

FILED
COURT OF APPEALS

98 SEP -2 AM 10:30

IN THE COURT OF APPEALS OF OHIO
FOR MONTGOMERY COUNTY
SECOND APPELLATE DISTRICT

CLERK OF COURTS
MONTGOMERY CO., OHIO

MELVIN McCOY

Plaintiff-Appellant

v.

DONALD SCHRENGARDUS

Defendant-Appellee

Case No. 98-CA-65

T.Ct. Case No. EBR 293817

DECISION AND ENTRY

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Rendered on the 2nd day of September, 1998.

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PER CURIAM:

This matter came to be considered upon a motion filed by counsel for appellee, Donald Schrengardus, on July 21, 1998, requesting this court to dismiss the above-captioned appeal. Specifically, appellee contends that, pursuant to R.C. 3745.06, this court lacks subject matter jurisdiction over the appeal filed by appellant, Melvin McCoy, *pro se*, on June 22, 1998. Appellee asserts that jurisdiction is solely in the Franklin County Court of Appeals. To date, appellant, Melvin McCoy, *pro se*, has filed no responsive memorandum.

Appellant challenges the Environmental Review Appeals Commission's ("ERAC") May 21, 1998 "Findings of Fact, Conclusions of Law and Final Order" ("the order"), which affirmed the decision of the Director of the Ohio Environmental Protection Agency ("the

agency") denying appellant's after-the-fact application for section 401 water quality certification ("section 401 certification"). Previously, the agency had issued a proposed denial of the application, and a hearing examiner had conducted an adjudicatory hearing. The hearing examiner recommended affirming the agency's proposed denial, and the agency thereafter denied appellant's application. Appellant then appealed to the ERAC, which heard the parties' oral arguments and affirmed the agency's denial of appellant's application.

Appellee seeks dismissal on the basis of R.C. 3745.06, which provides, in pertinent part:

Any party adversely affected by an order of the environmental review appeals commission may appeal to the court of appeals of Franklin county, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred.

In *Kimble Clay & Limestone v. McAvoy* (1979), 59 Ohio St.2d 94, 96, the Supreme Court stated that the issue of which appellate court had subject matter jurisdiction under R.C. 3745.06 depended on whether the Ohio Environmental Board of Review's denial of "appellant's initial request to operate a rock crusher constituted a denial of a permit or license, or whether such denial encompassed an appeal arising from an alleged violation of a law or regulation." The Supreme Court explained:

If the appellant in this cause would have initiated operations contrary to the permit or license denial, then subsequent action to enforce such denial would have been clearly within the provisions of R.C. 3745.08 and the second segment of the first provision of R.C. 3745.06 which specifically addresses itself to "an alleged violation of a law or regulation." At such point in time, the jurisdiction of the Court of Appeals of the district in

which the violation was alleged to have occurred would have been statutorily invoked. * * *

The determination of appellee dealt with compliance standards prerequisite to the granting of a permit or license. Any violation proceedings would be subsequent, based upon violation of such denial. Only the appellant could create a "violation" or "alleged violation."

Id. at 97-98.

In this case, appellant sought our review of the ERAC's denial of his application for section 401 certification, which was required for his project involving the placement of fill materials in the stream adjacent to his property. See Ohio Adm.Code 3745-32-01(L), 3745-32-02, 3745-32-04, 3745-32-05. The agency may not issue section 401 certification unless the applicant has demonstrated that the discharge will not "prevent or interfere with the attainment or maintenance of applicable water quality standards" and will not "result in a violation of any applicable provision of [particular] sections of the Federal Water Pollution Control Act." Ohio Adm.Code 3745-32-05(A). Furthermore, an application may be denied upon a finding that "the discharge of dredged or fill material or obstructions or alterations in waters of the state will result in adverse long or short term impact on water quality." Ohio Adm.Code 3745-32-05(B). The ERAC agreed with the hearing examiner's conclusions that appellant had not met his burden of demonstrating that "any fill he would place in the original Sugar Creek channel, would not pollute the water or degrade the quality of the stream" and that "the project would result in adverse long and short term impacts on the water quality."


As in *Kimble Clay*, 59 Ohio St.2d at 98, the ERAC's underlying determination in the

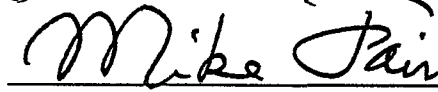
present matter "dealt with compliance standards prerequisite to the granting of a permit or license." The ERAC decision did not involve an alleged violation of a law or regulation. Accordingly, R.C. 3745.06 directs that the Franklin County Court of Appeals, rather than this court, has subject matter jurisdiction over an appeal.

WHEREFORE, upon due consideration of the foregoing, IT IS HEREBY ORDERED that appellee's motion to dismiss is hereby **Granted**. This matter is hereby **Dismissed** for lack of subject matter jurisdiction.

IT IS SO ORDERED.


FREDERICK N. YOUNG, Presiding Judge


JAMES A. BROGAN, Judge


MIKE FAIN, Judge

Copies provided by the Court of Appeals:

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DJ7/jeg



Attorney General
Betty D. Montgomery

MEMORANDUM

TO: All EES Attorneys

FROM: Bud Vielhauer, AAG 
Environmental Enforcement Section

RE: Court of Appeals Decision
Melvin McCoy v. Director

DATE: September 9, 1998

Attached is the latest in the continuing saga of Melvin McCoy. The Court of Appeals for Greene County (Second District) granted our Motion to Dismiss for lack of subject matter jurisdiction. Mr. McCoy appealed an ERAC decision affirming the Director's denial of a Section 401 Certification. McCoy appealed the ERAC decision to the Second Appellate District Court in Greene County. We moved to dismiss arguing that pursuant to R.C. § 3745.06 an Appellant must appeal an order of the ERAC to the Court of Appeals for Franklin County, unless it involves a violation of a law or regulation. The Second District Court of Appeals found that denial of a Section 401 Certification dealt with the compliance standards prerequisite to granting of a permit or a license and did not involve an alleged violation of law or regulation. Accordingly the Second District granted the Motion to Dismiss for lack of subject jurisdiction