

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-2097

STATE OF OHIO ex rel.
FERNANDO CARRION

Appellant,

v.

MARK A. BETLESKI, JUDGE

Appellee

: On Appeal from the Lorain
: County Court of Appeals
: Ninth Appellate District
:
: Court of Appeals
: Case No. 10CA009856
:
:
:
:

NOTICE OF APPEAL OF APPELLANT FERNANDO CARRION

Fernando Carrion, in pro se, #A399-375
Grafton Correctional Institution
2500 South Avon-Belden Road
Grafton, Ohio 44044

COUNSEL FOR APPELLANT

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COUNSEL FOR APPELLEE, MARK A. BETLESKI, JUDGE

RECEIVED
DEC 03 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
DEC 03 2010
CLERK OF COURT
SUPREME COURT OF OHIO

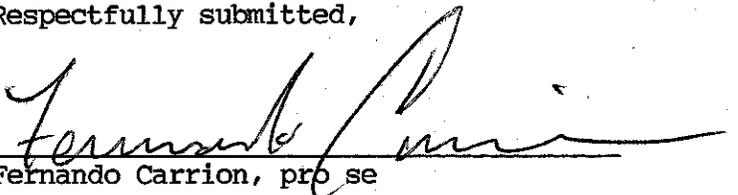
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Notice of Appeal of Appellant Fernando Carrion

Appellant Fernando Carrion hereby gives notice of appeal to the Supreme Court of Ohio from the judgment, pursuant to Civ.R. 54(B), of the Lorain County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 10CA00985 on November 2, 2010. This is an appeal of right.

This case raises a substantial constitutional question and one of public or great general interest.

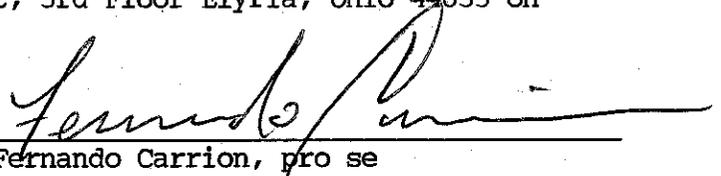
Respectfully submitted,


Fernando Carrion, pro se

COUNSEL FOR APPELLANT
FERNANDO CARRION

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail to counsel for appellee, Matthew A. Mishak, Assistant Prosecuting Attorney for Lorain County, Ohio, at 225 Court Street, 3rd Floor Elyria, Ohio 44035 on November 29, 2010.


Fernando Carrion, pro se

)ss:

COUNTY OF LORAIN)

FILED
LORAIN COUNTY

STATE OF OHIO ex rel. FERNANDO CARRION

NOV - 21 A 11: 08

C.A. No. 10CA009856

Relator

v.

9th APPELLATE DISTRICT

MARK A. BETLESKI, JUDGE

Respondent

JOURNAL ENTRY

ENTERED

Fernando Carrion is incarcerated in an Ohio prison. He has filed a complaint in this Court against Judge Mark Betleski in which he has asked this Court to order Judge Betleski to execute this Court's judgment by entering a new sentencing order. Judge Betleski has moved to dismiss the complaint. Because Mr. Carrion cannot show that Judge Betleski has a duty to enter a new sentencing order, this Court dismisses his complaint.

Requirements for the Writs

"For a writ of mandamus to issue, a relator must demonstrate that (1) the relator has a clear legal right to the relief prayed for, (2) respondent is under a corresponding clear legal duty to perform the requested acts, and (3) relator has no plain and adequate legal remedy." *State ex rel. Serv. Emp. Internatl. Union, Dist. 925 v. State Emp. Relations Bd.*, 81 Ohio St.3d 173, 176 (1998). To be entitled to a writ of procedendo, Mr. Carrion must establish a clear legal right to require Judge Betleski to proceed, a clear legal duty on the part of Judge Betleski to proceed, and a lack of an adequate remedy in the ordinary course of law. *State ex rel. Miley v. Parrott, Judge* (1996), 77 Ohio St. 3d

64, 65.

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Execution of Judgment

Mr. Carrion has alleged that Judge Betleski has not executed this Court's judgment following his earlier direct appeal. To understand his claim, it is necessary to review the procedural history of his underlying case.

Mr. Carrion was indicted for committing a number of offenses. He was convicted on seven counts: one count of rape, five counts of gross sexual imposition, and one count of sexual imposition. He appealed his conviction to this Court.

On appeal, this Court sustained one of his arguments and vacated his conviction for sexual imposition. *State v. Carrion*, 9th Dist. No. 01CA007797 (Jan. 30, 2002). This Court overruled his remaining assignments of error and otherwise affirmed the trial court's judgment. In his complaint, Mr. Carrion has argued that Judge Betleski has not executed this Court's judgment. He points to the language at the end of this Court's decision that states: "We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution." *Id.* Based on this sentence, Mr. Carrion has argued that Judge Betleski has a clear legal duty to enter a new sentencing order that complies with Rule 32 of the Ohio Rules of Criminal Procedure, without the vacated sexual imposition conviction.

Motion to Dismiss

Judge Betleski has moved to dismiss. He has argued that this matter is moot because he has now entered the order Mr. Carrion seeks by this action. The order Judge Betleski entered, however, merely memorializes that this Court vacated the sexual imposition conviction – it is not a new sentencing entry that complies with Rule 32(C). Nor was it entered with Mr. Carrion present, as he also argues is necessary under Rule

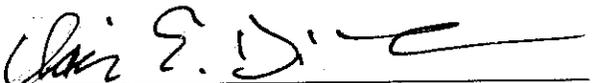
43(A) of the Ohio Rules of Criminal Procedure. Accordingly, Judge Betleski's order does not make Mr. Carrion's action moot.

Nevertheless, this Court concludes that dismissal is appropriate under Rule 12(B)(6) of the Ohio Rules of Civil Procedure. To dismiss a complaint pursuant to Rule 12(B)(6), it must appear beyond doubt from the complaint, after all factual allegations are presumed true and all reasonable inferences are made in favor of Mr. Carrion, that he can prove no set of facts warranting relief. *State ex rel. Dehler v. Sutula, Judge*, 74 Ohio St.3d 33, 34 (1995). Based on the allegations in the complaint, Judge Betleski does not have a duty to issue a new sentencing entry that complies with Rule 32(C). Nor does Mr. Carrion have a right to be present for Judge Betleski to enter a new sentencing entry under Criminal Rule 43(A), as he also argues.

On his direct appeal, this Court vacated Mr. Carrion's conviction for sexual imposition. There was nothing for the trial court to do to carry out that judgment, there is no requirement that the trial court enter a new judgment of conviction following an appeal, and this Court did not order the trial court to do so. Under Rule 12 of the Ohio Rules of Appellate Procedure, where this Court determines that the trial court's judgment should be modified as a matter of law, it shall enter its judgment accordingly. That is precisely what this Court did. It determined that the trial court erred as a matter of law when it granted the State's motion to amend the indictment to a different offense, one that the trial court erroneously concluded was a lesser included offense. Because the trial court erred as a matter of law, this Court modified the trial court's judgment by vacating the conviction for sexual imposition. There is no requirement that the trial court then recall the defendant to enter a new sentence consistent with this Court's decision and

enter a new judgment of conviction that complies with Rule 32(C). Because Mr. Carrion cannot demonstrate that he has a clear legal right to the relief requested, therefore, dismissal under Rule 12(B)(6) is appropriate.

Mr. Carrion's complaint is dismissed. Costs taxed to Mr. Carrion. The clerk of courts is hereby directed to serve upon all parties not in default notice of this judgment and its date of entry upon the journal. See Civ.R. 58(B).



Judge

Concur:
Whitmore, J.
Moore, J.

