[Cite as *State ex rel. McKinney v. McKay*, 2011-Ohio-3756.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO, ex rel. JERMAINE MCKINNEY,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2011-T-0039**
- vs -	:	
JUDGE W. WYATT MCKAY, JUDGE OF TRUMBULL COUNTY COURT OF COMMON PLEAS,	:	
Respondent.	:	

Original Action for Writ of Mandamus and/or Procedendo.

Judgment: Petition dismissed.

Jermaine McKinney, pro se, PID: A520-677, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Relator).

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent).

PER CURIAM.

{¶1} This matter is before the court pursuant to the petition for a writ of mandamus and/or procedendo filed by relator, Jermaine McKinney, against respondent, Judge W. Wyatt McKay, Judge of the Trumbull County Court of Common Pleas. This court granted an alternative writ, ordering respondent to respond to the petition. Respondent filed a motion to dismiss for failure to state a claim pursuant to Civ.R.

12(B)(6), and relator filed a brief in opposition. At issue is whether respondent entered a final appealable order following relator's conviction by a jury of two counts of aggravated murder and related felonies. For the reasons that follow, we grant respondent's motion to dismiss, and dismiss relator's petition for a writ of mandamus and/or procedendo.

{¶2} On January 6, 2006, the grand jury returned an indictment against relator charging him with two counts of aggravated murder with prior calculation and design of his girlfriend Rebecca Cliburn and her elderly mother Wanda Rollyson (respectively Counts One and Three), with the following specifications of aggravating circumstances as to each count as set forth in R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7): multiple murders, aggravated burglary, aggravated robbery, kidnapping, and aggravated arson; aggravated murder in the commission of a felony of Rebecca and Wanda (respectively Counts Two and Four), with the same specifications as to each count; aggravated burglary, a felony of the first degree (Count Five); aggravated robbery, a felony of the first degree (Count Six); kidnapping of Rebecca, a felony of the first degree (Count Seven); kidnapping of Wanda, a felony of the first degree (Count Eight); and aggravated arson, a felony of the second degree (Count Nine).

{¶3} The court's judgment on sentence, entered on December 11, 2006, which is the judgment at issue here, stated that on October 11, 2006, relator was tried by a jury, and on November 3, 2006, after due deliberation, was found guilty of Count 2: aggravated murder (felony murder of Rebecca) with specifications of aggravating circumstances as set forth in R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7); Count 3: aggravated murder (with prior calculation and design of Wanda) with specifications of

aggravating circumstances as set forth in R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), but not guilty as to specification number 4: kidnapping; Count 4: aggravated murder (felony murder of Wanda) with specifications of aggravating circumstances as set forth in R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), but not guilty as to specification number 4: kidnapping; Count 5: aggravated burglary (Felony 1); Count 6: aggravated robbery (Felony 1); Count 7: kidnapping (Felony 1); and Count 9: aggravated arson (Felony 2). The judgment also stated that the jury returned not guilty verdicts on Count 1: aggravated murder with specifications of aggravating circumstances as set forth in R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7) and Count 8: kidnapping (Felony 1).

{¶4} The trial court's judgment on sentence further recited that on November 16, 2006, on the state's motion, the court dismissed Count Three, murder of Wanda with prior calculation and design, and the attached specifications. The entry further provided that on November 16, 2006, relator was brought into court and gave evidence in mitigation with respect to Count Two and Count Four, felony murder of Rebecca and Wanda, respectively. The judgment recited that, after due deliberation, on November 20, 2006, the jury found and recommended that two sentences of life in prison without parole be imposed on relator.

{¶5} The judgment on sentence further recited that on November 29, 2006, the court held relator's sentencing hearing, and that on December 11, 2006, the court sentenced relator to life in prison without parole on Count Two (felony murder of Rebecca); life in prison without parole on Count Four (felony murder of Wanda); ten years on Count Five (aggravated burglary); ten years on Count Six (aggravated

robbery); ten years on Count Seven (kidnapping of Rebecca); and eight years on Count Nine (aggravated arson), all sentences to be served consecutively to each other.

{¶6} Relator appealed his conviction to this court asserting 16 assignments of error, challenging various evidentiary rulings; alleged procedural irregularities; venue; the trial court's jury instructions; the alleged ineffectiveness of his trial counsel; the trial court's alleged denial of relator's right to represent himself; and the weight of the evidence. Significantly, relator did not challenge the finality of the trial court's judgment on sentence. In *State v. McKinney*, 11th Dist. No. 2007-T-0004, 2008-Ohio-3256 ("*McKinney I*"), this court affirmed appellant's conviction.

{¶7} Thereafter, relator filed a motion to reopen his direct appeal, pursuant to App.R. 26(B), arguing his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on appeal. This court denied that motion.

{¶8} Subsequently, relator filed a motion in the trial court for resentencing, challenging the court's imposition of consecutive sentences. He did not, however, challenge the finality of the court's judgment on sentence. The trial court denied the motion. Relator appealed the court's ruling, but due to his failure to file an appellate brief, this court dismissed his appeal in *State v. McKinney*, 11th Dist. No. 2009-T-0093 ("*McKinney II*").

{¶9} Meanwhile, relator filed a motion in the trial court to vacate void judgment, arguing his sentence was void because the trial court did not impose the mandatory term of post-release control with respect to the first-degree felonies of which he was convicted. This court in *State v. McKinney*, 11th Dist. No. 2011-T-0011, 2010-Ohio-6445 ("*McKinney III*"), affirmed in part and reversed in part relator's conviction and

sentence, holding that, contrary to relator's argument, his sentence was not void, but remanded the matter to the trial court for the sole purpose of issuing a nunc pro tunc entry to correctly impose post-release control.

{¶10} Between December 29, 2010, and January 18, 2011, relator filed a series of motions in the trial court, each of which requested that respondent issue a final order of conviction pursuant to Crim.R. 32(C). Respondent denied each of these motions in a single judgment entry, dated February 17, 2011, finding that relator's motions were in effect petitions for post-conviction relief and untimely pursuant to R.C. 2953.21(A)(2). Appellant failed to appeal this ruling and, instead, filed the instant petition for a writ of mandamus and/or procedendo.

{¶11} Appellant argues in his petition that the trial court's judgment on sentence is not a final appealable order because, he maintains, it omitted the following: (1) the manner of conviction of Counts Five, Six, Seven, and Nine; (2) the verdicts of the jury on the aggravating circumstances in Counts Two and Four, aggravated murder; (3) the disposition of the aggravating circumstances in Count Three, aggravated murder; (4) the jury's verdict for kidnapping as a felony of the second degree (the jury found him guilty of felony-one kidnapping); and (5) the court's sentence for felony-two kidnapping (the court sentenced him for felony-one kidnapping). Relator argues that because respondent has failed to enter a final appealable order, he is entitled to a writ of mandamus and/or procedendo compelling respondent to enter such an order.

{¶12} Crim.R. 32(C) provides, in pertinent part:

{¶13} "A judgment of conviction shall set forth the plea, the verdict, or findings upon which each conviction is based, and the sentence. Multiple judgments of

conviction may be addressed in one judgment entry. If the defendant is found not guilty ***, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk."

{¶14} In *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, the Supreme Court of Ohio held: "A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." Id. at syllabus. The Supreme Court also held: "Only one document can constitute a final appealable order." Id. at 201. "[A]llowing multiple documents to constitute a final appealable order *** is *** an erroneous interpretation of [Crim.R. 32(C)]." Id. "[T]he judgment of conviction is a single document that *** must include the sentence and the means of conviction, whether by plea, verdict, or finding by the court, to be a final appealable order under R.C. 2505.02." Id. "[A] defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence." Id. Further, the requirements of Crim.R. 32(C) are jurisdictional and, absent compliance with Crim.R. 32(C), there can be no final appealable order under R.C. 2505.02. Id.

{¶15} In *State ex rel. Widmer v. Mohney*, 11th Dist. No. 2007-G-2776, 2008-Ohio-1028, this court held:

{¶16} "A mandamus is a civil proceeding, extraordinary in nature since it can only be maintained when there is no other adequate remedy to enforce clear legal rights. *State ex rel. Brammer v. Hayes* (1955), 164 Ohio St. 373. Mandamus is a writ

issued to a public officer to perform an act that the law enjoins as a duty resulting from his or her office. R.C. 2731.01. For a writ of mandamus to issue, [1.] the relator must establish a clear legal right to the relief prayed for; [2.] the respondent must have a clear legal duty to perform the act; and [3.] the relator must have no plain and adequate remedy in the ordinary course of the law. *State ex rel. National Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 80. ***" *Widmer*, supra, at ¶31.

{¶17} Similarly, 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. *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462, 1995-Ohio-26. A writ of procedendo is appropriate when a court has refused to enter judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna*, 73 Ohio St.3d 180, 184, 1995-Ohio-98. 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* (1995), 74 Ohio St.3d 33, 35, quoting *State ex rel. Levin v. Sheffield Lake*, 70 Ohio St.3d 104, 110, 1994-Ohio-385. "'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 Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 45, quoting *State ex rel. Davey v. Owen* (1937), 133 Ohio St. 96, 106.

{¶18} If a judgment of conviction has not been entered in final and appealable form, then mandamus or procedendo is the proper remedy to compel the trial court to issue a final appealable order. *State ex rel. Culgan v. Medina Cty. Court of Common*

Pleas, 119 Ohio St.3d 535, 536, 2008-Ohio-4609. However, a direct appeal from a final judgment of conviction is an adequate remedy at law, which bars a relator's mandamus action. *Cunningham v. Lucci*, 11th Dist. No. 2006-L-052, 2006-Ohio-4666, at ¶12.

{¶19} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural in nature and tests the sufficiency of the complaint. *Huffman v. Willoughby*, 11th Dist. No. 2007-L-040, 2007-Ohio-7120, at ¶16, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. "[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60. A ruling on a Civ.R. 12(B)(6) motion to dismiss must be based solely on the factual assertions set forth in the complaint. *Huffman*, supra, at ¶17. In order for a court to grant a motion to dismiss for failure to state a claim, it must appear """beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."""" *Huffman*, supra, at ¶18, quoting *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, quoting *Conley v. Gibson* (1957), 355 U.S. 41, 45. As long as there is a set of facts consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss. *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 418, 2002-Ohio-2480.

{¶20} The prosecutor argues that, pursuant to *State ex rel. Lemons v. Kontos*, 11th Dist. No. 2009-T-0053, 2009-Ohio-6518, this court can consider the trial court's docket in ruling on respondent's Civ.R. 12(B)(6) motion to dismiss. However, *Lemons* is inapposite because in that case, the relator did not dispute the finality of the trial court's

judgment. Instead, he argued the trial court should have acquitted him of rape due to, inter alia, insufficient evidence. Because the parties in *Lemons* did not attach a copy of the judgment of conviction to their respective filings, this court reviewed the docket merely to confirm that a conviction had been entered. In contrast, here, relator challenges the finality of the court's judgment. Pursuant to *Baker*, supra, our determination of whether the judgment on sentence is a final appealable order is confined to a review of that single document.

{¶21} To summarize the parties' respective positions, relator argues that he is entitled to a writ of mandamus and/or procedendo because, he claims, he has a clear legal right to, but the trial court failed to enter, a final judgment that complies with Crim.R. 32(C). Respondent argues that relator is entitled to neither writ because he has already entered a final order that is compliant with Crim.R. 32(C). Respondent additionally argues that relator had an adequate remedy at law and is therefore not entitled to a writ because he could have challenged and, in fact, did challenge his conviction in his direct appeal.

{¶22} We now consider relator's arguments in support of his contention that the trial court failed to enter a final appealable order. As noted above, relator asserts five arguments in support of his position. He does not claim that the judgment incorrectly recited the jury's verdicts. Instead, he argues the judgment is not a final appealable order due to certain omissions.

{¶23} First, relator argues the trial court's judgment is not final because it "omits the manner of conviction for counts 5, 6, 7, and 9" since, according to him, "it only states: 'after due deliberation the defendant was found guilty.'" (Emphasis deleted.)

Relator argues that based on the terms of the judgment, it is impossible to determine who deliberated and found him guilty. He also argues that because the judgment does not expressly state the jury was empanelled to consider all charges, the judgment is equally consistent with Counts Two and Four having been tried to a jury and the remaining counts having been tried to the bench.

{¶24} The problem with relator's argument, however, is that the court's judgment clearly indicated the entire case was submitted to the jury. After listing each offense and specification charged in the indictment, the judgment stated that relator was "brought into Court for trial before a *** jury"; "a jury having been empanelled"; and "after due deliberation, the Defendant was found guilty" of Count Two, aggravated murder with specifications; Count Three, aggravated murder with specifications, but not guilty as to specification number four, kidnapping; Count Four, aggravated murder with specifications, but not guilty as to specification number four, kidnapping; Count Five, aggravated burglary; Count Six, aggravated robbery; Count Seven, kidnapping; and Count Nine, aggravated arson. The entry also recited that the jury returned not guilty verdicts on Count One, aggravated murder, and Count Eight, kidnapping. Moreover, the judgment stated that, with respect to Counts Two and Four, aggravated murder, the jury made a finding and recommendation of two sentences of life in prison without parole.

{¶25} Relator concedes that the statement in the judgment that the jury was empanelled and returned verdicts at the mitigation hearing with respect to Counts Two and Four implies that these counts were tried by the jury. However, based on the foregoing references to the jury in the judgment, it plainly indicates that the entire case

was tried by jury. There is nothing in the judgment suggesting that any part of the indictment was submitted to the court for its determination.

{¶26} Thus, contrary to relator's argument, the trial court's judgment clearly indicated that the indictment as a whole was submitted to the jury and that the jury returned verdicts on Counts Five, Six, Seven, and Nine.

{¶27} Second, relator argues that the judgment did not sufficiently identify the specifications of aggravating circumstances of which he was found guilty with respect to Counts Two and Four, aggravated murder. He therefore argues the court's judgment is not a final appealable order. However, with respect to Count Two, the judgment stated that the jury found relator guilty of Count Two, aggravated murder, with specifications of aggravating circumstances as set forth in R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7). R.C. 2929.04(A)(5) referred to specification number one regarding multiple murders, and R.C. 2929.04(A)(7) referred to specification numbers two, three, four, and five regarding, respectively, aggravated burglary, aggravated robbery, kidnapping, and aggravated arson. With respect to Count Four, the judgment stated that the jury found relator guilty of Count Four, aggravated murder, with specifications of aggravating circumstances as set forth in R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), but not guilty as to specification number four, kidnapping. As with Count Two, R.C. 2929.04(A)(5) referred to specification number one regarding multiple murders, and R.C. 2929.04(A)(7) referred to specification numbers two, three, four, and five regarding, respectively, aggravated burglary, aggravated robbery, kidnapping, and aggravated arson.

{¶28} Therefore, the trial court's judgment indicated the jury's verdict with respect to the specifications of both counts of aggravated murder. Contrary to relator's argument, there is no requirement that the judgment further identify the specifications. Moreover, such exercise would have been superfluous here because the jury recommended that relator be sentenced to life imprisonment without parole, and the trial court was obligated pursuant to R.C. 2929.03(D)(2) to impose that sentence on relator.

{¶29} Third, relator argues that, while the judgment indicated he was found not guilty of specification number four, kidnapping, of Count Three, aggravated murder of Wanda with prior calculation and design, there is no indication regarding the disposition of the other specifications. It is unclear from relator's argument whether he is referring to all other specifications (in Counts Two, Three, and Four) or only to the other specifications in Count Three. To the extent this argument refers to the specifications in Counts Two and Four, the argument is redundant and is addressed in our analysis under relator's second argument. To the extent the argument refers to Count Three, the argument is likewise without merit because the judgment provided that the jury found relator guilty of the specifications attached to Count Three as referenced in R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), but not guilty as to specification number four. Consistent with our analysis with respect to Counts Two and Four, the judgment thus clearly provided that, other than specification number four, the jury found relator guilty of the specifications charged under Count Three.

{¶30} Moreover, relator's argument with respect to Count Three is moot because, as noted in the judgment, the state dismissed Count Three and the attached specifications after the jury returned its verdict, but before the mitigation hearing.

{¶31} Fourth, relator argues that, while the court's judgment indicated he was found guilty of kidnapping of Rebecca, a felony of the first degree, he was in fact only found guilty of second-degree kidnapping because the verdict did not contain a finding of the aggravating circumstance that the victim was released in a safe place unharmed.

{¶32} Relator's reliance on *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, is misplaced. In that case the defendant was charged with tampering with records. Pursuant to R.C. 2913.42, if the records are government records, the offense is elevated from a misdemeanor to a felony. In contrast, the provision regarding kidnapping referenced by relator is a mitigating, rather than an aggravating, circumstance because its presence reduces the degree of the offense. The Supreme Court of Ohio directly addressed this issue in *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, as follows:

{¶33} "Under R.C. 2905.01(C), the offense of kidnapping is generally a first-degree felony but may be reduced to a second-degree felony if 'the offender releases the victim in a safe place unharmed.' This provision, however, is not an element of the offense; rather, the defendant must plead and prove that assertion as an affirmative defense. *State v. Sanders*, 92 Ohio St.3d at 265; *State v. Cornute* (1979), 64 Ohio App.2d 199, syllabus. Appellant never argued that Murray was released unharmed in a safe place. Thus, the language was not properly at issue." *McKnight*, supra, at 133.

{¶34} Because the provision referenced by relator is a mitigating factor, he, rather than the state, was required to plead and prove its existence. Because relator failed to do either, he was properly found guilty of first-degree kidnapping.

{¶35} Moreover, since this argument does not implicate the trial court's subject matter jurisdiction, because relator failed to plead this affirmative defense; failed to present any evidence that Rebecca, whom he had murdered, was released in a safe place unharmed; and failed to request a jury instruction on the issue, the argument is either waived or barred by res judicata. Id.; *State v. White*, 10th Dist. No. 06AP-607, 2007-Ohio-3217, at ¶20. Any argument that these principles do not apply here is barred by our holding that the court's December 11, 2006 judgment entry is a final appealable order.

{¶36} In summary, the trial court's judgment of December 11, 2006, set forth the jury's verdict on each count and specification and the court's sentence. Moreover, the judgment was signed by the trial judge and was duly time-stamped. Therefore, the court's judgment is a judgment of conviction that satisfied the requirements for finality and is a final appealable order under R.C. 2505.02 and Crim.R. 32(C). *Baker*, supra.

{¶37} As such, Judge McKay has already performed his obligation to render a final judgment of conviction. It is well-established that a writ of mandamus will not issue to compel a public official to perform a legal duty which has already been performed. *State ex rel. Gantt v. Coleman* (1983), 6 Ohio St.3d 5, citing *State ex rel. Breaux v. Court of Common Pleas* (1977), 50 Ohio St.2d 164, citing *State ex rel. Bowman v. Asmann* (1925), 113 Ohio St. 394. Stated otherwise, the writ will not lie in order to secure a determination of issues which have become moot. *State ex rel. Hawke v. Weygandt* (1947), 148 Ohio St. 453, 456; *State ex rel. Warner & Swasey Co. v. Indus. Comm*. (1977), 50 Ohio St.2d 152.

{¶38} We therefore hold that, since respondent has already entered a final appealable order, relator had an adequate remedy at law by way of a direct appeal, and neither a writ of mandamus nor a writ of procedendo could lie to compel any further action by respondent.

{¶39} In light of the foregoing analysis, respondent's motion to dismiss is granted, and relator's petition for a writ of mandamus and/or procedendo is dismissed.

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