[Cite as *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, 2010-Ohio-1066.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93814

STATE OF OHIO, EX REL. JAMES A. DAVIS, JR.

RELATOR

vs.

CUYAHOGA COUNTY COURT OF COMMON PLEAS, ET AL.

RESPONDENTS

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion Nos. 426169 and 426650
Order No. 431852

RELEASE DATE: March 17, 2010

FOR RELATOR

James A. Davis, Jr., pro se
Inmate No. 444-458
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ATTORNEYS FOR RESPONDENTS

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By: James E. Moss
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SEAN C. GALLAGHER, A.J.:

{¶ 1} On August 24, 2009, the relator, James A. Davis, Jr., commenced this mandamus action against the respondents, the Cuyahoga County Common Pleas Court and Judge Bridget McCafferty, to compel them to issue a final appealable order in the underlying case, *State v. Davis,* Cuyahoga County Common Pleas Court Case No. CR-428529. Davis submits that because the trial court's sentencing entry did not reiterate the resolution of deleted specifications and a nolled count and because it improperly included an order of postrelease control, the sentencing entry

is void and does not constitute a final appealable order; thus, he has a right to a new, correct sentencing entry that would be a final appealable order. On September 11, 2009, the respondents, through the Cuyahoga County Prosecutor, moved for summary judgment. On September 25, 2009, Davis filed his brief in opposition and his own motion for summary judgment. The respondents did not file a further brief. For the following reasons, this court grants the respondents' motion for summary judgment, denies Davis's dispositive motion, and denies the application for a writ of mandamus.

{¶ 2} In the underlying case, the grand jury indicted Davis for aggravated murder with one- and three-year firearm specifications and for tampering with evidence. On April 17, 2003, the prosecutor amended the aggravated murder charge by deleting the prior calculation element and the firearm specifications and further nolled the tampering with evidence charge. Davis then pleaded guilty to murder. The trial court, on April 28, 2003, sentenced him to 15 years to life. The sentencing entry, which was journalized on April 30, 2003, also provided: "Post release control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28."

{¶ 3} On July 22, 2003, Davis moved for a delayed appeal, which this court granted on September 5, 2003.[1] Although this court initially appointed counsel, that

[1]Appeal No. 83188.

counsel withdrew, and this court directed Davis to proceed pro se. He failed to file a brief, and this court dismissed the appeal on February 12, 2004.

{¶ 4} On July 22, 2003, Davis also filed a postconviction relief petition, which the trial court denied on August 14, 2003. He moved to withdraw his guilty plea on June 23, 2004, and the trial court denied that motion on November 9, 2004. On September 7, 2005, Davis again moved for a delayed appeal, which this court denied in October 2005. On July 13, 2009, he filed a motion to "revise/correct" the sentencing entry, which the trial court denied on July 21, 2009. Instead of filing a timely appeal, Davis commenced this mandamus action.

{¶ 5} The requisites for mandamus are well established: (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. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914. Furthermore, mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 631 N.E.2d 119; *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 295 N.E.2d 659; and *State ex rel. Pressley v. Indus. Comm. of Ohio* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631, paragraph three of the syllabus. Thus, mandamus does not lie to correct errors and

procedural irregularities in the course of a case. *State ex rel. Tommie Jerninghan v. Judge Patricia Gaughan* (Sept. 26, 1994), Cuyahoga App. No. 67787. Furthermore, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108; and *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 564 N.E.2d 86.

{¶ 6} Moreover, mandamus is an extraordinary remedy which is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 113 N.E.2d 14; *State ex rel. Connole v. Cleveland Bd. of Edn.* (1993), 87 Ohio App.3d 43, 621 N.E.2d 850; and *State ex rel. Dayton-Oakwood Press v. Dissinger* (1940), 32 Ohio Law Abs. 308.

{¶ 7} Davis's first claim is that under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, the sentencing journal entry must dispose of all the counts and specifications in order to be a final appealable order. He argues that the sentencing entry did not dispose of the aggravated murder count, the firearm specifications, and the tampering with evidence count. Thus, it is not a final appealable order. In *State ex rel. Culgan v. Medina Cty. Ct. of Common Pleas,* 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, the Supreme Court of Ohio

granted the writs of procedendo and mandamus to compel the trial court to issue a final appealable order pursuant to *Baker* and Crim.R. 32. Accordingly, Davis concludes that mandamus will lie to compel the trial court to issue a final appealable order in the underlying case so that it disposes of all the counts and specifications.

{¶ 8} However, Davis's argument is ill-founded. *Baker,* at syllabus, states: "A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." Thus, *Baker* requires a full resolution of those counts for which there were convictions. It does not require a reiteration of those counts and specifications for which there were no convictions, but were resolved in other ways, such as dismissals, nolled counts, or not guilty findings. *State v. Robinson,* Cuyahoga App. No. 90731, 2008-Ohio-5580; and *State v. Toney*, Cuyahoga App. No. 90605, 2008-Ohio-6473. Thus, the sentencing entry in the underlying case complies with *Baker*. It states the means of conviction and imposes a sentence for the sole count for which Davis was convicted. Davis has no right to a journal entry stating the means of exoneration for the other count and specifications.

{¶ 9} Davis's second claim is that an error in the sentencing entry relating to postrelease control renders the sentencing entry void, as if it never happened. Such an entry is not a final appealable order. Thus, he has a right to a new sentencing

hearing and entry which, he argues, is enforceable in mandamus. Davis notes that R.C. 2967.13(A) provides in pertinent part that a person sentenced to life imprisonment for murder becomes eligible for parole at the expiration of the minimum term. Murder is a special felony and not a numbered-degree felony. Thus, it is outside the scope of postrelease control pursuant to R.C. 2967.28. Nevertheless, the trial judge imposed postrelease control. Davis cites *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568; and *State v. McGee*, Cuyahoga App. No. 89133, 2007-Ohio-6655, for the proposition that a sentence which improperly imposes postrelease control is void. Indeed, in *Bezak*, the Supreme Court of Ohio ruled: "When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void." 114 Ohio St.3d at ¶16. The Supreme Court of Ohio reasoned that a trial court exceeds its authority when it disregards the statutory sentencing requirements, and thus, such a sentence is void. In *McGee,* this court indicated that a void sentence for failing to impose postrelease control properly is not a valid, final judgment and not subject to res judicata. From these authorities, Davis concludes that imposing postrelease control when it is not authorized must also result in a void sentence that is not a valid, final order.

Accordingly, mandamus will lie to compel the trial court to issue a proper, final appealable order.

{¶ 10} However, the Supreme Court of Ohio has rejected the use of extraordinary writs to remedy error in the imposition of postrelease control. In *Bezak*, ¶16, the Supreme Court of Ohio held that if a sentence is void for failing to impose postrelease control, then "the sentence must be vacated and the matter remanded to the trial court for resentencing." The use of the word "remand" necessarily implies that the case is on appeal. Significantly, the procedural posture of *Bezak*, *Simpkins,* and *McGee* involved appeals, not extraordinary writs.

{¶ 11} Furthermore, in *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-6147, 898 N.E.2d 950, ¶8, the petitioner sought the extraordinary writ of habeas corpus to obtain his release from postrelease control because the trial judge had failed to notify him of postrelease control during the sentencing hearing. The Supreme Court of Ohio affirmed the denial of the writ because there was an adequate remedy at law that precluded such extraordinary relief. The court held that direct appeal from the sentence was the remedy for improprieties relating to postrelease control: "We have never held that these claims can be raised by extraordinary writ when the sentencing entry includes postrelease control, however inartfully it might be phrased." See, also, *Pierre v. McFaul*, Cuyahoga App. No. 94357, 2010-Ohio-271; and *In Re: Jackson v. Phillips*, Cuyahoga App. No. 91963,

2009-Ohio-125. Mandamus will not lie if the relator has or had an adequate remedy at law. Davis's failure to timely commence and/or pursue an appeal does not excuse him from the rigors of this legal principle.

{¶ 12} Accordingly, this court grants the respondents' motion for summary judgment and denies the application for a writ of mandamus. Costs assessed against relator. The court directs the clerk to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR