ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. WILLIAM HUDSON,

APPELLANT,

-vs-

HONORABLE JOHN SUTULA, et al.,

APPELLEES.

Case No. 2011-1680

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

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MERIT BRIEF OF APPELLEES

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FILED
NOV 18 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

On February 7, 2007, a jury found Appellant William Hudson guilty of two counts of attempted murder in violation of R.C. 2923.02/2903.02 with one-year and three-year firearm specifications (counts 1 and 2), two counts of felonious assault in violation of R.C. 2903.11 with one-year and three-year firearm specifications (counts 3 and 4), and one count of having a weapon while under a disability under R.C. 2923.13 (count 7). Hudson was found not guilty of counts 5 and 6. The trial court found Hudson guilty of notice of prior conviction and repeat violent offender specifications in counts 1, 2, 3, and 4 of the indictments.

On March 8, 2007, Hudson was sentenced to three years on the firearm specifications (all one and three-year firearm specifications to merge) to be served prior to and consecutive with ten years on the base charge on each of counts 1 and 2 to run concurrent with each other, and six years on each of the base charges in counts 3 and 4 to run concurrent with each other, and five years on count 7 with all counts to run concurrently to each other for a total sentence of 24 years.

Hudson's convictions were affirmed on appeal. *State v. Hudson*, Cuyahoga App. No. 89588, 2008-Ohio-1265, appeal not allowed by *State v. Hudson*, 119 Ohio St.3d 1447, 2008-Ohio-4487. Hudson subsequently filed an application to reopen that was denied by the Eighth District Court of Appeals. *State v. Hudson*, Cuyahoga App. No. 89588, 2009-Ohio-3069, appeal not allowed by *State v. Hudson*, 123 Ohio St.3d 1426, 2009-Ohio-5340, reconsideration granted by *State v. Hudson*, 123 Ohio St.3d 1526, 2009-Ohio-6487, appeal dismissed as improvidently allowed by *State v. Hudson*, 124 Ohio St.3d 1237, 2010-Ohio-1425.

On April 22, 2011, Hudson filed a petition for writ of mandamus and/or procedendo ("Petition") asking the Eighth District Court to compel Appellee Judge John Sutula to resentence him based upon his claim that he was convicted of allied offenses in violation of the Double Jeopardy Clause of the United States Constitution. On September 14, 2011, the Eighth District Court granted Appellees' motion to dismiss and denied Appellant's Petition. *State ex rel. Hudson v. Sutula, et al.,* Cuyahoga App. No. 96705, 2011-Ohio-4644.

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

II. LAW AND ARGUMENT

Proposition of Law: The Court of Appeals erred in dismissing Relator's Complaint/Petition for Writs of Mandamus and/or Procedendo to correct Relator's Sentence that is contrary to law pursuant to R.C. 2941.25(A) that the trial court had a mandatory duty to comply with the provisions thereof, violating Relator's constitutional guarantee against double jeopardy.

Hudson complains the Eighth District Court of Appeals erred in dismissing his petition for writ of mandamus and/or procedendo. In doing so, he contends the appellee Judge Sutula did not properly address the issue of allied offenses at sentencing and, therefore, his sentence is void. Yet, Hudson's petition was properly dismissed by the appellate court because it is defective and Hudson has no a clear legal right to the writ.

A. Appellant's petition is defective

The local rules of the Eighth District Court of Appeals require that extraordinary writs contain an affidavit specifying the details of the claim. "All complaints must contain the specific statements of fact upon which the claim of illegality is based and

must be supported by an affidavit from the plaintiff or relator specifying the details of the claim. Absent such detail and attachments, the complaint is subject to dismissal." Local App.R. 45(B)(1)(a).

The Eighth District Court of Appeals found that Appellant's affidavit that simply indicates that "[t]he statements contained in paragraph 1 through 11 in Complaint/Petition for Writs of Mandamus and/or Procedendo are accurate representations of the actual events in Relator's Criminal case" was defective and required dismissal of Appellant's Complaint since it failed to comply with the mandates of Local App.R. 45(B)(1)(a). *State ex rel. Hudson v. Sutula, et al.*, Cuyahoga App. No. 96705, 2011-Ohio-4644 at ¶ 8.

This Court has recognized that a violation of Local App.R. 45(B)(1)(a) of the Eighth District Court of Appeals warrants a dismissal of an action for an extraordinary writ. See *State ex rel. Boccuzzi*, 112 Ohio St.3d 438, 860 N.E.2d 749, 2007-Ohio-323, ¶ 19 (appellants' conclusory allegations of abuse of discretion, bad faith, conflict of interest, self-interest, and self-dealing by Cuyahoga County Board of Commissioners in their complaint for writ of mandamus were insufficient to withstand dismissal under Local App.R. 45(B)(1)(a)); *State ex rel. White v. Suster*, 95 Ohio St.3d 465, 768 N.E.2d 1178, 2002-Ohio-2482, ¶ 2 (even assuming Appellant was correct that mandamus was appropriate to compel a judge to enter a specific judgment, he would still not be entitled to reversal based upon his failure to comply with Loc.App.R 45(B)(1)(a)).

Therefore, the decision of the Eighth District Court of Appeals to grant Appellees' motion to dismiss Appellant's petition should be affirmed.

B. Appellant has no clear legal right to the writ

The requirements 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.

Furthermore, a writ of mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176 (overruled on other grounds); *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55; *State ex rel. Pressley v. Industrial Commission of Ohio* (1967), 11 Ohio St.2d 141, paragraph three of the syllabus. Moreover, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath,* 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108; *State ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga County* (1990), 56 Ohio St.3d 33.

Also well-established are the criteria for relief in procedendo. The relator must demonstrate: (1) a clear legal right to proceed in the underlying matter; and (2) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Weiss v. Hoover* (1999), 84 Ohio St.3d 530, 531-532; see, e.g., *State ex rel. Charvat v. Frye,* 114 Ohio St. 3d 76, 2007-Ohio-2882, at ¶ 13. 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. In addition, 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.

Hudson failed to establish that he has a clear legal right to the requested relief, that Appellee Judge Sutula has a clear legal duty to perform the requested relief, that he had or has no adequate remedy at law, or that Appellee Judge Sutula has refused to render a judgment or has unnecessarily delayed proceeding to judgment.

Hudson claims that he was convicted of allied offenses in violation of the Double Jeopardy Clause of the United States Constitution. But Hudson is not entitled to a remedy by way of extraordinary writ based upon allegations that he was convicted of allied offenses since he has or had adequate remedies at law to raise these claims. *State ex rel. Martin v. Russo*, __ Ohio St.3d. __, 2011-Ohio-5516 (slip opinion) (allied-offense claims were not cognizable in an action for an extraordinary writ because defendant had an adequate remedy by appeal to raise these claims); *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479, at ¶ 10 (allied offenses are non-jurisdictional and are not cognizable in habeas corpus). Since Hudson had or has adequate remedies at law to raise his claim that he was convicted of allied offenses he is not entitled to a remedy by way of mandamus or procedendo.

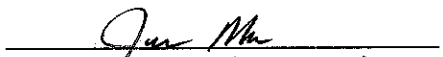
Therefore, the decision of the Eighth District Court of Appeals to grant Appellees' motion to dismiss Appellant's Petition should be affirmed.

III. CONCLUSION

For the foregoing reasons, Appellees Judge John Sutula and the Cuyahoga Court of Common Pleas respectfully request that this Honorable Court affirm the judgment of the Eighth District Court of Appeals dismissing Appellant's Petition for Writ of Mandamus and/or Procedendo.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecutor



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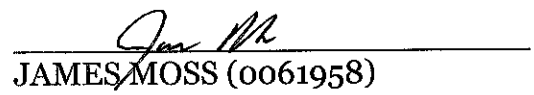
IV. CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of appellees Judge John Sutula and the Cuyahoga County Court of Common Pleas was sent this 18th day of November, 2011, by regular U.S. Mail to William Hudson Pro Se, Inmate # 523-118, at Mansfield Correctional Institution, P.O. Box 788, 1150 North Main Street, Mansfield, Ohio 44901.



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