[Cite as *State ex rel. Sanders v. Enlow*, 2010-Ohio-5053.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE ex rel. DOUGLAS M. SANDERS,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2010-P-0022**
- vs -	:	
JUDGE JOHN A. ENLOW,	:	
Respondent.		

Original Action for Writ of Mandamus.

Judgment: Petition dismissed.

Douglas M. Sanders, PID: 450-434, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430 (Relator).

Victor V. Vigluicci, Portage County Prosecutor, and *Denise L. Smith*, Chief Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Respondent).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for consideration of the motion to dismiss of respondent, Judge John A. Enlow of the Portage County Court of Common Pleas. As the sole basis for his motion, respondent asserts that the petition of relator, Douglas M. Sanders, fails to state a viable claim for the writ because his own factual allegations support the conclusion that he has already had a full and adequate opportunity to contest the validity of his criminal sentence. For the following reasons, we hold that that the dismissal of this action is warranted.

{¶2} A review of relator's mandamus petition shows that his sole claim for relief is predicated upon these basic facts. In April 2003, he was convicted in Portage County on twenty counts of various drug offenses. In imposing relator's sentence, respondent ordered him to serve an aggregate term of nineteen and one-half years. As part of his legal analysis, respondent concluded that the terms for each of the eighteen felonies of the fourth and fifth degree should run consecutive to each other and consecutive to the terms for the two felonies of the first degree.

{¶3} Relator immediately appealed his 2003 conviction to this court. In *State v. Sanders*, 11th Dist. No. 2003-P-0072, 2004-Ohio-5629, we upheld the basic conviction on the twenty counts, but reversed respondent's decision regarding the imposition of consecutive prison terms. Specifically, this court held that the procedure employed by respondent had been improper because: (1) he had failed to consider certain statutory factors pertaining to the seriousness of the crimes and the likelihood of recidivism; and (2) he had failed to fully explain the reasons for his decision. Given these errors, this court remanded the action to respondent for resentencing.

{¶4} Upon remand, respondent held a new sentencing hearing and issued a new final judgment, in which the identical sentence of nineteen and one-half years was re-imposed. Since respondent again determined that many of the terms on the twenty counts should be served consecutively, relator instituted a second appeal before this court.

{¶5} In *State v. Sanders*, 11th Dist. No. 2005-P-0026, 2006-Ohio 2147, it was again concluded that an improper procedure had been followed in the imposition of the consecutive prison terms. Citing the Ohio Supreme Court's recent decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, this court expressly concluded that it was no

longer legally permissible for a trial judge to engage in judicial factfinding, as had been previously mandated under R.C. 2929.14(E), when imposing consecutive prison terms. As a result, we again remanded relator's case to respondent for resentencing in light of the new *Foster* precedent.

{¶6} After conducting a third sentencing hearing as part of the second remand, respondent rendered a third final judgment that again re-imposed the original sentence of nineteen and one-half years. This led to the filing of relator's third appeal before this court. In *State v. Sanders*, 11th Dist. No. 2006-P-0062, 2007-Ohio-5613, relator argued that the application of the *Foster* holding to the facts of his case had caused violations of the constitutional prohibitions against ex post fact laws and the lack of due process; accordingly, he requested this court to declare unconstitutional the remedy ordered by the *Foster* court. In rejecting this argument, we specifically held that an appellate court did not have the authority to alter any constitutional mandates or statutory constructions promulgated by the Supreme Court. Id. at ¶8.

{¶7} After the release of the third *Sanders* opinion in October 2007, relator filed a notice of appeal with the Supreme Court of Ohio. However, in *State v. Sanders*, 117 Ohio St.3d 1426, 2008-Ohio-969, the Supreme Court decided not to accept jurisdiction over the matter and dismissed it without addressing the merits. Thus, the holding in our third *Sanders* opinion has never been reversed and is still enforceable.

{¶8} Over two years following the dismissal of relator's Supreme Court appeal, he brought the instant action in mandamus before this court. As the legal basis for his claim, relator again seeks to essentially contest the merits of our decision in the second *Sanders* appeal, 11th Dist. No. 2005-P-0026, 2006-Ohio-2147. As was stated above, our second *Sanders* opinion concluded that the underlying criminal proceeding had to

be remanded again so that respondent could resentence relator consistent with the new analysis of the Supreme Court in *Foster*. Relator now contends that the application of the *Foster* precedent to his case violated the basic principle that a new decision cannot be enforced retroactively on a "closed" matter. According to relator, since this court had previously followed the Supreme Court's earlier "judicial factfinding" precedent, *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, in determining the original *Sanders* appeal, the *Comer* precedent had become the "law" of his case and could never be altered. In light of this, he seeks the issuance of a writ to compel respondent to again resentence him under the prior *Comer* precedent.

{¶9} As to the substance of the foregoing contention, this court would indicate that the Supreme Court has consistently recognized that new decisional law can only be applied to criminal matters which are still pending on the date of issuance. *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, at ¶6. To this extent, the basic prohibition against retroactive application only comes into play when a criminal conviction has become truly "final." *State v. Evans* (1972), 32 Ohio St.2d 185, 186. In considering this exact point, the Supreme Court has stated that a conviction is not deemed final until the defendant has exhausted all possible appellate remedies. Id.

{¶10} In the instant matter, a review of the *Foster* opinion readily demonstrates that it was released by the Supreme Court on February 27, 2006. Given that our final opinion in the second *Sanders* appeal was not issued until April 2006, it is apparent that the second appeal was still pending before us when *Foster* became the law of this state. Therefore, relator had not exhausted his appellate remedies, and his conviction had not become entirely final.

{¶11} Given the lack of finality, it cannot be said that our application of *Foster* in

the second *Sanders* appeal was retroactive in nature. In turn, this further means that the "law of the case" doctrine, as cited by relator in his petition, is simply inapplicable to the facts of the underlying case.

{¶12} Even if a true question existed concerning the propriety of our analysis in the second *Sanders* appeal, relator cannot now contest the merits of that decision in the context of a mandamus case because he had an adequate remedy in the ordinary course of the law. Specifically, he could have appealed the second *Sanders* decision directly to the Ohio Supreme Court. In reviewing the elements for a writ of mandamus, this court has stated that "a party is not permitted to employ a writ of mandamus as a substitute remedy when he previously failed to invoke an adequate legal remedy in a timely fashion." *State ex rel. Zimcosky v. Collins*, 11th Dist. No. 2009-L-141, 2010-Ohio-1716, at ¶13. Thus, relator is now barred from raising an issue which could have been advanced before the Supreme Court.

{¶13} In conjunction with the latter point, we would further note that relator could have raised his "retroactivity" argument in his third appeal before us. As was indicated above, our opinion in the third *Sanders* appeal addressed the question of whether our prior application of *Foster* to his criminal case had resulted in due process and ex post facto violations. Given the similarity of his "retroactivity" argument, its final merits could have likewise been fully addressed in the third appeal. In this regard, relator appears to have had two other adequate remedies he could have pursued.

{¶14} To be entitled to a writ of mandamus, the relator must be able to prove that: (1) he has a clear legal right to have a specific act performed by a public official; (2) the public official has a corresponding duty to perform that act; and (3) there is no other legal remedy that could be pursued to adequately resolve the matter. *State ex rel.*

Appenzeller v. Mitrovich, 11th Dist. No. 2007-L-125, 2007-Ohio-6157, at ¶5. Pursuant to the foregoing discussion, this court concludes that, even when the factual allegations in relator's petition are construed in a manner most favorable to him, he will still not be able to establish a set of facts under which he could satisfy any of the three elements for the writ. That is, not only are his allegations legally insufficient to demonstrate that he has a "right" to a new sentencing hearing, but they also readily show that he did have an adequate legal remedy. Accordingly, the dismissal of this action is warranted under Civ.R. 12 (B)(6). Id. at ¶9.

{¶15} Respondent's motion to dismiss the instant matter is granted. It is the order of this court that relator's entire mandamus petition is hereby dismissed.

DIANE V. GRENDELL, J., CYNTHIA WESTCOTT RICE, J., COLLEEN MARY O'TOOLE, J., concur.