

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. LEVERT ERVIN,

APPELLANT,

-vs-

JUDGE PAMELA BARKER,

APPELLEE.

Case No. 2013-0331

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

**MERIT BRIEF OF APPELLEE
JUDGE PAMELA BARKER**

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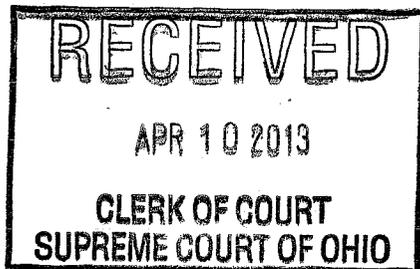


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MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY OF THE CASE

On May 4, 2001, a jury found appellant Levert Ervin guilty in Cuyahoga County Court of Common Pleas case number CR-01-400774 of eleven counts of rape in violation of R.C. 2907.02 (Counts 1, 3 through 7, and 10 through 14), and one count of attempted rape in violation of R.C. 2923.02/2907.02 (Count 2). Counts 8 and 9 were dismissed.

On May 22, 2001 Ervin was sentenced to mandatory life in prison for each of Counts 1, and 3 through 7, to ten years on Count 2, and to life in prison on each of Counts 10 through 14 with all counts to run consecutively to each other. Ervin's convictions were affirmed on appeal. *State v. Ervin*, 8th Dist. No. 80473, 2002-Ohio-4093, appeal not accepted for review *State v. Ervin*, 98 Ohio St.3d 1412, 2003-Ohio-60.

On July 24, 2012, Ervin filed a petition for writ of mandamus ("Petition") asking the Eighth District Court of Appeals to compel appellee Judge Pamela Barker to vacate an order issued by acting administrative judge Christopher Boyko¹ on April 25, 2001, in which he granted the State of Ohio's motion to take the deposition of Ian Lucash, a social worker from the Cuyahoga County Department of Children and Family Services, during the trial in underlying case number CR-01-400774.

On August 6, 2012, Judge Barker filed a motion to dismiss Ervin's Petition. On August 15, 2012, Ervin filed a brief in opposition to Judge Barker's motion to dismiss. In addition, on September 10, 2012, Ervin filed a motion for summary judgment.

¹ Judge Christopher Boyko, who is currently a judge in the United States District Court for the Northern District of Ohio, was a judge in the Cuyahoga County Court of Common Pleas during the period of time of Ervin's trial in case number CR-01-400774.

On February 4, 2013, the Eighth District Court of Appeals granted Judge Barker's motion to dismiss Ervin's Petition, denied Ervin's motion for summary judgment, and dismissed Ervin's Petition. *State ex rel. Ervin v. Barker*, 8th District No. 98704, 2013-Ohio-376.

Ervin appealed the Eighth District Court's dismissal of his Petition that is currently before this Court.

II. LAW AND ARGUMENT

Proposition of Law: The lower court erred as a matter of law by failing to apply the correct standard of review when granting respondent's motion to dismiss relator's petition for writ of mandamus based upon allegations and assertions contained outside the pleadings, and which motion was not properly supported by affidavits, exhibits or attachments as required by Civ.R. 56(C).

In his proposition of law Ervin claims that the Eighth District Court of Appeals erred when it granted appellee Judge Barker's motion to dismiss his Petition since the Eighth District Court: (1) considered matters outside the record; (2) erroneously denied his Petition on the basis that he had an adequate remedy at law; and (3) erroneously considered the affirmative defense of res judicata. Ervin's claims are without merit.

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 *State ex rel. Ervin v. Barker*, 8th District No. 98704, 2013-Ohio-376 ("*Ervin*") the Eighth District Court of Appeals denied Ervin's Petition on the basis that he had an adequate remedy at law to challenge the authority of the acting administrative judge to grant the State of

Ohio's motion to take the deposition of witness Ian Lucash, a social worker from the Cuyahoga County Department of Children and Family Services, when he filed his appeal of his convictions, and when the trial court, on June 21, 2012, denied his motion to vacate the order of the administrative judge to take the deposition of witness Ian Lucash². *Id.* at ¶ 9.

In his proposition of law Ervin maintains that the Eighth District Court in *Ervin* erroneously considered matters outside of the record when it granted appellee Judge Barker's motion to dismiss Ervin's Petition. More specifically, Ervin maintains that the Eighth District Court in *Ervin* should not have considered whether he had an adequate remedy at law to raise his claim that the administrative judge had the authority to grant the State's motion to take the deposition of witness Ian Lucash since he did not "[s]ubmit on the face of his petition for mandamus that he had exhausted his remedy by way of appeal...." (Appellant's brief, p. 5).

However, the Eighth District Court in *Ervin* was required to determine if Ervin had an adequate remedy at law as part of its determination whether he was entitled to a remedy by way of writ of mandamus. *State ex rel. Hudson v. Sutula*, 131 Ohio St.3d 177, 2012-Ohio-554, ¶ 1 (neither mandamus nor procedendo will issue if the party seeking extraordinary relief has an adequate remedy at law).

Ervin also appears to be maintaining that the Eighth District Court in *Ervin* erroneously considered matters outside of the record when it determined that he had an adequate remedy to challenge the authority of the administrative judge to grant the State's motion to take the deposition of witness Ian Lucash when he appealed his conviction in *State v. Ervin*, 8th Dist. No. 80473, 2002-Ohio-4093. (Appellant's brief, p. 4).

² The acting administrative judge granted the State's motion to take the deposition of witness Ian Lucash on April 25, 2001. (See trial transcript of April, 25, 2001 in case number CR-01-400774, pp. 141-142, attached to Ervin's petition for writ of mandamus as Ex. 1)

However, a court can take judicial notice of adjudicative facts from other Ohio courts under Evid.R. 201. *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 16 (1996), citing *First Michigan Bank & Trust Co. v. P. & S. Bldg.*, 4th Dist. No. 413, 1989 WL 11915 (Feb. 16, 1989) (a court may take judicial notice of adjudicative facts under Evid.R. 201); *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, ¶ 10, citing *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573 (court can take judicial notice of appropriate matters in determining a Civ.R. 12(B)(6) motion without converting it to a motion for summary judgment); *State v. Raymond*, 10th Dist. No. 08AP-78, 2008-Ohio-6814, ¶ 16 (appellate courts may take judicial notice of findings in other Ohio cases).

As a result, the Eighth District Court in *Ervin* had the authority and discretion to take judicial notice of the fact that Ervin filed an appeal of his convictions, but failed to raise a claim in his appeal that the acting administrative judge in case number CR-01-400774 was without authority to grant the State of Ohio's motion to take the deposition of witness Ian Lucash. As a result, the Eighth District Court in *Ervin* did not err when it took judicial notice that Ervin failed to raise a claim in his appeal of his convictions that the acting administrative judge was without authority to grant the State's motion to take the deposition of witness Ian Lucash in case number CR-01-400774.

In his proposition of law Ervin also maintains that the Eighth District Court in *Ervin* erred when it denied his Petition on the basis that Ervin had an adequate remedy at law to appeal the trial court's denial, on June 21, 2012, of Ervin's motion to vacate the order of the acting administrative judge of April 25, 2001 to take the deposition of witness Ian Lucash. (Appellant's brief, p. 6). More specifically, Ervin contends that the Eighth District Court in *Ervin* improperly considered the trial court's denial of Ervin's motion to vacate the order of the acting

administrative judge of April 25, 2001 to take the deposition of witness Ian Lucash since the journal entry was outside the record and not “accompanied by any exhibits or other evidentiary matter”. (Appellant’s merit brief at p. 6).

However, a court can take judicial notice of adjudicative facts from other Ohio courts under Evid.R. 201. *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, ¶ 10, citing *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573 (court can take judicial notice of appropriate matters in determining a Civ.R. 12(B)(6) motion without converting it to a motion for summary judgment); *France v. Celebrezze*, 8th Dist. No. 98147, 2012-Ohio-2072, ¶ 6 (court took judicial notice of docket that a pleading was filed in underlying case pursuant to Evid.R. 201(B)).

Moreover, Ervin attached a copy of the trial court’s journal entry issued on June 22, 2012 denying his motion to vacate the order of the acting administrative judge of April 25, 2001 as an exhibit to his Petition. (Appellant’s Petition, Ex. 4). As a result, the Eighth District Court in *Ervin* properly considered the trial court’s denial of Ervin’s motion to vacate the order of the acting administrative judge of April 25, 2001 when it determined that he had an adequate remedy at law to appeal the trial court’s denial of Ervin’s motion to vacate.

Furthermore, the Eighth District Court in *Ervin* was correct when it held that the trial court’s denial, on June 21, 2012, of Ervin’s motion to vacate the order of the administrative judge of April 25, 2001 is a final appealable order that precludes relief by way of writ of mandamus. *State ex rel. Skyway Investment Corp. v. Ashtabula Cty. Court of Common Pleas*, 130 Ohio St.3d 220, 2011-Ohio-5452, ¶ 14 (court denied petition for writ of prohibition since appellant had an adequate remedy at law to appeal the trial court’s denial of appellant’s motion to vacate). Consequently, the Eighth District Court in *Ervin* correctly denied Ervin’s Petition on

the basis that he had an adequate remedy at law by way of appealing the trial court's denial of Ervin's motion to vacate the order of the administrative judge of April 25, 2001. *State ex rel. Ervin v. Barker*, 8th District No. 98704, 2013-Ohio-376, ¶ 9.

Ervin also contends that the Eighth District Court in *Ervin* erred when it utilized the phrase "substitute judge" since "[t]he subject of a substitute judge was not raised in the petition for mandamus." (Appellant's brief, p. 4). Ervin appears to be claiming that the Eighth District Court raised an issue not before the court when it used the phrase "substitute judge" in paragraph 8 of its opinion. However, it is clear from a plain reading of the phrase "substitute judge" in the context of paragraph 8 of the court's opinion in *Ervin* that the court used the term "substitute judge" in the context of the reassignment of a case that was at issue in the case of *Berger v. Berger*, 3 Ohio App.3d 125 (8th Dist. 1981), that was relied upon by Ervin on support of his Petition. As a result, the Eighth District Court in *Ervin* did not err in utilizing the phrase "substitute judge" in its opinion.

Ervin also claims in his proposition of law that the Eighth District Court in *Ervin* erred when it determined that he had an adequate remedy at law to challenge the authority of the acting administrative judge to grant the State's motion to take the deposition of witness Ian Lucash since the administrative judge's order is void. (Appellant's brief, p. 5)

However, the Eighth District Court in *Ervin* correctly determined that the acting administrative judge's order to grant the State's motion to take the deposition of witness Ian Lucash was voidable, not void. As a result, the Eighth District Court in *Ervin* properly found that Ervin had an adequate remedy by way of appeal to raise his claim that the acting administrative judge did not have the authority to grant the State's motion to take the deposition of witness Ian Lucash.

In *Berger v. Berger*, 3 Ohio App.3d 125 (8th Dist. 1981), a case heavily relied upon by Ervin in support of his Petition, the court found that since all the persons in the case who attempted to exercise jurisdiction were judges, any improper rulings concerning the transfer of cases to judges were voidable, not void. *Id.* at fnt 4. As a result, the court on *Berger* concluded, the relator waived the issue of improper transfer of cases having failed to raise the claim in his first appeal. *Id.* at p. 131. See also *Rolfe v. Galvin*, 8th Dist. No. 86471, 2006-Ohio-2457, ¶ 6-7 (court denied relator's petition for writ of prohibition since any error in the substitution of one judge for another is voidable, not void, and relator had an adequate remedy by way of appeal to raise his claim).

As a result, the Eighth District Court in *Ervin* correctly denied Ervin's Petition on the basis that he had an adequate remedy at law to raise his claim that the acting administrative judge did not have the authority to grant the State's motion to take the deposition of witness Ian Lucash. *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, ¶ 2 (court affirmed dismissal of petition for writ of mandamus and prohibition since appellant had an adequate remedy at law to raise claim that judge was improperly assigned); *State ex rel. Keith v. McMonagle*, 106 Ohio St.3d 61, 2005-Ohio-3669, ¶ 7 (court affirmed denial of petition for writ of mandamus since appellant had an adequate remedy at law to raise claim that judges were improperly assigned to criminal cases); *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 30 (1983) (court affirmed denial of petition for writ of mandamus and prohibition since appellant had an adequate remedy at law to contest the issue of improper assignment of case).

Ervin also suggests in his brief that appellant Judge Barker improperly asserted the affirmative defense of res judicata in her motion to dismiss Ervin's Petition. (Appellant's brief,

p. 4). However, appellee Judge Barker never asserted the affirmative defense of res judicata in her motion to dismiss Ervin's Petition.

Consequently, the Eighth District Court in *Ervin* correctly dismissed Ervin's Petition on the basis that he had an adequate remedy at law to challenge the authority of the acting administrative judge to grant the State of Ohio's motion to take the deposition of witness Ian Lucash when he filed his appeal of his convictions, and when the trial court, on April 25, 2001, denied his motion to vacate the order of the administrative judge to take the deposition of witness Ian Lucash. *State ex rel. Ervin v. Barker*, 8th District No. 98704, 2013-Ohio-376, ¶ 9.

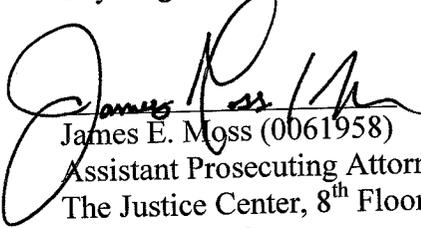
For the foregoing reasons, appellee Judge Pamela Barker respectfully requests that this Court deny Ervin's proposition of law.

III. CONCLUSION

For the foregoing reasons, appellee Judge Pamela Barker respectfully requests that this Honorable Court affirm the judgment of the Eighth District Court of Appeals granting Appellee's motion to dismiss Appellant's petition for writ of mandamus.

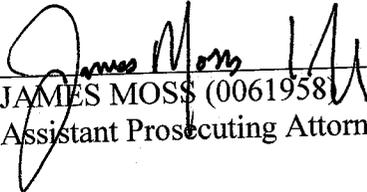
Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of appellee Judge Pamela Barker was sent this 10th day of April, 2013, by regular U.S. Mail to Levert Ervin, Pro Se, Inmate # 420633, at Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, Ohio 44044.



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