

[Cite as *State ex rel. Sherrills v. Cuyahoga Court of Common Pleas*, 2010-Ohio-1932.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94418

**STATE OF OHIO, EX REL.
DARIES SHERRILLS**

RELATOR

vs.

**CUYAHOGA COURT OF COMMON
PLEAS, ET AL.**

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Procedendo
Motion No. 429929
Order No. 432658

RELEASE DATE: April 21, 2010

FOR RELATOR

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ATTORNEYS FOR RESPONDENTS

William D. Mason
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By: James E. Moss
Assistant County Prosecutor
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ANN DYKE, J.:

On December 22, 2009, the petitioner, Daries Sherrills, commenced this procedendo action against the respondents, the Cuyahoga County Common Pleas Court and Judge Hollie Gallagher, to compel them to resentence him in the underlying case, *State v. Daries Sherrills*, Cuyahoga County Common Pleas Court Case No. CR-230459. Sherrills maintains that the respondent must proceed to resentence him because the trial court in 1997 did not comply with various statutory requirements pursuant to, inter alia, R.C. 2950.09(B) and R.C. 2929.19(B)(3). Consistent with Sherrills's past practices, he also endeavors to attack his convictions by arguing, inter alia, defects in the indictment and deficient

state investigations. On January 6, 2010, the respondents, through the Cuyahoga County Prosecutor, moved for summary judgment. Sherrills filed his brief in opposition on January 20, 2010, as well as a supplement to the writ on January 25, 2010. Since then Sherrills has also moved to amend his complaint and to transfer the record from the underlying case into this writ action. For the following reasons, this court denies the application for a writ of procedendo.

The writ of procedendo is merely an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie County Sheriff's Department* (1990), 51 Ohio St.3d 43, 553 N.E.2d 1354. Procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Watkins v. Eighth District Court of Appeals*, 82 Ohio St.3d 532, 1998-Ohio-190, 696 N.E.2d 1079. However, the writ will not issue to control what the judgment should be, nor will it issue for the purpose of controlling or interfering with ordinary court procedure. Thus, procedendo will not lie to control the exercise of judicial discretion. Moreover, it will not issue when there is an adequate remedy at law. *State ex rel. Utley v. Abruzzo* (1985), 17 Ohio St.3d 202, 478 N.E.2d 789 and *State ex rel. Hansen v. Reed* (1992), 63 Ohio St.3d 597, 589 N.E.2d 1324.

In the underlying case in late 1988, the trial court found Sherrills guilty of aggravated burglary, kidnapping, two counts of rape, and three counts of gross sexual imposition, each count with an aggravated felony specification for a 1983

aggravated burglary conviction which had been vacated. The trial court sentenced Sherrills to 10 to 25 years for the aggravated burglary, kidnapping and rape charges to run concurrent and two to five years for the gross sexual imposition charges which were to run concurrent with each other but consecutive to the first degree felony charges.

On appeal, *State v. Sherrills* (Apr. 5, 1990), Cuyahoga App. No. 56777, 1990 WL 40275, this court vacated the conviction for kidnapping because it merged with a rape count and affirmed the other convictions and sentences. Sherrills then successfully brought an application to reopen pursuant to App.R. 26(B) on the grounds that the aggravated felony specification was invalid. Upon remand in February 1997, the trial court resentenced Sherrills to nine to 25 years on all counts. *State v. Sherrills* (Apr. 5, 1990), Cuyahoga App. No. 56777, reopening granted and after remand affirmed (Sept. 18, 1997), 1997 WL 578941.

Since then Sherrills has engaged in a pattern and practice of filing motions, requests, applications, appeals, and writs to overturn his convictions and sentences. This writ application is the latest in these endeavors.

Viewing Sherrills's complaint in a favorable light, he argues that because the sentencing court did not comply with various statutory requirements, the sentence is not a final, appealable order. Thus, the trial court must proceed to resentence him again. Sherrills first argues that the trial court did not fulfill all the duties under R.C. 2929.19(B)(3), such as subsection (f) under which the judge

should require the offender not to ingest or be injected with drugs of abuse and to submit to random drug testing. Next, Sherrills submits that the sentencing was fatally defective because the victim was not present as permitted by R.C. 2930.09. He also complains that the trial court did not conduct a sexual predator hearing pursuant to R.C. 2950.09, et seq. He analogizes to postrelease control cases under which the failure to impose proper postrelease controls results in a void sentence.

However, the proper remedy for sentencing errors is not an extraordinary writ, but an appeal. *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-617, 898 N.E.2d 950; and *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 93814, 2010-Ohio-1066. In *State ex rel. Jaffal v. Calabrese*, 105 Ohio St.3d 440, 2005-Ohio-2591, 828 N.E.2d 107, Jaffal sought to have his sentences vacated and be resentenced because of constitutional errors. The Supreme Court of Ohio ruled: "Sentencing errors by a court that had proper jurisdiction cannot be remedied by extraordinary writ." At ¶5. Rather, the proper remedy is appeal or postconviction relief. See, also, *State ex rel. Carnail v. McCormick*, Cuyahoga App. No. 93524, 2009-Ohio-3884.

This court notes that after his resentencing, this court allowed Sherrills to contest the sentencing in the reopened appeal. Both he and his attorney filed briefs, and this court affirmed. This court further notes that Sherrills included in his brief his usual "shotgun" arguments. Accordingly, Sherrills's claims for

procedendo to compel resentencing based on the failure to follow statutory requirements are not well-founded, and this court declines to grant the writ of procedendo.

Sherrills also raises many other arguments, including that statute of limitations has now expired which would prevent resentencing, the indictments were void ab initio because they were not properly executed, the forensic testimony at trial was baseless, the resentencing was not conducted in his presence, the trial court committed fraud, and the transcripts have disappeared preventing a fair reconsideration. In these arguments Sherrills attacks the validity of his conviction and that which has already been done. These arguments do not state a claim to proceed to judgment. Thus, they are meritless in an application for a writ of procedendo.

Accordingly, this court grants the respondents' motion for summary judgment and denies the application for a writ of procedendo. Costs assessed against petitioner. This court orders the Clerk of the Eighth District Court of Appeals to serve notice of this judgment upon all parties as required by Civ.R. 58(B).

ANN DYKE, JUDGE

PATRICIA A. BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR