

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE ex rel.	:	PER CURIAM OPINION
JOHN E. BOYERS,	:	
	:	CASE NO. 2010-T-0111
Relator,	:	
	:	
- VS -	:	
	:	
HONORABLE JOHN M. STUARD,	:	
	:	
Respondent.		

Original Action for Writ of Mandamus.

Judgment: Writ denied.

John E Boyers, PID: #550-871, Belmont Correctional Institution, P.O. Box 540, St. Clairsville, OH 43950 (Relator).

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for final disposition of the summary judgment motion of respondent, Judge John M. Stuard of the Trumbull County Court of Common Pleas. As the primary basis for his motion, respondent states that he is entitled to prevail on the sole mandamus claim because he has no legal duty to perform the specific judicial act which relator, John E. Boyers, has sought to compel.

For the following reasons, we hold that the granting of summary judgment is warranted.

{¶2} In maintaining the instant action, relator requested the issuance of a writ to require respondent to make a ruling on a pending motion in an underlying criminal case. In his petition, relator asserted that he entered a plea of guilty to a third-degree felony in Trumbull C.P. No. 2009 CR 00330. He also asserted that, approximately one year after the imposition of his sentence, he filed a motion before respondent for an order granting him an additional jail-time credit of fifty-six days. Finally, relator's petition alleged that, despite the fact that the new motion had been pending before respondent for over three months, no dispositive ruling had been rendered.

{¶3} In now moving for relief under Civ.R. 56(C), respondent contends that he cannot be compelled to go forward in the underlying matter because, even though the caption of the pending "credit" motion referred to him as the assigned judge, he has not presided over any aspect of the criminal proceeding. Specifically, relator submits that he is not obligated to proceed on the motion because relator's criminal case has always been assigned to Judge Peter J. Kontos, another sitting member of the Trumbull County Court of Common Pleas.

{¶4} In support of his argument, respondent has attached to his present motion copies of the "plea" judgment and the final sentencing judgment from relator's case. A review of both judgments readily indicates that each was signed by Judge Kontos. In addition, respondent has submitted a copy of the entire docket from the subject case. As respondent aptly notes in his motion, the initials of Judge Kontos have been typed at the top of this document, thereby showing that the case had been assigned to him.

{¶5} Although relator has been afforded an ample opportunity to respond to the

motion for summary judgment, he has failed to do so; therefore, he has not raised any challenge to the authenticity of the three attached documents. As a general proposition, if an evidentiary submission is not cited in the list of acceptable documents delineated in Civ.R.56 (C), it cannot be considered in the summary judgment exercise unless it has been properly certified or is accompanied by a valid affidavit. *Robinson v. Gansheimer*, 11th Dist. No. 2007-A-0035, 2007-Ohio-3845, at ¶12-13. In attaching the copies of the three documents to his present motion, respondent did not follow this requirement for admissibility. Nevertheless, the courts of this state have further concluded that when the opposing party in the exercise fails to assert any objection to the lack of certified copies or a properly-framed affidavit, the documents can still be considered in disposing of the motion because any challenge to their authenticity has been waived. See, e.g., *Rodger v. McDonald's Restaurants of Ohio, Inc.* (1982), 8 Ohio App.3d 256, 258, fn.7.

{¶6} Our review of the three copies provided by respondent does not indicate any obvious defects which would call into question their authenticity. Hence, since no objection has been raised regarding respondent's failure to comply with the referenced procedure, this court holds that the copies are properly before us for purposes of ruling upon the summary judgment motion. *Robinson*, 2007-Ohio-3845, at ¶13. Moreover, the substance of the three documents, i.e., the two judgments and the docket, readily demonstrates that Judge Kontos, not respondent, was the assigned judge throughout the pendency of relator's criminal case.

{¶7} In considering a similar factual situation, the Supreme Court of Ohio has expressly held that a writ of mandamus will not lie to require a common pleas judge to proceed on a pending motion when the underlying case was never assigned to him.

State ex rel. Chavis v. Griffin (2001), 91 Ohio St.3d 50, 51. The *Chavis* court noted that, under such facts, the common pleas judge simply had no legal duty to go forward on the matter. In support of its holding, the *Chavis* court cited Sup.R. 36(B) for the proposition that, once a case has been assigned to a common pleas judge pursuant to an individual assignment system, that judge is responsible for deciding every issue in the case until its conclusion. *Id.*

{¶8} In the instant proceeding, the undisputed facts before this court establish that respondent was never assigned to preside over Trumbull C.P. No. 2009 CR 00330. In light of this, the *Chavis* precedent dictates that he would not be the appropriate judge to rule upon the merits of relator's new motion. Instead, only Judge Kontos would have a legal duty to proceed because he was the judicial officer who presided over all prior matters in the case. Since relator has never named Judge Kontos as a respondent in the action before us, a writ of mandamus will not lie.

{¶9} To be entitled to summary judgment under Civ.R. 56(C), the moving party must demonstrate that: (1) there are no remaining genuine issues of material fact which must be tried; (2) the moving party is entitled to prevail as a matter of law; and (3) even when the evidentiary materials are viewed in a manner most favorable to the opposing party, a reasonable person still could only reach a final conclusion adverse to that party. *Robinson*, 2007-Ohio-3845, at ¶14. Pursuant to the foregoing discussion, we ultimately find that respondent has satisfied each prong of this standard as to the critical element of relator's sole mandamus claim. That is, respondent is entitled to prevail because the undisputed facts show that he has no legal duty to perform the judicial as requested by relator.

{¶10} Respondent's motion for summary judgment is granted. It is the order of this court that final judgment is hereby entered in favor of respondent on relator's entire mandamus petition.

MARY JANE TRAPP, P.J., CYNTHIA WESTCOTT RICE, J., TIMOTHY P. CANNON, J.,
concur.