

[Cite as *State ex rel. Falkenstein v. Fuerst*, 2011-Ohio-15.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96187

**STATE OF OHIO, EX REL.
DONALD FALKENSTEIN**

RELATOR

vs.

JUDGE NANCY FUERST, ET AL.

RESPONDENTS

**JUDGMENT:
COMPLAINT DISMISSED**

Writ of Procedendo
Motion No. 440243
Order No. 440493

RELEASE DATE: January 5, 2011

FOR RELATOR

Donald Falkenstein, pro se
Inmate No. 451-824
Richland Correctional Institution
1001 Olivesburg Road
Mansfield, Ohio 44901

ATTORNEY FOR RESPONDENTS

William D. Mason
Cuyahoga County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Relator, Donald Falkenstein, is the defendant in *State v. Falkenstein*, Cuyahoga Cty. Court of Common Pleas Case No. CR-434255, which has been assigned to respondent judge. On October 15, 2010, Falkenstein filed a motion to set aside/vacate or in the alternate resentencing of an otherwise void sentence (“motion to vacate”). On December 20, 2010, Falkenstein filed this action in procedendo to compel respondents to dispose of his motion.

{¶ 2} Sup.R. 40(A)(3) provides, in part: “All motions shall be ruled upon within one hundred twenty days from the date the motion was filed * * * .”

It is well-established that the filing of an action to compel a judge to rule on a motion fewer than 120 days after the filing of the motion in the underlying case is premature and relief in procedendo is not appropriate. See, e.g., *State ex rel. Huffman v. Ambrose*, Cuyahoga App. No. 95546, 2010-Ohio-5376, ¶7. Fewer than 70 days elapsed between Falkenstein's filing of the motion to vacate and his filing of this action. Clearly, this action is not ripe.

{¶ 3} Additionally, Falkenstein avers in his affidavit in support of his complaint that "the foregoing complaint in procedendo is correct to the best of my knowledge * * * ." This court has held previously that similar language was insufficient to comply with the requirement that the relator support the complaint with an affidavit. "It is well-established that a conclusory statement in an affidavit does not satisfy the requirement in Loc.App.R. 45(B)(1)(a) that the complaint in an original action must be supported by an affidavit specifying the details of the claim. As a consequence, relator's failure to comply with Loc.App.R. 45(B)(1)(a) provides an additional basis for denying relief. See, e.g., *State ex rel. Stockwell v. Saffold*, Cuyahoga App. No. 93680, 2009-Ohio-4884." *State ex rel. Hernandez v. Sutula*, Cuyahoga App. No. 94983, 2010-Ohio-2901, ¶3.

{¶ 4} Accordingly, we dismiss this action sua sponte. 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).

Complaint dismissed.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR