

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

Edward E. Smith

Court of Appeals No. WM-16-011

Petitioner

v.

The Ohio Adult Parole Authority
and Jim Dennis, Executive Director,
Corrections Center of Northwest Ohio

DECISION AND JUDGMENT

Respondents

Decided: December 8, 2016

* * * * *

Edward E. Smith, pro se.

* * * * *

SINGER, J.

{¶ 1} Petitioner, Edward E. Smith, an inmate at the Corrections Center of Northwest Ohio (“CCNO”) in Williams County, Ohio, has filed an application for writ of habeas corpus alleging that he is being imprisoned unlawfully by Jim Dennis, the CCNO executive director. According to the September 3, 2014 judgment entry attached to his

brief, a Cuyahoga County court sentenced petitioner to nine months incarceration on August 27, 2014, for domestic violence in violation of R.C. 2919.25(A), a felony of the third degree.

{¶ 2} In addition to prison time, petitioner was sentenced to three years postrelease control. The September 2014 judgment entry unambiguously stated the sanction was part of the imposed sentence. Petitioner served his prison term and was released to postrelease control on May 11, 2015.

{¶ 3} Petitioner had past convictions which carried postrelease control supervision, including sanctions imposed in 2006, 2007 and 2012.

{¶ 4} In 2006, petitioner was sentenced to four years incarceration and three years postrelease control for domestic violence and robbery. Petitioner was released and was again arrested, charged and convicted in 2007, for receiving stolen property and failure to comply. Petitioner was sentenced to 30 months. He was released, arrested and convicted again, receiving two years incarceration and three years postrelease control in 2012 for domestic violence and disrupting public service. These new felony convictions resulted in postrelease control violations, and the Adult Parole Authority (APA) maintained sanction days to add to any sentence in the event petitioner had future violations.

{¶ 5} Petitioner was subsequently arrested for the domestic violence he was sentenced for in August 2014. The record reveals he violated terms of his postrelease control after release in May 2015, including in June 2015 and May 2016. The May 2016 violation resulted in 170 days incarceration. Petitioner is set to be released from CCNO

in November 2016, and he will have 878 days remaining with the APA from which he can be sentenced. This incarceration at CCNO, Williams County, is from where petitioner now challenges his imprisonment as an unlawful restraint of liberty.

{¶ 6} In this application for writ of habeas corpus, petitioner claims the trial court failed to comply with R.C. 2929.19 when sentencing him in August 2014 and, therefore, his sentence is void. The basis for his claim is not entirely clear from his petition. He either asserts the trial court erred in using discretionary language when mandatory language was necessary; the trial court erred in not imposing the sanction in open court; or, both.

{¶ 7} Petitioner also challenges the validity of the APA maintaining days of postrelease control. He contends R.C. 2967.28 violates the double jeopardy clause because he was sentenced more than once on past convictions.

{¶ 8} 6th Dist.Loc.App.R. 6(A) provides “Habeas Corpus actions shall be brought and proceed in accordance with R.C. Chapter 2725.”

{¶ 9} R.C. 2725.01 provides that “[w]hoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.”

{¶ 10} A writ of habeas corpus is an extraordinary writ that may not be issued by the court when an adequate remedy at law exists. *See State ex rel. Anderson v.*

Wichtman, 160 Ohio App.3d 585, 2005-Ohio-1882, 828 N.E.2d 169, ¶ 6 (6th Dist.), citing *Adams v. Humphreys*, 27 Ohio St.3d 43, 500 N.E.2d 1373 (1986).

{¶ 11} In disposing of this application for writ, we hold petitioner is not entitled to habeas corpus relief because (1) petitioner did not comply with R.C. 2969.25; (2) the August 2014 sentence was not void; (3) petitioner was sufficiently notified in both open court and in the entry; (4) petitioner did not provide the record for our review; and lastly (5) the claim of double jeopardy is not a ground for relief.

{¶ 12} First, petitioner did not comply with R.C. 2969.25 because he failed to submit an affidavit as to prior actions.

{¶ 13} R.C. 2969.25 requires that, at the time of petitioning for habeas corpus relief, an inmate must “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.” *See Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982, ¶ 6-9 (“we hold that the provisions in R.C. 2969.21 et seq. apply to state habeas corpus actions”).

{¶ 14} Petitioner here did not comply with this statutory mandate and, therefore, his request for habeas corpus relief is denied on this ground.

{¶ 15} Second, petitioner’s sentence was not void because “[o]n December 22, 2009, the Ohio Supreme Court held that for sentences imposed after July 11, 2006, the failure of the trial court to properly provide notification of post-release control does not result in a void judgment.” *See State v. Jones*, 9th Dist. Summit No. 25254, 2010-Ohio-

3850, ¶ 7, citing *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 27; *see also* R.C. 2929.19(B)(2)(c) (codification of rule).

{¶ 16} Petitioner's sentence was imposed in August 2014, and petitioner had ample time to file an appeal or petition for postconviction relief to address the voidable aspects of his sentence. *Id.* at ¶ 8. Therefore, petitioner's relief is denied on this ground.

{¶ 17} Third, petitioner was sufficiently notified of his postrelease control during sentencing in August 2014. Specifically, the September 3, 2014 entry stated:

The court imposes a prison sentence at the Lorain Correctional Institution of 9 months. Post release control is part of this prison sentence for up to 3 years for the above felony(s) under R.C. 2967.28. Defendant advised that if/when post release control supervision is imposed following his/her release from prison and if he/she violates that supervision or condition of post release control* * * parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the offender.

{¶ 18} As indicated by the entry, petitioner was notified and "advised" with regard to postrelease control and violations thereof. The language used was sufficient to satisfy the obligation of notifying petitioner. His argument stating otherwise has no merit.

{¶ 19} Fourth, petitioner is not entitled to habeas corpus because he has not supplied this court with the necessary record to properly challenge the proceedings.

{¶ 20} In *In re Alfrey*, 4th Dist. Pickaway Case No. 86 CA 37, 1988 Ohio App. LEXIS 2960 (July 22, 1988), appellant-petitioner Alfrey asserted the trial court denied him due process by failing to hold a hearing. *In re Alfrey* at *11. The record nonetheless contained evidence the hearing actually occurred. *Id.* Moreover, petitioner-appellant failed to request a transcript and did not supply one for review. *Id.* at *11-12; *see also McDermott v. State*, 5th Dist. Stark No. 2004-CA-00178, 2004-Ohio-5560, ¶ 17-29 (discussing responsibility and options for providing and supplementing record when indigent unable to bear costs of transcripts for review).

{¶ 21} In this case, the September 2014 judgment entry supports petitioner was informed of his three-year postrelease control sanction. Additionally, petitioner has not supplied the transcript of the August 27, 2014 sentencing hearing; thus, we must presume the regularity of the proceedings. *See, e.g., State v. Newman*, 6th Dist. Wood No. WD-15-031, 2016-Ohio-2667, ¶ 7 (“Without a complete appellate record, we must presume the regularity of the proceedings.”).

{¶ 22} Fifth and lastly, petitioner cannot challenge the validity of the 878 days of postrelease control remaining with the APA, upon his release in November 2016, by asserting R.C. 2967.28 violates the double jeopardy clause.

{¶ 23} Primarily, “the question of double jeopardy is one, which goes not to the jurisdiction of the trial court but rather to the judgment and sentence. These are issues, which must be raised by appeal and are not cognizable in a habeas corpus proceeding.” *See Barker v. Sacks*, 173 Ohio St. 413, 414-15, 183 N.E.2d 385 (1962). Also, “R.C.

2967.28 authorize[s] the imposition of a sentence for a ‘new felony’ in addition to sanctions for violations of post-release control.” *See, e.g., State v. Washington*, 5th Dist. Muskingum No. CT2003-0006, 2004-Ohio-292, ¶ 13. Petitioner, therefore, has not been placed in jeopardy for any offense during the postrelease control hearings. The principles of double jeopardy do not apply for these stated reasons.

{¶ 24} Accordingly, we decline to issue the writ and the application for writ of habeas corpus is not well-taken and is denied. Petitioner is ordered to pay the court costs.

{¶ 25} The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal pursuant to Civ.R. 58(B).

Writ denied.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

James D. Jensen, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio’s Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court’s web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
