

{¶ 3} The magistrate has issued a magistrate's decision, attached hereto, which includes a recommendation that we grant summary judgment for Judge Serrott. Boddie has filed objections to the magistrate's decision. The motion is now before the court for review.

{¶ 4} Boddie's complaint, at this point in time, is that the clerk of courts for the Franklin County Court of Common Pleas did not properly and promptly provide him a copy of Judge Serrott's ruling on Boddie's petition for post-conviction relief. Boddie does not, and indeed cannot, argue that Judge Serrott failed to rule on his petition. The relief Boddie seeks in this action in procedendo has already been provided, rendering the case moot.

{¶ 5} As a result, we overrule Boddie's objections to the magistrate's decision. We adopt the findings of fact and conclusions of law in the magistrate's decision and therefore grant summary judgment for Judge Serrott.

*Objections overruled;
summary judgment granted.*

BRYANT and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Howard Boddie, Jr.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 12AP-175
	:	
Judge Mark A. Serrott, Franklin	:	(REGULAR CALENDAR)
County Court of Common Pleas,	:	
	:	
Respondent.	:	
	:	

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

Rendered on April 25, 2012

Howard Boddie, Jr., pro se.

*Ron O'Brien, Prosecuting Attorney, and Jeremy David Smith,
for respondent.*

**IN PROCEDENDO
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

{¶ 6} In this original action, relator, Howard Boddie, Jr., an inmate Of the Chillicothe Correctional Institution ("CCI") requests that a writ of procedendo issue against respondent, the Honorable Mark A. Serrott, a judge of the Franklin County Court of Common Pleas. Relator requests that the writ order respondent to rule upon relator's

petition for post-conviction relief filed on July 26, 2011 in common pleas court case No. 08CR-3419.

Findings of Fact:

{¶ 7} 1. On February 29, 2012, relator, a CCI inmate, filed this procedendo action against respondent.

{¶ 8} 2. In his complaint, relator alleges that on July 26, 2011 he filed in the common pleas court a "Petition to Vacate or Set Aside Judgment of Conviction or Sentence." (See R.C. 2953.21.)

{¶ 9} 3. In his complaint, relator alleges that respondent has failed to act upon his petition.

{¶ 10} 4. As relief in this original action, relator requests that this court order respondent to proceed to judgment on the petition.

{¶ 11} 5. On March 23, 2012, respondent filed his answer to the complaint. In his answer, respondent alleged that this action is moot because respondent issued an order and judgment entry on September 8, 2011 in case No. 08CR-3419 that denies relator's petition. Respondent attached to his answer a certified copy of his September 8, 2011 order and judgment entry.

{¶ 12} 6. On March 27, 2012, respondent moved for summary judgment. Based upon his "Order and Judgment Entry" filed September 8, 2011 that denies relator's petition, respondent argued that he has already performed the relief requested.

{¶ 13} 7. On April 2, 2012, the magistrate issued an order notifying the parties that respondent's motion for summary judgment is set for submission to the magistrate on April 23, 2012.

{¶ 14} 8. On April 16, 2012, relator filed a memorandum contra the motion for summary judgment. In support, relator submitted his affidavit executed April 11, 2012.

The affidavit sets forth ten enumerated paragraphs. The affidavit states in part:

[Five]. On February 24, 2012, I filed an original action for writ of procedendo, due to the trial court[']s failure to respond to the July 26, 2011 Petition to Vacate, Case No. 08-05-3419, (See, *Boddie v. Serrott*, 12AP-175).

[Six]. On March 23, 2012, the Respondent, Honorable Mark Serrott filed an answer to the writ of procedendo. Attached to the answer was an order and judgment entry dated September 8, 2011, from the Franklin County Court of Common Pleas, reflecting Judge Serrott denying and overruling my petition to vacate.

[Seven]. As Relator in the above action, I, Howard Boddie, Jr. state that at no time did I ever receive this order and judgment entry dated September 8, 2011. * * *

* * *

[Nine]. I hereby state that if I would have timely received the September 8, 2011 order and judgment entry, I would have perfected my 30 day notice of appeal in compliance with App.R. 4(A).

Conclusions of Law:

{¶ 15} It is the magistrate's decision that this court grant respondent's motion for summary judgment.

{¶ 16} Summary judgment is appropriate when the movant demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner*, 67 Ohio St.3d 337, 339-40 (1993); *Bostic v. Connor*, 37 Ohio St.3d 144,

146 (1988); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 17} Civ. R. 56(E) states in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶ 18} Relator's affidavit does not place at issue whether respondent actually issued and filed his "Order and Judgment Entry" in case No. 08CR-3419 that ruled upon relator's July 26, 2011 petition. There is no doubt that respondent has issued his "Order and Judgment Entry" denying the petition. Thus, respondent has performed the act that relator sought to compel by a writ of procedendo.

{¶ 19} However, through his affidavit, relator suggests that he is seeking relief that was not requested in the complaint.

{¶ 20} Civ.R. 58(B) provides:

Notice of filing. When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A).

{¶ 21} App.R. 4(A) provides:

Time for appeal. A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

{¶ 22} It can be observed that the certified copy of respondent's "Order and Judgment Entry" filed with the clerk of courts on September 8, 2011 does not contain the Civ.R. 58(B) endorsement directing the clerk to serve notice of the judgment and its date of entry upon the journal. This may explain relator's statement in his affidavit that he did not timely receive respondent's September 8, 2011 order and judgment entry.

{¶ 23} Relator has not moved to amend his complaint pursuant to Civ.R. 15. But even if leave to amend were granted, relief in procedendo would be inappropriate unless relator could show that respondent has refused to journalize his decision upon being moved to do so by relator. *See State ex rel. Grove v. Nadel*, 81 Ohio St.3d 325 (1998); *State ex rel. Hawk v. McCracken*, 65 Ohio St.3d 397 (1992); *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465 , 2008-Ohio-1444.

{¶ 24} Based upon the foregoing analysis, relator's affidavit executed April 11, 2012 does not demonstrate that there is genuine issue of material fact.

{¶ 25} Accordingly, for the above reasons, it is the magistrate's decision that this court grant respondent's motion for summary judgment.

/s/Kenneth W. Macke
KENNETH W. MACKE
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).