

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL
MARK LUSHER

Relator

-VS-

HON. BRENT ROBINSON, JUDGE

Respondent

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 15CA60

O P I N I O N

CHARACTER OF PROCEEDING:

Writ of Procedendo

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

March 31, 2016

APPEARANCES:

Relator

Respondent

MARK LUSHER A560953
Richland Correctional Inst.
P.O. Box 8107
Mansfield, Ohio 44901

MELISSA A. ANGST
Assistant Richland County Prosecutor
38 South Park Street, 2nd Floor
Mansfield, Ohio 44902

Hoffman, P.J.

{¶1} Relator, Mark Lusher, has filed a complaint for writ of procedendo requesting this Court order Respondent to issue a final, appealable order. Respondent has filed a motion to dismiss for failure to state a claim upon which relief may be granted.

{¶2} Relator entered a guilty plea in the Richland County Court of Common Pleas to counts of aggravated vehicular homicide, aggravated vehicular assault, and OVI. He received a total sentence of eight years in prison.

{¶3} Relator's sole argument is that his sentence is void because Respondent failed to advise him orally in the plea colloquy that he was waiving his constitutional rights by entering a guilty plea. In short, Relator contends the trial court did not comply with Crim.R. 11 when taking Relator's plea. It is his contention Respondent has never fulfilled his legal duty to proceed to judgment.

{¶4} "To be entitled to a writ of procedendo, [a relator] 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. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462, 650 N.E.2d 899 (1995)." *State ex rel. Elkins v. Fais*, 143 Ohio St.3d 366, 367, 2015-Ohio-2873, 37 N.E.3d 1229, 1230, ¶¶ 7-8 (2015).

{¶5} "An appeal is an adequate remedy in the ordinary course of law that precludes an action for * * * procedendo." *State ex rel. Ward v. Reed*, 141 Ohio St.3d 50, 2014-Ohio-4512, 21 N.E.3d 303, ¶ 12, citing *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 250, 673 N.E.2d 1281 (1997), and *State ex rel. Sevayega v. McMonagle*, 122 Ohio St.3d 54, 2009-Ohio-2367, 907 N.E.2d 1180, ¶ 1." *Id.*

{¶6} In *Smith v. State*, the Eleventh District found an adequate remedy at law existed where a petitioner in a habeas corpus case claimed he was entitled to immediate release from prison because the plea was void due to the trial court's alleged failure to comply with Crim.R. 11. *Smith v. State*, 11th Dist. Ashtabula No. 2009-A-0019, 2009-Ohio-3940. The Court held, "[P]etitioner could have contested the propriety of the procedure during the plea hearing in a direct appeal or in a motion to withdraw his guilty plea." *Id.* at paragraph 14.

{¶7} While Relator in this matter has used procedendo rather than habeas corpus to bring the issue before us, we find he has or had an adequate remedy at law by way of direct appeal or motion to withdraw his guilty plea to raise any potential non-compliance with Crim.R. 11. As in a habeas corpus action, the existence of an adequate remedy at law bars the issuance of a writ of procedendo.

{¶8} Because Relator has failed to state a claim upon which relief may be granted due to the existence of an adequate remedy at law, we dismiss the complaint.

By: Hoffman, P.J.

Wise, J. and

Baldwin, J. concur