

[Cite as *State ex rel. D.H. v. Capizzi*, 2016-Ohio-5268.]

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

STATE OF OHIO, ex rel., D.H.

Relator

v.

THE HON. ANTHONY CAPIZZI, JUDGE

Respondent

Appellate Case No. 27068

[Original Action in Procedendo]

DECISION AND FINAL JUDGMENT ENTRY

July 28, 2016

PER CURIAM:

{¶ 1} D.H. filed this procedendo action on March 31, 2016. He asks this court to compel Respondent, the Honorable Anthony Capizzi, “to conduct an amenability hearing of Relator and issue a decision in accordance with the opinion from the Second District Court of Appeals in Appellate Case No. 26383.” The procedendo action is premised on D.H.’s challenge to the sufficiency of proceedings before Judge Capizzi in the Juvenile Division of the Montgomery County Court of Common Pleas (“Juvenile Court”). D.H. asserts that, on remand, Judge Capizzi should have taken additional steps during

bindover proceedings in which D.H. was transferred to the General Division of the Montgomery County Court of Common Pleas (the “Adult Court”) for the second time.

{¶ 2} On May 6, 2016, Respondent filed an amended motion to dismiss pursuant to Civ.R. 12(B)(6). He asserts that D.H. has failed to state a claim and cannot satisfy any of the prongs of the test for a writ of procedendo. D.H. filed a response to the motion on June 29, 2016. He challenges particular facets of the bindover proceedings and argues that fundamental fairness requires that he have received notice and the opportunity to be heard prior to Judge Capizzi’s second bindover order.

{¶ 3} For the following reasons, we sustain the motion to dismiss.

Procedural History

{¶ 4} Delinquency proceedings against D.H. began in the Juvenile Court on April 8, 2014. On June 11, 2014, the Juvenile Court found D.H. not amenable to care or rehabilitation within the juvenile system and transferred him to the Adult Court for prosecution. D.H. ultimately pled no contest and was sentenced by the trial court on September 10, 2014.

{¶ 5} D.H. appealed. This court, concluding that the Juvenile Court had “failed to identify its reasoning for reaching its finding that D.H. could not be rehabilitated in the juvenile system sufficiently to permit us to conduct meaningful appellate review of its decision,” reversed:

[T]his cause is remanded to the juvenile court for re-consideration of its decision to relinquish jurisdiction, and to provide a more thorough explanation as to why D.H. can, or cannot, be rehabilitated in the juvenile system, with sufficient findings of fact and reasoning to permit us to review

that decision under an abuse-of-discretion standard of appellate review, should either party choose to appeal.

State v. D.H., 2d Dist. Montgomery No. 26383, 2015-Ohio-3259, ¶ 2, 19, *appeal not accepted*, 144 Ohio St.3d 1477, 2016-Ohio-467, 45 N.E.3d 244.

{¶ 6} On March 9, 2016, Judge Capizzi issued an entry entitled “On Remand Motion to Relinquish Jurisdiction and Transfer to Juvenile Division,” again transferring D.H. to the Adult Court. This procedendo action was filed thereafter, on March 31, 2016.

Standard for a Motion to Dismiss

{¶ 7} Original actions in procedendo “ordinarily proceed as civil actions under the Ohio Rules of Civil Procedure.” Loc.App.R. 8(A). Respondent [has] moved to dismiss this procedendo 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).

{¶ 8} “The applicable Civ.R. 12(B)(6) standard is whether, after presuming the truth of all material factual allegations in the complaint and all reasonable inferences therefrom in relators’ favor, it appears beyond doubt that relators can prove no set of facts warranting relief.” *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 20, citing *Taylor v. London*, 88 Ohio St.3d 137, 139, 723 N.E.2d 1089 (2000). 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.” *Id.* 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 Procedendo

{¶ 9} A writ of procedendo is an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 45, 553 N.E.2d 1354 (1990). It is intended to remedy a court's "refusal or failure to timely dispose of a pending action." *State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 2004-Ohio-6567, 819 N.E.2d 703, ¶ 16 (internal citations omitted). The writ tells the lower court to rule on a motion, but does not tell that court how to rule. *State ex rel. Morgan v. Fais*, 10th Dist. Franklin No. 14AP-910, 2015-Ohio-1514, ¶ 4. "It is well-settled that the writ of procedendo will not issue for the purpose of controlling or interfering with ordinary court procedure." *State, ex rel. Utley v. Abruzzo*, 17 Ohio St.3d 203, 204, 478 N.E.2d 789 (1985).

{¶ 10} To be entitled to a writ of procedendo, D.H. must show "a clear legal right to require the 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 the law." *State ex rel. Brown v. Logan*, 138 Ohio St.3d 286, 2014-Ohio-769, 6 N.E.3d 42, ¶ 13. "An appeal is an adequate remedy in the ordinary course of law that precludes an action for procedendo." *State ex rel. Elkins v. Fais*, 143 Ohio St.3d 366, 2015-Ohio-2873, 37 N.E.3d 1229, ¶ 8 (internal citations and quotation omitted).

{¶ 11} Judge Capizzi moves to dismiss on all three prongs. We conclude that the complaint fails to state a claim in procedendo and must be dismissed.

D.H. has Failed to State a Claim in Procedendo

{¶ 12} As discussed above, procedendo relief is narrow. D.H. cannot obtain relief in procedendo on the facts presented, for several reasons. First, there is no matter pending before Judge Capizzi. A writ of procedendo is, by definition, an order to a lower court to decide a matter pending before it. *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462, 650 N.E.2d 899 (1995). Here, the complaint asserts that Judge Capizzi has already decided the matter by transferring D.H. to Adult Court. As there is no matter pending, there is no matter for us to compel Judge Capizzi to decide.

{¶ 13} Second, we cannot compel action where there is no jurisdiction to act. Here, Judge Capizzi lacks jurisdiction to proceed on any matter with respect to the transferred case as a matter of law. After a “case is transferred for criminal prosecution pursuant to section 2152.12 of the Revised Code, * * * the juvenile court does not have jurisdiction to hear or determine the case subsequent to the transfer.” R.C. 2151.23(H). “The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint, and, upon the transfer, all further proceedings pertaining to the act charged shall be discontinued in the juvenile court, and the case then shall be within the jurisdiction of the court to which it is transferred * * *.” R.C. 2152.12(I). We conclude that Judge Capizzi does not have a clear legal duty to proceed where he has no jurisdiction to proceed.

{¶ 14} Third, D.H. has asked this court to control Judge Capizzi’s actions with respect to how he conducted the bindover proceedings. A writ of procedendo cannot control *how* a lower court acts; it simply orders a court to act. *State, ex rel. Utley v.*

Abruzzo, 17 Ohio St.3d 203, 204, 478 N.E.2d 789 (1985). Here, D.H. asks us to compel Judge Capizzi to act in a particular way by conducting additional proceedings and affording to him specifically-identified due process rights. Such relief is unavailable in procedendo. See *Glass v. Terry*, 8th Dist. Cuyahoga No. 91704, 2008-Ohio-3347, ¶ 3-4 (denying procedendo relief where asked to compel respondent to take a particular action on a motion). In *Glass*, the court held that “[t]o the extent that [relator] is actually arguing that the judge must rule ‘correctly’ on the motion * * *, his argument is meritless.” *Id.* at ¶ 4. “Such use of procedendo is an attempt to control the discretion of the judge in ruling on a motion or handling a case, and procedendo may not be used for that purpose.” *Id.*

Conclusion

{¶ 15} We conclude that D.H. has failed to state a claim in procedendo. Civ.R. 12(B)(6). He cannot obtain, and we cannot order, the relief he is seeking by way of a writ of procedendo, which only lies to compel a lower court to act on a pending matter where there has been undue delay. Respondent’s motion to dismiss is therefore well-taken and is SUSTAINED. This matter is DISMISSED. The motion for a pre-hearing conference is OVERRULED as moot.

SO ORDERED.

MARY E. DONOVAN, Presiding Judge

JEFFREY E. FROELICH, Judge

JEFFREY M. WELBAUM, 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).

MARY E. DONOVAN, Presiding Judge

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