

[Cite as *State ex rel. Smith v. Wolaver*, 2017-Ohio-8190.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE EX. REL., SHELDON SMITH

Relator

v.

JUDGE STEPHEN WOLAVER

Respondent

Appellate Case No. 2017 CA 0014

[Original Action in Procedendo]

DECISION AND FINAL JUDGMENT ENTRY

August 7, 2017

PER CURIAM:

{¶ 1} On February 28, 2017, Sheldon Smith filed a petition for a writ of procedendo. He asks this court to compel the Honorable Stephen Wolaver to resolve a motion that remains pending in his criminal case. See Greene County Common Pleas Court Case No. 2008 CR 0926 (the “Trial Court Case”). Specifically, Smith asserts that a “Motion to Vacate Plea” filed on October 2, 2009 and supplemented on October 28, 2009 has not yet been decided. Judge Wolaver filed a motion to dismiss, arguing that the

issues raised in the motion were litigated and the motion denied. Smith filed a reply. For the following reasons, we conclude that this action is moot.

Proceedings in the Trial Court Case

{¶ 2} The following facts are taken from the Petition and the attachments thereto. On October 2, 2009, Smith filed three motions in his pending Trial Court Case. One was the “Motion to Vacate Plea” which is at issue here. The other two motions were, according to the Docket Sheet attached to the Petition, a “Request for Leave” and a “Motion in Support with Memorandum.” Copies of these two motions were not filed with the Petition.

{¶ 3} On October 28, 2009, Smith filed a “Supplement to Request For Leave/Motion to Vacate.” Smith asked the trial court to “permit a full evidentiary hearing and to the extent necessary to effectuate justice, vacate the plea pursuant to Crim. R. [illegible] based upon this newly discovered evidence.”

{¶ 4} On October 30, 2009, the trial court filed two entries. The Docket Sheet, which appears to be in reverse chronological order, reflects the following as entries number 22 and 23:

22 ENTRY FILED. DEFENDANT’S MOTION TO ENFORCE A PLEA AGREEMENT CONTRACT BETWEEN THE GREENE COUNTY PROSECUTOR AND COUNSEL FOR DEFENDANT IS DENIED AS BASED UPON THE EVIDENCE, THE DEFENDANT HAS NOT ESTABLISHED THAT A CONTRACT WAS ESTABLISHED IN THIS CASE.

23 ENTRY FILED. THE DEFENDANT’S REQUEST FOR LEAVE TO REOPEN THE MOTION TO SUPPRESS IS NOT WELL TAKEN AND IS

HEREBY DENIED. THE COPIES OF THE TAPE RECORDINGS WILL BE PLACED UNDER SEAL FOR APPELLATE PURPOSES.

{¶ 5} Also on October 30, 2009, the Docket Sheet reflects a Judgment Entry sentencing Smith and resolving the Trial Court Case. See Entry number 21. The Docket Sheet, or at least the portion provided to the court, does not reflect a separate entry resolving the Motion to Vacate Plea.

The Parties' Arguments

{¶ 6} Smith argues that Judge Wolaver has a duty to rule on his Motion to Vacate Plea. He also asks that “the trial court adhere to the rule [requiring an evidentiary hearing on the motion] and bring Petitioner back for a hearing so that a ruling can be made.”

{¶ 7} Judge Wolaver asserts that “these matters [have] previously been fully litigated and ruled on by Respondent on October 30, 2009 (Exhibits D & E).” Exhibit D to the motion to dismiss is an October 30, 2009 Entry overruling Smith’s motion for leave to reopen a motion to suppress. Exhibit E is an October 30, 2009 Entry overruling Smith’s motion to enforce a plea agreement contract. Neither Entry discusses the Motion to Vacate Plea.

{¶ 8} Judge Wolaver also argues that Smith appealed the factual determination underlying the October 30, 2009 entries, which were affirmed by this court on appeal. See *State v. Smith*, 2d Dist. Greene No. 2009-CA-81, 2010-Ohio-6229 (affirming conviction on direct appeal); *State v. Smith*, 2d Dist. Greene No. 2010-CA-80, 2012-Ohio-113 (affirming the denial of post-conviction relief). He asserts that the trial court lacked jurisdiction to modify the plea or proceedings below at that point, and argues that the claims are now barred by res judicata.

{¶ 9} Smith responds by pointing out that Exhibits D and E pertain to different motions and that the Judge Wolaver has not produced any written decision resolving the motion at issue here, the Motion to Vacate Plea.

Legal Standards

{¶ 10} A writ of procedendo is an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 45, 553 N.E.2d 1354 (1990). It is intended to remedy a court's "refusal or failure to timely dispose of a pending action." *State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 2004-Ohio-6567, 819 N.E.2d 703, ¶ 16 (internal citations omitted). The writ tells the lower court to rule on a motion, but does not tell the court how to rule. *State ex rel. Morgan v. Fais*, 10th Dist. Franklin No. 14AP-910, 2015-Ohio-1514, ¶ 4. It "will not issue for the purpose of controlling or interfering with ordinary court procedure." *State, ex rel. Utley v. Abruzzo*, 17 Ohio St.3d 203, 204, 478 N.E.2d 789 (1985).

{¶ 11} In addition, a writ of procedendo will not issue to "compel the performance of a duty that has already been performed." *State ex rel. Grove v. Nadel*, 84 Ohio St.3d 252, 253, 703 N.E.2d 304 (1998). "[T]he merits of a claim in procedendo will be considered moot when the judicial officer [has] already completed the precise act which the relator sought to compel." *Davis v. Smalheer*, 11th Dist. Geauga No. 2010-G-2982, 2010-Ohio-6061, ¶ 5.

{¶ 12} To be entitled to a writ of procedendo, Smith must show "a clear legal right to require the 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 the law." *State ex rel. Brown v. Logan*, 138 Ohio St.3d 286, 2014-Ohio-769, 6 N.E.3d 42, ¶ 13. Generally, "[a]n appeal is

an adequate remedy in the ordinary course of law that precludes an action for procedendo.” *State ex rel. Elkins v. Fais*, 143 Ohio St.3d 366, 2015-Ohio-2873, 37 N.E.3d 1229, ¶ 8 (internal citations and quotation omitted).

{¶ 13} Original actions in procedendo “ordinarily proceed as civil actions under the Ohio Rules of Civil Procedure.” Loc.App.R. 8(A). Judge Wolaver has moved to dismiss this procedendo action for failure to state a claim on which relief can be granted, presumably pursuant to Civ.R. 12(B)(6). The purpose of such a motion is to test a claim’s legal sufficiency. *MacConnell v. Dayton*, 2d Dist. Montgomery No. 25536, 2013-Ohio-3651, ¶ 11. Generally, a “Civ.R. 12(B)(6) motion must be judged on the face of the complaint alone.” *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 664 N.E.2d 931 (1996). However, we may appropriately review the attachments to the motion to dismiss to determine whether the Petition is moot. *State ex rel. Grove v. Nadel*, 84 Ohio St.3d 252, 253, 703 N.E.2d 304 (1998).

{¶ 14} “The applicable Civ.R. 12(B)(6) standard is whether, after presuming the truth of all material factual allegations in the complaint and all reasonable inferences therefrom in [relator’s] favor, it appears beyond doubt that [relator] can prove no set of facts warranting relief.” *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 20, citing *Taylor v. London*, 88 Ohio St.3d 137, 139, 723 N.E.2d 1089 (2000). With respect to original actions, the Ohio Supreme Court has also held that “Civ.R. 12(B)(6) dismissals may be based on ‘merits’ issues such as the availability of an adequate remedy in the ordinary course of law.” *Id.* The standard for such arguments is the same: whether it appears beyond doubt that relator can prove no set of facts warranting relief. *Id.*

Analysis

{¶ 15} Although not addressed by the parties, we first consider Smith’s requests for relief in this case. Smith seeks an order compelling Judge Wolaver to rule on his Motion to Vacate Plea, and also to hold an evidentiary hearing as part of that decision. The latter relief is not available in procedendo as a matter of law. Procedendo will lie to compel a decision on a pending motion, but will not lie to order the trial court to conduct an evidentiary hearing as a part of the decision. *State ex rel. D.H. v. Capizzi*, 2d Dist. Montgomery No. 27068, 2016-Ohio-5268, ¶ 14 (“D.H. asks us to compel Judge Capizzi to act in a particular way by conducting additional proceedings and affording to him specifically-identified due process rights. Such relief is unavailable in procedendo”). This “use of procedendo is an attempt to control the discretion of the judge in ruling on a motion or handling a case, and procedendo may not be used for that purpose.” *Glass v. Terry*, 8th Dist. Cuyahoga No. 91704, 2008-Ohio-3347, ¶ 4. Because that relief is unavailable in procedendo, the request for it will be denied. The remaining discussion concerns only Smith’s request that this court order Judge Wolaver to rule on his October 2, 2009 Motion to Vacate Plea, relief that is available in procedendo.

{¶ 16} Judge Wolaver argues that this matter is moot because the motion has been overruled, as shown by Exhibits D and E to his motion to dismiss. However, the entries attached as Exhibits D and E do not mention or resolve the Motion to Vacate Plea. They instead resolve two separate motions that were filed at the same time. Although one of the motions, the motion for leave to reopen a motion to suppress, appears to discuss the same allegations made in the Motion to Vacate Plea, the rejection of arguments in a motion to suppress context does not automatically mean the denial of a motion to vacate a

plea under Crim.R. 32.1's liberal standard. See *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992) ("a presentence motion to withdraw a guilty plea should be freely and liberally granted"). We have denied a motion to dismiss making similar arguments in the past. See *DeVaughns v. Judge, Gregory F. Singer*, 2d Dist. Montgomery No. 26905 (Mar. 8, 2016) (overruling motion to dismiss procedendo claim as moot where judge decided similar previous motions but not the motion at issue). We conclude that Smith's procedendo claim is not moot because the trial court issued entries resolving different motions.

{¶ 17} We do conclude, however, that Smith's Motion to Vacate Plea was implicitly overruled when the trial court proceeded to sentence him on that plea on October 30, 2009. "A motion not expressly decided by a trial court when the case is concluded is ordinarily presumed to have been overruled." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 13. See also *Maust v. Palmer*, 94 Ohio App.3d 764, 769, 641 N.E.2d 818 (10th Dist.1994) ("Generally, when the trial court enters judgment without expressly determining a pending motion, the motion is considered impliedly overruled"). This "useful principle of appellate law" generally applies "in instances where it is clear from the circumstances that that is what the lower court actually intended to do." *State v. Ryerson*, 12th Dist. Butler No. CA2003-06-153, 2004-Ohio-3353, ¶ 54.

{¶ 18} We believe this is the case here, for two reasons. First, the trial court's entry overruling the motion for leave to reopen the motion to suppress makes clear the court was rejecting the factual basis for the Motion to Vacate Plea. Both motions were premised on the argument that new evidence was discovered concerning Reginald Brooks, whose information was relied upon in a search warrant. See Supplement to Request for

Leave/Motion to Vacate, Exhibit B to Petition. The trial court's factual determination on the other motion strongly supports the inference that the court would have rejected the same factual argument had it explicitly resolved the Motion to Vacate Plea.

{¶ 19} Second, the judgment sentencing Smith on his plea is consistent with an implied overruling of the Motion to Vacate Plea. We do not believe that the trial court intended to allow Smith to withdraw his plea yet sentenced Smith anyway, or that the court intended to deal with the motion later, yet sentenced Smith and had him transported to prison. We conclude that the circumstances clearly show that overruling the Motion to Vacate Plea is “what the lower court actually intended to do.” *Ryerson* at ¶ 54. Thus, the motion was implicitly overruled when the trial court sentenced Smith on the un-vacated plea and entered the final judgment entry resolving the case on October 30, 2009. See *State ex rel. Cowan v. Gallagher*, 147 Ohio St.3d 416, 2016-Ohio-7430, 66 N.E.3d 728, ¶ 8, citing *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 13 (defendant’s pre-judgment motion to represent himself was “effectively denied when the trial court disposed of the case”). We note further that the issues of Reginald Brooks’ veracity and the accuracy of the detective’s inclusion of statements attributed to Brooks in a search warrant were already addressed in both Smith’s direct appeal and in his appeal from the denial of post-conviction relief. See *State v. Smith*, 2d Dist. Greene No. 2009-CA-81, 2010-Ohio-6229, ¶ 49-50, 54-55, 60-61; *State v. Smith*, 2d Dist. Greene No. 2010-CA-80, 2012-Ohio-113, ¶ 4-17.

{¶ 20} Because the Motion to Vacate Plea was impliedly overruled many years ago, the current procedendo claim seeking a decision on it is moot. A writ of procedendo will not issue to “compel the performance of a duty that has already been performed.” *State*

ex rel. Grove v. Nadel, 84 Ohio St.3d 252, 253, 703 N.E.2d 304 (1998). Accordingly, because Smith “can prove no set of facts warranting relief,” we SUSTAIN Judge Wolaver’s motion to dismiss. *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 20. This matter, Greene Appellate Case No. 2017 CA 0014, is DISMISSED.

SO ORDERED.

MICHAEL T. HALL, Presiding Judge

JEFFREY E. FROELICH, Judge

MICHAEL L. TUCKER, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).

MICHAEL T. HALL, Presiding Judge

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