

IN THE SUPREME COURT OF OHIO

BRIAN HANEY,

Plaintiff,

vs.

STEPHEN A. WOLAVER,

Defendant.

FILED :  
NOV 09 2007 :  
CLERK OF COURT :  
SUPREME COURT OF OHIO :

Case No. 2007-1912

DEFENDANT'S ANSWER TO  
WRIT OF MANDAMUS  
ACTION AND MOTION TO  
DISMISS UNDER CIV. R.  
12(B)(6)

ANSWER

Now comes the Stephen A. Wolaver, Judge of the Greene County Court of Common Pleas, by and through the Office of the Greene County Prosecuting Attorney, and files its Answer in the above captioned matter.

1. Stephen A. Wolaver admits he is the Common Pleas Court Judge assigned to the Defendant's criminal case, *State of Ohio v. Brian Haney*, Greene County Court of Common Pleas Case No. 2006 CR 0270.
2. All remaining allegations are denied generally, specifically, and/or for lack of knowledge sufficient to form a belief as to the truth and/or validity of said allegations.
3. All the remaining allegations contained in Plaintiff's Complaint for Writ of Mandamus not otherwise specifically admitted or denied herein are denied.

MOTION TO DISMISS

STATEMENT OF THE CASE

The Plaintiff, Brian Haney, was the subject of a four count indictment by the Grand Jury filed on April 19, 2006. The Defendant was charged with: Count I, Aggravated Burglary, a violation of O.R.C. 2911.11(A)(1), a first degree felony;

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Count II, Disrupting Public Service, a violation of O.R.C. 2909.04(A)(1), a fourth degree felony; Count III, Abduction, a violation of O.R.C. 2905.02(A)(2), a third degree felony; and Count IV, Gross Sexual Imposition, a violation of O.R.C. 2907.05(A)(1), a fourth degree felony.

On April 29, 2006, the Plaintiff appeared and entered a plea of 'not guilty'. However, the Plaintiff entered a plea of guilty on July 7, 2006, pursuant to a plea agreement. That agreement included a stipulated prison sentence of five years and dismissal of Count IV of the indictment in exchange for the Plaintiff's guilty plea to Counts I-III of the indictment.

The Plaintiff timely appealed his conviction to the Second District Court of Appeals and also he filed a Petition for Post-Conviction Relief. The trial court held a hearing on the Plaintiff's Petition, and subsequently denied it. The Plaintiff then timely filed a notice of appeal the trial court's decision to deny post-conviction relief. The Clerk of Court then had the transcript prepared for a hearing on the Plaintiff's Petition for Post-conviction Relief. The transcript was filed August 24, 2007. The Plaintiff's next filed a Motion for Transcript at the State's Expense on September 28, 2007. It appears that the Plaintiff is seeking an order from this Court to require the trial court to rule on the September 28<sup>th</sup> motion. The Plaintiff filed the instant action on October 18, 2007.

## STATEMENT OF FACTS

In the early morning hours of April 15, 2006, the Defendant entered the apartment of Tammy Hayden by stealth through the backdoor. Once he got inside the apartment, he attacked the victim. First, he knocked the victim's phone out of her hand when she attempted to call the police; he further cut the phone cord to the victim's land line in order to prevent her from calling the police. While inside the apartment, the Defendant struck the victim several times causing visible physical injury to her face, neck and torso. The victim attempted to escape, but was forcibly restrained from leaving by the Defendant.

At the Defendant's plea hearing on July 7, 2006, he was represented by counsel, and the trial court engaged the Defendant in a painstaking and thorough Rule 11 colloquy. During that colloquy, the trial court explained to the Defendant what Constitutional rights he was waiving by entering a plea of guilty (TR p. 5, 11-13). The trial court also asked questions regarding the voluntariness of the Defendant's plea. At all times, the Defendant indicated that he plea was, in fact, voluntary (TR p. 5, 6). The trial court also spent a lengthy amount of time explaining sentencing requirements to the Defendant. The trial court indicated that he would impose the stipulated sentence (TR p. 6), that there was "no such thing as good time credit" and, less any jail time credit earned in the Greene County Jail, he would serve the entire five year sentence (TR p. 8), and that post-release control was mandatory for five years upon the Defendant's release from prison (TR p. 8). The trial court further explained the consequences of violating post-release control (TR p. 8-10).

With respect to judicial release, the trial court asked the Defendant, "Do you appreciate the fact that because you've reached this agreement as to a specific sentence that you will not be receiving community control today nor will you be receiving judicial release?" (TR p. 10). The Defendant indicated that he was told he would be able to file for judicial release after serving four years of his sentence (TR p. 10). The trial court clearly explained to the Defendant that, because he was stipulating to his sentence, judicial release would not occur (TR p. 10-11). After this exchange took place, the trial court then asked, "Understanding all that I've just told you, the consequences of the sentence, in light of what you will do regarding the sentence that will be imposed, and these other matters, understanding that, is it your desire for me to proceed forward and to accept your change of plea to guilty?" (TR p. 11). The Defendant's response after having the information regarding judicial release clarified was an unequivocal "yes, sir" (TR p. 11).

#### LAW AND ARGUMENT

**A. Plaintiff's Petition for a Writ of Mandamus must be dismissed pursuant to section R.C. 2731.04, Civ. R. 17(A), and Civ. R. 12(B)(6).**

R.C. 2731.04 requires that in a writ of mandamus action, the application must be by petition, *in the name of the state on the relation of the person applying, and verified by affidavit. (Emphasis added)*. In the instant case, Plaintiff's filing is not captioned appropriately. It is captioned in the manner of the criminal case against him. Thus, on its face, the Action for Writ of Mandamus must be dismissed. *See Litigade v. Custodian of Records for Lakewood Police Dept.*, 75 Ohio St. 3d 508, 1996-Ohio-205 (holding that Litigade's action must be

dismissed for failing to bring complaint in the name of the state on relation of Litigade). Further, Civ. R. 17(A) requires that every action shall be prosecuted in the name of the real party in interest. The Rule also provides, in pertinent part, when a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of the state. Thus, pursuant to R.C. 2731.04, a petition for a writ of mandamus shall be brought in the name of the state, and accordingly, Civ. R. 17(A) is thereby triggered.

Therefore, because of the failure of the Plaintiff to abide by both the statutory provision and the procedural rule, and because the Plaintiff has not sought to amend its complaint in order to comply, the Plaintiff has failed to state a claim upon which relief can be granted. Accordingly, the Defendants move for dismissal under Civ. R. 12(B)(6).

**B. Plaintiff's Complaint for Writ of Mandamus must be dismissed as moot.**

The Plaintiff is seeking a Writ of Mandamus from this Court that would order the Greene County Court of Common Pleas to grant his Motion for Transcript at State Expense that was filed September 28, 2007. This petition is now moot, as Judge Wolaver issued an order granting the September 28<sup>th</sup> Motion on November 5, 2007 (see attached). Subsequent performance of the act requested in the mandamus action generally renders the action moot. *State ex rel. Scruggs v. Sadler*, 102 Ohio St. 3d 160, 2004-Ohio-2054. Further, because this is a specific motion, the Plaintiff's claim is not capable of repetition. Accordingly, this petition must be dismissed.

CONCLUSION

For the foregoing reasons, the Plaintiff's petition for a writ of mandamus ordering Judge Wolaver to grant Plaintiff's motion for transcript at state expense should be dismissed as moot, and as improperly filed. The Defendant prays that this Court dismiss the petition for the aforementioned reasons.

Respectfully Submitted,

STEPHEN K. HALLER  
PROSECUTING ATTORNEY

By: *Elizabeth A. Ellis*  
Elizabeth A. Ellis (#0074332)  
Assistant Prosecuting Attorney  
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TX: (937) 562-5669  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing has been sent via regular U.S. Mail to Brian Haney, Inmate #526-896, London Correctional Institution, P. O. Box 69, London, Ohio 43140 on the date the same was filed.

*Angela McHard*

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IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO  
FILED

2007 NO -5 PM 3:49

STATE OF OHIO

TERRI A. HAZER, CLERK CASE NO. 2006 CR 270  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

Plaintiff

-vs-

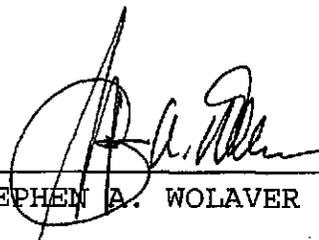
BRIAN HANEY

JUDGMENT ENTRY

Defendant

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This matter comes before the Court upon Defendant's Motion for Transcripts at the State's Expense filed on September 28, 2007. The Court finds said motion to be well taken and grants the same.

IT IS SO ORDERED.

  
\_\_\_\_\_  
JUDGE STEPHEN A. WOLAVER 11/5/7

SERVICE OF COPY: A copy hereof was served upon:

Brian Haney, #526-896, London Correctional Institution, P.O. Box 69, London, Ohio 43140  
Greene County Prosecutor's Office, 61 Greene Street, Xenia, Ohio 45385

  
\_\_\_\_\_  
ASSIGNMENT COMMISSIONER

CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL  
FILED November 5, 2007  
CERTIFIED THIS 5<sup>th</sup> DAY OF Nov., 2007  
Paul Richards  
DEPUTY CLERK OF COURTS, GREENE COUNTY, OHIO

COMPUTER

07-11-0663