

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

CLINTON PERDUE,)	
)	CASE NO. 14 MA 131
RELATOR,)	
)	<u>OPINION</u>
- VS -)	<u>AND</u>
)	<u>JUDGMENT ENTRY</u>
JUDGE LOU D'APOLITO,)	
)	
RESPONDENT.)	

CHARACTER OF PROCEEDINGS: Relator's Petition for Writ of Procedendo;
Respondent's Motion to Dismiss.

JUDGMENT: Petition for Writ of Procedendo Dismissed;
Motion to Dismiss Granted.

APPEARANCES:

For Relator:

Clinton Perdue, *Pro se*
#217-703
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430-0901

For Respondent:

Attorney Ralph Rivera
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: November 7, 2014

PER CURIAM:

¶{1} Relator Clinton Perdue, aka Purdue, was convicted by a jury of two counts of aggravated murder, two counts of aggravated robbery, and one count of attempted aggravated murder, all with firearm specifications. *State v. Purdue*, Mahoning C.P. No. 88CR574-B. On January 10, 1990, the Mahoning County Common Pleas Court filed an entry stating that the jury found him guilty of the aforementioned offenses. The court then filed separate sentencing entries for each of the five offenses and each of the specifications. These sentencing entries did not provide the manner of conviction, i.e. by jury trial.

¶{2} The court sentenced Relator to life on each of the aggravated murders, ten to twenty-five years on each of the aggravated robberies, seven to twenty-five years on the attempted aggravated murder, and three years on each of the five gun specifications. This court affirmed the convictions and merged/deleted one of the three-year gun specification sentences relating to the aggravated robbery offenses. See *State v. Perdue*, 7th Dist. No. 90CA18 (Dec. 30, 1993).

¶{3} On May 16, 2014, Relator filed a motion asking the trial court to issue a final appealable order. He attached the sentencing entry on count 1 aggravated murder that imposed a life sentence and the separate sentencing entry on count 2 aggravated murder that also imposed a life sentence. He cited Crim.R. 32(C), which provides the substantive requirements of a judgment as the fact of conviction, sentence, signature, and entry on the journal and which contained the procedural requirement of the manner of conviction. Former Crim.R. 32(B), moved to Former Crim.R. 32 (C) (and amended in 2013 to only mention fact of conviction as opposed to manner of conviction). The manner of conviction can be added nunc pro tunc. See *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142.

¶{4} Relator's motion argued that a sentencing opinion under R.C. 2929.03(F) was required as well as the Crim.R. 32(C) judgment entry, citing, e.g., *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 19, ¶ 17 (where the Court held that in aggravated murder cases subject to R.C. 2929.03(F), the final, appealable order consists of the combination of the judgment entry and the sentencing opinion). R.C. 2909.03(F) provides that "[t]he judgment in a case in which a sentencing hearing

is held pursuant to this section is not final until the opinion is filed.” Besides requiring a sentencing opinion for a death sentence, this section also provides: “The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors.” R.C. 2929.03(F).

¶{5} Division (D) provides “When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division.” And, division (D) then provides procedures for the mitigation hearing and speaks of weighing the aggravating circumstances and mitigating factors. *Compare* R.C. 2929.03(A) (providing for the situation where the indictment does not have death specification), (C) (providing for the situation where the indictment has the specification but the jury does not find defendant guilty of it).

¶{6} On September 4, 2014, the trial court cited to Crim.R. 32(C) and issued one Crim.R. 36 nunc pro tunc entry, reissuing one of the prior aggravated murder entries and adding the manner of conviction: “by way of a jury trial.” Thus, the court did not find that a sentencing opinion was required in this case. Although Relator does not mention this issue to us, we note that although Relator attached two aggravated murder sentencing entries to his motion, the court only issued one amended entry, referring to only one count of aggravated murder.

¶{7} On September 16, 2014, Relator filed the within original action asking for the issuance of a writ of procedendo against the trial court judge compelling him to issue a final appealable order. Relator posits that the September 4, 2014 nunc pro tunc entry *alone* is not a final appealable order. Although the death specifications were eliminated prior to trial and thus the jury was not presented with aggravating circumstances or the possibility of choosing a death sentence,¹ Relator suggests that

¹Appellant filed a petition for a writ of habeas corpus in the Ohio Supreme Court in 2009, wherein he contested the trial court’s amendment of the indictment to delete the death penalty specifications. See *Perdue v. Warden Kelly*, Sup. Ct. Case No. 2009-0653 (petition filed April 9, 2009; action dismissed June 3, 2009).

R.C. 2909.03(F) entitles him to a sentencing opinion in addition to the judgment entry required by Crim.R. 32(C).

¶{8} Respondent filed an answer and a motion to dismiss which avers that the petition does not set forth sufficient facts and urges that the Respondent ruled on the motion and thus there is no right to extraordinary relief in procedendo. Respondent does not specifically respond to the argument concerning a R.C. 2929.03(F) sentencing opinion.

¶{9} Respondent posits that the court ruled on appellant's May 16, 2014 motion by issuing an amended sentencing entry (albeit, on only one of the two requested offenses) to include the manner of conviction. Respondent thus concludes that there is no motion pending upon which to rule, pointing out that a court cannot be compelled to perform a duty that was already performed. *See State ex rel. Grove v. Nadel*, 84 Ohio St.3d 252, 253, 703 N.E.2d 304 (1998). Respondent submits that if Relator is unsatisfied with the trial court's ruling, procedendo is not the appropriate vehicle, suggesting (without specifying) that Relator should have appealed from the ruling on his motion if he believed it was not appropriate.

¶{10} Regardless of the arguments presented in the parties' pleadings, this case must be dismissed due to violations of R.C. 2969.25. The requirements of this statute apply to original actions by inmates including procedendo claims. *State ex rel. Graham v. Niemeyer*, 106 Ohio St.3d 466, 2005-Ohio-5522, 835 N.E.2d 1250, ¶ 5; *State ex rel. Staffrey v. Mahoning Cty. Court of Common Pleas*, 7th Dist. No. 09MA194, 2010-Ohio-616, ¶ 7.

¶{11} "At the time that an inmate commences a civil action or appeal against a government entity or employee, the inmate shall file with the court 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." R.C. 2969.25(A). The affidavit shall include for each of those civil actions or appeals: (1) a brief description of the nature of the civil action or appeal; (2) the court and that court's case name and number; (3) the parties' names; (4) the outcome, including whether the case was dismissed as frivolous or malicious, whether the court made an award against the

inmate or his attorney for frivolous conduct, and the date of the final order affirming the dismissal or award for frivolous conduct. R.C. 2969.25(A)(1)-(4).

¶{12} Moreover, in such a civil action, an inmate who seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action is filed, shall file with the complaint an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency. R.C. 2969.25(C). The affidavit of waiver and the affidavit of indigency shall contain: (1) a statement setting forth the balance in the inmate's account for each of the preceding six months, as certified by the institutional cashier, and (2) a statement setting forth all other cash and things of value owned by the inmate. R.C. 2969.25(C)(1)-(2).

¶{13} Relator has not prepaid the filing fees in this original action, and he has not filed an affidavit of waiver of prepayment of filing fees or an affidavit of indigency as required by R.C. 2969.25(C). This failure requires dismissal of the action. *Hazel v. Knab*, 130 Ohio St.3d 22, 2011-Ohio-4608, 955 N.E.2d 378, ¶ 1 (petition was defective because, although he filed an affidavit of indigency and sought waiver of prepayment of the court's filing fees, the petitioner failed to include in his affidavit of indigency a statement setting forth the balance in his inmate account for each of the preceding six months, as certified by the institutional cashier); *State ex rel. Hawk v. Athens Cty.*, 106 Ohio St.3d 183, 2005-Ohio-4383, 833 N.E.2d 296 (inmate filed affidavit of indigency but failed to provide inmate account balance).

¶{14} In addition, Relator has failed to file an affidavit of prior civil actions as required by R.C. 2969.25(A). The failure to file this affidavit at the time a procedendo action is filed is cause for dismissal of the action. *State ex rel. Staffrey*, 7th Dist. No. 09MA194 at ¶ 7-8, citing *State ex rel. Hawk*, 106 Ohio St.3d 183 and *State ex rel. Graham*, 106 Ohio St.3d 466 at ¶ 5 (dismissal warranted where affidavit of prior actions was filed but did not provide a brief description of the nature of the action).

¶{15} "The requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal." *Hazel*, 130 Ohio St.3d 22 at ¶ 1, quoting *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003-Ohio-2262, 788 N.E.2d 634, ¶ 5. Consequently, appellant's procedendo action is hereby dismissed and Respondent's Motion to Dismiss is granted.

¶{16} Final Order. Clerk to serve notice as provided by the Civil Rules. Costs taxed against Relator.

Vukovich, J., concurs.

Donofrio, J., concurs.

DeGenaro, P.J., concurs.