

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Dennis Holt,	:	
Relator,	:	
v.	:	No. 10AP-811
Richard S. Sheward, Judge,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on March 1, 2011

Dennis Holt, pro se.

Ron O'Brien, Prosecuting Attorney, for respondent.

IN PROHIBITION
ON MOTION TO DISMISS

BROWN, J.

{¶1} Relator, Dennis Holt, has filed an original action requesting that this court issue a writ of prohibition ordering respondent, the Honorable Richard S. Sheward, to cease from proceeding with two underlying criminal cases (common pleas case Nos.

09CR-003905 and 09CR-004534) because respondent has refused to allow relator to dismiss his court-appointed attorney.

{¶2} Respondent filed a motion to dismiss relator's petition. This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which is appended to this decision including findings of fact and conclusions of law, recommending that this court grant respondent's motion to dismiss. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, respondent's motion to dismiss is granted, and this action is hereby dismissed.

Motion to dismiss granted; action dismissed.

KLATT and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Dennis Holt,	:	
Relator,	:	
v.	:	No. 10AP-811
Richard S. Sheward, Judge,	:	(REGULAR CALENDAR)
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on October 22, 2010

Dennis Holt, pro se.

Ron O'Brien, Prosecuting Attorney, for respondent.

IN PROHIBITION ON MOTION TO DISMISS

{¶4} Relator, Dennis Holt, has filed this original action requesting that this court issue a writ of prohibition ordering respondent, the Honorable Richard S. Sheward, Judge of the Franklin County Court of Common Pleas, to cease from proceeding with his underlying criminal cases (Nos. 09CR-003905 and 09CR-004534) because respondent has refused to permit relator to dismiss his court appointed attorney.

Findings of Fact:

{¶5} 1. According to his complaint, relator has been charged with multiple counts of aggravated robbery, kidnapping and aggravated murder in the aforementioned cases.

{¶6} 2. Larry W. Thomas has been appointed to represent relator in the underlying criminal cases.

{¶7} 3. According to relator, Thomas "has utterly failed in his duty to attempt to investigate and formulate a defense to the serious criminal charges filed by the State of Ohio against the relator."

{¶8} 4. Relator further alleges that he has attempted to notify respondent of Thomas' failures and professional incompetence; however, according to relator, respondent has failed to act on relator's request to appoint new counsel on his behalf.

{¶9} 5. Relator argues that respondent's failure to dismiss Thomas and appoint new counsel violates his constitutional right to a fair trial and effective assistance of counsel.

{¶10} 6. Relator seeks a writ of prohibition ordering respondent to refrain from proceeding with the underlying criminal proceedings until respondent holds a hearing on relator's request that new counsel be appointed.

{¶11} 7. Respondent has filed a motion to dismiss on grounds that, in the event relator is convicted, he has an adequate remedy in the ordinary course of law by way of an appeal as of right from any alleged errors that may occur during the trial, including respondent's alleged refusal to remove trial counsel upon his request.

{¶12} 8. Relator has not filed a memorandum contra and the motion is currently before the magistrate for determination.

Conclusions of Law:

{¶13} For the reasons that follow, it is this magistrate's decision that this court should grant respondent's motion to dismiss relator's complaint.

{¶14} A writ of prohibition is an extraordinary judicial writ, the purpose of which is to restrain inferior courts and tribunals from exceeding their jurisdiction. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70. A writ of prohibition is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies. *Id.* In order to be entitled to a writ of prohibition, relator must establish that: (1) respondent is about to exercise judicial or quasi-judicial powers; (2) the exercise of the power is unauthorized by law; and (3) the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. Henry v. McMonagle* (2000), 87 Ohio St.3d 543.

{¶15} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. *Id.*

{¶16} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242. As such, a complaint for writ of mandamus is

not subject to dismissal under Civ.R. 12(B)(6) if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being asserted against it, and it appears that relator might prove some set of facts entitling him to relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94. For the following reasons, respondent's motion should be granted and relator's complaint should be dismissed.

{¶17} In essence, relator is arguing that his current trial counsel is ineffective and that he has a clear legal right to the appointment of new counsel.

{¶18} In *State v. Hairston*, 10th Dist. No. 08AP-735, 2009-Ohio-2346, ¶36, Deante L. Hairston argued on appeal that the trial court infringed his due process rights and Sixth Amendment right to counsel by refusing to grant a continuance on the first day of trial so he could fire his appointed public defender and retain private counsel. This court disagreed, stating:

The Sixth Amendment guarantees criminal defendants the right to competent assistance of an attorney. See generally *United States v. Morrison* (1981), 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564; *Gideon v. Wainwright* (1963), 372 U.S. 335, 341-42, 82 S.Ct. 792. Regarding choice of counsel, defendants are typically free to *hire* any attorney of their liking. See *Morris v. Slappy* (1983), 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610. But this principle cannot be interpreted to mean that indigent defendants can *choose* which counsel a court appoints to represent them. See, e.g., *Wheat v. United States* (1988), 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 ("[A] defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant."); *Thurston v. Maxwell* (1965), 3 Ohio St.2d 92, 93, 209 N.E.2d 204 ("The right to have counsel assigned by the court does not impose a duty on the court to allow the accused to

choose his own counsel; the selection is within the discretion of the court.").

(Emphases sic.)

{¶19} Clearly, respondent is an officer of the court and is about to exercise judicial power over relator's underlying proceedings. Further, respondent is authorized by law and has jurisdiction to preside over the underlying criminal trial. Lastly, although relator argues that he is being forced to proceed with ineffective trial counsel, relator has no clear legal right to have new counsel appointed and respondent has no clear legal duty to appoint new counsel. Further, relator possesses an adequate remedy at law by way of an appeal from any adverse judgment of conviction resulting from the underlying proceedings. As such, a writ of prohibition is unwarranted.

{¶20} Accordingly, it is this magistrate's decision that this court should grant respondent's motion and dismiss relator's complaint in prohibition.

/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).