

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

STATE OF OHIO ex rel. CHARLES LEMONS, III,	:	PER CURIAM OPINION
	:	CASE NO. 2010-T-0101
Relator,	:	
	:	
- VS -	:	
	:	
JUDGE PETER J. KONTOS, TRUMBULL COUNTY COURT OF COMMON PLEAS,	:	
	:	
Respondent.		

Original Action for Writ of Procedendo.

Judgment: Writ denied.

Charles Lemons, III, PID: 503-098, Lebanon Correctional Institution, P.O. Box 56, Lebanon, OH 45036 (Relator).

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent).

PER CURIAM.

{¶1} This action in procedendo is presently before this court for consideration of the summary judgment motion of respondent, Judge Peter J. Kontos of the Trumbull County Court of Common Pleas. As the primary basis for his motion, respondent states that he is entitled to prevail on the sole claim of relator, Charles Lemons, III, because the evidentiary materials establish that he has already rendered a sufficient judgment in

disposing of a petition for postconviction relief. For the following reasons, we conclude that the granting of summary judgment is warranted under Civ.R. 56(C).

{¶2} In maintaining the instant case, relator sought the issuance of a writ which would require respondent to render findings of fact and conclusions of law in regard to a prior determination. In his procedendo petition, he alleged that, on December 2, 2009, he submitted before respondent a petition for postconviction relief which pertained to his February 2009 conviction for rape, attempted rape, felonious assault, and kidnapping. Relator further asserted that, approximately three months later, respondent released a new judgment which overruled the postconviction petition without providing any analysis for the decision. According to relator, the lack of any analysis constituted a violation of respondent's statutory duty to explain the ruling through findings of fact and conclusions of law, and respondent did not take any subsequent steps to correct the violation.

{¶3} In responding to the procedendo petition, respondent immediately moved to dismiss relator's sole claim under Civ.R. 12(B)(6). As part of our initial review of this motion, this court noted that respondent's primary argument was partially based upon a single item of evidentiary material which was attached to his submission. Since it was obvious that the Civ.R. 12(B)(6) motion was not predicated solely upon the allegations in the petition, this court rendered an order which converted the submission to a motion for summary judgment under Civ.R. 56(C).

{¶4} In contending that he was not legally obligated to take any additional steps in disposing of relator's postconviction petition, respondent asserts that there was no reason to provide any analysis to justify his ruling because the postconviction petition was procedurally defective. In support of his position, respondent emphasizes that,

pursuant to R.C. 2953.21(A)(2), a defendant is obligated to file his postconviction petition within one hundred eighty days of the date upon which the trial transcript of the criminal action is filed with the appellate court during his direct appeal of the conviction. Respondent submits that relator instituted a direct appeal from his disputed conviction in April 2009, and that the transcript of the trial proceedings was filed with this court on May 20, 2009; thus, relator's postconviction petition was not filed in a timely manner because his own factual allegations state that its submission did not occur until December 2009.

{¶5} As the sole evidentiary item attached to his motion for summary judgment, respondent has provided a copy of a "filing" notice which was served by the appellate clerk of courts as part of the proceedings in relator's direct appeal, 11th Dist. No. 2009-T-0032. A review of this notice shows that it was sent to the Trumbull County Prosecutor to give notice that the entire trial transcript from the criminal case had been entered upon the appellate record on May 20, 2009. Furthermore, our own simple mathematical calculation confirms that the one hundred eightieth day after the "May 20" date would have been Monday, November 16, 2009.

{¶6} In replying to the motion for summary judgment, relator has not expressly challenged the authenticity of the "filing" notice submitted by respondent. Moreover, he has not contested respondent's calculation of the one hundred eighty-day period for the filing of a timely postconviction petition, based upon the starting date of May 20, 2009. Instead, relator makes a new allegation which directly conflicts with the factual assertion contained in his procedendo petition. That is, relator's reply brief asserts that his petition for postconviction relief was filed on May 15, 2009, not December 2, 2009. In

addition, he asserts that the transcript of the trial proceedings was filed for purposes of his direct appeal on November 29, 2008.

{¶7} As to the second of relator's new assertions, this court would simply note that, in the text of his reply brief, he readily admits that the case number for his appeal before this court was 2009-T-0032. In light of the fact that the appeal at issue was given a "2009" number, logic dictates that it was initially filed at some point during that particular year. Under such circumstances, it would not be possible for the transcript of the trial proceedings to have been filed with the appellate clerk on November 29, 2008. Thus, to the extent that a transcript may have been filed on the November 2008 date, it would not have pertained to relator's appeal from his February 2009 conviction.

{¶8} More importantly, it must be emphasized that, in now altering his assertion as to the date of the filing of his postconviction petition, relator has failed to attach any evidentiary materials in support of his position. The only items accompanying his reply brief were copies of two correspondences which he sent to the Trumbull County Clerk of Courts. Our review of the two items demonstrates that neither contained a reference to the date upon which the petition was filed under R.C. 2953.21. Therefore, since relator has failed to at least create a factual conflict as to this point, respondent could properly base his motion upon the date set forth in the procedendo petition; i.e., December 2, 2009. In this regard, this court would indicate that Civ.R. 56(C) expressly provides that the pleadings in a civil action can be considered in determining whether a genuine issue of material fact exists for purposes of summary judgment.

{¶9} In relation to respondent's sole evidentiary item, this court has indicated on numerous occasions that when an evidentiary submission does not fall within the list

of acceptable documents set forth in Civ.R. 56(C), it cannot be reviewed for purposes of summary judgment unless it is accompanied by a valid affidavit or is properly certified. See, e.g., *State ex rel. Boyers v. Stuard*, 11th Dist. No. 2010-T-0111, 2010-Ohio-6444, at ¶5. However, we have further held that the lack of a properly-framed affidavit can be waived when no timely objection is made. *Id.* Under such circumstances, a trial court can consider the disputed item when there is no reason to question its authenticity. *Id.* at ¶6.

{¶10} In the instant action, the copy of the “filing” notice submitted by respondent was not accompanied by a certifying affidavit. Nevertheless, in contesting the basic merits of the summary judgment motion, relator never objected to the copy of the notice on any basis. Moreover, our review of this document fails to reveal any obvious defects or extraneous markings that would call into question its authenticity. As a result, this court holds that the copy of the notice is properly before us and can be considered in deciding whether respondent is entitled to summary judgment as to the sole pending claim for relief.

{¶11} As was previously noted, the “filing” notice indicated that the transcript of proceedings from relator’s underlying criminal case had been filed in his direct appeal on May 20, 2009. In turn, relator’s own allegations in his procedendo petition state that he did not submit his postconviction petition until December 2, 2009. Accordingly, the undisputed facts in the instant action demonstrate that the postconviction petition as to relator’s February 2009 conviction was not filed until the one hundred ninety sixth day after the time limit under R.C. 2953.21(A)(2) began to run.

{¶12} As a general proposition, even if a trial court concludes following its initial

review of a postconviction petition that the defendant has failed to state any substantive grounds for relief, it still has an obligation to issue findings of fact and conclusions of law as part of its dismissal of the petition. See R.C. 2953.21(C). However, in construing the governing statutory language, this court has expressly held that this legal duty does not apply when the petition is dismissed for failure to timely file under the one hundred eighty-day time limit. *State v. Beaver* (1998), 131 Ohio App.3d 458, 464. As the basis for this holding, we emphasized that when the decision to dismiss does not reach the merits of the petition, findings of fact and conclusions of law are not necessary in order to allow for meaningful appellate review. *Id.*

{¶13} Before a writ of procedendo will lie, it must be proven that the relator has a legal right to have the trial judge proceed and render a judgment in the underlying case. *State ex rel. Fontanella v. Kontos*, 11th Dist. No. 2007-T-0055, 2007-Ohio-5213, at ¶13. In the instant action, since the undisputed facts indicate that respondent's dismissal of relator's postconviction petition could have been based upon the failure to comply with the one hundred eighty-day time limit, relator was not legally entitled to any explanation as to the grounds for the decision. In other words, respondent had no legal duty under R.C. 2953.21 to issue findings of fact and conclusions of law on the matter.

{¶14} Pursuant to Civ.R. 56(C), the moving party in a summary judgment exercise can succeed only when he has demonstrated that: "(1) there are no remaining genuine issues of material fact which must be tried; (2) the moving party is entitled to prevail as a matter of law; and (3) even when the evidentiary materials are viewed in a manner most favorable to the opposing party, a reasonable person still could only reach a final conclusion adverse to that party." *Boyers*, 2010-Ohio-6444, at ¶9. Consistent

with the foregoing analysis, this court holds that respondent has met each prong of this standard as to the primary element for a writ of procedendo. Therefore, respondent's motion for summary judgment is granted. It is the order of this court that final judgment is now entered in favor of respondent as to relator's entire procedendo claim.

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