

**[J-47A-2016 and J-47B-2016] [MO: Wecht, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

ADAM KUREN AND STEVEN : No. 57 MAP 2015  
ALLABAUGH, ON BEHALF OF :  
THEMSELVES AND ALL OTHERS :  
SIMILARLY SITUATED, : Appeal from the Order of the  
: Commonwealth Court at No. 2072 CD  
: 2013 dated October 14, 2014,  
Appellants : Reargument Denied December 2, 2014,  
: Affirming the Order of Luzerne County  
v. : Court of Common Pleas, Civil Division,  
: at No. 04517, April Term, 2012 dated  
: October 22, 2013.

LUZERNE COUNTY OF THE : ARGUED: April 6, 2016  
COMMONWEALTH OF PENNSYLVANIA :  
AND ROBERT C. LAWTON, COUNTY :  
MANAGER, IN HIS OFFICIAL CAPACITY, :  
Appellees :

ADAM KUREN AND STEVEN : No. 58 MAP 2015  
ALLABAUGH, ON BEHALF OF :  
THEMSELVES AND ALL OTHERS :  
SIMILARLY SITUATED, : Appeal from the Order of the  
: Commonwealth Court at No. 2207 CD  
Appellants : 2013 (cross to Nos. 2072 CD 2013)  
: dated October 14, 2014, Reargument  
: Denied December 2, 2014, Affirming the  
v. : Order of Luzerne County Court of  
: Common Pleas, Civil Division, at No.  
: 04517, April Term, 2012 dated October  
: 22, 2013.

LUZERNE COUNTY OF THE :  
COMMONWEALTH OF PENNSYLVANIA : ARGUED: April 6, 2016  
AND ROBERT C. LAWTON, COUNTY :  
MANAGER, IN HIS OFFICIAL CAPACITY, :  
Appellees :

**CONCURRING OPINION**

**JUSTICE BAER**

**DECIDED: September 28, 2016**

I concur in the result. Like the Majority, I would reverse the Commonwealth Court's order and remand the case to the trial court for further proceedings, as I too conclude that Appellants' amended complaint avers sufficient facts to survive Appellees' preliminary objection in the nature of a demurrer. However, the rationale I employ in reaching this conclusion differs significantly from the Majority's reasoning. More specifically, in my view, the disposition of this appeal requires a straight-forward application of well-settled principles of law regarding mandamus actions and the standards that govern preliminary objections.

The crux of Appellants' amended complaint is that Luzerne County's failure to fund adequately the county's Office of Public Defender ("OPD") has rendered the OPD incapable of providing indigent defendants with effective assistance of counsel.

In terms of relief, Appellants requested as follows:

A writ of mandamus and permanent injunction compelling [Appellees] to provide necessary funding to allow the OPD to hire additional trial attorneys and support staff as well as upgrade the physical and technological resources such that the OPD is capable of providing representation to all qualified indigent defendants prosecuted in Luzerne County that satisfies standards set by the U.S. and Pennsylvania Constitutions[.]

Amended Complaint, 5/15/2016, at 38.

Regarding their request for injunctive relief, Appellants seek an order compelling Appellees to perform an affirmative act and mandating a course of conduct which would result in an adequately funded OPD. Accordingly, Appellants desire a mandatory injunction. See BLACK'S LAW DICTIONARY 800 (8th ed. 2004) (defining "mandatory

injunction” as an “injunction that orders an affirmative act or mandates a specified course of conduct”).<sup>1</sup>

However, Appellees are Luzerne County (a government entity) and its county manager (a government official). Consequently, if the trial court were to grant Appellants’ request for a mandatory injunction and require Appellees to fund the OPD appropriately, then it necessarily would be compelling official performance of an allegedly mandatory duty. Thus, for all intents and purposes, the only relief Appellants actually seek is a writ of mandamus. See Fagan v. Smith, 41 A.3d 816, 818 (Pa. 2012) (“The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty.”); see also Sodus Cent. Sch. Dist. v. Kreps, 468 F.Supp. 884, 885 (W.D.N.Y. 1978) (stating that, when a plaintiff seeks a mandatory injunction against a government official, “it is a suit in the nature of mandamus and all of the common law restrictions on the use of mandamus is applicable”); Vann v. Hous. Auth. of Kansas City, Mo., 87 F.R.D. 642, 668 (W.D. Mo. 1980) (“When a mandatory injunction against a government official is sought, all of the common law restrictions on mandamus apply.”). I, therefore, am of the opinion that we must view this matter as a mandamus action.

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<sup>1</sup> I also highlight that Appellants’ complaint seeks a permanent, not a preliminary, injunction. This Court has explained that, in Pennsylvania, a court may issue a permanent injunction if the party seeking it can establish a clear right to relief. Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia, 4 A.3d 610, 627 (Pa. 2010). The Court further has explained that a party seeking a permanent injunction is not required to prove either irreparable harm or the need for immediate relief, “as is necessary when seeking a preliminary injunction[.]” Id.

The Majority concludes that, in order for Appellants to establish their right to injunctive relief, they must demonstrate “the likelihood of substantial and immediate irreparable injury[.]” Majority Opinion at 47-48 (quoting O’Shea v. Littleton, 414 U.S. 488, 502 (1974)). In terms of Pennsylvania law, it seems that such a requirement is more akin to the standard for a preliminary injunction than it is to the standard for a permanent injunction.

Moving forward and as relevant to this appeal, Appellees filed preliminary objections in the nature of a demurrer, claiming that Appellants' complaint fails to state a cause of action. The trial court sustained the objection, and the Commonwealth Court affirmed that decision. This Court granted allowance of appeal to review these decisions.

In order to determine whether the trial court properly sustained Appellees' preliminary objection in the nature of a demurrer, we must decide whether, based upon the facts pleaded in Appellants' complaint, it is clear and free from doubt that Appellants will be unable to prove facts legally sufficient to establish a right to mandamus relief. See Mazur v. Trinity Area Sch. Dist., 961 A.2d 96, 101 (Pa. 2008) (stating that, in examining the propriety of an order sustaining a preliminary objection in the nature of a demurrer, an appellate court's standard of review is *de novo*, and its scope of review is plenary; and further explaining that a court "may sustain preliminary objections only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief"). In performing this task, we must accept as true all well-pleaded facts alleged in the complaint and every inference that is fairly deducible from those facts. Id.

As to a cause of action in mandamus, it is well-settled that a court may issue a writ of mandamus only where the party seeking the writ has a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists. Fagan, 41 A.3d at 818. Moreover, this Court has explained that mandamus can compel the performance of an official duty, "even where the existence and scope of such duties must be found and defined in the course of the mandamus action itself." Delaware River Port Auth. v. Thornburgh, 493 A.2d 1351, 1355 (Pa. 1985).

First, I conclude that, when viewed in the proper light, the amended complaint contains sufficient facts to demonstrate that Appellants have a clear legal right. Specifically, it is indisputable that criminal defendants are constitutionally entitled to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 685–87 (1984) (recognizing that a criminal defendant’s right to counsel is the right to the effective assistance of counsel). Appellants’ complaint avers facts which, if believed, establish that they are indigent criminal defendants entitled to effective assistance of counsel.

Next, the amended complaint pleads facts sufficient to demonstrate that Appellees have a duty which corresponds with Appellants’ right to effective assistance of counsel. In this regard, the amended complaint accurately highlights that, pursuant to the Public Defender Act (“Act”),<sup>2</sup> save for Philadelphia, every county in Pennsylvania must appoint a public defender, 16 P.S. § 9960.3, who by statutory mandate must furnish legal counsel to any person who lacks sufficient funds to obtain legal counsel and who is facing criminal and related proceedings, *id.* at § 9960.6. To allow the public defender to accomplish this task, the Act provides him with the discretion, *inter alia*, to hire staff, *id.* at § 9960.5, and it requires the board of commissioners to provide the public defender with suitable office space, furniture, equipment, and supplies, *id.* at § 9960.9. Moreover, according to the amended complaint, Appellees are responsible for providing funding to the OPD so that ODP can fulfill its duties to indigent criminal defendants.

In my view, Appellants’ accurate legal statements, combined with their factual averments, are sufficient to demonstrate that Appellees have a duty to fund adequately

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<sup>2</sup> 16 P.S. §§ 9960.1-9960.13.

the OPD, which corresponds with Appellants' legal right to effective assistance of counsel. Moreover, as detailed by the Majority, the amended complaint is chock-full of allegations that Appellees have failed to fulfill this duty.

The last question is whether the amended complaint avers facts sufficient to establish that no other adequate and appropriate remedy at law exists. In their amended complaint, Appellants plead that they have no other adequate remedy at law. Amended Complaint, 5/15/2016, at ¶ 111. Stated succinctly, in my view, the remainder of the facts averred in the complaint supports this statement.<sup>3</sup> Thus, that element is properly plead.

For these reasons, the trial court erred by sustaining Appellees' demurrer. I must highlight, however, that the rather simplistic manner in which I believe this appeal should be decided is dictated by the procedural posture of this case. Pleading sufficient facts to survive a preliminary objection in the nature of a demurrer is a rather low legal hurdle to clear. Providing evidence to substantiate those facts and proving the necessity of a writ of mandamus are far more challenging obstacles. Indeed, it is well-settled that mandamus is an extraordinary writ. See, e.g., Chilli v. Sch. Dist. of City of McKeesport, 6 A.2d 99, 99 (Pa. 1939) ("Mandamus is not a remedy of absolute right, it is an extraordinary writ, discretionary with the court, and can only be obtained when there is a clear legal right in the relator and a positive duty of the defendant to be

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<sup>3</sup> As detailed by the Majority Opinion, Appellees argue that the Post Conviction Relief Act, ("PCRA"), 42 Pa.C.S. §§ 9541-9546, provides a remedy for successful claims of ineffective assistance of counsel. This is true. However, the PCRA does not offer a vehicle to bring the specific cause of action that Appellants present in this matter nor does it contain a remedy that would allow for the relief that Appellants seek. Consequently, the PCRA does not supply Appellants with an adequate or appropriate remedy at law.

performed, and where there is no other adequate, specific or appropriate remedy; mandamus can never be invoked in a doubtful case.”).

Furthermore, assuming *arguendo* that Appellants ultimately can meet these high standards, fashioning a legally sound judgment will present unique problems. Such a judgment only could require Appellees to provide funding that meets minimum requirements necessary to allow the OPD to provide effective assistance of counsel, as that term is well-defined in cases involving collateral attacks on judgments of sentence. See, e.g., Commonwealth v. Pierce, 786 A.2d 203 (Pa. 2001).

In addition, a judgment in Appellants favor must be crafted in such a way that it does not necessitate the courts to maintain continuous oversight over the manner in which the OPD is funded. See Dorris v. Lloyd, 100 A.2d 924, 927 (Pa. 1953) (“The ordinary office of the writ of mandamus is to coerce the performance of single acts of specific and imperative duty, . . . and ordinarily it is not an appropriate remedy to compel a general course of official conduct or a long series of continuous acts, to be performed under varying conditions . . .”). In any event, today we simply are presented with determining whether Appellants’ complaint survives Appellees’ preliminary objection in the nature of a demurrer, and the Court has held that it does.