

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
ASHTABULA COUNTY, OHIO**

|                       |   |                             |
|-----------------------|---|-----------------------------|
| STATE OF OHIO ex rel. | : | <b>PER CURIAM OPINION</b>   |
| STANLEY SMITH,        | : |                             |
|                       | : | <b>CASE NO. 2009-A-0004</b> |
| Relator,              | : |                             |
|                       | : |                             |
| - VS -                | : |                             |
|                       | : |                             |
| GARY LEO YOST, JUDGE, | : |                             |
|                       | : |                             |
| Respondent.           | : |                             |

Original Action for Writ of Mandamus.

Judgment: Petition dismissed.

*Stanley Smith*, pro se, 828 Center Street, Ashtabula, OH 44004 (Relator).

*Thomas L. Sartini*, Ashtabula County Prosecutor, and *Rebecca K. Divorky*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Respondent).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for final disposition of the motion to dismiss of respondent, Judge Gary Leo Yost of the Ashtabula County Court of Common Pleas. As the primary grounds for the motion, respondent contends that the factual allegations of relator, Stanley Smith, are not sufficient to state a proper claim for the writ because those allegations establish that relator does not have a clear legal right to have his prior criminal conviction vacated. For the following reasons, we conclude that the motion to dismiss has merit.

{¶2} In bringing this action, relator sought the issuance of an order which would compel respondent to vacate his 1992 criminal conviction in the Ashtabula County Court of Common Pleas on a single count of felonious assault and an accompanying firearm specification. As the factual basis for his mandamus claim, relator alleged that, as part of the one-count indictment in the underlying criminal case, the grand jury also charged him with a “physical harm” specification under R.C. 2741.131. He further alleged that, at the close of his subsequent jury trial, respondent made a ruling that the jury would not be instructed on the “physical harm” specification; i.e., respondent determined that the case would only go forward on the felonious assault count and the firearm specification.

{¶3} In arguing in his instant petition that the procedure followed by respondent was legally flawed, relator maintained that respondent had a legal duty to give the jury an instruction regarding the disputed specification. Specifically, he contended that the lack of any instruction on the matter constituted an improper amendment of the charges under Crim.R. 7(D) and resulted in a violation of his general due process rights. Based on this, relator ultimately asserted that his entire conviction should be declared null and void because respondent exceeded the scope of his jurisdiction by not allowing the jury to go forward on the “physical harm” specification.

{¶4} As was stated above, respondent has now moved to dismiss relator’s sole claim for the reason that, even when his allegations are interpreted in a manner which is most favorable to him, he will never be able to show a jurisdictional violation that would warrant the vacation of his conviction. In response, relator maintains that the motion to dismiss should be stricken from the record of this case because respondent has failed to address a critical distinction raised in the mandamus petition. In support of this point,

relator emphasizes that his petition does not state that respondent did not have subject matter jurisdiction over the underlying case; instead, according to relator, his sole claim for relief is predicated on the contention that respondent acted beyond the scope of his jurisdiction in regard to the “physical harm” specification.

{¶5} At the outset of our discussion, this court would note that neither party has referred to the fact that, on at least three prior occasions, relator has sought to employ a mandamus action as a means of contesting the basic propriety of his 1992 conviction. See *State ex rel. Smith v. Yost*, 11th Dist. No. 2004-A-0054, 2005-Ohio-690; *State ex rel. Smith v. Yost*, 11th Dist. No. 2003-A-0044, 2003-Ohio-4228; *State ex rel. Smith v. Yost*, 11th Dist. No. 98-A-0047, 1998 Ohio App. LEXIS 2750. In all three cases, relator basically asserted that respondent had lost the authority to impose the conviction when the “physical harm” specification was excluded from the jury’s consideration. In support of this general assertion, relator raised two specific arguments: (1) respondent’s actions were tantamount to an improper amendment of the indictment in the underlying case; and (2) by not referring to the “physical harm specification, respondent’s instructions to the jury were fatally flawed.

{¶6} In dismissing his mandamus claims in all three prior cases, this court held that relator was not entitled to proceed because his allegations were legally insufficient to prove a lack of jurisdiction. In the second case filed by relator, 2003-Ohio-4228, our determination to dismiss was based on the following analysis:

{¶7} “As was noted above, the crux of relator’s petition is his assertion that respondent lost jurisdiction during the course of the underlying case when he amended the indictment by essentially deleting the ‘physical harm’ specification. However, even if

it is assumed that respondent's alleged amendment was improper, the relevant case law of this state supports the further conclusion that an improper amendment would not affect respondent's authority to proceed in the case. In *State ex rel. Raglin v. Brigano* (1998), 82 Ohio St.3d 410, \*\*\*, the petitioner sought a writ of habeas corpus on the grounds that the trial court had allegedly erred in amending the indictment against him. In affirming the dismissal of the habeas corpus petition, the Supreme Court of Ohio expressly held that the issue raised by the petitioner was 'nonjurisdictional in nature \*\*\*.'

{¶8} "Under the *Raglin* precedent, any error in the amendment of an indictment would merely be a procedural error which could only be challenged through a direct appeal of the conviction. Thus, even if respondent did err in essentially deleting the 'physical harm' specification from the indictment in relator's case, such an error would not render the subsequent conviction void because it would not have any effect upon respondent's jurisdiction over the subject matter of the case.

{¶9} \*\*\*\*

{¶10} "Under his mandamus claim, relator has requested the identical basic relief which he sought under his prohibition claim; i.e., relator prays that respondent be ordered to vacate the 1992 conviction. Before a writ of mandamus can be rendered, though, the relator in such an action must be able to show, inter alia, that the judge has a clear legal duty to perform the specific act which the relator seeks to compel. *State ex rel. Manson v. Morris* (1993), 66 Ohio St.3d 440, 441, \*\*\*. In this instance, because relator's allegations are insufficient to prove a lack of jurisdiction, it follows that respondent would not have a legal duty to vacate the conviction. Therefore, it is equally evident that relator cannot satisfy the elements for a writ of mandamus.

{¶11} “Under Civ.R. 12(B)(6), a claim in a civil action is subject to dismissal if the nature of the allegations is such that, even when the allegations are construed in a manner most favorable to the plaintiff-relator, it is beyond doubt that he will be unable to prove a set of facts under which he will be entitled to the requested relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94, 95, \*\*\*. Applying this standard to the allegations in the instant petition, this court concludes that both claims asserted by relator fail to state viable grounds for the requested relief.” *Id.*, 2003-Ohio-4228, at ¶11-12, 15-16.

{¶12} In the foregoing quote, this court’s analysis focused solely upon relator’s contention that respondent’s alleged amendment of the indictment had deprived him of jurisdiction over the criminal case. However, we have also applied the same basic logic to relator’s separate contention that the failure to instruct the jury on the “physical harm” specification deprived respondent of jurisdiction. In the third of the cases cited above, 11th Dist. No. 98-A-0047, 1998 Ohio App. LEXIS 2750, at \*5, we expressly concluded that any alleged error in respondent’s jury instructions would only have been procedural in nature, and would not have had any effect on respondent’s jurisdiction over the case as a whole.

{¶13} In his prior mandamus cases before this court, relator has usually worded his arguments in terms of respondent’s subject matter jurisdiction. As was noted above, in the context of the instant action, relator now submits that, by committing the alleged errors regarding the “physical harm” specification, respondent “exceeded” the scope of his general jurisdiction. As to this point, this court would indicate that, to the extent that relator is attempting to draw a distinction between different types of jurisdiction, he has

failed to establish any valid reason why our legal analyses in his prior cases would not apply in the instant action. Under that prior precedent, any alleged mistake concerning the “physical harm” specification would have only constituted a procedural error which could only be contested in the context of a direct appeal of relator’s conviction. In other words, even if the alleged errors did occur, they would not have related to, or have any effect upon, respondent’s jurisdiction, subject matter or otherwise.

{¶14} In light of the fact that relator’s present petition raised the same arguments which formed the basis of his prior mandamus cases, his factual allegations again are insufficient to establish any jurisdictional flaw in the underlying criminal action. Under such circumstances, even when the allegations are construed in a way most favorable to relator, he will never be able to prove a set of facts under which respondent would be legally obligated to vacate the 1992 felonious assault conviction. Thus, because relator cannot satisfy all necessary elements of a mandamus claim, the dismissal of his entire petition is warranted under Civ.R. 12(B)(6). See *Smith*, 2003-Ohio-4228, at ¶16.

{¶15} Consistent with the foregoing analysis, it also follows that, despite the fact that respondent’s motion to dismiss did not reference the prior opinions from this court addressing the jurisdictional argument, he still asserted a viable argument. Accordingly, relator’s motion to strike the motion to dismiss lacks merit.

{¶16} Respondent’s motion to dismiss the mandamus claim is granted. It is the order of this court that relator’s entire petition for mandamus relief is hereby dismissed.

MARY JANE TRAPP, P.J., DIANE V. GRENDALL, J., CYNTHIA WESTCOTT RICE, J.,  
concur.