

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

DAVID E. BRODY,	:	PER CURIAM OPINION
Relator,	:	
- vs -	:	CASE NO. 2011-L-139
JUDGE EUGENE LUCCI,	:	
Respondent.	:	

Original Action for Writ of Procedendo.

Judgment: Petition dismissed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Respondent).

David E. Brody, pro se, PID: A591175, Toledo Correctional Institution, P.O. Box 80033, Toledo, OH 43608 (Relator).

PER CURIAM.

{¶1} This matter is before the court pursuant to the petition for a writ of procedendo filed by relator, David E. Brody, against respondent, Judge Eugene Lucci of the Lake County Court of Common Pleas, and the motion for summary judgment filed by Judge Lucci. Due to the presence of procedural irregularities, we sua sponte dismiss relator's petition.

{¶2} Relator was indicted or charged by way of information in three separate cases. He entered a plea bargain with the state pursuant to which, on June 23, 2010,

he entered a guilty plea in each of these cases. In case No. 10 CR 000026, he pled guilty to misuse of credit cards, a felony of the fifth degree; grand theft of a police officer's handgun, a felony of the third degree; and burglary, a felony of the second degree, with a firearm specification.

{¶3} In case No. 10 CR 000029, relator pled guilty to breaking and entering, a felony of the fifth degree; receiving stolen property involving a motor vehicle, a felony of the fourth degree; grand theft of another motor vehicle, a felony of the fourth degree; and vandalism, a felony of the fourth degree.

{¶4} Finally, in case No. 10 CR 000366, relator pled guilty to burglary, a felony of the second degree.

{¶5} The court accepted the guilty pleas and found relator guilty. Specifically, in case No. 10 CR 000026, the court found relator guilty of misuse of credit cards, burglary with a firearm specification, and grand theft of the officer's handgun. In case No. 10 CR 000029, the trial court found appellant guilty of grand theft of a motor vehicle, vandalism, receiving stolen property involving another motor vehicle, and breaking and entering. Finally, in case No. 10 CR 000366, the trial court found relator guilty of burglary.

{¶6} Pursuant to the plea bargain, in exchange for relator's guilty pleas, the trial court dismissed the remaining counts in the indictments.

{¶7} On July 29, 2010, the matter proceeded to sentencing. Relator apologized to the victims for his crimes in open court. He told Judge Lucci that he allowed his drug addiction to cause him to do terrible things and that he regretted the choices he had made. Judge Lucci also considered relator's extensive criminal record.

{¶8} The trial court sentenced relator in case No. 10 CR 000026 to 11 months for misuse of credit cards; seven years for burglary, to be served consecutively to the one-year term of imprisonment on the related firearm specification; and two years for grand theft of the police officer's handgun. The prison terms for misuse of credit cards and grand theft of the firearm were to be served concurrently with one another, but consecutively to the term for burglary and the firearm specification, for a total of ten years in prison.

{¶9} In case No. 10 CR 000029, the court sentenced relator to 12 months for grand theft of a motor vehicle, 12 months for vandalism, 12 months for receiving stolen property involving another vehicle, and 12 months for breaking and entering, each sentence to be served concurrently with each other, for a total of 12 months in prison.

{¶10} In case No. 10 CR 000366, the trial court sentenced relator to seven years for burglary.

{¶11} The sentences in each of the three cases were to be served consecutively to one another, for a total of 18 years in prison.

{¶12} On August 17, 2010, relator appealed his convictions by filing three notices of appeal in this court, which were consolidated for purposes of briefing, oral argument, and disposition.

{¶13} On January 3, 2011, while his appeals were still pending, relator filed a motion to withdraw his guilty plea in the trial court.

{¶14} On September 23, 2011, this court released its decision affirming relator's conviction in *State v. Brody*, 11th Dist. Nos. 2010-L-095, 2010-L-096, and 2010-L-097, 2011-Ohio-4884.

{¶15} On October 3, 2011, relator filed a motion for reopening in this court.

{¶16} On October 31, 2011, relator filed a notice of appeal in the foregoing consolidated cases in the Ohio Supreme Court. That appeal remains pending.

{¶17} Also, on October 31, 2011, relator filed his petition for a writ of procedendo in this court.

{¶18} On November 28, 2011, this court denied relator's motion for reopening.

{¶19} In his petition for a writ of procedendo, relator asks this court to compel Judge Lucci to hold an evidentiary hearing on relator's motion to withdraw his guilty plea. He argues that because nine months have elapsed since he filed his motion to withdraw his guilty plea, Judge Lucci has essentially refused to act on his motion. He argues he is therefore entitled to the writ he seeks.

{¶20} Subsequently, Judge Lucci filed a motion for summary judgment in which he argues there is no evidence he refused to enter judgment or unnecessarily delayed proceeding to judgment on relator's motion to withdraw his guilty plea. Judge Lucci argues that, due to relator's successive appeals, the trial court has been deprived of jurisdiction to rule on relator's motion to withdraw his guilty plea. Relator has failed to respond to Judge Lucci's motion. As a result, the evidentiary materials attached in support of Judge Lucci's motion are undisputed.

{¶21} Initially, we note that a court may sua sponte dismiss a petition for an extraordinary writ when it is improperly captioned. *Hill v. Kelly*, 11th Dist. No. 2011-T-0094, 2011-Ohio-6341, ¶4, citing *Maloney v. Court of Common Pleas of Allen Cty.*, 173 Ohio St. 226, 227 (1962). "The failure to caption an original action properly constitutes sufficient grounds for dismissing the petition." *Barry v. Galvin*, 8th Dist. No. 85990,

2005-Ohio-2324, ¶2. The application for a writ of procedendo “*must be by petition, in the name of the state on the relation of the person applying.*” (Emphasis sic.) *Maloney, supra*, quoting *Gannon v. Gallagher*, 145 Ohio St. 170 (1945); *accord, Hill, supra*, at ¶5. The failure to bring an action for a writ of procedendo in the name of the state on the relation of the person applying for the writ constitutes sufficient grounds to dismiss the petition. *Hill, supra*, at ¶7; *Barry, supra*.

{¶22} First, the caption of relator’s petition does not indicate that the request is made in the name of the state on the relation of Brody. Instead, the petition was filed by Brody in his individual capacity. For this reason alone, relator’s petition must be dismissed.

{¶23} Second, pursuant to Civ.R. 10(A), the caption of a complaint must “include the names and addresses of all the parties.” *Hill, supra*, at ¶8; *Turner, supra*, at ¶2. Here, relator has failed to include his address in the caption. For this additional reason, the petition must be dismissed.

{¶24} Further, relator’s petition for a writ of procedendo is procedurally defective because he has failed to comply with the affidavit requirement of R.C. 2969.25. Pursuant to this statute, relator was required to attach to his request for a writ of procedendo an affidavit that describes each civil action or appeal filed by him within the previous five years in any state or federal court. It is well settled that a petitioner’s failure to comply with R.C. 2969.25 warrants the dismissal of the complaint for a writ of procedendo. *Hill, supra*, at ¶9; *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421 (1998); *State ex rel. Alford v. Winters*, 80 Ohio St.3d 285 (1997); *State ex rel. Davis*

v. Gaul, 8th Dist. No. 87884, 2006-Ohio-2299, ¶2 (“Davis’ failure to comply with R.C. 2969.25 warrants the dismissal of the complaint for a writ of procedendo”).

{¶25} In any event, even if relator’s petition was not procedurally defective, it would still lack merit.

{¶26} A writ of procedendo is a civil judgment in which a court of superior jurisdiction orders a court of inferior jurisdiction to proceed to judgment. *Yee v. Erie Cty. Sheriff’s Dept.*, 51 Ohio St.3d 43, 45 (1990).

{¶27} A writ of procedendo is appropriate when a court has refused to enter judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. McKinney v. McKay*, 11th Dist. No. 2011-T-0039, 2011-Ohio-3756, ¶17, citing *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna*, 73 Ohio St.3d 180, 184 (1995). 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). In order to be entitled to a writ of procedendo, a relator must establish a clear legal right to require the 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 the law. *McKinney, supra*; *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462 (1995).

{¶28} Based on the undisputed evidence attached to Judge Lucci’s summary judgment motion, relator filed his notices of appeal in this court on August 17, 2010. While his appeals were still pending, on January 3, 2011, he filed his motion to withdraw his guilty plea in the trial court. Thereafter, this court released its decision on

September 23, 2011. On October 31, 2011, relator filed his notice of appeal in the Ohio Supreme Court. That appeal remains pending. Thus, during the entire period of time relator's motion to withdraw was pending in the trial court, there was only a 38-day period, from September 23, 2011, to October 31, 2011, during which he did not have an appeal pending. Judge Lucci argues that he was divested of jurisdiction to rule on relator's motion to withdraw during that time except for this 38-day period. Thus, he only had 38 days in which to rule on relator's motion to withdraw. He argues that, as a matter of law, his failure to rule on the motion within that limited period did not constitute an undue delay in ruling on the motion to withdraw, and relator is therefore not entitled to a writ of procedendo.

{¶29} This court's precedent supports Judge Lucci's argument. In *State v. Dudas*, 11th Dist. Nos. 2006-L-267 and 2006-L-268, 2007-Ohio-6739, this court stated:

{¶30} "[T]he filing of a notice of appeal divests the trial court of jurisdiction to consider a motion to withdraw a guilty plea. *Id.* at ¶99, citing *State v. Morgan*, 8th Dist. No. 87793, 2007-Ohio-398, at ¶9; *State v. Winn* (Feb. 19, 1999), 2d Dist. No. 17194, 1999 Ohio App. LEXIS 511. The court in *Winn* held:

{¶31} This is consistent with the general rule that after appeal, trial courts retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction. * * * A motion to withdraw a plea is not a collateral issue, because it potentially directly impacts an appeal. *Id.* at *12-13.

{¶32} By filing an appeal in this court and the Ohio Supreme Court before and after he filed his motion to withdraw his guilty plea in the trial court, relator divested the trial court of jurisdiction to consider his motion during all periods of time that his respective appeals were and are pending.

{¶33} The only time the trial court had jurisdiction to rule on relator's motion to withdraw was the 38-day period between the date this court released its decision in relator's appeal and the date he filed his notice of appeal in the Ohio Supreme Court. We note that in *State ex rel. Atkins v. Hoover*, 97 Ohio St.3d 76, 2002-Ohio-5313, the Ohio Supreme Court held that a trial court's delay of less than two months in ruling on a motion does not amount to an undue delay for purposes of ruling on a petition for an extraordinary writ. *Id.* at 77.

{¶34} We therefore hold that even if relator's petition was not barred by procedural defects, it would still lack merit due to the lack of any evidence that Judge Lucci refused to enter judgment or unnecessarily delayed proceeding to judgment on relator's motion to withdraw his guilty plea.

{¶35} Accordingly, we sua sponte dismiss relator's petition for a writ of procedendo.

TIMOTHY P. CANNON, P.J., MARY JANE TRAPP, J., THOMAS R. WRIGHT, J.,
concur.