

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. TRACIE M. HUNTER,

Case No. 14-2223

Relator,

Original Action in Habeas,
Mandamus, and Prohibition

v.

HON. PENELOPE CUNNINGHAM,
et al.,

Respondents.

MOTION TO DISMISS OF RESPONDENTS

FIRST DISTRICT COURT OF APPEALS AND JUDGE PENELOPE CUNNINGHAM

DAVID A. SINGLETON (0074556)
Ohio Justice & Policy Center
215 East 9th Street, Suite 601
Cincinnati, Ohio 45202
Tel: 513-421-1108 ext. 17
Fax: 513-562-3200
dsingleton@ohiojpc.org

*Counsel for Relator,
Tracie M. Hunter*

JOSEPH T. DETERS (0012084)
Hamilton County Prosecutor

JAMES W. HARPER (009872)*
*Counsel of Record
CHRISTIAN J. SCHAEFER (0015494)
Assistant Prosecuting Attorneys
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Tel: 513-946-3159
Tel: 513-946-3041 (Schaefer)
Fax: 513-946-3018

*Counsel for Respondent,
Hamilton County Sheriff Jim Neil*

MICHAEL DEWINE (0009181)
Ohio Attorney General

TIFFANY L. CARWILE (0082522)*
*Counsel of Record

BRODI J. CONOVER (0092082)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872
Fax: 614-728-7592
tiffany.carwile@ohioattorneygeneral.gov
brodi.conover@ohioattorneygeneral.gov

*Counsel for Respondents,
First District Court of Appeals and
Judge Penelope Cunningham*

FILED
DEC 2 6 2014
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE ex rel. TRACIE M. HUNTER,

Case No. 14-2223

Relator,

Original Action in Habeas,
Mandamus, and Prohibition

v.

HON. PENELOPE CUNNINGHAM,
et al.,

Respondents.

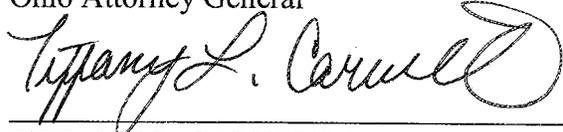
MOTION TO DISMISS OF RESPONDENTS

FIRST DISTRICT COURT OF APPEALS AND JUDGE PENELOPE CUNNINGHAM

Pursuant to Sup.Ct.Prac.R. 12.04 and Civ.R. 12(B)(6), Respondents the First District Court of Appeals and Judge Penelope Cunningham hereby move this Court to dismiss Relator's petition for writs of habeas, mandamus, and prohibition. A memorandum in support is attached.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



TIFFANY L. CARWILE (0082522)*

*Counsel of Record

BRODI J. CONOVER (0092082)

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

Tel: 614-466-2872; Fax: 614-728-7592

tiffany.carwile@ohioattorneygeneral.gov

brodi.conover@ohioattorneygeneral.gov

Counsel for Respondents,

The First District Court of Appeals and

Judge Penelope Cunningham

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Relator, suspended Hamilton County Juvenile Court Judge Tracie M. Hunter, brings this action against Respondents, the Honorable Judge Penelope Cunningham, the First District Court of Appeals, and Hamilton County Sheriff Jim Neil. Relator asks for writs of habeas corpus and mandamus against Judge Cunningham and the First District (collectively referred to as “the First District”) to order them to reevaluate and provide greater analysis on their decision denying her prior motion for a stay of sentence. This Court has recognized, however, that decisions to deny bail and stays are within the sound discretion of courts—and may only be disturbed for patent abuse of discretion.

The Relator has failed to meet the burden of establishing *any* abuse of discretion—much less a patent abuse of discretion. The Relator has no legal right to her release or the relief requested, and the First District has no legal duty to grant it. Accordingly, Relator fails to state a claim for which relief can be granted, and this Court should dismiss the complaint pursuant to Civ.R. 12(B)(6).¹ Relator also seeks a writ of prohibition against Sheriff Neil, which is addressed in a separate motion to dismiss filed on behalf of the Sheriff.

I. STATEMENT OF FACTS

Relator Tracie M. Hunter was indicted on nine counts by a Hamilton County Grand Jury, including Count Six—Having an Unlawful Interest in a Public Contract. Compl., ¶ 9. A trial on

¹ The First District is aware of the line of cases in which this Court has deemed facts admitted when the respondents/defendants have only filed a motion to dismiss in expedited elections cases and cases in which an alternative writ was issued. *See State ex rel. Beck v. Casey*, 51 Ohio St.3d 79, 554 N.E.2d 1284 (1990); *State ex rel. Nat. Broadcasting Co., Inc. v. Ct. of C.P. of Lake Cty.*, 52 Ohio St.3d 104, 556 N.E.2d 1120 (1990), overruled in part on other grounds by *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431. However, it is unclear at this time whether this line of cases would apply. In addition, as less than one business day has lapsed, the majority of the allegations would be denied for lack of knowledge at this time. Should this Court request, the First District will gladly file an Answer to the Complaint expressly admitting or denying the respective allegations.

all counts occurred from September 8, 2014, to October 14, 2014. *Id.* at ¶ 10. At the conclusion of the presentation of evidence, the jury deliberated for two days, and then announced that it had reached a verdict on Count Six. *Id.* After two more days of deliberation, the jury ended in a deadlock over the eight remaining counts. *Id.* A guilty verdict was announced on Count Six. *Id.*

Relator moved for a new trial. *Id.* at ¶ 14. On November 20, 2014, the trial court denied Relator's motion. *Id.* at ¶ 20.

The trial court held a sentencing hearing on December 5, 2014, and Relator submitted her initial motion to the trial court for a stay of sentence. *Id.* at ¶¶ 21-22. The trial court denied the stay and sentenced Relator to six months in jail, ordering her to report to the Hamilton County Jail at 8:30 a.m. on December 29, 2014. *Id.* at ¶¶ 21-22. Then, on December 12, 2014, Relator moved for a stay of sentence from Respondent the First District Court of Appeals. *Id.* at ¶ 23. The Court denied that motion on December 22, 2014. *Id.* at ¶ 27. On December 24, 2014, Relator submitted this petition for a writ of habeas corpus, a writ of mandamus, and a writ of prohibition.

II. STANDARD OF REVIEW

A court may dismiss mandamus and habeas actions under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9; *State ex rel. Turner v. Houk*, 112 Ohio St.3d 561, 2007-Ohio-814, 862 N.E.2d 104, ¶ 5. In order for a complaint to be dismissed, it must appear beyond doubt that the relator can prove no set of facts warranting the requested writ of mandamus or habeas corpus. *Russell*, 111 Ohio St.3d at ¶ 9; *Turner*, 112 Ohio St.3d at ¶ 5. The Court must consider and accept all factual allegations of the complaint as true and afford all reasonable inferences in the nonmoving party's favor. *Russell*, 111 Ohio St.3d at ¶ 9. This does

not allow, however, unsupported conclusions to be admitted or to be sufficient. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). In fact, an “inmate must plead specific facts to withstand dismissal of a complaint for writ of mandamus.” *Id.*, citing *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989).

III. LAW AND ARGUMENT

Because Relator’s petition fails to state a claim for which relief can be granted, this Court should dismiss her Complaint pursuant to Civ.R. 12(B)(6). First, Relator’s habeas petition is technically deficient because it is improperly verified under S.Ct.Prac.R. 12.01 and R.C. 2725.04. Second, Relator fails to show that the First District abused its discretion in denying the stay. This Court gives great deference to a court’s discretion in denying motions for bail and stays.

Furthermore, Relator’s mandamus claim must be dismissed because she fails to establish a clear legal right to a detailed explanation of the First District’s rationale in denying the stay. She also fails to show that the First District has a clear legal duty to provide such a rationale.

- A. The Relator’s habeas petition fails because it is technically deficient and Relator fails to show that the First District patently abused its discretion in denying her motion for stay of sentence.**
 - i. The affidavit attached to Relator’s complaint fails to properly verify the petition pursuant to S.Ct.Prac.R. 12.01 and R.C. 2725.04.**

As an initial matter, Relator’s habeas claims fail on technical grounds. Pursuant to this Court’s rules, all habeas corpus actions must be brought in accordance with Chapter 2725 of the Revised Code. S.Ct.Prac.R. 12.01(B). Within Chapter 2725 is the requirement that an application for a writ of habeas corpus “shall be by petition, signed and *verified* by the party for whose relief it is intended, or by some person for him.” R.C. 2725.04 (emphasis added). This Court has held that failure to comply with the mandatory requirements of R.C. 2725.04 shall lead

to dismissal. *Chari v. Vore*, 91 Ohio St.3d 323, 327-28, 744 N.E.2d 763 (2001). Verification requires a petitioner or her attorney to “expressly [swear] to the truth of the facts contained therein.” *Id.* at 328 (indicating that a notary public signing and affixing seal to complaint does not satisfy verification requirement). Ultimately, alleging facts in a complaint is not enough; those facts must be expressly sworn to by the Relator or her attorney.

Here, Relator’s attorney, David A. Singleton, submitted an affidavit along with Relator’s complaint. In the affidavit, Mr. Singleton presented as exhibits Relator’s prior filings and entries, and he attested to the exhibits’ accuracy and authenticity. At no point did Mr. Singleton expressly swear to the truth of the facts contained within the petition. Relator, thus, has failed to properly verify her petition for a writ of habeas corpus pursuant to S.Ct.Prac.R. 12.01 and R.C. 2725.04. This technical deficiency, in itself, requires dismissal.

ii. The Relator cannot show that the First District Court of Appeals patently abused its discretion in denying Relator’s request for a stay.

Even if this Court were to overlook the technical flaws in Relator’s request for habeas corpus, the claim must be dismissed because Relator cannot show that the First District abused its discretion in denying Relator’s request for stay. A petition for habeas corpus is an extraordinary remedy that is only appropriate when there is no alternative legal remedy. *State ex rel. Jackson v. McFaul*, 73 Ohio St.3d 185, 186, 652 N.E.2d 746 (1995). The petitioner of a habeas action has the burden of establishing her right to release. *Chari*, 91 Ohio St.3d at 325. In order to satisfy this burden, a petitioner must introduce evidence to overcome the presumption of regularity that attaches to all court proceedings. *Id.* If the petition does not state a claim for habeas relief, the Court should not allow the writ and should dismiss the petition. *Id.* at 327. Unsupported and uncorroborated statements made by the petitioner do not overcome the

presumption of regularity of the court's judgment. *Yarbrough v. Maxwell*, 174 Ohio St. 287, 288, 189 N.E.2d 136 (1963).

To determine whether a court improperly refused to set bail after a judgment of conviction, this Court reviews a court's decision for abuse of discretion. *Jenkins v. Billy*, 43 Ohio St.3d 84, 85, 538 N.E.2d 1045 (1989). This Court previously determined that the "granting of bail is strictly within the discretion of the courts. There is no bail on appeal as a matter of right." *Coleman v. McGettrick*, 2 Ohio St.2d 177, 179, 207 N.E.2d 552 (1965). Even when a petitioner is released on bail after a conviction and appeal is pending, the matter is to be "resolved by an exercise of the sound discretion of the court." *Id.* at 180. A decision should only be disturbed if there is a *patent abuse of such discretion*. *Id.* The burden of establishing this patent abuse of discretion rests with the petitioner. *Chari*, 91 Ohio St.3d at 326.

In *Coleman*, the petitioner was convicted and subsequently sought to overturn his conviction on appeal. 2 Ohio St.2d at 177. He argued that bail should be granted because there were substantial questions on appeal, he was not a flight risk, and the court of appeals had no sound basis for denying bail. *Id.* at 180. However, this Court was not persuaded. Indeed, this Court held that, if it were to follow the petitioner's argument, it would have to assume that, because the court issued "*no written opinion in its denial of bail*, it had no grounds for such denial but acted purely arbitrarily. . . . Such an assumption cannot validly be made. To do so would be to ignore the presumption of regularity which adheres to all judicial proceedings." *Id.* (emphasis added). This Court did not find any abuse of discretion and remanded the petitioner into custody. *Id.*

In another analogous case, *Christopher v. McFaul*, the petitioner argued that: (1) his appeal would likely result in reversal; (2) there was no likelihood that he will flee the

jurisdiction; and, (3) he posed no danger to the community. 18 Ohio St.3d 233, 234, 480 N.E.2d 484 (1985). As to the first and third assertions, the pleadings were insufficient to enable this Court to determine the strength of petitioner's claims. *Id.* For the second assertion, this Court held that the "danger of flight is inherently greater after a conviction than before a guilty verdict," and therefore, denied petitioner's request for writs of habeas corpus and mandamus. *Id.*

In her complaint, the Relator relies exclusively on *In re Liles*, 35 Ohio St.3d 610, 520 N.E.2d 183 (1988). However, this reliance is misplaced. In that case, the petitioner sought bond based on Crim.R. 46(C) and (E)(1). *Liles*, 35 Ohio St.3d at 610. He argued that the court of appeals had denied his request for a stay of sentence pending the appeal without the explanation mandated by Crim. R. 46(C) and (E)(1). *Id.* This Court held that the decision denying the stay did not provide enough information to determine whether denial was proper, and then remanded the case for further consideration in accordance with Crim.R. 46. *Id.*

In re Liles is not controlling authority in this situation. First, this Court did not—explicitly or otherwise—overrule its decision in *Coleman*. In fact, after the *In re Liles* decision, this Court affirmed its decision in *Coleman* by declining to issue a writ of habeas corpus—despite the trial court and the court of appeals failing to disclose why they had denied bail. *Jurek v. McFaul*, 39 Ohio St.3d 42, 43, 528 N.E.2d 1260 (1988).

Second, *Liles* was based upon Crim.R. 46(E)(1), which was subsequently amended in 1998. Before the amendment, the rule required a court to consider bail for a person who had been convicted but appealed in the same manner as preconviction bail determinations. *See* Crim.R. 46(E)(1) (1998). Only if the person was a flight risk was the court alleviated from considering bail, and must have "reason to believe" that no bail conditions would "reasonably ensure" the person would not flee. *Id.* However, the 1998 Amendment changed Rule 46(E)(1),

such that this old provision is not even in the new rule. *See generally* Crim.R. 46. Under the current rule, there is no provision requiring a court to make particularized findings that a person is a flight risk before denying bail. *Id.*

Here, Relator states that the First District did not provide an explanation other than a simple denial of her request for bail and motion to stay her sentence. Because of her community ties and her pastoral duties, Relator reasons that she is not a flight risk. Relator also contends that the strength of her appellate case “clearly” cuts in her favor. However, Relator fails to articulate *any* abuse of discretion by the First District—much less a patent abuse of discretion. Much like in *Coleman*, Relator suggests that, simply because the analysis of the denial of her stay was limited, the decision was arbitrary. *Coleman*, 2 Ohio St.2d at 180. Further, like in *Coleman*, such an assumption cannot be made. *Id.* Relator presents no evidence that the First District did not consider the Crim.R. 46 factors, and, besides *In re Liles*, Relator does not present any law or case that requires the First District to provide a particularized analysis regarding those factors. In order to succeed on a habeas action in this context, Relator has the burden of showing that the First District patently abused its discretion, and therefore, is *entitled* to release. Relator has not, and cannot, make such a showing.

B. The Relator’s claim for mandamus fails because she cannot establish that she has a clear legal right to a detailed explanation of the First District’s rationale for denying the Relator’s motion to stay her sentence, or that the First District has a clear legal duty to provide such rationale.

Relator cannot establish that she has a clear legal right to a detailed explanation of the First District’s rationale for denying her motion to stay her sentence during the pendency of her appeal. She further fails to establish that the First District has a clear legal duty to provide her with its rationale for denying her motion to stay. Mandamus is an extraordinary legal remedy. *State ex rel. Gerspacher v. Coffinberry*, 157 Ohio St. 32, 36, 104 N.E.2d 1 (1952). The essential

purpose of mandamus is to command the performance of an act or duty which the law especially enjoins upon an office or tribunal. *Id.* To be entitled to a writ of mandamus, the relator must establish three elements: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the respondent; and, (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Richard v. Mohr*, 135 Ohio St.3d 373, 2013-Ohio-1471, 987 N.E.2d 650, ¶ 4. The burden of proof in mandamus rests with the moving party. *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13. If a relator fails to establish one of these elements, the court has discretion to dismiss the action. *Id.* at ¶ 1.

A writ of mandamus may be used to compel an officer or tribunal to discharge its duty. It cannot, however, control judicial discretion. R.C. 2731.03; *State ex rel. Richfield v. Laria*, 138 Ohio St.3d 168, 2014-Ohio-243, 4 N.E.3d 1040, ¶ 11. Indeed, mandamus will not lie to control even abused judicial discretion. *State ex rel. Richfield*, 138 Ohio St.3d at ¶ 11; *State ex rel. Rashada v. Pianka*, 112 Ohio St.3d 44, 2006-Ohio-6366, 857 N.E.2d 1220, ¶ 3. In denying a motion for bail and a motion to stay, a court possesses great discretion. *Coleman*, 2 Ohio St.2d at 179. In granting or denying such a motion, a court is not required to offer explanation of its decision. *See, e.g., id.* at 180; *Jurek*, 39 Ohio St.3d at 43.

In this case, Relator argues that the First District is required to articulate its reasoning for denying her motion to stay her sentence. Relator contends that, in light of Relator possessing no flight risk, no danger to the community, and meritorious appellate issues, the First District should be required to reevaluate the motion and to articulate the reasoning for their decision denying her motions for bail and to stay her sentence. However, mandamus does not lie to control judicial discretion—even abused discretion. The decision to deny a motion for bail rests within the

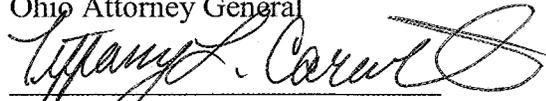
sound discretion of a court. *Coleman*, 2 Ohio St.2d at 179. Relator fails to put forth any facts to establish that this exercise of discretion was arbitrary. In addition, Relator's petition fails to cite any proposition of law or any case that shows the First District is required to give a more detailed analysis of its decision. Therefore, Relator does not have a clear legal right to have her motions for bail and to stay her sentence granted and explained, and thus, has not established that mandamus is warranted. Accordingly, Relator's request for mandamus must fail.

IV. CONCLUSION

For the foregoing reasons, Respondents Judge Penelope Cunningham and the First District Court of Appeals respectfully request this Court grant their Motion to Dismiss.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



TIFFANY L. CARWILE (0082522)*

*Counsel of Record

BRODI J. CONOVER (0092082)

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

Tel: 614-466-2872; Fax: 614-728-7592

tiffany.carwile@ohioattorneygeneral.gov

brodi.conover@ohioattorneygeneral.gov

Counsel for Respondents,

*The First District Court of Appeals and Judge
Penelope Cunningham*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss was filed with the Court on December 26, 2014. I further certify that a true and accurate copy of the foregoing was served via regular mail and email on December 26, 2014 to the following:

David A. Singleton (0074556)
Ohio Justice & Policy Center
215 East 9th Street, Suite 601
Cincinnati, Ohio 45202

Counsel for Relator

James W. Harper (009872)
Christian J. Schaefer (0015494)
Assistant Prosecuting Attorneys
Hamilton County Prosecutor's Office
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202

*Counsel for Respondent,
Hamilton County Sheriff Jim Neil*


TIFFANY J. CARWILE (0082522)
Assistant Attorney General