

[Cite as *State ex rel. Cherry v. McCarthy*, 2015-Ohio-3989.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

**[The State ex rel.] Demetrius Cherry, Sr.,** :

**Relator,** :

**v.** :

**Judge Sean McCarthy,** :

**Respondent.** :

**No. 15AP-395**

**(REGULAR CALENDAR)**

## DECISION

Rendered on September 29, 2015

*Demetrius Cherry, Sr., pro se.*

*Ron O'Brien*, Prosecuting Attorney, and *Scott J. Gaugler*, for respondent.

## IN MANDAMUS

**BROWN, P.J.**

{¶ 1} Relator, Demetrius Cherry, Sr., has filed this original action requesting that this court issue a writ of procedendo ordering respondent, the Honorable Sean McCarthy, judge of the Franklin County Court of Common Pleas, to rule on his motion to withdraw his guilty plea to set aside judgment of conviction filed on February 24, 2014 in his underlying criminal action. Respondent has filed a motion to dismiss.

{¶ 2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court grant respondent's motion to dismiss. No objections have been filed to that decision.

{¶ 3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the file, this court adopts the magistrate's decision. Respondent's motion to dismiss is granted.

*Action dismissed.*

SADLER and BRUNNER, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

[The State Ex Rel.] Demetrius Cherry, Sr.,	:	
Relator,	:	
v.	:	No. 15AP-395
Judge Sean McCarthy,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	

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MAGISTRATE'S DECISION

Rendered on June 16, 2015

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*Demetrius D. Cherry Sr., pro se.*

*Ron O'Brien, Attorney General, and Scott J. Gaugler, for respondent.*

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IN MANDAMUS  
ON RESPONDENT'S MOTION TO DISMISS

{¶ 4} Relator, Demetrius Cherry, Sr., has filed this original action requesting that this court issue a writ of procedendo ordering respondent, the Honorable Sean McCarthy, Judge of the Franklin County Court of Common Pleas, to rule on his motion to withdraw his guilty plea to set aside judgment of conviction filed on February 24, 2014 in his underlying criminal action.

**Findings of Fact:**

{¶ 5} 1. Relator is an inmate currently incarcerated at the Correctional Reception Center in Orient, Ohio.

{¶ 6} 2. On February 24, 2014, relator filed a motion to withdraw his guilty plea to set aside judgment of conviction in criminal case Nos. 05CR-7280, 06CR-165, and 06CR-694.

{¶ 7} 3. On April 3, 2014, the trial court granted the state until April 11, 2014 to respond to relator's motion.

{¶ 8} 4. On April 4, 2014, the state filed its response to relator's motion to withdraw his guilty plea to set aside judgment of conviction and, on April 15, 2014, relator filed his reply.

{¶ 9} 5. On April 9, 2015, relator filed this procedendo action.

{¶ 10} 6. On May 8, 2015, the trial court set May 19, 2015 as the date for relator's hearing on his motion.

{¶ 11} 7. On May 12, 2015, the trial court issued a warrant to convey ordering the Correctional Reception Center to convey relator to the Franklin County Correctional Center for the hearing.

{¶ 12} 8. On May 19, 2015, the trial court continued the hearing until June 2, 2015.

{¶ 13} 9. In an entry filed May 21, 2015, the trial court appointed counsel to represent relator in the underlying criminal actions.

{¶ 14} 10. Respondent has filed a motion to dismiss arguing that this court should deny relator's request for a writ of procedendo because respondent has set a date for the hearing on relator's motion and has taken the necessary steps to ensure that relator will be present for that hearing.

{¶ 15} 11. Relator has not filed a memorandum in response to respondent's motion.

{¶ 16} 12. The matter is currently before the magistrate on respondent's motion to dismiss.

#### Conclusions of Law:

{¶ 17} For the reasons that follow, it is this magistrate's decision that this court should grant respondent's motion and dismiss relator's procedendo action.

{¶ 18} 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). A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *Id.*

{¶ 19} 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*, 74 Ohio St.3d 33, 35 (1995), quoting *State ex rel. Levin v. Sheffield Lake*, 70 Ohio St.3d 104, 110 (1994).

{¶ 20} 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).

{¶ 21} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992). In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. *Id.*

{¶ 22} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242 (1975). As such, a complaint for writ of mandamus is not subject to dismissal under Civ.R. 12(B)(6) if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being asserted against it, and it appears that relator might prove some set of facts entitling him to relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94 (1995). For the following reasons, respondent's motion should be granted and relator's complaint should be dismissed.

{¶ 23} Because respondent has taken the affirmative steps toward the performance of the requested act, relator cannot demonstrate that respondent has refused to issue a ruling nor can he show that respondent is unduly delaying the proceedings. Since the

matter has been scheduled for a hearing on the merits, this court should grant respondent's motion and dismiss relator's procedendo action.

/S/ MAGISTRATE  
STEPHANIE BISCA

### **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).