

MOTION TO DISMISS

I. INTRODUCTION

Pursuant to S.Ct.Prac.R. XIV, Section 4, Respondent, Judge Lawrence S. Turner, hereby moves this Court to dismiss Relator's Verified Complaint which seeks a writ of prohibition, on the grounds that the alleged claim is moot. Respondent has maintained throughout this case that Relator's claim is moot. And, as will be set forth in more detail below, the proceedings Relator claims are extra-judicial have now been terminated in their entirety, and the court order Respondent seeks to enjoin has been permanently superseded. For this reason, Relator's claim is moot, and the Verified Complaint must be dismissed.

II. PROCEDURAL HISTORY AND FACTS

On February 13, 2007, Relator, Richard F. Schwartz, the Law Director and Prosecuting Attorney for the city of Newton Falls, Ohio, filed a Verified Complaint asking this Court to issue a writ of prohibition permanently enjoining Respondent, the Judge of the Newton Falls Municipal Court, from conducting judicial proceedings of the Newton Falls Municipal Court at a location outside the "territorial jurisdiction" of the court and from enforcing the provisions of a January 9, 2007 Journal Entry. (Jan. 9, 2007 Journal Entry, attached to Verified Complaint.) Indeed, Relator's entire prohibition claim centers on this January 9, 2007 Journal Entry.

Under the January 9, 2007 Journal Entry, Respondent determined that the Newton Falls Municipal Court Judge would "hold arraignments of defendants in the custody of the Sheriff's Department in the Trumbull County Jail[.]" *Id.* at 2. The Trumbull County Jail is located outside of Newton Falls, Ohio, in Warren, Ohio (within the same county). Relator has not alleged that the defendants for whom in-jail proceedings have been held pursuant to the January 9, 2007 Journal Entry were not subject to the jurisdiction of the Newton Falls Municipal Court.

In fact, Relator acknowledges that the defendants were “Newton Falls Municipal Court prisoners.” (See Verified Complaint at ¶17.)

The January 9, 2007 Journal Entry further indicated that the Sheriff’s Department or other law enforcement agencies were not precluded from transporting defendants to the Newton Falls Municipal Court for arraignments nor was the court precluded from directing defendants to appear in the Newton Falls Municipal Court for arraignments. Additionally, if a defendant or his/her counsel objected or sought re-arraignment, such arraignment would be held at the Newton Falls Municipal Court. (Jan. 9, 2007 Journal Entry at pp. 1-2.) The January 9, 2007 Journal Entry further stated that such proceedings would not continue if the Sheriff’s Department was not in accord with the arrangements. *Id.* Finally, the Journal Entry indicated that the Trumbull County Commissioners had pledged to provide the Newton Falls Municipal Court, in the near future, a system to allow for electronic, video arraignments. *Id.* at 1.

Thereafter, the court and the Trumbull County Sheriff’s office met to review the results of the first week of in-jail arraignments. (See Jan. 23, 2007 Journal Entry, attached to Verified Complaint.) Safety concerns were noted and as a result, on January 23, 2007, a second Journal Entry was filed suspending the in-jail arraignments. *Id.* Three weeks later, and in the absence of any other in-jail proceedings, Relator filed this prohibition action.

In his Verified Complaint, Relator asserts that “Respondent’s decision to conduct arraignments of Newton Falls Municipal Court prisoners, and other hearings, at a location other than one within the territorial jurisdiction of the Newton Falls Municipal Court is legally impermissible[.]” and that such conduct “constitutes an extra-judicial exercise of jurisdiction * * * [.]” (See Verified Complaint at ¶¶15, 17.) Relator asks this Court to enjoin Respondent from conducting any judicial proceedings at a location outside the territorial jurisdiction of the

Newton Falls Municipal Court and from enforcing the provisions of the January 9, 2007 Journal Entry. *Id.* at p. 5.

In May 2007, the court regularly began conducting video hearings, as the equipment had since been put in place. On July 5, 2007, a Journal Entry terminating the in-jail arraignments and other non-adversarial proceedings that were the subject of the January 9, 2007 Journal Entry was filed. (See July 5, 2007 Journal Entry, attached hereto as Exhibit 1.)¹ Specifically, the July 5, 2007 Journal Entry references the January 9, 2007 Journal Entry that “inaugurated a program” to arraign defendants in the custody of the Trumbull County Sheriff. *Id.* at 1. Pursuant to the January 9, 2007 Journal Entry, the program was an interim measure until two-way, live video communications could be established between the jail and the court. *Id.* The July 5, 2007 Journal Entry also references the January 23, 2007 stay of the in-jail proceedings and states that no such proceedings have taken place since the January 23, 2007 Journal Entry. *Id.*

The July 5, 2007 Journal Entry notes that on May 2, 2007, the court had journalized an entry indicating that the video equipment had been put in place and ordering the court to hold video hearings of defendants in the Trumbull County Jail. *Id.* It also notes that the court has been conducting video hearings for over two months. *Id.* at pp. 1-2. The July 5, 2007 Journal Entry orders the court to hold such video hearings, and it specifically terminates the January 9 and 23, 2007 Journal Entries and states that such previous entries are “permanently superseded.” *Id.* at 2.

The acts Relator alleges are extra-judicial have not occurred in over five months and have been terminated by order of the Newton Falls Municipal Court. Specifically, the January 9, 2007

¹ It is well established that an event that causes a case to become moot may be proved by extrinsic evidence. See *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, at ¶8.

Journal Entry—the Entry upon which this action is based—has been permanently superseded by the July 5, 2007 Journal Entry, which orders the court to conduct video hearings from the Newton Falls Municipal Court. In short, Relator’s claim is moot and, accordingly, must be dismissed.

III. STANDARD OF REVIEW

In order to be entitled to a writ of prohibition, Relator must establish that: (1) Respondent *is about to* exercise judicial power; (2) the exercise of that power is unauthorized by law; and (3) denial of the writ will cause injury for which there is no other adequate remedy at law. See *State ex rel. Westlake v. Corrigan*, 112 Ohio St. 3d 463, 2007-Ohio-375, at ¶12. (Emphasis added.) Although the proceedings at issue were not unauthorized by law, and although no injury has occurred for which there is no adequate remedy at law, the proceedings about which Relator complains are no longer being conducted by Respondent. Thus, even if Relator could establish the last two elements required in order for a writ of prohibition to issue (which Relator cannot), Relator is unable establish the first element—that Respondent is about to exercise judicial power.

Indeed, because the alleged extra-judicial acts complained of have been terminated by Respondent, Relator’s claims are moot. Further, Relator cannot show any exception to the mootness doctrine. Accordingly, the Verified Complaint must be dismissed.

IV. LAW AND ARGUMENT

A. **Relator’s Claim is Moot Because the January 9, 2007 Journal Entry, Which Forms the Basis of this Prohibition Action, Has Been Terminated by a Subsequent Court Order That Permanently Supersedes the January 9, 2007 Journal Entry.**

1. **Because the January 9, 2007 Journal Entry has been superseded and the procedures ordered thereunder have been terminated by subsequent court order, prohibition does not lie to prevent any future, alleged unauthorized exercise of jurisdiction.**

By the July 5, 2007 Journal Entry of the Newton Falls Municipal Court, the practice sought to be prevented by Relator has been terminated. By this same July 5, 2007 order, the January 9, 2007 order that Relator seeks to enjoin has been *permanently* superseded. This Court has determined that a prohibition claim can be rendered moot when the act sought to be prevented is discontinued by the respondent. Compare *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, ¶¶18-19 (wherein this Court determined that a prohibition action was not moot or premature because, even though not yet conducted, the extra-judicial proceeding had not actually been cancelled by the respondent). See also, *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, ¶26 (to the extent relator seeks to prevent a policy that is discontinued by a judge, the prohibition claim is moot). In the present case, the proceedings at issue have been permanently discontinued.

In *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶15, this Court determined that a prohibition action will not necessarily be rendered moot when the unauthorized act occurs before a court can rule on the prohibition claim. The principle set forth in *Zaleski* is meant to permit a court to issue a writ to prevent a lower court from exercising, *in the future*, the same (allegedly) unauthorized jurisdiction. *Id.* In the case at bar, however, Relator seeks a writ to enjoin the enforcement of a general order of the Newton Falls Municipal Court that has been *permanently* superseded by a subsequent general order of the court that specifically terminates the practice complained of. Thus, the principle set forth in *Zaleski* simply has no application in the case at bar, because there is no future act to prevent.

To assert that this Court may nonetheless issue a writ in this case is tantamount to asking this Court to engage in an advisory opinion, and it is well-settled that this Court will not indulge

in advisory opinions. See *State ex rel. White v. Koch, Judge*, 96 Ohio St.3d 395, 2002-Ohio-4848, at ¶18. There is only one exception to the mootness doctrine, and it does not apply here.

2. The issue presented is not capable of repetition yet evading review.

The limited exception to the mootness doctrine provides that a court may rule on an otherwise moot case, such as the one here, where the issues raised are capable of repetition yet evading review. See *State ex rel. Beacon Journal Publishing Co. v. Donaldson* (1992), 63 Ohio St.3d 173, 175. This applies only in exceptional circumstances, where both of the following two factors are present: (1) the challenged action is too short in duration to be fully litigated before its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231, citing *Spencer v. Kemna* (1998), 523 U.S. 1, 17-18. Neither factor is present here.

In determining whether the first factor has been met, the Court has looked at whether the challenged action is in the nature of a finite act or proceeding that could begin and end before an appellate court could consider the propriety of such act. This Court has recognized, for example, that court closure cases often evade review, since a closure order usually expires before an appellate court can consider it. See *State ex rel. Dispatch Printing Co. v. Loudon* (2001), 91 Ohio St.3d 61, 64. It is significant that the “action” Relator challenges here was not a single act conducted in one particular case. In contrast to the court closure cases, the challenged action here consisted of a general order of the court and was a practice applicable to all arraignments and other non-adversarial proceedings. Thus, if the general order at issue here were still in effect, then it would obviously not be too short in duration to fall under the first prong of the

exception to the mootness doctrine. For this reason alone, the exception to the mootness doctrine does not apply.

More on point is the second prong of the mootness exception, which requires that there be a reasonable expectation that the same complaining party will be subject to the same action again. There is no reasonable expectation that Relator (assuming, for the sake of argument only, that it was the Relator who was “subject to” the general order calling for in-jail arraignments) will be subject to the same action. Again, the general order that Relator has asked this Court to enjoin has been permanently superseded by a subsequent order that terminates the conduct complained of. In *Bedinghaus*, this Court held that to the extent a relator seeks to prevent a policy that has been discontinued, a prohibition claim is rendered moot. *Id.* at ¶26. Obviously, if the policy or practice complained of has been specifically discontinued, it is far less likely that the complaining party will be subject to the same action again.

In his Memorandum in Opposition to Respondent’s Motion to Dismiss, Relator argued that this matter was capable of repetition yet evading review because the January 23, 2007 Journal Entry only “temporarily halted” the in-jail proceedings and did not vacate or withdraw the January 9, 2007 Journal Entry. (See March 19, 2007 Memorandum in Opposition at p. 5.) Given that the January 9 and January 23, 2007 Journal Entries have now been “terminated” and “permanently superseded” by the July 5, 2007 Entry, Relator can no longer assert this same argument. Indeed, the facts show that there is no reason to expect that the conduct complained of will occur again.

A recent case from this Court is analogous to the instant case and supports the conclusion that this matter is moot. In *State ex rel. Montgomery Cty. Pub. Defender v. Rosencrans*, 111 Ohio St.3d 338, 2006-Ohio-5793, a mandamus action was filed against a city and its mayor

wherein the relator sought to compel the mayor to, among other things, conduct arraignments in open court. Id. at ¶¶1, 6. Shortly after the mandamus action was filed, however, the mayor ended his previous policy and stopped the practice of conducting arraignments that were not in open court. Id. at ¶¶9, 14.² Because of this, the Court concluded there was no reasonable expectation that the relator would be subject to the same practice again. Id. at ¶¶17, 19.

The same reasoning is applicable here. Respondent has ceased the very practice about which Relator complains. And there can be no legitimate argument that there remains a reasonable expectation that Respondent will resume the practice of holding in-jail arraignments. The in-jail arraignments were first introduced on January 9, 2007 as a cost-savings and safety measure. (See Jan. 9, 2007 Journal Entry at p. 1.) More importantly, the January 9, 2007 Journal Entry specifically noted that the county had pledged to provide for electronic, video arraignments “in the near future” and that it was “expressly understood” that the county, the sheriff’s department and the court would be working expeditiously toward achieving the capability to conduct video arraignments. Id. at pp. 1, 2. Clearly, Respondent’s practice of holding in-jail arraignments was a temporary practice conducted only until video hearings could be set up.

Respondent’s termination of the January 9, 2007 Journal Entry was not due to Relator’s filing of the instant prohibition case. Thus, Relator has no argument, for example, that Respondent has only temporarily halted the practice ordered in the January 9, 2007 Journal Entry, only to resume such practice at a later time when this case is resolved. Instead, Respondent ceased the practice in January 2007 and has since “permanently superseded” the January 9, 2007 Journal Entry because the practice at issue has been replaced by video hearings.

² In the instant case, there is no allegation (and there is no evidence) that the in-jail proceedings were not held in “open court.”

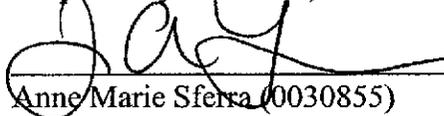
(See July 5, 2007 Journal Entry, attached at Exhibit 1.) This is entirely consistent with the plan set forth in the January 9, 2007 Journal Entry. As the July 5, 2007 Journal Entry states, the program of in-jail arraignments established in the January 9, 2007 Journal Entry was an interim measure until video hearing capabilities could be established. Id. at p. 1.

Video hearing capabilities have indeed been established, and such hearings have been conducted for over two months now. Id. at pp. 1-2. No in-jail proceedings have been conducted for over five months. The January 9, 2007 Journal Entry has been permanently superseded by the new order because video hearings are now available and occurring. There is simply no reasonable expectation that Relator will be subjected to the same action that is the subject of the instant prohibition claim. For this reason, the issue set forth in this prohibition action is not capable of repetition yet evading review. The matter is indeed moot, and it must accordingly be dismissed.

V. CONCLUSION

For all of the reasons set forth above, the issues set forth in the instant prohibition action are moot, and no exception to the mootness doctrine applies. Relator's Verified Complaint, therefore, must be dismissed.

Respectfully submitted,



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Lawrence S. Turner, Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Respondent's Motion to Dismiss on the Basis of Mootness was sent via electronic mail and regular U.S. mail, postage prepaid this 6th day of July 5007, to the following:

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IN THE NEWTON FALLS MUNICIPAL COURT
TRUMBULL COUNTY, OHIO

FILED
Newton Falls Municipal Court

JUL 05 2007

By _____

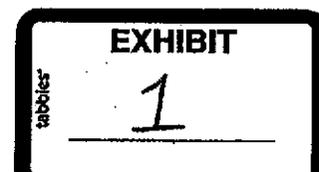
In the Matter of:]
] Case No. GEN-0700018
ARRAIGNMENT OF DEFENDANTS]
IN THE CUSTODY OF THE]
TRUMBULL COUNTY SHERIFF] Journal Entry

The matter came on for consideration this 5th day of July 2007 upon the Court's own motion. On January 9, 2007, in Case No. GEN-0700001, this Court inaugurated a program to arraign defendants in the custody of the Trumbull County Sheriff. Under that program, the Judge of this Court would travel to the Trumbull County Adult Justice Center and conduct arraignments, as well as other non-adversarial proceedings, in cases arising under the jurisdiction of the Newton Falls Municipal Court. Pursuant to the terms of that journal entry, the program was an interim measure until the County, the Sheriff and this Court could establish two-way, electronic video communications between the jail and the Court. In the alternative, the program was to last six (6) months, until early July 2007.

On January 23, 2007, the Court stayed in-jail arraignments due to security concerns of the Trumbull County Sheriff. No further in-jail proceedings occurred after the January 23, 2007 journal entry.

On May 2, 2007, this Court journalized an Entry noting that the electronic (video) communication equipment had been installed to facilitate video hearings and ordering that the Judge of the Newton Falls Municipal Court hold video hearings for defendants in the custody of the Sheriff's Department in the Trumbull County Jail.

It appearing that the current practice of transporting defendants in the custody of the Trumbull County Sheriff to this Court is (i) an excessive use of manpower by the Sheriff's Department; (ii) that such manpower can be far better utilized by the Sheriff protecting and serving the citizens of Trumbull County patrolling the roads and highways of the county and investigating criminal activity; (iii) there is an inherent danger to the public, the defendants and those deputies transporting them in taking prisoners to and from Court; (iv) the Court's personnel, Trumbull County Sheriff and the Trumbull County Commissioners have worked diligently to provide a system of electronic (video) communication to the Newton Falls Municipal Court; (v) the electronic equipment and software have been in place to facilitate such video arraignments since early May 2007; (vi) the Trumbull County Jail has accommodations for holding video hearings in a judicial setting; (vii) no defendant's constitution or procedural safeguards will be prejudiced by holding Newton Falls Municipal Court video hearings where the Defendants are in the Trumbull County Jail; (viii) the Warren Municipal Court has contributed the necessary in-court equipment, at no costs to the taxpayers of the district, to accommodate the conducting of video arraignments where the Defendant is in the Trumbull County Jail and the Court is in its courtroom in Newton Falls; and (ix) said video hearings have



now been conducted by the Court for over two months. With the installation, calibration, and testing of the in-Court video communication equipment, and the actual conducting of video hearings, the Court has determined that the judicial travel to the Jail is no longer necessary and, in fact, is more costly than conducting such hearings via the electronic video equipment.

As used in this Order, "video hearings" shall include arraignments and probable cause and initial bond hearings. Video hearings shall consist of the defendant being at the Trumbull County Jail, in the judicial suite, or at such other location as the Sheriff or other law enforcement agency determines and the Court in its courtroom, in open court, in Newton Falls. Communication between the defendant and the Court shall be by video and audio equipment of sufficient quality that the defendant can see and hear the Court and other participants in the case and the Court can see and hear the defendant.

The Court finds that it can schedule and has scheduled its Judge to conduct such video hearings in late mornings, subject to other Trumbull County Municipal and County Courts' usage schedules. Such scheduling by this Court is for Monday, Tuesday and Thursday of each week at 11:30 o'clock a.m., subject to modification for other scheduling requirements or for the convenience of the Sheriff's Department. In consideration whereof, it is, by this Court

ORDERED that its Judge shall hold video hearings for defendants in the custody of the Sheriff's Department in the Trumbull County Jail on Monday, Tuesday and Thursday mornings provided such dates are regular business days for the Court. It is further

ORDERED that such video hearings do not preclude the Sheriff's Department or other law enforcement agencies from transporting defendants to the Court for arraignment in Newton Falls; nor the Court directing that defendants appear in person in the Court for arraignment. It is further

ORDERED should any defendant object to the video hearing procedure and such objection being made prior to the hearing, such video hearing may, at the Court's discretion, be stayed and the Court direct that the defendant appear in person in the Court. Should the defendant, or counsel for the defendant, object to the video hearing at or subsequent to the start of the video hearing, the Court may, at its discretion, rehear the matter with the defendant physically present in the Court. It is further

ORDERED that this accommodation shall continue so long as the Sheriff's Department and the Court are in agreement to such arrangement. It is further

ORDERED that the procedure wherein the Judge of this Court would travel to the Trumbull County Jail be, and it hereby is, terminated and the provisions of the January 9, 2007, and January 23, 2007 journal entries are permanently superseded hereby. It is further

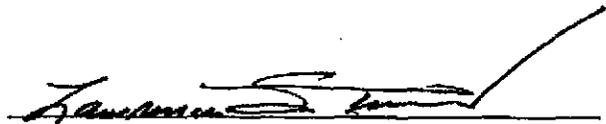
ORDERED that any financial arrangements between the defendants and the Court, such as the posting of bond, payment of costs, etc., shall be processed under the same guidelines as the Sheriff's Department has with this Court's Clerk of Courts and with other Courts conducting video arraignments. It is further

FILED
Newton Falls Municipal Court

JUL 05 2007

By _____

ORDERED that this Order shall not affect nor change the current practice of transporting defendants to the Newton Falls Municipal Court for reasons other than such proceedings as provided herein, unless ordered by this Court.



Lawrence S. Turner
Judge

July 5, 2007

Copy to: Trumbull County Sheriff
Warren Municipal Court
Law Director, City of Newton Falls

FILED
Newton Falls Municipal Court

JUL 05 2007

By _____