**[Cite as *State ex rel. Cornwall v. Sutula*, 2015-Ohio-4704.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 103322**

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**STATE OF OHIO, EX REL.**
**MELBORN CORNWALL**

RELATOR

vs.

**JUDGE KATHLEEN A. SUTULA**

RESPONDENT

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**JUDGMENT:**
WRIT DENIED

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Writ of Mandamus
Motion No. 488704
Order No. 490106

**RELEASE DATE:** November 6, 2015

**FOR RELATOR**

Melborn Cornwall
Inmate No. 654088
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

**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

KATHLEEN ANN KEOUGH, P.J.:

**{¶1}** On July 31, 2015, the relator, Melborn Cornwall, commenced this mandamus action against the respondent, Judge Kathleen Sutula, to vacate as void part of the sentence in the underlying case, *State v. Cornwall*, Cuyahoga
C.P. No. CR-14-583023-A. Cornwall argues that because he was not informed that if he committed a felony while on postrelease control he could be sentenced to a consecutive sentence for the remainder of his postrelease control time, that portion of the sentence is void. On August 28, 2015, the respondent moved for summary judgment on the grounds of adequate remedy at law, and Cornwall filed his reply brief on September 11, 2015. For the following reasons, this court grants the respondent's motion for summary judgment and denies the application for a writ of mandamus.

**{¶2}** 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. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Mandamus is not a substitute for appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973); *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. 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; *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.*, 56 Ohio St.3d 33, 564 N.E.2d 86 (1990). Moreover, mandamus is an extraordinary remedy that 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*, 50 Ohio St.2d 165, 364

N.E.2d 1 (1977); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953); *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (8th Dist.1993).

Factual and Procedural Background

**{¶3}** In early 2011, in *State v. Cornwall*, Cuyahoga C.P. No. CR-10-540972-A, Cornwall pleaded guilty to gross sexual imposition. The trial court sentenced him to 16 months, imposed five years of mandatory postrelease control supervision, and informed Cornwall that if he violated postrelease control, the parole board could impose a prison term as part of the sentence up to one-half of the stated prison term originally imposed. The trial court did not inform him of any potential consequences under R.C. 2929.141.

**{¶4}** That statute provides that if a convict commits a felony while on postrelease control, the trial court may terminate postrelease control and sentence the individual as follows:

> "In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. * * * A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony."

R.C. 2929.141(A)(1).

**{¶5}** In the underlying case in April 2014, Cornwall pleaded guilty to attempted notice of change of address in violation of R.C. 2923.02 and R.C. 2950.05(F)(1), a fifth-degree felony. On May 28, 2014, the trial court imposed a one-year sentence for this crime and then imposed the remainder of postrelease control time from the gross sexual imposition case to run consecutive to the sentence in the underlying case, pursuant to R.C. 2929.141. Cornwall did not appeal from this conviction. Instead, on November 12, 2014, he filed a motion to correct void

sentence and argued that the two-and-one-half-year consecutive sentence for violating postrelease control was void because it exceeded the statutory range authorized by R.C. 2967.28(F)(2). The trial court denied the motion on June 30, 2015.

Legal Analysis

**{¶6}** Cornwall now brings this mandamus action to vacate the consecutive postrelease control sentence and makes a more sophisticated argument. Cornwall seizes upon the language in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, that a trial court during the sentencing hearing and in the sentencing journal entry must inform the defendant about postrelease control and its consequences, including the provision that violating postrelease control could result in the parole authority imposing a prison term up to one-half of the stated prison term originally imposed on the offender. Indeed, the failure to so advise an offender both during the hearing and in the sentencing entry renders the sentence void as to postrelease control.

Cornwall then argues these principles apply to the consecutive postrelease control sentence under R.C. 2929.141. The failure to disclose in the earlier case the possibility of being sentenced to a consecutive one-year prison term or the longer remainder of postrelease control, if the offender commits a felony while on postrelease control, prohibits the trial court from imposing such a sentence in the later case. Cornwall relies upon *State v. Pippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454 and *State v. Adkins*, 4th Dist. Lawrence No. 14CA29, 2015-Ohio-2830, in which the Fourth Appellate District adopted this position: the failure to advise an offender about the possibility of a R.C. 2929.141 sentence prevents a trial court from imposing such a sentence; indeed such a sentence is void. Finally, Cornwall relies upon *Mun. Court of Toledo v. State, ex rel Platter*, 126 Ohio St. 103, 184 N.E. 1 (1933), and *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182, 553 N.E.2d 650 (1990), for the proposition that if a

court acts outside of its jurisdiction and / or issues an unlawful order, mandamus is a proper remedy by which to compel the court to vacate such order.

**{¶7}** However, Cornwall's argument is not persuasive because this court and other courts of appeal have rejected the proposition that there is a duty to inform an offender of a possible consecutive sentence under R.C. 2929.141. Without that initial duty to inform the offender of such a possible sentence, a trial court in a subsequent case is unfettered in its ability to impose a R.C. 2929.141 sentence.

**{¶8}** This court examined the issue in *State v. Bybee*, 2015-Ohio-878, 28 N.E.2d 149 (8th Dist.). In 2011, Bybee pled guilty to several felonies. The trial court imposed three years of postrelease control and made the required notification that if Bybee violated postrelease control, the parole board could impose a prison term of up to one-half of the original prison term; it did not notify in the sentencing entry of a possible consecutive prison term under R.C. 2929.141. In 2014, while on postrelease control for the 2011 crimes, Bybee pled guilty to a fifth-degree felony, and the trial court imposed a two-year consecutive sentence pursuant to R.C. 2929.141. On appeal, Bybee argued that the prison term for the remaining time on his postrelease control was contrary to law and void, because he had not been informed of a possible sentence under R.C. 2929.141. Essentially, he sought to extend the postrelease control notification requirement codified in R.C. 2929.19(B) and *State v. Jordan* to R.C. 2929.141. This court rejected that proposition, because unlike the requirement of R.C. 2929.19(B) that the trial court inform a defendant that if he violates postrelease control, the parole board may return him to prison for up to one-half of the original sentence, R.C. 2929.141 contains no such notification requirement. This court examined and rejected the Fourth District's holding in *Pippen.*

**{¶9}** Similarly, in *State v. Witherspoon*, 8th Dist. Cuyahoga No. 90490, 2008-Ohio-4092, the appellant argued that the trial court erred by failing to inform him of the consequences of violating his postrelease control, including the possibility of a sentence pursuant to R.C. 2929.141. This court rejected that argument because he failed to show a statutory requirement of disclosure in R.C. 2929.141. *See also State v. Dotson*, 8th Dist. Cuyahoga No. 101911, 2015-Ohio-2392, in which this court ruled that the failure to inform the defendant of a possible consecutive sentence under R.C. 2929.141 did not render a guilty plea involuntary.

**{¶10}** Both the Seventh and Twelfth Districts have rejected the attempts to extend *State v. Jordan*'s mandatory notifications for postrelease control under R.C. 2929.19(B) to 2929.141, because R.C. 2929.141 contains no such notification requirement. *State v. Mullins*, 12th Dist. Butler No. CA2007-01-028, 2008-Ohio-1995, and *State v. Susany*, 7th Dist. Mahoning No. 07 MA 7, 2008-Ohio-1543.

**{¶11}** This court further notes that in *Bybee*, *Witherspoon*, *Dotson*, *Mullins*, and *Susany*, the defendant raised the R.C. 2929.141 issue in a direct appeal. Thus, Cornwall has or had an adequate remedy at law, which precludes an extraordinary writ.

**{¶12}** In summary, because this court and other district courts have rejected Cornwall's argument that the failure to notify the defendant in the initial case of the possibility of a sentence under R.C. 2929.141 renders the trial court without authority to impose such a sentence in a subsequent case, there is no clear, legal duty to vacate Cornwall's sentence under R.C. 2929.141. Cornwall also has or had an adequate remedy through appeal to raise this issue.

**{¶13}** Accordingly, this court grants the respondent's motion for summary judgment and denies the application for a writ of mandamus. Relator to pay costs. This court directs the

clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

**{¶14}** Writ denied.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR