

[Cite as *State ex rel. Hazel v. Bender*, 2009-Ohio-5028.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Corey Hazel,	:	
Relator,	:	
v.	:	No. 09AP-377
Honorable Judge John F. Bender, Franklin County Ct. of Common Pleas,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on September 24, 2009

Corey Hazel, pro se.

Ron O'Brien, Prosecuting Attorney, and *Paul Thies*, for respondent.

IN PROCEDENDO
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Corey Hazel, filed this original action requesting a writ of procedendo ordering respondent, the Honorable John F. Bender, Judge of the Franklin County Court of Common Pleas, to rule on relator's motion to withdraw his guilty plea and

petition for post-conviction relief. Respondent filed a motion for summary judgment, and relator filed a memorandum contra.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that this court should grant the motion for summary judgment and deny the writ. Relator filed objections to the magistrate's decision, and respondent filed a memorandum opposing the objections. This cause is now before the court for a full review.

{¶3} " '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. CNG Financial Corp. v. Nadel*, 111 Ohio St.3d 149, 2006-Ohio-5344, ¶20, quoting *State ex rel. Weiss v. Hoover*, 84 Ohio St.3d 530, 532, 1999-Ohio-422. "A lower court's refusal or failure to timely resolve a pending case is the error that procedendo was created to rectify." *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 2007-Ohio-2882, ¶14. But a writ of procedendo will not issue to compel the performance of a duty that has already been performed. *State ex rel. Howard v. Skow*, 102 Ohio St.3d 423, 2004-Ohio-3652, ¶9.

{¶4} In his motion for summary judgment respondent argues that because he has already ruled on both relator's motion to withdraw his guilty plea and his petition for post-conviction relief, there is no genuine issue of material fact with respect to whether relator is entitled to a writ of procedendo. Respondent attached to his motion a copy of his August 27, 2008 decision and entry, along with a copy of the opinion from this court

affirming respondent's denial of relator's petition for post-conviction relief. In his memorandum contra, relator acknowledges that respondent did rule on his motion and petition, but argues, without citation to authority, that respondent should have issued two separate decisions and accompanying entries rather than one combined decision and entry.

{¶5} The magistrate rejected this argument, noting that respondent clearly considered relator's motion to withdraw his guilty plea and petition for post-conviction relief separately, and applied the correct standard to each, when it ruled on the merits of each. In his objections, relator makes the same arguments he made before the magistrate and, like the magistrate, we find them to be without merit. Relator does not point to a specific error on the magistrate's part; he merely disagrees with the magistrate's conclusion.

{¶6} Having reviewed the pleadings, the motion for summary judgment and the memorandum contra, the magistrate's decision and relator's objections thereto, we find no error in the magistrate's decision and conclude that the magistrate correctly determined the facts and applied the law thereto. We find no genuine issue of material fact with respect to whether respondent has ruled on relator's motion to withdraw his guilty plea and petition for post-conviction relief, and we conclude that respondent is entitled to judgment as a matter of law.

{¶7} Accordingly, we overrule relator's objections, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained

therein, and we grant respondent's motion for summary judgment and deny the requested writ of procedendo.

*Motion for summary judgment granted;
objections overruled, and requested writ of procedendo denied.*

TYACK and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Corey Hazel,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-377
	:	
Honorable Judge John F. Bender,	:	(REGULAR CALENDAR)
Franklin County Ct. of Common Pleas,	:	
	:	
Respondent.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on June 12, 2009

Corey Hazel, pro se.

Ron O'Brien, Prosecuting Attorney, and Paul Thies, for respondent.

IN PROCEDENDO
ON MOTION FOR SUMMARY JUDGMENT

{¶8} Relator, Corey Hazel, has filed this original action requesting that this court issue a writ of procedendo ordering respondent, the Honorable John F. Bender, Judge of the Franklin County Court of Common Pleas, to separately rule on his motion to withdraw his guilty plea and petition for post-conviction relief.

Findings of Fact:

{¶9} 1. Relator is an inmate currently incarcerated at the Chillicothe Correctional Institution.

{¶10} 2. On April 13, 2009, relator filed the instant action requesting that this court issue a writ of procedendo ordering respondent to rule separately on his motion to withdraw his guilty plea and petition for post-conviction relief.

{¶11} 3. On May 6, 2009, the assistant prosecuting attorney filed a motion for summary judgment on behalf of respondent asserting that respondent had ruled on relator's motions.

{¶12} 4. Respondent attached the August 27, 2008 decision and entry wherein the court denied both of relator's motions. The entry is styled as follows: "Decision and Entry Denying Amended Motion of Defendant for Post-Conviction Relief Filed March 28, 2008 and Denying Motion of Defendant to Withdraw Guilty Pleas filed April 9, 2008." In the court's decision and entry, Judge Bender separately considered relator's respective motions. Specifically, with regard to his petition for post-conviction relief, relator asserted that he had not received effective assistance of counsel and had not been properly informed of his right to appeal. Judge Bender spent ten paragraphs explaining why the court found that relator had failed to satisfy his burden of proving the fact that he was denied effective assistance of counsel. Thereafter, Judge Bender spent five paragraphs explaining the court's rationale for finding that the record clearly demonstrated that relator had been advised that by pleading guilty he was giving up his right to appeal. As such, Judge Bender denied relator's petition for post-conviction relief. Thereafter, Judge Bender separately considered the merits of relator's motion to

withdraw his guilty plea. Judge Bender spent four paragraphs explaining that the transcript from the March 8, 2007 sentencing hearing demonstrated that the court had informed relator that he would be subject to a mandatory three-year term of post-release control after his sentence was served. As such, Judge Bender denied relator's motion to withdraw his guilty plea.

{¶13} 5. Respondent has also attached a copy of this court's opinion in *State v. Hazel*, 10th Dist. No. 08AP-789, 2009-Ohio-880, wherein relator appealed the trial court's denial of his petition for post-conviction relief. In a five-page opinion, this court affirmed the judgment of the common pleas court.

{¶14} 6. Relator has filed a memorandum contra acknowledging that respondent has ruled on his motions but arguing that respondent was required to consider his motions individually and, by law, to file separate, individual decisions and entries relative to those motions.

{¶15} 7. The matter is currently before the magistrate on respondent's motion for summary judgment.

Conclusions of Law:

{¶16} For the reasons that follow, it is this magistrate's conclusion that this court should grant respondent's motion for summary judgment and relator's action should be dismissed.

{¶17} A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Accordingly, any party moving for

summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material facts; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶18} In order to be entitled to a writ of procedendo, a relator must establish a clear legal right to require that court to proceed, a clear legal duty on the part of the court to proceed, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Miley v. Parrott* (1996), 77 Ohio St.3d 64, 65. A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *Id.*

{¶19} An " 'inferior court's refusal or failure to timely dispose of a pending action is the ill a writ of procedendo is designed to remedy.' " *State ex rel. Dehler v. Sutula* (1995), 74 Ohio St.3d 33, 35, quoting *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 110.

{¶20} Procedendo is an order from a court of superior jurisdiction to proceed to judgment: it does not attempt to control the inferior court as to what the judgment should be. *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas* (1995), 72 Ohio St.3d 461, 462.

{¶21} In asserting that the trial court is required to separately consider his petition for post-conviction relief and his motion to withdraw his guilty plea, relator cites to various cases including *State v. Yuen*, 10th Dist. No. 01AP-1410, 2002-Ohio-5083 and *State v. Gegia*, 9th Dist. No. 21438, 2003-Ohio-3313. In both of those cases, the

appellate courts have indicated that a motion to withdraw a guilty plea is not to be viewed as a petition for post-conviction relief. The courts explained that a petition for post-conviction relief under R.C. 2953.21 is a collateral attack and that a motion to withdraw a guilty plea is not a collateral attack and, instead, challenges the validity of the plea itself.

{¶22} For example, in *Gegia*, the defendant filed a petition for post-conviction relief and a motion to withdraw his guilty pleas. The trial court treated the defendant's submission *solely* as a petition for post-conviction relief and denied the petition as untimely filed. The appellate court held, in pertinent part:

[T]he trial court erred when it considered Appellant's post-sentence motion as only a petition for post-conviction relief. The trial court should have separately entertained those arguments contained in the dual post-sentence motion that pertained to Appellant's motion to withdraw his guilty plea.

Id. at ¶8.

{¶23} Based upon these cases, relator argues that the trial court was not only required to separately consider his petition for post-conviction relief and motion to withdraw his guilty plea, but, that, in determining those issues, the trial court was required to file separate, individual judgment entries. In essence, relator contends that respondent erred by addressing both of his motions within a single decision and entry. This magistrate disagrees.

{¶24} The importance of the cases cited by relator is that a motion to withdraw a guilty plea pursuant to Crim.R. 32.1 is a separate and distinct action and is not to be considered a petition for post-conviction relief. In the present case, respondent treated relator's motion to withdraw his guilty plea separately and distinctly from his petition for

post-conviction relief. Respondent issued a decision and entry denying both motions after spending a great deal of time explaining the rationale for deciding those motions. The magistrate specifically finds that respondent was not required to rule on the motions in two separate, individual entries. The law is satisfied when the trial court considered those motions separately.

{¶25} Because the magistrate finds that respondent has properly performed the task which relator seeks to compel, summary judgment should be granted in favor of respondent and relator's procedendo action should be dismissed.

/S/ *Stephanie Bisca Brooks*
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).