

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX. REL,	:	JUDGES:
JAMES F. MORRISON	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
RELATOR	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
DANIEL F. SMITH	:	Case No. 15-CA-46
	:	
RESPONDENT	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Writ of Mandamus

JUDGMENT: Dismissed

DATE OF JUDGMENT: February 12, 2016

APPEARANCES:

For Plaintiff-Relator

JAMES F. MORRISON, pro se
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For Defendant-Respondent

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Baldwin, J.

{¶1} Relator, James F. Morrison, has filed a Petition for Writ of Mandamus requesting this Court order Respondent to file affidavits presented by Relator to Respondent pursuant to R.C. 2935.09. Respondent has filed an answer alleging the petition fails to state a claim upon which relief may be granted.

{¶2} Section D of R.C. 2935.09 outlines the procedure for a private citizen to file an affidavit charging a criminal offense:

(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 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.

{¶3} R.C. 2935.09(A) provides the definition of reviewing official, "(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."

{¶4} A clerk of courts is not a reviewing official under this definition.

{¶15} The facts of this case appear to be undisputed. Relator, who is incarcerated, sent affidavits alleging criminal offenses to Respondent. Respondent is the clerk of courts for the Mansfield Municipal Court. Upon receiving the affidavits, Respondent did not file the affidavits, but instead forwarded them to the magistrate of the Richland County Court of Common Pleas.

{¶16} We will now examine the procedure outlined in R.C. 2935.09(D). The first sentence of R.C. 2935.09(D) explains that a private person may file an affidavit with a “reviewing official.” As noted above, the clerk of courts is not a reviewing official.

{¶17} The second sentence of R.C. 2935.09(D) provides that a private person may file the affidavit with the clerk of courts if (1) it is before or after the normal business hours of the reviewing official and (2) the clerk is open during the reviewing official’s non-business hours. In this case, it appears the affidavit was sent directly to the clerk. Because Relator was incarcerated, it must be presumed, the affidavit was mailed. There is no evidence provided by Relator nor any allegation contained in his petition that the office of the reviewing officials was closed at the time the clerk received the affidavit. The plain language of this section only contemplates clerk involvement if it is before or after the normal business hours of a reviewing official.

{¶18} The final sentence requires a clerk to forward an affidavit to a reviewing official if the clerk receives the affidavit during the reviewing official’s non-business hours. In this case, the clerk did forward the affidavit to the reviewing official although no evidence has been presented showing he was required to do so because there is no evidence he received it during the reviewing official’s non-business hours.

{¶9} In short, under R.C. 2935.09, the clerk's legal duty to file an affidavit only arises when the clerk receives an affidavit from a private citizen during a reviewing official's non-business hours. Relator makes no allegation in his complaint that the affidavit was received by the clerk during the reviewing official's non-business hours, therefore, the petition fails to state a claim upon which relief may be granted.

{¶10} Relator also relies on section R.C. 2935.10(A) for imposing a duty of the clerk to file the charging affidavit.

{¶11} R.C. 2935.10 provides,

(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.

{¶12} The reference to the clerk in this section must be read in pari materia with section R.C. 2935.09. The clerk has no reviewing authority. A clerk is only required to issue a warrant if the reviewing authority finds the claim to be meritorious and filed in good faith. The magistrate who reviewed the affidavit from Relator advised Relator the matter had been referred to the prosecuting attorney for investigation. Therefore, the magistrate did not find the affidavit to have merit and did not find it was filed in good faith. For these reasons, the clerk's duty under R.C. 2935.10 did not arise.

{¶13} Because Relator has failed to state a claim in his petition upon which relief may be granted, the petition is dismissed.

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.