

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY COURT OF APPEALS

OCT 29 2008

TINA M. MERANDA
BROWN COUNTY CLERK OF COURTS

STATE OF OHIO ex rel.
DENNIS J. VARNAU,

Relator-Appellant,

- vs -

BROWN COUNTY BOARD
OF ELECTIONS,

Respondent-Appellee.

CASE NO. CA2008-09-006
(Accelerated Calendar)

JUDGMENT ENTRY

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CVH2008-0566

{¶1} This is an accelerated appeal in which relator, Dennis J. Varnau, appeals the decision of the Brown County Court of Common Pleas dismissing the petition for a writ of mandamus he filed against respondent, the Brown County Board of Elections (the "Board"). Appellant is an independent candidate running for the office of Brown County Sheriff in the November 4, 2008 general election. Dwayne Wenninger is the current Brown County sheriff running for re-election. Appellant's petition sought to compel the Board to accept as valid the protest appellant filed against Wenninger's candidacy.

{¶2} Appellant's first assignment of error challenges the common pleas court's decision to accept as accurate a "proposed statement of proceedings" filed by the

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Board¹ in connection with its motion to set aside the magistrate's entry (which had denied the Board's motion to dismiss appellant's petition). The assignment of error is overruled. Appellant did not object to the proposed statement below or file anything in response to the statement; rather, appellant challenges the statement for the first time on appeal. Despite appellant's claim to the contrary, the proposed statement does not constitute "facts;" rather, it is merely a summary of the parties' respective positions and arguments during the hearing before the magistrate, positions which mirrored the parties' arguments in their pleadings following appellant's petition for a writ of mandamus. There was no testimony or evidence given at the hearing. Appellant does not state how the proposed statement resulted in an erroneous decision by the common pleas court or how he was prejudiced by the lower court's decision to accept the statement.²

{13} Appellant's second assignment of error challenging the dismissal of his petition for a writ of mandamus is overruled. Should Wenninger be elected and take office, appellant has other legal remedies.

{14} Judgment affirmed.

{15} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this judgment entry shall

1. In its proposed statement of proceedings, the Board (1) explained that the hearing held before the magistrate on its motion to dismiss appellant's petition could not be transcribed as the recording was unintelligible; (2) stated that there was no testimony or evidence given at the hearing; and (3) subsequently summarized the parties' respective positions as they had been argued during the hearing.

2. Under the assignment of error, appellant cites *Music Express Broadcasting Corp. v. Aloha Sports, Inc.*, 161 Ohio App.3d 737, 2005-Ohio-3401, for the proposition that the Board was required to submit a transcript or a sworn affidavit to document the hearing before the magistrate. We find that *Music Express* does not apply here as that case dealt with objections to a magistrate's decision under Civ.R. 53 (D)(3), and not a motion to set aside a magistrate's decision under Civ.R. 53(D)(2) which does not require that a transcript or affidavit be filed.

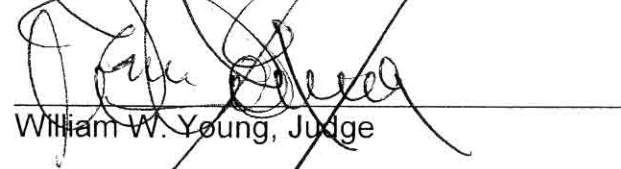
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constitute the mandate pursuant to App.R. 27.

{16} Costs to be taxed in compliance with App.R. 24.



H.J. Bressler, Presiding Judge



William W. Young, Judge



Stephen W. Powell, Judge

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