

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

The State ex rel. Mykel Small,	:	
Relator,	:	
v.	:	No. 19AP-103
Judge Michael Holbrook of Franklin County Common Pleas Court,	:	(REGULAR CALENDAR)
Respondent.	:	
	:	

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D E C I S I O N

Rendered on September 26, 2019

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*Mykel Small, pro se.*

*Ron O'Brien, Prosecuting Attorney, and Iris L. Jin, for respondent.*

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IN MANDAMUS  
ON RESPONDENT'S MOTION TO DISMISS

NELSON, J.

{¶ 1} Relator Mykel Small filed with us a petition for a writ of mandamus in effort to obtain a trial court order providing certain jail-time credit. Weeks later, the trial court issued a decision and entry providing that credit. The respondent trial court judge then moved to dismiss Mr. Small's mandamus petition as moot.

{¶ 2} After independent review, and noting no objections to the Magistrate's Decision of June 26, 2019, we adopt that decision and dismiss as moot Mr. Small's petition seeking a writ of mandamus.

*Action dismissed.*

DORRIAN and BRUNNER, JJ., concur.

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**A P P E N D I X**

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	:	
Respondent.	:	
	:	

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

**Rendered on June 26, 2019**

*Mykel Small, pro se.*

*Ron O'Brien, Prosecuting Attorney, and Iris L. Jin, for respondent.*

**IN MANDAMUS  
ON RESPONDENT'S MOTION TO DISMISS**

{¶ 3} Relator, Mykel Small, has filed this original action requesting this court issue a writ of mandamus ordering respondent, the Honorable Michael Holbrook, judge of the Franklin County Court of Common Pleas, to vacate its September 1, 2016 void judgment and reinstate its July 21, 2016 valid judgment.

**Findings of Fact:**

{¶ 4} 1. Relator is an inmate currently incarcerated at Ross Correctional Institution.

{¶ 5} 2. On April 5, 2018, relator filed a motion with the trial court to correct his sentence to reflect the correct number of days of jail-time credit.

{¶ 6} 3. On February 21, 2019, relator filed this original action asking this court to order respondent to rule on his motion.

{¶ 7} 4. On March 5, 2019, respondent issued a decision and entry, stating: "The July 21, 2016 Corrected Amended Judgment Entry reflecting the four hundred fifty-six (456) day jail time credit is hereby **REINSTATED**." (Emphasis sic.)

{¶ 8} 5. On March 20, 2019, respondent filed a motion to dismiss on grounds that respondent had now performed the act which relator sought to compel respondent to perform.

{¶ 9} 6. The matter is currently before the magistrate on the motion to dismiss.

#### Conclusions of Law:

{¶ 10} For the reasons that follow, it is this magistrate's decision that this court should grant respondent's motion because the matter is now moot.

{¶ 11} Although relator styled his original action in mandamus, relator actually seeks a writ of procedendo ordering the trial court to perform a specific act.

{¶ 12} 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*, 77 Ohio St.3d 64, 65 (1996). A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *Id.*

{¶ 13} 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*, 74 Ohio St.3d 33, 35 (1995), quoting *State ex rel. Levin v. Sheffield Lake*, 70 Ohio St.3d 104, 110 (1994).

{¶ 14} 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*, 72 Ohio St.3d 461, 462 (1995).

{¶ 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.*, 65 Ohio St.3d 545 (1992). 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. Univ. Community Tenants Union*, 42 Ohio St.2d 242 (1975). 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.*, 72 Ohio St.3d 94 (1995). For the following reasons, respondent's motion should be granted and relator's complaint should be dismissed.

{¶ 17} Inasmuch as respondent has now performed the act which relator sought to compel, the matter is moot and neither procedendo or mandamus will compel the performance of a duty which has already been performed. As such, this court should dismiss relator's complaint. Furthermore, inasmuch as respondent performed the act which relator sought to compel by the filing of this original action, this court should waive the payment of costs in this manner.

/S/ MAGISTRATE  
STEPHANIE BISCA

### **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).