[Cite as *State ex rel. Kelley v. Junkin*, 2009-Ohio-2723.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91860

**STATE OF OHIO, EX REL.,
LYNN A. KELLEY**

RELATOR

vs.

JUDGE PETER J. JUNKIN

RESPONDENT

**JUDGMENT:
WRIT GRANTED**

WRIT OF PROHIBITION
MOTION NO. 416518 AND 416544
ORDER NO. 422719

RELEASE DATE: June 10, 2009

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PATRICIA A. BLACKMON, J.:

{¶ 1} Relator, Lynn A. Kelley ("Kelley"), requests that this court issue a writ of prohibition preventing respondent, Peter J. Junkin ("Judge Junkin"), a judge of Bedford Municipal Court, from enforcing his orders in *In re: Orange Village Investigation, Incident No. 2006-146 v. Kelley*. For the reasons stated below, we grant relator's request for relief in prohibition.

{¶ 2} Orange Village filed a "Motion to Compel Evidence" in the Bedford Municipal Court on April 23, 2008. The "Motion to Compel Evidence" bore the caption "*In re: Orange Village Investigation, Incident No. 2006-146 v. Lynn A. Kelley*" and initiated proceedings in the Bedford Municipal Court. The "Motion to Compel Evidence" stated that Kelley was a suspect in a matter involving an alleged violation

of R.C.2917.33 (unlawful possession or use of a hoax weapon of mass destruction), a fourth-degree felony.

{¶ 3} Orange Village attached to the "Motion to Compel Evidence" what is denominated as an affidavit. Although the document is called an "affidavit" and indicates that it is signed by Michael J. Debeljak, a detective of the Orange Village Police Department, the "affidavit" is not notarized and respondent has not provided this court with a notarized copy of the "affidavit."

{¶ 4} In the "affidavit," Debeljak states that he was called to investigate a letter received at the Orange Village home of attorney, John M. Murphy. The letter had a white powdery substance on the envelope. Murphy was a partner in the law firm of Kelley and Ferraro in Cleveland, Ohio, and the firm was in litigation with Kelley regarding the dissolution/valuation of the firm after the death of Kelley's husband and firm partner, Michael V. Kelley. Debeljak states that Kelley was a suspect and alludes to two conversations between Kelley and Murphy. He indicates that he would like to ascertain whether Kelley's DNA matches DNA on the envelope received by Murphy and that he would like to obtain handwriting exemplars from Kelley.

{¶ 5} On April 24, 2008, Judge Junkin granted the "Motion to Compel Evidence" and ordered Kelley, upon demand of the Orange Village Police Department, to provide handwriting exemplars and DNA. By entry dated April 30,

2008, Judge Junkin denied Kelley's motion for stay of execution of the April 24 order.

{¶ 6} Kelley commenced an appeal. Judge Junkin granted a stay of execution of judgment pending this court's decision. This court dismissed the appeal -- first, for failure to file the record then later, in response to an application for reconsideration, per R.C. 2505.02.[1] After this court denied Kelley's application for reconsideration, Judge Junkin issued an order on July 17, 2008 requiring Kelley to comply with the order compelling her to give DNA evidence.

{¶ 7} Kelley commenced this action in prohibition requesting this court to prevent Judge Junkin from enforcing his orders of: April 24, 2008; April 30, 2008; and July 17, 2008. The parties filed motions for summary judgment as well as opposing briefs.

{¶ 8} The criteria for the issuance of a writ of prohibition are well-established. "In order to be entitled to a writ of prohibition, [relator] had to establish that (1) the [respondent] is about to exercise judicial or quasi-judicial power, (2) the exercise of such power is unauthorized by law, and (3) denial of the writ will cause injury to

[1] See *In Re: Orange Village Investigation v. Kelley*, Cuyahoga App. No. 91382, Entry Nos. 410221, dated June 18, 2008, and 410413 dated July 10, 2008, respectively, appeal not accepted for review 120 Ohio St.3d 1422, 2008-Ohio-6166 [Case No. 2008-1698]. Prior to Kelley's appeal to the Supreme Court of Ohio, this court also denied a second motion for reconsideration.

[relator] for which no other adequate remedy in the ordinary course of law exists. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 336, 686 N.E.2d 267, 268."[2]

{¶ 9} Courts implement these criteria by applying a two-part test. "A two-part test must be employed by this Court in order to determine whether a writ of prohibition should be issued. *State ex rel. East Mfg. Corp. v. Ohio Civ. Rights Comm.* (1992), 63 Ohio St.3d 179; *Dayton Metro. Hous. Auth. v. Dayton Human Relations Council* (1992), 81 Ohio App.3d 436. Initially, we must determine whether the respondent patently and unambiguously lacks jurisdiction to proceed. The second step involves the determination of whether the relator possesses an adequate remedy at law. *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.* (1990), 55 Ohio St.3d 98."[3]

{¶ 10} In some cases, the relator need not demonstrate the existence of an adequate remedy. "'If a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition and mandamus will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions.' *State ex rel. Mayer v. Henson*, 97 Ohio St. 3d 276, 2002 Ohio 6323, 779 N.E.2.d 223, ¶12; *State ex rel. Powell v. Markus*, 115 Ohio St.3d 219, 2007 Ohio 4793, 874 N.E.2d 775, ¶7. Where jurisdiction is patently and

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[2] *State ex rel. Wright v. Ohio Bur. of Motor Vehicles*, 87 Ohio St.3d 184, 185, 1999-Ohio-1041, 718 N.E.2d 908.

[3] *State ex rel. Wright v. Registrar, Bur. of Motor Vehicles* (Apr. 29, 1999), Cuyahoga App. No. 76044, at 3., affirmed in *Wright*, supra.

unambiguously lacking, relators need not establish the lack of an adequate remedy at law because the availability of alternate remedies like appeal would be immaterial. *State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St.3d 340, 2008 Ohio 849, 884 N.E.2d 1, ¶ 16."[4]

{¶ 11} Certainly, the first criterion is fulfilled. Enforcing a judicial order is clearly an exercise of judicial power.

{¶ 12} Relator contends that Judge Junkin's April 24, 2008 order and those that would compel her compliance with that order are unauthorized by law. She argues that Judge Junkin lacks both subject matter jurisdiction and territorial jurisdiction.

{¶ 13} Civ.R. 3(A) provides, in part: "A civil action is commenced by filing a complaint with the court ***." The state or a subdivision commences a criminal proceeding by filing a complaint,[5] an indictment or information.[6] Judge Junkin has not provided this court with any authority for commencing a municipal court proceeding by filing a "Motion to Compel Evidence."

{¶ 14} "Municipal courts are statutory courts and their territorial jurisdiction may not be enlarged except by statute. ***. *Bedford v. Lacey* (1985), 30 Ohio App. 3d 1,

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[4] *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, at ¶15.

[5] Crim.R. 3.

[6] Crim.R. 7.

506 N.E.2d 224 and *City of Rocky River v. Hughes*(Nov. 22, 2000), Cuyahoga App. No. 76771, unreported."[7] Kelley correctly observes that various provisions in the Revised Code set out the civil and criminal jurisdiction of municipal court.[8] Again, Judge Junkin has not rebutted Kelley's assertion that none of these provisions authorizes a subdivision to commence a proceeding before a municipal court by filing a "Motion to Compel Evidence."

{¶ 15} Judge Junkin argues that the "Motion to Compel Evidence" was the "functional equivalent" of a search warrant. Yet, despite the requirement that a search warrant be supported by oath or affirmation,[9] respondent has not provided this court with a notarized copy of the "affidavit" accompanying the "Motion to Compel Evidence." Additionally, the authority of a court to issue a search warrant is limited to its territorial jurisdiction.[10] Although Murphy -- who received the powdery envelope -- resides in Orange which is in the territorial jurisdiction of Bedford Municipal Court, Kelley resides in Hunting Valley which is in the territorial jurisdiction

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[7] *State ex rel. Kline v. Carroll* (Jan. 4, 2002), Cuyahoga App. No. 79737, at 5. See also R.C. 1901.01(A) establishing, inter alia, the Bedford Municipal Court and R.C. 1901.02(B) describing the territorial jurisdiction of the Bedford Municipal Court.

[8] See: R.C. 1901.17 (monetary jurisdiction); R.C. 1901.18 (subject matter jurisdiction); R.C. 1901.19 (jurisdictional powers); and R.C. 1901.20 (criminal and traffic jurisdiction).

[9] R.C. 2933.22(A).

[10] Crim.R. 41(A).

of Shaker Heights Municipal Court.[11] Finally, neither the "affidavit" nor the "Motion to Compel Evidence" is in any way denominated as a "search warrant."

{¶ 16} The filing of the "Motion to Compel Evidence" as a means to commence a municipal court proceeding was completely contrary to law. The Bedford Municipal Court patently and unambiguously lacked jurisdiction to grant the relief requested in the "Motion to Compel Evidence." Judge Junkin's April 24, 2008 journal entry granting the "Motion to Compel Evidence" and the later orders purporting to enforce it are, therefore, ultra vires. "It is true that a court of superior jurisdiction may grant a writ of prohibition to prevent the attempted exercise of *ultra vires* jurisdiction by a court of inferior jurisdiction. Where the proceedings are void *ab initio*, *ultra vires* jurisdiction is invoked and the writ will lie."[12]

{¶ 17} Judge Junkin also argues that the arguments made by Kelley in this court and in the Supreme Court of Ohio as part of her appeal in Case Nos. 91382 and 2008-1698, respectively, are barred by res judicata. Of course, this court dismissed Case No. 91382 for lack of a final appealable order under R.C. 2505.02 and the Supreme Court did not accept Case No. 2008-1698 for review. Res judicata applies, however, only with respect to judgments *on the merits*.[13] Clearly, neither

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[11] R.C. 1901.01(A) and 1901.02(B).

[12] *Wisner v. Probate Court of Columbiana Cty.* (1945), 145 Ohio St. 419, 422, 61 N.E.2d 889, 31 O.O. 37, citing *State ex rel. Young v. Morrow* (1936), 131 Ohio St. 266, 2 N.E.2d 595, 5 O.O. 584.

[13] *Grava v. Parkman Tp.* (1995), 73 Ohio St.3d 279, 1995-Ohio-331, 653 N.E.2d

this court nor the Supreme Court of Ohio reached the merits of Kelley's claims regarding the propriety of the April 24, 2008 journal entry granting the "Motion to Compel Evidence" as well as the April 30, 2008 journal entry denying Kelley's motion for stay of execution of the April 24 order.

{¶ 18} We hold that Judge Junkin patently and unambiguously lacked the authority to grant the "Motion to Compel Evidence" as well as to enforce that order by his entries of April 30, 2008 and July 17, 2008.

{¶ 19} Accordingly, Judge Junkin's motion for summary judgment is denied. Kelley's motion for summary judgment is granted. We grant Kelley's request for relief in prohibition to prevent Judge Junkin from enforcing his orders of: April 24, 2008; April 30, 2008; and July 17, 2008 entered in *In re: Orange Village Investigation, Incident No. 2006-146 v. Kelley*. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal.[14] Respondent to pay costs.

Writ granted.

PATRICIA A. BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR

226, syllabus.

[14] Civ.R. 58(B).