

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

STATE OF OHIO ex rel.	:	PER CURIAM OPINION
JAMES C. ROBINSON,	:	
	:	
Relator,	:	CASE NO. 2010-L-117
	:	
- vs -	:	
	:	
HONORABLE EUGENE A.	:	
LUCCI, JUDGE, COURT OF	:	
COMMON PLEAS, LAKE	:	
COUNTY, OHIO,	:	
	:	
Respondent.	:	

Original Action for Writ of Procedendo.

Judgment: Writ denied.

James C. Robinson, pro se, PID: 574-665, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Relator).

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

PER CURIAM.

{¶1} This procedendo action is presently before this court for disposition of the summary judgment motion of respondent, Judge Eugene A. Lucci of the Lake County Court of Common Pleas. As the sole basis for his motion, respondent submits that he is entitled to prevail in this matter because his evidentiary materials establish that he has no present duty to go forward in the underlying criminal case. Specifically, he contends

that he cannot render a ruling upon the pending motion of relator, James C. Robinson, because he lacks the requisite authority to proceed at this time.

{¶2} A review of the allegations in relator's claim and respondent's evidentiary materials readily demonstrates that the essential facts of this action are not in dispute. Relator is presently an inmate at the Lake Erie Correctional Institution, predicated upon his 2009 criminal conviction in the Lake County Court of Common Pleas. In that case, he pled guilty to one count of complicity in the trafficking of cocaine.

{¶3} The final sentencing judgment in the criminal proceeding was rendered on November 17, 2009. Twenty-seven days later, relator initiated before this court a timely appeal of the sentencing judgment. That particular appeal, 11th Dist. No. 2009-L-168, has remained pending throughout the entire interim period. The delay in the appellate process was due to the fact that it became necessary for relator to submit a new brief after the filing of an amended transcript of the sentencing hearing before respondent.

{¶4} On the same date relator instituted the pending appeal, he filed at the trial level a motion to withdraw his guilty plea pursuant to Crim.R. 32.1. A review of the trial docket indicates that this motion has also remained pending before respondent during the interim period.

{¶5} After relator's motion to withdraw had been pending for nearly ten months, he brought the instant original action for a writ of procedendo. As the basis for his sole claim for relief, relator asserted that respondent had a legal obligation to immediately go forward and issue a final ruling on the motion in question.

{¶6} In now moving for summary judgment under Civ.R. 56, respondent argues that, due to the pendency of the separate appeal of the sentencing judgment, he does

not have the authority to proceed on relator's motion. That is, respondent submits that the filing of the appeal had the effect of divesting him of the jurisdiction to take any new steps in the underlying criminal case which would conflict with this court's authority to review the appealed judgment. In support of this argument, respondent has attached to his summary judgment motion certified copies of the dockets of the criminal proceeding before him and the direct appeal before us.

{¶7} In responding to the Civ.R. 56 motion, relator has not contested the basic authenticity of the two certified copies presented by respondent. Furthermore, he has not challenged the general validity of respondent's contention as to the legal effect of a pending appeal upon the jurisdiction of a trial court. Instead, relator only maintains that it would be unfair not to require respondent to proceed on the motion to withdraw when, as part of its brief in the direct appeal, the state of Ohio has stated that certain issues concerning the propriety of his guilty plea cannot be fully addressed in the context of an appeal.

{¶8} As an initial point, this court would note that respondent's essential legal argument is consistent with the governing appellate case law of our state. As a general proposition, the filing of a notice of appeal deprives a trial court of its authority to render any new ruling that would conflict with the appellate court's jurisdiction to affirm, modify, or reverse the appealed determination. *State v. Leach*, 8th Dist. No. 84794, 2005-Ohio-1870, at ¶16. In applying this fundamental principle to a situation in which a defendant has moved to withdraw a guilty plea following the release of the sentencing judgment, we have expressly concluded that a trial court lacks the authority to dispose of such a motion so long as an appeal of that specific judgment remains pending. *State v. Dudas*,

11th Dist. Nos. 2006-L-267 & 2006-L-268, 2007-Ohio-6739, at ¶99. Our conclusion was based upon the fact that the disposition of the motion to withdraw could potentially have a direct impact upon the merits of the subject matter of the appeal. *Id.* at ¶100, quoting *State v. Winn*, 2nd Dist. No. 17194, 1999 Ohio App. LEXIS 511, at *12-13. See, also, *State v. Morgan*, 8th Dist. No. 87793, 2007-Ohio-398, at ¶9-11; *Leach*, 2005-Ohio-1870, at ¶16.

{¶9} As was noted above, in moving for summary judgment in the instant case, respondent submitted certified copies of the trial docket in the underlying criminal action and the appellate docket in the pending appeal. A review of these documents readily establishes that relator's direct appeal of the sentencing judgment has been pending for the entire period in which his motion to withdraw has been before respondent at the trial level. Moreover, although relator did attempt to attach his own evidentiary materials to the second of his two responses to the Civ.R. 56 motion, none of his items conflicted in any respect with the copies of the two dockets. In fact, relator's evidentiary items only consisted of copies of the first pages of his motion to withdraw and his notice of appeal.

{¶10} Therefore, since the evidentiary materials show that relator filed his motion to withdraw and his notice of appeal on the same date, it is undisputed that the motion and the appeal have been pending simultaneously throughout the entire relevant time frame. In light of this, the foregoing case law dictates that respondent has not had the basic ability to proceed and dispose of relator's motion. That is, because the pendency of the direct appeal has divested respondent of jurisdiction over the underlying matter, he cannot adjudicate the merits of the motion at this time.

{¶11} According to relator, respondent's "refusal" to proceed has effectively left

him without a remedy as to his contention that he has stated a valid reason to withdraw his guilty plea. However, in considering similar situations in which the pendency of an appeal has deprived a lower court of the authority to review the merits of a new pending issue, the Supreme Court of Ohio has indicated that the jurisdiction to go forward can be conferred upon the lower court through a remand order of the superior court. See, e.g., *State ex rel. Rock v. School Employees Retirement Bd.*, 96 Ohio St.3d 206, 2002-Ohio-3957, at ¶8. Pursuant to this precedent, relator himself could have remedied the instant predicament by moving this court to remand the case to respondent for purposes of disposing of the motion to withdraw. The submitted copy of our docket in the pending appeal demonstrates, though, that a motion to remand has never been filed.

{¶12} To be entitled to a writ of procedendo, the relator must prove that he has a clear legal right to an immediate determination on a pending issue, and that there is no other adequate legal remedy he could pursue to resolve the matter. *State ex rel. Dean v. McKay* (Dec. 24, 1998), 11th Dist. No. 98-T-0160, 1998 Ohio App. LEXIS 6294, at *2-3. Hence, as the defending party in the present action, respondent would be entitled to prevail on the procedendo claim if he can demonstrate for summary judgment purposes that relator will be unable to satisfy one of the two elements for the writ. In turn, Civ.R. 56(C) provides that summary judgment can only be granted when the moving party has shown that: (1) no genuine issues of material fact remain to be tried; (2) he is entitled to final judgment as a matter of law; and (3) the evidentiary materials are such that, even when those items are construed most favorably for the non-moving party, a reasonable individual could only reach a conclusion adverse to that party. *State ex rel. Lemons v. Kontos*, 11th Dist. No. 2010-T-0101, 2011-Ohio-653, at ¶14.

{¶13} Pursuant to the foregoing discussion, this court holds that respondent has satisfied all three prongs of the “summary judgment” standard as to the first element of relator’s procedendo claim. Given the undisputed fact that relator’s direct appeal of the sentencing judgment has been pending the entire period of time in which his motion to withdraw has been before respondent, relator has no clear right to an immediate ruling because respondent lacks the requisite jurisdiction to proceed on the motion. In light of these circumstances, respondent is entitled to judgment on the procedendo claim as a matter of law.

{¶14} Accordingly, respondent’s motion for summary judgment is granted. It is the order of this court that final judgment is hereby entered in favor of respondent as to relator’s entire procedendo claim.

TIMOTHY P. CANNON, P.J., CYNTHIA WESTCOTT RICE, J., MARY JANE TRAPP, J.,
concur.