

**THE STATE EX REL. DUNCAN, APPELLANT, v. DRISCOLL, PROS. ATTY.,
APPELLEE.**

[Cite as *State ex rel. Duncan v. Driscoll*, 172 Ohio St.3d 684, 2023-Ohio-3113.]

*Mandamus—Appellant’s claim seeking to enforce alleged contractual duty is not
cognizable in mandamus—Court of appeals’ denial of writ affirmed.*

(No. 2023-0027—Submitted May 16, 2023—Decided September 7, 2023.)

APPEAL from the Court of Appeals for Clark County,

No. 2022-CA-71, 2022-Ohio-4625.

Per Curiam.

{¶ 1} In this appeal, appellant, Johnny T. Duncan, seeks a writ of mandamus compelling the Clark County Prosecuting Attorney to join in the filing of a motion to vacate guilty pleas Duncan entered in two criminal cases. The Second District Court of Appeals denied the writ, concluding that Duncan had adequate remedies in the ordinary course of the law and that his claim was barred under the doctrine of res judicata. We affirm but for a different reason.

Background

{¶ 2} In 1992, Duncan entered into a plea agreement with the state, agreeing to plead guilty to, among other charges, two counts of aggravated murder. Duncan had been charged in two cases. He and the state agreed that he would be sentenced in the first case to a life prison term with parole eligibility after 30 years and that he would be sentenced in the second case to a life prison term with parole eligibility after 20 years. The plea agreement provided, “[I]f any other sentence is imposed other than that contemplated by the Plea Agreement, Stipulation and Waiver, then [the state and Duncan] will join in a motion to vacate the guilty pleas entered pursuant to this agreement.”

{¶ 3} The trial court issued judgment entries imposing the agreed-upon sentences. At the sentencing hearing, however, the court stated that Duncan was being sentenced in the first case to a life prison term with parole eligibility after 20—not 30—years. In February 2022, based on that discrepancy, Duncan filed in the trial court a motion for leave to withdraw his guilty pleas or, alternatively, to grant specific performance of his plea agreement.

{¶ 4} In October 2022, Duncan filed a mandamus action in the court of appeals, naming as the respondent “Stephen A. Schumaker, Judge.” Schumaker was the prosecuting attorney who signed Duncan’s plea agreement but now is a municipal-court judge. Duncan argued that the trial court failed to impose the agreed-upon sentence in one of his cases, and he sought a writ of mandamus compelling the prosecuting attorney to join him in filing a motion to vacate his guilty pleas. Neither Schumaker nor the current prosecuting attorney responded to the mandamus complaint.

{¶ 5} Duncan filed a motion for default judgment, which the court of appeals denied. The court noted that under Civ.R. 55(D), default judgment could not be entered against the prosecuting attorney unless Duncan established a right to relief with sufficient evidence. The court concluded that Duncan had not established a right to relief, because he had adequate remedies in the ordinary course of the law. According to the court of appeals, Duncan could have raised the alleged breach of his plea agreement in a direct appeal of his conviction and he already had sought to enforce the plea agreement by filing motions in the trial court. The court of appeals also concluded that because Duncan could have pursued—and in fact had pursued—other remedies, his claim was barred under the doctrine of res judicata.

{¶ 6} Duncan appealed to this court. Shortly after Duncan filed his notice of appeal, current Clark County Prosecuting Attorney Daniel P. Driscoll filed a

motion to be substituted as the appellee. We granted the motion. 169 Ohio St.3d 1440, 2023-Ohio-482, 203 N.E.3d 728.

Analysis

{¶ 7} “Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” R.C. 2731.01. To be entitled to a writ of mandamus, the relator must establish a clear legal right to the requested relief, a clear legal duty on the part of the respondent to provide it, and the lack of an 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, ¶ 6.

{¶ 8} The court of appeals held that Duncan was not entitled to relief in mandamus, because he had adequate remedies in the ordinary course of the law. The court cited *State ex rel. Phelps v. McClelland*, 159 Ohio St.3d 184, 2020-Ohio-831, 149 N.E.3d 500, ¶ 12-13, in which we recognized that (1) a prosecutor’s alleged breach of a plea agreement may be challenged in a direct appeal and (2) a defendant may seek to enforce a plea agreement by filing a motion in the trial court. The court of appeals’ reliance on *Phelps* was misplaced.

{¶ 9} Phelps brought a mandamus claim against the trial-court judge who convicted him, seeking to enforce an agreement the state had reached with Phelps’s wife to secure her testimony against him. Phelps argued that the state had breached the agreement by prosecuting him on death-penalty specifications after it had promised his wife that those charges would be dropped in exchange for waiver of her spousal privilege. We affirmed the court of appeals’ denial of the writ because the alleged breach was evident at the time of Phelps’s direct appeal (and therefore could have been raised then), *id.* at ¶ 12, and Phelps already had filed a motion in the trial court seeking a new trial based on the alleged breach, *id.* at ¶ 6, 13.

{¶ 10} Here, in contrast, Duncan is seeking an order compelling the prosecuting attorney to join in the filing of a motion. Duncan could not have been

expected to raise in a direct appeal the alleged breach of his plea agreement, because the prosecutor’s apparent refusal to join in filing a motion had not yet occurred. Moreover, because Duncan’s sole objective in this mandamus case is to compel the prosecutor to join in filing a motion—and not to vacate the guilty pleas or obtain a new trial—*Phelps* does not support the conclusion that filing a motion in the trial court is an alternative remedy for Duncan to obtain the relief he seeks. Finally, *Phelps* does not support the court of appeals’ application of res judicata in this case. “[R]es judicata is an affirmative defense that is not a proper basis for dismissal for failure to state a claim upon which relief can be granted.” *State ex rel. Newell v. Cuyahoga Cty. Court of Common Pleas*, 165 Ohio St.3d 341, 2021-Ohio-3662, 179 N.E.3d 84, ¶ 10.

{¶ 11} But “this court will not reverse a correct judgment merely because erroneous reasons were given for it.” *State ex rel. Neguse v. McIntosh*, 161 Ohio St.3d 125, 2020-Ohio-3533, 161 N.E.3d 571, ¶ 10. And there is a more fundamental problem with Duncan’s mandamus claim: Duncan wants to enforce an agreement between himself and the state, claiming that the prosecuting attorney has a contractual duty to join in the filing of a motion. *See State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, ¶ 21. But an obligation that arises only under contract is not enforceable in mandamus. *Zanesville Gas-Light Co. v. Zanesville*, 47 Ohio St. 35, 51, 23 N.E. 60 (1889). We affirm the court of appeals’ judgment because Duncan has not established a clear legal duty enforceable in mandamus.

Conclusion

{¶ 12} We affirm the court of appeals’ judgment because Duncan’s claim seeking to enforce an alleged contractual duty is not cognizable in mandamus.

Judgment affirmed.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, BRUNNER, and DETERS, JJ., concur.

January Term, 2023

Johnny T. Duncan, pro se.

Daniel P. Driscoll, Clark County Prosecuting Attorney, and Andrew P.
Pickering, Assistant Prosecuting Attorney, for appellee.
