

IN THE SUPREME COURT OF OHIO

State ex rel., LA'MON R. AKEMON, JR., :
: Relator, : Case No. 2012-0529
v. : Original Action in Mandamus
LEE H. HILDEBRANDT, JR., JUDGE, et al., :
: Respondents. :
:

MOTION TO DISMISS OF RESPONDENTS
JUDGE HILDEBRANDT AND THE FIRST DISTRICT COURT OF APPEALS

Pursuant to Sup. Ct. Prac. R. 10.5 and Ohio Civ. Rule 12(B)(6), Respondents Judge Lee H. Hildebrandt, Jr. and the First District Court of Appeals hereby move this Court to dismiss Relator's petition for a writ of mandamus. A memorandum in support is attached.

Respectfully submitted,

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*Judge Lee H. Hildebrandt, Jr. and
the First District Court of Appeals*

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

Relator La'Mon R. Akemon, Jr. initiated this mandamus action to compel Respondents, Judge Lee H. Hildebrandt, Jr. and the First District Court of Appeals, to accept Relator's appeal as timely filed. Relator's complaint fails to articulate any facts showing that he is entitled to this relief. Accordingly, Respondents respectfully request this Court dismiss Relator's complaint.

II. STATEMENT OF FACTS

On March 8, 2004, Relator pled guilty to two first-degree felony counts of trafficking in cocaine. Relator's Complaint at 1.¹ On April 30, 2004, the Hamilton County Court of Common Pleas sentenced Relator to two concurrent ten-year prison terms. *Id.* Following this sentence, Relator attempted to challenge his convictions on at least four separate occasions to the First District. *Id.* at 1, 3, 7; *see also* Relator's Ex. E.

On September 24, 2009, Relator discovered, on his own, that the trial court had issued a decision and judgment entry on August 31, 2009 on one of his motions for resentencing, but that the court had failed to provide him service of that decision. *Id.* at 1. On October 6, 2009, Relator received a copy of this decision after calling the clerk's office. *Id.* On October 21, 2009, Relator filed a notice of appeal of the August 31, 2009 decision with the First District. *Id.*

On November 10, 2009, the First District, which considered the appeal timely due to the trial court's failure to properly notify Relator, denied Relator's motion as moot. *Id.* The court later denied the appeal as moot because Relator had since received the relief he requested: a resentencing hearing. *See* Relator's Ex. E (entry dated December 22, 2010).

¹ Pagination begins on the second page of the complaint. The first, unnumbered page will be referred to as "cover page."

On April 6, 2010, the First District Court of Appeals deemed Relator's original sentence null and void because the trial court failed to properly notify Relator of post-release controls. Relator's Complaint at 2. The First District thus remanded Relator's case back to the trial court for resentencing. *Id.*

On April 19, 2010, Relator filed a motion to withdraw his guilty plea. *Id.* at 2. On June 15, 2010, the trial court held a resentencing hearing, at which Relator was present, and dismissed Relator's motion to withdraw his guilty plea. *Id.* This decision was journalized on June 15, 2010; the new sentence, although also decided on June 15, 2010, was not journalized until July 9, 2010. *See* Relator's Ex. G.

On June 25, 2010, Relator filed a "Motion to Stay entry of any judgment from the hearing held on June 15, 2010 and recall the Defendant for a hearing that comports with due process." Relator's Complaint at 2; *see also* Relator's Ex. D. Relator received the State's memorandum contra Relator's motion to withdraw his guilty plea after the June 15, 2010 hearing. Relator's Complaint at 2. This appears to be the impetus for Relator's June 25, 2010 motion. *Id.* Relator filed two additional motions on August 6, 2010 and October 15, 2010. *Id.*

Relator received a copy of the June 15, 2010 hearing entries on November 9, 2010, attached to the prosecution's praecipe. *Id.* On February 1, 2011, Relator received both judgment entries in the mail after contacting the clerk's office on January 28, 2011. *Id.* at 3, citing Relator's Ex. G.

On February 14, 2011, Relator filed a notice of appeal with the First District for the June 15, 2010 and July 9, 2010 judgment entries. *Id.*, citing Relator's Ex. H. On March 9, 2011, the First District dismissed the appeal because Relator did not timely file. *Id.*, citing Relator's Ex. I.

On June 16, 2011, Relator filed a complaint in mandamus in this Court requesting a writ ordering the First District to accept Relator's appeal as timely. Relator's Complaint at 3, citing S.Ct. Case No. 2011-1020.² The complaint was dismissed on August 24, 2011. See S.Ct. Case No. 2011-1020.³ Following this decision, Relator filed a motion for delayed appeal with the First District on December 27, 2011. Relator's Complaint at 6. His motion was denied on January 25, 2012. *Id.*; see also Relator's Ex. L.

On March 29, 2012, Relator filed the current complaint in mandamus with this Court apparently requesting a writ ordering Respondents to toll his deadline for appeal. Relator's Complaint at 1. Relator appears to argue that because he did not receive notice of the journalized entries from the June 15, 2010 resentencing hearing, his deadline for appeal was tolled. *Id.* These are essentially the arguments presented to this Court in Relator's June 16, 2011 mandamus action. See S.Ct. Case No. 2011-1020. For the following reasons, Respondents respectfully ask this Court to dismiss Relator's complaint.

III. ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt, Inc.*, 125 Ohio St.3d. 494, 2010-Ohio-2057, ¶ 11. When considering the factual allegations of the complaint, a court must accept incorporated items as true and "the plaintiff must be afforded all reasonable inferences possibly derived therefrom."

² Relator cites "Ohio Supreme Court Sup. Ct. no. 11-10." He appears to refer to Case No. 11-1020, the mandamus action he filed on June 16, 2011.

³ Civil Rule 12(B)(6) requires that, where a motion to dismiss presents matters outside of the complaint, the court must treat the motion as a summary judgment motion under Civil Rule 56. The court may consider documents attached to or incorporated into the complaint in a motion to dismiss, however. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249 (1997). Here, Relator's complaint references this mandamus action.

Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 192 (1988). Finally, a court must find that it appears beyond doubt that the plaintiff's complaint can prove none of the facts presented. Civ.R. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.*, 55 Ohio St.3d 98, 99 (1990).

B. Relator's request for writ of mandamus must fail because he can satisfy none of the requirements for a writ to issue.

A writ of mandamus will issue only where three requirements are met: (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) the relator must have no adequate remedy at law. *State ex rel. Van Gundy v. Indus. Comm'n*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13, citing *State ex rel. Luna v. Huffman*, 74 Ohio St.3d 486, 487, 659 N.E.2d 1279 (1996). Because Relator fails to meet any of these requirements, his mandamus action must fail.

After the thirty day period to appeal has expired, a party must file both a notice of appeal and an accompanying motion for delayed appeal. App. R. 4(A); App. R. 5(A). This motion for delayed appeal should set out the reasons for the failure of the party to perfect the appeal. App. R. 5(A)(2). If a party has failed to obtain leave of the appellate court to file a delayed appeal, an appellate court lacks jurisdiction under Ohio Const. Art. IV, § 3(B)(2) and R.C. § 2501.02 to determine whether the trial court abused its discretion in denying a defendant's motion to withdraw a guilty plea. *State v. Kramer*, 10th App. Dist. No. 03AP-633, 2004-Ohio-2646.

Relator cites *In re Anderson*, 92 Ohio St.3d 63, 2001-Ohio-131 (2001) for the proposition that the deadline for appeal is tolled until proper service of a final judgment entry is made. Relator's Complaint at 1. *In re Anderson*, however, dealt exclusively with juvenile court proceedings and has since been superseded by statute. *In re T.M.*, 6th Dist. Case Nos. L-10-

1245, L-10-1246, 2010-Ohio-5506, ¶ 12. Thus, Relator's reliance on *In re Anderson* is inapposite.

On February 14, 2011, Relator filed a notice of appeal with the First District Court of Appeals after the thirty day appeal period had lapsed. Relator's Complaint at 3, citing Relator's Ex. G-H. Relator failed to file a motion for delayed appeal. Accordingly, Respondent Judge Hildebrandt properly dismissed this appeal as untimely. Judge Hildebrandt noted, however, that Relator did not file a motion for delayed appeal as required by App. R. 5(A). *Id.*, citing Ex. I. Over nine months later, after filing a mandamus action in this Court, Relator filed a motion for a delayed appeal. *Id.* at 7. After considering Relator's motion, the First District denied his motion for a delayed appeal. *Id.*, citing Relator's Ex. L.

Relator can therefore meet none of the requirements for a writ of mandamus to issue. First, Relator has no legal right to the relief he requests because his timeframe for appeal from the June 15, 2010 judgments was not tolled. Further, Relator has not provided adequate support for his assertion that his timeframe for appeal should have been tolled. Relator thus has no appeal of right. Second, Respondents have no legal duty to grant Relator the relief he requests. Again, Relator had thirty days to appeal from the decisions of the trial court made at the June 15, 2010 hearing, at which he was present. He failed to timely appeal. Further, Respondents have no legal duty to grant a motion for a delayed appeal that is more than seventeen months late, as was Relator's motion. App. R. 5(A). Finally, Relator has an adequate remedy at law: an appeal from the First District's order denying his motion for a delayed appeal. Accordingly, this Court must dismiss Relator's request for a writ of mandamus.

IV. CONCLUSION

For the foregoing reasons, Respondents Judge Hildebrandt and the First District Court of Appeals respectfully ask this Court to dismiss Relator's complaint.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



SARAH PIERCE (0087799)

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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 April 20, 2012 upon the following:

LA'MON R. AKEMON, JR.
Ross Correctional Institution
P.O. Box 7010
Chillicothe, Ohio 45601

Relator

A handwritten signature in cursive script, appearing to read "S. Pierce", is written over a horizontal line.

SARAH PIERCE
Assistant Attorney General