

MOTION TO DISMISS

Now comes the Respondent, by and through counsel, and hereby moves this Court to dismiss Respondent Judge Marcelain, pursuant to Civ. R. 12(B)(6), as a party from the Relator's *Complaint for Mandamus* (hereinafter simply "Complaint") filed on March 4, 2013 as the facts do not support Relator's claim for relief. When evaluating whether a motion to dismiss filed under Civ.R. 12(B)(6) should be granted, the trial court must assume all factual allegations are true and make all reasonable inferences in favor of the non-moving party. *Jackson v. Ohio Bur. of Workers' Comp.*, 98 Ohio App.3d 579 (1994). In this case, Respondent Marcelain not only did not set any of the bonds in any of the cases referenced by the Relator's affidavit, he cannot recall ever ordering the Licking County Clerk of Courts to reject a surety bond if it is posted on a 10% cash deposit bond. As that issue is the crux of the Relator's Complaint, it is only appropriate to dismiss Judge Marcelain as a party from this action.

Standard for Mandamus Relief

Mandamus actions are controlled by Chapter 2731 of the Ohio Revised Code. "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. § 2731.01. "Application for [a] writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit." R.C. § 2731.04. Moreover, the Rules of Civil Procedure are generally applicable in original actions for extraordinary writs. See, e.g., *State ex rel. Ahmed v. Costine*, 99 Ohio St.3d 212, 2003-Ohio-3080, ¶ 5, fn. 1.

In order for a court to grant a writ of mandamus, the Relator must satisfy all three of the following:

- 1) that he/she has a clear legal right to relief prayed for; **and**
- 2) that the Respondent is under clear legal duty to perform acts; **and**
- 3) that he has no plain and adequate remedy in the ordinary course of law .

See, *State ex rel. McGrath v. Ohio Adult Parole Authority*, 2003 WL 1901344 (Ohio App. 8th Dist.) citing *State ex rel. National City Bank v. Board of Education*, (1977) 52 Ohio St. 2d 81, 369 N.E. 2d 1200.

As a writ for mandamus is an “extraordinary relief”, the Relator must prove that he is entitled to said writ through “clear and convincing evidence.” *State ex rel. Doner v. Zody* (2011), 130 Ohio St.3d 446, 958 N.E.2d 1235. To satisfy this burden, a Relator “must submit facts and produce proof that is plain, clear, and convincing” before a writ of mandamus can be granted. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 161, 228 N.E. 2d 631.

Courts will only issue a writ of mandamus when the respondent had a clear duty to act and has failed to do so. *State ex rel. Van Harlingen v. Bd. of Education of Mad River Twp. Rural School District* (1922), 104 Ohio St. 360; *City of Wapakoneta v. Helpling* (1939), 135 Ohio St. 98. Mandamus is considered a remedial remedy and not a preventive one. *Fisher v. Damm*, 36 Ohio App. 515 (1930).

Argument

Here, the Relator has failed to show that Respondent Marcelain committed the act that he is seeking to enjoin. Relator alleges in his Complaint that the Licking County Common Plea Court regularly sets “monetary bail” pursuant to Crim.R. 46(A)(2) and rejects the posting of a surety bond to satisfy this type of bail. See Paragraphs 14-15 of the Relator’s Complaint. The Relator further alleges that the Licking County Common Pleas Court judges are setting bail pursuant to Crim. 46(A)(2) and then “improperly directing” Respondent Walters to reject a surety bond when posted to satisfy. See Paragraphs 15 & 20 of the Relator’s Complaint.

In response to the Relator's Complaint, Respondent Marcelain reviewed the six cases cited in support for the Writ of Mandamus: *State of Ohio v. Jenny Markle*, 2012 CR 404; *State of Ohio v. Melissa Canterbury*, 2011 CR 73; *State of Ohio v. Sara Caw*, 2012 CR 106; *State of Ohio v. Abigail Hunt*, 2012 CR 396; *State of Ohio v. Brittani Hill*, 2012 CR 439; and *State of Ohio v. Ralph Lawyer*, 2012 CR 358. See attached Affidavit of Judge Marcelain. Of the six cases cited in support of Relator's Complaint, only two were assigned to Judge Marcelain—*Hill* and *Lawyer*. Id. As to these two cases, Judge Marcelain did not set bond on either case. Id. Judge Marcelain further avers in his affidavit that he cannot recall ever setting a "10% Bond" and instructing the clerk to reject a surety bond in lieu of cash. Id.

Respondent is not conceding that it has been improper for the other Respondents to reject surety bonds when a 10% Bond is set and relies on the Motion to Dismiss filed on behalf Respondents Branstool and Walters in support of that position. However, as Relator failed to cite to a single case where Respondent Marcelain has specifically committed the act in question and Respondent Marcelain has no specific recollection of ever committing said act, Respondent Marcelain is not an appropriate party to this action.

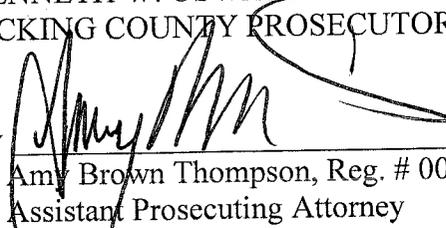
Conclusion

For all the foregoing reasons, the Respondent respectfully requests that Respondent Judge Thomas Marcelain be dismissed as a party from this action.

Respectfully submitted,

KENNETH W. OSWALT
LICKING COUNTY PROSECUTOR

By


Amy Brown Thompson, Reg. # 0070511
Assistant Prosecuting Attorney

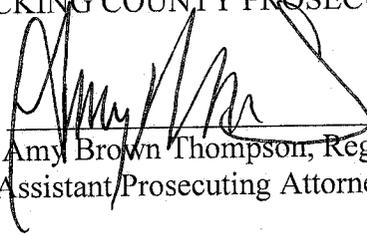
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion to Dismiss on behalf of Respondent Marcelain has been served on the following party by regular U.S. Mail, postage pre-paid, this 28th day of March, 2013:

Kendra Carpenter
Sprinkle Carpenter, LLC
Counsel for Relator
P.O. Box 14293
Columbus, OH 43214

KENNETH W. OSWALT
LICKING COUNTY PROSECUTOR

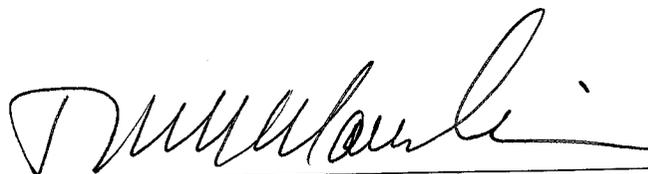
By



Amy Brown Thompson, Reg. # 0070511
Assistant Prosecuting Attorney

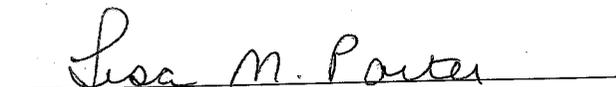
10. As the affiant has no involvement with any of the cases cited to support relator's complaint for mandamus, affiant requests to be dismissed from the above captioned lawsuit.

FURTHER AFFIANT SAYETH NOT.



Judge Thomas Marcelain

Sworn before me and subscribed in my presence on this day, 20th of March, 2013.



Notary Public

My Commission expires Aug 17, 2017



LISA M. PORTER
Notary Public, State of Ohio
My Commission Expires
08-17-2017

PROSECUTING ATTORNEY
KENNETH W. OSWALT
20 SOUTH SECOND ST.
NEWARK, OH 43055

FELONY AND CIVIL
DIVISIONS
670-5255

JUVENILE COURT
DIVISION
670-5264

TAX FORECLOSURES
670-5021

FAX 670-5241

IN THE LICKING COUNTY COMMON PLEAS COURT

THIS IS A TRUE and CERTIFIED COPY OF ORIGINAL ON FILE COMMON PLEAS COURT LICKING COUNTY, OHIO

State of Ohio

Plaintiff, LICKING COUNTY COMMON PLEAS COURT

-vs-

Jenny Markle

Defendant

FILED GARY R. WALTERS CLERK

Case No. 12 CR 40 MAR 27 2013

Deputy Chris Sharp

Gary R. Walters
Clerk of Courts

JUDGMENT ENTRY - INITIAL APPEARANCE

The Defendant appeared for his/her initial appearance on 8-21, 2012. The State of Ohio was represented by the Licking County Prosecutor's Office. The Defendant appeared (with counsel, without counsel).

The Defendant acknowledged receiving a copy of the indictment. In accordance with Crim. R. 10, the indictment was read to the Defendant, or in the alternative, the Defendant waived a reading of the indictment. Further, the Court advised the Defendant of his/her rights under Crim. R. 5(A).

This case is continued for Arraignment on 8-29, 2012 at 8:30 am, at the Licking County Common Pleas Court, 1 Courthouse Square, Newark, Ohio 43055.

Pursuant to Crim. R. 46, the Defendant shall be released on the following bond(s) and conditions:

I. Type and Amount of Bail

- Bond is set in the amount of \$ _____, to be posted as follows:
 - The personal recognizance of the Defendant, under Crim. R. 46(A)(1).
 - The execution of an unsecured bail bond in the amount of \$ _____, under Crim. R. 46(A)(1).
 - The execution of an appearance bond in the amount of \$ _____. The accused or bond depositor may deposit 10% of the full amount of bond directly with the Licking County Clerk of Courts. Upon breach, the accused/depositor will forfeit the amount deposited and will owe the balance on the full amount of bond. Upon compliance, 90% of the amount deposited shall be returned to the defendant or the bond depositor. Crim. R. 46(A)(2).
 - The execution of a surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the Defendant, in the amount of \$ _____, under Crim. R. 46(A)(3).
- Bond is continued as previously (set)(posted).

II. Conditions

- The Defendant shall have no contact, directly or indirectly, with the following individuals: _____
- The Defendant shall abstain from the consumption of alcohol or any controlled substance without a prescription and immediately submit to alcohol or drug testing.
- Defendant shall report to Adult Court Services immediately following court or upon release.
- Defendant shall:
 - Complete Drug/Alcohol Eval.
 - Complete Mental Health Eval.

It is so ordered.

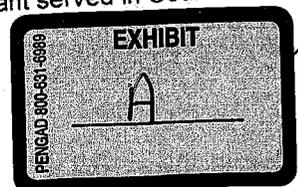
David Branstool
Judge W. David Branstool

Copies:

Licking County Prosecutor

Defense Counsel

Defendant served in Court



THIS IS A TRUE and CERTIFIED COPY OF ORIGINAL ON FILE COMMON PLEAS COURT LICKING COUNTY, OHIO

In the Court of Common Pleas, Licking County, Ohio

State of Ohio,

LICKING COUNTY COMMON PLEAS COURT

Deputy Alvin Hoop
Angie R. Walters
Clerk of Courts

Plaintiff, 2011 MAR -8 P 3: 31

Case No. 11-CR-13

vs.

Melissa Canterbury, FILED GARY R. WALTERS CLERK

Defendant.

**JUDGMENT ENTRY
INITIAL APPEARANCE**

On the 8th day of March, 2011, came the State of Ohio through The Licking County Prosecutor's Office, and also came the Defendant, personally, and with / without legal counsel, and this matter came on for initial appearance hearing.

- At the hearing, the Defendant requested the proceedings constitute as his/her arraignment. The Defendant waived a reading of, or in the alternative was read the indictment, and entered a plea(s) of Not Guilty to the charge(s) contained in the indictment. The Court accepted the plea(s).
- The Defendant is to appear for Arraignment on 3, 15, 11 at 8:30 a.m. at the Licking County Justice Center.
- Defendant is appearing pursuant to the summons issued in the above referenced matter.

For appearance of Defendant, the Court:

- Sets bond at \$5,000 own recognizance reporting.
- Sets bond at _____ cash or surety.
- Continues bond as set / posted through Municipal Court.
- Other _____

With the added conditions:

- The Defendant shall report in person to the Adult Court Services Department, immediately following Arraignment and/or upon the posting of bond, and as they shall suggest.
- The Defendant shall not consume, or have in his possession, any alcohol or drugs, and shall submit to random urinalysis and breathalyzer testing.
- The Defendant shall submit to a LAPP evaluation.
- The Defendant shall have no contact, either directly or indirectly, with the alleged victim(s) in this matter and / or with any co-defendant(s).
- The Defendant shall not possess or have in his possession any firearm(s) and / or weapons.
- Other _____

Judge
Thomas M. Marcelain
740-670-5777

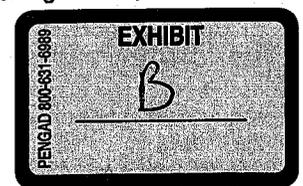
Judge
W. David Branstool
740-670-5770

Courthouse
Newark, OH 43055

cc: Licking County Prosecutor's Office
Adult Court Services Department
 Defense Counsel: _____
 Defendant Served in Court

[Signature]
Magistrate Mattie Klein
Licking County Common Pleas Court

Judge
Licking County Common Pleas Court 813
1916



IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO
CLERK OF COMMON PLEAS COURT
LICKING CO. OHIO

2012 MAR 21 AM 8:03

State of Ohio,

Plaintiff, GARY R. WALTERS
CLERK

Case No. 12-CR-106

vs.

Sara Caw

Defendant.

**MAGISTRATE'S ORDER
INITIAL APPEARANCE**

On the 20th day of March, 2012, came the State of Ohio through the Licking County Prosecutor's Office, and also came the Defendant, personally, and with / without legal counsel, and this matter came on for an initial appearance.

- At the hearing, the Defendant requested the proceedings constitute as his/her arraignment. The Defendant waived a reading of, or in the alternative was read the indictment, and entered a plea(s) of Not Guilty to the charge(s) contained in the indictment. The Court accepted the plea(s).
- The Defendant is to appear for Arraignment on 3 / 27 / 12 at 8:30 a.m. at the Licking County Courthouse, Courtroom 4, 1 Courthouse Square, Newark, Ohio 43055. If you are incarcerated at the time of the hearing, appearance will be by video.
- Defendant is appearing pursuant to the summons issued in the above referenced matter.

For appearance of Defendant and pursuant to Crim. R. 46, the Court:

- Sets bond at \$5,000 own recognizance reporting.
- Sets bond at _____ appearance or 10%.
- Sets bond at _____ cash or surety.
- Continues bond as set / posted through Municipal Court.
- Other _____

With the added conditions:

- The Defendant shall report in person to the Adult Court Services Department, immediately following Arraignment and/or upon the posting of bond, and as they shall suggest.
- The Defendant shall not consume, or have in his possession, any alcohol or drugs, and shall submit to random urinalysis and breathalyzer testing.
- The Defendant shall submit to a LAPP evaluation.
- The Defendant shall have no contact, either directly or indirectly, with the alleged victim(s) in this matter and/or with any co-defendant(s).
- The Defendant shall not possess or have in his possession any firearm(s) and/or weapon(s).
- Other _____

Judge
Thomas M. Marcelain
740-670-5777

Judge
W. David Bramstool
740-670-5770

Courthouse
Newark, OH 43055


Magistrate Mattie Klein

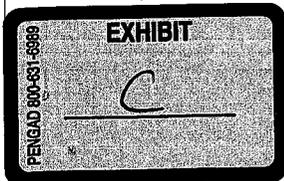
cc: Licking County Prosecutor's Office
Adult Court Services Department
 Defense Counsel: _____
 Defendant Served Court

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COPY OF ORIGINAL ON FILE
COMMON PLEAS COURT
LICKING COUNTY, OHIO

MAR 27 2013

Deputy Alvin Sharp
Gary R. Walters
Clerk of Courts

847/78



IN THE LICKING COUNTY COMMON PLEAS COURT

State of Ohio

Plaintiff,

-vs-

Abigail Hunt

Defendant.

LIICKING COUNTY
COMMON PLEAS COURT

2012 JUL 31 A 10:07

Case No. 12 CR 396

THIS IS A TRUE and CERTIFIED
COPY OF ORIGINAL ON FILE
COMMON PLEAS COURT
LIICKING COUNTY, OHIO

MAR 27 2013

Deputy

[Signature]

JUDGMENT ENTRY - INITIAL APPEARANCE

FILED
GARY R. WALTERS
CLERK

Gary R. Walters

7-31 Clerk of Courts, 2012

The Defendant appeared for his/her initial appearance on 7-31, 2012. The State of Ohio was represented by the Licking County Prosecutor's Office. The Defendant appeared (with counsel, without counsel).

The Defendant acknowledged receiving a copy of the indictment. In accordance with Crim. R. 10, the indictment was read to the Defendant, or in the alternative, the Defendant waived a reading of the indictment. Further, the Court advised the Defendant of his/her rights under Crim. R. 5(A).

This case is continued for Arraignment on 8-7, 2012, at 8:30 am, at the Licking County Justice Center, 155 E. Main Street, Newark, Ohio 43055.

Pursuant to Crim. R. 46, the Defendant shall be released on the following bond(s) and conditions:

I. Type and Amount of Bail

- Bond is set in the amount of \$ 25,000.00, to be posted as follows:
 - The personal recognizance of the Defendant, under Crim. R. 46(A)(1).
 - The execution of an unsecured bail bond in the amount of \$____, under Crim. R. 46(A)(1).
 - The execution of an appearance bond in the amount of \$ 15,000.00. The accused or bond depositor may deposit 10% of the full amount of bond directly with the Licking County Clerk of Courts. Upon breach, the accused/depositor will forfeit the amount deposited and will owe the balance on the full amount of bond. Upon compliance, 90% of the amount deposited shall be returned to the defendant or the bond depositor. Crim. R. 46(A)(2).
 - The execution of a surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the Defendant, in the amount of \$ 10,000.00 under Crim. R. 46(A)(3).
- Bond is continued as previously (set)(posted).

II. Conditions

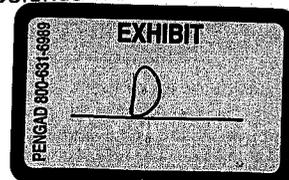
- The Defendant shall have no contact, directly or indirectly, with the following individuals: [Signature]
- The Defendant shall abstain from the consumption of alcohol or any controlled substance without a prescription and immediately submit to alcohol or drug testing.
- Defendant shall report to Adult Court Services immediately following court or upon release.
- Defendant shall: Complete Drug/Alcohol Eval. Complete Mental Health Eval.

It is so ordered.

David Branstool
Judge W. David Branstool

Copies:

- Licking County Prosecutor
- Defense Counsel
- Defendant served in Court



IN THE LICKING COUNTY COMMON PLEAS COURT

State of Ohio

LICKING COUNTY COMMON PLEAS COURT

MAR 27 2013

Deputy Clerk of Courts

Case No. 12 CR 439

-vs-

Brittani Hill

2012 AUG 28 P 1:53

Defendant

FILED WALTERS CLERK

JUDGMENT ENTRY - INITIAL APPEARANCE

The Defendant appeared for his/her initial appearance on 8-28, 2012. The State of Ohio was represented by the Licking County Prosecutor's Office. The Defendant appeared () with counsel, (X) without counsel.

The Defendant acknowledged receiving a copy of the indictment. In accordance with Crim. R. 10, the indictment was read to the Defendant, or in the alternative, the Defendant waived a reading of the indictment. Further, the Court advised the Defendant of his/her rights under Crim. R. 5(A).

This case is continued for Arraignment on 9-4-12, 2012, at 8:30 am, at the Licking County Common Pleas Court, 1 Courthouse Square, Newark, Ohio 43055.

Pursuant to Crim. R. 46, the Defendant shall be released on the following bond(s) and conditions:

I. Type and Amount of Bail

- Bond is set in the amount of \$ 10,000.00 to be posted as follows:
[] The personal recognizance of the Defendant, under Crim. R. 46(A)(1).
[] The execution of an unsecured bail bond in the amount of \$ _____, under Crim. R. 46(A)(1).
[X] The execution of an appearance bond in the amount of \$ 10,000.00. The accused or bond depositor may deposit 10% of the full amount of bond directly with the Licking County Clerk of Courts. Upon breach, the accused/depositor will forfeit the amount deposited and will owe the balance on the full amount of bond. Upon compliance, 90% of the amount deposited shall be returned to the defendant or the bond depositor. Crim. R. 46(A)(2).
[] The execution of a surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the Defendant, in the amount of \$ _____, under Crim. R. 46(A)(3).
[] Bond is continued as previously () set () posted.

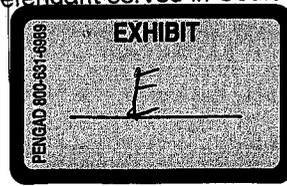
II. Conditions

- [] The Defendant shall have no contact, directly or indirectly, with the following individuals: _____
[X] The Defendant shall abstain from the consumption of alcohol or any controlled substance without a prescription and immediately submit to alcohol or drug testing.
[X] Defendant shall report to Adult Court Services immediately following court or upon release.
[X] Defendant shall: [X] Complete Drug/Alcohol Eval. [] Complete Mental Health Eval.

It is so ordered.

W.D. Branstool
Judge W. David Branstool

Copies: [] Licking County Prosecutor [] Defense Counsel [] Defendant served in Court



IN THE LICKING COUNTY COMMON PLEAS COURT

THIS IS A TRUE and CERTIFIED COPY OF ORIGINAL ON FILE COMMON PLEAS COURT LICKING COUNTY, OHIO

State of Ohio

Plaintiff,

-vs-

Ralph Lanza

Defendant.

Case No. 12 Deputy 358 Clerk of Courts

MAR 27 2013

Deputy 358 Clerk of Courts

2012 JUL 17 P 4: 11

JUDGMENT ENTRY - INITIAL APPEARANCE

The Defendant appeared for his/her initial appearance on 7-17, 2012. The State of Ohio was represented by the Licking County Prosecutor's Office. The Defendant appeared with counsel without counsel.

The Defendant acknowledged receiving a copy of the indictment. In accordance with Crim. R. 10, the indictment was read to the Defendant, or in the alternative, the Defendant waived a reading of the indictment. Further, the Court advised the Defendant of his/her rights under Crim. R. 5(A).

This case is continued for Arraignment on 7-27, 2012, at 8:30 am, at the Licking County Justice Center, 155 E. Main Street, Newark, Ohio 43055.

Pursuant to Crim. R. 46, the Defendant shall be released on the following bond(s) and conditions:

I. Type and Amount of Bail

- Bond is set in the amount of \$10,000.00 to be posted as follows:
- [x] The personal recognizance of the Defendant, under Crim. R. 46(A)(1).
- [] The execution of an unsecured bail bond in the amount of \$ under Crim. R. 46(A)(1).
- [x] The execution of an appearance bond in the amount of \$10,000. The accused or bond depositor may deposit 10% of the full amount of bond directly with the Licking County Clerk of Courts. Upon breach, the accused/depositor will forfeit the amount deposited and will owe the balance on the full amount of bond. Upon compliance, 90% of the amount deposited shall be returned to the defendant or the bond depositor. Crim. R. 46(A)(2).
- [] The execution of a surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the Defendant, in the amount of \$ under Crim. R. 46(A)(3).
- [] Bond is continued as previously (set)(posted).

II. Conditions

- The Defendant shall have no contact, directly or indirectly, with the following individuals: alleged victim: Robbie Estep
- [x] The Defendant shall abstain from the consumption of alcohol or any controlled substance without a prescription and immediately submit to alcohol or drug testing.
- [x] Defendant shall report to Adult Court Services immediately following court or upon release.
- [x] Defendant shall: [x] Complete Drug/Alcohol Eval. [] Complete Mental Health Eval.

It is so ordered.

W D Branstool Judge W. David Branstool

Copies: [] Licking County Prosecutor [] Defense Counsel [] Defendant served in Court

