

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Anthony N. Bowling, :
Relator, :
v. : No. 09AP-704
The Court of Common Pleas : (REGULAR CALENDAR)
for Franklin County Ohio, Honorable :
Judge Richard S. Sheward, :
Respondent. :

D E C I S I O N

Rendered on January 21, 2010

Anthony N. Bowling, pro se.

Ron O'Brien, Prosecuting Attorney, and *Paul Thies*, for respondent.

IN PROCEDENDO
ON MOTION FOR SUMMARY JUDGMENT

SADLER, J.

{¶1} Relator, Anthony N. Bowling ("relator"), requests a writ of procedendo ordering respondent, the Honorable Richard S. Sheward ("respondent"), a judge of the Franklin County Court of Common Pleas, to rule on relator's petition for post-conviction relief filed in March 2008. Respondent filed a motion for summary judgment asserting

that he has performed the act which relator sought to compel by ruling on the motion for post-conviction relief. Respondent attached to the motion for summary judgment a certified copy of the decision and entry denying relator's petition for post-conviction relief, which was filed on July 29, 2009. Relator responded to the motion for summary judgment and acknowledged that respondent has performed the act which he sought to compel.

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, this case was referred to a magistrate of this court to conduct appropriate proceedings. The magistrate rendered a decision, including findings of fact and conclusions of law, which is appended to this opinion. In her decision, the magistrate set forth the requirements for a party to prevail on a motion for summary judgment, and determined that it was undisputed that relator has received the relief requested in his writ of procedendo and that summary judgment is appropriate in the instant matter. Accordingly, the magistrate recommended that this court grant summary judgment in favor of respondent, and additionally, that the court should waive relator's filing fees.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} Finding no error or other defect on the face of the magistrate's decision, pursuant to Civ.R. 53(C), we adopt the decision of the magistrate as our own, including the findings of fact and conclusions of law contained therein. In accordance with the recommendation of the magistrate, we grant respondent's motion for summary judgment in favor of respondent, and further, waive relator's filing fees.

Motion for summary judgment granted, writ of procedendo denied.

BRYANT and McGRATH, JJ., concur.

A P P E N D I X
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State of Ohio [ex rel.] Anthony N. Bowling,	:	
Relator,	:	
v.	:	No. 09AP-704
The Court of Common Pleas for Franklin County Ohio, Honorable Judge Richard S. Sheward,	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on September 25, 2009

Anthony N. Bowling, pro se.

Ron O'Brien, Prosecuting Attorney, and Paul Thies, for respondent.

**IN PROCEDENDO
 ON MOTION FOR SUMMARY JUDGMENT**

{¶5} Relator, Anthony N. Bowling, has filed this original action requesting that this court issue a writ of procedendo ordering respondent, Judge Richard S. Sheward of the Franklin County Court of Common Pleas, to rule on relator's petition for post-conviction relief filed in March 2008.

Findings of Fact:

{¶6} 1. Because his March 2008 petition had yet to be ruled on, relator filed the instant complaint on July 20, 2009.

{¶7} 2. On August 12, 2009, respondent filed a motion for summary judgment. Respondent attached to the motion a certified copy of the decision and entry denying relator's petition for post-conviction relief filed on July 29, 2009.

{¶8} 3. Relator has filed a response to respondent's motion for summary judgment acknowledging that respondent has now performed the act which he sought to compel respondent to perform by the filing of this complaint.

{¶9} 4. Relator also requests that this court assess costs against respondent because it took the filing of this complaint in this court to compel respondent to perform the act which respondent should have performed earlier. In essence, relator argues that, but for the filing of this complaint, his motion would still be pending in the trial court.

{¶10} 5. The matter is currently before the magistrate on respondent's motion for summary judgment.

Conclusions of Law:

{¶11} Although styled as a mandamus action, relator actually seeks a writ of procedendo from this court. In order to be entitled to a writ of procedendo, a relator must establish a clear legal right to require that court to proceed, a clear legal duty on the part of the court to proceed, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Miley v. Parrott* (1996), 77 Ohio St.3d 64, 65. A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *Id.*

{¶12} An " 'inferior court's refusal or failure to timely dispose of a pending action is the ill a writ of procedendo is designed to remedy.' " *State ex rel. Dehler v. Sutula* (1995), 74 Ohio St.3d 33, 35, quoting *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 110.

{¶13} Procedendo is an order from a court of superior jurisdiction to proceed to judgment: it does not attempt to control the inferior court as to what the judgment should be. *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas* (1995), 72 Ohio St.3d 461, 462.

{¶14} A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Accordingly, any party moving for summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material facts; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶15} Because respondent has ruled on relator's petition for post-conviction relief, there is no longer any act which this court could compel respondent to perform. As such, summary judgment in favor of respondent is appropriate and should be granted.

{¶16} As noted in the findings of fact, while acknowledging that respondent has now ruled on his petition for post-conviction relief, relator asks that costs be assessed

against respondent. Relator asserts that, but for his filing of the instant complaint, his petition for post-conviction relief would still be pending.

{¶17} Relator filed his petition for post-conviction relief in March 2008. Sixteen months later, relator filed this complaint asking this court to compel respondent to rule on his petition. Given the unique facts of this case, that his petition for post-conviction relief is the only post-conviction motion he has filed in the trial court and that 16 months have passed since his petition was filed, it is this magistrate's decision that this court should waive relator's filing fees.

{¶18} Based on the foregoing, it is this magistrate's decision that this court should waive relator's filing fees and, because respondent has performed the act which relator sought to compel, there is no longer any act to be performed and summary judgment should be granted in favor of respondent.

/s/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).