[Cite as *Perry v. McKay*, 2009-Ohio-5767.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ALFONSIA M. PERRY,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2009-T-0023**
- vs -	:	
JUDGE W. WYATT McKAY,	:	
Respondent.	:	

Original Action for writ of Procedendo.

Judgment: Petition dismissed.

Alfonsia M. Perry, PID: 300-444, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, OH 45601-5500 (Relator).

Dennis Watkins, Trumbull County Prosecutor, and *William J. Danso,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent).

PER CURIAM

{¶1} The instant case is a procedendo proceeding in which relator, Alfonsia M. Perry, seeks the issuance of a writ that would require the trial judge in an underlying criminal action to render certain judgments. As the primary basis for his petition, relator submits that, even though he has been a prisoner in the state penal system since 1994, the trial judge in the criminal action has never rendered a final judgment in regard to his conviction for aggravated murder. Specifically, he contends that the trial judge must be ordered to issue a new sentencing judgment because the original judgment in the action

did not comply with Crim.R. 32(C).

{¶2} On May 21, 2009, relator filed a "Motion for Leave to Correct Deficiency" to amend the case caption to reflect "Judge Wyatt McKay" as the respondent, instead of the "State of Ohio", the party captioned as respondent when this action was originally filed. Relator's motion "request[s] that this Honorable Court except (sic) this filing[,] as Plaintiff a Pro-se litigant incorrectly did not caption this Original final writ properly toward the right party." Upon consideration, relator's motion is construed as a Motion to Amend relator's Writ of Procedendo and is hereby granted. See *Chokel v. Celebrezze*, 8th Dist. No. 78355, 2000 Ohio App. LEXIS 6227, at *2 (appellate court granted relator's motion to amend his complaint to cure certain procedural defects in a procedendo action).

{¶3} Relator's procedendo petition is predicated upon the trial proceedings in Trumbull C.P. No. 94-CR-42, in which he was indicted on a single count of aggravated murder, pursuant to R.C. 2903.01. After conducting a jury trial on the matter, the trial judge issued a sentencing judgment on November 7, 1994. In that judgment, the judge expressly stated that the jury had found relator guilty of the sole charge. In light of this, the trial judge sentenced him to a determinate term of life in a state prison. Relator now contends that the foregoing judgment did not constitute a final order.

{¶4} Following the release of the November 7, 1994 judgment, relator appealed that particular entry to this court. In *State v. Perry* (Aug. 29, 1997), 11th Dist. No. 94-T-5165, 1997 Ohio App. LEXIS 3884, we upheld both the jury verdict and the imposed sentence in all respects. Approximately eleven years later, relator tried to file a second appeal from the same judgment, seeking to assert a new issue regarding the validity of the original indictment. However, in *State v. Perry*, 11th Dist. No. 2008-T-0127, 2009-

Ohio-1320, we dismissed the new appeal on the basis that relator could not employ the "delayed appeal" procedure under App.R. 5(A) as a means of maintaining successive appeals from the same judgment.

{¶5} Immediately after the dismissal of his second appeal, relator instituted the instant action in procedendo. Although respondent, the State of Ohio, has submitted two motions to dismiss the petition, neither motion addresses relator's contention that the trial judge should be required to issue a new sentencing judgment. Nevertheless, our review of the November 7, 1994 judgment readily indicates that it was sufficient to satisfy the requirements for finality under the governing case law. Thus, since relator's assertions regarding the original sentencing judgment are clearly frivolous, they can be reviewed sua sponte and dismissed without notice. See *State ex rel. Culgan v. Medina Cty. Ct. of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, at ¶7.

{¶6} As an initial point, this court would note that neither party to this action has attached a copy of the November 7, 1994 judgment to their respective pleadings. Yet, it is well established under Ohio law that a court has the ability to take judicial notice of any judgment issued by another court within this state. See, e.g., *Szerlip v. Szerlip*, 5th Dist. No. 01CA09, 2002-Ohio-2541, at ¶26. Although this rule does not permit a court to take notice of the truth of a finding of fact, it does allow judicial notice of the fact that a particular ruling has been made. *In re Facemyer* (Dec. 22, 2000), 11th Dist. No. 2000-L-017, 2000 Ohio App. LEXIS 6118, at *5-6.

{¶7} In this instance, a review of the trial docket in Trumbull C.P. No 94-CR-42 shows that a sentencing judgment was journalized on November 7, 1994. Furthermore, the original copy of that judgment is contained in the record of the action. Given these

circumstances, this court concludes that the taking of judicial notice is appropriate.

{¶8} As was noted above, the November 7, 1994 judgment had statements that explained both the outcome of the trial and the imposed sentence. In regard to the trial itself, the disputed judgment provided: "The Defendant herein ***, having been brought into Court for trial before a petit jury and being represented by counsel, ***, and the jury having been impaneled, and after due deliberation was found guilty of Aggravated Murder (ORC 2903.01)."

{¶9} As to the imposed sentence, the disputed judgment was equally clear: "It is therefore ORDERED, ADJUDGED and DECREED that the Defendant, ALFONSIA PERRY, be taken from the courtroom to the Trumbull County Jail and from thence to the Lorain Correctional Institution at Grafton, Ohio, and imprisoned therein for the determinate period of LIFE, as provided by law, ***."

{¶10} In the instant petition, relator makes the basic assertion that the foregoing judgment failed to comply with the requirements of Crim.R.32(C). The first sentence of that rule indicates that a judgment of conviction must delineate "the plea, the verdict or findings, and the sentence." The rule further states that the judgment must be signed by the trial judge and must be entered on the journal by the clerk of courts.

{¶11} In interpreting Crim.R. 32(C), some appellate districts had held that even if the criminal defendant was found guilty by a petit jury, it was still necessary for the final judgment of conviction to state what his initial plea to the charges had been. However, in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, the Supreme Court of Ohio specifically rejected this interpretation and essentially held that the rule only mandates a reference to the defendant's plea when the plea forms the actual basis of his conviction.

In other words, Crim.R. 32(C) only requires the trial judge to provide a basic statement of the imposed sentence and a statement regarding the manner in which the defendant had been convicted. Id. at ¶13.

{¶12} "We now hold that a judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the findings of the court upon which the conviction is based; (2) the sentence;(3) the signature of the judge; and (4) the time stamp showing journalization by the clerk of court." Id. at ¶16.

{¶13} In the instant case, the November 7, 1994 judgment clearly indicated that a petit jury had found relator guilty of aggravated murder, and that he would be required to serve a life sentence. Moreover, the disputed judgment was signed by the trial judge and was duly time-stamped. Therefore, pursuant to *Baker*, the disputed judgment was a judgment of conviction which satisfied the requirements for finality under R.C. 2505.02 and Crim.R. 32(C). To this extent, the trial judge in the underlying criminal proceeding has already performed his obligation to render a final judgment of conviction; thus, a writ of procedendo will not lie to require the issuance of a new judgment on that matter.

{¶14} As a separate basis for his procedendo petition, relator further alleged that the trial judge was refusing to proceed on a motion for a new trial which he had recently filed. In moving to dismiss this aspect of relator's claim, respondent contends that any issue concerning the motion for a new trial has become moot because, subsequent to the filing of the instant action, the trial judge released a new judgment entry overruling that particular motion. In support of this point, respondent has attached to its present motion a certified copy of the entry which was rendered by the trial court on September 1, 2009.

{¶15} Our review of the submitted copy confirms that the trial judge has fully disposed of the motion for a new trial. In addition, we would note that relator has not submitted any type of response in regard to this specific point.

{¶16} Under the prior precedent of this court, a procedendo claim will be viewed as moot when the trial judge has already performed the specific act that is the subject matter of the petition. *State ex rel. Noble v. Vettel*, 11th Dist. No. 2004-A-0079, 2005-Ohio-692, at ¶5. This court has further held that, although evidentiary materials cannot normally be considered in ruling upon a motion to dismiss under Civ.R. 12(B)(6), such materials are permissible when that motion is based upon a "mootness" argument. Id. Applying this precedent to the instant situation, we conclude that a writ of procedendo cannot lie in regard to relator's motion for new trial because the trial judge has no duty to take any further action in the underlying criminal case.

{¶17} As a final point, this court would note that, as part of its original motion to dismiss, respondent argued that the instant matter should not go forward because relator had failed to name the trial judge as a party to this proceeding. Since this court granted relator's motion to amend the writ of procedendo, this issue lacks merit.

{¶18} As a general proposition, a writ of procedendo will only be issued when the trial judge in the underlying case has refused to proceed on a pending matter and render a determination. *State ex rel. Agosto v. Cuyahoga Cty. Ct. of Common Pleas*, 119 Ohio St.3d 366, 2008-Ohio-4607, at ¶8. Pursuant to the foregoing discussion, this court holds that the trial judge in this matter has already released all judgments which were necessary for the criminal proceeding to properly proceed. Therefore, since relator will not be able to prove a set of facts under which he would be entitled to the

writ, the dismissal of his entire procedendo claim is justified under Civ.R. 12(B)(6).

{¶19} In regard to the "new trial" aspect of the procedendo claim, respondent's motion to dismiss of September 4, 2009, is granted, and judgment is hereby entered accordingly. As to the remaining aspect of the procedendo claim, it is the sua sponte order of this court that relator's entire claim for relief is hereby dismissed.

MARY JANE TRAPP, P.J., DIANE V. GRENDELL, CYNTHIA WESTCOTT RICE, J., concur.