

[Cite as *State ex rel. Davis v. Cuyahoga Cty. Common Pleas*, 2016-Ohio-4709.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104033

**STATE OF OHIO, EX REL.
DWAYNE DAVIS**

RELATOR

VS.

CUYAHOGA COUNTY COMMON PLEAS, ET AL.

RESPONDENTS

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion No. 493646
Order No. 497014

RELEASE DATE: June 27, 2016

FOR RELATOR

Dwayne Davis, pro se
Inmate No. 644653
501 Thompson Road
Conneaut, Ohio 44030

ATTORNEYS FOR RESPONDENT

Timothy J. McGinty
Cuyahoga County Prosecutor
By: James E. Moss
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MELODY J. STEWART, J.:

{¶1} Relator, Dwayne Davis, commenced this mandamus action against the respondent, Judge Kathleen Ann Sutula, to compel her to rule on four motions that he filed in *State v. Davis*, Cuyahoga C.P. No. CR-13-574008-A. Respondent has moved for summary judgment, which Davis has not opposed. For the following reasons, this court grants the summary judgment motion and denies the petition for a writ of mandamus.

{¶2} According to the evidence presented, Davis was arrested on April 30, 2013. He was indicted on May 8, 2013, and was assigned counsel at the arraignment on May 13, 2013. While represented by counsel, Davis filed several motions, pro se, including the following: a motion for disclosure of favorable evidence filed on May 28, 2013; a demand for counsel to reveal evidence material to defendant prior to trial filed on May 28, 2013; and a motion to dismiss filed on July 30, 2013. Davis entered a guilty plea on September 3, 2014, and was sentenced on October 3, 2014. At both hearings, Davis was represented by counsel.

{¶3} On December 4, 2014, Davis filed a motion to withdraw his guilty plea.

{¶4} On March 12, 2015, Davis was granted leave to file a delayed appeal and was appointed counsel who represented him in *State v. Davis*, 8th Dist. Cuyahoga No. 102639, 2015-Ohio-4501. The trial court's judgment was affirmed on October 29, 2015. *Id.*

{¶15} On February 10, 2016, the trial court denied Davis's motion to withdraw his guilty plea. Davis's appeal of that decision is pending in *State v. Davis*, 8th Dist. Cuyahoga No. 104149.

{¶16} 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*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

Mandamus is not a substitute for appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973); and *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerneinghan v. Gaughan*, 8th Dist. Cuyahoga No. 67787, 1994 Ohio App. LEXIS 6227 (Sept. 26, 1994). Mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977).

{¶17} A defendant does not have a right to hybrid representation and, with a limited exception, a trial court may not entertain pro se motions filed while a defendant is represented by counsel. *Turner v. McGinty*, 8th Dist. Cuyahoga No. 102074, 2015-Ohio-529, ¶ 3-4 (defendant was not entitled to rulings on pro se motions filed while

represented, however he was entitled to a ruling on a pro se motion for self-representation). Three of the four motions at issue in this action were filed by Davis while he was represented by counsel. None of them involved any request to proceed with self-representation. The trial court had no duty to rule on the motions filed on May 28, 2013, and July 30, 2013.

{¶8} The law further provides that any pretrial motions that have not been ruled upon are deemed to be presumptively overruled upon entry of final judgment. *State ex rel. Cos v. Marshall*, 81 Ohio St.3d 467, 692 N.E.2d 198 (1998); *see also Jarrett v. Cuyahoga Cty. Common Pleas Court*, 8th Dist. Cuyahoga No. 87232, 2006-Ohio-2220, ¶ 2, quoting *State v. Whitaker*, 8th Dist. Cuyahoga No. 83824, 2004-Ohio-5016, ¶ 32 (“It is well-settled that when a motion is not ruled on, it is deemed to be denied.”)

{¶9} The trial court has denied Davis’s post-judgment motion to withdraw his guilty plea, and therefore, his request to rule on it is moot. *State ex rel. Fontanella v. Kantos*, 117 Ohio St.3d 514, 2008-Ohio-1431, ¶ 6 (procedendo cannot compel the performance of a duty that has already been performed).

{¶10} Davis does not dispute that his petition is also subject to dismissal for pleading defects, including his failure to comply with R.C. 2969.25(A) and (C), which provides additional grounds for granting respondent’s motion.

{¶11} Respondent’s motion for summary judgment is granted, and the petition for a writ of mandamus is denied. Relator to pay costs. Costs waived. This court

directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B)._

{¶12} Writ denied.

MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, J., and
KATHLEEN ANN KEOUGH, P.J., CONCUR