

[Cite as *Griffin v. State of Ohio*, 2004-Ohio-4993.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ANTONIO GRIFFIN

RELATOR

VS.

STATE OF OHIO

RESPONDENT

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CASE NO. 03 MA 221

OPINION AND
JOURNAL ENTRY

CHARACTER OF PROCEEDINGS:

Petition for Mandamus to Compel
Appropriate Extraordinary Relief from the
Court of Common Pleas of Mahoning
County, Ohio
Case No. 99CR00523

JUDGMENT:

Petition Dismissed.

APPEARANCES:

For Relator:

Antonio Griffin, Pro-se
#385-277
P.O. Box 901
Leavittsburg, Ohio 44430

For Respondent:

Atty. Paul J. Gains
Mahoning County Prosecutor
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 15, 2004

PER CURIAM.

{¶1} On November 14, 2003, Relator Antonio Griffin filed a writ of mandamus petition with this Court concerning the manner in which his felony sentence was imposed. Relator does not specify the crime or crimes for which he is incarcerated, but he does allege that he was sentenced to 13 years in prison on August 7, 2001. The Respondent was listed as the State of Ohio. Relator asserts that the sentencing portion of his criminal case did not conform to the recent Ohio Supreme Court case of *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473. Relator argues that, according to *Comer*, the findings and supporting reasons that are required by certain aspects of the sentencing statutes, such as R.C. §2929.14(B) and (E)(4), must be made orally at the sentencing hearing. Although *Comer* was issued over two years after Relator was allegedly sentenced, he is attempting to use mandamus proceedings to retrospectively apply the holding in *Comer* to his own criminal case. Based on a number of procedural errors and on Relator's failure to meet the requirements of a writ of mandamus, we must dismiss his petition.

{¶2} A writ of mandamus is an extraordinary remedy that is issued “only in cases of extreme necessity, because of the absence or inadequacy of other remedies * * *.” *State ex rel. Utility Workers Union of America, AFL-CIO Local 349 v. Macelwane* (1961), 116 Ohio App. 183, 191, 187 N.E.2d 901.

{¶3} The burden to establish the right to mandamus lies upon the relator who seeks the writ. *State ex rel. Fant v. Sykes* (1986), 28 Ohio St.3d 90, 91, 28 OBR 185, 502 N.E.2d 597.

{¶4} The decision to issue of a writ of mandamus is discretionary. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 40 O.O.2d 141, 228 N.E.2d 631, paragraph seven of the syllabus.

{¶5} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. *State ex rel. Sekermestrovich v. Akron* (2001), 90 Ohio St.3d 536, 537, 740 N.E.2d 252.

{¶6} Mandamus is not a substitute for appeal. *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 57, 63 O.O.2d 88, 295 N.E.2d 659. Thus, mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerninghan v. Gaughan* (Sept. 26, 1994), Cuyahoga App. No. 67787. Furthermore, if the relator had an adequate remedy at law, regardless of whether or not the remedy was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath* (1997), 78 Ohio St.3d 45, 676 N.E.2d 108.

{¶7} We must initially point out that Relator's petition must fail because it does not meet the statutory requirements of a writ of mandamus as set forth in R.C. §2731.04. This statute requires, inter alia, that the petition must be filed in the name of the state and not in the name of party requesting relief, which was not done in this case. *Maloney v. Court of Common Pleas of Allen Cty.* (1962), 173 Ohio St. 226, 227, 19 O.O.2d 45, 181 N.E.2d 270. Furthermore, R.C. §2731.04 requires that the

allegations in the petition must be verified by affidavit. Relator failed to file such an affidavit.

{¶8} Relator also requests relief which could have been addressed in direct appeal. Errors involving the proper application of Ohio's felony sentencing statutes are regularly reviewed on direct appeal, as is evidenced by the very case that Relator hopes to rely upon in this mandamus action, namely, the *Comer* case. Relator asserts that the *Comer* holding must be applied retrospectively by the court that sentenced him, and that mandamus is appropriate in order to force the lower court to comply with the opinion and dictates of the Ohio Supreme Court. Although it is true that, in general, new caselaw from the Ohio Supreme Court is applied retrospectively, it is only applied retrospectively to judgments whose finality remains open and pending within the court system. See *State v. Spaulding* (Apr. 10, 1991), 9th Dist. No. 14710; *Griffith v. Kentucky* (1987), 479 U.S. 314, 333, 314, 107 S.Ct. 708, 93 L.Ed.2d 649.

{¶9} We are not the first court of appeals to hold that the *Comer* opinion may only be applied to cases pending on direct review. The Eleventh District Court of Appeals has also come to this same conclusion on two occasions. *Wallace v. State*, 11th Dist. No. 2004-T-0008, 2004-Ohio-2596; *Olds v. State*, 11th Dist. No. 2003-A-0129, 2004-Ohio-1848.

{¶10} Relator has not alleged that he attempted to litigate a direct appeal, and has not alleged whether the *Comer* case was raised or available to be raised in that appeal. Our records reveal that Relator did initiate a direct appeal of Mahoning County Court of Common Pleas Case No. 99CR523, which is the case number written

on the face of Relator's petition for writ of mandamus. See *State v. Griffin*, 7th Dist. No. 01 CA 151, 2002-Ohio-6900 (decided December 11, 2002). Relator did not raise any sentencing errors in that appeal. Relator attempted to reopen that appeal, and again failed to raise any errors relating to sentencing. See *State v. Griffin*, 7th Dist. No. 01 CA 151, 2003-Ohio-1599. Relator also attempted to open a delayed appeal with the Ohio Supreme Court, and that motion was denied. *State v. Griffin*, 98 Ohio St.3d 1488, 2003-Ohio-1189. Relator has not alleged any facts or legal theories that would allow us to consider whether mandamus proceedings could be used to reopen a case in order to apply a new rule of law, particularly after the Ohio Supreme Court has refused to hear the direct appeal of that case.

{¶11} For all of the above reasons, we dismiss Relator's petition for writ of mandamus.

{¶12} Final order. Clerk to serve notice as provided by the Civil Rules.

Waite, P.J., concurs.

Vukovich, J., concurs.

DeGenaro, J., concurs.