

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE EX REL. RUSSELL STOKES,

Case No. 2011-1493

RELATOR,

-vs-

ORIGINAL ACTION IN
PROCEDENDO

CUYAHOGA COUNTY SHERIFF'S
OFFICE, ET AL.,

RESPONDENTS.

**RESPONDENTS' MOTION TO DISMISS RELATOR'S
COMPLAINT FOR WRIT OF PROCEDENDO**

COUNSEL FOR RELATOR, PRO SE

COUNSEL FOR RESPONDENTS
CUYAHOGA COUNTY SHERIFF'S
OFFICE AND CUYAHOGA COUNTY
CLERK OF COURTS

RUSSELL STOKES (#493364)
c/o Marion Correctional Institution
P.O. Box 57
940 Marion-Williamsport Road
Marion, Ohio 43302

WILLIAM D. MASON
Cuyahoga County Prosecutor
BY: **JAMES E. MOSS**
(#0061958)
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I. PROCEDURAL HISTORY OF THE CASE

On September 26, 2005, relator Russell Stokes pled guilty in Cuyahoga County Court of Common Pleas case number CR-05-466472-A to two counts of rape in violation of R.C. 2907.02(A)(2) (counts 1 and 2), one count of aggravated burglary in violation of R.C. 2911.11(A)(1) (count 7), and one count of felonious assault in violation of R.C. 2903.11(A)(2) (count 9). All other counts were nolle.

On October 25, 2005, Relator was sentenced to seven years as to count 1, ten years as to count 2, and four years as to count 9. The trial court merged count 7 with counts 1 and 2. Counts 1 and 2 were ordered to run consecutively to each other, and count 9 was ordered to run concurrently with counts 1 and 2 for a total sentence of seventeen years.

Relator appealed his convictions to the Eighth District Court of Appeals which vacated his sentence and remanded the case for a new sentencing hearing in accordance with *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856. *State v. Stokes*, Cuyahoga App. No. 87319, 2006-Ohio-3966. On October 6, 2006, Relator was resentenced to the same sentence he received at his original sentence hearing. The Eighth District Court affirmed his convictions at resentencing. *State v. Stokes*, Cuyahoga App. No. 88939, 2007-Ohio-5063, appeal not accepted for review *State v. Stokes*, 117 Ohio St.3d 1408, 2008-Ohio-565.

On August 30, 2011, Relator filed a complaint for writ of procedendo (“Complaint”) asking this Court: (1) to compel respondent the Cuyahoga County Clerk of Courts to provide him with copies of documents relating to his underlying criminal case in response to a praecipe he sent to the Cuyahoga County Clerk of Courts on or about July 6 and July 20th, 2011 and (2) to compel the Cuyahoga County Sheriff’s Office to provide him with copies of documents he

claims he requested by public records request to the Cuyahoga County Sheriff's Office on or about July 20th, 2011.

II. LAW AND ARGUMENT

A. Relator failed to attach an affidavit to his Petition as mandated by R.C. 2969.25(A)

Under R.C. 2969.25(A) an inmate who commences a civil action against a government entity or employee must file an affidavit that contains a description of each civil action or appeal of a civil action that an inmate has filed in the previous five years in any state or federal court. Relator attached an affidavit to his Complaint in which he indicates that "I have previously filed the following civil actions which have been deemed frivolous or malice totaling: 0". R.C. 2969.25(A) does not limit the information that an inmate must provide concerning civil actions against a government entity or employee that he has filed to those that were deemed frivolous or malicious. Consequently, Relator has failed to comply with R.C. 2969.25(A).

The failure of Relator to comply with R.C. 2969.25(A) warrants dismissal of his petition for writ of procedendo. *State ex rel. Kimbro v. Glavas*, 97 Ohio St.3d 197, 2002-Ohio-5808, at ¶ 2 (court dismissed relator's complaint for writ of mandamus in part due to relator's failure to attach an affidavit as required by R.C. 2969.25(A)).

B. Relator's Affidavit Fails To Comply With R.C. 2969.25(C)

Under R.C. 2969.25(C) an inmate who files a complaint against a government entity or employee who seeks waiver of prepayment of the court's full filing fees must file with the complaint a waiver that contains: (1) a statement that sets forth the balance in the inmate account for the preceding six months, as certified by the institutional cashier; and (2) a statement that sets forth all other cash and things of value owned by the inmate. Relator attached an affidavit to his Complaint in which he indicates that he seeks a waiver of fees and costs and that he possesses

“no sufficient funds, property, nor chattel to offer as security to the costs and fees related to and in this action.”

Relator’s affidavit fails to include a statement that sets forth the balance in his inmate account for the preceding six months, as certified by the institutional cashier, and a statement that sets forth all other cash and things of value owned by him as mandated by R.C. 2969.25(C). The failure of Relator to comply with the requirements of 2969.25(C) warrants dismissal of his petition for writ of procedendo. *State ex rel. Alford v. Winters*, 80 Ohio St.3d 285, 286, 1997-Ohio-117 (relator’s failure to comply with R.C. 2969.25(C) warrants dismissal of his petition for writ of mandamus).

C. Relator is not entitled to a remedy by way of writ of procedendo

A writ of procedendo is merely an order from a court of superior jurisdiction to a court of inferior jurisdiction to proceed to judgment. It does not attempt to control the inferior court as what that judgment should be. *State ex rel. Utley v. Abruzzo* (1985), 17 Ohio St.3d 203, 204.

In his Complaint Relator is asking this Court: (1) to compel respondent the Cuyahoga County Clerk of Courts to provide him with copies of documents relating to his underlying criminal case in response to a praecipe he sent to the Cuyahoga County Clerk of Courts on or about July 6 and July 20th, 2011 and (2) to compel the Cuyahoga County Sheriff’s Office to provide him with copies of documents he claims he requested by public records request to the Cuyahoga County Sheriff’s Office on or about July 20th, 2011.

But respondent the Cuyahoga County Clerk of Courts is under no duty to transmit copies of documents relating to his underlying criminal case in response to a praecipe. The Cuyahoga County Clerk of Courts is only under a duty to supply requested records at a reasonable cost within a reasonable time during regular business hours. The Cuyahoga County Clerk of Courts

is under no duty to mail records to Relator. *State ex rel. Iacovone v. Kaminski*, 81 Ohio St.3d 189, 1998-Ohio-304 (court denied inmate's complaint for writ of mandamus, in which relator sought to compel clerks of courts to provide requested documents pursuant to public records request, since clerk of courts did not have a clear legal duty to transmit copies of documents to inmate in prison by mail); *State ex rel. Nelson v. Fuerst*, 66 Ohio St.3d 47, 1993-Ohio-179 (court denied inmate's complaint for writ of mandamus, in which relator sought to compel clerks of courts to provide requested documents pursuant to public records request, since clerk of courts had a duty to make records available at a reasonable cost within a reasonable time during regular business hours but did not have a duty to mail copies of public records).

Moreover, a writ of procedendo is an order from a court of superior jurisdiction to a court of inferior jurisdiction to proceed to judgment. *State ex rel. Weiss v. Hoover*, 84 Ohio St.3d 530, 1999-Ohio-422. Since respondent the Cuyahoga County Clerk of Courts is not a judge and has not refused to render a judgment or has unnecessarily delayed proceeding to judgment, he is an improper party. *State ex rel. Doughty v. Campbell*, Trumbull App. No. 2002-T-0112, 2002-Ohio-6466, at ¶ 5 (court dismissed relator's petition for writ of procedendo against Trumbull County Central District Court Clerk since she is not a judge and there are no circumstances under which a writ of procedendo would lie against her) ; *State ex rel. Smith v. Clerk of Courts Office Cuyahoga County* (Nov. 12, 1998), Cuyahoga App. No. 75215, 1998 WL 787420, * 1 (court dismissed petition for writ of procedendo filed against clerk of courts since only courts are proper parties in procedendo actions).

Relator also claims in his Complaint that the respondent Cuyahoga County Sheriff's Office failed to provide him with copies of documents he claims he requested by public records request to the Cuyahoga County Sheriff's Office on or about July 20th, 2011. However, the

Cuyahoga County Sheriff's Office never received Relator's public records request. In addition, Relator has failed to attach any documentation to his Complaint that establishes that he sent a public records request to the Cuyahoga County Sheriff's Office.

But even if he had sent a public records request to the Cuyahoga County Sheriff's Office, Relator is not entitled to a remedy by way of procedendo. As indicated above, a writ of procedendo is an order from a court of superior jurisdiction to a court of inferior jurisdiction to proceed to judgment. Since respondent the Cuyahoga County Sheriff's Office is not a judge and has not refused to render a judgment or has unnecessarily delayed proceeding to judgment, it is an improper party. *Yee v. Erie County Sheriff's Department*, 51 Ohio St.3d 43, 45 (court dismissed petition for writ of procedendo filed against county sheriff's department since a writ of procedendo cannot lie against a sheriff).

III. CONCLUSION

For the foregoing reasons, Respondents the Cuyahoga County Sheriff's Office and the Cuyahoga County Clerk of Courts respectfully request that this Court grant Respondents' Motion To Dismiss Relator's Complaint For Writ Of Procedendo.

Respectfully submitted,



James E. Moss (0061958)
Assistant Prosecuting Attorney
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216.443.7800

SERVICE

A copy of the foregoing Respondents' Motion To Dismiss Relator's Complaint For Writ Of Procedendo was mailed this 13th day of September, 2011, by regular U.S. Mail to Russell Stokes, Pro Se, Inmate # 493364, at Marion Correctional Institution, P.O. Box 57, 940 Marion-Williamsport Road, Marion, Ohio 43302.

A handwritten signature in black ink, appearing to read "James E. Moss", written over a horizontal line.

James E. Moss (0061958)
Assistant Prosecuting Attorney
Attorney For Respondents