

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

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|---------------------|---|-----------------------------|
| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2009-07-026 |
| - vs - | : | <u>OPINION</u> 3/15/2010 |
| DWAYNE WENNINGER, | : | |
| Defendant-Appellee. | : | |

APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CR2002-2234

Jessica A. Little, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Gary Rosenhoffer, 302 E. Main Street, Batavia, Ohio 45103, for defendant-appellee,
Dwayne Wenninger

Patrick L. Gregory, 717 W. Plane Street, P.O. Box 378, Bethel, Ohio 45106, for
defendant-appellee, Dwayne Wenninger

Thomas G. Eagle, 3386 N. St. Rt. 123, Lebanon, Ohio 45036, for movant-appellant,
Dennis Varnau

HENDRICKSON, J.

{¶1} Movant-appellant, Dennis Varnau, appeals from a decision of the Brown
County Court of Common Pleas denying his motion for the trial judge to recuse and to
vacate an order denying Varnau's motion to unseal court records relating to the

qualifications of Brown County Sheriff Dwayne Wenninger, to hold public office.¹

{¶12} On May 15, 2009, Varnau, a candidate for the Brown County Sheriff's Office, filed in the Brown County Court of Common Pleas a motion to unseal and produce court records from a 2002-2003 case in which Sheriff Wenninger was acquitted of falsifying election records relating to his qualifications to run for and hold the sheriff's office. See *State v. Wenninger*, 125 Ohio Misc.2d 55, 2003-Ohio-5521, fn. 1. Varnau sought to have the records unsealed for purposes of using them in a pending civil action he had filed in this court in February 2009 wherein Varnau petitioned for a writ of quo warranto challenging Sheriff Wenninger's claim to office.

{¶13} On May 20, 2009, Judge Scott T. Gusweiler denied Varnau's motion to unseal and produce court records. On June 23, 2009, Varnau filed a motion requesting Judge Gusweiler to recuse himself from the case due to the facts that Judge Gusweiler and Sheriff Wenninger are from the same political party and Judge Gusweiler made a contribution to a fund established to help pay the costs of medical treatments for Sheriff Wenninger's wife. Varnau also filed a motion requesting Judge Gusweiler to vacate his previous order denying Varnau's motion to unseal and produce court records. On July 2, 2009, Judge Gusweiler denied Varnau's motion to recuse and motion to vacate.²

{¶14} Varnau now appeals and assigns the following as error:

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED IN DECIDING THE PENDING MOTION

1. This case is hereby removed, sua sponte, from the accelerated calendar and placed on this court's regular calendar.

2. On July 7, 2009, Varnau filed an affidavit with the Ohio Supreme Court under R.C. 2701.03 seeking the disqualification of Judge Gusweiler from acting on any further proceedings in the action Varnau had brought in the Brown County Court of Common Pleas. On July 15, 2009, Chief Justice Moyer dismissed the affidavit of disqualification as moot, after noting that his statutory authority to order disqualification of judges extends only to those situations "in which a proceeding [is] pending before the court[.]" R.C. 2701.03(A), and in this case, there was no longer anything pending before Judge Gusweiler after he denied Varnau's motion to recuse and motion to vacate prior to the filing of the affidavit of disqualification.

WITHOUT RECUSING HIMSELF."

{¶7} Varnau argues Judge Gusweiler denied him due process by refusing to recuse himself from this case due to bias or prejudice. However, this court has no authority to address the merits of this assignment of error, since R.C. 2701.03 gives the Chief Justice of the Ohio Supreme Court exclusive authority to disqualify a judge for bias or prejudice. See, e.g., *State v. Wesley*, Warren CA2008-06-086, 2008-Ohio-6755, ¶18.

{¶8} Therefore, Varnau's first assignment of error is overruled.

{¶9} Assignment of Error No. 2:

{¶10} "THE TRIAL COURT ERRED IN DENYING THE MOTION TO UNSEAL THE RECORD."

{¶11} Varnau argues the trial court erred in denying his motion to unseal and produce court records relating to Sheriff Wenninger's qualifications to hold office. We disagree.

{¶12} R.C. 2953.53(D) sets forth the individuals who are permitted access to sealed records, and states in pertinent part:

{¶13} "[T]he official records of a case that have been sealed may be made available to the following persons for the following purposes:

{¶14} "(1) To the person who is the subject of the records upon written application, and to any other person named in the application, for any purpose;

{¶15} "(2) To a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case;

{¶16} "(3) To a prosecuting attorney or the prosecuting attorney's assistants to determine a defendant's eligibility to enter a pre-trial diversion program established pursuant to section 2935.36 of the Revised Code;

{¶17} "(4) To a prosecuting attorney or the prosecuting attorney's assistants to

determine a defendant's eligibility to enter a pre-trial diversion program under division (E)(2)(b) of section 4301.69 of the Revised Code."

{¶18} As the trial court noted, Varnau does not fall within any of these classifications of persons to whom sealed records may be made available. Therefore, he was not entitled to have access to the sealed records pertaining to Sheriff Wenninger.

{¶19} Varnau argues "[t]he trial court relied on R.C. 2953.52," but contends that statute "is not sufficiently tailored to protect the public's right of access to court proceedings," because it violates the First Amendment to the United States Constitution and the "Open Courts" provision in Section 16, Article I of the Ohio Constitution.

{¶20} R.C. 2953.52 provides an opportunity to persons found not guilty of an offense by a jury or a court to apply to the court for an order to seal his official records in his case. R.C. 2953.52(A). This section also establishes the conditions that must be met in order for the records to be sealed. R.C. 2953.52(B).

{¶21} A review of the trial court's judgment entries from May 20 and July 2, 2009 shows that the trial court relied on R.C. 2953.53 rather than R.C. 2953.52 in overruling Varnau's motion to unseal and produce court records and his subsequent motion to vacate the court's order denying his motion to unseal and produce court records. Moreover, Varnau did not challenge the constitutionality of R.C. 2953.52 or 2953.53 in the trial court, and therefore has waived this issue for purposes of appeal. *Anderson v. Anderson*, Warren App. No. CA2009-03-033, 2009-Ohio-5636, ¶38.

{¶22} Finally, Varnau argues the trial court's decision denying his motion to unseal and produce court records should be vacated "for violation of Sup.R. 44-47, which includes the presumption of public access to court records, and the process for making a determination otherwise." We disagree with this argument.

{¶23} Sup.R. 44 states in pertinent part:

{¶24} "As used in Sup.R. 44 through 47:

{¶25} "****

{¶26} "(B) 'Court record' means *** a case document *** regardless of physical form or characteristic, manner of creation, or method of storage.

{¶27} "(C)(1) 'Case document' means a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices, subject to the exclusions in division (C)(2) of this rule.

{¶28} "(2) The term 'case document' does *not* include the following:

{¶29} "(a) A document or information in a document exempt from disclosure under state, federal, or the common law[.]" (Emphasis added.)

{¶30} In this case, the court records from the 2002-2003 case involving Sheriff Wenninger that Varnau sought to have unsealed were apparently sealed under R.C. 2953.52, and therefore the proceedings in the case must "be deemed not to have occurred." R.C. 2953.52(B)(3). Moreover, court records sealed under R.C. 2953.52(B)(3) qualify as documents that are exempt from disclosure under state law, and thus are not "case documents" or "court records" as those terms are defined in Sup.R. 44 through 47. Therefore, the provisions in Sup.R. 44 through 47 relating to court records do not apply to this case.

{¶31} Accordingly, Varnau's second assignment of error is overruled.

{¶32} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.

