

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL.,
LEVERT ERVIN, #A420-633,

: Case No. 2013-0331

Relator-Appellant,

: On appeal from the Court of
Appeals for Cuyahogs County, Ohio
: Eighth Judicial Appellate District

-vs-

JUDGE PAMELA BARKER.

:
COURT OF APPEALS NO. 98704

Respondent-Appellee.

:

REPLY BRIEF OF APPELLANT LEVERT ERVIN

LEVERT ERVIN, #A420-633
Grafton Correctional Institution
2500 South Avon-Belden Road
Grafton, Ohio 44044

RELATOR-APPELLANT, PRO SE

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR
By: James E. Moss (0061958)
Assistant County Prosector
9th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio

COUNSEL FOR APPELLEE JUDGE PAMELA BARKER

RECEIVED
APR 26 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
APR 28 2013
CLERK OF COURT
SUPREME COURT OF OHIO

(COVER PAGE)

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MEMORANDUM IN SUPPORT OF REPLY BRIEF

I. STATEMENT OF THE CASE AND FACTS:

Mr. Ervin restates and incorporates, herein, the statement of the case and the facts, as stated in the Merit Brief of the Appellant. Additionally, the Merit Brief of the Appellee was filed on/or about April 10, 2013, received by the appellant on April 11, 2013, from Sgt. Heathcote of his Unit Staff. Appellant now submits the following Reply Brief of the Appellant.

II. LAW AND ARGUMENT REBUTTAL:

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).

Appellee essentially argues that the Eighth District Court took discretionary judicial notice from, *State v. Ervin*, 8th Dist. No. 80473, 2002-Ohio-4093, that Ervin filed an appeal of his criminal convictions, but failed to raise a claim in that appeal that the acting administrative judge was without authority to grant the State of Ohio's motion to take the deposition of witness Ian Lucash, in *State v. Ervin*, Cuyahoga County C.P. No. CR-01-400774. And as a result, the Eighth District Court in, *State ex rel. Ervin v. Judge Barker*, 8th District No. 98704, 2013-Ohio-376 ("*Ervin*") did not err when it took judicial notice that Mr. Ervin failed to raise a claim in his appeal of his criminal convictions that the acting administrative judge was without authority to grant the State's motion to depose Ian Lucash. The appellee proffers that a court can take judicial notice of adjudicative facts from other Ohio courts under Evid. R. 201. Additionally, appellee argues that the Eighth District Court in *Ervin* was correct when it held that the trial court's denial, on June 21, 2012, of Mr. Ervin's motion to vacate the order of the administrative judge of April 25, 2001 is a final appealable

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order that precludes relief by way of writ of mandamus. Stating, consequently, the Eighth District Court in Ervin correctly denied Mr. Ervin's petition on the basis that he had an adequate remedy at law by way of appealing the trial court's denial of his motion to vacate the administrative judge's order of April 25, 2001. State ex rel. Ervin v. Barker, 8th Dist. No. 98704, 2013-Ohio-376, ¶ 9.

In rebuttal, Mr. Ervin proffers that the Eighth District Court made no announcement in its determination of the respondent's motion to dismiss that it had taken judicial notice of any adjudicated facts and or matters from any other proceedings involving the parties and the subject matter in Ervin pursuant to Evid.R. 201(C) and (D). (C.A. Opinion in its entirety). Mr. Ervin would have exercised his rights pursuant to Evid.R. 201(E), State v. Raymond, 10th Dist. No. 08AP-78, 2008-Ohio-6814, P20, had the Eighth District Court announced in its opinion that it had taken judicial notice of facts and matter from prior proceedings. At the least, Mr. Ervin would have made his objections known in a proposition of law, in the Merit Brief of the Appellant, for this Court's review.

The fact remains, the Eighth District Court made its determination to dismiss appellant's petition for writ of mandamus on the basis of matters outside the complaint, without converting the Civ.R. 12(B)(6) motion into a Civ.R. 56(C) summary judgment motion. The appellee's argument that the Eighth District Court took judicial notice of the facts and matters outside the complaint is unfounded. Even if the Eighth District Court had taken judicial notice of the facts and matters discussed in respondent's motion to dismiss, which were outside the complaint, such matters and facts were not a part of these immediate proceedings. See Deversified Mortgage Investors v. Athens County Board of Revision, (1982), 7 Ohio App.3d 157, 159, (Court may not take judicial notice of prior proceedings in the court, but may only take judicial notice of the proceedings in the

immediate case.) See Burke v. McKee (1928), 30 Ohio App. 236; Rosser v. Hoch Walt. (1967), 12 Ohio App.2d 129; and Kiester v. Ehler (1964), 9 Ohio App.2d 52. This Court should not be persuaded by the appellee's veiled attempt to conceal the Eighth District Court's review and determination of respondent's Civ.R. 12(B)(6) motion based upon matters outside of the complaint, under the pretense that the Court took judicial notice of these matters.

Furthermore, the appellee's contention that Mr. Ervin had an adequate remedy at law by way of his direct criminal appeal, in CR-01-400774, is not supported by fact or law. Mr. Ervin set forth in his petition that the April 25, 2001 order of the acting administrative judge was void for lack of jurisdiction. (Petition ¶1, ¶11, & ¶19). See State ex rel. Jones v. Suster, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998); See also Eisenber v. Peyton, 56 Ohio App. 2d 144, 148, 381 N.E.2d 1136 (8th Dist. 1978). If a court acts without jurisdiction, then any proclamation by the court is void. See Patton v. Diemer (1988), 35 Ohio St.3d 68, 518 N.E.2d 941. In the case of Romito v. Maxwell, Warden (1967), 10 Ohio St.2d 266, at 267, 227 N.E.2d 223, 224, the Supreme Court stated, "The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity." (Tari v. State [1927], 117 Ohio St. 481, 498, 159 N.E. 594.). Mr. Ervin set forth in his petition that the respondent failed to make a showing that the assigned trial judge and the trial record fails to demonstrate the unavailability of the assigned trial judge. (Petition ¶6 & ¶15). In Berger v. Berger, 2 Ohio App.3d 125, 443 N.E.2d 1375, at P-1380 (8th Dist. 1981) Citing Rosenberg v. Gattarello, 49 Ohio App.2d 87, 359 N.E.2d 467 (8th Dist. 1976), (an administrative judge does not have the authority to rule on a motion unless it is shown that the assigned trial judge is unavailable). As evidence of the respondent's failure to make a showing, from the record, the unavailability of

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the assigned judge, Mr. Ervin filed a motion for summary judgment and attached an affidavit of the evidence, which included five exhibits. Exhibit# 2 of the affidavit is the State's attorney, Kestra Smith's motion to depose Ian Lucash in Case No. CR-01-400774. Exhibit# 5 of the affidavit is the criminal docket appearance sheet for Case No. CR-01-400774. These two certified documents collectively and individually unequivocally demonstrate that no showing of the unavailability of the assigned judge was made by the State's attorney. (The movant before the administrative judge has an affirmative duty to demonstrate in the record that the assigned judge is not available to rule on said matter). Id. Berger, at page 1380, 443 N.E.2d 1375; citing Rosenberg, at pages 93-94, 359 N.E.2d 467. The showing of the unavailability of the assigned judge is a conditional precedent upon the administrative judge's authority to rule on the State's motion to depose Ian Lucash. (This conditional precedent must be complied with before the administrative judge has authority to rule on any preliminary matter. Until a showing of unavailability is made, the assigned judge has the exclusive authority to rule on preliminary matter.) Id. Berger, at page 1380, 443 N.E.2d 1375, citing Rosenberg, at pages 93-94, 359 N.E.2d 467. The administrative judge was without authority to rule on the State's attorney's motion to depose Ian Lucash in Case No. CR-01-400774, in accordance to facts and applicable law.

Moreover, Mr. Ervin did not have an adequate remedy at law to appeal the acting administrative judge's authority to grant the State's motion to depose Ian Lucash when appealing his criminal convictions in State v. Ervin, 8th Dist. No. 80473, 2008-Ohio-4093, as the Eighth District Court ruled in State ex rel. Ervin v. Barker, 8th District No 98704, 2013-Ohio-376. There are three compelling reasons why this remedy did not exist for Mr. Ervin. The first

reason is that no journal entry granting the State's motion to depose Ian Lucash was journalized with the clerk of court pursuant to App.R. 4(A) and (D), from which an appeal could be taken. (C.A. Opinion, at ¶2) also see (Relator's Mtn for Summ. Judgt., at Exhibit# 5). The second reason is that there is no transcript of any proceedings where the acting administrative judge issued an order granting the testimonial deposition of Ian Lucash, of which the record could be preserved for an appeal. See Lima v. Elliot, 6 Ohio App.2d 243, 35 Ohio Op.2d 427, 217 N.E.2d 878 (1964). Jurisdiction of an appellate court on appeal depends upon the existence of a final appealable order. If such an order does not, in fact and law, exist it cannot be made to exist by agreement of counsel. *Id.* The third reason rests upon the fact that the alleged April 25, 2001 order of Judge Christopher Boyko is void as a matter of law.

The only indication that Judge Christopher Boyko granted the State's motion to depose Ian Lucash came from State's attorney Kestra Smith. Ms. Smith made this statement in the transcript of the proceedings during the testimonial deposition of Ian Lucash in Cuyahoga County C.P. Case No. CR-01-400774. (Relator's Mtn for Summ. Judgt., Exhibit# 1, at pages 141-142). Ms. Smith was not under oath when she made this statement. She simply boastfully proclaimed that she was an officer of the court and that Judge Boyko granted her motion to depose Ian Lucash. Ms. Smith was the only party with an agenda to obtain the testimonial deposition of Ian Lucash. The parties proceeded with the deposition on the sole word of Ms. Smith, just as the Eighth District Court has done in Ervin without question for validity of the alleged order. This Court should rule that Mr. Ervin did not have an adequate remedy at law during his initial appeal, to challenge the authority of the acting administrative judge to order the deposition of Ian Lucash.

Finally, Mr. Ervin requests that this Court rule that an appeal of the trial court's June 21, 2012 journal entry denying his motion to vacate the order of the acting administrative judge to take the deposition of Ian Lucash was not an adequate remedy at law that precluded relief in a writ of mandamus. State v. Pasqualone, 140 Ohio App.3d 650, 784 N.E.2d 1153 (2000). (Denial of a motion to vacate costs was not a final appealable order.). In Ervin the Eighth District Court determined that Mr. Ervin's "[p]roper remedy was to appeal this issue in his initial appeal or after the trial court denied his motion to vacate. The fact that he had an adequate remedy law [sic] now precludes a writ of mandamus." (C.A. Opinion, at ¶9). That determination is improbable, in view of the fact that, if Mr. Ervin's remedy was in his initial appeal, then any appeal of a subsequent motion on this issue would be res judicata. Surely, if Mr. Ervin squander his initial remedy in direct appeal there is no remedy in an appeal of the denial of his motion to vacate, as determined by the Eighth District Court.

The closest case law that Mr. Ervin was able to find that would mirror his argument is found in Crim.R. 32(C). State ex rel. Moore v. Scott, 2010-Ohio-1541, 2010 Ohio App. LEXIS 1282. (Procedendo and Mandamus will lie when a trial court has refused to render, or delayed rendering, a judgment.). In Criminal Rule 32(C) law, in order to seek remedy for an improper final order that is lacking any of the four requirements, a defendant must file a motion in the trial court requesting a revised sentencing entry. Dunn v. Smith, 119 Ohio St.3d 364, 2008-Ohio-4565, 894 N.E.2d 312, at p.8. If the trial court refuses the defendant's motion for a revised sentencing entry, the defendant may compel the trial court to act by filing an action for a writ of mandamus or procedendo with the court of appeals. Id. at p.9.

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Mr. Ervin requests that this Court apply the same legal standard in the case sub judice that it applied in State ex rel. Culgan v. Medina County Court of Common Pleas, (2008), 119 Ohio St.3d 535 and in State ex rel. McAllister v. Smith, 119 Ohio St.3d 163, 2008-Ohio-3881, 2008 Ohio LEXIS 1995. Mr. Ervin filed a motion to vacate in the trial court on June 18, 2012. The trial court refused Ervin's requests for relief on June 21, 2012. Mr. Ervin filed a writ of mandamus petition to compel the trial court to act and on February 4, 2013 the Eighth District Court dismissed that petition for the reasons stated herein. Instead of complying with the case law of the appellate district, Berger, at page 1380, 443 N.E.2d 1375; citing Rosenberg, at pages 93-94, 359 N.E.2d 467, the appellee has spun Mr. Ervin's issue from the lack of the acting administrative judge's authority into what appellee defines as procedural irregularities: in the reassignment of a judge and the authority of a substitute judge. The Eighth District Court has completely ignored Mr. Ervin's factual and legal argument adopting that of the appellee's.

III. CONCLUSION:

Therefore, this Court is requested to find that Mr. Ervin had a right to relief as requested; 2) that the appellee has a clear legal duty to perform the requested act, and 3) Mr. Ervin possessed no adequate remedy at law in either his initial appeal or an appeal after the trial court denied his motion to vacate.

Respectfully submitted,


Levert Ervin, Appellant

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of the Appellant Levert Ervin was sent this 22nd day of April, 2013, by regular U.S. Mail, to James E. Moss, Assistant Cuyahoga County Prosecutor, counsel for the Appellee, at 1200 Ontario Street, Justice Center, 9th Floor, Cleveland, Ohio 44113.



Levert Ervin