

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State ex rel. James R. Kirwan

Court of Appeals No. E-11-051

Relator

v.

Erie County Court of Common Pleas,
Judge Roger E. Binette

DECISION AND JUDGMENT

Respondent

Decided: September 29, 2011

* * * * *

James R. Kirwan, pro se.

Kevin J. Baxter, Erie County Prosecuting Attorney, Sandy J. Rubino
and Jason R. Hinnners, Assistant Prosecuting Attorneys, for respondent.

* * * * *

YARBROUGH, J.

{¶ 1} This matter is before the court on motion of respondent, Judge Roger E. Binette, pursuant to Civ.R. 12(B)(6), to dismiss relator's original action seeking a writ of procedendo. For the following reasons, the motion to dismiss shall be granted.

{¶ 2} On July 8, 2011, relator filed a complaint for a writ of procedendo seeking this court to order respondent "to issue a final order or proceed to judgment" regarding a "pending action" in respondent's court "for a nunc pro tunc entry" to correct an alleged error in the court's sentencing entry. On August 11, 2011, we issued an alternative writ, after which respondent filed the instant motion to dismiss. The motion is supported by a number of documents from the trial record that bear on the challenged entry, relator's nunc pro tunc motion and the merits of this original action. Relator failed to respond to the dismissal motion.

{¶ 3} In relator's motion for a nunc pro tunc entry, he claimed that the court had originally sentenced him to a prison term of eight months and sought correction of his sentence on that basis. He offered nothing to support this claim and, after reviewing its sentencing entry of June 5, 2009, the court denied the motion.

{¶ 4} We have reviewed the trial court's sentencing entry. The entry stated that relator was sentenced to a period of four years of community control sanction ("CCS"). It also stated that if he violated any condition of this sanction and was terminated, "further, harsher sanctions, including a prison term of ten (10) months, would be imposed if defendant does not comply with community sanctions."

{¶ 5} On May 13, 2010, at a CCS hearing, the trial court determined, and relator apparently admitted, that he had violated the community control conditions previously imposed. On November 24, 2010, at a disposition hearing on the admitted CCS

violation, relator's community control was revoked and terminated and the 10 month prison sentence imposed.

{¶ 6} Pursuant to Crim.R. 32(C), "[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence * * *." See, also, *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. In order to obtain a remedy for an allegedly improper order that lacks any of the above-stated requirements, a defendant must first file a motion in the trial court seeking correction of the judgment entry. If such a request is refused, the defendant may seek to compel the trial court to act by filing an action for mandamus or procedendo. *Jones v. Ansted*, 6th Dist. No. S-11-024, 2011-Ohio-3714, ¶ 5; *State ex rel. Moore v. Krichbaum*, 7th Dist. No. 09 MA 201, 2010-Ohio-1541, ¶ 9, citing *Dunn v. Smith*, 119 Ohio St.3d 364, 2008-Ohio-4565, ¶ 8.

{¶ 7} A writ of procedendo, however, will not issue from a superior court to compel a lower court to make a specific ruling. *Jones* at ¶ 6; *State ex rel. Lisboa v. Gold*, 8th Dist. No. 96164, 2011-Ohio-2666, ¶ 2. The writ is merely an order "to proceed to judgment" and timely dispose of a pending action. *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 45; *State ex rel. Watkins v. Eighth Dist. Court of Appeals*, 82 Ohio St.3d 532, 534-535. Procedendo is appropriate when a court has either *refused* to render a judgment or has unnecessarily *delayed* proceeding to judgment. *State ex rel. Lisboa v. Gold*, 8th Dist. No. 96164, 2011-Ohio-2666, ¶ 2, citing *Watkins*, *supra*. The

writ will not issue to control the substance of what the judgment should be, nor will it issue to control or interfere with ordinary court procedure. *Id.*

{¶ 8} Here, there was no refusal or delay in rendering judgment. Respondent ruled on relator's nunc pro tunc motion on April 18, 2011, finding it to be without merit. Respondent's original sentencing entry was compliant with Crim.R. 32(C) and *Baker*. Further, nothing therein states that the court was imposing a "term of imprisonment of eight (8) months," as relator claimed both in his motion below and in his procedendo complaint before this court. The term imposed in the sentencing entry is plainly stated to be 10 months. Since there was nothing improper about the challenged sentencing entry, we cannot compel respondent to make a specific finding that relator's prison sentence was "for eight (8) months" or otherwise correct the sentencing entry under Crim.R. 32.

{¶ 9} Accordingly, a writ of procedendo will not issue in this case. Relator's complaint for a writ of procedendo is dismissed. Costs assessed to relator.

{¶ 10} Pursuant to Civ.R. 58(B), the clerk is directed to serve upon all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

{¶ 11} It is so ordered.

WRIT DENIED.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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