

[Cite as *State ex rel. Ellis v. Burnside*, 2015-Ohio-4190.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102815

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STATE OF OHIO, EX REL.  
LDDARYL ELLIS

RELATOR

vs.

HONORABLE JUDGE JANET R. BURNSIDE

RESPONDENT

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**JUDGMENT:**  
**WRIT DENIED**

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Writ of Mandamus  
Motion No. 485559  
Order No. 484994

**RELEASE DATE:** October 7, 2015

**FOR RELATOR**

Lddaryl Ellis, pro se  
Inmate #641-151  
Trumbull Correctional Institution  
P.O. Box 901  
Leavittsburg, Ohio 44430

**ATTORNEYS FOR RESPONDENT**

Timothy J. McGinty  
Cuyahoga County Prosecutor  
By: James E. Moss  
Assistant County Prosecutor  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} Relator Lddaryl Ellis (“Ellis”) seeks a writ of mandamus from this court ordering respondent Judge Janet R. Burnside to issue findings of fact and conclusions of law regarding her denial of his petitions for postconviction relief that were filed in Cuyahoga C.P. No. CR-12-568532-A on January 14, 2015 and January 22, 2015. For the reasons that follow, we deny the writ.

{¶2} Ellis has commenced two identical original actions in this court. The first action is *State v. Ellis*, 8th Dist. Cuyahoga No.102815 and subsequently he filed *State v. Ellis*, 8th Dist. Cuyahoga No. 102956. He maintains that he re-filed his complaint because he did not know that his initial complaint had been filed. Relator has moved to dismiss the first-filed action and respondent has moved to dismiss the second. Because respondent had already filed a motion for summary judgment in the first-filed action before receiving notice of relator’s second action, App. No. 102956 is dismissed as duplicative.<sup>1</sup>

{¶3} Ellis was convicted in the underlying criminal matter of murder, involuntary manslaughter, felonious assault, firearm specifications, and aggravated riot. *State v. Ellis*, 8th Dist. Cuyahoga No. 99830, 2014-Ohio-116,

¶ 18. The court merged the involuntary manslaughter, felonious assault, and aggravated riot counts with the murder count for sentencing purposes. *Id.* at

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<sup>1</sup>Notwithstanding the dismissal of App. No. 102956, the arguments and authorities that Ellis has presented in that action have been considered here.

¶ 19. The court imposed a three-year sentence for the firearm specification to be served prior and consecutive to a sentence of 15 years to life. *Id.* Ellis filed a timely direct appeal. This court affirmed in part, reversed in part, and remanded with specific instructions to the trial court to vacate the aggravated riot conviction. *Id.* at ¶ 63. This mandate would have no impact on his sentence.

{¶4} On April 7, 2014, the trial court complied with our mandate and vacated the conviction for aggravated riot. On May 7, 2014, Ellis filed a motion seeking to vacate the April 7, 2014 order and argued that Crim.R. 43 required his presence at the alleged resentencing hearing. Respondent denied the motion on May 28, 2014, and Ellis appealed that ruling in *State v. Ellis*, 8th Dist. Cuyahoga No. 101603, 2015-Ohio-1642. This court affirmed the trial court and held that the April 7, 2014 proceeding was not a resentencing hearing and, therefore, Crim.R. 43 did not apply. *Id.* at ¶ 13. This court reasoned that the trial court's compliance with this court's mandate was ministerial in nature, was merely a correction of the sentencing entry, and did not require resentencing. *Id.*

{¶5} On January 14, 2015 and January 22, 2015, Ellis filed motions for postconviction relief, alleging among other things that the trial court violated his constitutional rights by conducting the April 7, 2014 proceedings without his presence.

{¶6} Respondent denied the motions for postconviction relief and denied Ellis's motion requesting findings of fact and conclusions of law.

{¶7} Respondent contends she has no duty to issue findings of fact and conclusions of law because the petitions were untimely. Ellis argues that his petition was timely filed based on his appeal in App. No. 101603.

{¶8} R.C. 2953.21(A)(2)<sup>2</sup> provides, in pertinent part:

Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication \* \* \* .

{¶9} The transcript in the direct appeal from Case No. CR-12-568532-A, *State v. Ellis*, 8th Dist. Cuyahoga No. 99830, 2014-Ohio-3226 was filed on June 4, 2013. The first petition for postconviction relief was filed on January 14, 2015, well beyond the 180-day time limit. Ellis has not demonstrated that any exception to the 180-day requirement applies. Instead, he argues that the time limit applicable to his petitions for postconviction relief should be extended by his subsequently filed appeal, which was App. No. 101603. He is mistaken. Assuming R.C. 2953.21(A)(2) can apply to issues that arise from a resentencing hearing, this court has held that the April 7, 2015 proceeding was not a resentencing hearing. Further, there was no transcript of the April 7, 2015 proceedings ever filed in App. No. 101603. Rather, the docket reflects that this court granted Ellis's motion to transfer the trial transcripts from his direct appeal into

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<sup>2</sup>The amendments to R.C. 2953.21(A)(2) that took effect on March 23, 2015, do not apply in this case because the petitions and the court's orders denying them and denying Ellis's request for findings of fact and conclusions of law were all filed and entered prior to that date. *See State v. Lacking*, 10th Dist. Franklin Nos. 14AP-691 and 14AP-692, 2015-Ohio-1715.

App. No. 101603 on July 9, 2015. As stated, the trial transcripts were filed in the direct appeal on June 4, 2013. There is no authority that would enable Ellis to extend or reset the statutory time limit of R.C. 2953.21 by simply filing a new appeal and then transferring the trial transcript. The trial transcripts were filed on June 4, 2013 and the transfer of them to a later filed appeal does not reset the time for filing a petition for postconviction relief.<sup>3</sup>

{¶10} Because the petitions were untimely, respondent did not have a clear legal duty to issue findings of fact and conclusions of law. *State ex rel. Kimbrough v. Greene*, 8th Dist. Cuyahoga No. 81172, 2002-Ohio-2750, *aff'd* 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155; *State ex rel. Jackson v. Court of Common Pleas*, 8th Dist. Cuyahoga No. 77999, 2000 Ohio App. LEXIS 3951 (Aug. 31, 2000). As a consequence, denial of relief in mandamus is appropriate.

{¶11} Accordingly, respondent's motion for summary judgment is granted. Relator's motion to dismiss is denied as moot because respondent's motion to dismiss App. No. 102956 as duplicative is granted. 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).

{¶12} Writ denied.

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<sup>3</sup>We do not address whether the subject petitions would have been timely had the second appeal involved the filing of a new or different transcript, such as a resentencing hearing transcript, because we are not presented with that factual scenario here.

PATRICIA ANN BLACKMON, JUDGE

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LARRY A. JONES, SR., P.J., and  
SEAN C. GALLAGHER, J., CONCUR