

ORIGINAL

IN THE SUPREME COURT OF OHIO

DIONDRAY BEAL , : Supreme Court Case No. 09-1167
 Relator :
 v. : (Original Action in Mandamus)
 CLARK COUNTY COURT OF :
 APPEALS, SECOND DISTRICT, :
 Respondent :

**MOTION TO DISMISS ON BEHALF OF RESPONDENT,
 CLARK COUNTY COURT OF APPEALS, SECOND DISTRICT**

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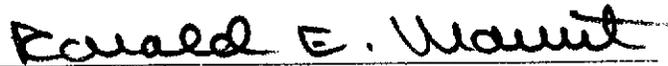
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Respondent : :
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**MOTION TO DISMISS ON BEHALF OF RESPONDENT,
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Now comes the respondent, the Clark County Court of Appeals, Second District, and moves the Court to dismiss the "Petition for the Issuance of a Writ of Mandamus" filed by Relator, Diondray Beal, on June 26, 2009. Reasons in support of this motion to dismiss are set forth in the memorandum below.

Respectfully submitted,



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MEMORANDUM

On June 26, 2009, Relator, Diondray Beal, filed a “Petition for the Issuance of a Writ of Mandamus” in the Supreme Court of Ohio. Named as Respondent was the Clark County Court of Appeals, Second District.

This matter originates from Respondent’s April 3, 2008 Decision and Entry overruling Beal’s request for leave to file a supplemental brief, pro se, in *State v. Beal*, Clark App. No. 2007-CA-86. In its entry, Respondent noted that Beal’s appointed appellate counsel, Darrell L. Heckman, filed a brief on behalf of the petitioner on November 30, 2007, approximately four months before Beal filed his request. Respondent further provided that it does not permit pro se parties to file briefs when they are represented by counsel and when said counsel has filed a brief on the party’s behalf. Accordingly, Respondent overruled Beal’s request to file a supplemental brief. On August 8, 2008, Respondent issued its final judgment entry and opinion affirming the trial court’s conviction of Beal for aggravated robbery with a firearm specification.

On June 26, 2009, Beal filed the present petition for an extraordinary writ in the Supreme Court of Ohio. In his petition, Beal asks that a writ of mandamus be directed toward Respondent, the Clark County Court of Appeals, Second District, for failure to rule on his supplemental brief filed in Clark App. No. 2007-CA-86. According to Beal, his rights to due process of law were violated when Respondent refused to consider the supplemental brief upon review of the merits of Beal’s appeal. Beal further asks for an investigation into this alleged violation of his due process rights, and he seeks leniency as a prisoner proceeding pro se. For the following reasons, Beal’s petition should be denied.

I.

BEAL'S PETITION FAILS TO STATE A CLAIM IN MANDAMUS AGAINST THE CLARK COUNTY COURT OF APPEALS, SECOND DISTRICT, UPON WHICH RELIEF MAY BE GRANTED.

"Mandamus is a writ, issued in the name of the state to an inferior tribunal * * * or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01; *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 166, 4 O.O.3d 367, 364 N.E.2d 1. A writ of mandamus is an *extraordinary remedy*, which is to be exercised with great caution and only when the right of the petitioner is manifestly clear. See *State ex rel. Taylor*, 50 Ohio St.2d at 166. To be entitled to a writ of mandamus, the petitioner must demonstrate: (1) that he has a clear legal right to the relief requested; (2) that the respondent is under a clear legal duty to perform the requested act; and (3) that the petitioner has no plain and adequate remedy in the ordinary course of law. *State ex rel. Luna v. Huffman* (1996), 74 Ohio St.3d 486, 487, 659 N.E.2d 1279.

At the core of Beal's petition is his belief that he has a clear legal right and that Respondent has a corresponding duty to allow him to file a supplemental brief on appeal despite the fact that he is represented by counsel. Under Ohio law, however, "[a] defendant has no right to a 'hybrid' form of representation wherein he is represented by counsel, but also acts simultaneously as his own counsel." *State v. Keenan* (1998), 81 Ohio St.3d 133, 138, 689 N.E.2d 929, citing *McKaskle v. Wiggins* (1984), 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122; *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, at ¶97. Respondent upholds this principle by rejecting a party's pro se supplemental brief where said

party is duly represented by appellate counsel, in the absence of a clear indication that the party no longer wishes to be represented by counsel and wants to strike counsel's brief. See *State v. Freeman* (Nov. 29, 2001), Montgomery App. No. 18798, (Decision and Entry).¹

Appellate counsel in the present matter filed a brief on behalf of Beal on November 30, 2007. With no indication by motion or otherwise to Respondent that he desired to remove his court-appointed counsel on appeal and proceed pro se, Beal filed a motion for leave to file a supplemental brief, with the supplemental brief attached, on March 27, 2008. Clearly, Beal's action violated Ohio's prohibition against "hybrid" forms of representation. Respondent appropriately overruled Beal's motion, as the court was proceeding under the authority of Ohio law.

Based on the foregoing, Beal's petition for a writ of mandamus fails to demonstrate that he has a clear legal right to the relief he requests, i.e., filing of a pro se supplemental brief when represented by counsel. Nor does the present petition show that the Clark County Court of Appeals, Second District, is under a corresponding clear legal duty to provide Beal with this relief. Consequently, Beal's petition should be denied.

II.

BEAL HAS AN ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.

Beal is provided an adequate remedy at law by way of a direct appeal to the Supreme Court of Ohio from Respondent's decision. Indeed, Beal has filed with the Ohio Supreme Court a notice of appeal (along with a motion for a delayed appeal) concerning Respondent Court's final judgment of August 8, 2008. See *State v. Beal*, Sup. Ct. No. 2009-1075. On appeal, Beal

¹ Available at <http://clerksvr-intapp/pro/>

is permitted to assign as error for review the court of appeals' refusal to permit him to file his supplemental brief.

Accordingly, the Supreme Court of Ohio should find that Beal has a plain and adequate remedy in the ordinary course of law and deny the instant petition.

III.

BEAL HAS FAILED TO PROPERLY CAPTION HIS PETITION FOR A WRIT OF MANDAMUS.

R.C. 2731.04 provides that an action for a writ of mandamus "must be * * * in the name of the state on the relation of the person applying." Failure to bring an action in mandamus in the name of the state on the relation of the person requesting the writ may warrant dismissal. See *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, at ¶34; *Gannon v. Gallagher* (1945), 145 Ohio St. 170, 171, 30 O.O. 351, 60 N.E.2d 666; *Maloney v. Court of Common Pleas of Allen Cty.* (1962), 173 Ohio St. 226, 227, 19 O.O.2d 45, 181 N.E.2d 270. The petition in this action simply designates "Diondray Beal" as Relator. The failure of Beal to properly caption his petition for a writ of mandamus is grounds for dismissal.

IV.

For the foregoing reasons, Respondent, the Clark County Court of Appeals, Second District, respectfully moves the Court to dismiss the "Petition for the Issuance of a Writ of Mandamus" filed by Relator, Diondray Beal, and to assess the costs of this action against Beal.

Respectfully submitted,

Ronald E. Mount

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PROOF OF SERVICE

I hereby certify that the foregoing "Motion to Dismiss on Behalf of Respondent, Clark County Court of Appeals, Second District," along with its accompanying memorandum was served by regular United States mail on the 23rd day of July, 2009 upon Relator, Diondray Beal, #556-926, Ross Correctional Institution, P.O. Box 7010, Chillicothe, Ohio 45601.

Ronald E. Mount

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