

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel., BRUGGEMAN, :

Relator, :

v. :

JOHN R. WILLIAMOWSKI, JUDGE :

RICHARD M. ROGERS, JUDGE :

STEPHEN R. SHAW, JUDGE, :

Respondents. :

Case No. 2010-1808

Original Action in Prohibition and Mandamus

MOTION TO DISMISS OF RESPONDENTS WILLIAMOWSKI, ROGERS, AND SHAW

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IN THE SUPREME COURT OF OHIO

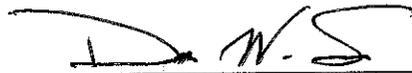
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	:	
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	:	Case No. 2010-1808
v.	:	
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JOHN R. WILLIAMOWSKI, JUDGE	:	Mandamus
RICHARD M. ROGERS, JUDGE	:	
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	:	
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**MOTION TO DISMISS OF RESPONDENTS
WILLIAMOWSKI, ROGERS, AND SHAW**

Pursuant to Sup. Ct. Prac. R. 10.5 and Ohio Civ. Rule 12(B)(6), Respondents John R. Williamowski, Richard M. Rogers, and Stephen R. Shaw, judges for the Third District Court of Appeals, hereby move to dismiss Relator's petition for a writs of prohibition and mandamus. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

Relator Christopher Bruggeman initiated this prohibition and mandamus action to compel Respondents, John R. Williamowski, Richard M. Rogers, and Stephen R. Shaw, judges for the Third District Court of Appeals, to vacate or strike a 1994 decision upholding his conviction and to provide him with an opportunity to appeal a nunc pro tunc judgment made by the trial court earlier this year. Relator is not entitled to such extraordinary relief. For the following reasons, Relators respectfully ask this Court to dismiss Relator's complaint.

II. STATEMENT OF FACTS

This action follows a long history of attempts by the Relator to appeal his 1993 conviction of gross sexual imposition against his then five year old stepdaughter. *State of Ohio v. Bruggeman*, Nov. 8, 1994, 3d App. Dist Auglaize County No. 2-94-1, Ohio App. LEXIS 5302, at *1. See, *State of Ohio v. Bruggeman*, Nov. 8, 1994, 3d App. Dist. Auglaize County No. 2-94-1, Ohio App. LEXIS 5302 (affirming jury conviction); *State of Ohio v. Bruggeman* (1996) 74 Ohio St.3d 1497, 659 N.E.2d 312 (denying appeal); *State of Ohio v. Bruggeman* (1996) 74 Ohio St. 1517, 660 N.E.2d 472 (denying appeal for reopening); *State ex rel. Bruggeman v. Leonard* (1999), 86 Ohio St.3d 298, 1999 Ohio 165, 714 N.E.2d 921 (affirming the Third District Court's 1998 denial of Relator's petition to force the warden to release him from prison under habeas corpus); *Bruggeman v. Taft* (N.D. Ohio 2000), No. 00-07791 (denying Relator's petition for a federal writ of habeas corpus); *Bruggeman v. Taft* (6th Cir. 2001), 27 Fed. Appx. 456 (affirming N.D. Ohio's denial of habeas); *In re Bruggeman* (2003), 538 U.S. 997, 123 S.Ct. 1924, No. 02-9873 (denying writ of habeas); *State v. Bruggeman*, Mar. 7, 2005, 3d App. Dist. Auglaize County (affirming the Common Pleas Court of Auglaize County's July 14, 2004 denial for

second petition for post conviction relief); *State v. Bruggeman*, 106 Ohio St.3d 1483, 2005 Ohio 3978, No. 2005-0592 (denying discretionary appeal); *Bruggeman v. Ohio* (2006), 456 US 1183, 126 S. Ct. 1361 (denying cert); *State v. Bruggeman*, Apr. 28, 2010, 3d Dist. App. Auglaize County, No. 2-10-17 (dismissing attempt to re-appeal of 1993 conviction); *State v. Bruggeman*, May 7, 2010, 3d Dist. App. Auglaize County, No. 2-94-1 (denying Relator's motion to vacate and/or strike 1994 appeal).

On March 19, 2010, apparently on its own motion, the trial court caused a *Nunc Pro Tunc* Judgment of Sentence to be filed which corrected the original sentencing entry by adding a paragraph which reflects the facts that the convictions were pursuant to a verdict at jury trial. Although not stated as such, the purpose was apparently to correct a clerical omission in the December 1993 judgment of sentence to reflect that Appellant was convicted at jury trial. On April 15, 2010, Appellant filed an appeal in the Third District Court of Appeals. On April 28, 2010, the Respondent Judges issued a sua sponte order dismissing Relators' appeal for want of jurisdiction.

Now, Relator asks this Court to 1) order the Respondents to strike or vacate the Third District Court of Appeals' 1994 decision affirming Relator's conviction and 2) reverse the Respondents' sua sponte judgment entry dismissing for want of jurisdiction the Relator's appeal of the nunc pro tunc judgment that was issued by the trial court.

III. ARGUMENT

Relator asks this Court to issue a writ of prohibition against Respondents, or in the alternative, for this Court to issue a writ of mandamus. Neither a writ of prohibition nor a writ of mandamus is appropriate. Accordingly, Respondents respectfully ask this Court to dismiss this case.

A. Relator's request for a writ of prohibition must fail.

In order for Relator to be entitled to his requested writ of prohibition, he must establish that (1) Respondent Judges Williamowski, Rogers, and Shaw of the Third District Court of Appeals have or are about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, *and* (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. City of Cleveland v. Sutula*, 2010 Ohio 5039, at P 13; *State ex rel. Hamilton County Bd. of Comm'n v. Hamilton County Ct. of Common Pleas*, 126 Ohio St.3d 111, 2010 Ohio 2467, 931 N.E.2d 98, at P 18. While Respondents were acting in a judicial capacity when they dismissed Relator's attempt to gain a second appeal his 1993 conviction after a 2010 entry of nunc pro tunc, Relator has failed to meet the second and third requirements necessary for this Court to issue a writ of prohibition in his favor.

A relator can only meet the second and third requirements for a writ of prohibition, "[i]f a lower court patently and unambiguously lacks jurisdiction to proceed in a cause," and "prohibition [...] will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of the prior jurisdictionally unauthorized actions." *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002 Ohio 6323, 779 N.E.2d 223, at P 12. Here, Respondent Judges did not patently and unambiguously lack the jurisdiction to dismiss Relator's 2010 appeal of his 1993 conviction because he had already appealed his 1993 conviction in 1994. *State of Ohio v. Bruggeman*, Apr. 28, 2010, 3d Dist. App. No. 2-94-1, considering *State of Ohio v. Bruggeman*, Nov. 8, 1994, 3d Dist. App. No. 2-94-1, Ohio App. LEXIS 5302.

Further, Respondents did not patently and unambiguously lack the jurisdiction to dismiss Relator's motion to vacate and/or strike the appeal he filed in 1993 for want of appellate

jurisdiction pursuant to App. R. 15. *State of Ohio v. Bruggeman*, May 7, 2010, 3d Dst. App. No. 2-94-1. First, Relator's 1993 order was a final and appealable order, which he already appealed in 1994. *State of Ohio v. Bruggeman*, Nov. 8, 1994, 3d Dist. App. No. 2-94-1, Ohio App. LEXIS 5302. Second, App. R. 15 does not provide Respondents with the authority to vacate the earlier appeal.

For the foregoing reasons, Relator's request for this Court to issue a writ of prohibition against Respondents fails.

B. Relator's request for a writ of mandamus must fail.

"Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." *State ex rel. Smith v. Indus. Comm'n* (1942), 139 Ohio St. 303, 306. Ohio case law well establishes the requisites for an action in mandamus: (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. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St. 3d 118; *State ex rel. Nat'l City Bank v. Bd. Of Ed.* (1977), 52 Ohio St.2d. 81, 83. An adequate remedy by way of appeal, regardless of whether the relator used it, bars relief in mandamus. *State ex rel. Gilligan v. Ohio Bd. of Tax Appeals* (1994), 70 Ohio St.3d 196, 201.

Relator fails to meet all three requirements for an action in mandamus. First, Relator does not have a clear legal right to the relief he requests because the 1993 conviction order against him was a final, appealable order and this Court cannot disregard that order. Second, because the 1993 order was final and appealable, the judges of the Third District Court of Appeals have no clear legal duty to disregard that order. Finally, Relator had an adequate

remedy at law, but simply chose not to exercise it. Because Relator has failed to satisfy the requirements necessary for a writ of mandamus, this Court must deny his request.

1. Relator does not have a clear legal right to the requested relief.

Relator does not have a clear legal right to relief to either have Respondents strike the 1994 decision on his appeal or to a second appeal of his 1993 conviction. The 1993 order entered by the Auglaize County Court of Common Pleas, No. 93-C-138, was a final, appealable order under Ohio Crim. R. 32(C). In 1994, Relator appealed that 1993 order, albeit unsuccessfully. Because he already appealed the order, Relator does not have a clear legal right to appeal it again.

Pursuant to Ohio Crim.R. 32(C), a “judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of courts.” *State v. Baker*, 119 Ohio St.3d 197, 2008 Ohio 3330, 893 N.E.2d 163, at P. 15.

On March 19, 2010, the Auglaize County Court of Common Pleas entered a nunc pro tunc order adding a paragraph to the 1993 order that clarified that Relator had been convicted by a jury, as opposed to a judge. See Relator’s Comp. § III; Relator’s Exhibit A; Relator’s Exhibit B. Nunc pro tunc orders correct clerical errors retrospectively and do not create new final orders of judgment. *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 1995 Ohio 278, 656 N.E.2d 1288, at 164. Further, nunc pro tunc orders are “limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.” *Id.* The 2010 nunc pro tunc entry simply corrected a clerical omission made by the trial court, namely clarifying that a jury had decided the case. See Relator’s Exhibit B.

Relator argues that the nunc pro tunc entry indicates that the trial courts original entry “failed to set forth the verdict or finding of the court upon which the convictions were based” pursuant to Ohio Crim. R. 32(C) and that the nunc pro tunc entry was a final appealable order separate from the order it modified. Rather, the trial court’s original order does set forth the verdict or finding of the court upon which it based the convictions: the order states that Relator was guilty of the counts against him, lists those counts, and with each count, provides the corresponding Ohio Revised Code that he violated. *See* Relator’s Exhibit A. Again, the only clerical addition by the trial court to the 2010 entry was a clarification that a jury convicted Relator.¹

Pursuant to Ohio App. R. 3 and R. 4, Relator had a right of appeal from his 1993 order because it was final and appealable. Relator exercised this right and appealed to the Third District Court of Appeals in 1994, ultimately losing his appeal. *State of Ohio v. Bruggeman*, Nov. 8, 1994, 3d App. Dist. Auglaize County No. 2-94-1. The nunc pro tunc entry was not a separate and final appealable order. Relator now asks this Court to order the Respondent Judges from the Third District Court of Appeals to strike their earlier appeal order, which was a final and appeal order. Further, Relator asks this Court to order Respondents to provide Relator with a second appeal of his 1993 conviction. Both of these requests are contrary to Ohio law. Consequently, Relator is not entitled to the relief he seeks.

¹ This Court recently certified the issue of whether a nunc pro tunc judgment adding “means of conviction” language” is a final order subject to appeal. *State of Ohio v. Lester*, 2010 Ohio 1372. At issue in *Lester*, as in this case, is whether a nunc pro tunc entry adding that Defendant was convicted by a jury is a final order subject to appeal. *State of Ohio v. Lester*, 3d App. Dist. Auglaize County No. 2-10-20, at ¶ 7. In contrast to the Third District Court of Appeals’ holding that such a nunc pro tunc entry does not constitute a final order subject to appeal, the Sixth District Court of Appeals has held that it does constitute a final order subject to appeal. *State v. Lampkin*, 6th App. Dist. No. L-09-1270, 2010 Ohio 1971, at P 10. In *Lampkin*, the original order stated that Defendant “had been convicted of” his crimes, and the nunc pro tunc entry changed that language to “found guilty by a jury and convicted of” his crimes. *Id.*

2. Respondents do not have a clear legal duty to perform the requested relief.

The 1993 order was final and appealable pursuant to R.C. 2323.03(F), and therefore, the Third District Court of Appeals had jurisdiction to hear Relator Relator's 1994 appeal. Relator now asks this Court to order the Respondent Judges of the Third District to provide him with yet another opportunity to appeal his 1993 conviction. Because Relator's request is contrary to Ohio law, the Respondent Judges have no clear legal duty to perform the requested relief.

Pursuant to R.C. 2501.02, the courts of appeals have jurisdiction to hear appeals of final orders from inferior courts within their jurisdictions. Further, App. R. 5(C) allows a court to reopen its appellate decision if a federal court grants a relator a writ of habeas corpus that the state's appellate proceedings violated the relator's constitutional rights.

In this case, the Respondent Judges lack jurisdiction to hear an appeal of the nunc pro tunc entry, because it is not a final appealable order. Also, although Relator has petitioned the federal courts for federal writs of habeas corpus, those courts have denied his petitions. *Bruggeman v. Taft* (N.D. Ohio 2000), No. 00-07791 (denying Relator's petition for a federal writ of habeas corpus); *Bruggeman v. Taft* (6th Cir. 2001), 27 Fed. Appx 456 (affirming N.D. court's denial of habeas); *In re Bruggeman* (2003), 538 U.S. 997, 123 S.Ct. 1924, No. 02-9873 (denying writ of habeas). Consequently, the Respondent Judges are under no legal duty to reopen the 1994 appeal.

3. The Relator had an adequate remedy at law.

Relator's complaint is barred because the Relator had a plain and adequate legal remedy at law in that he could have appealed the Respondents' 2010 decision dismissing his appeal of the trial court's nunc pro tunc entry. This Court has unequivocally stated that "[m]andamus cannot be used as a substitute for appeal," *State ex rel. Pressley v. Indus. Comm'n.* (1967), 11

Ohio St. 2d 141, 163, and that mandamus will not lie where the availability of an appeal provides an adequate remedy at law. *State ex rel. Gilligan v. Ohio Bd. of Tax Appeals* (1994), 70 Ohio St. 3d 196, 201. See also *State ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals* (1990), 56 Ohio St. 3d 33, 34 (discretionary appeals are adequate remedies that will prevent issuance of both writs of mandamus) (citations omitted).

At this point, it is irrelevant whether Relator's time to file an appeal has expired. Mandamus will not issue where a relator does not avail himself of a remedy by way of appeal. *State ex rel. Corrigan v. Griffin* (1984), 14 Ohio St. 3d 26, 27. Accordingly, Relator's request for relief must be denied.

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss Relator action in prohibition and mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss was served by regular U.S. mail, postage prepaid, on November 15, 2010 upon the following:

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Relator



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