[Cite as *State ex rel. Harwell v. Wiseman*, 2015-Ohio-4718.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO, EX REL. MICHAEL D. HARWELL *Relator* v. HONORABLE MARY L. WISEMAN, JUDGE MONTGOMERY COUNTY COMMON PLEAS COURT *Respondent*	:	Appellate Case No. 26600 [Original Action in Prohibition]

DECISION AND FINAL JUDGMENT ENTRY
November 6, 2015

PER CURIAM:

{¶ 1} Michael D. Harwell filed this prohibition action on February 27, 2015. He argues that Respondent, the Honorable Mary L. Wiseman, patently and unambiguously lacked jurisdiction to enter a February 11, 2015 "NUNC PRO TUNC (to June 28, 2013) FINDING AND VERDICT OF GUILT ON COUNT 14 HAVING WEAPONS UNDER DISABILITY (prior drug conviction)" while his direct appeal was pending. Judge Wiseman asserts that a trial court has the inherent authority to enter nunc pro tunc orders to make the record speak the truth, even while a case is pending on appeal. The matter is currently before the court on Judge Wiseman's motion to dismiss, and Harwell's subsequent motion for summary judgment. For the reasons that follow, we sustain Judge Wiseman's motion to dismiss and dismiss the action.

Facts and Procedural History

{¶ 2} Harwell is the named defendant in Montgomery County Court of Common Pleas Case No. 2012 CR 02367 (hereinafter, "the Criminal Case"). Judge Wiseman presided over a trial in the criminal case between June 21, 2013 and June 28, 2013, after which Harwell was convicted. It appears from Harwell's petition that an entry sentencing Harwell was filed on June 28, 2013.

{¶ 3} Harwell filed a timely appeal to this court, which was, at the time this action was filed, pending as Appellate Case No. 25852 (hereinafter, "the Appellate Case"). Many months later, on February 11, 2015, while the parties were briefing the Appellate Case, Judge Wiseman filed in the Criminal Case the "NUNC PRO TUNC (to June 28, 2013) FINDING AND VERDICT OF GUILT ON COUNT 14 HAVING WEAPONS UNDER DISABILITY (prior drug conviction)" at issue here (hereinafter, "the Order"). Harwell filed a motion to vacate the Order in the Appellate Case on February 27, 2015, but there is no indication in the limited record before us that he separately appealed it or moved the trial court to vacate it.

{¶ 4} On February 27, 2015, concurrent with the motion to vacate, Harwell filed this prohibition action. Judge Wiseman moved to dismiss this action pursuant to Civ.R. 12(B)(6). In response, Harwell filed a motion for summary judgment, responding to the substantive legal positions taken in the motion to dismiss. Harwell did not file a separate response to the motion to dismiss, and Judge Wiseman did not file a separate response to the motion for summary judgment. As the time for such responses has passed, the matter is now ripe for decision.

Standard for a Motion to Dismiss

{¶ 5} Original actions in prohibition "ordinarily proceed as civil actions under the Ohio Rules of Civil Procedure." Loc.App.R. 8(A). Judge Wiseman has moved to dismiss the prohibition action for failure to state a claim pursuant to Civ.R. 12(B)(6). The purpose of such a motion is to test

a claim's legal sufficiency. *MacConnell v. Dayton*, 2d Dist. Montgomery No. 25536, 2013-Ohio-3651, ¶ 11. A "Civ.R. 12(B)(6) motion must be judged on the face of the complaint alone." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 664 N.E.2d 931 (1996).

{¶ 6} "Dismissal of the prohibition complaint for failure to state a claim upon which relief can be granted is appropriate if, after presuming the truth of all factual allegations of the complaint and making all reasonable inferences in [relator's] favor, it appears beyond doubt that he can prove no set of facts entitling him to the requested extraordinary writ of prohibition." *State ex rel. Hemsley v. Unruh*, 128 Ohio St.3d 307, 2011-Ohio-226, 943 N.E.2d 1014, ¶ 8. With respect to original actions, the Ohio Supreme Court has also held that "Civ.R. 12(B)(6) dismissals may be based on 'merits' issues such as the availability of an adequate remedy in the ordinary course of law." *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 20. The standard for such arguments is the same: whether it appears beyond doubt that relator can prove no set of facts warranting relief. *Id*.

Standard for Issuance of a Writ of Prohibition

{¶ 7} A writ of prohibition "is an extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998) (internal citation and quotation omitted). To be entitled to a writ of prohibition in this case, Harwell must establish that (1) Judge Wiseman "is about to or has exercised judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law." *State ex rel. Shumaker v. Nichols*, 137 Ohio St.3d 391, 2013-Ohio-4732, 999 N.E.2d 630, ¶ 9.

{¶ 8} This court's analysis of the second and third elements is intertwined. Whether proof is required on the third element (whether relator has an adequate remedy at law) depends on the particular exercise of jurisdiction at issue. "Where jurisdiction is patently and unambiguously lacking, relators need not establish the lack of an adequate remedy at law because the availability of alternate remedies like appeal would be immaterial." *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15. "However, 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." *Shumaker* at ¶ 10 (internal citations and quotation omitted). In such a case, "the party asserting the trial court's lack of jurisdiction must first argue that issue in the trial court, and then, if it loses on that issue, assign that as error in any subsequent appeal." *Dayton Metro. Hous. Auth. v. Dayton Human Relations Council*, 81 Ohio App.3d 436, 442, 611 N.E.2d 384 (2d Dist.1992). In other words, unless there is a patent and unambiguous lack of jurisdiction, there is generally an adequate remedy at law, and a prohibition claim cannot succeed.

{¶ 9} Whether a court patently and unambiguously lacks jurisdiction for purposes of a writ of prohibition is a question of the court's subject matter jurisdiction. *Suster*, 84 Ohio St.3d at 73, quoting *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409, 534 N.E.2d 46 (1988) (prohibition "tests and determines 'solely and only' the subject matter jurisdiction" of the trial court). The Supreme Court of Ohio has recognized "the general rule that if a trial court has general subject-matter jurisdiction, prohibition will not lie" to correct or prevent an error. *Shumaker* at ¶ 14, citing *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 74, 701 N.E.2d 1002 (1998).

{¶ 10} Courts evaluate subject matter jurisdiction by reference to the relevant statutory and constitutional law. *See State ex rel. Shumaker v. Nichols*, 137 Ohio St.3d 391, 2013-Ohio-4732, 999

N.E.2d 630, 634 (2013) (noting the absence of any particular statute or constitution provision alleged to have been violated). For example, the Supreme Court of Ohio looked to the statute governing the Ohio Civil Rights Commission's jurisdiction to determine that it provided the Commission with the "basic authority" to evaluate a discrimination charge. *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Com'n*, 55 Ohio St.3d 98, 100, 562 N.E.2d 1383 (1990). Similarly, the court has held that "a court of common pleas has general jurisdiction over civil cases, including the civil claims here, and Judge Nichols does not lack general subject-matter jurisdiction," citing the Ohio Constitution, Article IV, Section 4(B). *Shumaker* at ¶ 13. With these principles in mind, we consider the parties' arguments.

The Parties' Arguments

{¶ 11} Judge Wiseman argues that the petition fails to state a claim for which relief can be granted. She asserts that she had jurisdiction to enter the Order to make the record conform to what actually occurred at trial, that is, to reflect her oral announcement finding Harwell guilty on the count at issue. We note that this assertion is based on facts outside the petition for prohibition, which this court cannot consider on a Civ.R. 12(B)(6) motion. We also note that oral pronouncements of guilt are ineffective; a court speaks only through its journal entries. Crim.R. 32(C); *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 686 N.E.2d 267 (1997). Judge Wiseman does not address the subject matter jurisdiction of the Common Pleas Court in criminal cases.

{¶ 12} Harwell argues that Judge Wiseman was divested of jurisdiction to enter the Order in the Criminal Case when he filed the Appellate Case. He cites, among other cases, this court's decision in *State v. Alford*, where we emphasized that we have "repeatedly held that, '[a]lthough a court generally may issue a nunc pro tunc entry any time, * * * a notice of appeal divests a trial court of

jurisdiction to do so.' " 2d Dist. Montgomery No. 24368, 2012-Ohio-3490, ¶ 11. Harwell likewise does not address the subject matter jurisdiction of the Common Pleas Court in criminal cases.

Analysis

{¶ 13} The parties' arguments do not fit neatly into the question currently before this court on a motion to dismiss a prohibition action. That question is whether "presuming the truth of all factual allegations of the complaint and making all reasonable inferences in [relator's] favor, it appears beyond doubt that he can prove no set of facts entitling him to the requested extraordinary writ of prohibition." *State ex rel. Hemsley v. Unruh*, 128 Ohio St.3d 307, 2011-Ohio-226, 943 N.E.2d 1014, ¶ 8.

{¶ 14} Judge Wiseman's argument appears to be addressed to the second element of the test for prohibition, i.e., whether entry of the Order was unauthorized by law, and whether she patently and unambiguously lacked jurisdiction. *State ex rel. Shumaker v. Nichols*, 137 Ohio St.3d 391, 2013-Ohio-4732, 999 N.E.2d 630, ¶ 9. She argues that it was authorized as a matter of law, while Harwell argues it was not. However, neither party addresses the primarily relevant issue: whether Judge Wiseman, as a judge of the Montgomery County Common Pleas Court, has general subject matter jurisdiction over criminal cases like Harwell's case. *State ex rel. 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) (prohibition "tests and determines 'solely and only' the subject matter jurisdiction" of the trial court).

{¶ 15} The Supreme Court of Ohio has often noted the confusion surrounding the use of the term "jurisdiction." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18. The "general term 'jurisdiction' can be used to connote several distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a

particular case." *Id*. As discussed above, a writ of prohibition tests the respondent's subject matter jurisdiction, which is "the power of a court to entertain and adjudicate a particular class of cases." *Id*. at ¶ 19, citing *Morrison v. Steiner*, 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972). It "is determined without regard to the rights of the individual parties involved in a particular case." *Id*. at ¶ 19, citing *Suster* at 75.

{¶ 16} "Ohio's common pleas courts are endowed with 'original jurisdiction over all justiciable matters * * * as may be provided by law.' Article IV, Section 4(B), Ohio Constitution." *Kuchta* at ¶ 20. They are provided such jurisdiction by R.C. 2931.03, which provides "original jurisdiction over crimes and offenses committed by an adult, with certain exceptions irrelevant here." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 13. "Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in proceeding is only error in the 'exercise of jurisdiction,' as distinguished from the want of jurisdiction in the first instance." *Jimison v. Wilson*, 106 Ohio St.3d 342, 2005-Ohio-5143, 835 N.E.2d 34, ¶ 11 (internal quotation and citations omitted).

{¶ 17} In his petition for prohibition, Harwell asserts that Judge Wiseman is a duly elected judge of the Court of Common Pleas for Montgomery County, Ohio. He also asserts that he was indicted and tried on a criminal charge of having weapons under a disability. There is no allegation that Harwell is a minor. On these facts, we conclude that Judge Wiseman had general subject matter jurisdiction over Harwell's criminal case, and therefore did not patently and unambiguously lack jurisdiction to act. We further conclude that Harwell must prove the lack of an adequate remedy at law as an element of his prohibition claim. *State ex rel. Shumaker v. Nichols*, 137 Ohio St.3d 391, 2013-Ohio-4732, 999 N.E.2d 630, ¶ 10. Whether Judge Wiseman's exercise of judicial authority was

unauthorized in the context of Harwell's argument – because the trial court was divested of jurisdiction when Harwell appealed – is a question we need not resolve here, because we find that Harwell has an adequate remedy at law and a viable avenue in which to raise that argument.

{¶ 18} A "party asserting the trial court's lack of jurisdiction must first argue that issue in the trial court, and then, if it loses on that issue, assign that as error in any subsequent appeal." *Dayton Metro. Hous. Auth. v. Dayton Human Relations Council*, 81 Ohio App.3d 436, 442, 611 N.E.2d 384 (2d Dist.1992). Harwell could, among other things, move to vacate the Order in the trial court, and could appeal any denial of his motion. We observe, however, that the trial court could again enter the order once this court's appellate jurisdiction concluded. Although we are concerned by the timing of the Order issued by the trial court while the appeal was pending, we make no decision on the propriety of the Order at this time. *See State v. Alford*, 2d Dist. Montgomery No. 24368, 2012-Ohio-3490, ¶ 11. Harwell must first make his argument to the trial court.

Conclusion

{¶ 19} Harwell cannot prove any set of facts entitling him to extraordinary relief in prohibition, as Judge Wiseman had general subject matter jurisdiction over his criminal case. Whether the Order was properly entered while the criminal case was on appeal is a question Harwell can raise directly with the trial court. Judge Wiseman's motion to dismiss is therefore SUSTAINED and this matter is DISMISSED.

SO ORDERED.

JEFFREY E. FROELICH, Presiding Judge

MIKE FAIN, Judge

MICHAEL T. HALL, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).

JEFFREY E. FROELICH, Presiding Judge

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