

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO EX REL. REX A. BOSLEY,

Relator,

v.

MAHONING COUNTY COURT OF COMMON PLEAS
JUDGE ANTHONY M. D'APOLITO,

Respondent.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0050

Writ of Procedendo

BEFORE:

Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:

Dismissed.

Rex A. Bosley, PRO SE, Inmate No. 683-856, Grafton Correctional Institution, 2500 S. Avon Belden Road, Grafton, Ohio 44044, for Relator.

Atty. Paul Gains, Mahoning County Prosecutor and *Atty. Ralph Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Respondent.

Dated:
July 13, 2021

PER CURIAM.

{¶1} Relator Rex A. Bosley, a self-represented inmate, initiated this original action by filing a complaint for a writ of procedendo against Respondent Mahoning County Court of Common Pleas Judge Anthony D’Apolito seeking to compel him to rule on the motion to withdraw the guilty plea he filed on July 11, 2018. Respondent has filed a combined answer and motion to dismiss. Because Respondent never owed a duty to Relator to rule on the motion, we grant Respondent’s motion to dismiss and dismiss this original action accordingly.

{¶2} On November 5, 2015, Relator was indicted on 10 counts of pandering obscenity involving a minor, a felony of the fourth degree in violation of R.C. 2907.321(A)(5), (C), and 40 counts of pandering sexually orientated matter involving a minor, a felony of the fourth degree in violation of R.C. 2907.322(A)(5), (C).

{¶3} On April 11, 2016, Relator and the state entered into a Crim.R. 11 agreement. As part of the agreement, the state agreed to dismiss counts 16 through 50 relating to pandering sexually orientated matter. In return, Relator agreed to plead guilty to the remaining 15 counts: 10 counts of pandering obscenity involving a minor and 5 counts of pandering involving sexually orientated matter involving a minor. The plea hearing transcript was not made a part of the appellate record.

{¶4} On June 15, 2016, the trial court held a sentencing hearing. At the hearing, the state recommended 10 years of incarceration. The defense requested Relator receive a community control sanction. The trial court sentenced Relator to 6 months of incarceration per count to run consecutively, for an aggregate total of 7½ years of incarceration. The trial court also imposed a mandatory 5-year postrelease control period. Relator is additionally required to register as a tier-2 sex offender. On direct appeal, this Court affirmed Relator’s conviction and sentence on September 17, 2017, in *State v. Bosley*, 7th Dist. Mahoning No. 16 MA 0100, 2017-Ohio-7643, *appeal not accepted*, 152 Ohio St.3d 1421, 2018-Ohio-923, 93 N.E.3d 1003.

{¶5} On July 17, 2018, Relator, proceeding on his behalf, filed a motion to withdraw his guilty plea pursuant Crim.R. 32.1 including a request for a hearing on the motion. The following words appear at the heading of the motion: “IN THE COURT OF

COMMON PLEAS Mahoning COUNTY, OHIO.” Other than Relator appealing this Court’s decision to the Ohio Supreme Court and that Court’s decision declining to accept his appeal for review of our decision, Relator’s direct appeal concluded with this Court’s opinion and judgment entry issued on September 7, 2017. Despite the motion’s heading, Relator’s July 17, 2018 motion to withdraw inexplicably was assigned to his concluded and closed direct appeal under case no. 16 MA 0100.

{¶6} Unsurprisingly, Respondent (if he was even aware of the motion’s filing in another court) has not ruled upon the motion. Nor shall we. As indicated, Relator’s direct appeal in appellate case number 16 MA 0100 has concluded and the appellate case is closed. Even if the direct appeal were still pending before this Court, we would lack the jurisdiction to entertain Relator’s Crim.R. 32.1 motion to withdraw for two reasons. First, Crim.R. 1 explains the scope of the Rules of Criminal Procedure; and, by extension, their applicability, construction, and exceptions. The first such exception highlighted by Crim.R. 1 necessarily concerns courts of appeal: “These rules, to the extent that specific procedure is provided by other rules of the Supreme Court or to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * upon appeal to review any judgment, order or ruling.” Second, the Ohio Constitution vests courts of appeal with original jurisdiction (contrasted to appellate review jurisdiction) only over writs of quo warranto, mandamus, habeas corpus, prohibition, and procedendo. Ohio Constitution, Article IV, Section 3(B)(1)(a)-(f) (Courts of Appeals).

{¶7} While we do not have jurisdiction to determine a Crim.R. 32.1 motion to withdraw a guilty plea, we are certainly constitutionally vested with original jurisdiction over Relator’s complaint for a writ of procedendo, which is the subject of this action. “A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment.” *State ex rel. Weiss v. Hoover*, 84 Ohio St.3d 530, 532, 705 N.E.2d 1227 (1999). “To be entitled to a writ of procedendo, a relator must establish (1) a clear legal right to require the respondent to proceed, (2) a clear legal duty on the part of the respondent to proceed, and (3) the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Williams v. Croce*, 153 Ohio St.3d 348, 2018-Ohio-2703, 106 N.E.3d 55 ¶ 6. “The writ of procedendo is merely an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment.

It does not in any case attempt to control the inferior court as to what that judgment should be.” *State ex rel. Davey v. Owen*, 133 Ohio St. 96, 106, 12 N.E.2d 144 (1937).

{¶8} In this instance, Respondent never owed a duty to Relator to rule upon his motion in the first instance because the motion was not filed in his court. More importantly though, the procedural posture of Relator’s case nonetheless would have directly impacted Respondent’s ability to determine the motion. By the time Relator filed his motion, this Court had already affirmed Relator’s conviction and sentence. In this exact type of situation, the Ohio Supreme Court has explained:

Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court. While Crim.R. 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do.

State ex rel. Special Prosecutors v. Judges, Court of Common Pleas, 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162 (1978).

{¶9} For all of the foregoing reasons, this Court sustains Respondent’s motion to dismiss and dismisses this original action accordingly. Final order. Clerk to serve notice as provided by the Rules of Civil Procedure. No costs assessed.

JUDGE GENE DONOFRIO

JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

