

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DENNIS RAY LOWE

Relator

-vs-

JUDGE RICHARD E. BERENS

Respondent

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Craig R. Baldwin, J.

Case No. 19-CA-30

O P I N I O N

CHARACTER OF PROCEEDINGS:

Writ of Procedendo

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

September 30, 2019

APPEARANCES:

For Relator

For Respondent

DENNIS RAY LOWE
S.O.C.F. #441-903
P.O. Box 45699
Lucasville, Ohio 45699

JOSHUA S. HORACEK
Assistant Prosecuting Attorney
Fairfield County Prosecutor's Office
239 West Main Street, Suite #101
Lancaster, Ohio 43130

Hoffman, J.

{¶1} On July 3, 2019, Dennis Lowe filed a petition for writ of procedendo to compel Judge Richard Berens to rule upon two motions he had pending before the trial court in his underlying criminal case: Motion for Relief from Judgment and Motion to Dismiss Case. The Fairfield County Prosecutor, on behalf of Judge Berens, has moved to dismiss the writ. This Court grants the prosecutor's motion.

{¶2} On July 8, 2019, Judge Berens issued a Judgment Entry overruling both of Mr. Lowe's motions. Because Judge Berens addressed Mr. Lowe's pending motions that are the subject of this writ, the writ is moot. "Neither mandamus nor procedendo will compel the performance of a duty that has already been performed." *State ex rel. Nelson v. Russo*, 89 Ohio St.3d 227, 228, 729 N.E.2d 1181 (2000), citing *State ex rel. Grove v. Nadel*, 84 Ohio St.3d 252, 253, 703 N.E.2d 304 (1998).

{¶3} Further, in *Grove*, the Ohio Supreme Court explained the court of appeals appropriately took judicial notice Grove's procedendo action was moot based on the journalized entry submitted by Judge Nadel in his second motion to dismiss. Similarly, here, the Fairfield County Prosecutor attached to his Motion to Dismiss a copy of the Judgment Entry issued by Judge Berens that overruled Mr. Lowe's two pending motions. We may properly take judicial notice of this Judgment Entry which renders Mr. Lowe's writ of procedendo moot. Because Mr. Lowe's writ of procedendo is moot we grant the prosecutor's motion to dismiss.

{¶4} The clerk of courts is hereby directed to serve upon all parties not in default notice of this judgment and its date of entry upon the journal. See Civ.R. 58(B).

By: Hoffman, J.

Gwin, P.J. and

Baldwin, J. concur

