therefore, we hold that Leavell cannot establish a clear legal right to have Wilson file-stamp and assign a case number to his affidavit so that he can directly appeal the special prosecutor’s decision.

{¶ 15} Accordingly, because Leavell cannot demonstrate a clear legal right to the requested relief, we hereby dismiss his petition for a writ of mandamus at Leavell’s costs. The clerk is directed to serve upon the parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

Writ denied.

¹ “[A] prosecuting attorney will not be compelled to prosecute except when the failure to do so constitutes an abuse of discretion.” *State ex rel. Evans v. Columbus Dept. of Law*, 83 Ohio St.3d 174, 175, 699 N.E.2d 60 (1998). Here, we do not reach the issue of whether the special prosecutor abused his discretion in declining to file a criminal complaint because the special prosecutor is not the subject of this mandamus action.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Christine E. Mayle, J.
CONCUR.

JUDGE