

[Cite as *State ex rel. McGrath v. Matia*, 2010-Ohio-1987.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94147

**STATE OF OHIO, EX REL.
JOSEPH MCGRATH**

RELATOR

VS.

JUDGE DAVID MATIA, ET AL.

RESPONDENTS

**JUDGMENT:
COMPLAINT DISMISSED**

Writ of Mandamus
Motion No. 428233
Order No. 432704

RELEASE DATE: April 30, 2010

FOR RELATOR

Joseph McGrath, pro se
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ATTORNEYS FOR RESPONDENTS

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By: James E. Moss
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MELODY J. STEWART, J.:

{¶ 1} Relator, Joseph McGrath, is the defendant in *State v. McGrath*, Cuyahoga Cty. Court of Common Pleas Case Nos. CR-352526 (which has been assigned to respondent Judge David T. Matia) and CR-388833 (which has been assigned to Judge Eileen A. Gallagher). McGrath avers that the court of common pleas did not impose postrelease control in either of these two cases. He also avers that he has served the full sentence in each case.

{¶ 2} McGrath contends that his sentences are void and requests that this court issue a writ of mandamus: compelling respondents to vacate his sentences; prohibiting respondents from resentencing him; compelling

respondents to certify that he was wrongfully incarcerated; compelling respondents to seal the court records; and compelling respondents to reimburse him for his costs, including legal and paralegal fees.

{¶ 3} Respondents have filed a motion to dismiss and McGrath has filed a motion for summary judgment. For the reasons stated below, we grant respondents' motion to dismiss and deny McGrath's motion for summary judgment.

{¶ 4} The fundamental criteria for issuing a writ of mandamus are well-established. "In order to be entitled to a writ of mandamus, relator must show (1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State, ex rel. National City Bank v. Bd. of Education* (1977), 52 Ohio St. 2d 81, 369 N.E.2d 1200." *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St. 2d 41, 42, 374 N.E.2d 641. Of course, all three of these requirements must be met in order for mandamus to lie.

{¶ 5} McGrath relies on *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, as the basis for asserting that his sentences are void. "However, the Supreme Court of Ohio has rejected the use of extraordinary writs to remedy error in the imposition of postrelease control. In [*State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E. 2d 961], ¶ 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* [and] *Simpkins* * * * involved appeals, not extraordinary writs.” *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 93814, 2010-Ohio-1066, at ¶11. Clearly, McGrath has not established a basis for relief in mandamus.

{¶ 6} Additionally, relief in mandamus is not appropriate if a relator had an adequate remedy. See *State ex rel. Barksdale v. Sutula*, Cuyahoga App. No. 93861, 2009-Ohio-4885, at ¶4. McGrath had the opportunity to challenge the propriety of his sentences as part of his direct appeals. See *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-6147, 884 N.E.2d 568, at ¶8. Because McGrath had an adequate remedy by way of appeal, his complaint fails to state a claim for relief in mandamus to compel respondents to vacate his sentences.

{¶ 7} McGrath also has not established either a clear legal duty for respondents to vacate his sentence or a clear legal right to that relief. In *Foster v. Friedland*, Cuyahoga App. No. 91888, 2008-Ohio-6505, the relator requested “that this court issue a writ of mandamus compelling respondent to set a date for his resentencing and vacate his ‘void sentence.’ Complaint, Ad Damnum Clause.”

Id. at ¶4. This court emphasized the distinction between compelling a respondent court to exercise its judgment and controlling its discretion. As a consequence, we held that “Foster's request that this court compel respondent judge to schedule a resentencing hearing and to vacate Foster's sentence is clearly inappropriate.” Id. Again, McGrath has failed to state a claim for relief in mandamus to compel respondents to vacate his sentences.

{¶ 8} Likewise, McGrath has not stated a claim for relief to prohibit respondents from resentencing him. He has not averred any facts which suggest that respondents have initiated proceedings to resentence him. Regardless, if respondents were to resentence McGrath, he would have an adequate remedy by way of appeal. See, e.g., *State ex rel. Hughley v. McMonagle*, 123 Ohio St.3d 91, 2009-Ohio-4088, 914 N.E.2d 371.

{¶ 9} McGrath also has failed to state a claim for the other relief which he requests. The Revised Code provides the procedure for determining whether an individual has been wrongfully imprisoned. “See R.C. 2305.02 and 2743.48 (court of common pleas has exclusive, original jurisdiction to hear and determine wrongful imprisonment claim).” *State v. McGrath*, Cuyahoga App. No. 91261, 2009-Ohio-1361, at ¶8.¹ As was noted above, mandamus may be used to

¹ We recognize that McGrath has also filed supplemental authority citing *Nelson v. State*, 183 Ohio App.3d 83, 2009-Ohio-3231, 915 N.E.2d 729, and *Griffith v. State*, Franklin App. No. 08AP-964, 2009-Ohio-2854. In these opinions, the Tenth District Court of Appeals held that “the Court of Claims may determine

compel the exercise of judgment but not direct a court to enter a specific judgment. See *Foster*, supra. Similarly, mandamus is not appropriate to compel respondents to seal the records in McGrath’s underlying criminal cases. McGrath has also not established that he is entitled to relief in mandamus to compel respondents to reimburse him for the costs of the underlying criminal proceedings.

{¶ 10} McGrath’s complaint is also defective. “R.C. 2969.25 * * * requires the attachment of an affidavit to the complaint for a writ of mandamus that describes each civil action or appeal filed within the previous five years in any state or federal court. [A relator]’s failure to comply with R.C. 2969.25 requires the dismissal of his complaint for a writ of mandamus. *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 1998 Ohio 218, 696 N.E.2d 594; *Alford v. Winters*, 80 Ohio St.3d 285, 1997 Ohio 117, 685 N.E.2d 1242.” *State ex rel. Washington v. McMonagle*, Cuyahoga App. No. 91477, 2008-Ohio-3798, at 2.

{¶ 11} Attached to McGrath’s complaint is an “Affidavit of Prior Civil Actions R.C. §2969.25” (“R.C. 2969.25 Affidavit”). In this affidavit, McGrath asserts that he is not required to provide information regarding his prior filings, observes that the information is in the possession of “the Government” and asserts “his right to remain silent and to not bear witness against myself on the basis that it may

whether an individual was wrongfully imprisoned due to procedural error. See R.C. 2743.48(A)(5).” *Nelson*, at ¶20.

incriminate me in relation to this statute or other.” R.C. 2969.25 Affidavit. McGrath does not, however, provide this court with any controlling authority exempting an inmate² from complying with R.C. 2969.25 on these or any other grounds. Also, he has failed to include a certified copy of the prison cashier’s statement of the balance in his inmate account as required by R.C. 2969.25(C). *State ex rel. Bristow v. Sidoti* (Dec. 1, 2000), Cuyahoga App. No. 78708, at 3-4. As a consequence, in this action, we deny McGrath’s claim of indigency and order him to pay costs.

{¶ 12} Accordingly, respondent’s motion to dismiss is granted and relator’s motion for summary judgment is denied. Relator to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Complaint dismissed.

MELODY J. STEWART, JUDGE

PATRICIA A. BLACKMON, P.J., and
ANN DYKE, J., CONCUR

² In his filings in this action, McGrath uses a location in Gates Mills as his address. He also contends that he is not an inmate. Nevertheless, we take judicial notice of the fact that the Department of Rehabilitation and Correction of the State of Ohio indicates that McGrath is incarcerated at Lake Erie Correctional Institution and was admitted on June 10, 2009.