

[Cite as *In re Perry v. Villanueva*, 2016-Ohio-5938.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104630

IN RE: DAMIEN PERRY

RELATOR

vs.

JOSE VILLANUEVA, JUDGE

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion No. 498219
Order No. 499814

RELEASE DATE: September 20, 2016

FOR RELATOR

Damien Perry, pro se
Inmate No. 422-572
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ATTORNEYS FOR RESPONDENT

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EILEEN T. GALLAGHER, J.:

{¶1} Relator Damien Perry seeks a writ of mandamus directing respondent Judge Jose Villanueva to re-issue the June 23, 2015 nunc pro tunc entry issued in *State v. Perry*, Cuyahoga C.P. No. CR-01-400753-B. Respondent has filed a motion for summary judgment and relator has filed a “Motion/Memorandum Contra.” For the reasons that follow, we grant respondent’s motion for summary judgment.

{¶2} On January 18, 2002, a three-judge panel issued an order reflecting that Perry had pled guilty to aggravated murder with death penalty and firearm specifications, and aggravated robbery with firearm specifications. The court imposed a life sentence for the aggravated murder conviction, “with parole eligibility after thirty full years plus a 3 years consecutive sentence for firearm specification.” Perry received a five year consecutive sentence for aggravated robbery. The entry further provided that “post release control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28.”

{¶3} Respondent issued a limited resentencing order on April 5, 2012, regarding the imposition of five years mandatory postrelease control.

{¶4} In July 2012, Perry was granted leave to pursue a delayed appeal and this court affirmed his convictions in *State v. Perry*, 8th Dist. Cuyahoga No. 98302, 2013-Ohio-1540.

{¶5} On June 23, 2015, respondent issued a nunc pro tunc order to correct the plea/sentence order dated January 8, 2002.

{¶6} Relator contends that mandamus should issue because he believes the order was not final and appealable and seeks to have us compel respondent to comply with Civ.R. 58(B) by serving him with notice of the orders.

{¶7} The requisites for mandamus are well established: 1) the relator must establish a clear legal right to the requested relief; 2) the respondent must possess a clear legal duty to perform the requested relief; and 3) the relator does not possess nor possessed an adequate remedy at law. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 676 N.E.2d 108 (1997).

{¶8} Respondent argues that the complaint should be dismissed due to several procedural deficiencies, including: failure to comply with R.C. 2731.04 and 2969.25(A) and (C).

{¶9} R.C. 2731.04 requires that an application for a writ of mandamus “must be by petition, in the name of the state on the relation of the person applying.” This failure to properly caption a mandamus action is sufficient grounds for denying the writ and dismissing the petition. *Maloney v. Court of Common Pleas of Allen Cty.*, 173 Ohio St. 226, 181 N.E.2d 270 (1962). However, the Ohio Supreme Court recently established that this defect is not jurisdictional and that a court may still consider the merits of the action where the complaint is miscaptioned. *See Salemi v. Cleveland Metroparks*, 145 Ohio St.3d 408, 2016-Ohio-1192, 49 N.E.3d 1296, ¶ 15.

{¶10} The Ohio Supreme Court has held that the requirements of R.C. 2969.25 are mandatory and failure to comply with them requires dismissal. *State ex rel. Young v. Clipper*, 142 Ohio St.3d 318, 2015-Ohio-1351, 29 N.E.3d 977, ¶ 9 (“[t]he failure to comply with the mandatory requirements of R.C. 2969.25(C) is not curable by subsequent amendment.”); *Hazel v. Knab*, 130 Ohio St.3d 22, 2011-Ohio-4608, 955 N.E.2d 378, ¶ 1; *see also State ex rel. Hightower v. Russo*, 8th Dist. Cuyahoga No. 82321, 2003-Ohio-3679, ¶ 5; *State ex rel. Tate v. Callahan*, 8th Dist. Cuyahoga No. 85615, 2005-Ohio-1202, ¶ 7.

{¶11} Perry’s complaint does not contain a certified statement setting forth the balance in the inmate account for the preceding six months as required by R.C. 2969.25(C). This is a mandatory requirement, which cannot be cured by subsequent amendment, and requires dismissal of the complaint. *Id.*

{¶12} Further, respondent contends that Perry is not entitled to a writ of mandamus. Perry premises his action upon a belief that Civ.R. 58 required the respondent judge to direct the clerk to serve a copy of the nunc pro tunc criminal judgment on him. Civ.R. 58 does not impose a duty on the judge to direct the clerk to serve criminal judgments. *State ex rel. Ford v. Honorable Adm. Judge of Cuyahoga Cty. Court of Common Pleas*, 8th Dist. Cuyahoga No. 100053, 2013-Ohio-4197, ¶ 6. Crim.R. 32(C) applies to criminal judgments and requires that “the judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.” *Id.* The nunc pro tunc entry was signed by respondent and the clerk entered it on the journal. “App.R. 5(A) allows for delayed appeals in criminal cases, which is an adequate remedy in the ordinary course of the law.” *Id.*

{¶13} Further, the nunc pro tunc entry purports to correct a clerical error in the initial sentencing entry. “When a defendant is notified about postrelease control at the sentencing hearing, but notification is inadvertently omitted from the sentencing entry, the omission can be corrected with a nunc pro tunc entry and the defendant is not entitled to a new sentencing hearing.” *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 1. “A nunc pro tunc entry issued under those conditions relates back to the original sentencing entry and does not extend the time to file an appeal.” *Id.* at ¶ 15 (citations omitted). Because the nunc pro tunc entry applies retrospectively to the judgment it corrects, it does not create a new final order from which a new appeal may be taken. *Id.* The nunc pro tunc entry simply corrected an omission from the sentencing entry to conform to the advisement given at the sentencing hearing and therefore did not require a hearing or Perry’s attendance. Finally, the fact that the nunc pro tunc order was signed by one judge rather than the three-judge panel may present a procedural error subject to appellate review but does not implicate the jurisdiction of the court and does not render the order void. *See, e.g., State v. Harris*, 2d Dist. Montgomery No. 24739, 2012-Ohio-1853, ¶ 20.

{¶14} For the foregoing reasons, respondent’s motion for summary judgment is granted. The application for a writ of mandamus is denied. 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).

{¶15} Writ denied.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR