

[Cite as *State ex rel. Waver v. Gallagher*, 2006-Ohio-1743.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 87495

STATE OF OHIO, EX REL.,	:	ORIGINAL ACTION
JAMES WAVER	:	
	:	JOURNAL ENTRY
Relator	:	AND
	:	OPINION
vs.	:	
	:	
EILEEN A. GALLAGHER, JUDGE	:	
	:	
Respondent	:	

DATE OF JOURNALIZATION: APRIL 3, 2006

CHARACTER OF PROCEEDINGS: WRIT OF MANDAMUS

JUDGMENT: Writ Dismissed.  
Motion No. 379714  
Order No. 381947

APPEARANCES:

For Relator: JAMES WAVER, pro se  
Inmate No. 340-516  
Mansfield Correctional  
Institution  
P.O. Box 788  
Mansfield, Ohio 44901

For Respondent: WILLIAM D. MASON  
Cuyahoga County Prosecutor  
BY: DIANE SMILANICK  
Assistant County Prosecutor  
Justice Center - 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

JUDGE ANTHONY O. CALABRESE:

{¶ 1} Relator, James Waver, is the defendant in *State v. Waver*, Cuyahoga County Court of Common Pleas Case No. CR-351032. Waver argues that the judgment of conviction against him on two counts of rape and one count of felonious assault is void.

{¶ 2} Waver contends that the grand jury considered evidence of the charges in Case No. CR-351032 as the basis for the court's finding of guilt on the sexually violent predator specifications and a sexual motivation specification in the felonious assault count. In support of this contention, Waver cites *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, in which the Supreme Court held in the syllabus:

"Conviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in *R.C. 2971.01(H)(1)* if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment."

*Id.* at 107. Waver argues, therefore, that the judgment in Case No. CR-351032 is void and that he is entitled to relief in mandamus compelling respondent judge to vacate his conviction. See *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, 553 N.E.2d 650.

{¶ 3} Respondent has filed a motion to dismiss and argues that relief in mandamus is not appropriate.

The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914. Furthermore, mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 631 N.E.2d 119; *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 295 N.E.2d 659; and *State ex rel. Pressley v. Industrial Commission of Ohio* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631, Paragraph Three of the Syllabus. Thus, mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Tommie Jerningham v. Judge Patricia Gaughan* (Sept. 26, 1994) Cuyahoga App. No. 67787. Furthermore, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997 Ohio 245, 676 N.E.2d 108 and *State ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga County* (1990), 56 Ohio St.3d 33, 564 N.E.2d 86."

*State ex rel. Smith v. Fuerst*, Cuyahoga App. No. 86118, 2005-Ohio-3829, at ¶4.

{¶4} Although Waver wishes to characterize the holding in *State v. Smith*, supra, as indicating that the judgment of conviction was "void," the Supreme Court held that "the trial court erred in relying on the jury's convictions of the underlying rape and kidnaping charges to prove the sexually-violent-predator specification alleged in the same indictment." *Id.* at ¶33. (Emphasis added.) Appeal is, therefore, the remedy for asserting Waver's challenge. As a consequence, relief in mandamus is not

appropriate.

{¶ 5} Accordingly, respondent's motion to dismiss is granted. Relator to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Writ dismissed.

ANTHONY O. CALABRESE, JR.  
JUDGE

PATRICIA A. BLACKMON, P.J., CONCURS

KENNETH A. ROCCO, J., CONCURS