

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO ex rel. CHARLES LEMONS, III,	:	OPINION
Relator,	:	CASE NO. 2009-T-0053
- VS -	:	
JUDGE PETER J. KONTOS,	:	
Respondent.	:	

Original Action for Writ of Procedendo.

Judgment: Petition dismissed.

Charles Lemons, III, PID: A563-098, Madison Correctional Institution, P.O. Box 740, London, OH 43140-0740 (Relator).

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent).

MARY JANE TRAPP, P.J.

{¶1} This action in procedendo is presently before this court for final disposition of the motion to dismiss of respondent, Judge Peter J. Kontos of the Trumbull County Court of Common Pleas. As the primary basis for his motion, Judge Kontos asserts that the petition of relator, Charles Lemons, III, fails to state a viable claim for a writ because his own allegations support the conclusion that there exists a separate legal proceeding he could maintain to obtain the identical relief requested in this action. For the following

reasons, we conclude that the dismissal of this matter is warranted.

{¶2} In bringing the instant original action, relator sought an order which would require Judge Kontos to enter final judgment in his favor as to criminal charges brought against him in Trumbull C.P. No. 2007-CR-806. In the first section of his petition, relator simply set forth a list of the various motions that had been filed on his behalf prior to his actual trial. These motions included two separate requests to dismiss the criminal case on the grounds that he had been denied his statutory right to a speedy trial. In referring to the motions, relator did not attempt to provide a summary of the arguments that had been raised before the trial court. Instead, the petition merely contended that, since his motions had been appropriate under the circumstances, he was entitled to the entry of a dismissal judgment regarding all charges.

{¶3} In the second section of his petition, relator alleged that the trial testimony of the purported victim was not sufficient to prove that he committed at least five of the charged offenses. In conjunction with this point, he appeared to challenge the fact that he was ultimately found guilty of two counts of rape even though no biological evidence was presented at trial. In light of this, relator again maintained that Judge Kontos had a legal duty to acquit him in the criminal case.

{¶4} In now claiming that relator's petition should be subject to dismissal under Civ.R. 12(B)(6), Judge Kontos first submits that: (1) he has already issued a final order in the underlying proceeding, in which relator was found guilty of five criminal offenses and sentenced accordingly; and (2) relator has already filed in this court a direct appeal of the conviction. Based upon this, Judge Kontos argues that the instant action should not go forward because relator is already pursuing an appropriate legal remedy for

contesting the propriety of the trial proceedings. In the same vein, Judge Kontos further argues that relator's petition is legally insufficient to state a viable claim in procedendo because he is attempting to use the instant action as a substitute for his direct appeal.

{¶5} In regard to the basic factual assertions upon which the motion to dismiss is predicated, this court would note that, although relator's petition made reference to a jury trial, he did not admit that Judge Kontos had released the final sentencing judgment in the underlying case. Furthermore, our review of the motion to dismiss indicates that Judge Kontos did not attach any evidentiary materials in support of his assertions. As a result, when the scope of our review in this matter is limited to the petition for relief and the motion to dismiss, there appears to be a dispute concerning the exact status of the criminal case.

{¶6} As a general proposition, any determination on a Civ.R. 12(B)(6) motion to dismiss must be based solely upon the factual assertions set forth in the civil complaint. See *Huffman v. City of Willoughby*, 11th Dist. No. 2007-L-040, 2007-Ohio-7120, at ¶17. However, Civ.R. 44.1(A)(1) provides that a trial court in a civil proceeding has the ability to take judicial notice of the decisional law of our state. Consistent with the latter rule, it has been held that judicial notice can be taken of a judgment of conviction in a criminal action. *Szerlip v. Szerlip*, 5th Dist. No. 01CA09, 2002-Ohio-2541, at ¶26. Thus, given that this tribunal is acting as a trial court in disposing of the instant original action, this court could predicate our ruling upon the existence of an actual conviction if our review of the docket in Trumbull C.P. No. 2007-CR-806 confirms Judge Kontos' assertion in his motion to dismiss.

{¶7} In fact, such a review does indicate that a conviction has been entered in

the underlying criminal proceeding against relator. Specifically, the docket shows that, on March 11, 2009, Judge Kontos issued a judgment stating that, following a jury trial, relator had been found guilty of five criminal offenses and had been ordered to serve an aggregate sentence of fifty-eight years. Therefore, a final order of conviction has been rendered, from which relator could pursue a direct appeal under R.C. 2505.02(B) and App.R. 3.

{¶8} In order to be entitled to a writ of procedendo, the relator in such an action must be able to demonstrate, inter alia, that there is no alternative legal remedy which he could pursue under the circumstances. See *Davis v. Camplese*, 11th Dist. No. 2007-A-0082, 2008-Ohio-2509, at ¶12. In light of this basic requirement, the Supreme Court of Ohio has concluded that the writ will not lie when the relator had the ability to appeal a trial court's determination, since a direct appeal constitutes an adequate legal remedy. *State ex rel. Grove v. Nadel* (1998), 84 Ohio St.3d 252.

{¶9} In other words, a procedendo action cannot be employed to challenge the underlying merits of a lower court's decision because such a challenge can be raised as part of a direct appeal. See *State ex rel. Sevayega v. McMonagle*, 122 Ohio St.3d 54, 2009-Ohio-2367; *Davis*, 2008-Ohio-2509, at ¶12. Instead, the limited purpose of the writ is to require a lower court to go forward "when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." *State ex rel. Miley v. Parrott* (1996), 77 Ohio St.3d 64, 65.

{¶10} In the instant matter, it has been established through judicial notice that Judge Kontos has already released a judgment of conviction against relator as part of the underlying criminal case; therefore, this matter does not involve a situation in which

the trial judge has failed to proceed to judgment. To this extent, relator's sole purpose in maintaining this action was to obtain an order under which Judge Kontos would be required to enter a different judgment or ruling; i.e., a judgment in his favor based upon either his prior motions or the evidence submitted at trial. In other words, he brought the procedendo action to obtain a reversal of Judge Kontos' various rulings, including his ultimate criminal conviction.

{¶11} Since a reversal of a criminal conviction can be achieved through a direct appeal from Judge Kontos' final judgment, relator had an adequate legal remedy when he filed this action. Under such circumstances, a writ of procedendo would never lie to compel any further action on Judge Kontos' part.

{¶12} As this court has indicated on prior occasions, the dismissal of a claim in procedendo will be justified under Civ.R. 12(B)(6) "when it is apparent beyond doubt that, even if the truth of the material factual allegations is presumed and all reasonable inferences are made in favor of the non-moving party, that party will still not be able to satisfy all of the necessary elements for the requested relief." *Davis*, 2008-Ohio-2509, at ¶15. Pursuant to the foregoing discussion, this court holds that relator's allegations were not sufficient to state a viable cause of action because he will be unable to satisfy the foregoing standard in regard to the third element of a procedendo claim. That is, his own allegations demonstrate that he has an adequate legal remedy through the filing of a direct appeal from his criminal conviction.

{¶13} For the stated reasons, the motion to dismiss of Judge Peter J. Kontos,

respondent, is hereby granted. It is the order of this court that relator's entire petition in procedendo is dismissed.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

DIANE V. GRENDELL, J., concurs in judgment with a Concurring Opinion.

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{¶14} I concur in judgment only on the basis that the relator has an adequate legal remedy through the direct appeal of his conviction, currently pending before this court (Appellate Case No. 2009-T-0032). *Davis v. Complese*, 11th Dist. No. 2007-A-0082, 2008-Ohio-2509, at ¶12 (“a writ of procedendo will not lie when an adequate remedy at law exists”). Since the absence of a legal remedy is a mandatory prerequisite for the writ, relator's action lacks merit and dismissal is warranted. *State ex rel. Weiss v. Hoover*, 84 Ohio St.3d 530, 531-532, 1999-Ohio-422 (“to be entitled to a writ of procedendo, [relator] must establish *** the lack of an adequate remedy in the ordinary course of law”).

{¶15} On this basis, I concur in the ultimate decision to dismiss the Petition for Writ of Procedendo.