

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE ex rel.	:	<b>PER CURIAM OPINION</b>
TODD A. DANIEL,	:	
	:	
Relator,	:	<b>CASE NO. 2010-L-122</b>
	:	
- VS -	:	
	:	
HONORABLE JUDGE	:	
EUGENE A. LUCCI,	:	
	:	
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Petition dismissed.

*Todd A. Daniel*, pro se, PID# 512-362, Belmont Correctional Institution, P.O. Box 540, St. Clairsville, OH 43950 (Relator).

*Charles E. Coulson*, Lake County Prosecutor, and *Michael L. DeLeone*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Respondent).

PER CURIAM.

{¶1} Before this court is Relator, Todd A. Daniel's, Petition for Writ of Mandamus pursuant to R.C. 2731.01. Respondent, Judge Eugene A. Lucci, has filed a Motion to Dismiss and/or in the alternative Motion for Summary Judgment. For the following reasons, Daniel's Petition is dismissed for failure to state a claim upon which relief can be granted.

{¶2} On October 19, 2010, Daniel filed his Petition for Writ of Mandamus, alleging that Judge Lucci failed to comply with R.C. 2949.092 and R.C. 2929.18(B)(1), in requiring Daniel to pay fines and/or court costs. Accordingly, Daniel seeks the issuance from this court of a writ ordering Judge Lucci “to reverse [his] previous decision and to vacate the order requiring the Relator to pay fines and/[or] court costs.”

{¶3} On October 22, 2010, this court issued an alternative writ, ordering the Respondent to either file an Answer or a Motion to Dismiss, in accordance with Civ.R. 12(B), within twenty-eight days of the date of the Judgment Entry.

{¶4} On November 2, 2010, Judge Lucci filed a Motion to Dismiss and/or in the alternative Motion for Summary Judgment. Attached to Judge Lucci’s Motion were certified copies of trial court dockets indicating that, on July 25, 2006, Daniel pled guilty to one count of Unlawful Sexual Conduct with a Minor, in Lake County C.P. Case No. 06CR000430. On the same date, he pled guilty to one count of Burglary with a Firearm Specification, and to one count of Theft, in Lake County C.P. Case No. 05CR000648. On August 24, 2006, Daniel was sentenced in both cases to pay court costs.

{¶5} On July 27, 2010, Daniel filed a Motion to Vacate Order Requiring Payment of Court Costs, Fines and/or Restitution in both cases. On August 17, 2010, Judge Lucci issued an Order Denying Motion to Vacate Payment of Costs under both case numbers.

{¶6} Judge Lucci asserted that Daniel’s Petition should be dismissed, pursuant to Civ.R. 12(B)(6), and/or summary judgment granted in his favor on the following grounds: Daniel failed to comply with the requirements of R.C. 2969.25(C) by not attaching “[a] statement that sets forth the balance in the inmate account of the inmate

for each of the preceding six months, as certified by the institutional cashier,” to avoid prepayment of the required filing fees; Daniel failed to comply with the requirement of R.C. 2969.25(A) to file “an affidavit that contains a description of each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court” at the time he filed his Petition; Daniel’s Petition is moot as Judge Lucci has fulfilled his clear legal duty by ruling on all pending motions before him; a Writ of Mandamus may not be used to control the discretion of the trial court with respect to when and how a criminal sentence is imposed; Daniel has a plain and adequate remedy in the ordinary course of law by way of a direct appeal; and Judge Lucci properly denied Daniel’s Motion to Vacate Order Requiring Payment of Court Costs, Fines and/or Restitution on its merits.

{¶7} On November 30, 2010, Daniel filed a Relator’s Response to Respondent’s Motion to Dismiss Application for Writ of Mandamus or in the alternative Motion for Summary Judgment.

{¶8} On December 20, 2010, Judge Lucci filed a Reply Brief in Support of Motion to Dismiss and/or in the alternative Motion for Summary Judgment.

{¶9} Having considered Judge Lucci’s arguments and Daniel’s responses thereto, we determine that Daniel has a plain and adequate remedy in the ordinary course of law by way of a direct appeal and, accordingly, dismiss this Petition pursuant to Civ.R. 12(B)(6).

{¶10} It is a defense to any claim for relief in any pleading that it “fail[s] to state a claim upon which relief can be granted.” Civ.R. 12(B)(6).

{¶11} “The writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law.” R.C. 2731.05. “A cause of action in mandamus, filed originally \*\*\* in the court of appeals, will not lie where it is determined that the relator has a plain and adequate remedy in the ordinary course of the law by way of appeal.” *State ex rel. Bd. of Edn. of the Middletown City School Dist. v. Butler Cty. Budget Comm.* (1987), 31 Ohio St.3d 251, at syllabus; *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 30 (“it is axiomatic that a ‘\*\*\*’ discretionary right of appeal \*\*\* [constitutes] a sufficiently plain and adequate remedy in the ordinary course of the law”) (citation omitted).

{¶12} “Civ.R. 12(B)(6) dismissals may be based on ‘merits’ issues such as the availability of an adequate remedy in the ordinary course of law.” *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, at ¶20. The Ohio Supreme Court has held that courts may take judicial notice of appropriate matters, such as judgments rendered by other courts, in considering a motion to dismiss for failure to state a claim without having to convert it to a motion for summary judgment. *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 15-16, 1996-Ohio-231; *State ex rel. Womack v. Marsh*, \_\_\_ Ohio St.3d \_\_\_, 2011-Ohio-229, at ¶8 (“[t]he court of appeals could take judicial notice of the entry attached to [respondent’s] motion to dismiss in support of her claim that the entry rendered [relator’s] mandamus claim moot without converting the motion to a motion for summary judgment”); *State ex rel. Kolkowski v. Bd. of Commrs. of Lake Cty.*, 11th Dist. No. 2008-L-138, 2009-Ohio-2532, at ¶38 (“[a]lthough this court’s ability to take judicial notice is not unbridled, we may take judicial notice of findings and judgments as rendered in other Ohio cases”) (citation omitted).

{¶13} In the present case, Daniel seeks a Writ ordering Judge Lucci to vacate the order requiring him to pay court costs on the grounds that the order did not comply with the laws governing the imposition of costs. Daniel had an adequate remedy to challenge the common pleas court's imposition of court costs by way of a direct appeal of the order imposing costs. *State ex rel. Whittenberger v. Clarke*, 89 Ohio St.3d 207, 208, 2000-Ohio-136; *State ex rel. Biros v. Logan*, 11th Dist. No. 2003-T-0016, 2003-Ohio-5425, at ¶9 (“the propriety of a decision to impose court costs on a convicted defendant can only be contested in a direct appeal from the sentencing judgment”); *Wuescher v. Whitney*, 5th Dist. No. 07CAD110064, 2008-Ohio-118, at ¶4 (“[t]he appropriate forum for challenging court costs is by way of appeal from the sentencing entry; therefore, an adequate remedy at law exists for making such a challenge”).

{¶14} Daniel asserts that an appeal is no longer a remedy available to him and that he was not notified, at the time of sentencing, that he had a right to appeal court costs, in addition to the right to appeal his convictions. However, an “appeal is not an inadequate remedy because relator has allowed the time for appeal to expire.” *State ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 35; *State ex rel. Hester v. Crush*, 75 Ohio St.3d 563, 564, 1996-Ohio-460 (appeal remains an adequate remedy “[e]ven though the time for an ordinary appeal has expired”); *State ex rel. Sheffield v. Cuyahoga Cty. Court of Common Pleas*, 8th Dist. No. 93508, 2009-Ohio-3590, at ¶6 (“mandamus is not the proper remedy, because [relator] has or had adequate remedies at law through appeal, delayed appeal, or postconviction relief, all of which preclude mandamus”).

{¶15} For the foregoing reasons, Judge Lucci's Motion to Dismiss is granted. It is the order of this court that Daniel's Petition for Writ of Mandamus is dismissed.

TIMOTHY P. CANNON, P.J., DIANE V. GRENDALL, J., CYNTHIA WESTCOTT RICE, J., concur.