[Cite as *State ex rel. Humr v. Pittman,* 2011-Ohio-403.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE ex rel. JAMES C. HUMR, JR.,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2010-P-0066**
- vs -	:	
JUDGE LAURIE J. PITTMAN,	:	
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Petition dismissed.

James C. Humr, Jr., Pro se, PID: 520-592, Belmont Correctional Institution, P.O. Box 540, St. Clairsville, OH 43950-0540 (Relator).

Victor V. Vigluicci, Portage County Prosecutor, and *Denise L. Smith*, Chief Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Respondent).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for final disposition of the motion to dismiss of respondent, Judge Laurie J. Pittman of the Portage County Court of Common Pleas. As the sole basis for his motion, respondent asserts that the petition of relator, James C. Humr, Jr., fails to state a viable claim for a writ because his own allegations support the conclusion that he is seeking to employ this original action as a substitute for a direct appeal. For the following reasons, we hold that the dismissal of this matter is warranted under Civ.R. 12(B)(6).

{¶2} Our review of relator's petition indicates that his sole claim is predicated

upon the ensuing basic assertions. In September 2006, the Portage County Grand Jury returned a six-count indictment against relator. After initially entering a "not guilty" plea, he subsequently agreed to plead guilty to one count of illegal manufacture of drugs and one count of trafficking in cocaine. Upon accepting the new plea, respondent rendered the final sentencing judgment, in which relator was essentially ordered to serve a term of ten years on the two counts. In addition, respondent ordered him to pay restitution in an amount "up to" $400, assessed a mandatory drug fine of $7,500, and required him to pay the costs of the criminal proceeding.

{¶3} Relator did not attempt to immediately bring a direct appeal from the final sentencing judgment. Instead, in October 2007, he filed a motion to vacate the prior orders concerning the payment of restitution, court costs, and the drug fine. On the same date that the motion was received, respondent released a separate judgment in which the request to vacate was expressly denied.

{¶4} In September 2008, relator instituted a delayed appeal in regard to respondent's final sentencing judgment. After we had granted relator leave to pursue the appeal, he submitted a brief which contained two assignments pertaining to the three "payment" orders. Under the first of these assignments, relator contended that the "restitution" order should be declared void because: (1) the judgment did not identify a victim of the underlying crimes; and (2) the judgment did not state the precise amount of restitution to be paid. Under the second, he maintained that respondent had erred in overruling his motion to vacate the "payment" orders.

{¶5} In *State v. Humr*, 11th Dist. No. 2008-P-0088, 2009-Ohio-5632, this court concluded that respondent's "restitution" order had failed to comply with the governing statutory provisions. We further held that respondent had erred in suspending relator's

license to drive and in failing to advise him of his right to an immediate appeal. Based on this, we vacated relator's original sentence and remanded the matter to respondent for resentencing. Id. at ¶39. Regarding relator's arguments as to the payment of court costs and the mandatory drug fine, our opinion indicated that these points had been rendered moot in light of the other aspects of our holding. Id. at ¶38.

{¶6} Approximately ten months following the release of our decision, relator brought the instant proceeding for a writ of mandamus. In delineating the factual basis for his sole claim, relator did not refer to any new action taken by respondent after the underlying case had been remanded to the trial level for resentencing. Instead, his petition again focused upon the merits of respondent's original sentencing judgment. That is, relator asserted that all three "payment" orders must be declared void because respondent had committed certain errors in issuing the original judgment. In relation to the "restitution" order, the petition not only referenced the two arguments that this court had already addressed in the delayed appeal, but also raised two new contentions. As to the court costs and the mandatory drug fine, relator asserted that respondent should have waived these specific payments because he did not have the financial resources to comply.

{¶7} In the final paragraph of his petition, relator did not pray for the issuance of an order which would require respondent to perform any particular judicial act. Rather, he requested this court to enter a new final judgment and vacate all "payment" orders in the original sentencing judgment. In this respect, relator has sought relief which would typically be granted in a direct appeal, not an original action in mandamus.

{¶8} In now moving to dismiss under Civ.R. 12(B)(6), respondent submits that this court should not go forward on the merits of the instant petition because relator will

never be able to meet the "adequate remedy" element for a writ of mandamus. That is, respondent argues that, since she was obligated to render a new sentencing judgment as part of the new proceedings under our prior remand order, an action in mandamus is barred because relator had an adequate legal remedy through a direct appeal from the new sentencing judgment.

{¶9} As this court has noted on numerous occasions, a writ of mandamus will not lie unless the relator can establish, inter alia, that there is no other legal remedy he could seek to obtain adequate relief. See *Sellers v. State*, 11th Dist. No. 2007-T-0090, 2007-Ohio-4484, at ¶7. In applying this element for the writ, we have consistently held that an appeal from a final judgment in a criminal case constitutes an adequate remedy under the ordinary course of the law. *State ex rel. Appenzeller v. Mitrovich*, 11th Dist. No. 2007-L-125, 2007-Ohio-6157, at ¶5. This holding is premised upon the fact that the merits of the trial court's underlying decision will be subject to a complete review as part of a direct appeal. *State ex rel. Verbanik v. Bernard*, 11th Dist. No. 2006-T-0080, 2007-Ohio-1786, at ¶7. Consequently, it has been recognized that a criminal defendant is not permitted to use a mandamus action as a substitute for an appeal. *Appenzeller*, 2007-Ohio-6157, at ¶5.

{¶10} In the instant matter, relator did not allege in his petition that, following the issuance of our remand order in his previous appeal, respondent refused to go forward and render a new sentencing judgment. In fact, a review of this court's docket readily shows that, in January 2010, relator filed a second appeal. Our review further indicates that the new appeal was taken from a judgment in which respondent, in compliance with the remand order, resentenced relator on the underlying conviction. Moreover, we have already considered the merits of the second appeal, and upheld the new final judgment

in all respects. See *State v. Humr*, 11th Dist. No. 2010-P-0004, 2010-Ohio-5057.

{¶11} As part of our opinion in relator's second appeal, this court noted that the new sentencing judgment contained new orders as to the payment of restitution, court costs, and the mandatory drug fine. For whatever reason, relator chose not to contest those new orders in the context of the second appeal. Nevertheless, since the merits of all three "payment" orders could have been adequately addressed in the second appeal, relator is foreclosed under the well-established precedent of this court from attempting to litigate those particular issues in a separate mandamus action. As to this point, we would also emphasize that the "payment" orders in the new sentencing judgment have superseded those in the original sentencing judgment; thus, relator cannot contend that the foregoing analysis is inapplicable to his petition on the basis that his allegations only referred to original "payment" orders. The orders in the new sentencing judgment are now controlling, and the merits of those orders were only subject to review as part of the second direct appeal.

{¶12} Citing Civ.R. 44.1(A)(1), this court has previously concluded that, in ruling upon a Civ.R. 12(B)(6) motion to dismiss in an original action, an appellate court can take judicial notice of its own prior opinions. *State ex rel. DeBolt v. Inderlied*, 11th Dist. No. 2009-P-0081, 2010-Ohio-5306, at ¶12. In the instant matter, our review of our prior opinions in relator's two appeals fails to reveal any unusual circumstances which would have impeded his ability to challenge the propriety of the three "payment" orders as part of his second appeal. Therefore, since relator will never be able to prove a set of facts under which he could demonstrate the lack of an adequate legal remedy, the dismissal of his mandamus petition is justified.

{¶13} Consistent with the foregoing discussion, respondent's motion to dismiss

is granted. It is the order of this court that relator's sole claim in mandamus is hereby dismissed.

DIANE V. GRENDELL, J., CYNTHIA WESTCOTT RICE, J., MARY JANE TRAPP, J., concur.