

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

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| STATE OF OHIO, ex rel. ALAN M. FRANCIS, | : | PER CURIAM OPINION |
| | : | |
| Relator, | : | CASE NO. 2012-T-0045 |
| | : | |
| - VS - | : | |
| | : | |
| HONORABLE JOHN M. STUARD, JUDGE, et al., | : | |
| | : | |
| Respondents. | : | |

Original Action for Writ of Procedendo.

Judgment: Complaint dismissed.

Alan M. Francis, pro se, PID: A562-142, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901-0788 (Relator).

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondents).

PER CURIAM.

{¶1} This matter is before the court pursuant to the complaint for a writ of procedendo filed by relator, State of Ohio, ex rel. Alan M. Francis, against respondents, Honorable John M. Stuard, Judge, et al. At issue is whether relator is entitled to a writ of procedendo. For the reasons that follow, we sua sponte dismiss relator's complaint.

{¶2} On December 6, 2005, relator was indicted for two counts of aggravated murder, with death penalty specifications and three-year firearm specifications; one

count of aggravated burglary, with a firearm specification; four counts of aggravated robbery, each with a firearm specification; one count of robbery; and one count of having a weapon while under disability.

{¶3} Relator pled not guilty. He filed a motion to suppress his statements to the police. Following multiple hearings, the trial court denied that motion. Relator then entered a plea bargain with the state. On January 22, 2009, he pled no contest to the indictment, including the firearm specifications, in exchange for the dismissal of the death specifications.

{¶4} On the same date, the trial court found relator guilty of the charges, and sentenced him to 30 years to life for the aggravated murder conviction. This sentence was ordered to be served concurrently with relator's sentence to 37 years in prison for three unrelated aggravated robberies and the disability charge, and a separate three-year term of imprisonment for the merged firearm specifications. The effective sentence imposed on relator was 40 years to life. The court filed its entry on sentence on February 3, 2009.

{¶5} Relator filed a direct appeal challenging his conviction. Specifically, he challenged the trial court's ruling on his motion to suppress and also argued he was denied the effective assistance of counsel. Relator did not allege error in connection with the court's imposition of post-release control. On June 11, 2010, this court unanimously affirmed appellant's conviction in *State v. Francis*, 11th Dist. No. 2009-T-0015, 2010-Ohio-2686, discretionary appeal not allowed at 2011-Ohio-1618, 2011 Ohio LEXIS 885.

{¶6} Relator subsequently filed a motion to reopen his direct appeal pursuant to App.R. 26(B). He argued his appellate counsel was ineffective. He asserted several additional proposed assignments of error, but he did not raise an issue regarding post-release control. This court denied his motion to reopen on November 23, 2010.

{¶7} On June 9, 2011, two and one-half years after relator was sentenced, he filed a motion to vacate the assessment of court costs against him in his 2009 sentencing entry. On July 12, 2011, the trial court denied appellant's motion. He did not appeal this ruling.

{¶8} Then, on July 25, 2011, appellant filed a second motion to vacate court costs. The trial court again denied the motion. On September 20, 2011, relator appealed the trial court's judgment denying his second motion to vacate court costs in *State v. Francis*, 11th Dist. No. 2011-T-0092.

{¶9} *On the same date*, September 20, 2011, relator filed in the trial court a motion to vacate his sentence, arguing for the first time that his 2009 sentence is void because the court improperly imposed post-release control. He asks that this court issue a writ of procedendo compelling respondents to either conduct a new sentencing hearing or to rule on his motion to vacate his sentence.

{¶10} “[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.” *Hill v. Kelly*, 11th Dist. No. 2011-T-094, 2011-Ohio-6341, ¶10. The writ of procedendo is employed against a judge who either has refused to issue a judgment or has taken an inordinate amount of time to render a judgment. *Id.* at ¶11.

{¶11} It is well-settled that a court may sua sponte dismiss a petition for an extraordinary writ for failure to state a claim upon which relief can be granted if the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint. *Id.* at ¶4.

{¶12} Initially, we note that relator's complaint for a writ of procedendo is procedurally defective because relator has failed to comply with the affidavit requirements of R.C. 2969.25. Pursuant to this statute, relator was required to attach to his complaint for a writ of procedendo an affidavit that describes each civil action or appeal filed by him within the previous five years in any state or federal court. "The affidavit shall include *all of the following* for each of those civil actions or appeals: (1) A brief description of the nature of the civil action or appeal; (2) The case name, case number, and the court in which the civil action or appeal was brought; (3) The name of each party to the civil action or appeal; (4) The outcome of the civil action or appeal, including whether the court dismissed the civil action or appeal as frivolous * * * , whether the court made an award against the inmate or the inmate's counsel * * * for frivolous conduct * * * , and, if the court so dismissed the action or appeal or made an award of that nature, the date of the final order affirming the dismissal or award." (Emphasis added.) R.C. 2969.25(A).

{¶13} This court has held that a petitioner's failure to comply with R.C. 2969.25 warrants the sua sponte dismissal of the complaint for a writ of procedendo. *Hill, supra*, at ¶9. In *State ex rel. Norris v. Giavasis*, 100 Ohio St.3d 371, 2003-Ohio-6609, the relator filed an affidavit that he claimed listed his prior "civil actions and * * * appeals within the preceding five years pursuant to [R.C.] 2969.25." The affidavit, however, did

not contain a “brief description of the nature” of each civil action or appeal and the outcome of each civil action and appeal, as required by R.C. 2969.25(A)(1) and (4). The Fifth Appellate District sua sponte dismissed the relator’s complaint. The Supreme Court of Ohio affirmed, holding: “The requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate’s action to dismissal.” *Id.* at ¶4.

{¶14} Here, relator states in his affidavit that he has commenced a civil action in the past five years. However, his affidavit does not contain a description of the nature of the civil action; the case name, case number, or the court in which the civil action was brought; the name of each party to the civil action; the outcome of the civil action, including whether the court dismissed the civil action as frivolous, whether the court made an award against relator or his counsel for frivolous conduct, and, if the court so dismissed the action or made an award of that nature, the date of the final order affirming the dismissal or award. The omission of these required items in relator’s affidavit is fatal to his complaint and warrants its dismissal.

{¶15} Further, contrary to relator’s contention that the trial court has unduly delayed in ruling on his motion to vacate his sentence, we note that relator filed his appeal from the court’s denial of his request to vacate costs on the same day he filed his motion to vacate his sentence. Thus, at all times while relator’s motion to vacate his sentence has been pending in the trial court, his appeal on the costs issue has been pending in this court. The filing of a notice of appeal deprives the trial court of jurisdiction of any matters that would conflict with the ability of the appellate court to reverse, modify, or affirm the subject judgment. *Nemeth v. Nemeth*, 11th Dist. No. 2008-G-2824, 2008-Ohio-4673, ¶3. Relator appealed the trial court’s denial of

his motion to vacate the assessment of costs against him in the entry on sentence. Thus, if the trial court were to grant relator's motion to vacate the sentence itself, there would be nothing for us to review on appeal. Relator's motion to vacate his sentence necessarily conflicts with our review of relator's appeal. By filing his appeal, relator deprived the trial court of jurisdiction to rule on his motion to vacate his sentence. We therefore hold that the trial court has not unduly delayed in ruling on the motion.

{¶16} Based on the foregoing analysis, there are no circumstances in which a writ of procedendo would lie in this matter.

{¶17} Accordingly, we sua sponte dismiss relator's request for a writ of procedendo.

TIMOTHY P. CANNON, P.J., CYNTHIA WESTCOTT RICE, J., MARY JANE TRAPP, J.,
concur.