

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

|   |   |                    |
|---|---|--------------------|
| State ex rel. Robert D. Harris,   | : |                    |
| Relator,  | : |                    |
| v.  | : | No. 12AP-10        |
| Stephen L. McIntosh, Judge, Franklin<br>[County] Court of Common Pleas, Ohio, | : | (REGULAR CALENDAR) |
| Respondent.   | : |                    |
|   | : |                    |

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D E C I S I O N

Rendered on November 27, 2012

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*Robert D. Harris, pro se.*

*Ron O'Brien, Prosecuting Attorney, and Jeremy David Smith, for respondent.*

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IN MANDAMUS  
ON MOTION FOR SUMMARY JUDGMENT

BROWN, P.J.

{¶1} Relator, Robert D. Harris, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, the Honorable Stephen L. McIntosh, a judge of the Franklin County Court of Common Pleas, to vacate a November 2, 2011 entry denying relator's motion seeking a nunc pro tunc judgment entry in Franklin County Common Pleas case No. 07CR-2837, and to enter a nunc pro tunc judgment entry.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. On February 10, 2012, respondent filed a motion for summary judgment, relying upon certified documents attached to his answer. The magistrate issued a decision, including findings of fact and conclusions of law, recommending that this court grant respondent's motion for summary judgment. No objections have been filed to that decision.

{¶3} Upon review, the magistrate properly determined that relator has an adequate remedy at law by way of direct appeal, which he has already exercised. Moreover, because the same issue now raised by relator was addressed and rejected by this court in *State v. Harris*, 10th Dist. No. 11AP-1019, 2012-Ohio-2039, res judicata also bars relator's action in mandamus. Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, respondent's motion for summary judgment is granted.

*Writ of mandamus denied;  
respondent's motion for summary judgment granted.*

BRYANT and TYACK, JJ., concur.

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# APPENDIX

## IN THE COURT OF APPEALS OF OHIO

### TENTH APPELLATE DISTRICT

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| State ex rel. Robert D. Harris,   | : |                    |
| Relator,  | : |                    |
| v.  | : | No. 12AP-10        |
| Stephen L. McIntosh, Judge, Franklin<br>[County] Court of Common Pleas, Ohio, | : | (REGULAR CALENDAR) |
| Respondent.   | : |                    |
|   | : |                    |

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### MAGISTRATE'S DECISION

Rendered on September 11, 2012

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*Robert D. Harris, pro se.*

*Ron O'Brien, Prosecuting Attorney, and Jeremy David Smith, for respondent.*

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### IN MANDAMUS ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

{¶4} In this original action, relator, Robert D. Harris, an inmate of the Toledo Correctional Institution ("TCI") requests a writ of mandamus ordering respondent the Honorable Stephen L. McIntosh, a Judge of the Franklin County Court of Common Pleas ("common pleas court") to vacate his November 2, 2011 entry that denied relator's August 26, 2011 motion for the issuance of a nunc pro tunc judgment entry in criminal case No. 07CR-2837, and to enter a nunc pro tunc judgment entry.

Findings of Fact:

{¶5} 1. On January 4, 2012, relator, a TCI inmate, filed this original action against respondent.

{¶6} 2. On January 31, 2012, respondent filed his answer to the complaint. Respondent attached to his answer certified copies of various court documents relating to common pleas court case No. 07CR-2837.

{¶7} 3. On January 31, 2012, respondent moved for judgment on the pleadings. Respondent's motion relied upon the certified documents attached to his answer.

{¶8} 4. On February 9, 2012, the magistrate denied respondent's motion for judgment on the pleadings. However, in his order, the magistrate noted that denial of the motion did not prohibit a motion for summary judgment.

{¶9} 5. On February 10, 2012, respondent moved for summary judgment. Apparently, respondent relies upon the certified documents attached to his answer.

{¶10} 6. On February 15, 2012, the magistrate issued an order setting the summary judgment motion for submission to the magistrate on March 5, 2012.

{¶11} 7. Relator has not opposed the motion for summary judgment

{¶12} 8. The certified documents before this court indicate that on April 20, 2007, relator was indicted by the Franklin County Grand Jury on four felony counts. Count one alleged aggravated murder with a firearm specification. Count two also alleged aggravated murder with a firearm specification. Count three alleged aggravated robbery. Count four alleged tampering with evidence.

{¶13} 9. Counts one, two, and four were tried to a jury during April and May 2009. On May 15, 2009, the jury returned verdicts of guilty on counts one, two, and four.

{¶14} 10. On June 9, 2007, the common pleas court filed its judgment entry in case No. 07CR-2837. The entry states in part:

Counts One, Two and Four of the indictment were tried by a jury which returned a verdict on May 15, 2009 finding: the Defendant guilty of the following offense:

**Count One of the indictment, to-wit: Guilty of Aggravated Murder, in violation of R.C. 2903.01.**

Count **Two** of the indictment, to-wit: **Guilty of Aggravated Murder**, in violation of R.C. 2903.01.

Count **Four** of the indictment, to-wit: **Tampering with Evidence**, in violation of R.C. 2921.12, a felony of the Third degree.

\* \* \*

The Court hereby imposes the following sentence: **Life, Without the Possibility of Parole** for Count One, **Life, Without the Possibility of Parole** for Count Two, **Five (5) years** for Count Four and the **Defendant shall serve an additional 3 years actual incarceration for the use of a firearm as to Counts One and Two which merge with each other to be served at THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. Count One and Count Two shall run Consecutive with each other and Concurrently with Count Four. Said Sentence shall run Concurrent with Case No. 08CR-3476 for a total sentence of Two Life sentences Without the Possibility of Parole.**

(Emphasis sic.)

{¶15} 11. Relator appealed the common pleas court judgment to this court. The appeal was assigned case No. 09AP-578.

{¶16} 12. On April 15, 2010, in case No. 09AP-578, this court issued its decision and judgment entry overruling the assignments of error and affirming the judgment of the common pleas court.

{¶17} 13. On August 26, 2011, relator moved the common pleas court for a nunc pro tunc judgment entry. The motion alleged:

Mr. Harris's [sic] June 9, 2009 Judgment Entry, attached hereto, did not specify the manner of conviction on the Firearm Specifications as to Counts One and Two. Specifically, the judgment entry does not contain that Mr. Harris was charged with any firearm specifications, nor does the court's judgment entry contain a guilty plea, jury verdict, or finding on which the firearm specification sentences are based.

{¶18} 14. On November 2, 2011, the common pleas court issued a judgment entry denying relator's August 26, 2011 motion. Relator appealed to this court. Relator's appeal was assigned case No. 11AP-1019.

{¶19} 15. On May 8, 2012, this court issued its decision and judgment entry in case No. 11AP-1019. This court overruled the single assignment of error and affirmed the common pleas court's judgment entry that denies relator's August 26, 2011 motion.

{¶20} 16. Relator applied for reconsideration of this court's May 8, 2012 decision.

{¶21} 17. On July 10, 2012, this court issued a memorandum decision and journal entry denying the application for reconsideration in case No. 11AP-1019.

{¶22} 18. Earlier, on January 14, 2012 (as previously noted), relator filed this original action during the pendency of his appeal to this court in case No. 11AP-1019.

#### Conclusions of Law:

{¶23} It is the magistrate's decision that this court grant respondent's motion for summary judgment.

{¶24} Summary judgment is appropriate when the movant demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner*, 67 Ohio St.3d 337, 339-40 (1993); *Bostic v. Connor*, 37 Ohio St.3d 144, 146 (1988); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶25} Civ.R. 56(E) states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶26} In *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, the syllabus states:

1. A judgment of conviction is a final order subject to appeal under R.C. 2505.02 when it sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk. (Crim.R. 32(C), explained; *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, modified.)

2. A nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken.

{¶27} In this original action, relator invokes *Lester* to support his request for a writ of mandamus ordering respondent to vacate the November 2, 2011 entry that denies his August 26, 2011 motion for the issuance of a nunc pro tunc judgment entry in criminal case No. 07CR-2837.

{¶28} But relator appealed respondent's November 2, 2011 entry to this court. In that appeal, relator requested the same relief that he now requests in this original action. As previously noted, this court overruled the single assignment of error and affirmed the common pleas court's judgment entry. A writ of mandamus will not issue if an adequate remedy at law exists. *State ex rel. Reynolds v. Basinger*, 99 Ohio St.3d 303, 2003-Ohio-3631.

{¶29} Here, relator had an adequate remedy by way of his direct appeal which he has already exercised. Thus, his original action here is barred by that remedy. *See State ex rel. Hazel v. Hon. Judge John Bender*, 10th Dist. No. 09AP-288, 2009-Ohio-6326.

{¶30} Accordingly, it is the magistrate's decision that this court grant respondent's motion for summary judgment.

/s/ Kenneth W. Macke  
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KENNETH W. MACKE  
MAGISTRATE

**NOTICE TO THE PARTIES**

**Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).**