

prevent respondent from "proceeding contrary to the mandate of this Courts [sic] Judgment Entry." Respondent filed a motion to dismiss pursuant to Civ.R. 12(B)(6), and relator filed a motion for summary judgment pursuant to Civ.R. 56(C).

{¶2} We referred this case to a magistrate of this court pursuant to Loc.R. 12(M) and Civ.R. 53. The magistrate issued an order converting relator's motion for summary judgment into a response to respondent's motion to dismiss. On August 31, 2010, the magistrate issued a decision, a copy of which is attached, recommending that we deny respondent's motion to dismiss and issue a writ of procedendo directing respondent to hold a resentencing hearing. The magistrate's decision did not specifically address relator's request for a writ of prohibition.

{¶3} Relator filed an objection to the magistrate's decision. In his objection, relator argues that an undue delay in his resentencing divested respondent of any further jurisdiction, thus entitling him to an order discharging him from incarceration. Relator then filed a motion seeking leave to amend his objection to the magistrate's decision.

{¶4} We have reviewed the magistrate's decision, and hereby adopt the magistrate's findings of fact, as well as the magistrate's conclusion that respondent's motion to dismiss should be overruled. However, for the reasons that follow, we amend the magistrate's decision.

{¶5} In the March 31, 2010 decision that gave rise to this action, we sustained a number of assignments of error relator asserted regarding his sentences in Franklin County Court of Common Pleas case Nos. 05CR-7105 and 06CR-4742. We concluded that the two cases should be remanded for resentencing because relator had been

informed that he would be subject to a period of "up to" three years of post-release control after completion of his sentences in those two cases. We concluded that use of the words "up to" incorrectly created the appearance that the period of post-release control could be some period less than three years, when the actual period would be three years, thus rendering the sentences void.

{¶6} The state sought review of our decision by the Supreme Court of Ohio and moved for a stay of proceedings in the trial court pending that appeal, which was granted. On July 21, 2010, the Supreme Court dismissed the state's appeal, as well as a cross-appeal that had been filed by relator.

{¶7} A writ of procedendo will issue when a court has either refused to enter a judgment or has unnecessarily delayed entering a judgment. *State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas*, 126 Ohio St.3d 198, 2010-Ohio-3299. When a trial court refuses to issue a sentencing entry that includes the correct period of post-release control, a writ of procedendo is the appropriate remedy. *State ex rel. Womack v. Marsh*, ___ Ohio St.3d ___, 2011-Ohio-229 (slip opinion).

{¶8} The basis for the magistrate's August 31, 2010 decision recommending issuance of a writ of procedendo in this case was that, at the time of the decision, the Supreme Court of Ohio had denied jurisdiction over the state's appeal and relator's cross-appeal. The magistrate noted that only 30 days had passed since the Supreme Court had declined jurisdiction, and specifically declined to find that 30 days constituted an unnecessary delay, but concluded that the writ of procedendo should be issued because there was no reason for further delay.

{¶9} On October 20, 2010, respondent issued nunc pro tunc judgment entries in both case Nos. 05CR-7105 and 06CR-4742. The entries each state that at the time of the original sentencing, the court informed relator that the applicable period of post-release control was three years. The entries further state that on September 29, 2010, the trial court held a resentencing hearing with relator present and represented by counsel, at which the court considered arguments regarding the propriety of issuing a corrected judgment entry. Respondent then re-imposed the original sentences and formally advised relator of the applicable periods of post-release control.

{¶10} Respondent's issuance of the nunc pro tunc entries regarding relator's sentence renders relator's request for a writ of procedendo moot because respondent has already taken the action relator seeks to compel with the writ. *State ex rel. Howard v. Skow*, 102 Ohio St.3d 423, 2004-Ohio-3652. Accordingly, we amend that portion of the magistrate's decision recommending issuance of a writ of procedendo, and instead conclude that relator's request for a writ of procedendo is moot.

{¶11} We also amend the magistrate's decision to reflect that relator's request for a writ of prohibition is rendered moot by respondent's issuance of the nunc pro tunc entries. When the action a writ of prohibition seeks to prevent has been completed, the claim for the writ becomes moot. *Gatto v. Falvey*, 5th Dist. No. 2009 CA 0184, 2009-Ohio-4996. Furthermore, the writ requested by relator in his complaint sought to prevent respondent from exceeding his jurisdiction in any resentencing proceeding. Any error by the trial court in the resentencing hearing, including whether respondent exceeded his jurisdiction, can be challenged by way of a direct appeal from the court's

nunc pro tunc sentencing entries.¹ Thus, relator has an adequate remedy at law, and therefore cannot satisfy the elements necessary for issuance of a writ of prohibition. See *State ex rel. Cleveland v. Sutula*, 127 Ohio St.3d 131, 2010-Ohio-5039.

{¶12} As for relator's motion to amend his objection to the magistrate's decision, we note that nothing in Civ.R. 53 allows a party to amend objections that have been filed. Furthermore, in the proposed objection, relator seeks to argue that the magistrate did not adequately address his claim for a writ of prohibition. Our amendment of the magistrate's decision finding the request for a writ of prohibition moot renders the proposed objection moot as well. Consequently, relator's motion to amend his objection is denied.

{¶13} Accordingly, we overrule relator's objection to the magistrate's decision, adopt the magistrate's findings of fact, adopt the magistrate's decision overruling respondent's motion to dismiss, amend the magistrate's decision to reflect that relator's requests for writs of procedendo and prohibition are moot, and deny relator's motion to amend his objection to the magistrate's decision.

*Objection overruled;
magistrate's decision adopted in part, amended in part;
motion denied.*

BROWN and KLATT, JJ., concur.

¹ Relator has filed notices of appeal challenging respondent's nunc pro tunc entries.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Corey Hazel,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-435
	:	
Judge John F. Bender, Franklin	:	(REGULAR CALENDAR)
County Court of Common Pleas,	:	
	:	
Respondent.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on August 31, 2010

Corey Hazel, pro se.

Ron O'Brien, Prosecuting Attorney, and Paul Thies, for respondent.

IN PROCEDENDO
ON MOTION TO DISMISS

{¶14} Relator, Corey Hazel, has filed this original action requesting that this court issue a writ of procedendo ordering respondent, the Honorable John F. Bender of the Franklin County Court of Common Pleas, to immediately hold a hearing and

resentence him pursuant to this court's decision in *State v. Hazel* (Mar. 31, 2010), 10th Dist. No. 09AP-1132 (memorandum decision).

Findings of Fact:

{¶15} 1. Relator is an inmate currently incarcerated at Chillicothe Correctional Institution.

{¶16} 2. The underlying facts involving this action are succinctly set forth in this court's decision in *Hazel*. Those facts include:

On October 19, 2005, [relator] was indicted in case No. 05CR-7105 on one count of engaging in a pattern of corrupt activity, two counts of theft, seventeen counts of forgery, fifteen counts of securing writings by deception, and thirteen counts of money laundering. On June 27, 2006, [relator] was indicted in case No. 06CR-4742 on two counts of forgery, one count of theft, one count of money laundering, and one count of securing writings by deception.

On March 1, 2007, [relator] entered a guilty plea in case No. 05CR-7105 to one count of engaging in a pattern of corrupt activity, a stipulated felony of the second degree, one count of forgery, a felony of the third degree, and one count of securing writings by deception, a felony of the third degree. The trial court ordered a nolle prosequi as to the remaining counts. Also on March 1, 2007, in case No. 06CR-4742, [relator] entered a guilty plea to one count of forgery, a felony of the third degree, and the court entered a nolle prosequi on the remaining counts of that indictment.

In case No. 05CR-7105, the trial court sentenced [relator] to six years incarceration on Count 1 (engaging in a pattern of corrupt activity), two years incarceration on Count 15 (forgery), and two years incarceration on Count 29 (securing writings by deception). Pursuant to a joint recommendation of the parties, the trial court ordered Counts 1, 15, and 29 to be served concurrently, for a total sentence of six years incarceration. Further[,] in case No. 06CR-4742, the trial court sentenced [relator] to two years incarceration, with such sentence to run concurrently with the sentence in case No. 05CR-7105. * * *

Id. at ¶2-4.

{¶17} 3. On May 31, 2007, relator filed pro se motions for leave to file delayed appeals in case Nos. 05CR-7105 and 06CR-4742, which this court denied by memorandum decision filed August 16, 2007. Id. at ¶4.

{¶18} 4. On November 2, 2009, relator filed with the trial court motions for resentencing in case Nos. 05CR-7105 and 06CR-4742. By entries filed November 23, 2009, the trial court denied relator's motions for resentencing. On November 30, 2009, relator filed motions to correct a clerical mistake in case Nos. 05CR-7105 and 06CR-4742, which the trial court denied by entries filed December 2, 2009. Id. at ¶7.

{¶19} 5. Relator appealed the trial court's entries denying his motions for resentencing and to correct a clerical mistake arguing that, during the sentencing hearing, the trial court failed to properly inform him of the applicability of post-release control.

{¶20} 6. In sustaining relator's first, second, and fourth assignments of error, this court specifically noted:

A review of the transcript of the sentencing hearing indicates that the trial court only addressed the issue of post-release control as to the mandatory three-year term for the second-degree felony offense in case No. 05CR-7105; the court did not inform appellant, at the time of the sentencing hearing, that he would be subject to post-release control with respect to the third-degree felony offenses in case No. 05CR-7105, or the third-degree felony offense in case No. 06CR-4742. Thus, while the sentencing entry in case No. 06CR-4742 correctly indicates that appellant was subject to "up to Three years – Optional" post-release control, the court's failure to notify appellant during the sentencing hearing of discretionary post-release control for the felony three forgery offense constituted error, and rendered that sentence void. See [*State v. Scott*, 6th Dist. No. E-09-048, 2010-Ohio-297]

at ¶10 (while trial court properly informed defendant he was subject to a mandatory three-year term of post-release for burglary offense, court erred in not advising defendant he may be subject to discretionary terms of up to three years for two other offenses and, thus, the sentences imposed "for those two offenses are void").

* * *

Regarding case No. 05CR-7105, while the trial court informed appellant during the sentencing hearing that he would be subject to three years of post-release control for the second-degree felony offense, the court's sentencing entry in that case contains discretionary language, i.e., "up to three years," in stating the duration of the term. Reviewing courts have held that a trial court's "language of 'up to three years' is a statement that appellant may be subject to less than three years, possibly even no years, of post release control." *State v. Jones*, 7th Dist. No. 06 MA 17, 2009-Ohio-794, ¶12. See also *State v. Osborne*, 116 Ohio St.3d 1228, 2008-Ohio-261 * * *.

Here, the trial court's sentencing entry in case No. 05CR-7105 erroneously suggests that appellant's period of post-release control could be less than three years for the second-degree felony offense. * * *

Upon review, we conclude that the trial court's failure to notify appellant during the sentencing hearing that he was subject to terms of post-release control with respect to the third-degree offenses in case Nos. 05CR-7105 and 06CR-4742, as well as the court's inclusion of erroneous language in the sentencing entry in case No. 05CR-7105, rendered the sentences in those cases void, requiring a remand for re-sentencing. See *Scott* at ¶19 ("[i]f a sentence is void for failure to include post-release control notification, the trial court – or the reviewing court – has an obligation to recognize the void sentence, vacate it, and order re-sentencing"). * * *

Id. at ¶16, 19-21.

{¶21} 7. On April 13, 2010, the state of Ohio appealed this court's decision to the Supreme Court of Ohio. Further, the state moved to stay proceedings in the trial court pending the appeal and that motion was granted.

{¶22} 8. Relator also filed a notice of cross-appeal in the Supreme Court.

{¶23} 9. On June 1, 2010, the state filed this motion to dismiss. At that time, the Supreme Court had not yet decided whether the state's leave to appeal would be granted.

{¶24} 10. On June 14, 2010, relator filed his memorandum contra to the state's motion to dismiss arguing that respondent was required to immediately comply with this court's decision and entry regarding resentencing.

{¶25} 11. In an entry filed July 21, 2010, the Supreme Court denied the state's leave to appeal and the cross-appeal of relator and dismissed both the appeal and the cross-appeal as not involving any substantial constitutional question.

{¶26} 12. On July 28, 2010, relator filed a motion for summary judgment which this magistrate indicated would be treated as an additional response to the state's motion to dismiss.

{¶27} 13. The matter is currently before the magistrate for determination.

Conclusions of Law:

{¶28} For the reasons that follow, it is this magistrate's decision that this court should, at this time, grant relator's motion for a writ of procedendo.

{¶29} In order to be entitled to a writ of procedendo, a relator must establish a clear legal right to require that 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 law.

State ex rel. Miley v. Parrott, 77 Ohio St.3d 64, 65, 1996-Ohio-350. A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *Id.*

{¶30} An " 'inferior court's refusal or failure to timely dispose of a pending action is the ill a writ of procedendo is designed to remedy.' " *State ex rel. Dehler v. Sutula* (1995), 74 Ohio St.3d 33, 35, quoting *State ex rel. Levin v. Sheffield Lake*, 70 Ohio St.3d 104, 110, 1994-Ohio-385.

{¶31} Procedendo is an order from a court of superior jurisdiction to proceed to judgment: it does not attempt to control the inferior court as to what the judgment should be. *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462, 1995-Ohio-26.

{¶32} At the time the state filed its motion to dismiss, the Supreme Court had yet to rule on the state's appeal from this court's decision in the underlying case. The state had argued that respondent did not have a clear legal duty to resentence relator at that time because of the pending appeal in the Supreme Court.

{¶33} At this time, the Supreme Court has denied the state's motion for leave to appeal this court's decision and entry in the underlying action. As such, there is no longer any reason for the trial court to refrain from resentencing relator as indicated in this court's decision. As such, relator has a clear legal right and respondent has a clear legal duty to act.

{¶34} While cognizant that, at this time, only 30 days have passed since the Supreme Court denied the state's motion for leave to appeal this court's decision and, without specifically finding that failing to act within 30 days constitutes an unnecessary

delay, the alternative would be for this magistrate to refrain from timely ruling on this motion and would result in further delay. As such, it is this magistrate's decision that this court should deny the state of Ohio's motion to dismiss, grant relator's request for a writ of procedendo and should order respondent to conduct further proceedings to resentence relator in conformity with this court's decision in *Hazel*.

/S/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

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).