[Cite as *State ex rel. Rodriguez v. Barker*, 2019-Ohio-256.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107831

STATE OF OHIO, EX REL.
JOSE RODRIGUEZ

RELATOR

vs.

PAMELA BARKER, JUDGE

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion No. 522915
Order No. 523846

RELEASE DATE: January 18, 2019

FOR RELATOR

Jose Rodriguez
Inmate No. 661117
Grafton Correctional Institution
Grafton, Ohio 44044

ATTORNEYS FOR RESPONDENT

Michael C. O'Malley
Cuyahoga County Prosecutor
By: James E. Moss
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, A.J.:

{¶1} Relator, Jose Rodriguez, seeks a writ of mandamus to compel respondent judge to vacate a nunc pro tunc order issued September 11, 2018, vacate the allegedly void sentencing entry filed September 11, 2014, and properly impose sentence. Respondent, Judge Pamela Barker, has filed a motion for summary judgment, which we grant, and deny the requested writ.

Facts and Procedural History

{¶2} In 2014, Rodriguez was convicted of numerous crimes related to the murder of Nashad Atallah. Rodriguez appealed his convictions for aggravated murder, murder, aggravated robbery, and two counts of felonious assault. *State v. Rodriguez*, 8th Dist. Cuyahoga No. 101971, 2015-Ohio-3875. No assignment of error was raised about the improper imposition of sentence on firearm specifications or postrelease control. This court overruled the arguments that were advanced and affirmed Rodriguez's convictions. *Id*. at _ 79.

{¶3} On August 16, 2018, Rodriguez filed a "motion to correct facially illegal sentence." There, he argued that the trial court failed to impose multiple sentences on firearm specifications as required by R.C. 2929.14(B)(1)(g), and failed to properly impose postrelease control. Respondent judge granted the motion in part, and issued a nunc pro tunc entry clarifying that she merged all one-year firearm specifications at sentencing. Respondent also set a hearing for November 28, 2018, to properly notify Rodriguez of postrelease control.

{¶4} This action for writ of mandamus was filed on October 19, 2018. Rodriguez filed a second, almost identical, complaint on November 16, 2018, which was dismissed by this court without opinion because it was duplicative of the instant complaint. *State ex rel. Rodriguez v. Barker*, 8th Dist. Cuyahoga No. 107910 (dismissed Dec. 5, 2018).

{¶5} Respondent filed a motion for summary judgment on November 14, 2018, which Rodriguez opposed. Therefore, the case is now ripe for determination.

Standards

{¶6} A writ of mandamus will issue where the relator establishes a clear legal right to relief, a clear legal duty on the part of the respondent to provide it, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Schroeder v. Cleveland*, 150 Ohio St.3d 135, 2016-Ohio-8105, 80 N.E.3d 417, ¶ 13, citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6. The relator must prove entitlement to the writ by clear and convincing evidence. *Id*. at ¶ 13. Further, mandamus may not be used as a substitute for appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973). Finally, mandamus is an extraordinary remedy that should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977).

{¶7} The present matter is before the court on summary judgment. As stated in Civ.R. 56(C),

> [s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Procedural Deficiencies

{¶8} Original actions filed in this court are civil actions and must comply with the Ohio Rules of Civil Procedure unless clearly inapplicable. Loc.R. 45(B)(2); Civ.R. 1(A) and 1(C)(7). For instance, Civ.R. 10(A) requires that the caption of a complaint include the name and address of each party to the action. Rodriguez's complaint only includes the name of each party. The failure to include the address in the case caption is sufficient grounds for dismissal of the complaint. *State ex rel. Smith v. Cuyahoga Cty. Prosecutor*, 8th Dist. Cuyahoga No. 103637, 2016-Ohio-3066, _ 9.

Clear Legal Right to Relief

{¶9} Examining the merits of the instant case, Rodriguez's claims for relief in mandamus can be broken down into three issues. He argues that respondent must vacate his sentence and conduct a resentencing hearing or issue a new sentencing entry because respondent (1) failed to properly impose postrelease control, (2) failed to impose sentence on a firearm specification, and (3) then improperly used a nunc pro tunc entry to correct the second issue. It appears that Rodriguez's goal is to have his entire sentence reviewed in a subsequent, successive appeal.

Improper Imposition of Postrelease Control

{¶10} Rodriguez first asserts that his original sentencing entry failed to contain any notice about postrelease control, which is void as a result. In support, Rodriguez cites to outdated case law. *See, e.g., State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110; *Brown v. Brown*, 183 Ohio App.3d 384, 2009-Ohio-3589, 917 N.E.2d 301 (4th Dist.).

{¶11} In *Carnail*, the Ohio Supreme Court granted a writ of mandamus to compel a trial court judge to issue a new sentencing entry after finding the original sentencing was void because it failed to contain an advisement about postrelease control. *Carnail* at _ 39. Rodriguez appears to assert that because his sentence is void, the court must issue a new sentencing entry so that he may properly appeal it.

{¶12} Rodriguez fails to square this case with more recent developments in Ohio jurisprudence as outlined in *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 7:

> Although we have not previously so stated, generally speaking, our recent cases in this area have dealt with void sanctions, rather than sentences that were void ab

> initio. For example, in [*State*] *v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, we held that "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, *that part of the sentence* is void and must be set aside." (Emphasis added in part.) *Id*. at ¶ 26. We further recognized that in most cases, the prison sanction is not void and therefore "only the offending portion of the sentence is subject to review and correction." *Id*. at ¶ 27. Accordingly, when a judge fails to properly impose statutorily mandated postrelease control as part of a defendant's sentence, the postrelease-control sanction is void. In such situations, the void sanction "may be reviewed at any time, on direct appeal or by collateral attack," *id*., but "res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence," *id*. at ¶ 40.

{¶13} Here, the failure of the trial court to include an advisement about postrelease control in the sentencing entry did not render his entire sentence void. As *Fischer* and *Holdcroft* indicate, only the offending portion of the sentence, the postrelease control sanction, is void and may be corrected at any time prior to the expiration of the attendant sentence. The remainder of Rodriguez's sentence is not void and is and was capable of invoking appellate review. In fact, Rodriguez did invoke that review in his 2015 appeal. *See Rodriguez*, 8th Dist. Cuyahoga No. 101971, 2015-Ohio-3875.

{¶14} Here, adequate remedies at law are available to correct an improper advisement of postrelease control. The failure to properly impose postrelease control does not result in an entirely void sentence, but only a void sanction, for which the legislature has provided a means of

correction. This error may be corrected at any time prior to the expiration of the underlying sentence pursuant to R.C. 2929.191.

{¶15} The trial court scheduled a hearing for November 28, 2018, to correct this alleged error and properly impose postrelease control. Therefore, Rodriguez's claim that this court must grant him relief in mandamus to correct the improper imposition of postrelease control is moot. "A writ of mandamus will not issue to compel an act already performed." *Jerninghan v. Cuyahoga Cty. Court of Common Pleas*, 74 Ohio St.3d 278, 279, 658 N.E.2d 723 (1996). "Stated otherwise, the writ will not lie in order to secure a determination of issues which have become moot pending consideration by the court of appeals." *State ex rel. Gantt v. Coleman*, 6 Ohio St.3d 5, 450 N.E.2d 1163 (1983).

{¶16} Finally, Rodriguez argues in his brief in opposition to summary judgment that respondent lost jurisdiction to impose postrelease control by the filing of the instant complaint for a writ of mandamus. However, the filing of an original action does not stay the underlying proceedings. *Chalendar v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 02AP-567, 2003-Ohio-39, ¶ 28 ("[S]imply filing a complaint for writs of mandamus and prohibition in a higher court does not stay the proceedings in the lower court."). Rodriguez did not seek an alternative writ or otherwise seek to stay the underlying proceedings. Therefore, respondent could hold a hearing to properly notify Rodriguez of postrelease control.

Improper Sentence for a Firearm Specification

{¶17} Rodriguez also argues that his entire sentence is void because the trial court failed to impose multiple sentences for firearm specifications.

{¶18} R.C. 2929.14(B)(1)(g) indicates that, for certain enumerated offenses, sentences for firearm specifications for the two most serious felonies must be imposed consecutively.

This section is applicable to Rodriguez's sentence because he was convicted of at least two of the enumerated offenses. He argues that as a result, his original sentencing entry must be vacated, and he must be resentenced or a new sentencing entry issued so he can appeal his sentence.

{¶19} The failure to impose sentence on a firearm specification does not result in a sentencing entry incapable of invoking appellate jurisdiction. *State ex rel. Jones v. Ansted,* 131 Ohio St.3d 125, 2012-Ohio-109, 961 N.E.2d 192. In that case, the Ohio Supreme Court held that a writ is not an appropriate vehicle to correct such an error because a direct appeal is available to address the failure to impose sentence on all firearm specifications. *Id*. at _ 2. *See also State ex rel. Cunningham v. Lindeman,* 126 Ohio St.3d 481, 2010-Ohio-4388, 935 N.E.2d 393. The Ohio Supreme Court has gone further, stating, '"[w]e have routinely held that extraordinary writs may not be used as a substitute for an otherwise barred second appeal or to gain successive appellate reviews of the same issue.'" *State ex rel. Peoples v. Johnson*, 152 Ohio St.3d 418, 2017-Ohio-9140, 97 N.E.3d 426, ¶ 11, quoting *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 249, 594 N.E.2d 616 (1992).

{¶20} Rodriguez's sentencing entry constituted a final, appealable order as to the issue he now argues. According to *Johnson*, he may not use it as a means of gaining a second appeal. The lack of sentence on a firearm specification was merely a sentencing error Rodriguez could have and should have raised in his direct appeal. The failure to do so means that the claim preclusion branch of res judicata bars the argument in this action. "[A] convicted defendant is precluded under the doctrine of res judicata from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment." (Emphasis deleted.) *State v.*

Szefcyk, 77 Ohio St.3d 93, 96, 671 N.E.2d 233 (1996). Rodriguez failed to argue this issue in his direct appeal. It is therefore not proper grounds for a writ of mandamus.

Improper Use of a Nunc Pro Tunc

{¶21} Rodriguez also argues that the use of a nunc pro tunc entry, rather than a new sentencing entry, further deprives him of appellate review. As explained above, Rodriguez is not entitled to additional appellate review of his sentence. But even if he were, the trial court's use of a nunc pro tunc entry in this matter was proper.

{¶22} A court may use a nunc pro tunc entry to correct a clerical error. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 26. A trial court may not use a nunc pro tunc entry where the change does not reflect what actually occurred, or to reflect what a court may have intended to occur. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, _ 19.

{¶23} Rodriguez points to passages in the sentencing transcript for support. At the original sentencing hearing, respondent stated the following when addressing the firearm specifications:

> Therefore, it is ordered, the Defendant shall serve a term of life imprisonment with parole eligibility after serving 20 years of imprisonment.
>
> With regard to the one-year firearm specification on that count. That one year must be served prior to and consecutive to the life imprisonment with possibility of parole after 20 years.

(Tr. 1778.) Respondent did not address the one-year firearm specification on Count 3. When imposing sentence on this count, the court stated,

> With regard to Count 3, the aggravated robbery count. It is ordered the Defendant shall serve a term of four years on that count. And again, that is going to be served, even though I find they do not merge for purposes of sentencing, those sentences are going to be served concurrently. So you will have a period of 21 years before you are eligible for parole.

Id.

{¶24} Rodriguez argues that this means respondent failed to address all the required firearm specifications and the use of a nunc pro tunc entry was improper. However, a more thorough reading of the sentencing transcript indicates that respondent, in fact, merged all the firearm specifications and imposed a single one-year sentence on the firearm specification attached to the aggravated murder charge.

{¶25} During the sentencing hearing, respondent discussed the charges and the findings of guilt and the potential penalties. In this discussion, respondent stated, "[a]s to each of the firearm specifications associated with the underlying offenses, those merge for purposes of sentencing. There will be one year for that firearm specification." (Tr. 1750.) While this may have been error under R.C. 2929.14 (B)(1)(g), it does mean that respondent's nunc pro tunc entry reflects what actually occurred at sentencing. Therefore, the use of a nunc pro tunc entry was proper.

{¶26} For all the above reasons, this court grants respondent's motion for summary judgment. Costs to relator. Costs waived. The court directs the clerk of court to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

{¶27} Writ denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR