[Cite as *State ex rel. McElroy v. O'Donnell*, 2022-Ohio-3240.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE EX REL. JOSEPH MCELROY, :

Relator, :

No. 111752

v. :

HON. JOHN P. O'DONNELL, :

Respondent. :

JOURNAL ENTRY AND OPINION

JUDGMENT: COMPLAINT DISMISSED
DATED: September 9, 2022

Writ of Mandamus
Motion No. 557086
Order No. 557425

Appearances:

Cullen Sweeney, Cuyahoga County Public Defender, and Erica B. Cunliffe, Assistant Public Defender, *for relator*.

James Wooley, *for respondent*.

EMANUELLA D. GROVES, J.:

{¶ 1} Relator, Joseph McElroy, seeks a writ of mandamus to compel respondent, Judge John P. O'Donnell, to find McElroy incompetent to stand trial in *State v. McElroy*, Cuyahoga C.P. No. CR-21-662351. For the following reasons, we deny the requested writ and dismiss the complaint.

I. Background

{¶ 2} On August 27, 2021, an indictment charging McElroy with aggravated burglary, burglary, and aggravated menacing was filed in the aforementioned criminal case. In October, McElroy's attorney filed a motion for a competency evaluation, which was granted. Respondent referred McElroy to the court psychiatric clinic for evaluation. That competency evaluation was completed by Dr. Jacqueline Heath. Her report, filed with the court, indicated that McElroy was competent to stand trial.

{¶ 3} McElroy sought a second evaluation to be completed by a different mental health professional at his own cost. Respondent granted the motion and McElroy was evaluated for a second time. A competency hearing was held on April 13, 2022. According to the complaint, the sole report admitted was the second evaluation conducted by Dr. Sara West, a clinical associate professor of psychiatry at Case Western Reserve University. In her report, Dr. West stated that McElroy was not competent to stand trial but could be restored to competency. The state stipulated to the authenticity of the West report and separately stipulated that the opinion of Dr. West, that McElroy was not currently competent to stand trial but could be restored to competency, was correct. Because of the stipulation from the state, McElroy's attorney did not call any witnesses at the hearing but asked for additional time to secure the presence of witnesses to testify if respondent found that the stipulated report was insufficient to show by a preponderance of the evidence that McElroy was currently not competent to stand trial. Respondent also

inquired whether he could consider the Heath report even though it was not offered into evidence by the parties. Both parties agreed that he could not. The hearing was then adjourned. On June 2, 2022, respondent issued an order finding McElroy competent to stand trial.

{¶ 4} McElroy then filed a notice of appeal on June 6, 2022, attempting to appeal the competency determination. According to the complaint, this court issued an order directing McElroy to show cause why the appeal should not be dismissed for lack of a final, appealable order because other Ohio appellate courts had determined that an order finding a defendant competent to stand trial was not a final, appealable order. After this show cause order was issued, McElroy filed the instant complaint for writ of mandamus on July 18, 2022. This court issued an order setting an abbreviated briefing schedule on July 22, 2022. Respondent timely filed a motion to dismiss the complaint on August 5, 2022, to which McElroy timely filed a brief in opposition. Respondent, on August 18, 2022, then filed a brief in reply that was not provided for in this court's briefing order. Finally, on August 26, McElroy filed a motion for leave to file a sur-response with attached brief. In order to ensure that the issues were fully briefed by the parties, this court granted the motion.

II. Law and Analysis

A. Standard for Mandamus

{¶ 5} A writ of mandamus is an extraordinary remedy available only to those that can show that they (1) have a clear legal right to the requested relief, (2)

respondent has a clear legal duty to provide the requested relief, and (3) there is no other adequate remedy in the ordinary course of the law. *State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 1010 N.E.3d 430. "Mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused." *State ex rel. Seawright v. Russo*, 8th Dist. Cuyahoga No. 108484, 2019-Ohio-4983, ¶ 10, citing *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

{¶ 6} This case is before this court on respondent's motion to dismiss for failure to state a claim. The Civ.R. 12(B)(6) requires a court to presume as true all factual allegations contained in the complaint and draw all reasonable inferences in favor of the nonmoving party. *State ex rel. Adams v. Winkler*, 166 Ohio St.3d 412, 2022-Ohio-271, 186 N.E.3d 796, ¶ 9. If "'it appears beyond doubt that [relators] can prove no set of facts entitling [them] to the requested writ'" then dismissal under Civ.R. 12(B)(6) is appropriate. *Id.*, quoting *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9.

B. Clear Right to Relief and Clear Legal Duty

{¶ 7} "Fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial." *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995), citing *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). The *Berry* Court went on to specify that "[i]n Ohio, R.C.

2945.37 protects the right of a criminal defendant not to be tried or convicted while incompetent." *Id*.

{¶ 8} Relevant to this case, when the competency of a criminal defendant is raised prior to trial, a trial judge has a clear legal duty to hold a hearing on the issue. R.C. 2945.37(B). At this hearing, defendants are presumed competent and have the burden of demonstrating by a preponderance of the evidence that "because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense[.]" R.C. 2945.37(G). Pursuant to this subsection, if the trial judge finds that this showing has been made, then the judge must enter an order authorized by R.C. 2945.38. However, if the trial court finds the defendant competent, then the case may proceed to trial. It is the right to a hearing that "rises to the level of a constitutional [guarantee]" where the record supports that such an inquiry is required. *Berry* at 359, citing *Drope*, *Pate*, and *State v. Bock*, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016 (1986).

{¶ 9} The decision to find a defendant incompetent is trusted to the discretion of the trial judge. *State v. Lozada*, 8th Dist. Cuyahoga No. 107827, 2020-Ohio-5008, ¶ 10, citing *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 31. Reviewing courts will not disturb that decision on appeal so long as it is supported by some competent, credible evidence. *State v. Williams*, 23 Ohio St.3d 16, 19, 490 N.E.2d 906 (1986); *State v. Laghaoui*, 2018-Ohio-2261, 114 N.E.3d 249 (12th Dist.).

{¶ 10} Evidentiary issues are also trusted to the sound discretion of the court. *State v. Jeffries*, 8th Dist. Cuyahoga No. 106889, 2018-Ohio-5039, ¶ 11, quoting *State v. Marshall*, 8th Dist. Cuyahoga No. 100736, 2015-Ohio-2511, ¶ 16.

{¶ 11} Here, respondent argues that there is conflicting evidence in the record regarding McElroy's competency. He points to both psychological evaluations filed with the court and R.C. 2945.371(H), which requires the filing of a competency evaluation with the trial court that then becomes part of the trial court record. McElroy argues that respondent may not consider Dr. Heath's report because it was not submitted at the hearing. He argues R.C. 2317.36 bars respondent from considering the report without a stipulation or testimony from the evaluator. In the additional briefing, the parties reinforce their respective arguments as to why respondent may or may not consider the Heath report. Respondent claims that Dr. Heath is a court witness, and her report is before him such that he may consider it. McElroy responds that there is no stipulation to the report and respondent did not call Dr. Heath to testify at the hearing or otherwise provide a means of placing her report in the record such that it could be considered. McElroy may be entirely correct, but "[m]andamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused." *State ex rel. Seawright v. Russo*, 8th Dist. Cuyahoga No. 108484, 2019-Ohio-4983, ¶ 10, citing *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Further, mandamus does not lie "to correct errors and

procedural irregularities in the course of a case." *State ex rel. Hudson v. Sutula*, 8th Dist. Cuyahoga No. 96705, 2011-Ohio-4644.

{¶ 12} For instance, a trial court has a duty to hold a hearing when a postconviction relief petition presents substantive grounds for relief. R.C. 2953.21(E). However, mandamus may not be used to compel a court to hold a hearing because a writ of mandamus may not be used to control judicial discretion. *State ex rel. Madsen v. Jones*, 106 Ohio St.3d 178, 2005-Ohio-4381, 833 N.E.2d 291, ¶ 10; *State ex rel. Freeman v. Court of Common Pleas*, 24 Ohio St.2d 31, 262 N.E.2d 880 (1970); *State ex rel. Hagwood v. Jones*, 8th Dist. Cuyahoga No. 72084, 1997 Ohio App. LEXIS 1651, 3-4 (Apr. 24, 1997); *State ex rel. Giles v. Portage Cty. Court of Common Pleas*, 11th Dist. Portage No. 93-P-0109, 1994 Ohio App. LEXIS 378, 3 (Feb. 4, 1994). That is an issue that is suitable for argument on appeal.

{¶ 13} Pursuant to R.C. 2945.37, a defendant does not have a clear legal right to be found incompetent and a trial judge does not have a clear legal duty to find an individual incompetent to stand trial. These determinations are discretionary decisions where defendants must demonstrate by a preponderance of the evidence that they are not competent to stand trial. In this action, we are not sitting as a reviewing court to determine whether the court erred. We are sitting as a court of original jurisdiction where the right to relief must be clear and unequivocal. *State ex rel. Karmasu v. Tate*, 83 Ohio App.3d 199, 205, 614 N.E.2d 827 (4th Dist.1992) ("The duty to be enforced by a writ of mandamus must be specific, definite, clear and unequivocal."). Even if we presume that respondent has committed clear error

as the Civ.R. 12(B) standard dictates, that is not sufficient to demonstrate that relief in mandamus is appropriate.

{¶ 14} Mandamus may not be used to control judicial discretion, even where, as McElroy alleges and the documents attached to the complaint tend to indicate, that discretion is grossly abused. Certainly, respondent is free to revisit his decision finding McElroy competent or potentially repeat the lower court proceedings after reversal on appeal. This may well be the ultimate outcome based on respondent's arguments to this court justifying his actions. That would be an incredible waste of judicial resources. Additionally, by not acceding toward restoration of competency, respondent may be doing further harm by prolonging or exacerbating an untreated mental condition.

C. Adequate Remedy

{¶ 15} McElroy also argues that there is no adequate remedy at law because appeal after final judgment is not speedy. He asserts that respondent has committed clear error and it is untenable to make him go through a trial while he is unable to assist in his own defense, is convicted and sentenced to prison, and only then appeal respondent's clearly erroneous determination. However, the added time and expense of a trial does not make appeal after final judgment an inadequate remedy. "The mere fact that pursuing an available remedy of appeal at the conclusion of the proceedings encompasses more delay and inconvenience than seeking a writ of mandamus is insufficient to prevent the process from constituting a plain and adequate remedy in the ordinary course of the law." *State ex rel. Logue v.*

Fregiato, 7th Dist. Belmont No. 01-BA-53, 2002-Ohio-1028, citing *State ex rel. Willis v. Sheboy,* 6 Ohio St.3d 167, 451 N.E.2d 1200 (1983).

{¶ 16} An appeal after final judgment constitutes an adequate remedy even where there is a claimed violation of due process rights that may subject a defendant to time in prison pending appeal. *See State ex rel. Jones v. Paschke*, Slip Opinion No. 2022-Ohio-2427, ¶ 10, citing *State ex rel. Dailey v. Dawson*, 149 Ohio St.3d 685, 2017-Ohio-1350, 77 N.E.3d 937, ¶ 14. *See also State ex rel. Jackim v. Ambrose*, 8th Dist. Cuyahoga No. 90785, 2008-Ohio-45 (writ of prohibition denied for claimed violation of speedy trial rights); *State ex rel. Dix v. Angelotta*, 18 Ohio St.3d 115, 480 N.E.2d 407 (1985) (writ of mandamus denied for claimed violation of speedy trial rights). McElroy claims that it would be fundamentally unfair to give the state the right to immediately appeal a finding that a person is incompetent to stand trial while denying a right to immediate appeal or review in the present situation. However, the right to appeal an order finding a defendant incompetent is not exclusive to the state. A defendant who is declared incompetent to stand trial also may immediately appeal that determination. *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711.

{¶ 17} Several courts have determined that an appeal of an order finding a defendant competent to stand trial must come after final judgement. *State v. Glynn*, 2d Dist. Montgomery No. 28824, 2020-Ohio-7031, ¶ 8-10, citing *State v. Eyajan*, 11th Dist. Ashtabula No. 2019-A-0005, 2019-Ohio-419, ¶ 6; *State v. Shine*, 7th Dist. Mahoning No. 15 MA 0210, 2016-Ohio-1445, ¶ 9; *In re J.W.*, 11th Dist. Geauga No.

2009-G-2939, 2010-Ohio-707, ¶ 14-15; *State v. Blankenship*, 11th Dist. Ashtabula No. 2019-A-0018, 2019-Ohio-1304; and *In re E.H.*, 10th Dist. Franklin No. 15AP-680, 2016-Ohio-1186, ¶ 15-17. Therefore, claims that a trial judge erred in finding a defendant competent to stand trial have often been raised on appeal after final determination. *See, e.g., State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112; *In re S.D.*, 8th Dist. Cuyahoga No. 99763, 2014-Ohio-2528; *State v. Young*, 8th Dist. Cuyahoga No. 80059, 2003-Ohio-272; *State v. Spurrier*, 11th Dist. Lake No. 2020-L-069, 2021-Ohio-1061, ¶ 42, *State v. Dollar*, 12th Dist. Butler No. CA2012-01-002, 2012-Ohio-5241; *State v. Laghaoui*, 2018-Ohio-2261, 114 N.E.3d 249 (12th Dist.). The regularity with which courts of appeals hear these assigned errors and the lack of original actions granting the relief requested here also tends to indicate that appeal after final judgment constitutes an adequate remedy at law.[1]

{¶ 18} For all the above reasons, we grant respondent's motion to dismiss and dismiss McElroy's complaint for writ of mandamus. Costs assessed against relator; costs waived. The clerk is directed to serve on the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

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[1] Granted, respondent's actions in this case are unusual. However, mandamus cannot be used for interlocutory review of a trial court's orders. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973); *State ex rel. Overmeyer v. Walinski*, 8 Ohio St.2d 23, 222 N.E.2d 312 (1966).

{¶ 19} Complaint dismissed.

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EMANUELLA D. GROVES, JUDGE

SEAN C. GALLAGHER, A.J., and
CORNELIUS J. O'SULLIVAN, JR., J., CONCUR