[Cite as *State ex rel. Smith v. Vettel*, 2010-Ohio-3809.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO ex rel. STANLEY T. SMITH,	:	**PER CURIAM OPINION**
	:	**CASE NO. 2010-A-0020**
Relator,	:	
- vs -	:	
JUDGE RONALD W. VETTEL, ASHTABULA COUNTY COURT OF COMMON PLEAS,	:	
	:	
Respondent.		

Original Action for Writ of Prohibition.

Judgment: Petition dismissed.

Stanley T. Smith, pro se, PID: 474-521, Richland Correctional Institution, P.O. Box 8107, Mansfield, OH 44901 (Relator).

Thomas L. Sartini, Ashtabula County Prosecutor, and *Rebecca K. Divoky*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Respondent).

PER CURIAM.

{¶1} This action in prohibition is presently before this court for final disposition of the motion to dismiss of respondent, Judge Ronald W. Vettel of the Ashtabula County Court of Common Pleas. As the primary basis for this motion, respondent submits that the petition of relator, Stanley T. Smith, fails to state a viable claim for a writ because his

own allegations support the conclusion that he cannot employ a prohibition action as a means of challenging the merits of respondent's earlier ruling in an underlying criminal case. For the following reasons, we hold that the motion to dismiss is well taken.

{¶2} Our review of the prohibition petition indicates that relator's sole claim for relief is based upon the following factual assertions. In May 2003, relator was indicted on seven counts in Ashtabula C.P. No. 03 CR 150. After a jury trial, he was found guilty of five counts of drug trafficking, and was sentenced to an aggregate term of four years in a state prison. As part of the final sentencing judgment, respondent further ordered that the four-year term was to be served consecutively to a six-year sentence that had been imposed in an unrelated criminal case.

{¶3} Relator appealed the foregoing conviction to this court in *State v. Smith*, 11th Dist. No. 2004-A-0089, 2006-Ohio-5187 ("*Smith I*"). At the close of that particular appeal, we upheld relator's basic conviction, but also concluded that the trial court had erred in making judicial findings of fact in regard to the "consecutive sentence" issue. In light of this, we declared his original sentence to be void and remanded the matter to the trial court for resentencing.

{¶4} During the new sentencing hearing upon remand, respondent stated that he would consider the prior judicial findings of fact as guidelines for imposing the new sentence. After considering arguments from relator's trial counsel concerning whether consecutive sentences were warranted, respondent re-imposed the identical sentence which had been ordered in the original sentencing judgment; i.e., an aggregate term of four years, to be served consecutively to the separate six-year sentence.

{¶5} Relator again sought to contest the propriety of the imposed sentence in

State v. Smith, 11th Dist. No. 2006-A-0082, 2007-Ohio-4772 ("*Smith II*"). However, in that second appeal, we affirmed respondent's new sentencing decision in all respects. In doing so, this court expressly rejected relator's contention that respondent had erred in basing his decision upon the prior judicial findings of fact.

{¶6} Approximately seventeen months after the release of *Smith II*, relator filed the instant case for a writ of prohibition. As the factual foundation for his petition, relator asserted that, during the new proceedings which followed the release of our decision in his first appeal, respondent failed to comply with the requirements of our remand order. Specifically, relator alleged that respondent "ignored" the holding of the first appeal by predicating his second sentencing determination upon the same factual findings which had previously been declared unconstitutional. In light of this, he stated that his original sentence, as re-imposed by respondent, still was void. Thus, for his ultimate relief, he sought an order which would compel respondent to act in compliance with our remand order from the first appeal.

{¶7} In now moving to dismiss the sole claim under Civ.R. 12(B)(6), respondent essentially submits that this action should not go forward on the merits because relator has not chosen the proper legal proceeding for contesting the propriety of the decision to re-impose the original sentence. That is, he maintains that relator had an adequate legal remedy because any issue regarding the second sentencing determination could have been litigated in relator's second appeal. In support of his point, respondent notes that, after the second sentencing judgment was rendered, relator filed a notice of appeal in relation to that judgment.

{¶8} Regarding relator's second appeal, this court would note that the materials

before us readily show that he did not merely file a notice of appeal, but subsequently submitted a brief and prosecuted the matter to its completion. Moreover, as was stated above, this court rendered an opinion in that appeal which fully discussed the propriety of the procedure followed by respondent during the proceedings upon remand. *Smith II*, 2007-Ohio-4772. As a result, the outcome of the second appeal is controlling as to the final disposition of the instant action.

{¶9} As an initial point, it must be emphasized that, under Civ.R. 44.1(A)(1), a trial court in a civil action has the authority to take judicial notice of the "decisional" law which has been previously issued throughout the state. In applying this particular rule in the context of an original action, this court has indicated that judicial notice of an earlier final determination can be taken as part of an analysis on the merits of a Civ.R. 12(B)(6) motion to dismiss. *State ex rel. Lemons v. Kontos*, 11th Dist. No. 2009-T-0053, 2009-Ohio-6518, at ¶6. Therefore, notwithstanding the fact that relator did not refer to *Smith II* in the text of his prohibition petition, we can still rely upon the substance of our prior opinion in deciding whether he has stated a viable claim for the writ.

{¶10} Second, a review of our *Smith II* opinion shows that it addressed the exact same issue which forms the basis of relator's present claim. Under his first assignment of error in the appeal, relator argued that, pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, it was improper for respondent to consider as "sentencing guidelines" the identical points which had been the subject of judicial findings of fact under the prior sentencing scheme. In the fourth paragraph of his prohibition petition, he has now asserted that respondent erred in re-imposing "the exact same sentence, incorporated the very same findings rendered unconstitutional by *Foster*, ***."

{¶11} In ultimately holding in *Smith* II that respondent had acted appropriately in basing his second sentencing determination upon the prior judicial findings, a majority of this court concluded its legal analysis in the following manner:[1]

{¶12} "The trial court stated that it would use its previous findings as guidelines during appellant's resentencing. It did not use them to augment appellant's sentence. In *Foster*, those portions of Ohio's felony sentencing scheme mandating judicial fact-finding in order to increase a defendant's sentence beyond the statutory maximum were found unconstitutional, declared void, and formally excised. Here, the trial court, in resentencing appellant post-*Foster*, did not engage in impermissible judicial fact-finding. ***

{¶13} "Nothing in *Foster* precludes a trial court from considering any factors deemed relevant in achieving the principles and purposes of sentencing, including, in this case the findings of fact made in the original sentence. While *Foster* does not require the trial court to state the reasons for its sentence, there is nothing in *Foster* which precludes a court from doing so. As a result, we do not agree that the trial court erred in considering its previous findings of fact as guidelines during appellant's resentencing." *Smith II*, 2007-Ohio-4772, at ¶23-24.

{¶14} Given the conclusion in the cited opinion that respondent did not commit any prejudicial error in re-imposing the original sentence, logic dictates that respondent acted within the scope of our remand order during the new sentencing proceedings. For this reason, relator will never be able to establish for purposes of the instant action that respondent exceeded the scope of his general jurisdiction while conducting the new

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1. In the ensuing quote, relator is referred to as the "appellant" and respondent is referenced as the "trial court."

sentencing hearing and issuing the new sentencing judgment.

{¶15} As part of the allegations in his present petition, relator also asserted that: (1) he had recently filed with respondent a new motion for resentencing; and (2) a writ of prohibition was further needed to ensure that respondent acted within the scope of his authority in ruling upon that new motion. However, in raising the possibility of a future jurisdictional problem, relator has again premised his point upon the basic contention that respondent previously exceeded his jurisdiction by failing to act in accordance with our prior remand order. In light of our rejection of relator's basic contention, it follows that he has failed to assert any allegation which would tend to show that respondent has acted, or intends to act, beyond the scope of his jurisdiction in the underlying criminal case.

{¶16} To be entitled to a writ of prohibition, the relator in such an action must be able to demonstrate, inter alia, that the judge's use of his authority is not permissible under Ohio law. See *State ex rel. Feathers v. Badger*, 11th Dist. No. 2006-P-0092, 2007-Ohio-3852, at ¶9. Consistent with the foregoing analysis, this court concludes that relator in the present matter will never be able to prove a set of facts under which this particular element will be met. That is, since we have already determined that respondent followed the correct procedure in issuing his new sentencing judgment, relator can never establish that respondent exceeded the parameters of our prior remand order. Thus, relator's factual allegations are legally insufficient to state a viable claim for a writ of prohibition.

{¶17} Respondent's motion to dismiss the instant matter is granted. It is the

order of this court that relator's entire prohibition is hereby dismissed.

DIANE V. GRENDELL, J., CYNTHIA WESTCOTT RICE, J., COLLEEN MARY O'TOOLE J., concur.