

[Cite as *State ex rel. Merritt v. DeWeese*, 2009-Ohio-5291.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE EX REL., CHARLES A.
MERRITT

Relator

-vs-

JUDGE JAMES DEWEESE

Respondent

JUDGES:

Hon. John W. Wise, P. J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CA 76

OPINION

CHARACTER OF PROCEEDING:

Writ of Mandamus

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

October 2, 2009

APPEARANCES:

For Relator

For Respondent

CHARLES A. MERRITT, PRO SE
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KIRSTEN L. PSCHOLKA-GARTNER
ASSISTANT PROSECUTOR
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Wise, P. J.

{¶1} Relator was convicted in the Richland County Court of Common Pleas of two counts of rape, two counts of gross sexual imposition, one count of pandering obscenity involving a minor, and one count of illegal use of a minor in a nudity-oriented material or performance. A total prison term of 18 years was imposed for these offenses. Relator filed an appeal from his conviction which was affirmed by this Court on February 5, 2007. No appeal was taken to the Supreme Court of Ohio.

{¶2} The Supreme Court issued its decision in *State v. Baker* on July 9, 2008 holding four elements must be present for a criminal entry of conviction to be a final, appealable order. The *Baker* court 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.” *State v. Baker* (2008), 119 Ohio St.3d 197, 201, 893 N.E.2d 163, 167.

{¶3} On February 12, 2009, Relator filed a “Motion for Re-Sentencing” requesting to be re-sentenced because his initial sentencing entry did not comply with *Baker*. In response, the trial court issued an amended sentencing entry on May 4, 2009.

{¶4} Apparently unaware of the May 4, 2009 amended entry, Relator then filed the instant Petition for Writ of Mandamus and/or Writ of Procedendo on June 19, 2009. The Petition raises two claims for relief: First, Relator requests Respondent be ordered to rule on Petitioner’s “Motion for Re-Sentencing” and second, Relator requests

Respondent be ordered to issue an entry which complies with the mandate of *State v. Baker*.

{¶15} Respondent has filed a Motion to Dismiss the Petition suggesting the Petition is moot because the trial court has issued the requested entry.

{¶16} Relator argues the entry issued by the trial court does not comply with *Baker*, therefore, the Petition has not been made moot.

{¶17} A relator is entitled to a writ of mandamus if the following conditions are satisfied: (1) the relator demonstrates a clear legal right to the relief prayed for; (2) the respondent is under a corresponding legal duty to perform the actions that make up the prayer for relief; and, (3) the relator has no plain and adequate remedy in the ordinary course of law. *Doss Petroleum, Inc. v. Columbiana Cty. Bd. of Elections*, 164 Ohio App.3d 255, 2005-Ohio-5633, 842 N.E.2d 66, citing to *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225.

{¶18} Further, 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 law.” *Miley*, supra, at 65, citing *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas* (1995), 72 Ohio St.3d 461, 462, 650 N.E.2d 899. The Supreme Court has noted, “The writ of procedendo is merely an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. It does not in any case attempt to control the inferior court as to what that judgment should be.” *State ex rel. Davey v. Owen*, 133 Ohio St. 96, *106, 12 N.E.2d 144, 149 (1937).

{¶19} The Supreme Court has held, “Neither procedendo nor mandamus will compel the performance of a duty that has already been performed. *Martin v. Judges of the Lucas Cty. Court of Common Pleas* (1990), 50 Ohio St.3d 71, 72, 552 N.E.2d 906, 908.” *State ex rel. Grove v. Nadel* (1998), 84 Ohio St.3d 252, 253, 703 N.E.2d 304, 305.

{¶10} In reply to Respondent’s Motion to Dismiss, Relator states he was unaware of the fact Respondent had issued an amended sentencing entry. Further, Relator argues the amended entry does not comply with *Baker* because the entry does not contain a journalization number and because the entry was amended without a new sentencing hearing.

{¶11} To comply with *Baker*, the order must set forth “entry on the journal by the clerk of court.” *Baker* at 201. The amended sentencing entry contains a file stamp from the Richland County Clerk of Courts stating the entry was filed with the Clerk on May 1, 2009, therefore, we find the entry complies with the requirements of *Baker*. For this reason, Relator’s argument fails.

{¶12} Next, Relator contends the amended entry could not have been issued in Relator’s absence. We find Relator has or had an adequate remedy at law by way of direct appeal or petition for post conviction relief to challenge whether Relator’s presence is necessary under these circumstances. See *Brown v. Hall* 2009 WL 765520, 1 (Ohio App. 5 Dist.) and *State ex rel. Hill v. Niehaus* (1994), 68 Ohio St.3d 507, 628 N.E.2d 1376 (appeal provides adequate remedy at law for challenge of trial court’s authority to re-issue sentencing entry). Because Relator has or had an adequate remedy at law, the writ will not issue.

{¶13} For these reasons, we grant Respondent's motion to dismiss and decline to issue the requested writs.

{¶14} MOTION TO DISMISS GRANTED.

{¶15} PETITION DISMISSED.

{¶16} COSTS TO RELATOR.

{¶17} IT IS SO ORDERED.

By: Wise, P. J.

Edwards, J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 813

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE EX REL., CHARLES A. MERRITT	:	
	:	
Relator	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JUDGE JAMES DEWEESE	:	
	:	
Respondent	:	Case No. 09 CA 76

For the reasons stated in our accompanying Memorandum-Opinion,
Respondent's motion to dismiss is granted, and the requested writs are denied.

Costs assessed to Relator.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES