

ORIGINAL

IN THE SUPREME COURT OF OHIO

[State ex. rel.] Kirk D. Toms,

Relator,

Case No. 09-1335

v.

Original Action in Mandamus

The Honorable Daniel T. Hogan,
et al,

Respondents.

**RESPONDENTS JUDGE DANIEL T. HOGAN, ET AL.'S
MOTION TO DISMISS**

Kirk D. Toms
608 East Jenkins Ave.
Columbus, Ohio 43207
Relator
PRO SE

RON O'BRIEN (0017245)
Prosecuting Attorney
Franklin County, Ohio

Patrick J. Piccininni (0055324)
Asst. Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520
FAX (614) 462-6012
pjpccin@franklincountyohio.gov
COUNSEL FOR JUDGE DANIEL T. HOGAN, ET AL.

FILED
AUG 10 2009
CLERK OF COURT
SUPREME COURT OF OHIO

RESPONDENT'S MOTION TO DISMISS

Now comes Respondents Judge Daniel T. Hogan, *et al.* (hereinafter "Respondents"), by and through undersigned counsel, and move this Court to dismiss Relator's writ of mandamus for failure to comply with Sup. Ct. R. X(4)(B) or in the alternative under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted. Respondents respectfully request that this Motion to Dismiss be granted in their favor and Relator's writ of mandamus be denied. Respondents' position is more fully set forth in the attached Memorandum in Support and is incorporated herein by reference.

Respectfully submitted,

**RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO**


PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
P: (614) 462-3520
F: (614) 462-6012
ppiccin@franklincountyohio.gov
Counsel for Respondents

MEMORANDUM IN SUPPORT

I. Introduction

This action is before the Court on Relator's Petition for a Writ of Mandamus filed July 29, 2009. Relator asks this Court to compel Respondents Judge Daniel T. Hogan and court reporter Thomas K. Cheney to provide a free transcript of proceedings of a July 20, 2009 in which Relator was a criminal defendant. On July 21, 2009, Relator made a public records request for the transcript pursuant to Ohio Rev. Code § 149.43. Respondents denied Relator's request for a free copy of the transcript.

II. Law and Argument

A. Standard of Review

In considering a motion to dismiss for failure to state a claim, the Court must construe all material allegations in the Complaint and all inferences that may be reasonably drawn there from in favor of the nonmoving party. *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 653 N.E.2d 1186. In order for a trial court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that plaintiff can prove no set of facts warranting relief. *State ex rel. Jennings v. Nurre* (1995), 72 Ohio St.3d 596, 651 N.E.2d 1006.

B. Relator Failed to Comply with Supreme Court Practice Rule X(4)(B).

Supreme Court Practice Rule X(4)(B) requires that a complaint be accompanied by a sworn affidavit that attests the Relator has personal knowledge of facts that the Relator could competently testify to that entitle the Relator to the relief sought in the Complaint. Failure to comply with the sworn affidavit requirement of Rule X(4)(B) warrants dismissal

of the action. *State ex rel. Evans v. Blackwell* (2006), 111 Ohio St.3d 437, 2006-Ohio-5439, at ¶31, *State ex rel. Esarco v. Youngstown City Council* (2007), 116 Ohio St.3d 131, 2007-Ohio-5699, at ¶14. A review of the complaint indicates that Relator has failed to attach an affidavit that complies with Rule X(4)(B), therefore a dismissal of Relator's Complaint is warranted.

C. Relator Has No Right to the Relief Prayed For.

In the alternative, Relator has no right to the relief prayed for in his Complaint. For a writ of mandamus to issue, a relator must show that they have a clear legal right to the relief prayed for, the respondent is under a clear legal duty to perform the requested act, and the relator has no plain and adequate remedy in the ordinary course of the law. *State, ex rel. Olander, v. Ohio Environmental Protection Agency* (1989), 45 Ohio St.3d 196, 197, citing *State, ex rel. Berger, v. McMonagle* (1983), 6 Ohio St. 3d 28.

Relator cannot meet the requirements for a writ of mandamus because Relator has no right to a free copy of a court transcript. Relator made a request for the transcript under the public records statute, Ohio Rev. Code § 149.43. But, "R.C. 149.43 does not require a public-records custodian to provide copies of records free of charge; instead, the Public Records Act requires only that copies of public records be made available at cost." *State ex rel. Call v. Fragale* (2004), 104 Ohio St.3d 276, 2004-Ohio-6589, at ¶6, *accord State ex rel. Call v. Zimmers* (1999), 85 Ohio St.3d 367, 708 N.E.2d 711 (holding that twenty dollar fee to cover the cost of blank cassette tapes allowable under R.C. 149.43)

Pursuant to Ohio Rev. Code § 2301.24, the Franklin County Court of Common Pleas has set a fee for the transcription of a shorthand record. Appellant's public record request may be an attempt at an end-run around paying the court reporter fee; but a public

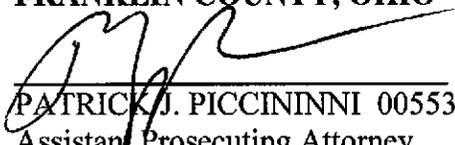
records request for a transcript requires the requestor to pay the full fee of the court reporter, not the cost of photocopies. 2002 Ohio Att.Gen.Ops. No. 02-014. Furthermore, Relator has not alleged that his case is currently pending appellate review which may warrant his receiving a free copy of the transcript. *State ex rel. Call v. Zimmers*, 85 Ohio St. 3d at 368.

III. Conclusion

For the foregoing reasons Relator's instant Complaint for Writ of Mandamus should be denied and this matter be dismissed.

Respectfully submitted,

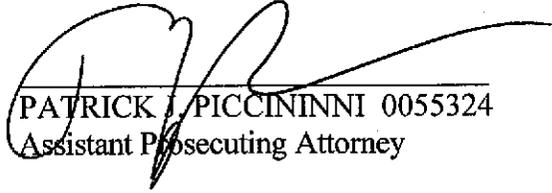
RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO



PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney
pjp Piccin@franklincountyohio.gov
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520
Fax: (614) 462-6013

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded by regular U.S. mail, postage prepaid, to Kirk D. Toms, Relator *pro se*, at 608 East Jenkins Ave., Columbus, Ohio, 43207, this 10th day of August, 2009.



PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney