

[Cite as *State ex rel. Briscoe v. Matia*, 2010-Ohio-4144.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 95414**

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**STATE OF OHIO, EX REL.  
HARRY BRISCOE**

RELATOR

vs.

**DAVID T. MATIA, ET AL.**

RESPONDENTS

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**JUDGMENT:  
WRIT DENIED**

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Writ of Mandamus  
Motion No. 436487  
Order No. 436896

**RELEASE DATE:** September 1, 2010

**FOR RELATOR**

Harry Briscoe, pro se  
Inmate No. 530-252  
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P.O. Box 788  
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**ATTORNEYS FOR RESPONDENTS**

William D. Mason  
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PATRICIA A. BLACKMON, J.:

{¶ 1} Harry Briscoe has filed a complaint for a writ of mandamus. Briscoe seeks an order from this court, that requires Judge David T. Matia and Warden Keith Smith to comply with the mandate of R.C. 2953.13 and convey him back to the Cuyahoga County Court of Common Pleas for proceedings consistent with the appellate judgment as rendered in *State v. Briscoe*, Cuyahoga App. No. 89979,

2008-Ohio-6276. Judge Matia has filed a motion for summary judgment, which we grant for the following reasons. In addition, we sua sponte dismiss the complaint as filed against Warden Smith.

{¶ 2} In *State v. Briscoe*, Cuyahoga App. No. CR-487410, Briscoe was convicted of one count of murder with firearm specifications and two counts of aggravated robbery with firearm specifications. On appeal, this court affirmed Briscoe's conviction and sentence for the offenses of murder with firearm specifications and aggravated robbery with firearm specifications, as contained within count three of the indictment. This court, however, reversed Briscoe's conviction for the offense of aggravated robbery with firearm specifications, as contained within count four of the indictment, on the basis of a defective indictment. Specifically, this court held that count four of the indictment was defective, because it did not contain the mens rea of recklessness as required by R.C. 2911.01(A)(3). Thus, in conformity with *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, Briscoe's conviction and sentence with regard to count four was reversed and remanded to the trial court for further proceedings. Briscoe's conviction and sentence for the offenses of murder with firearm specifications, under count two, and aggravated robbery with firearm specifications, under count three, was affirmed. It must also be noted that the appellate judgment, as rendered in *State v. Briscoe*, was affirmed by the Supreme

Court of Ohio on appeal. See *State v. Briscoe*, 124 Ohio St.3d 117, 2009-Ohio-6540, 919 N.E.2d 735.

{¶ 3} On remand, Judge Matia issued revised verdict and sentencing journal entries in which the conviction for count four of the indictment was vacated, but left undisturbed the original sentence of incarceration as rendered with regard to count two and count three. On July 14, 2010, Briscoe filed his complaint for a writ of mandamus.

{¶ 4} In order for this court to issue a writ of mandamus, Briscoe must establish that: (1) he possesses a clear legal right to be conveyed back to the Cuyahoga County Court of Common Pleas for proceedings consistent with the appellate judgment as rendered in *State v. Briscoe*, supra; (2) Judge Matia possesses a clear legal duty to order Briscoe to be conveyed back to the Cuyahoga County Court of Common Pleas for proceedings consistent with the appellate judgment as rendered in *State v. Briscoe*, supra; and (3) there exists no other adequate remedy in the ordinary course of the law. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914. Herein, Briscoe argues that he must be conveyed back to the Cuyahoga County Court of Common Pleas for further proceedings, as ordered by this court in *State v. Briscoe*, supra, pursuant to R.C. 2953.13. Briscoe's reliance upon R.C. 2953.13, however, is misplaced. R.C. 2953.13 requires that Briscoe be conveyed to the jail of the county in which he was convicted, and committed to the custody of the sheriff, if a new trial is ordered.

This court, in *State v. Briscoe*, supra, did not order a new trial nor did it order that he be discharged. Thus, Briscoe has failed to state a claim upon which relief can be granted vis-a-vis the application of R.C. 2953.13. *State v. Tate* (1991), 77 Ohio App.3d 228, 601 N.E.2d 544. See, also, *State ex rel. Jones v. Bradshaw*, 123 Ohio St.3d 444, 2009-Ohio-5586, 917 N.E.2d 268.

{¶ 5} Finally, we find that Briscoe has failed to state a claim for relief against Warden Smith. Warden Smith possesses no clear duty to convey Briscoe back to the Cuyahoga County Court of Common Pleas for proceedings consistent with the appellate judgment as rendered in *State v. Briscoe*, supra. *State ex rel. Peebles*, 73 Ohio St.3d 559, 1995-Ohio-335, 653 N.E.2d 371. Cf. *State ex rel. Leach v. Schotten* (1995), 73 Ohio St.3d 538, 653 N.E.2d 356.

{¶ 6} Accordingly, we grant Judge Matia's motion for summary judgment and sua sponte dismiss the complaint for a writ of mandamus as filed against Warden Smith. Costs to Briscoe. It is further ordered that the Clerk of the Eighth District Court of Appeals serve notice of this judgment upon all parties as required by Civ.R. 58(B).

Writ denied.

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PATRICIA A. BLACKMON, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and  
MELODY J. STEWART, J., CONCUR