

[Cite as *State ex rel. Carey v. O'Donnell*, 2011-Ohio-946.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96227

STATE OF OHIO, EX REL., CALIEL CAREY

RESPONDENT

VS.

JUDGE JOHN P. O'DONNELL

RELATOR

JUDGMENT:
WRIT DENIED

Writ of Procedendo
Motion No. 441179
Order No. 442162

RELEASE DATE: March 2, 2011

FOR RELATOR

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JAMES J. SWEENEY, J.:

{¶ 1} On December 28, 2010, the relator, Caliell Carey, commenced this procedendo action against the respondent, Judge John P. O'Donnell, to compel the judge to sentence him in the underlying case, *State of Ohio v. Caliell Carey*, Cuyahoga County Common Pleas Court Case No. CR-472579, because the judge did not properly impose postrelease control. On January 20, 2011, the respondent, through the Cuyahoga County Prosecutor, moved for summary judgment on the grounds of procedural deficiencies and adequate remedy at law. Carey has not opposed this motion. For the following reasons, this court grants the respondent's motion for summary judgment and denies the application for a writ of procedendo.

{¶ 2} In the underlying case on June 22, 2006, the trial court sentenced Carey to 12 years for two counts of aggravated robbery both with three-year firearm specifications. The sentence included: “Post release control is part of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28.” The sentence did not include the further disclosure that violation of postrelease control could result in Carey returning to prison for up to one-half of the original sentence. Carey argues that under *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961; *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958; and *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, the failure to impose postrelease controls properly renders the entire sentence void and that procedendo should issue to compel a complete de novo sentencing.

{¶ 3} 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 County Sheriff's Department* (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 District 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).

{¶ 4} The Supreme Court of Ohio has clarified that incomplete references or explanations of postrelease control are sentencing errors which 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, held that because the sentencing entry sufficiently included language that postrelease control was part of the sentence, Pruitt has sufficient notice to raise any claimed errors on appeal rather than by a writ. In *State ex rel. Thomas v. DeWine*, 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 continued 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 Authority*, Richland App. No. 08-CA-33, 2008-Ohio-2620.

{¶ 5} Very recently, the Supreme Court of Ohio revisited the issues involved in imposing proper postrelease controls. In *State v. Fischer*, 2010-Ohio-6238, the court modified *Bezak* 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. Paragraph two of the syllabus.

{¶ 6} In *State ex rel. Tucker v. Forchione*, 2010-Ohio-6291, ¶11, 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.

{¶ 7} Accordingly, this court grants the respondent’s motion for summary judgment and denies Carey’s application for a writ of procedendo. Costs assessed against relator. 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).

Writ denied.

JAMES J. SWEENEY, JUDGE

PATRICIA ANN BLACKMON, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR