[Cite as *State ex rel. Richardson v. Suster*, 2011-Ohio-1753.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95579

**STATE OF OHIO, EX REL.,
ALLEN RICHARDSON**

RELATOR

vs.

JUDGE RONALD SUSTER

RESPONDENT

**JUDGMENT:
COMPLAINT DISMISSED IN PART;
WRIT GRANTED**

Writ of Procedendo
Motion No. 437567
Order No. 439024

RELEASE DATE: April 1, 2011

FOR RELATOR

Allen Richardson, Pro se
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ATTORNEYS FOR APPELLEE

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BY: James E. Moss
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LARRY A. JONES, J.:

{¶ 1} On August 20, 2010, the petitioner, Allen Richardson, commenced this procedendo action against the respondent, Judge Ronald Suster, to compel the judge to hold a de novo sentencing hearing in the underlying case, *State v. Richardson*, Cuyahoga County Common Pleas Court Case No. CR-461998, or to rule on his outstanding motion for a de novo sentencing hearing. Richardson complains that during the sentencing hearing, the respondent judge did not properly inform him of postrelease control, specifically that if he violates postrelease control, the parole board may impose a prison term, as part of the sentence, of up to one-half of the originally imposed sentence. Additionally, Richardson asserts that R.C.

2967.28(B)(1) requires a mandatory five-year term of postrelease control for first-degree felonies such as involuntary manslaughter and that the trial judge did not explicitly impose such a term. Richardson maintains that because the respondent did not comply with the postrelease control statutes, his sentence is void, and he is entitled to a full, new sentencing hearing.

{¶ 2} On September 16, 2010, the respondent judge, through the Cuyahoga County Prosecutor, moved to dismiss because Richardson had an adequate remedy at law. On September 29, 2010, Richardson filed a brief in opposition. For the following reasons, this court grants the motion to dismiss in part, and grants the writ of procedendo and orders the respondent judge to rule on the outstanding motion for a de novo sentencing hearing.

{¶ 3} In the underlying case, on July 6, 2005, Richardson pleaded guilty to involuntary manslaughter and felonious assault, both with a three-year firearm specification. The trial judge sentenced him to 18 years in prison. The sentencing entry also included the following language: "Post release control is part of this prison sentence for the maximum time allowed for the above felony(s) under R.C. 2967.28." Richardson appealed, and this court affirmed. *State v. Richardson*, Cuyahoga App. No. 87886, 2006-Ohio-8. Richardson then filed an App.R. 26(B) application to reopen, which this court denied. *State v. Richardson*, Cuyahoga App. No. 87886, 2008-Ohio-2360.

{¶ 4} In July 2009, Richardson filed a motion to withdraw his guilty plea or in the alternative a motion for resentencing. The trial judge denied that motion two months later.

Richardson appealed the ruling, but this court dismissed for failure to file the record. *State v. Richardson* (Dec. 11, 2009), Cuyahoga App. No. 94090. On March 4, 2010, Richardson filed a motion for de novo sentencing hearing pursuant to R.C. 2929.191(A)(1) to correct a void sentence. The respondent judge has not ruled on this motion. Richardson then commenced this procedendo action.

{¶ 5} The writ of procedendo is merely an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 553 N.E.2d 1354. Procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Watkins v. Eighth Dist. Court of Appeals*, 82 Ohio St.3d 532, 1998-Ohio-190, 696 N.E.2d 1079. However, the writ will not issue to control what the judgment should be, nor will it issue for the purpose of controlling or interfering with ordinary court procedure. Thus, procedendo will not lie to control the exercise of judicial discretion. Moreover, it will not issue if the petitioner has or had an adequate remedy at law. *State ex rel. Utley v. Abruzzo* (1985), 17 Ohio St.3d 202, 478 N.E.2d 789; *State ex rel. Hansen v. Reed* (1992), 63 Ohio St.3d 597, 589 N.E.2d 1324; and *Howard v. Cuyahoga Cty. Probate Court,* Cuyahoga App. No. 84702, 2004-Ohio-4621 (petitioner failed to use an adequate remedy at law).

{¶ 6} Richardson's claim to compel a new sentencing hearing directly is not well founded. The Supreme Court of Ohio has clarified that incomplete references or explanations of postrelease control are sentencing errors that are remedied by appeal and not

by extraordinary writ. *State ex rel. Pruitt v. Cuyahoga Cty. Court of Common Pleas*, 125 Ohio St.3d 402, 2010-Ohio-1808, 928 N.E.2d 722. The *Pruitt* court held that because the sentencing entry sufficiently included language that postrelease control was part of the sentence, Pruitt had sufficient notice to raise any claimed errors on appeal rather than by a writ. In *State ex rel. Thomas v. DeWine*, Slip Opinion No. 2010-Ohio-4984, the Supreme Court of Ohio ruled that an extraordinary writ would not lie to compel a resentencing in order to provide the defendant with oral notification at his sentencing of the mandatory five-year postrelease control term. The Court found that the defendant had an adequate remedy by direct appeal to raise his claim that he did not receive proper notification about postrelease control. See, also, *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78; *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas,* 127 Ohio St.3d 29, 2010-Ohio-4728, 936 N.E. 2d 41; and *Patterson v. Ohio Adult Parole Auth.*, Richland App. No. 08-CA-33, 2008-Ohio-2620.

{¶ 7} Very recently, the Supreme Court of Ohio revisited the issues involved in imposing proper postrelease controls. In *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238, the court modified *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, to hold that if postrelease controls are not properly imposed, then only that portion of the sentence dealing with postrelease control is void and that the new sentencing hearing is limited to proper imposition of postrelease control. Id. at paragraph two of the syllabus.

{¶ 8} In *State ex rel. Tucker v. Forchione*, Slip Opinion No. 2010-Ohio-6291, ¶1, the

Supreme Court of Ohio ruled that because Tucker's February 1999 sentencing entry "included language that postrelease control was part of his sentence so as to afford him notice to raise any claimed error on appeal rather than by extraordinary writ," Tucker was not entitled to mandamus relief to correct postrelease control sentencing errors. Rather, he had an adequate remedy at law through appeal. *Tucker* is particularly instructive because the sentencing entry occurred before the effective date of R.C. 2929.191. Thus, the Supreme Court of Ohio has rejected the extraordinary writs as remedies for correcting the improper imposition of postrelease controls, regardless of when the case occurred.

{¶ 9} Richardson's reliance on *State ex rel. Carnail v. McCormick,* 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, is misplaced. In *Carnail*, the respondent judge did not sentence Carnail to postrelease control and did not make any reference to it in the sentencing journal entry because he thought it was inapplicable for the sentence of life imprisonment for rape. In *Carnail*, the Supreme Court of Ohio ruled that postrelease control must be included for life sentences for rape. Because there had been no reference whatsoever to postrelease control, an element of the sentence was missing and rendered the sentence void. Thus, the writs of procedendo and mandamus should issue to correct the void sentence. In the present case, the sentencing journal entry imposed postrelease control. *Pruitt, Thomas, Davis*, and their progeny stand for the proposition that if reference is made to postrelease control, then appeal is the proper remedy. Thus, the present case comes within the rule of the latter cases.

{¶ 10} However, Richardson's claim to compel a ruling on his March 4, 2010 motion for a new sentencing hearing is well founded. The respondent judge has failed to rule on this motion for more than a year, and Richardson is entitled to a ruling on the motion. *Fortson v. Sutula* (July 1, 2004), Cuyahoga App. No. 84676; *State ex rel. Pilz v. Corrigan*, Cuyahoga App. No. 81973, 2003-Ohio-35; and *State ex rel. McJunkins v. McCormick*, Cuyahoga App. No. 83443, 2003-Ohio-5258.

{¶ 11} Accordingly, this court grants the respondent's motion to dismiss as it applies to Richardson's claim to compel a new sentencing hearing directly. This court denies the motion to dismiss as it applies to Richardson's claim to rule on his March 4, 2010 motion for a de novo hearing. The court grants the application for a writ of procedendo and issues the writ: The respondent is directed to rule on the March 4, 2010 motion for a de novo sentencing hearing forthwith. Each side to bear its own costs. This court further orders the clerk to serve upon all parties notice of this judgment and date of entry pursuant to Civ.R. 58(B).

Complaint dismissed in part and writ granted.

LARRY A. JONES, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
COLLEEN CONWAY COONEY, J., CONCUR