[Cite as *State ex rel. Cornett v. Mayberry*, 2012-Ohio-3727.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio ex rel. Zachary Cornett — Court of Appeals No. WD-12-040

Relator

v.

Hon. Alan R. Mayberry — **DECISION AND JUDGMENT**

Respondent — Decided: August 13, 2012

* * * * *

William V. Stephenson, for relator.

* * * * *

YARBROUGH, J.

{¶1} This matter is before the court on relator Zachary Cornett's petition for a writ of mandamus and accompanying request for a waiver of the filing fee. Because Cornett has a plain and adequate remedy at law, we sua sponte dismiss his petition.

{¶2} The facts as set forth in the petition are as follows. Between November 30, 2010, and December 5, 2010, Cornett stole merchandise from Walmart totaling $749.48.

These acts constituted theft in violation of R.C. 2913.02(A)(1).[1] He was arraigned on May 20, 2011, and entered an initial plea of not guilty. The case was assigned to respondent, Hon. Alan R. Mayberry. On January 18, 2012, Cornett changed his plea to no contest, and was found guilty by the trial court. The court ordered a pre-sentence investigation, for which Cornett failed to appear. Cornett also failed to appear at the scheduled sentencing hearing. Cornett asserts that he did not appear for those matters because he had recently begun a union job and was on strict probation with the employer, and therefore could not miss work. A warrant was issued, and Cornett was subsequently arrested. A bond hearing was held on July 20, 2012, and bond was set at $35,000. At the hearing, counsel requested that sentencing be set out so that a pre-sentence investigation report could be completed. The trial court denied the request and scheduled sentencing for July 27, 2012.

{¶3} At the center of this matter is a dispute over whether Cornett should be sentenced as if this offense were a misdemeanor or a felony. Cornett argues that the trial court has a clear legal duty to sentence him as if this offense was a misdemeanor. In support, Cornett argues that at the time he committed the offense, R.C. 2913.02(B)(2) stated,

> Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a

[1] "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent."

misdemeanor of the first degree. If the value of the property or services stolen is *five hundred dollars or more* and is less than five thousand dollars * * * a violation of this section is theft, a felony of the fifth degree. (Emphasis added.)

However, R.C. 2913.02(B)(2) was amended effective September 30, 2011, raising the felony threshold from five hundred dollars to one thousand dollars. Thus, Cornett's actions in stealing approximately $750 in merchandise, which constituted a felony in December 2010, constituted a misdemeanor at the time he entered his no contest plea and was found guilty in January 2012.

{¶4} Relying on R.C. 1.58(B), Cornett concludes that only misdemeanor penalties could be applied at his sentencing. R.C. 1.58 provides,

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

* * *

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

* * *

(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture,

> or punishment, if not already imposed, shall be imposed according to the statute as amended.

{¶5} Cornett contends that because the punishment for his violation of R.C. 2913.02(A)(1) was reduced from felony-level sanctions to misdemeanor-level sanctions by the September 2011 amendment, and because his punishment had not been imposed prior to the September 2011 amendment, the trial court is obligated to sentence him as if it were a misdemeanor.

{¶6} As further support for his argument, Cornett cites to *State v. Collier*, 22 Ohio App.3d 25, 488 N.E.2d 887 (3d Dist.1984). In that case, the defendant committed two thefts in violation of R.C. 2913.02. Prior to the defendant's trial, but after the commission of the offense, R.C. 2913.02 was amended to raise the monetary threshold for a felony from $150 to $300. The defendant argued that application of the amendment precluded the court from giving him felony sentences. The Third District agreed. Examining R.C. 2913.02, the court concluded that at all times, and despite the amendment, the definition of the offense of theft, and accordingly its violation, remained the same. Consequently, the court reasoned that the amendment

> relates only to penalty and since it operated, when the value of the property stolen fell between these two limitations, to reduce the penalty from that prescribed for a felony to that prescribed for a misdemeanor, the amendment comes within the provisions of R.C. 1.58(B), requiring, in the

> instant case, that the amendment be applied, and that the penalty be imposed according to the amendment. See, also, *State v. Burton* (1983), 11 Ohio App.3d 261, 464 N.E.2d 186 [(10th Dist.)]. *Collier*, 22 Ohio App.3d at 27.

Therefore, the Third District reversed and vacated the sentences for the theft convictions, and "remanded to the trial court for resentencing on said convictions based on the degree of the crimes being misdemeanors as set forth in R.C. 2913.02(B), as amended." *Id.* at 31.

{¶7} Nevertheless, despite Cornett's arguments, respondent disagreed. At the plea hearing, the trial court indicated that it viewed Cornett's actions to constitute a felony. In the order following the plea hearing, the court stated, "**IT IS THEREFORE ORDERED AND JUDGMENT RENDERED** that the Defendant is convicted of the offense of Count 1: Theft, a violation of R.C. 2913.02(A)(1), a felony of the fifth degree."

{¶8} With sentencing for the theft conviction set for July 27, 2012, Cornett filed this petition for a writ of mandamus on the afternoon of July 26, 2012, seeking to have us order respondent to impose a misdemeanor sentence. Cornett also simultaneously filed a request for waiver of the filing fee for his petition.

{¶9} To be entitled to a writ of mandamus, a relator must demonstrate (1) a clear legal right to the relief requested, (2) that respondent is under a clear legal duty to perform the act requested, and (3) that the relator has no plain and adequate remedy at

law. *State ex rel. Akron Paint & Varnish, Inc. v. Gullotta*, 131 Ohio St.3d 231, 2012-Ohio-542, 963 N.E.2d 1266, ¶ 11.

{¶10} Without expressing our opinion on the propriety of Cornett's sentencing arguments, we hold that this action in mandamus cannot lie because Cornett has an adequate remedy at law—his appeal. "[M]andamus is not a substitute for appeal. Thus, mandamus is not a vehicle by which to correct errors or procedural irregularities in the course of a case." (Internal citations omitted.) *State ex rel. Nickelson v. Mayberry*, 6th Dist. No. WD-11-039, 2011-Ohio-4494, ¶ 6.

{¶11} Cornett argues that an appeal is not an adequate remedy in this case because he "will have completed his *prison* sentence by the time an appeal is filed, briefed, answered, argued, and decided." *See State ex rel. Kingsley v. State Emp. Relations Bd.*, 130 Ohio St.3d 333, 2011-Ohio-5519, 958 N.E.2d 169, ¶ 13 ("The alternate remedy must be complete, beneficial, and speedy in order to be an adequate remedy at law"). However, because Cornett can seek a suspension of the execution of his sentence under App.R. 8, we find this argument to be unpersuasive. Further, for purposes of this decision, we do not consider Cornett's presumption that his application for bail and suspension of sentence will be "problematic, given [his] prior criminal record," since at the time of the filing of his petition, the sentence has not been issued and no application for its suspension has been made.

{¶12} Therefore, finding that the requirements for a writ of mandamus have not been met, Cornett's petition is hereby dismissed.

{¶13} As a final matter, upon consideration of the materials attached to his request for a waiver of the filing fee, we hereby find his request well-taken and granted. It is therefore ordered that the filing fee for this petition for a writ of mandamus is waived.

Writ denied.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE