

[Cite as *State ex rel. Winston v. Bombik*, 2009-Ohio-6319.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94094

**STATE OF OHIO EX REL.,
DIONTA WINSTON**

RELATOR

vs.

RICHARD BOMBIK, ET AL.

RESPONDENTS

**JUDGMENT:
WRIT DISMISSED**

Writ of Mandamus
Motion No. 427907
Order No. 428465

RELEASE DATE: December 1, 2009

FOR RELATOR

Dionta L. Winston, pro se
Inmate No. A431-444
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P.O. Box 901
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ATTORNEYS FOR RESPONDENTS

William D. Mason
Cuyahoga County Prosecutor

BY: James E. Moss
Assistant County Prosecutor
8th Floor Justice Center
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Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶ 1} On October 16, 2009, relator Dionta Winston filed a writ of mandamus and an alternative writ of mandamus against Assistant County Prosecutor Richard Bombik and Andrew Smith. In his petition, Winston asks this court to order Bombik and Smith to respond to numerous postconviction motions he filed in *State v. Winston*, Cuyahoga County Court of Common Pleas Case No. CR-415935. Winston also asks this court to grant an alternative writ and order respondents to provide police reports and discovery in relation to Winston's motions for postconviction relief. On November 2, 2009, Richard Bombik,

through the Cuyahoga County Prosecutor's office, filed a motion to dismiss.¹ For the following reasons, we grant the motion to dismiss and sua sponte dismiss the writs filed against Andrew Smith.

{¶ 2} Initially, we find that Winston's complaint for a writ of mandamus is defective because it is improperly captioned. Civ.R. 10(A) requires the caption of the complaint to state the addresses of all the parties. This court has previously held that such deficiency warrants dismissal. *State ex rel. Larry Calloway v. Court of Common Pleas of Cuyahoga Cty.* (Feb. 27, 1997), Cuyahoga App. No. 71699; *State ex rel. Samuels v. Mun. Court* (Nov. 22, 1994), Cuyahoga App. No. 67792; and *State ex rel. White v. Villanueva* (Oct. 6, 1993), Cuyahoga App. No. 66009.

{¶ 3} We also find that Winston failed to comply with Loc.App.R. 45(B)(1)(a), which mandates that the complaint be supported by an affidavit that specifies the details of the claim. Attaching an affidavit that merely avers that relator has "read the foregoing complaint, and that the statements and averments therein contained are true as he verily believes," does not specify the details of the claim. *State ex rel. Pecsí v. Jones* (Mar. 16, 2000), Cuyahoga App. No. 77464; See, also, *State ex rel. White v. Suster* (Aug. 3, 2000), Cuyahoga App. No. 77894. The failure to comply with the supporting affidavit provision of

¹The respondent Smith is not employed by the Cuyahoga County Prosecutor's Office. However, the Cuyahoga County Prosecutor's Office accepted service for

Loc.App.R. 45(B)(1)(a) further requires dismissal of the complaint for a writ of mandamus. *State ex rel. Smith v. McMonagle* (July 17, 1996), Cuyahoga App. No. 70899; *State ex rel. Wilson v. Calabrese* (Jan. 18, 1996), Cuyahoga App. No. 70077.

{¶ 4} Winston also failed to comply with R.C. 2969.25, which mandates that he attach an affidavit to his complaint that describes each civil action or appeal of a civil action filed in the previous five years. The failure to provide such affidavit constitutes sufficient grounds for dismissal of the relator's complaint for a writ of mandamus. *State ex rel. Zanders v. Ohio Parole Board*, 82 Ohio St.3d 421, 2008-Ohio-218, 696 N.E.2d 594; *State ex rel. Alford v. Winters*, 80 Ohio St.3d 285, 1997-Ohio-117, 685 N.E.2d 1242.

{¶ 5} Despite these procedural defects, in order for this court to issue a writ of mandamus, Winston must establish that he has a clear legal right to the requested relief; that the respondent has a clear legal duty to perform the requested relief; and there must be no adequate remedy at law. *State ex rel. Manson v. Morris* (1993), 66 Ohio St.3d 440, 613 N.E.2d 232, citing *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 451 N.E.2d 225. Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. "The duty to be enforced by a writ of mandamus must be specific, definite, clear and unequivocal." *State ex rel. Karmasu v. Tate*

(1992), 83 Ohio App.3d 199, 205, 614 N.E.2d 827. It should not be issued in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 113 N.E.2d 14; *State ex rel. Cannole v. Cleveland Bd. of Edn.* (1993), 87 Ohio App.3d 43, 621 N.E.2d 850.

{¶ 6} Additionally, if a relator had an adequate remedy at law, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108; *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 564 N.E.2d 86; *State ex rel. Provolone Pizza, LLC v. Callahan*, Cuyahoga App. No. 88626, 2006-Ohio-660; *State ex rel. Grahek v. McCafferty*, Cuyahoga App. No. 88614, 2006-Ohio-4741.

{¶ 7} Initially, we sua sponte dismiss the writs filed against Andrew Smith. Because Smith does not work for the Cuyahoga County Prosecutor's office, Winston cannot establish that Smith has a clear legal duty to perform the requested acts.

{¶ 8} Regarding Winston's request for a writ of mandamus against Bombik, we deny the request because Winston possesses an adequate remedy at law. Winston can ask the trial court to rule on the various motions without a response from the state of Ohio. *State ex rel. Manning v. Montgomery* (1988), 39 Ohio St.3d 140, 529 N.E.2d 935; *State v. Jester*, Cuyahoga App. No. 83520,

2004-Ohio-3611. Accordingly, the availability of an adequate remedy at law precludes this court from granting the writ of mandamus.

{¶ 9} We also grant the motion to dismiss the alternative writ. In post-conviction proceedings, there is no duty to provide civil discovery. *State ex rel. Sherrills v. McMonagle*, Cuyahoga App. No. 92993, 2009-Ohio-2376.

{¶ 10} Accordingly, we grant the motion to dismiss. We also sua sponte dismiss Winston's petition for a writ of mandamus and alternative writ filed against Andrew Smith. Costs to relator. It is further ordered that the clerk shall serve upon all parties notice of this judgment and date of entry pursuant to Civ.R. 58(B).

Writ dismissed.

MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
ANN DYKE, J., CONCUR