

[Cite as *State ex rel. Thompson v. Santoli*, 2018-Ohio-1743.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106888

STATE OF OHIO, EX REL.
JOHNNY THOMPSON

RELATOR

vs.

ASSISTANT PROSECUTING ATTORNEY
ANDREW SANTOLI

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Procedendo
Motion No. 516125
Order No. 516739

RELEASE DATE: May 2, 2018

FOR RELATOR

Johnny Thompson, pro se
Inmate No. 641037
Chillicothe Correctional Institution
P.O. Box 5500
Chillicothe, Ohio 45601

ATTORNEYS FOR RESPONDENT

Michael C. O'Malley
Cuyahoga County Prosecutor
By: James E. Moss
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, P.J.,:

{¶1} Relator, Johnny Thompson, seeks a writ of procedendo to compel a ruling or action on a document filed with a common pleas court judge in an underlying criminal case, Cuyahoga C.P. No. CR-12-562669-A.¹ The complaint, however, only names a Cuyahoga County assistant prosecutor as respondent. The respondent assistant county prosecutor has filed a motion for summary judgment, which we grant.

I. Procedural and Factual History

{¶2} According to his complaint, on September 23, 2017, Thompson filed what he describes as an original action with the trial court pursuant to R.C. 2935.09 and 2935.10 in the

¹In his brief in opposition to summary judgment, Thompson asserts that the filing was wrongly docketed in this case rather than being assigned an independent case number.

underlying criminal case.² The docket from this case indicates that a filing titled “(Accusation by Affidavit) Pursuant to R.C. 2935.09 and R.C. 2935.10” was filed on September 21, 2017. The filing alleges that the respondent prosecutor committed crimes during the proceedings. In November, December, and January, Thompson filed other documents asserting that the trial court failed to act on the September filing, and thereby violated various constitutional rights.

{¶3} In response, on February 6, 2018, the trial court issued an order stating, “defendant’s judicial notices are not a motion and fails to meet the requirements of Evidence Rule 201(b) and this court is not required to rule upon it,” and the court determined that the November, December, and January filings were moot. Thompson then filed the instant complaint for a writ of procedendo on March 2, 2018. The respondent prosecutor filed a motion for summary judgment, and Thompson filed a brief in opposition.

II. Law and Analysis

{¶4} To be entitled to a writ of procedendo, Thompson must show “a clear legal right to require the respondent to proceed, a clear legal duty on the part of the respondent to proceed, and the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Nye v. Coates*, 146 Ohio St.3d 426, 2016-Ohio-1559, 57 N.E.3d 1138, ¶ 6, citing *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462, 650 N.E.2d 899 (1995).

{¶5} Here, the complaint for a writ of procedendo seeks to have a judge rule on Thompson’s “accusation by affidavit” without naming the judge as a party in the present action. A writ cannot issue against a nonparty judge. *See Coates* at _ 8. Further, a writ of procedendo cannot issue against a county prosecutor; nor can a writ issue when the prosecutor is not the party

²R.C. 2935.09(D) allows a private citizen to file an affidavit charging a criminal offense with a reviewing official.

that Thompson is seeking to compel to action. *State ex rel. Johnson v. Jensen*, 140 Ohio St.3d 65, 2014-Ohio-3159, 14 N.E.3d 1039; *Hill v. Kelly*, 11th Dist. Trumbull No. 2011-T-0094, 2011-Ohio-6341, _ 11 (writ of procedendo cannot issue against a respondent warden), citing *State ex rel. Doughty v. Campbell*, 11th Dist. Trumbull No. 2002-T-0112, 2002-Ohio-6466, _ 5 (writ of procedendo cannot issue against a clerk of courts). A writ of procedendo is a civil judgment in which a court of superior jurisdiction orders a court of inferior jurisdiction to make a determination on a pending matter. *State ex rel. Grove v. Nadel*, 81 Ohio St.3d 325, 326, 691 N.E.2d 275 (1998). Thompson's failure to name the judge he wishes to compel to act is fatal.

{¶6} Further, the complaint does not comply with Civ.R. 10 in that the address of the prosecutor is not listed in the case caption. A failure to comply with Civ.R. 10 is a separate grounds for dismissal. *State ex rel. Sherrills v. State*, 91 Ohio St.3d 133, 133, 742 N.E.2d 651 (2001).

{¶7} Additionally, the complaint fails to comply with R.C. 2969.25(C). This statute requires an inmate wishing to waive the filing fee must file an affidavit of indigency along with a certified statement from the institutional cashier setting forth the balance in the inmate's account for each of the preceding six months. R.C. 2969.25(C)(1). Thompson attached an affidavit of indigency to his complaint, but failed to include a certified statement from the prison cashier. Thompson attempted to cure this defect by attaching the required statement to his brief in opposition to summary judgment. However, the failure to include the necessary statement from the prison cashier is a defect that may not be cured by subsequent filings. *Hazel v. Knab*, 130 Ohio St.3d 22, 2011-Ohio-4608, 955 N.E.2d 378. This also is sufficient reason to deny the petition, deny indigency status, and assess costs against him. *State ex rel. Pamer v. Collier*, 108 Ohio St.3d 492, 2006-Ohio-1507, 844 N.E.2d 842.

{¶8} The respondent prosecutor asserts that he is also entitled to summary judgment because Thompson failed to attach an affidavit required by R.C. 2969.25(A).

{¶9} This provision generally requires an inmate-relator to set forth all the civil actions or appeals of civil actions that the relator has filed in the previous five years. Thompson did not include such an affidavit, but he did assert in his complaint that he had filed no such actions in the last five years. Under these circumstances, the Supreme Court of Ohio has determined that such an affidavit is not required. *State ex rel. Wickensimer v. Bartleson*, 123 Ohio St.3d 154, 2009-Ohio-4695, 914 N.E.2d 1045. Such an affidavit is only required where the inmate has instituted qualifying actions under the statute within the previous five years. *Id.* at _ 4. Here, Thompson has asserted in his complaint that he filed no such actions in the last five years. Therefore, this is not a grounds on which this court may grant summary judgment.

{¶10} For the above reasons, the respondent prosecutor's motion for summary judgment is granted, and the writ is denied. Relator to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶11} Writ denied.

EILEEN T. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR