

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
ROSS COUNTY

DAMON SHAWN LLOYD, : Case No. 14CA3462  
Petitioner-Appellant, :  
v. : DECISION AND  
 : JUDGMENT ENTRY  
NORM ROBINSON, :  
WARDEN, :  
 : **RELEASED: 03/31/2015**  
Respondent-Appellee.

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APPEARANCES:

Damon Shawn Lloyd, Chillicothe, Ohio, pro se appellant.

Michael DeWine, Ohio Attorney General, and William H. Lamb, Assistant Ohio Attorney General, Cincinnati, Ohio, for appellee.

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Harsha, J.

{¶1} After being convicted of murder with a firearm specification and sentenced to prison, Damon Shawn Lloyd unsuccessfully appealed to the Twelfth District Court of Appeals and the Supreme Court of Ohio. Lloyd subsequently filed a petition for a writ of habeas corpus to compel the warden of the Chillicothe Correctional Institution to release him from prison. The trial court granted the warden’s Civ.R. 12(B)(6) motion to dismiss the petition for failure to state a claim upon which relief can be granted, and we affirmed that dismissal on appeal.

{¶2} Lloyd also filed a second petition for a writ of habeas corpus, and once again the trial court granted the state’s Civ.R. 12(B)(6) motion and dismissed it.

{¶3} On appeal Lloyd asserts that the trial court erred in dismissing his second habeas corpus petition on the basis it was a successive petition. Lloyd argues that because his second petition raised different claims than his first petition and because they constitute plain errors, res judicata does not bar his successive petition. Res judicata is applicable to successive habeas corpus petitions because petitioners have the right to appeal adverse judgments. This right to appeal imposes a result of finality in habeas corpus cases. And because Lloyd could have raised his claims in his first habeas corpus petition, the trial court properly dismissed his second petition based on res judicata.

{¶4} Next Lloyd contends that because he did not have an adequate remedy in the ordinary course of law, the trial court erred in dismissing his second petition. Lloyd claims that he could not have raised his claims of judicial misconduct, prosecutorial misconduct, and ineffective assistance of his trial counsel on direct appeal because they are based on new evidence he discovered after his appeal had concluded. But even assuming that Lloyd could not have raised these claims on direct appeal, he could have raised them by proper postjudgment filing, e.g., petition for postconviction relief or motion for leave to file a motion for new trial based on the newly discovered evidence. These constituted adequate remedies in the ordinary course of law, which precluded extraordinary relief in habeas corpus.

{¶5} Because Lloyd has not established reversible error, we affirm the judgment of the trial court.

## I. FACTS

{¶6} In 2006 Damon Shawn Lloyd shot and killed David Richardson at Lloyd's residence in Warren County, Ohio. The Warren County Grand Jury indicted Lloyd on one count of murder with a firearm specification. Following a bench trial the Warren County Court of Common Pleas rejected Lloyd's claim of self-defense, convicted and sentenced him to prison. In Lloyd's direct appeal, where he was represented by counsel, he raised his claim that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. The Twelfth District Court of Appeals rejected his claims and affirmed his conviction and sentence. *State v. Lloyd*, 12th Dist. Warren Nos. CA2007-04-052 and CA2007-04-053, 2008-Ohio-3383. The Supreme Court of Ohio did not allow his discretionary appeal from the court of appeals' judgment. *State v. Lloyd*, 120 Ohio St.3d 1454, 2008-Ohio-6813, 898 N.E.2d 968.

{¶7} Over five years later in February 2014 while he was an inmate at the Chillicothe Correctional Institution, Lloyd filed a petition in the Ross County Court of Common Pleas for a writ of habeas corpus to compel Warden Norm Robinson to release him from custody. Lloyd claimed that his conviction and sentence were illegal because he was indicted based on the unlawful testimony of his wife during the grand jury proceeding. The trial court granted the warden's Civ.R. 12(B)(6) motion to dismiss the petition for failure to state a claim upon which relief can be granted. On appeal, we affirmed. *Lloyd v. Robinson*, 4th Dist. Ross No. 14CA3452, 2014-Ohio-4977.<sup>1</sup>

{¶8} In April 2014, before the trial court dismissed his first petition for writ of habeas corpus, Lloyd filed his second petition for a writ of habeas corpus in the same court. In his second petition Lloyd claimed that based on newly discovered evidence

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<sup>1</sup> Lloyd's discretionary appeal to the Supreme Court of Ohio from our judgment is pending in that court as Case No. 2014-2113.

that was not available to him at trial, his conviction was unlawful and against the manifest weight of the evidence because of judicial misconduct, prosecutorial misconduct, and the ineffective assistance of his trial counsel. Lloyd alleged that: 1) the prosecutor presented evidence at trial that the murder victim, Richardson, had only one prior conviction of violence, when Richardson actually had 35 prior convictions of violence, 2) this fact was known to both the prosecutor and the trial court judge, 3) the judge was aware that Richardson's fists were considered deadly weapons because he had been a professional boxer, and 4) Lloyd's trial counsel failed to research or investigate these important facts. The warden filed a Civ.R. 12(B)(6) motion to dismiss the petition for failure to state a claim upon which relief can be granted, and Lloyd filed a response.

{¶9} After the trial court dismissed the first petition and while Lloyd's appeal from that dismissal was pending in this court, the trial court granted the warden's motion and dismissed Lloyd's second petition. The trial court held that res judicata barred Lloyd from filing a successive petition and that he has, or had, an adequate remedy in the ordinary course of law to raise his claims. This appeal followed.

## II. ASSIGNMENTS OF ERROR

{¶10} Lloyd assigns the following errors for our review:

1. The Habeas Court erred and abused its discretion in dismissing Appellant's Petition for State Habeas Relief under O.R.C. Section 2725.03; as a successive Habeas Corpus Petition.
2. The Habeas Court erred and abused its discretion in dismissing Appellant's Petition for State Habeas Relief under O.R.C. Section 2725.03; as Appellant had no other Adequate remedy in the ordinary course of law.

## III. STANDARD OF REVIEW

{¶11} “A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint.” *Volbers–Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010–Ohio–2057, 929 N.E.2d 434, ¶ 11. “In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought.” *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011–Ohio–4432, 956 N.E.2d 814, ¶ 12; *Rose v. Cochran*, 4th Dist. Ross No. 11 CA3243, 2012–Ohio–1729, ¶ 10. This same standard applies in cases involving claims for extraordinary relief, including habeas corpus. *Boles v. Knab*, 130 Ohio St.3d 339, 2011–Ohio–5049, 958 N.E.2d 554, ¶ 2 (“Dismissal under Civ.R. 12(B)(6) for failure to state a claim was warranted because after all factual allegations of [petitioner’s habeas corpus] petition were presumed to be true and all reasonable inferences therefrom were made in his favor, it appeared beyond doubt that he was not entitled to the requested extraordinary relief in habeas corpus”).

#### IV. LAW AND ANALYSIS

##### A. Res Judicata

{¶12} In his first assignment of error Lloyd asserts that the trial court erred by dismissing his second habeas corpus petition based on res judicata. The Supreme Court of Ohio previously recognized that habeas corpus actions are typically exempt from res judicata because “ ‘[c]onventional notions of finality of litigation have no place where life or liberty is at stake.’ ” *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d

60, 63, 558 N.E.2d 1178 (1990), quoting *Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

{¶13} Nevertheless, in *Hudlin v. Alexander*, 63 Ohio St.3d 153, 155-156, 586 N.E.2d 86 (1992), the Supreme Court of Ohio held that res judicata is applicable to successive habeas corpus petitions because habeas corpus petitioners have the right to appeal adverse judgments in habeas corpus cases. In so holding, the Supreme Court of Ohio relied on the Supreme Court of the United States' limitation on the right to bring successive federal habeas corpus actions under the federal "abuse-of-writ" doctrine. *Id.* at 155-156, citing *McCleskey v. Zant*, 499 U.S. 467, 479, 111 S.Ct. 1454, 1462, 113 L.Ed.2d 517, 535 (1991) ("As appellate review became available from a decision in habeas refusing to discharge the prisoner, courts began to question the continuing validity of the common-law rule allowing endless successive [habeas corpus] petitions").

{¶14} As the Supreme Court of Ohio observed in a subsequent case, the court has "since consistently applied res judicata to bar petitioners from filing successive habeas corpus petitions." *See State ex rel. Childs v. Lazaroff*, 90 Ohio St.3d 519, 520, 739 N.E.2d 802 (2001), and cases cited there; *see also Pruitt v. Cook*, 137 Ohio St.3d 296, 2013-Ohio-4734, 998 N.E.2d 1159, ¶ 10.

{¶15} Lloyd argues that res judicata does not bar his successive habeas corpus petition because it raised different claims from in his first petition. But because he could have raised his claims in his first petition, which was filed only a couple months before he filed his second petition, Lloyd's argument fails to persuade us. *See State ex rel. Harsh v. Sheets*, 132 Ohio St.3d 198, 2012-Ohio-2368, 970 N.E.2d 926, ¶ 2 ("because [petitioner] either raised or could have raised his claims in three previous state habeas

corpus cases, res judicata also bars him from filing a successive habeas corpus petition”). In his second petition Lloyd alleged that “certain facts and evidence have been discovered showing [p]lain [e]rrors, lies, prosecutorial misconduct and judicial misconduct.” But he failed to identify the specific time of his discovery; he alleged only that it had been “since said trial.” He never claimed that this new evidence had been discovered after he filed his first habeas corpus petition. See *Shie v. Leonard*, 84 Ohio St.3d 160, 702 N.E.2d 419 (1998) (“In order to withstand dismissal, a petition for a writ of habeas corpus must conform to R.C. 2725.04 and state with particularity the extraordinary circumstances entitling the petitioner to the writ”); *Goudluck v. Voorhies*, 119 Ohio St.3d 398, 2008 -Ohio- 4787, 894 N.E.2d 692, ¶ 15 (habeas corpus petition must include specific facts to support claim for relief in order to avoid dismissal). In the absence of a specific factual allegation to the contrary, we must presume that Lloyd discovered the purported new evidence before he filed his first habeas corpus petition.

{¶16} Lloyd also claims that res judicata is inapplicable because he is raising plain, structural errors that must be addressed regardless of previous actions. But even plain errors are precluded by res judicata. See *State v. Haynes*, 2d Dist. Clark No. 2013 CA 90, 2014-Ohio-2675, ¶ 14. (“the issues raised in [the defendant’s] assignments of error could have been raised on direct appeal, and are barred by res judicata, regardless of whether they might be characterized as plain error”); *State v. Dover*, 5th Dist. Stark No. 2014 CA 00073, ¶ 35 (“The doctrine of res judicata bars appellant from raising this issue anew via a motion for plain error review \*\*\* [b]ecause appellant could have raised the claim on direct appeal”). And Lloyd cites no persuasive authority in

support of his contentions that his claims raise structural errors, or that these errors are not also barred by res judicata. Therefore, we reject Lloyd's additional contention.

{¶17} Because the trial court correctly found that res judicata barred Lloyd's successive habeas corpus petition, we overrule his first assignment of error.

#### B. Adequate Remedy in the Ordinary Course of Law

{¶18} In his second assignment of error Lloyd contends that the trial court erred in dismissing his successive petition based on its additional rationale that he has or had an adequate remedy in the ordinary course of law to raise his claims. Lloyd argues that he did not discover his claims of judicial misconduct, prosecutorial misconduct, and ineffective assistance of his trial counsel until after his direct appeal so he could not have raised them at that time.

{¶19} “ ‘Like other extraordinary-writ actions, habeas corpus is not available when there is an adequate remedy in the ordinary course of law.’ ” *Billiter v. Banks*, 135 Ohio St.3d 426, 2013-Ohio-1719, 988 N.E.2d 556, ¶ 8, quoting *In re Complaint for Writ of Habeas Corpus for Goeller*, 103 Ohio St.3d 427, 2004-Ohio-5579, 816 N.E.2d 594, ¶ 6. In general the claims that Lloyd raises in his habeas corpus petition are not cognizable in habeas corpus because they can be raised on direct appeal. See *Ellis v. McMackin*, 65 Ohio St.3d 161, 161-162, 602 N.E.2d 611 (1992) (claim of judicial misconduct had to be raised by direct appeal rather than habeas corpus because it was not jurisdictional); *Harsh*, 132 Ohio St.3d 198, 2012-Ohio-2368, 970 N.E.2d 926, at ¶ 3 (claims of fraud upon the court and prosecutorial misconduct are not cognizable in habeas corpus because petitioner had an adequate remedy by direct appeal to raise

these claims); *Shroyer v. Banks*, 123 Ohio St.3d 88, 2009-Ohio-4080, 914 N.E.2d 368, ¶ 1 (claim of ineffective assistance of counsel is not cognizable in habeas corpus).

{¶20} Lloyd argues that because he did not discover the evidence that supported his claims until after his direct appeal, that appeal did not provide him an adequate remedy in the ordinary course of law. However, as previously noted he alleged in his second petition only that he had discovered the alleged new evidence “since said trial.”

{¶21} In addition Lloyd ignores other postconviction remedies in the ordinary course of law that either are or were available to him to raise his claims based on alleged newly discovered evidence, e.g., a petition for postconviction relief or a motion for leave to file a motion for new trial (even assuming that he discovered the purported new evidence after the time for his direct appeal had passed). R.C. 2953.23(A); Crim.R. 33(A)(6) and (B). Because he can or could have raised these claims by employing these postconviction remedies in the ordinary course of law, he is not entitled to the requested extraordinary relief in habeas corpus to raise them. See *Boszik v. Hudson*, 110 Ohio St.3d 245, 2006-Ohio-4356, 852 N.E.2d 1200, ¶ 10 (“Insofar as [petitioner] asserts that appeal and postconviction relief are inadequate because his claims are premised on new evidence that he did not discover until after the time limitations for filing an appeal and postconviction relief had expired, he could have filed—and did file—a motion for leave to file a motion for new trial on the basis of the alleged newly discovered evidence”). We overrule Lloyd’s second assignment of error.

## V. CONCLUSION

{¶22} Because it appeared beyond doubt that Lloyd was not entitled to the requested extraordinary relief in habeas corpus, the trial court properly dismissed his second petition for failure to state a claim upon which relief can be granted. Having overruled Lloyd's assignments of error, we affirm the judgment of the trial court dismissing his habeas corpus petition.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

**IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT**, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**