[Cite as *State ex rel. Martin v. Russo*, 2019-Ohio-2242.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT

COUNTY OF CUYAHOGA

STATE OF OHIO EX REL.
TRAMAINE EDWARD MARTIN, :

Relator, :

No. 108231

v. :

HON. JOSEPH D. RUSSO, JUDGE,
ET AL., :

Respondents. :

JOURNAL ENTRY AND OPINION

JUDGMENT: DISMISSED
DATED: May 28, 2019

Writ of Mandamus
Motion Nos. 526546 and 526895
Order No. 527714

Appearances:

Tramaine Edward Martin, *pro se*.

Michael C. O'Malley, Prosecuting Attorney, and James E. Moss, Assistant Prosecuting Attorney, *for respondents*.

RAYMOND C. HEADEN, J.:

{¶ 1} Relator, Tramaine Edward Martin, seeks a writ of mandamus to require respondents Judges Joseph D. Russo and Michael J. Russo, to hold hearings to determine relator's ability to pay court costs. Respondents filed a joint motion to dismiss, which we grant and dismiss the complaint for writ of mandamus.

Procedural and Factual History

{¶ 2} Journal entries attached to the complaint indicate the following. In Cuyahoga C.P. No. CR-10-532936-A, relator was convicted of failure to comply and receiving stolen property. The June 8, 2010 sentencing entry imposed court costs.[1] In Cuyahoga C.P. No. CR-09-526971-A, relator was convicted of drug possession and court costs were imposed.

{¶ 3} A review of the docket in both cases shows that relator filed motions to vacate court costs on May 8, 2018. On May 11, 2018, respondent Judge Joseph Russo entered an order denying one motion, and respondent Judge Michael Russo denied the other motion on May 25, 2018. On October 15, 2018, relator availed himself of the remedy provided by law by filing notices of appeal in both cases. However, these notices were not timely filed, which deprived this court of jurisdiction to hear the appeals.

[1] A review of the appellate history of this case indicates relator filed a direct appeal, but did not raise any issue related to the imposition of court costs.

{¶ 4} On February 21, 2019, relator filed the instant complaint for writ of mandamus. The complaint seeks an order mandating that respondents hold hearings pursuant to R.C. 2947.23(B).[2] Respondents filed a motion to dismiss, and relator answered with a motion to strike the motion to dismiss and his own motion for summary judgment.

Law and Analysis

A. Applicable Standards

{¶ 5} "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01. In order for a writ in mandamus to issue (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. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). If there is a "plain and adequate remedy in the ordinary course of law," regardless of whether it was used, relief in mandamus is precluded. R.C. 2731.05; *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 676 N.E.2d 108 (1997).

{¶ 6} Respondents have filed a motion to dismiss for failure to state a claim.

> "In construing a complaint upon a motion to dismiss for failure to state a claim, the material allegations of the complaint are taken as admitted. *Jenkins v. McKeithen*

[2] Relator's complaint cites to R.C. 2947.36(B), but there is no such section of the Ohio Revised Code. His combined motion to strike and for summary judgment indicates that his arguments are based on R.C. 2947.23(B).

> (1969), 395 U.S. 411, 421 [89 S.Ct. 1843, 23 L.Ed.2d 404]. [All reasonable inferences must also be drawn in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756; *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584.] Then, before the court may dismiss the complaint, ' * * * it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. * * * ' *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242 [327 N.E.2d 753]."

State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs., 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992), quoting *State ex rel. Alford v. Willoughby*, 58 Ohio St.2d 221, 223-224, 390 N.E.2d 782 (1979).

B. Entitlement to a Hearing

{¶ 7} Relator relies on provisions of R.C. 2947.23 for support in his complaint and motion for summary judgment. R.C. 2947.23, among other things, provides a mechanism whereby a trial court may revisit the imposition of court costs that were imposed at sentencing or impose community work service requirements for the nonpayment of court costs. Relator argues that he has a legal right to a hearing for the payment of court costs under R.C. 2947.23, which respondents are required to hold, and he possesses no adequate remedy at law in appeal because he is only challenging a portion of his sentence.

{¶ 8} Relator has no clear right to the requested relief. The court costs in the two underlying criminal cases cited above were imposed in 2010. The Ohio Supreme Court has determined that

> R.C. 2947.23(C) provides that for sentences entered on or after March 23, 2013, the trial court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution at any time. For sentences entered prior to that date, however, an offender may seek a waiver of costs only at sentencing, the trial court lacks jurisdiction to reconsider its own final order, and any subsequent collateral attack on that order in either the trial or appellate court is barred by res judicata.

State v. Braden, Slip Opinion No. 2018-Ohio-5079, ¶ 24. A determination of relator's ability to pay court costs was made during his 2010 sentencing hearings when those costs were imposed. Further collateral attacks are barred by res judicata. *Id*. Any claim of error was required to be asserted on direct appeal.

{¶ 9} Relator also claims that, in a third criminal case, a cognovit judgment was entered against him in December 2013. He appears to argue that this judgment entered against him was improper because it imposed a judgment for costs originating from the two prior cases without a hearing required by R.C. 2947.23.[3] Relator misunderstands the applicability of this statute.

{¶ 10} R.C. 2947.23 provides a mechanism by which a person who fails to pay court costs can be mandated to perform community work service. The statute requires a hearing, where the defendant is entitled to representation by counsel, before a trial court can order a defendant to perform community work services. R.C. 2947.23(B). Relator has not alleged that he has been ordered to perform community work service, and the journal entries attached to the complaint do not order him to perform community work

[3] It should be noted that respondents are not involved in this third case.

service. Further, court costs were waived in the third case — the only one to which R.C. 2947.23 applies. So, the hearing requirement set forth in R.C. 2947.23(B) is inapplicable.

{¶ 11} Relator's reliance on *State v. Johnson*, 8th Dist. Cuyahoga No. 106138, 2018-Ohio-496, is similarly misplaced. In that case, a defendant was ordered to perform community work service in the original journal entry of sentence. *Id*. at _ 2. R.C. 2947.23 requires a trial court to have some reason to believe that a defendant has failed to pay the judgment of court costs before the imposition of mandatory community work service. *Id*. at _ 9; R.C. 2947.23(B). This court found no reasonable belief of a failure to pay court costs because the order to perform community work service was imposed at the outset and without any basis for such a determination. The *Johnson* court reversed the order to perform community work service. *Id*.

{¶ 12} Relator has not been ordered to perform community work service. Therefore, the holding in *Johnson* is inapplicable to him. Relator has no clear legal right to a hearing, and respondents have no clear legal duty to afford him a hearing.

{¶ 13} Finally, if relator believes that the imposition of court costs in the first two criminal cases or the imposition of a cognovit judgment in the third criminal case was improper, he possessed an adequate remedy at law through direct appeal. *McGrath*, 78 Ohio St.3d at 45, 676 N.E.2d 108. It does not matter whether that remedy was used in order to constitute an adequate remedy at law, only that the remedy was available and offered complete and timely relief. *State ex rel. Sneed v. Anderson*, 114 Ohio St.3d 11, 2007-Ohio-2454, 866 N.E.2d 1084, _

7; *State ex rel. Durrani v. Ruehlman*, 147 Ohio St.3d 478, 2016-Ohio-7740, 67 N.E.3d 769, _ 16. Relator possessed an adequate remedy at law, making relief in mandamus unavailable.

{¶ 14} Respondents' motion to dismiss is granted. Relator's motion to strike is denied. Relator's motion for summary judgment is denied. Relator's complaint for a writ of mandamus is dismissed. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶ 15} Writ dismissed.

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RAYMOND C. HEADEN, JUDGE

EILEEN A. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR