[Cite as *State ex rel. Cornely v. McCall*, 2020-Ohio-6747.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, EX REL.,
JOHN P. CORNELY, :

Relator, :

No. 110125

v. :

JUDGE SHELIA TURNER MCCALL, :

Respondent. :

JOURNAL ENTRY AND OPINION

JUDGMENT: WRIT DISMISSED
DATED: December 11, 2020

Writ of Prohibition
Order No. 542643

Appearances:

Jay F. Crook, Attorney at Law, LLC, and Jay F. Crook, *for relator*.

EILEEN T. GALLAGHER, A.J.:

{¶ 1} Relator, John P. Cornely, seeks a writ of prohibition to prevent respondent, Judge Shelia Turner McCall, from enforcing terms of community control imposed on Cornely in Cleveland M.C. No. 2018 CRB 017558. Cornely argues that there is no final, appealable order sentencing him in this case, so the

respondent does not have jurisdiction to enforce a no-contact order that is a part of his community control. Because Cornely cannot prevail on the facts alleged in the complaint, and his request for relief is moot, his request for a writ of prohibition is sua sponte dismissed.

I. Factual and Procedural History

{¶ 2} Cornely filed a complaint for writ of prohibition on December 2, 2020. There he alleged that he was convicted of domestic violence in the aforementioned case, over which respondent presided. He asserts that on February 19, 2019, a sentencing entry was issued, imposing community control. The docket in that case indicates that a no-contact order was issued as a part of community control to remain in effect until Cornely completed parenting classes and the Domestic Intervention Education Training ("DIET") program.[1]

{¶ 3} On February 28, 2020, he filed a notice of appeal with this court, *Cleveland v. Cornely*, 8th Dist. Cuyahoga No. 109556, which remains pending. During the pendency of this appeal, he filed a motion for a stay pending appeal with the trial court. Respondent did not timely rule on the motion, and Cornely filed a

[1] The Supreme Court of Ohio has approvingly cited cases holding that a court may take notice of a docket that is publicly available via the internet. *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 8, citing *Doe v. Golden & Walters, P.L.L.C.*, 173 S.W.3d 260, 265 (Ky.App.2005); *Leatherworks Partnership v. Berk Realty, Inc.*, N.D.Ohio No. 4:04 CV 0784, 2005 U.S. Dist. LEXIS 27887, *2 (Nov. 15, 2005). *See also State v. Chairperson of the Ohio Adult Parole Auth.*, 2018-Ohio-1620, 96 N.E.3d 303, ¶ 23 (10th Dist.). The docket in the present case is publicly available on the Cleveland Municipal Court Clerk of Courts Website. https://clevelandmunicipalcourt.org/

complaint for writ of procedendo with this court. *State ex rel. Cornely v. McCall*, 8th Dist. Cuyahoga No. 109832, 2020-Ohio-4384. This court ultimately issued a writ, directing respondent to rule on the pending motion for stay. *Id.* Cornely states respondent denied the motion on September 16, 2020.[2] He then sought a stay with this court, which was also denied.

{¶ 4} Also during the pendency of the appeal, a review of the journal entry of sentence caused this court to remand the case to respondent for the issuance of a nunc pro tunc entry because the journal entry lacked the fact of conviction, an element required by the Supreme Court of Ohio's decisions in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163; *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. After the court issued an order extending the due date for the return of the record from respondent, the record was to be returned to this court by December 7, 2020.

{¶ 5} The complaint was filed on December 2, 2020. On December 1, 2020, a notation on the docket in Cornely's appeal indicates that the supplemental record was received by this court in compliance with the September 18, 2020 and November 6, 2020 orders.[3]

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[2] The complaint indicates the trial court denied the motion on September 16, 2019, but this court will assume this is a typographical error because the writ action was not decided until September 4, 2020. *McCall*, 8th Dist. Cuyahoga No. 109832, 2020-Ohio-4384.

[3] The publicly available docket in *Cornely*, 8th Dist. Cuyahoga No. 109556, of which we take judicial notice, shows that on December 1, 2020, the supplemental record was received by this court pursuant to the November 6, 2020 order. https://coc.cuyahogacounty.us/.

II. Law and Analysis

{¶ 6} The necessary elements a relator must establish, by clear and convincing evidence, in order for a writ of prohibition to issue are: (1) that the respondent is about to exercise judicial power; (2) the exercise of such power is unauthorized by law; and (3) the relator possesses no other adequate remedy in the ordinary course of the law. *State ex rel. Largent v. Fisher*, 43 Ohio St.3d 160, 540 N.E.2d 239 (1989). However, where there is a patent and unambiguous lack of jurisdiction, a writ may issue without regard for other remedies a relator may have. *State ex rel. Tilford v. Crush*, 39 Ohio St.3d 174, 529 N.E.2d 1245 (1988).

{¶ 7} The Supreme Court of Ohio has recently reiterated that "with few exceptions, 'a writ of prohibition "tests and determines 'solely and only' the subject matter jurisdiction" of the lower court.'" *State ex rel. Thomas v. McGinty*, Slip Opinion No. 2020-Ohio-5452, ¶ 26, quoting *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998), quoting *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409, 534 N.E.2d 46 (1988), quoting *State ex rel. Staton v. Franklin Cty. Common Pleas Court*, 5 Ohio St.2d 17, 21, 213 N.E.2d 164 (1965). "'In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party contesting that jurisdiction has an adequate remedy by appeal.'" *Ohio High School Athletic Assn. v. Ruehlman*, 157 Ohio St.3d 296, 2019-Ohio-2845, 136 N.E.3d 436, ¶ 6, quoting *State ex rel. Plant v. Cosgrove*, 119 Ohio St.3d 264, 2008-Ohio-3838, 893 N.E.2d 485, ¶ 5. A writ of prohibition may not be used as a substitute for

an appeal, or to correct an error in judgment. *State ex rel. Campus Health Servs. v. Russo*, 8th Dist. Cuyahoga No. 110003, 2020-Ohio-5436, ¶ 6, citing *State ex rel. Sparto v. Juvenile Court of Darke Cty.*, 153 Ohio St. 64, 90 N.E.2d 598 (1950). Prohibition must also be employed with caution. *State ex rel. Merion v. Tuscarawas Cty. Court of Common Pleas*, 137 Ohio St. 273, 28 N.E.2d 641 (1940).

{¶ 8} A court may sua sponte dismiss a complaint seeking a writ where the complaint is frivolous or the relator obviously cannot prevail on the facts alleged in the complaint. *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 108, 647 N.E.2d 799 (1995). Such a dismissal is governed by the standard for a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6). *Id.* Therefore, this court must presume as true all factual allegations made in the complaint and we must draw all reasonable inferences in favor of the relator. *Id.* "Dismissal [is] appropriate if after presuming the truth of all material factual allegations of [relators'] petition and making all reasonable inferences in their favor, it appeared beyond doubt that they could prove no set of facts entitling them to the requested extraordinary relief in prohibition." *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 14, citing *State ex rel. Brady v. Pianka*, 106 Ohio St.3d 147, 2005-Ohio-4105, 832 N.E.2d 1202, ¶ 6.

{¶ 9} Here, Cornely claims that respondent lacks jurisdiction to continue to enforce provisions of his community control because respondent has not issued a final, appealable order in his criminal case. Even though he seeks "urgent treatment" in his complaint, Cornely has not complied with Loc.App.R. 45(D)(2) by

filing an application for alternative writ for expedited disposition. Further, Cornely has not attached any of the journal entries or dockets of cases he relies on to assert that there is no final, appealable order in his criminal case. Cornely only quotes journal entries from his appellate case. He claims that an order issued September 17, 2020, in *Cornely*, 8th Dist. Cuyahoga No. 109556, finding that there is a technical error with the journal entry of sentence because the trial court did not include the fact of conviction in the sentencing entry, demonstrates that there is no final order in his criminal case.

{¶ 10} In that order, this court remanded the case to the trial court for the issuance of a nunc pro tunc entry to include the fact of conviction in the journal entry. Cornely's complaint further states that respondent failed to comply with this court's initial remand order, and the remand was extended on November 6, 2020.

{¶ 11} When we examine the journal entry that Cornely relies on for the proposition that there is no final order in his criminal case, it becomes clear that this does not provide a source of authority for this assertion.

{¶ 12} The Supreme Court of Ohio has examined the requirements for a final appealable order in a criminal case pursuant to Crim.R. 32(C). *Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163; *Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. In *Baker*, the court outlined the necessary elements of a sentencing entry: "A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the

judge; and (4) entry on the journal by the clerk of court." *Baker* at the syllabus. These elements are required to be in a single document to constitute a final, appealable order. *Id*. at ¶ 19. These requirements were later modified and explained by the court in *Lester*. *Lester* at paragraph one of the syllabus.

{¶ 13} There, the court was faced with a purely technical omission of the fact of conviction from a sentencing entry that otherwise complied with Crim.R. 32(C). The court determined that a nunc pro tunc entry journalized to correct the technical omission of the fact of conviction from a sentencing entry did not result in a new final, appealable order. In so holding, the *Lester* court found that such an omission, a matter of form rather than substance, still resulted in a final, appealable order. *Id*. at ¶ 12. A trial court could correct such technical omissions by issuing a nunc pro tunc order. *Id*. at ¶ 20.

{¶ 14} At the same time, the *Lester* court recognized that a defendant was entitled to a journal entry that fully complied with Crim.R. 32(C). So, a defendant could motion the court for a corrected entry at any time, and the trial court could correct this error through a nunc pro tunc entry. *Id*. at ¶ 16. But, the fact that a defendant could request a complying order does not render the original order incapable of invoking appellate jurisdiction. *Id*.

{¶ 15} The order of this court that Cornely cites to in his appeal, provides:

> In *City of Cleveland v. John [Cornely]*, Cleveland Municipal Court Case No. 2018 CRB 017558, [Cornely] was charged with one count of domestic violence and two counts of endangering children. The court's January 22, 2019 order found him guilty of domestic violence and nolled the other two charges. The court's February 19, 2019

> sentencing order does not include the fact of conviction. The Supreme Court of Ohio in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142 held that in order to have a final, appealable order, the sentencing order must state (1) the charges on which the defendant has been convicted, (2) the fact of conviction, (3) the sentence for the charges, and (4) the signature of the judge and file stamp of the clerk. Accordingly, in order to remove any possible jurisdictional impediments, this court remands this case to the Cleveland Municipal Court to issue a sentencing order in compliance with *Lester* * * *.

{¶ 16} Cornely misconstrues the nature of this order. He claims this is evidence that this court found that there was no final, appealable order in his criminal case. That is not a finding by this court evidenced in this journal entry. Pursuant to *Lester*, this court proactively remanded the case to the trial court to issue a nunc pro tunc order. As *Lester* explained, a sentencing entry that lacks the fact of conviction still results in a final order capable of invoking appellate jurisdiction. *Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, at ¶ 16. This court's remand is merely a housekeeping matter that ensures a criminal defendant proceeds in an appeal from a final order that fully complies Crim.R. 32(C).

{¶ 17} Cornely points to no other supporting authority for the proposition that respondent has exercised or is about to exercise judicial authority that is unauthorized by law. There is no dispute that respondent has jurisdiction to impose community control as a form of punishment. Further, "Ohio courts have recognized that a no-contact order is a community-control sanction." *State v. Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 17, citing *e.g. State v. Snyder*, 3d

Dist. Seneca No. 13-12-38, 2013-Ohio-2046, ¶ 55; *State v. Schwartz*, 6th Dist. Wood No. WD-12-060, 2013-Ohio-3958, ¶ 9-12; *State v. Marcum*, 4th Dist. Hocking Nos. 11CA8 and 11CA10, 2012-Ohio-572, ¶ 11; *State v. Simms*, 12th Dist. Clermont No. CA2009-02-005, 2009-Ohio-5440, ¶ 25; and *State v. Loveless*, 2d Dist. Champaign No. 2002CA16, 2002-Ohio-5380, ¶ 18. Whether respondent has overreached in the imposition of conditions of community control does not question the subject-matter jurisdiction of a court and is a proper subject in an appeal. Therefore, Cornely obviously cannot prevail on the facts alleged in his complaint, and his complaint is subject to sua sponte dismissal.

{¶ 18} Even if this court's journal entry in Cornely's appeal could be read as finding that Cornely's criminal case lacked a final order or deprived respondent of jurisdiction, that argument is moot in light of respondent returning to this court the supplemental record required in our September 17, 2020 and November 6, 2020 journal entries in his appeal.

{¶ 19} Paragraph 21 of Cornely's complaint sets forth the relief he requests:

> Accordingly, Relator respectfully requests this Honorable Court to issue a writ of prohibition barring and/or otherwise prohibiting the Respondent from continuing to carry out, enforce, execute or in any way impose the Relator's sentence until and after such time as a *Lester* compliant sentencing order is issued and/or otherwise vacate the defective sentencing order issued by the Respondent.

{¶ 20} As previously noted, the supplemental record was returned by respondent on December 1, 2020. Therefore, this claim for relief is moot. "A '"case is moot when the issues presented are no longer 'live' or the parties lack a legally

cognizable interest in the outcome."'" *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, 928 N.E.2d 728, ¶ 10, quoting *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

{¶ 21} Generally, a court is limited to the complaint when deciding a motion to dismiss for failure to state a claim. *Thompson v. Cent. Ohio Cellular*, 93 Ohio App.3d 530, 538, 639 N.E.2d 462 (8th Dist.1994). However, a court may consider matters outside of the complaint to determine that an action is moot. *State ex rel. Cincinnati Enquirer v. DuPuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 8 ("An event that causes a case to become moot may be proved by extrinsic evidence outside the record."). Further, this court may take judicial notice of facts that arise after a complaint is filed: "In extraordinary-writ cases, courts are not limited to the facts at the time a proceeding is commenced, but should consider facts at the time it determines whether to grant the writ." *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 11.

{¶ 22} As of December 1, 2020, the docket in Cornely's appeal indicates that respondent has complied with these orders by filing the supplemental record, rendering the claim for relief moot.

{¶ 23} For all these reasons, Cornely's complaint for writ of prohibition is dismissed, sua sponte. Costs to relator. 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).

{¶ 24} Complaint dismissed.

EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

KATHLEEN A. KEOUGH, J., and
EILEEN A. GALLAGHER, J., CONCUR