

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

State of Ohio, ex rel. James R. Eubank

Court of Appeals No. L-12-1143

Relator

v.

Judge Frederick McDonald

DECISION AND JUDGMENT

Respondent

Decided: August 15, 2012

* * * * *

James R. Eubank, relator.

Julia R. Bates, Lucas County Prosecuting Attorney, and
John A. Borell, Lucas county Assistant Prosecuting Attorney,
for respondent.

* * * * *

HANDWORK, J.

{¶1} Relator, James R. Eubank, has filed an application for a writ of mandamus, requesting that respondent, Judge Frederick McDonald, Lucas County Court of Common

Pleas, enter a corrected judgment as to his prior convictions, pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. Respondent has filed a motion to dismiss, asserting that the original judgment entry fully complied with Crim.R. 32(C) as required by *Baker*.

{¶2} For a writ of mandamus to issue, relator must demonstrate (1) that he has a clear legal right to the relief requested, (2) that respondent has a clear legal duty to perform the act requested, and (3) that relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225(1983). Mandamus lies to command the performance of an act only where specially enjoined by law as a duty arising from the office, trust or station of the respondent. *State ex rel. Van Curen v. Adult Parole Auth.*, 45 Ohio St.2d 298, 299, 345 N.E.2d 75 (1976).

{¶3} Neither mandamus nor procedendo, however, will compel the performance of a duty that has already been performed. See *State ex rel. Fontanella v. Kantos*, 117 Ohio St.3d 514, 2008-Ohio-1431, 885 N.E.2d 220, ¶ 6; *State ex rel. Howard v. Doneghy*, 102 Ohio St.3d 355, 2004-Ohio-3207, 810 N.E.2d 958, ¶ 6.

{¶4} All criminal defendants are entitled to a final appealable order. In order to be a final appealable order, a judgment of conviction under R.C. 2505.02 must set forth “(1) the fact of conviction, (2) the sentence, (3) the signature of the judge, and (4) entry on the

journal by the clerk of courts.” *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus, modifying *Baker, supra*.

{¶5} Relator was originally indicted on two counts of aggravated murder and two counts of aggravated arson. *See State v. Eubank*, 38 Ohio App.3d 141, 142, 528 N.E.2d 1294 (1987). On the first two counts, he was found guilty of, and sentences were imposed for, involuntary manslaughter, a lesser-included offense of aggravated murder; he was found guilty of aggravated arson on the third and fourth counts. *Id.* at 143. The trial court issued its judgment entry imposing sentence in July 1985. *Id.* at 142. Our review of that judgment entry indicates that it included all four of the required elements under *Lester*.

{¶6} In imposing sentences for each of the first two offenses for which relator was convicted, involuntary manslaughter, the trial court clearly referenced “as to the first count of the indictment” and “as to the second count of the indictment.” The words “lesser included” do not appear and are unnecessary as modifiers of the offense of involuntary manslaughter, since the judgment entry includes the fact of conviction for all counts in the indictment and the sentence for each. Therefore, relator has failed to establish that the trial court’s entry did not comply with Crim.R. 32(C) under *Lester, supra*, or that the court did not fulfill its legal duty to issue a final appealable judgment.

{¶7} Accordingly, respondent's motion to dismiss is well-taken and granted.

Relator's application for writ of mandamus is denied. Costs of this action are assessed to relator.

Writ denied.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
