

[Cite as *Smith v. Cuyahoga Cty. Sheriff's Dept.*, 2010-Ohio-1763.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94626

GREGORY SMITH (DEDONNO)

PETITIONER

vs.

CUYAHOGA CTY. SHERIFF'S DEPT., ET AL.

RESPONDENTS

**JUDGMENT:
WRIT DENIED**

Writ of Habeas Corpus
Motion Nos. 431052, 432036, and 431686
Order No. 432943

RELEASE DATE:

April 21, 2010

FOR PETITIONER

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COLLEEN CONWAY COONEY, J.:

{¶ 1} On February 4, 2010, the petitioner, Gregory Smith, commenced this habeas corpus action against the respondents, the Cuyahoga County Sheriff's Department, the Cuyahoga County Jail, and Judge Dick Ambrose. Smith argues that because his initial sentence in the underlying case, *State v. Smith*, Cuyahoga County Common Pleas Court Case No. CR-362460, did not properly include postrelease control, he has been imprisoned under a void sentence since 1998. Furthermore, he argues that because there has been a ten-year delay in trying to impose postrelease control, the trial court has lost jurisdiction over him pursuant to

State v. Mack, Cuyahoga App. No. 92606, 2009-Ohio-6460. Therefore, he claims he is entitled to immediate release from his void sentence. On February 11, 2010, the respondents moved for summary judgment on the grounds that the habeas petition is fatally defective, an appeal is an adequate remedy at law, and the specific law concerning postrelease control did not deprive the trial court of jurisdiction.

{¶ 2} On March 1, 2010, Smith filed an “Amended Complaint.” In substance and form, it is not an amended complaint but a brief in opposition, and this court will treat it as such. The respondents replied with a motion to dismiss the amended complaint. Smith then filed a combined motion for summary judgment and to strike the respondents’ dispositive motions. The respondents did not reply. For the following reasons, this court grants the respondents’ motion for summary judgment, denies their motion to dismiss the amended complaint, denies Smith’s combined motion to strike and for summary judgment, and denies the petition for a writ of habeas corpus.

{¶ 3} In 1998, Smith pled guilty to one count of rape and one count of kidnapping, both first degree felonies. The trial court sentenced him to ten years on the rape charge and nine years on the kidnapping charge to be served consecutively. The sentencing journal entry did not explicitly notify Smith about postrelease control; rather, the entry provided that the sentence included any

extensions provided by law. This court affirmed in *State v. Smith* (Mar. 9, 2000), Cuyahoga App. No. 75512.

{¶ 4} In February 2008, Smith moved to vacate his sentence because it did not include postrelease control. The trial court granted this motion and held a resentencing hearing on April 1, 2008. The trial court reimposed the 19-year sentence and further added: “Post release control is part of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28.” This court affirmed the resentencing in *State v. Smith*, Cuyahoga App. No. 91346, 2009-Ohio-1610, finding that the court “properly applied postrelease control.” *Id.* at ¶42.

{¶ 5} A review of the docket in the underlying case shows that on January 14, 2010, Smith filed a motion for resentencing under the authority of *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. On January 29, 2010, the trial court granted the motion in part, ruling that Smith was entitled to a hearing under R.C. 2929.191 and ordering Smith returned for the hearing. Smith then commenced this habeas action. The trial court conducted that hearing on February 10, 2010, and informed Smith that he was subject to five years of mandatory postrelease control and that the failure to abide by the terms and conditions of postrelease control would subject him to being returned to prison for up to one-half of his original sentence.

{¶ 6} On February 17, 2010, the trial court issued a nunc pro tunc journal entry that restated the means of conviction, reimposed the 19-year sentence and

five years of postrelease control, and notified Smith that violating postrelease control would allow the parole board to impose a prison term as part of the sentence for up to one-half of the originally stated prison term. Smith is appealing this February 17, 2010 journal entry in *State v. Smith*, Cuyahoga App. No. 94732.

{¶ 7} Pursuant to Chapter 2725 of the Ohio Revised Code, habeas corpus will lie if persons are restrained of their liberty by process or order of a court that did not have jurisdiction to issue such process or order. However, habeas corpus will not lie if there is an adequate remedy at law, such as direct appeal. *In re Coleman*, 95 Ohio St.3d 284, 2002-Ohio-1804, 767 N.E.2d 677, and *Thomas v. Huffman* (1998), 84 Ohio St.3d 266, 703 N.E.2d 315. Generally, the proper remedy for sentencing errors is not an extraordinary writ, but an appeal. *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-617, 898 N.E.2d 950; and *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 93814, 2010-Ohio-1066.

{¶ 8} *Mack* is the foundation of Smith's argument. In *Mack*, a jury found Mack guilty of vehicular assault, failure to stop after an accident, and improperly handling a firearm in a motor vehicle. On August 15, 2006, the trial court sentenced Mack to eight months in prison on the vehicular assault charge. The court then further ordered that upon release from prison, Mack was to be returned to the trial court for the terms and conditions of a five-year community control

sanction, which would include restitution and drug and alcohol treatment and testing.

{¶ 9} Upon release from prison, however, Mack was not returned to the trial court. It was not until October 30, 2008, that the trial court discovered that it had not completed its sentencing of Mack. Thus, on December 1, 2008, the trial court imposed the terms and conditions of community control and ordered Mack to pay the victim \$107,000 in restitution. On appeal, this court held the delay from August 2006 to December 2008 to complete its sentencing was so unreasonable that it deprived the trial court of jurisdiction to impose sentence.

{¶ 10} Smith analogizes his case to *Mack*. If the 26-month delay in *Mack* was so unreasonable that it deprived the trial court of jurisdiction to complete the sentencing process, then Smith claims the ten- to 12-year delay in properly imposing postrelease control must also deprive the trial court of jurisdiction to impose sentence. Furthermore, Smith argues that if the failure to properly impose postrelease control results in a void sentence, *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864 and *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774, then the entire 19-year sentence must be void. Because the trial court does not have jurisdiction to impose a valid sentence, Smith claims he is being held illegally under a void sentence, and habeas corpus will lie to secure his immediate release.

{¶ 11} However, Smith's reliance on *Mack* is misplaced, because the law concerning the proper imposition of postrelease control is very specific. The Supreme Court of Ohio in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, syllabus, held that "in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." Smith comes within this rule of law. His first degree felonies are subject to postrelease control, and he has not completely served his sentence. Thus, the trial court has jurisdiction to resentence him.

{¶ 12} Moreover, Smith has an adequate remedy at law through an appeal which he appears to be pursuing. The existence of such a remedy also precludes the issuance of a writ of habeas corpus.

{¶ 13} Accordingly, this court grants the respondents' motion for summary judgment and denies the application for a writ of habeas corpus. Smith to pay costs. This court further orders the Clerk of the Eighth District Court of Appeals to serve notice upon all parties of this judgment and its date of entry upon the journal. Civ.R. 58(B).

COLLEEN CONWAY COONEY, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS;
CHRISTINE T. MCMONAGLE, J., CONCURS IN JUDGMENT ONLY