

[Cite as *State ex rel. Cowan v. Gallagher*, 2017-Ohio-108.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104666

STATE OF OHIO, EX REL.
CRAIG A. COWAN

RELATOR

vs.

JUDGE SHANNON M. GALLAGHER

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion No. 498400
Order No. 500705

RELEASE DATE: January 11, 2017

FOR RELATOR

Craig A. Cowan, pro se
Inmate No. 622034
Grafton Correctional Institution
2500 South Avon Belden Road
Grafton, Ohio 44044

ATTORNEYS FOR RESPONDENT

Michael C. O'Malley
Cuyahoga County Prosecutor
By: James E. Moss
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Craig A. Cowan has filed a complaint for a writ of mandamus to compel Judge Shannon M. Gallagher to vacate the criminal sentence imposed in *State v. Cowan*, Cuyahoga C.P. No. CR-11-550536, and conduct a de novo sentencing hearing. Cowan argues that “[t]he only responsible action is for the [Eighth District Court of Appeals] to take action by either becoming the finder of facts, compelling the trial court to perform the duty owed to relator of a de novo sentencing hearing and reducing or vacating the remainder [sic] of relator sentence, or order a completely new trial.” Cowan argues that the sentence imposed in CR-11-550536 was defective and must be vacated and/or a new trial ordered because:

(1) the trial court failed to conduct a de novo resentencing hearing as mandated by the appellate judgment rendered in *State v. Cowan*, 8th Dist. Cuyahoga No. 99566, 2013-Ohio-4475;

(2) Cowan is entitled to a new trial based upon the claim that the trial court improperly advised him of postrelease control at the resentencing hearing held on November 22, 2013;

(3) Cowan is entitled to a reduction in sentence for his conviction of the offense of discharge of a firearm on or near a prohibited premises because the completed jury verdict form failed to correctly state the degree of the charged offense;

(4) Cowan's constitutional right to confront the victim at trial was denied because the victim never testified at trial;

(5) the trial court erroneously instructed the jury with regard to prior convictions;

(6) Cowan was improperly convicted of a first-degree felony with regard to the offenses of felonious assault and discharge of a firearm on or near a prohibited premises;

(7) the Eighth District Court of Appeals, in *State v. Cowan*, 8th Dist. Cuyahoga No. 97877, 2012-Ohio-5723, improperly determined that the convictions for felonious assault, having weapons while under disability, improperly handling firearms in a motor vehicle, and discharge of a firearm on or near a prohibited premises did not merge for the purpose of sentencing; and

(8) Cowan was wrongly convicted of the firearm specifications.

{¶2} Judge Gallagher has filed a motion for summary judgment that is granted for the following reasons.

{¶3} In order for this court to issue a writ of mandamus, Cowan must clearly establish that: (1) he possesses a clear legal right to the requested relief, (2) Judge Gallagher possesses a clear legal duty to perform the requested relief, and (3) there exists no other adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452; *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 650 N.E.2d 899 (1995).

{¶4} A writ of mandamus will not issue if there exists a plain and adequate remedy in the ordinary course of the law. *State ex rel. Culgan v. Kimbler*, 132 Ohio

St.3d 480, 2012-Ohio-3310, 974 N.E.2d 88; *State ex rel. Ullman v. Hayes*, 103 Ohio St.3d 405, 2004-Ohio-5469, 816 N.E.2d 245. Any sentencing errors that are committed by a court possessing proper jurisdiction over a criminal matter may not be remedied through an extraordinary writ. *See generally Smith v. Warren*, 89 Ohio St.3d 467, 732 N.E.2d 992 (2000) (prohibition); *Majoros v. Collins*, 64 Ohio St.3d 442, 596 N.E.2d 1038 (1992) (habeas corpus); *State ex rel. Corrigan v. Lawther*, 39 Ohio St.3d 157, 529 N.E.2d 1377 (1988) (mandamus).

{¶5} A review of the docket maintained in CR-00-398499 clearly demonstrates that Cowan has availed himself of adequate remedies in the ordinary course of the law with regard to his claimed sentencing errors. The following appeals were filed by Cowan and decided by this court:

(1) *State v. Cowan*, 8th Dist. Cuyahoga No. 97877, 2012-Ohio-5723 — convictions affirmed, but sentence vacated in part and remanded for resentencing based upon the trial court's failure to articulate appropriate findings for the imposition of consecutive sentences as required by R.C. 2929.15(C)(4);

(2) *State v. Cowan*, 8th Dist. Cuyahoga No. 99566, 2013-Ohio-4475 — convictions affirmed, but sentence vacated in part and remanded for a de novo resentencing hearing for the imposition of consecutive sentences as required by R.C. 2929.15(C)(4);

(3) *State v. Cowan*, 8th Dist. Cuyahoga No. 100741, 2014-Ohio-3593 — convictions affirmed, but sentence vacated in part and remanded for resentencing for the sole purpose of advising Cowan of postrelease control requirements and memorializing same in a judgment entry;

(4) *State v. Cowan*, 8th Dist. Cuyahoga No. 101995, 2015-Ohio-2271 — convictions affirmed, but sentence vacated in part and remanded for the sole purpose of advising Cowan of the proper postrelease control requirements and memorializing those requirements into a judgment entry;

(5) *State v. Cowan*, 8th Dist. Cuyahoga No. 103938 — appeal from trial court's journal entry of April 7, 2015, that reimposed postrelease control — dismissed on June 17, 2015, for failure to file the record; and

(6) *State v. Cowan*, 8th Dist. Cuyahoga No. 103855, 2016-Ohio-8045 — convictions affirmed, but matter remanded to the trial court for the sole purpose of correcting the sentencing journal entry to reflect the correct felony levels of Cowan's convictions, advise Cowan of the proper postrelease control requirements, and memorialize those requirements into a judgment entry.

{¶6} Cowan has or had numerous adequate remedies in the ordinary course of the law, by way of appeal, that addressed or could have addressed the issues of a de novo resentencing hearing, failure to properly advise of postrelease control, jury verdict form is defective for failing to correctly state the degree of the offense of discharge of a firearm on or near prohibited area, failure to confront victim at trial, improper instruction as to a

prior conviction, erroneous conviction as to offenses of felonious assault and discharge of a firearm on or near prohibited area, all convictions should have merged for the purpose of sentencing, and wrongful conviction as to all firearm specifications. *State ex rel. Ward v. Reed*, 141 Ohio St.3d 50, 2014-Ohio-4512, 21 N.E.3d 303; *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 673 N.E.2d 1281 (1997), and *State ex rel. Sevayega v. McMonagle*, 122 Ohio St.3d 54, 2009-Ohio-2367, 907 N.E.2d 1180. In fact, the appeal filed by Cowan in 8th Dist. Cuyahoga No. 103855 addressed the issues of the improper imposition of a five-year term of postrelease control and the failure of the sentencing journal entry to reflect the correct felony levels of the convictions. *See State v. Cowan*, 8th Dist. Cuyahoga No. 103855, 2016-Ohio-8045.

{¶7} Moreover, Cowan’s complaint for a writ of mandamus is barred by the doctrine of res judicata. Res judicata “involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel).” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226. Claim preclusion provides that “[a] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.” *Id.*, quoting *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943), paragraph one of the syllabus.

{¶8} The issues of a de novo resentencing hearing, improper convictions as to all counts, improper imposition of a five-year-term of postrelease control, and the failure of

the sentencing journal entry to reflect the correct felony levels of the convictions were raised and adjudicated in prior appeals. Because four of the issues raised in the present complaint for a writ of mandamus were previously addressed and adjudicated in prior appeals, we find that res judicata is applicable, which prevents any further litigation of those issues.

{¶9} Accordingly, we grant Judge Gallagher’s motion for summary judgment. Costs to Cowan. The court directs the clerk of courts to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

{¶10} Writ denied.

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
PATRICIA ANN BLACKMON, J., CONCUR