

[Cite as *State ex rel. Thomas v. Hogan*, 2010-Ohio-1386.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. [John Alfred Thomas], :  
Relator, :  
v. : No. 09AP-804  
[Judge Hogan of Common Pleas Court], : (REGULAR CALENDAR)  
Respondent. :

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D E C I S I O N

Rendered on March 31, 2010

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*John Alfred Thomas, pro se.*

*Ron O'Brien, Prosecuting Attorney, and Mary Jane Martin,*  
for respondent.

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IN PROCEDENDO  
ON MOTION FOR SUMMARY JUDGMENT

KLATT, J.

{¶1} Relator, John Alfred Thomas, commenced this original action seeking a writ of procedendo to compel respondent, Judge Daniel Hogan, of the Franklin County Court of Common Pleas, to rule on relator's March 10, 2009 motion for post-conviction relief. Respondent has filed a motion for summary judgment.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that

respondent has ruled on the motion that is the subject of this action. Therefore, respondent has performed the act that relator sought to compel in this action. Accordingly, the magistrate has recommended that we grant summary judgment in favor of respondent.

{¶3} Relator filed an objection to the magistrate's decision. Relator argues that the magistrate erred by not addressing a motion for summary judgment that relator also filed in the trial court. We note, however, that relator's motion for summary judgment is not the subject of this original action. Relator's petition for a writ of procedendo makes no mention of a motion for summary judgment. Therefore, we overrule relator's objection.

{¶4} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant summary judgment in favor respondent.

*Objection overruled;  
summary judgment granted for respondent; and  
writ of procedendo denied.*

BRYANT and BROWN, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. [John Alfred Thomas], :  
 Relator, :  
 v. : No. 09AP-804  
 [Judge Hogan of Common Pleas Court], : (REGULAR CALENDAR)  
 Respondent. :

MAGISTRATE'S DECISION

Rendered on November 25, 2009

*John Alfred Thomas, pro se.*

*Ron O'Brien, Prosecuting Attorney, and Mary Jane Martin,  
for respondent.*

IN PROCEDENDO  
ON MOTION FOR SUMMARY JUDGMENT

{¶5} Relator, John Alfred Thomas, has filed this original action requesting that this court issue a writ of procedendo ordering respondent, Daniel Hogan, a Judge of the Franklin County Court of Common Pleas, to rule on his March 10, 2009 motion for post-conviction relief.

Findings of Fact:

{¶6} 1. Relator is an inmate currently incarcerated at Madison Correctional Institution.

{¶7} 2. In 1985, a jury found relator guilty of multiple counts of rape, kidnapping, and gross sexual imposition. After sentencing him, the trial court ordered that his sentences run consecutively, totaling 51 to 180 years.

{¶8} 3. In 1986, this court affirmed relator's conviction. Further, this court has denied two applications for reopening.

{¶9} 4. On March 10, 2009, relator filed a motion for post-conviction relief in the trial court. Relator argued that there was insufficient evidence that he raped a specific victim.

{¶10} 5. On March 20, 2009, the state's memorandum contra was filed.

{¶11} 6. On April 3, 2009, relator filed a reply to the state's memorandum contra.

{¶12} 7. On April 23, 2009, relator filed a supplemental reply to the state's memorandum contra.

{¶13} 8. On June 12, 2009, relator filed a motion for summary judgment arguing that the state did not dispute or deny his statements that there had been insufficient evidence to convict him of rape at trial. As such, relator argued that he was entitled to judgment as a matter of law on his petition for post-conviction relief.

{¶14} 9. On August 24, 2009, relator filed this action requesting that this court issue a writ of procedendo ordering respondent to rule on his March 10, 2009 petition for post-conviction relief.

{¶15} 10. On October 22, 2009, the assistant prosecuting attorney, on behalf of respondent, filed a motion for summary judgment. Attached to that motion is the October 13, 2009 entry from respondent denying relator's March 10, 2009 petition.

Because the action which relator seeks to compel had been performed, respondent argues that summary judgment was appropriate.

{¶16} 11. On November 12, 2009, relator filed a motion in opposition to respondent's motion for summary judgment arguing that respondent had failed to rule on his June 12, 2009 motion for summary judgment and continued to argue that the state of Ohio had never presented any evidence to support a rape conviction.

{¶17} 12. Notice of summary judgment hearing was sent to the parties and the matter is currently before the magistrate on respondent's motion for summary judgment.

Conclusions of Law:

{¶18} 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* (1996), 75 Ohio St.3d 280. 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.* (1978), 54 Ohio St.2d 64.

{¶19} 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* (1996), 77 Ohio St.3d 64, 65. A writ of procedendo is appropriate

when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *Id.*

{¶20} 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* (1994), 70 Ohio St.3d 104, 110.

{¶21} 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* (1995), 72 Ohio St.3d 461, 462.

{¶22} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of procedendo.

{¶23} On October 13, 2009, the trial court issued its decision and entry denying relator's March 10, 2009 petition for post-conviction relief. Respondent has performed the act which relator sought to compel when he filed this mandamus action. As such, summary judgment in respondent's favor is appropriate.

{¶24} To the extent that relator now argues that respondent has failed to rule on his June 12, 2009 motion for summary judgment and that, on that basis, this court should not grant summary judgment in favor of respondent, this magistrate disagrees.

{¶25} First, relator did not file a motion to amend his complaint to seek a writ of procedendo to order respondent to rule on his June 12, 2009 petition. Second, by denying his March 10, 2009 petition for post-conviction relief, respondent has, by

implication, also denied relator's motion for summary judgment. For those reasons, summary judgment in favor of respondent is likewise appropriate here.

{¶26} Based on the foregoing, it is this magistrate's decision that respondent has performed the act which relator sought to compel by filing this procedendo action and that summary judgment should be entered in favor of respondent.

/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).