

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

NO. 1728

TINA M. MERANDA
BROWN COUNTY CLERK OF COURTS

STATE ex rel. DENNIS J. VARNAU,

Relator-Appellant

vs.

BROWN COUNTY BOARD
OF ELECTIONS

Respondent-Appellee

* Case No.: CA 2008-09-06
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* On Appeal from the Court of Common
* Pleas, Brown County, Ohio
*
* Case No. CVH 2008-0566
*
* ACCELERATED CALENDAR
*
*

**MEMORANDUM IN OPPOSITION TO
APPLICATION FOR RECONSIDERATION**

The standard of review in deciding a motion for reconsideration is whether the motion “calls to the attention of the court an obvious error in its decision or raises an issue for the court’s consideration that was either not considered at all or was not fully considered by the court when it should have been.” *State v. Williams*, Mahoning App. No. 07 MA 57, 2008 Ohio 2267, citing *State v. Wong* (1994), 97 Ohio App.3d 244, 246, 646 N.E.2d 538. Appellant Varnau presents no new argument in his Motion for Reconsideration. Varnau cites *State ex rel. Deiter v. McGuire*, 119 Ohio St.3d 384, 2008-Ohio-4536, for the proposition that alternative remedies must be complete, beneficial, and speedy in order to be an adequate remedy at law. *Deiter* also affirms the

well-settled fact that “quo warranto is the exclusive remedy by which one’s right to hold a public office may be litigated.” *Id.* at ¶ 20.

Deiter, which was decided before Varnau filed his merit brief, is factually distinguishable from the case at bar. Varnau’s case involves a mandamus action to compel the board of elections to accept an untimely protest against a candidate for sheriff. *Deiter* involves a quo warranto action to oust a police chief and a mandamus action to compel a civil service exam for police chief. *Deiter* does not change the result in this case.

Varnau also cites *In re Election Contest of Democratic Primary Election Held May 4, 1999*, 87 Ohio St.3d 118, 1999-Ohio-302, to support his allegation that his action is not moot even though the election has passed. That case however involved a protest of a primary election based on an alleged election irregularity, specifically the failure to the Board of Elections to remove the name of a candidate who had withdrawn from race more than 35 days before the primary election. Because the withdrawn candidate received more votes than separated the top two finishers, and the voters were not informed that votes cast for the withdrawn candidate would not be counted, the primary election result was in dispute. Although the court reversed and remanded the case, it was decided before the general election. *Election Contest* did not involve the protest of the candidacy of a candidate, as in our case.

Varnau sought to have Wenninger declared an unqualified candidate for the office of sheriff. He sought to have Wenninger removed from the November 4, 2008 ballot. Because the election has passed and Wenninger defeated Varnau, this action is now moot.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the State-Appellee's Memorandum in Opposition has been served on Thomas G. Eagle, Attorney for the Defendant-Appellant, 3386 N. State Rt. 123, Lebanon, Ohio 45036, by regular U.S. Mail, postage prepaid, on this 17th day of November, 2008.



Mary McMullen

Assistant Prosecuting Attorney