

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Kimberly S. Kendall,	:	
	:	
Relator,	:	
	:	
v.	:	No. 18AP-184
	:	
Jenifer A. French, Judge of the Court of Common Pleas,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	

D E C I S I O N

Rendered on September 25, 2018

On brief: *Kimberly S. Kendall*, pro se.

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Arthur J. Marziale, Jr.*, for respondent.

IN MANDAMUS

DORRIAN, J.

{¶ 1} In this original action, relator, Kimberly S. Kendall, requests a writ of mandamus issue against respondent, the Honorable Jenifer A. French, a judge of the Franklin County Court of Common Pleas.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate recommends this court grant respondent's motion to dismiss and dismiss this action.

{¶ 3} No party has filed objections to the magistrate's decision. The case is now before this court for review.

{¶ 4} No error of law or other defect is evident on the face of the magistrate's decision. Therefore, we adopt the findings of fact and conclusions of law contained therein. Accordingly, respondent's motion to dismiss is granted, and relator's complaint for a writ of mandamus is dismissed.

Action dismissed.

TYACK and HORTON, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel.	:	
Kimberly S. Kendall,	:	
	:	
Relator,	:	
	:	
v.	:	No. 18AP-184
	:	
Jenifer A. French,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
	:	

MAGISTRATE'S DECISION

Rendered on June 19, 2018

Kimberly S. Kendall, pro se.

Ron O'Brien, Prosecuting Attorney, and Arthur J. Marziale, Jr., for respondent.

**IN MANDAMUS
ON RESPONDENT'S MOTION TO DISMISS**

{¶ 5} In this original action, relator, Kimberly S. Kendall, an inmate of the Ohio Reformatory for Women, requests that a writ of mandamus issue against respondent, the Honorable Jenifer A. French, a judge of the Franklin County Court of Common Pleas.

Findings of Fact:

{¶ 6} 1. By indictment filed April 21, 2000, in Franklin C.P. No. 00CR-2490, relator was charged with nine counts of rape, violations of R.C. 2907.02, felonies of the first degree; and two counts of gross sexual imposition, in violation of R.C. 2907.05, felonies of the fourth degree.

{¶ 7} 2. By indictment filed May 30, 2000, in Franklin C.P. No. 00CR-3238, relator was charged with one count of felonious sexual penetration, a violation of R.C. 2907.12, a felony of the first degree.

{¶ 8} 3. On June 14, 2000, relator was tried by a jury in both cases. In case No. 00CR-2490, relator was found guilty of three counts of rape, felonies of the first degree. In case No. 00CR-3238, relator was found guilty of one count of felonious sexual penetration.

{¶ 9} 4. On August 4, 2000, a sentencing hearing was held. In a judgment entry filed August 29, 2000, relator was sentenced in case No. 00CR-2490 to life with respect to Count 2, 9 years determinate sentence with respect to Count 13; Count 13 to run consecutive to Count 2; 9 years determinate sentence with respect to Count 14; and Count 14 to run concurrent with Counts 2 and 13. In case No. 00CR-3238, relator was sentenced to life. Sentence in Case No. 00CR-3238 to run concurrent with sentence in Case No. 00CR-2490.

{¶ 10} 5. In September 2000, relator filed an appeal to this court. In June 2001, this court affirmed the judgment of the trial court. The case was later remanded for resentencing by this court in 2004 and 2006.

{¶ 11} 6. In November 2006, relator filed her second appeal to this court. On October 23, 2007, this court again affirmed the judgment and sentences of the trial court. *State v. Kendall*, 10th Dist. No. 06AP-1139, 2007-Ohio-5656.

{¶ 12} 7. On December 18, 2017, in the trial court, relator filed a motion to arrest judgment.

{¶ 13} 8. On January 19, 2018, the trial court (Judge French) filed its decision and entry denying the motion to arrest judgment.

{¶ 14} 9. On March 15, 2018, relator filed in this court a complaint for a writ of mandamus. In the complaint, relator challenges the trial court's decision denying the motion to arrest judgment. Relator contends the trial court lacked subject-matter jurisdiction to sentence her because she was allegedly not tried pursuant to a Crim.R. 3 complaint. (Relator fails to mention Crim.R. 7 regarding the use of an indictment.)

{¶ 15} 10. On April 13, 2018, respondent filed in this action a motion to dismiss the complaint. In support, respondent appended to the motion as Exhibit A a copy of respondent's January 19, 2018 decision and entry denying the motion to arrest judgment.

{¶ 16} 11. In her January 19, 2018 decision and entry denying the motion to arrest judgment, respondent found that relator's December 18, 2017 motion to arrest judgment "is essentially an untimely petition for post-conviction relief." Respondent also found relator's "claims are barred by res judicata." Lastly, respondent found that relator's claims lack merit. Respondent found "that no criminal complaint was required."

{¶ 17} 12. Relator failed to appeal respondent's January 19, 2018 decision and entry denying the motion to arrest judgment. Rather, on March 15, 2018, relator filed this original action against respondent.

{¶ 18} 13. Following the filing of respondent's motion to dismiss in this action, relator filed her response to the motion to dismiss on May 10, 2018. Relator captioned her response as "Objections to Respondent's Motion to Dismiss Petition."

{¶ 19} 14. On May 18, 2018, respondent filed her reply in support of her motion to dismiss.

{¶ 20} 15. This matter is currently before the magistrate on respondent's motion to dismiss.

Conclusions of Law:

{¶ 21} Relator failed to exercise a plain and adequate remedy at law by failing to appeal respondent's January 19, 2018 decision and entry denying relator's motion to arrest judgment. Accordingly, relator cannot maintain this action against respondent.

{¶ 22} It is well-settled that, in order for a writ of mandamus to issue, the relator must demonstrate: (1) that he has a clear legal right to the relief requested, (2) that the respondent is under a clear legal duty to perform the act, and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 23} A Civ.R. 12(B)(6) motion to dismiss tests the sufficiency of a complaint. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94 (1995), citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992).

{¶ 24} In reviewing the complaint, the court must take all of the material allegations as admitted and construe all reasonable inferences in favor of the non-moving party. *Id.*

{¶ 25} " 'A complaint in mandamus states a claim if it alleges the existence of the legal duty and the want of an adequate remedy at law with sufficient particularity so that

the respondent is given reasonable notice of the claim asserted.' " *Hanson* at 548, quoting *State ex rel. Alford v. Willoughby*, 58 Ohio St.2d 221, 223-24 (1979).

{¶ 26} "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242 (1975), syllabus.

{¶ 27} Here, respondent succinctly states her argument in her memorandum in support of her motion to dismiss:

[I]t is clear that Relator is using the instant action as an alternate to appeal.

Here, Relator had a plain and adequate remedy in the ordinary course of law. * * * The fact that she failed to exercise that remedy by appealing the recent Decision and Entry denying her motion to arrest judgment does not permit her to institute this mandamus action.

(Respondent's Motion to Dismiss, 6-7.)

{¶ 28} The magistrate agrees with respondent.

{¶ 29} Moreover, it was appropriate for respondent to append to her motion to dismiss a copy of her decision and entry filed January 19, 2018. This court can take judicial notice of the exhibit. *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229.

{¶ 30} Based on the undisputed facts, it is clear beyond doubt that relator can prove no set of facts entitling her to a writ of mandamus. *O'Brien*.

{¶ 31} Accordingly, it is the magistrate's decision that this court grant respondent's motion to dismiss.

/S/ MAGISTRATE
KENNETH W. MACKE

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).