

In The
Supreme Court of Ohio

STATE OF OHIO <i>ex rel.</i> PHILLIP BOLER,	:	
	:	
<i>Relator,</i>	:	Case No. 2024-0258
	:	
v.	:	Original Action in Mandamus
	:	
FOURTH DISTRICT COURT OF APPEALS,	:	
	:	
<i>Respondents.</i>	:	

MOTION TO DISMISS OF RESPONDENT FOURTH DISTRICT COURT OF APPEALS

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Pursuant to S.Ct.Prac.R. 12.04 and Civ.R. 12(B)(6), Respondent Fourth District Court of Appeals hereby moves this Courts to dismiss Relator’s petition for writs of prohibition and mandamus. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Relator Phillip Boler's complaint should be dismissed. Relator was convicted of murder and aggravated robbery more than a decade ago.¹ He appealed his convictions to the Respondent Fourth District Court of Appeals ("Fourth District"), which affirmed. He later filed a petition for post-conviction relief, which was denied. He appealed that decision to the Fourth District, which affirmed. He has now filed the instant action in an improper attempt to challenge these unsuccessful appeals more than a decade after his original appeal concluded. Through his request for writs of prohibition and mandamus, Relator seeks to re-write the Fourth District's discretionary ruling in his favor on his post-conviction relief petition. Therefore, Relator's complaint must be dismissed for multiple reasons. First, the Fourth District is not *sui juris* and, accordingly, is not a proper respondent to this action. Second, Relator ultimately seeks a different result than reached by the Fourth District by way of this action. But he cannot use mandamus to compel the courts to issue a different result. Third, Relator had an adequate remedy at law by way of discretionary appeal to this court, which forecloses any mandamus or prohibition relief. Finally, because the Fourth District had jurisdiction to consider Relator's most recent appeal, any prohibition claim necessarily fails. For these reasons, Relator's complaint should be dismissed.

II. BACKGROUND

Relator was indicted and subsequently convicted of one count of aggravated robbery and one count of murder in 2009. Compl. at p. 3; *see also State v. Boler*, 4th Dist. Athens No. 09CA24, 2010-Ohio-3344, ¶ 1 ("*Boler I*").² He appealed his convictions to the Fourth District, which

¹ As of the filing of this motion, the Fourth District has yet to be served. Further, this Motion to Dismiss does not constitute a waiver of service.

² Courts may take judicial notice of appropriate matters in determining a Civ.R. 12(B)(6) motion to dismiss without converting it to a motion for summary judgment. *State ex rel. Scott v. Cleveland*,

affirmed. *See Boler I* at ¶ 80. Years later, Relator filed a successive petition for post-conviction relief. *See Comp.* at p. 3. He argued that language used by the trial court in its determination did not come “within the purview of Ohio Rev. Code § 2911.01 and changes the nature and identity of the aggravated robbery statute as enacted by the General Assembly.” *Id.* The trial court denied the motion, and Relator appealed the decision to the Fourth District, which, ultimately, affirmed. *Id.*; *see also State v. Boler*, 4th Dist. Athens No. 18CA2, 2018-Ohio-3722, ¶ 24 (“The burglary element was an element of the aggravated robbery charge, not an independent count. Moreover, the factual allegations in the original and amended Bills of Particulars did not change. Thus, neither the name or identity of either crime was changed.”) (“*Boler II*”). Although Relator sought a discretionary appeal of the Fourth District’s decision, this Court did not accept it for review. *See State v. Boler*, 154 Ohio St. 3d 1446, 2018-Ohio-4962, 113 N.E.3d 553.

Relator proceeded to file the underlying action, seeking writs of mandamus and prohibition. *See generally* Compl. Although his precise argument is unclear, he alleges that the Fourth District exceeded its authority and usurped legislative power when it affirmed the denial of his petition for post-conviction relief. *Id.* at p. 4. In essence, Relator seeks an opportunity to overturn his 15-year-old conviction through this action. *Id.* at p. 12.

III. LAW AND ARGUMENT

A. Standard of Review

A motion to dismiss under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted challenges the sufficiency of the complaint itself, not any evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt., Inc.*, 125 Ohio St.3d. 494, 2010-Ohio-2057, 929

112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 26. A court may also take judicial notice of public court records available on the internet. *See, e.g., State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 8.

N.E.2d 434, ¶ 11. When considering a Civ.R. 12(B)(6) motion, a court must accept the factual allegations of the complaint as true and make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). However, a court “need not presume the truth of conclusions unsupported by factual allegations.” *Welch v. Finlay Fine Jewelry Corp.*, 10th Dist. Franklin No. 01AP-508, 2002 Ohio App. LEXIS 503, *5 (Feb. 12, 2002). When a relator fails to meet his burden, dismissal under Civ.R. 12(B)(6) is required.

B. The Fourth District is not sui juris.

Initially, any claim against the Fourth District necessarily fails as it is not sui juris and cannot be sued. “A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.” *Todd v. United States*, 158 U.S. 278, 284 (1895). This Court has long held that absent express statutory authority, a court can neither sue nor be sued in its own right. *State ex rel. Cleveland Mun. Court v. Cleveland City Council*, 34 Ohio St.2d 120, 121, 296 N.E.2d 544 (1973). The Fourth District is one such court that is immune from suit under this theory. *State ex rel. Smith v. Tenth Dist. Court of Appeals*, 166 Ohio St. 3d 1502, 2022-Ohio-1558, 187 N.E.3d 546, ¶ 1. Like in *Smith*, Relator does not reference any express statutory authority that permits him to sue the Fourth District. In fact, no statutory authority exists allowing Relator to file a complaint for a writ of mandamus or prohibition directly against the Fourth District. Accordingly, Relator fails to state a claim upon which relief can be granted, and his complaint should be dismissed.

C. Relator fails to state a claim in mandamus.

Even if this Court determines that the Fourth District is a proper respondent, and it is not, Relator nevertheless fails to state a valid mandamus claim. A writ of mandamus is an extraordinary remedy. *State ex rel. Baker v. Indus. Comm.*, 143 Ohio St.3d 56, 2015-Ohio-1191, 34 N.E.3d 104, ¶

12. To be entitled to a writ of mandamus, a relator must allege facts that establish: (1) a clear legal right to the relief requested; (2) a clear legal duty to perform the requested act on the part of the respondent; (3) and that no plain and adequate remedy exists in the ordinary course of the law. In seeking a writ of mandamus, Relator must prove that she is entitled to the writ by clear and convincing evidence. *State ex rel. Ward v. Reed*, 141 Ohio St.3d 50, 2014-Ohio-4512, 21 N.E.3d 303.

1. Relator fails to allege that he has a clear legal right to the requested relief or that Respondent has a clear legal duty to provide such relief.

Relator fails to sufficiently allege that he has a clear legal right to compel the Fourth District to issue a different decision on his challenge to the trial court's application of the aggravated robbery statute in *Boler II*. Moreover, he cannot demonstrate that the court has a clear legal duty to do so. To establish a clear legal duty, Relator must allege that there is a statutory duty imposed on the public official to perform the requested acts. *State ex rel. Ullmann v. Hayes*, 103 Ohio St. 3d 405, 2004-Ohio-5469, 816 N.E.2d 245, ¶ 11. In other words, mandamus is "a means to compel a legal duty, not a specific result." *State ex rel. Davies v. Schroeder*, 11th Dist. Ashtabula, 2019-Ohio-2871, ¶ 8. Importantly, mandamus cannot be used to control judicial discretion. *See State ex rel. Carroll v. Corrigan*, 91 Ohio St.3d 331, 332, 744 N.E.2d 771 (2001).

Relator appears to argue that the Fourth District had a clear legal duty to issue a different decision on his challenge to the trial court's application of Ohio's aggravated robbery statute. But mandamus cannot be used to control judicial discretion. Other than a lengthy exposition analyzing the aggravated robbery statute, Relator fails to provide any authority supporting the assertion that the Fourth District had a clear legal duty to reach a different decision on appeal. Nor has he shown that he has a clear legal right to have the Fourth District's judgment voided. He certainly does not meet his burden of proving such legal duty or right by clear and convincing evidence. Simply put, Relator cannot use a mandamus action to compel the Fourth District to agree with his legal analysis

and reach the specific result that he desires. Accordingly, he fails to allege a valid mandamus claim.

2. Relator had adequate remedies at law.

Relator's mandamus claim also fails because he had an adequate remedy at law that precludes mandamus. Mandamus will not lie when adequate remedies at law exist. *State ex rel. Kerns v. Simmers*, 153 Ohio St. 3d 103, 2018-Ohio-256, 101 N.E.3d 430, ¶ 15. Relator's mandamus claim must fail because he had an adequate remedy by way of discretionary appeal to this Court. The fact that this Court elected to decline jurisdiction does not move the needle. *State ex rel. McDonald v. Mitrovich*, 113 Ohio St.3d 167, 2007-Ohio-1258, 863 N.E.2d 172, ¶ 8 (finding that when a relator "has already unsuccessfully invoked * * * alternate remedies, mandamus is not available to relitigate the same issue"). Accordingly, Relator has not sufficiently alleged this final element for mandamus, precluding relief.

D. Relator fails to state a valid prohibition claim.

Similarly, Relator fails to state a valid prohibition claim against the Fourth District. Prohibition is "an extraordinary writ and [courts do] not grant it routinely or easily." *State ex rel. Barclays Bank, P.L.C. v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St.3d 536, 540, 1996 Ohio 286, 660 N.E.2d 458 (1996). To be entitled to the requested writ of prohibition, a relator must show that (1) the respondent is about to exercise or has exercised judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of the law. *State ex rel. Elder v. Camplese*, 144 Ohio St.3d 89, 2015-Ohio-3628, 40 N.E.3d 1138, ¶ 13; *see also State ex rel. Novak, L.L.P. v. Ambrose*, 156 Ohio St.3d 425, 2019-Ohio-1329, 128 N.E.3d 209, ¶ 9.

1. The Fourth District possessed jurisdiction over Relator’s appeal.

The Fourth District patently and unambiguously possessed jurisdiction over Relator’s appeal in *Boler II*, foreclosing a grant of prohibition. A writ of prohibition is typically used as a preventative tool, but it may be used to vacate prior “jurisdictionally unauthorized actions.” *See State ex rel. Stern Pros. Atty. v. Mascio*, 81 Ohio St.3d 297, 298-299, 691 N.E.2d 253 (1998). As such, the writ can only be used to correct a lower court’s decision if the court acted completely without jurisdiction. *See State ex rel. Boler v. McCarthy*, 170 Ohio St. 3d 392, 2023-Ohio-500, 213 N.E.3d 690, ¶ 9 (affirming the dismissal of a prohibition claim seeking backward relief wherein the respondent, a court of common pleas, clearly and unequivocally possessed jurisdiction). The Fourth District has appellate jurisdiction over all final, appealable orders from the counties that make up the district. *See Ohio Const. Art. IV, Sec. 3(B)(2); see also R.C. 2501.02* (Courts of Appeal “shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district . . .”). Athens County, wherein Relator was tried and convicted, falls under the Fourth District’s purview. R.C. 2501.01(D). Relator does not allege that the trial court’s decision denying his successive petition for post-conviction relief was not a final, appealable order. *See generally* Comp. Therefore, the Fourth District properly exercised jurisdiction over Relator’s appeal. Accordingly, the grant of a writ of prohibition is foreclosed.

2. Relator had an adequate remedy at law.

Like mandamus, “prohibition will [not] issue if the party seeking extraordinary relief has an adequate remedy in the ordinary course of law.” *State ex rel. Caskey v. Gano*, 135 Ohio St. 3d 175, 2013-Ohio-71, 985 N.E.2d 453, ¶ 2, quoting *Dzina v. Celebrezze*, 108 Ohio St. 3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 12. Unless a relator establishes a patent and unambiguous lack of jurisdiction, extraordinary relief in prohibition or mandamus will not issue, because the relator has

an adequate remedy by appeal. *State ex rel. Skyway Invest. Corp. v. Ashtabula Cty. Court of Common Pleas*, 130 Ohio St. 3d 220, 2011-Ohio-5452, 957 N.E.2d 24, ¶ 10; *see also State ex rel. Huntington Natl. Bank v. Kontos*, 145 Ohio St.3d 102, 2015-Ohio-5190, 47 N.E.3d 133, ¶ 17. As stated previously, the Fourth District had jurisdiction over Relator's appeal. And, again, it is immaterial that this Court declined review of his appeal. *Schlegel v. Sweeney*, 171 Ohio St.3d 1, 2022-Ohio-3841, 215 N.E.3d 451, ¶ 10 (the availability of an alternate remedy, whether or not invoked, forecloses the grant of a writ of prohibition). Because of this, Relator could have appealed the Fourth District's decision, which he did unsuccessfully, prohibiting prohibition relief.

IV. CONCLUSION

For the foregoing reasons, the Fourth District respectfully asks this Court to dismiss Relator's complaint against it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by first class mail via the U.S.

Postal Service on April 17, 2024, upon the following:

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