

IN THE SUPREME COURT OF OHIO

TERRANCE HOUGH,

APPELLANT,

-vs-

HONORABLE SHIRLEY STRICKLAND
SAFFOLD,

APPELLEE,

Case No. 2011-1430

On Appeal from the
Cuyahoga County Court
Of Appeals, Eighth
Appellate District

MERIT BRIEF OF APPELLEE

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I. STATEMENT OF THE CASE

On April 13, 2007 appellant Terrance Hough was charged with three counts of Aggravated Murder, pursuant to R.C. 2903.01(A), for purposely, and with prior calculation and design, causing the deaths of Jacob Feichtner, Katherine Rosby, and Bruce Anderson. (Counts 1-3). Each aggravated murder count contained mass murder and firearm specifications. Appellant was additionally charged with two counts of attempted murder, pursuant to R.C. 2903.02(A)/R.C. 2923.02, for attempting to cause the deaths of Donald Walsh and Katherine Nicholas. (Counts 4 and 5)

Appellant pled not guilty and exercised his right to a jury trial. On May 15, 2008, the jury found Appellant guilty to all counts as charged in the indictment. The matter proceeded to the mitigation phase. The jury recommended that Appellant be sentenced to life without the possibility of parole. The trial court accepted the recommendation and sentenced Appellant to three consecutive sentences of life without parole for each count of aggravated murder. He was sentenced to ten years for each count of attempted murder, to be served consecutively to each other and consecutively to the aggravated murder sentences. The trial court additionally imposed a merged three-year sentence for the firearm specifications which were run prior to and consecutive with the underlying felonies.

Appellant's convictions were affirmed on appeal. *State v. Hough*, Cuyahoga App. No. 91691, 2010-Ohio-2770, appeal not allowed *State v. Hough*, 126 Ohio St.3d 1601, 935 N.E.2d 47, 2010-Ohio-4928. On September 7, 2010, Appellant also filed an application to reopen his appeal that was denied by the Eighth District Court of Appeals. *State v. Hough*, Cuyahoga App. No. 91691, 2011-Ohio-2656, appeal not allowed by *State v. Hough*, 129 Ohio St.3d 1454, 951 N.E.2d 1049, 2011-Ohio-4217.

Appellant filed his first untimely petition (“First Petition”) for post conviction relief on December 30, 2009. His First Petition was denied by the trial court on January 4, 2010. Appellant filed a second petition for post conviction relief (“Second Petition”) on July 16, 2010, which was denied by the trial court on July 29, 2010. (See Appellee’s MSJ to Petition for Writ, Ex. A). On September 9, 2010, Appellant filed a motion for findings of fact and conclusions of law in relation to his Second Petition. On September 22, 2010, Appellant filed a motion to recuse appellee Judge Saffold and a motion to supplement his Second Petition¹. The trial court filed findings of facts and conclusions of law on Appellant’s Second Petition on October 5, 2010. (See Appellee’s MSJ to Petition for Writ, Ex. B). On October 7, 2010, appellee Judge Saffold issued a journal entry denying Appellant’s motion to recuse Judge Saffold and motion to supplement his Second Petition. (See Appellee’s MSJ to Petition for Writ, Ex. C).

On November 1, 2010, Appellant filed a notice of appeal of the trial court’s denial of his First Petition with the Eighth District Court of Appeals. The Eighth District Court affirmed the trial court’s denial of his First Petition. *State v. Hough*, Cuyahoga App. No. 95953, 2011-Ohio-3690. On November 1, 2010, Appellant filed a notice of appeal of the trial court’s denial of his motion to recuse appellee Judge Saffold and motion to supplement his Second Petition. On November 15, 2010, the Eighth District Court of Appeals denied Appellant’s appeal for lack of a final appealable order.²

On November 24, 2010, Appellant filed a second motion for findings of fact and conclusions of law in relation to his Second Petition. On December 13, 2010, appellee

¹ Appellant’s motion to supplement his Second Petition was filed on September 22, 2010, approximately one and one-half months after the trial court issued a journal entry denying Appellant’s Second Petition on August 4, 2010.

² *State v. Terrance Hough*, Eighth District Court of Appeals case number 95954.

Judge Saffold issued a journal entry denying Appellant's second motion for findings of fact and conclusions of law in relation to his Second Petition, noting in the journal entry that Appellant had previously filed the same motion on September 9, 2010, and that the court had already issued findings of fact and conclusions of law in relation to his Second Petition on October 5, 2010. (See Appellee's MSJ to Petition for Writ, Ex. D).

On March 1, 2010, Appellant filed a petition for writ of mandamus and /or procedendo ("Petition for Writ") asking the Eighth District Court of Appeals to compel appellee Judge Saffold to issue a final appealable order in relation to the trial court's denial of: (1) Appellant's motion to recuse appellee Judge Saffold; and (2) motion to supplement his Second Petition, both of which he filed with the trial court on September 22, 2010.

On March 17, 2011, appellee Judge Saffold filed a motion for summary judgment to Appellant's Petition for Writ. On April 1, 2011, Appellant filed a reply to Appellee's motion for summary judgment. On July 11, 2011, the Eighth District Court granted Appellee's motion for summary judgment and denied Appellant's Petition for Writ. *State ex rel. Hough v. Saffold*, Cuyahoga App. No. 96468, 2011-Ohio-3477.

Appellant has filed an appeal of the Eighth District Court's judgment denying Appellant's Petition for Writ as a matter of right that is before this Court.

II. LAW AND ARGUMENT

Proposition of Law No. I: Defendant-Appellant Terrance Hough has a clear, legal right to a final appealable order that complies with R.C. 2505.02 and 2953.02, regarding the denial of his Motion For Judge Shirley Strickland Saffold to Recuse Herself; and the denial of his Motion to Supplement the Petition for Post-Conviction Relief, so he may pursue right of appeal.

The requisites for mandamus are well established: (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. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118.

In addition, a writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 2004-Ohio-6567, at ¶ 13. A writ of procedendo cannot be used to control judicial discretion, even if that discretion is abused. *State ex rel. George v. Burnside*, 118 Ohio St.3d 406, 2008-Ohio-2702, ¶ 7.

In his first proposition of law Appellant maintains that the Eighth District Court of Appeals erred when it denied his Petition for Writ on the basis that Appellant had failed to establish that he has a clear, legal right to a final appealable order for the motion to recuse appellee Judge Saffold, and the motion to supplement his Second Petition he filed with the trial court on September 22, 2010. Appellant's claims are without merit.

A. Appellant's Motion To Recuse Appellee Judge Saffold

Appellant claims that the Eighth District Court erred when it held that Appellant does not have a clear, legal right to a final appealable order for the motion to recuse he filed against appellee Judge Saffold, and that Appellee has no duty to issue a final appealable order. The Eighth District Court, relying upon *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 377 N.E.2d 775, correctly found that since only the Chief Justice of the Supreme Court of Ohio or his designee may rule upon an affidavit of disqualification of a

judge, the Eighth District Court was without jurisdiction to rule upon Appellant's motion to recuse appellee Judge Saffold. *State ex rel. Hough v. Saffold*, Cuyahoga App. No. 96468, 2011-Ohio-3477, at ¶ 6.

However, Appellant's claim that he has a clear, legal right to a final appealable order for the motion to recuse appellee Judge Saffold is moot. On October 10, 2011 this Court issued a judgment entry granting Appellant's affidavit of disqualification seeking to disqualify appellee Judge Saffold from acting on any further proceedings in case number CR-07-499308-A³. As a result, Appellant's contention that he has a right to a final appealable order for the motion to recuse Judge Saffold is moot. *State ex rel. Fontanella v. Kantos*, 117 Ohio St.3d 514, 2008-Ohio-1431, ¶ 6 ("Neither procedendo nor mandamus will compel the performance of a duty that has already been performed.").

B. Appellant's Motion to Supplement His Second Petition

Appellant also claims that the Eighth District Court erred when it determined that Appellee did not have a duty to issue findings of fact and conclusions of law on Appellant's motion to supplement his Second Petition. Appellant's claim is without merit.

On October 10, 2011 this Court issued a judgment entry granting Appellant's affidavit of disqualification seeking to disqualify appellee Judge Saffold from acting on any further proceedings in case number CR-07-499308-A⁴. As a result, Appellant's claim that appellee Judge Saffold has a duty to issue a final appealable order for the motion to supplement his Second Petition is moot since appellee Judge Saffold is

³ *State v. Hough*, Supreme Court of Ohio case number 11-AP-088.

⁴ See fnt. 3.

prohibited from acting on any further proceedings in case number CR-07-499308-A. However, even if this Court determines that this claim is not moot, Appellant's claim should be denied since it is without merit.

Appellant filed his Second Petition on July 16, 2010, which was denied by the trial court on July 29, 2010. (See Appellee's MSJ to Petition for Writ, Ex. A). Appellant filed his motion to supplement Second Petition on September 22, 2010, approximately one and one-half months *after* the trial court denied his Second Petition. The trial court issued a journal entry on October 7, 2010 denying Appellant's motion to supplement Second Petition. (See Appellee's MSJ to Petition for Writ, Ex. C). It was within the trial court's discretion to deny Appellant's motion to supplement Second Petition without issuing findings of fact and conclusions of law. Appellee does not have a duty to issue findings of fact and conclusions of law when ruling on a motion to supplement a successive petition for postconviction relief.

As a result, the Eighth District Court was correct when it held that Appellee fulfilled her duty when she denied Appellee's motion to supplement his Second Petition since "[t]here exists no duty to issue findings of fact and conclusions of law for untimely or successive postconviction relief petitions, much less motions to supplement such petitions." *State ex rel. Hough v. Saffold*, Cuyahoga App. No. 96468, 2011-Ohio-3477, at ¶ 7; see also *State ex rel. White v. Goldsberry*, 76 Ohio St.3d 271, 1996-Ohio-406 (court affirmed denial of writ of mandamus, in which defendant sought to compel trial court to issue findings of fact and conclusions of law on successive petition for postconviction relief, since trial judge did not have a duty to file findings of fact and conclusions of law on successive petition); *State ex rel. Jennings v. Nurre*, 72 Ohio St.3d 596, 597, 1995-Ohio-280 (court affirmed dismissal of petition for writ of mandamus, in which

petitioner sought findings of facts and conclusion of law on successive petition for postconviction relief, since a trial court's discretion under R.C. 2953.23(A) applies to issuing findings of fact and conclusions of law on successive petitions for postconviction relief alleging different grounds than those in the first petition).

Appellant has not cited to any legal authority that requires a trial court to issue findings of fact and conclusions of law when ruling on a motion to supplement a successive petition for postconviction relief. Instead Appellant, relying on R.C. 2953.21(F), maintains that his motion to supplement Second Petition was timely since the State of Ohio had not responded to his motion. Under R.C. 2953.21(F) a petitioner may amend a petition for postconviction relief without leave of court at any time before an answer or motion is filed by the prosecuting attorney. However, R.C. 2953.21(F) applies to amending petitions for postconviction relief, not motions to supplement petitions for postconviction relief. In addition, in the instant case Appellant filed his motion to supplement Second Petition *after* the trial court had already denied his Second Petition. Therefore, R.C. 2953.21(F) is not applicable to this case.

But even if Appellant's motion to supplement Second Petition was timely filed, Appellant has failed to establish that Appellee had a duty to issue findings of fact and conclusions of law or that Appellant has a legal right to findings of fact and conclusions of law when Appellee denied Appellant's motion to supplement his Second Petition. The Eighth District Court was correct when it held that Appellee had no duty to issue findings of fact and conclusions of law when she denied Appellant's motion to supplement his Second Petition. *State ex rel. Hough v. Saffold*, Cuyahoga App. No. 96468, 2011-Ohio-3477, at ¶ 7. Therefore, the judgment of the Eighth District Court should be affirmed.

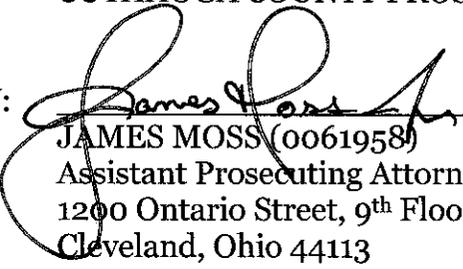
III. CONCLUSION

For the foregoing reasons, appellee Judge Saffold respectfully requests that this Court affirm the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

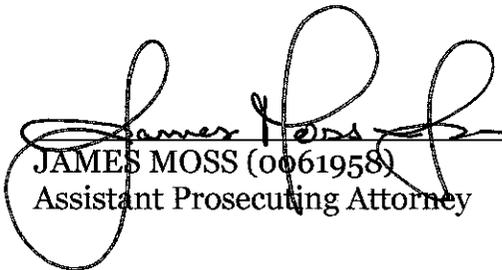
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IV. CERTIFICATE OF SERVICE

A copy of Appellee's Merit Brief was mailed this 28th day of October, 2011 to Terrance Hough, Pro Se, Inmate # 550442, at Toledo Correctional Institution, 2001 East Central Avenue, P.O. Box 80033, Toledo, Ohio 43608.

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