

[Cite as *State ex rel. Anderson v. Sheeran*, 2012-Ohio-2949.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kim L. Anderson,	:	
Relator,	:	
v.	:	No. 11AP-990
Franklin County Common Pleas Judge Patrick E. Sheeran,	:	(REGULAR CALENDAR)
Respondent.	:	
	:	

D E C I S I O N

Rendered on June 28, 2012

Kim L. Anderson, pro se.

*Ron O'Brien, Prosecuting Attorney, and Nick A. Soulas, Jr.,
for respondent.*

IN PROCEDENDO
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Kim L. Anderson ("relator"), filed an original action, which asks this court to issue a writ of procedendo ordering respondent, Franklin County Common Pleas Court Judge Patrick E. Sheeran ("respondent"), to rule on two motions filed in relator's underlying criminal case.

{¶ 2} As detailed in the magistrate's decision, relator alleged that respondent has failed to rule on the following two motions he filed concerning his underlying

criminal case: (1) his January 4, 2011 motion for new trial, and (2) his April 27, 2011 motion for resentencing. In his motion before the magistrate, respondent submitted evidence showing that he had ruled on the January 4, 2011 motion. Respondent did not, however, submit evidence that he had ruled on the April 27, 2011 motion and nothing in the case docket suggests that he has ruled on it.

{¶ 3} In her decision, the magistrate recommended that we deny relator's request for a writ concerning the January 4, 2011 motion and grant his request for a writ concerning the April 27, 2011 motion. Respondent did not object to the magistrate's decision.

{¶ 4} On February 13, 2012, relator filed an objection in which he argues the merits of his April 27, 2011 motion. As noted by the magistrate, a writ of procedendo is an order to proceed to judgment, not an order to proceed to a specific outcome. *See State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462 (1995). As relator seeks a specific outcome through his objection, we overrule it. We deny as moot respondent's motion to strike the objection.

{¶ 5} On April 5, 2012, relator filed a "Merit Brief," in which he argues that respondent abused his discretion and denied relator due process by failing to rule on two additional filings. To the extent relator's brief contains objections to the magistrate's decision, they are untimely, and we decline to address them. *See App.R. 34(C) and Civ.R. 53(D)(3)(b)(i)*. We grant respondent's motion to strike relator's "Merit Brief" from the record.

{¶ 6} We will only issue a writ of procedendo "when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." *State ex rel. Dehler v. Sutula*, 74 Ohio St.3d 33, 35 (1995). The Supreme Court of Ohio has concluded that a significant delay can be, but is not always, sufficient to support the issuance of a writ. *Compare State ex rel. Turpin v. Court of Common Pleas of Stark Cty.*, 8 Ohio St.2d 1 (1966) (where there was a 12-month delay, the court granted a writ) with *Dehler* (where there was a 10-month delay, the court denied a writ). In *Dehler*, for example, the court noted that the relator had filed other requests on and after the date

he filed the post-conviction petition at issue, including an affidavit to disqualify the trial judge. Given these facts, the court concluded there was no undue delay.

{¶ 7} Here, relator has inundated the trial court with repetitive motions and filings, including an affidavit to disqualify respondent. While the trial court has not yet ruled on relator's April 27, 2011 motion, the court has issued multiple decisions concerning relator's filings since then. The trial court has considered these filings with admirable patience, but recently noted: "Should [relator] continue to file motions that attempt to re-litigate his conviction, which are now barred based upon the affirmance of his criminal conviction AND the denial of his de facto post-conviction relief filings, the Court will be compelled to consider asking its statutory counsel to bring vexatious litigator proceedings against this [relator], and/or consider the imposition of sanctions." (Emphasis sic.) We do not condone a 13-month delay in deciding a defendant's motion. In this case, however, relator's own actions contributed significantly to that delay. Under these circumstances, we cannot conclude that respondent has simply refused to render judgment or has unnecessarily delayed proceeding to judgment. Therefore, we decline to issue a writ of procedendo.

{¶ 8} Based on our independent review, we overrule relator's objection and strike his "Merit Brief" from the record. We adopt the magistrate's findings of fact and conclusions of law as our own, with the exception of the last paragraph of the magistrate's decision. For the foregoing reasons, we grant summary judgment in favor of respondent and deny relator's request for a writ of procedendo.

*Motion to strike granted in part, denied in part;
objection overruled;
writ of procedendo denied.*

KLATT and CONNOR, JJ., concur.

A P P E N D I X

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v.	:	No. 11AP-990
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Franklin County Common Pleas	:	(REGULAR CALENDAR)
Judge Patrick E. Sheeran,	:	
	:	
Respondent.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on January 27, 2012

Kim L. Anderson, pro se.

*Ron O'Brien, Prosecuting Attorney, and Nick A. Soulas, Jr.,
for respondent.*

IN PROCEDENDO

{¶ 9} Relator, Kim L. Anderson, has filed this original action requesting that this court issue a writ of procedendo ordering respondent, Franklin County Common Pleas Judge Patrick E. Sheeran, to rule on two motions filed in his underlying criminal case.

Findings of Fact:

{¶ 10} 1. Relator is an inmate currently incarcerated at Chillicothe Correctional Institution.

{¶ 11} 2. Relator was found guilty in an underlying criminal case and was sentenced to 15 years in prison. *State v. Anderson*, C.P. No. 07CR-06-4563 (Jan. 5, 2009).

{¶ 12} 3. Relator appealed and this court affirmed the decision of the trial court. *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566.

{¶ 13} 4. On November 14, 2011, relator filed this application for a writ of procedendo.

{¶ 14} 5. In his application, relator asserts that respondent has failed to rule on two motions which he filed in the underlying case. Specifically, on January 4, 2011, relator filed a motion for new trial and on April 27, 2011, relator filed a motion for resentencing based on void unappealable order entered on November 21, 2008 and January 5, 2009.

{¶ 15} 6. On December 19, 2011, respondent filed a motion to dismiss or in the alternative for summary judgment.

{¶ 16} 7. Respondent attached to its motion a certified copy of the decision and entry denying relator's January 4, 2011 motion for new trial filed December 6, 2011.

{¶ 17} 8. Respondent did not attach a decision and entry ruling on relator's April 27, 2011 motion.

{¶ 18} 9. In response to respondent's motion for summary judgment, relator points out that respondent still has not ruled on his April 27, 2011 motion.

{¶ 19} 10. The matter is currently before the magistrate on respondent's motion for summary judgment.

Conclusions of Law:

{¶ 20} In order to be entitled to a writ of procedendo, a relator must establish a clear legal right to require that 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. *State ex rel. Miley v. Parrott*, 77 Ohio St.3d 64, 65, 671 N.E.2d 24 (1996). A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *Id.*

{¶ 21} 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, 656 N.E.2d 332 (1995), quoting *State ex rel. Levin v. Sheffield Lake*, 70 Ohio St.3d 104, 110, 637 N.E.2d 319 (1994).

{¶ 22} Procedendo is an order from a court of superior jurisdiction to proceed to judgment: it does not attempt to control the inferior court as to what the judgment should be. *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462, 650 N.E.2d 899 (1995).

{¶ 23} A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material

fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Accordingly, any party moving for summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material facts; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 375 N.E.2d 46 (1978).

{¶ 24} Respondent has established that relator's January 4, 2011 motion for new trial has been ruled upon. Because the action relator seeks to compel respondent to perform has been performed, the matter is now moot and summary judgment in favor of respondent should be granted as to this portion of relator's complaint.

{¶ 25} However, there is no evidence that respondent has ruled on relator's April 27, 2011 motion for resentencing. Relator has attached a copy of that motion to his complaint arguing that he was improperly sentenced to serve four years on Count 16, a felony of the fourth degree and that respondent failed to dismiss Count 10 which the jury determined relator was not guilty of committing.

{¶ 26} Relator has also attached two sentencing entries. The first entry, filed on November 21, 2008, does indeed sentence relator to serve a period of four years on Count 16, a felony of the fourth degree.

{¶ 27} However, relator also attached the first two pages of the trial court's corrected entry filed January 5, 2009. In an effort to properly resolve this motion for summary judgment, the magistrate has reviewed the complete corrected entry filed

January 5, 2009. A review of that entry clearly demonstrates that respondent has corrected this error. Specifically, the corrected entry now provides that relator was sentenced to "Twelve (12) months as to Counts Eleven, Fifteen and **Sixteen.**" (Emphasis added.) Further, there was no reason for the trial court to formally dismiss Count 10. As the entry indicates, relator was not sentenced on Count 10 and it appears that no error or prejudice occurred.

{¶ 28} To the extent that respondent has not ruled on relator's April 27, 2011 motion for resentencing, it is this magistrate's decision that relator is entitled to a writ of procedendo as to that motion. With regards to the January 4, 2011 motion, it is this magistrate's decision that respondent has ruled on that motion rendering relator's request moot and summary judgment in favor of respondent should be granted as to the January 4, 2011 motion.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).