

[Cite as *Roberts v. Gallagher*, 2007-Ohio-2628.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89686

DAVID W. ROBERTS

RELATOR

VS.

EILEEN T. GALLAGHER, JUDGE

RESPONDENT

**JUDGMENT:
PETITION DENIED**

WRIT OF PROCEDENDO
MOTION NOS. 396428 and 396895
ORDER NO. 396910

RELEASE DATE: May 29, 2007

FOR RELATOR:

David W. Roberts, pro se
Inmate No. 511-605
Lake Erie Correctional Inst.
P.O. Box 8000
Conneaut, Ohio 44030

ATTORNEY FOR RESPONDENT:

William D. Mason
Cuyahoga County Prosecutor
By: Diane Smilanick
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ADMINISTRATIVE JUDGE FRANK D. CELEBREZZE, JR.:

{¶1} On April 10, 2007, David W. Roberts commenced this procedendo action against Judge Eileen T. Gallagher (the judge) to compel her to issue findings of fact and conclusions of law pertaining to Roberts' motion to vacate conviction, which was filed on February 21, 2007, in the underlying matter of *State v. Roberts*, Cuyahoga County Court of Common Pleas, Case Nos. CR-480193 and CR-483914. On May 8, 2007, the judge, through the Cuyahoga County Prosecutor, filed her answer, and on May 8, 2007 and May 21, 2007, filed

a motion for summary judgment. For the following reasons, we grant the motion for summary judgment filed on May 21, 2007.

{¶2} Initially we note that Roberts' application for a writ of procedendo should be denied because it is improperly captioned. The application for a writ "must be by petition, in the name of the state on the relation of the person applying." The failure to caption a writ action properly constitutes sufficient grounds for dismissing the petition. *Allen v. Court of Common Pleas of Allen Cty.* (1962), 173 Ohio St. 226, 181 N.E.2d 270; *Dunning v. Judge Cleary* (Jan. 11, 2001), Cuyahoga App. No. 78763.

{¶3} Notwithstanding the above, attached to the judge's motion for summary judgment is a copy of the court's findings of facts and conclusions of law pertaining to the subject motion, which was journalized on May 16, 2007. Thus, Roberts' request for a writ of procedendo is moot. *State ex rel. Gantt v. Coleman* (1983), 6 Ohio St.3d 5, 450 N.E.2d 1163; *State ex rel. Jerningham v. Cuyahoga Cty. Court of Common Pleas* (1996), 74 Ohio St.3d 278, 658 N.E.2d 723.

{¶4} Accordingly, we deny the application for a writ of procedendo. Roberts to bear costs. It is further ordered that the clerk shall serve upon all parties notice of this judgment and date of entry pursuant to Civ.R. 58(B).

Petition denied.

FRANK D. CELEBREZZE, JR.,
ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., and
KENNETH A. ROCCO, J.. CONCUR