

STATE OF OHIO, NOBLE COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE ex rel. KIRK WATERS,)	
)	CASE NO. 09 NO 365
RELATOR,)	
)	
- VS -)	<u>OPINION</u>
)	<u>AND</u>
NOBLE COUNTY COMMON)	<u>JUDGMENT ENTRY</u>
PLEAS COURT,)	
)	
RESPONDENT.)	

CHARACTER OF PROCEEDINGS: Petition for Writ of Procedendo.

JUDGMENT: Petition for Writ of Procedendo Granted.

APPEARANCES:

For Relator:

Kirk Waters, *Pro Se*
#A436-936
Noble Correctional Institution
15708 McConnellsville Road
Caldwell, Ohio 43724

For Respondent:

Attorney Clifford Sickler
Prosecuting Attorney
508 North Street
Caldwell, Ohio 43724

JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: February 22, 2010

PER CURIAM:

¶{1} Relator Kirk Waters filed a Petition for Writ of Mandamus and/or Procedendo with this court on November 17, 2009. The petition requests this court to order the Noble County Common Pleas Court to lift the stay issued in response to a February 15, 2008 motion requesting a hearing. On January 12, 2010, Respondent Noble County Common Pleas Court responded to the petition and requested that this court deny the writ and let the stay stand.

¶{2} The Ohio Supreme Court has explained that a writ of procedendo is appropriate when “a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment.” *State ex rel. Weiss v. Hoover* (1999), 84 Ohio St.3d 530, 532. The criteria for relief in procedendo are well-established. The relator must demonstrate: (1) a clear legal right to proceed in the underlying matter; and (2) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 2007-Ohio-2882, at ¶13. “More pertinently, the requirements for a writ of procedendo are met if a judge erroneously stays a proceeding.” *Id.* at ¶15, citing *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535.

¶{3} In order to determine whether under the above law Waters is entitled to a writ of procedendo, a history of Waters’ convictions and filing in the Noble County Court must be reviewed.

¶{4} In 2002, Waters was convicted and sentenced in both Butler and Clermont counties for various conduct related to his unlawful sexual relationship with a thirteen-year old girl. The convictions in Butler County included three counts of sexual battery. Waters contends that as a result of those convictions he was labeled a “sexual predator.” This sexual offender classification was under the prior version of R.C. Chapter 2950.

¶{5} In 2008, Senate Bill 10, the new version of R.C. Chapter 2950, became effective and established a new classification system. Under Senate Bill 10, R.C. 2950.031(E) gave individuals labeled under the old sex offender classification system the right to request a hearing to contest the application of the new law to them.

Pursuant to the statute, on February 15, 2008, in Noble County Common Pleas Court, Waters' county of commitment, he filed a motion requesting a hearing to contest his classification.

¶{6} In response to that motion, the state filed a motion to stay the proceedings. 02/29/08 Motion. In that motion, the state asserted that in the U.S. District Court, Northern Division, *John Doe I, et al. v. Marc Dann, et al.*, Case No. 1:8-CV-002200-PAG, was currently pending and that the case challenged Senate Bill 10 on a number of grounds. It claimed that the resolution of John Doe would have an impact on Waters' claims and, thus, asked the court to hold the case in abeyance pending a decision in that case.

¶{7} In accordance with that request, the Noble County Common Pleas Court stayed the case pending resolution of the federal case. 03/10/08 J.E. Those facts bring us to the question at issue, whether the trial court's stay should be lifted at this time.

¶{8} A review of the order from *John Doe* that was attached to the state's motion for stay indicates that there was a basis for the trial court to stay the proceedings. However, in determining whether the writ should be granted we are permitted to consider the circumstances existing at the time the petition is considered. *State ex rel. Howard v. Skow*, 102 Ohio St.3d 423, 2004-Ohio-3652, ¶9, citing *State ex rel. Wilson v. Sunderland* (2000), 87 Ohio St.3d 548, 549.

¶{9} A review of the federal court docket from *John Doe* indicates that that case was concluded in August 2008. 08/21/08 Order of Dismissal. Thus, a stay based on the federal court is no longer warranted and is only delaying the proceedings.

¶{10} The state does not appear to dispute that *John Doe* has been resolved. Rather, it now argues that the constitutionality of Senate Bill 10 is currently before the Ohio Supreme Court and that decision will impact the resolution of Waters' February 2008 motion.

¶{11} The state is correct that the constitutionality of Senate Bill 10 is currently pending before the Ohio Supreme Court. *State v. Bodyke*, 121 Ohio St.3d 1438, 2009-Ohio-1638. Oral argument in *Bodyke* occurred on November 4, 2009.

¶{12} That said, procedendo still lies in this case. The trial court issued the stay specifically on the basis of the federal court case. As that case has been disposed of, the stay on the specific basis of *John Doe* must be lifted. However, in holding as such, we note that trial court is within its authority to issue another stay on the basis of the *Bodyke* case currently pending before the Ohio Supreme Court.

¶{13} For the foregoing reasons, Relator's Petition for Writ of Procedendo is hereby granted.

¶{14} Costs taxed against Respondent. Final order. Clerk to serve notice as provided by the Civil Rules.

Vukovich, P.J., concurs.

Waite, J., concurs.

DeGenaro, J., concurs.