[Cite as *State ex rel. Vernon v. Adrine*, 2015-Ohio-2867.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103149

STATE OF OHIO, EX REL. REV. DR. R.A. VERNON, ET AL.

RELATORS

vs.

RONALD ADRINE, CLEVELAND MUNICIPAL COURT JUDGE

RESPONDENT

JUDGMENT:
WRIT DISMISSED

Writ of Mandamus
Motion No. 486940
Order No. 487223

RELEASE DATE: July 10, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} On June 18, 2015, the relators, Dr. R.A. Vernon, Rev. Dr. Jawanza Colvin, Edward Little, Jr., Joseph Worthy, Dr. Rhonda Williams, Julia Shearson, Rachelle Smith, and Bakari Kitwana, commenced this mandamus action against the respondent, Cleveland Municipal Court Judge Ronald Adrine, to compel the judge to issue felony arrest warrants against Cleveland Police Officer Timothy Loehmann pursuant to R.C. 2935.10. This court issued a briefing schedule, and the parties filed their initial briefs on June 29, 2015, including the judge's motion to dismiss. The parties filed their reply briefs on July 6, 2015.[1] The court has reviewed the materials, and this matter is ripe for decision. For the following reasons, this court grants the judge's dispositive motion and dismisses the application for a writ of mandamus.

{¶2} The underlying matter, *In re: Affidavits relating to Timothy Loehmann and Frank Garmback*, concerns the fatal shooting of twelve-year-old Tamir Rice in a Cleveland playground on November 22, 2014. Responding to a complaint that a male was wielding a firearm in the park, Officer Garmback, driving the patrol car, pulled up closely to Tamir Rice, and Officer Loehmann fatally shot him. On June 9, 2015, the eight relators filed affidavits with the Cleveland Municipal Court pursuant to R.C. 2935.09 and 2935.10 swearing that upon review of the surveillance video they each had knowledge of the facts that Officer Loehmann and Officer Gartback committed the

[1] The eight relators represent themselves. Only Rachelle Smith signed the briefs and identified herself as "pro se."

following crimes: (1) aggravated murder, (2) murder, (3) involuntary manslaughter, (4) reckless homicide, (5) negligent homicide, and (6) dereliction of duty.

> **{¶3}** R.C. 2935.09 provides in pertinent part as follows:
> (A) As used in this section, "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.
> * * *
> (D) 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 prosecution attorney * * *.

> **{¶4}** R.C. 2935.10 provides in pertinent part as follows:
> (A) Upon the filing of an affidavit * * * as provided by section 2935.09 of the Revised Code, if it charges the commission of a felony, such judge * * * 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 * * *; otherwise he shall forthwith refer the matter to the prosecuting attorney * * * for investigation prior to the issuance of a warrant.

{¶5} On June 11, 2015, Judge Adrine, issued a ten-page opinion, in which he found that the review of the surveillance video provided the eight affiants with knowledge of the facts and that they executed the affidavits in good faith. Upon review of the affidavits and the video, the judge then ruled that probable cause existed for the following charges against Officer Loehmann: (1) murder, (2) involuntary manslaughter, (3) reckless homicide, (4) negligent homicide, and (5) dereliction of duty. The judge found that probable cause existed only for the charges of negligent homicide and dereliction of duty against Officer Garmback.[2]

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[2]Negligent homicide and dereliction of duty are misdemeanors. R.C. 2935.10 provides that the judge may issue an arrest warrant for misdemeanors. The permissive language takes those

{¶6} However, despite ruling that the affidavits were filed in good faith and were meritorious, the judge did not issue the arrest warrants as required by R.C. 2935.10(A) — "shall forthwith issue a warrant for the arrest * * *." The judge reasoned that the June 2006 amendments to R.C. 2935.09 nullified the mandatory language of R.C. 2935.10. The prior version of R.C. 2935.09 provided that in order to cause the arrest or prosecution of a person charged with committing an offense, a peace officer or a private citizen having knowledge of the facts, shall file with a judge, a clerk of court, or a magistrate an affidavit charging the offense committed or file the affidavit with a prosecuting attorney for the purpose of having a complaint filed by the prosecuting attorney. The amendments first defined a reviewing official as a judge of a court of record, a prosecuting attorney or an attorney charged by law with prosecuting offenses. Subsection (C) allows a peace officer seeking to cause an arrest or prosecution to file a charging affidavit with a reviewing official or a clerk of court of record. Subsection (D) provides that a private citizen seeking to cause an arrest or prosecution may file an affidavit with a reviewing official "for the purpose of review to determine if a complaint should be filed by the prosecuting attorney." The judge concluded that these amendments limit the private citizen's affidavit to just a review to determine if the prosecutor should file a complaint, at which point the provision of Crim.R. 4 apply to the exclusion of the provisions of R.C. 2935.10. Pursuant to Article IV, Section 5(B) of

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charges outside the scope of mandamus. Accordingly, the relators seek to compel felony arrest warrants for only Officer Loehmann.

the Ohio Constitution, the rule prevails over a statute governing procedural matters. Therefore, the judge did not issue any arrest warrants.

{¶7} Convinced that the mandatory language of R.C. 2935.10 must be effected once the prerequisites of merit and good faith have been fulfilled, the relators commenced this mandamus action.

{¶8} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Furthermore, mandamus is not a substitute for appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973); *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Thus, mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerninghan v. Gaughan*, 8th Dist. Cuyahoga No. 67787, 1994 Ohio App. LEXIS 6227 (Sept. 26, 1994). Furthermore, if the relator had an adequate remedy, 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.*, 56 Ohio St.3d 33, 564 N.E.2d 86 (1990). Moreover, mandamus is an extraordinary remedy that is

to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953); *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (8th Dist.1993).

{¶9} In the present case, appeal is an adequate remedy at law. In *State ex rel. Weber v. Waters*, 9th Dist. Medina No. 696, 1977 Ohio App. LEXIS 9893, (July 6, 1977), the relator commenced a mandamus action to compel the clerk of courts and a common pleas judge to exercise their duties under R.C. 2935.09 and 2935.10 to issue arrest warrants for certain individuals. The court of appeals denied the writ holding that the judge and clerk had discharged their duties by finding the affidavits did not establish probable cause. The court then noted that the relator had not appealed that decision and that mandamus is not a substitute for appeal.

{¶10} Moreover, the courts of appeals have repeatedly reviewed issues concerning the subject statutes through appeal. In *Metzenbaum v. Vitantonio*, 8th Dist. Cuyahoga Nos. 79477, 79478, 79479, 79480, and 79481, 2002-Ohio-489, the complainant filed affidavits seeking the prosecution of various individuals and entities in the Lyndhurst Municipal Court. The trial court conducted a probable cause hearing, concluded that the affidavits lacked merits, and dismissed the affidavits. The complainant then appealed the decision to this court, which ruled that the complainant's charges related to R.C. 2935.09 and 2935.10 and affirmed the decision of the municipal court.

{¶11} In *State ex rel. Brown v. Jeffries,* 4th Dist. Ross No. 11CA3275, 2012-Ohio-1522, Brown, the complainant, filed affidavits in the Ross County Common Pleas Court seeking the issuance of criminal warrants under R.C. 2935.09 for crimes allegedly committed against him. When the trial court found the affidavits not meritorious and denied Brown's request to issue warrants, Brown appealed. The Fourth District Court of Appeals ruled that under R.C. 2935.10 the trial judge may not just deny the affidavits and dismiss the matter, but instead needed to refer them to the prosecutor.

{¶12} In *In re Slayman*, 5th Dist. Licking No. 08CA70, 2008-Ohio-6713, the complainant appealed the judge's denial of his request for a probable cause hearing. The Fifth District Court of Appeals affirmed the judge's denial. Similarly, in *Bunting v. State*, 5th Dist. Stark No. 2009CA00153, 2009-Ohio-5007 and *In re: Charging Affidavit of Demis*, 5th Dist. Stark No. 2013 CA 00098, 2013-Ohio-5520, the issues concerning probable cause under the subject statute were reviewed on appeal.

{¶13} Issues raised under the subject statutes are reviewable on appeal. As a corollary, the respondent judge's interpretation of the statutes and his decision not to issue arrest warrants are also reviewable on appeal. Mandamus will not lie if there is an adequate remedy at law.

{¶14} The court does not find the relator's objections to the sufficiency of an appeal persuasive. The failure of the municipal court to issue a "case number" should not prevent it from accepting a notice of appeal in the matter for filing. The judge's opinion is "advisory" only to the extent that it is advising the prosecutor that there is

probable cause for the relevant charges. It is not an advisory opinion in the sense of an interlocutory opinion. The respondent judge ruled on all the charges and interpreted the statutes so as to show that he does not have the ability to issue arrest warrants; there is nothing left for him to do to resolve the matter. Finally, the fact that pursuing an appeal would encompass more delay and inconvenience than seeking a writ of mandamus is insufficient to prevent the appeal from constituting a plain and adequate remedy at law. *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 631 N.E.2d 119 (1994). The court further notes that an appeal will allow a broader range of arguments.

{¶15} Accordingly, this court grants the respondent judge's dispositive motion and denies the application for a writ of mandamus. Relators to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶16} Writ dismissed.

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FRANK D. CELEBREZZE, JR., A.J.,

MARY J. BOYLE, J., CONCUR**S**
ANITA LASTER MAYS, DISSENTS
(SEE ATTACHED DISSENTING OPINION)

ANITA LASTER MAYS, J., DISSENTING:

{¶17} I respectfully dissent.

{¶18} "'[C]ourts in mandamus actions have a duty to construe constitutions, charters, and statutes, if necessary, and thereafter evaluate whether the relator has

established the required clear legal right and clear legal duty,' and in doing so, the courts have a 'duty to resolve all doubts concerning the legal interpretation of those provisions.'" *State ex rel. McQueen v. Court of Common Pleas of Cuyahoga Cty.*, 135 Ohio St.3d 291, 2013-Ohio-65, 986 N.E.2d 925, ¶ 16, citing *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 125, 1998-Ohio-428, 698 N.E.2d 987. Such a case now confronts this court.

{¶19} Pursuant to the principles of statutory construction and R.C. 1.51, apparently conflicting statutory provisions are to be read "in pari materia" so as to give effect to both. The amendments to R.C. 2935.09 were meant to limit the effect of the private citizen's affidavit by "weeding out" the ill-founded ones, *e.g.*, vindictive vendettas. Thus, the General Assembly required a review of the private citizen's affidavits.

{¶20} The fact that the General Assembly did not repeal R.C. 2935.10 in 2006 shows that the legislature intended it to still have effect. It could not have that ability, if the amendments rendered the private citizens' affidavits to mere requests for a complaint. Thus, in synthesizing the two statutes, the amendments were promulgated to eliminate the risk of an unfounded arrest warrant being issued but still requiring a judge to issue an arrest warrant, if the requisites of good faith and merit are fulfilled. Because those requisites were fulfilled, including probable cause, the writ of mandamus should have issued.