[Cite as *State ex rel. Rice v. Wolaver*, 2016-Ohio-320.]

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

STATE ex rel. JAMIE RICE

Petitioner

v.

JUDGE STEPHEN WOLAVER

Respondent:

Appellate Case No. 2015 CA 0031

[Original Action in Mandamus]

DECISION AND FINAL JUDGMENT ENTRY
January 22, 2016

PER CURIAM:

{¶ 1} In this mandamus action, Jamie Rice asks this court to order the Honorable Stephen A. Wolaver to issue a final appealable order in Greene County Common Pleas Court Case No. 2009-CR-0020. Rice asserts that the current judgment entry sentencing him in that case is deficient and non-final in two ways: 1) it does not show the court's compliance with the mandatory sentencing requirements of R.C. 2929.11 and R.C. 2929.12; and 2) it does not reflect the manner of his conviction pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. He seeks the entry of a final appealable order for purposes of appeal.

{¶ 2} Judge Wolaver moved to dismiss the case. He argues that the judgment entry at issue expressly indicates consideration of R.C. 2929.11 and R.C. 2929.12. He also argues that Rice had an adequate remedy at law by way of appeal from the judgment entry. Judge Wolaver does not specifically address Rice's *Baker* argument.

Standard for a motion to dismiss

{¶ 3} Original actions in mandamus "ordinarily proceed as civil actions under the Ohio Rules of Civil Procedure." Loc.App.R. 8(A). Judge Wolaver has moved to dismiss the mandamus action, but does not specify the Civil Rule under which he seeks dismissal. In the current procedural posture, we construe the motion as a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. 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).

{¶ 4} 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. "For a court to dismiss a plaintiff's petition for a writ of mandamus under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling it to the extraordinary relief of mandamus." *Rural Bldg. of Cincinnati, L.L.C., v. Evendale*, 2015-Ohio-1614, 32 N.E.3d 983, ¶ 10 (1st Dist.). "[T]his court is required to accept all material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party." *Cleveland Constr., Inc. v. Villanueva*, 186 Ohio App.3d 258, 2010-Ohio-444, 927 N.E.2d 611, ¶ 14 (8th Dist.). 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*.

Evidence before the court

{¶ 5} As a preliminary matter, we consider what evidence is before the court on this motion to dismiss. Motions to dismiss under Civ.R. 12(B)(6) "must be judged on the face of the complaint alone." *Pontious, supra,* at 569. "[P]rior pleadings from other cases cannot be attached as evidence to a Civ.R. 12(B)(6) motion to dismiss." *Barton v. Realty Corp. of Am.*, 8th Dist. Cuyahoga No. 97340, 2012-Ohio-1838, ¶ 13. Documents that are attached to a motion to dismiss may not be considered, unless this court properly converts the matter to a motion for summary judgment pursuant to Civ.R. 56. Civ.R. 12(B). "In such a case, Civ.R. 12(B) requires that the court consider 'only such matters outside the pleadings as are specifically enumerated in Rule 56.' Civ.R. 56(C) enumerates 'pleading[s], depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact.' " *State, ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109, 579 N.E.2d 702 (1991). "[J]udgment entries, submitted without affidavit, are none of these." *Id*.

{¶ 6} Here, Rice did not attach the judgment entry at issue to his mandamus petition. Judge Wolaver has submitted the judgment entry as an exhibit to his motion to dismiss, but it has not been submitted with a Civ.R. 56 affidavit, and we have not converted the motion to one for summary judgment. *Freeman, supra*.

{¶ 7} We are aware that courts "can take judicial notice of appropriate matters in determining [a] Civ.R. 12(B)(6) motion without converting it to a motion for summary

judgment." *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 10, citing *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 26. However, the scope of such "appropriate matters," particularly with respect to actions of other courts, is not well-settled. *Compare State ex rel. Hawkins v. Haas*, 141 Ohio St.3d 98, 2014-Ohio-5196, 21 N.E.3d 1060, ¶ 4, fn. 1 ("An event that causes a case to become moot may be proved by extrinsic evidence") *with State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 26 ("it is true that a Civ.R. 12(B)(6) determination cannot rely on *factual allegations* or *evidence* outside the complaint") (emphasis in original).

{¶ 8} Here, we have not been asked to take judicial notice of the judgment entry, and need not do so to resolve this case. We do not consider the judgment entry sentencing Rice attached to the motion to dismiss. *See State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 110, 647 N.E.2d 799 (1995) (even though documents were attached to an answer, "the court of appeals did not consider the answer and, further, could not in a Civ.R. 12(B)(6) determination"). We construe Rice's allegations that the trial court did not mention the mandatory sentencing factors or include language complying with *Baker* as true.

Standard for a writ of mandamus

{¶ 9} For a writ of mandamus to issue, a relator must show "(1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the requested act, and (3) that relator has no plain and adequate remedy at law." *State ex rel. Dayton Newspapers, Inc. v. Wagner*, 129 Ohio App.3d 271, 273, 717 N.E.2d 773 (2d Dist.1998); *State ex rel. Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St.3d 165,

167, 527 N.E.2d 807 (1988). Petitioner's inability to show any of these elements subjects his mandamus claim to dismissal.

Analysis

Clear legal right and clear legal duty

{¶ 10} Rice's petition contains two layers of claims. While he ultimately seeks the entry of a final appealable order, this request is premised on two underlying claimed rights he seeks to enforce. We discuss these claims in turn.

To consider sentencing factors

{¶ 11} Rice asserts that Judge Wolaver had a clear legal duty to consider the mandatory sentencing statutes of R.C. 2929.11 and R.C. 2929.12. Judge Wolaver agrees.

To comply with Baker *and include the manner of conviction*

{¶ 12} Rice argues that Judge Wolaver was required to include the manner of his conviction in his sentencing entry. *State v. Baker,* 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. We note that *Baker* was refined by *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. In *Lester*, the Supreme Court of Ohio held that "the trial court's omission of how the defendant's conviction was effected, i.e., the 'manner of conviction,' does not prevent the judgment of conviction from being an order that is final and subject to appeal." *Id*. at ¶ 12. Thus, as a matter of law, Rice does not have a clear legal right, and Judge Wolaver does not have a clear legal duty, to include the manner of conviction in the judgment entry sentencing Rice.

To a new judgment entry

{¶ 13} Based on the two arguments above, Rice ultimately argues he is entitled to a new judgment entry for purposes of an appeal. He also asks that Judge Wolaver be compelled to bring him back to court for sentencing purposes. Having concluded that Rice has no right pursuant to *Baker* to inclusion of the manner of conviction, we consider whether the alleged failure to include the mandatory statutory factors for sentencing entitles Rice to a new, final judgment entry.

{¶ 14} Rice's argument is premised on his conclusion that the trial court's failure to consider R.C. 2929.11 and R.C. 2929.12 renders his judgment entry not final and appealable. As outlined above, *Lester* expressly rejects the part of his argument based on *Baker*. *Lester* at ¶ 12. *Lester* also implicitly rejects this second part of his argument. The Supreme Court of Ohio held "that a judgment of conviction is a final order subject to appeal under R.C. 2505.02 when the judgment entry sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk." *Id*. at ¶ 14. Explicit mention of these statutory sentencing factors are not required under *Baker*, *Lester*, or Crim.R. 32(C) for a final appealable order. Accordingly, even if reference to the sentencing factors was omitted from the judgment entry here, Rice would not be entitled to a new judgment entry that includes such a reference. He therefore cannot succeed on the first and second elements of his mandamus claim as a matter of law.

{¶ 15} To the extent that Rice argues that Judge Wolaver did not actually consider the factors while sentencing him, that is a separate issue, unrelated to finality, that Rice could have raised in the ordinary course of an appeal.

Adequate remedy at law

{¶ 16} Rice asserts he has no adequate remedy at law, because he cannot appeal without a final appealable order. However, Rice notes that he filed a motion for a final appealable order in the trial court on February 20, 2015. Judge Wolaver overruled the motion on March 9, 2015. Rice had an adequate remedy by way of appeal of that order. To the extent that Rice's claims amount to a challenge to his sentence, he could have raised alleged defects in his sentence on direct appeal. He had an adequate remedy precluding mandamus relief, "regardless of whether it was used." *State ex rel. Smith v. Fuerst*, 8th Dist. Cuyahoga No. 86118, 2005-Ohio-3829, ¶ 4. He therefore cannot show he lacked an adequate remedy at law.

Conclusion

{¶ 17} Rice cannot succeed on any element of his mandamus claim as a matter of law. Accordingly, we SUSTAIN Judge Wolaver's motion to dismiss this mandamus action. Greene Appellate Case No. 2015 CA 0031 is DISMISSED.

SO ORDERED.

MICHAEL T. HALL, Administrative Judge

MIKE FAIN, Judge

JEFFREY E. FROELICH, 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).

MICHAEL T. HALL, Administrative Judge

Copies to:

Jamie Rice, #609-174
P.O. Box 4501
Lima, Ohio 45802
Petitioner

Elizabeth Ellis
55 Greene Street
Xenia, Ohio 45385
Attorney for Respondent

CA3/KY