[Cite as *State ex rel. Christy v. Forshey*, 2022-Ohio-3622.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

THE STATE OF OHIO ON THE RELATION OF
KEVIN CHRISTY,

Petitioner,

v.

JAY FORSHEY, WARDEN,

Respondent.

OPINION AND JUDGMENT ENTRY
Case No. 22 NO 0493

Writ of Habeas Corpus

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Petition Dismissed.

Kevin Christy, *Pro Se,* #A759418, Noble Correctional Institution, 15708 McConnelsville Road, Caldwell, Ohio 43724, Petitioner and

Atty. Dave Yost, Attorney General of Ohio, *Atty. Maura O'Neill Jaite*, Senior Assistant Attorney General, Ohio Attorney General's Office, Criminal Justice Section, 30 East Broad Street, 23rd Floor, Columbus, Ohio 43215, for Respondent.

Dated: September 29, 2022

PER CURIAM.

{¶1} Petitioner Kevin Christy has initiated this original action with the filing of his *pro se* Verified Petition for Writ of Habeas Corpus seeking his immediate release from the Noble Correctional Institution in Caldwell, Ohio. Petitioner argues his sentence is void because it included a term of community control consecutive to a term of imprisonment. The petition names as respondent the Warden of the Noble Correctional Institution, Jay Forshey. Counsel for the warden has filed a Civ.R. 12(B)(6) Motion to Dismiss or, in the alternative, a Motion for Summary Judgment. We hereby dismiss the petition because the sentencing error Petitioner identifies renders his sentence voidable, not void, and is therefore not cognizable in a habeas corpus action.

{¶2} In 2008, Petitioner entered guilty pleas to abduction in violation of R.C. 2905.02(A)(2), a felony of the third degree, and aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree. Pursuant to an agreed upon sentence under R.C. 2953.08(D), the trial court sentenced Petitioner to consecutive prison terms of four years for abduction and eight years for aggravated burglary. The trial court also sentenced Petitioner to a community-control term of five years for his aggravated burglary conviction. Community control was ordered to commence upon his release from prison after serving his four-year sentence for abduction. Thus, the court implicitly suspended Appellant's eight-year prison sentence initially imposed by the court for aggravated burglary. Appellant did not file a direct appeal.

{¶3} On June 28, 2019, the trial court found Petitioner had violated the terms and conditions of community control and ordered him to begin serving his previously-imposed eight-year prison sentence for aggravated burglary. Eight months later, in March of 2020, Petitioner filed a Motion to Vacate Sentence and Revocation Disposition. He argued that

the period of his community control supervision had expired prior to the initiation of the revocation proceedings and, alternatively, that his 2008 sentence was void because it included a term of community control consecutive to a term of imprisonment. On June 30, 2020, the trial court issued a decision overruling Petitioner's motion. The trial court acknowledged the now-recognized absence of statutory authority to impose a community control sanction consecutively to a prison term that was imposed on a separate felony count. Because the trial court had personal and subject matter jurisdiction when it sentenced Petitioner in 2008, it concluded that the erroneous sentence was voidable, not void, and could only have been challenged on direct appeal, which Petitioner did not pursue.

{¶4} The purpose of a Civ.R. 12(B)(6) motion is to test 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. When considering a Civ.R. 12(B)(6) motion, the court must presume that all factual allegations of the petition are true, and it must make all reasonable inferences in favor of the nonmoving party. *Keith v. Bobby*, 117 Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067, ¶ 10. It must then appear beyond doubt that the nonmoving party can prove no set of facts entitling that party to the requested relief in the petition. *Id*. 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 Boles's 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.")

{¶5} R.C. 2725.01 provides: "Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation." The writ of habeas corpus is an extraordinary writ. It will only be issued in certain circumstances of unlawful restraint of a person's liberty where there is no adequate legal remedy at law, such as a direct appeal or postconviction relief. *In re Pianowski,* 7th Dist. Mahoning No. 03 MA 16, 2003-Ohio-3881, ¶ 3; *see also State ex rel. Pirman v. Money,* 69 Ohio St.3d 591, 593, 635 N.E.2d 26 (1994). If a person is in custody by virtue of a judgment of a court of record and the court had jurisdiction to render the judgment, the writ of habeas corpus will not be allowed. *Tucker v. Collins,* 64 Ohio St.3d 77, 78, 591 N.E.2d 1241 (1992). "Absent a patent and unambiguous lack of jurisdiction, a party challenging a court's jurisdiction has an adequate remedy at law by appeal." *Smith v. Bradshaw,* 109 Ohio St.3d 50, 2006-Ohio-1829, 845 N.E.2d 516, ¶ 10.

{¶6} Habeas corpus relief is only available when there is no other adequate legal remedy available. *State ex rel. Jackson v. McFaul,* 73 Ohio St.3d 185, 186, 652 N.E.2d 746, 748 (1995). Habeas relief is also not a substitute for direct appeal or other forms of legal postconviction relief. *Cornell v. Schotten,* 69 Ohio St.3d 466, 633 N.E.2d 1111 (1994). The burden is on the petitioner to establish an immediate right to release. *Halleck v. Koloski,* 4 Ohio St.2d 76, 77, 212 N.E.2d 601 (1965); *Yarbrough v. Maxwell,* 174 Ohio St. 287, 288, 189 N.E.2d 136 (1963).

{¶7} Petitioner contends his 2008 sentence is void because the Ohio Supreme Court has held that unless otherwise authorized by statute, a trial court may not impose community-control sanctions on one felony count to be served consecutively to a prison term imposed on another felony count. *State v. Paige*, 153 Ohio St.3d 214, 2018-Ohio-

813, 103 N.E.3d 800; *State v. Hitchcock*, 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164. When reviewing the trial court's 2020 decision denying Petitioner's motion to vacate his sentence, the Fifth District Court of Appeals addressed the same issue he now advances in his habeas petition:

> We find, however, that [Petitioner's] sentence was voidable, not void. [Petitioner's] contention that the trial court's alleged sentencing error rendered his sentence void and subject to collateral attack lacks merit. The Supreme Court recently "realign[ed]" its void sentence jurisprudence and returned to "the traditional understanding of what constitutes a void judgment." *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 4. Thus, "[a] sentence is void when a sentencing court lacks jurisdiction over the subject-matter of the case or personal jurisdiction over the accused." *Id.* at ¶ 42.
>
> When a sentencing court has jurisdiction to act, however, sentencing errors render the sentence "voidable, not void, and [the sentence] is not subject to collateral attack." *Id.* at ¶ 5. *See State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, ¶ 1 (following *Harper* to hold that "sentences based on an error, including sentences in which a trial court fails to impose a statutorily mandated term, are voidable if the court imposing the sentence has jurisdiction over the case and the defendant"). "[I]f a judgment is voidable, the doctrine of res judicata bars a party from raising and litigating in any proceeding, except a direct appeal, claims that could have been raised in the trial court." *Henderson* at ¶ 19, citing *State v. Perry,* 10 Ohio St.2d 175,

226 N.E.2d 104 (1967), paragraph nine of the syllabus. *Accord Harper* at ¶ 41, citing *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, ¶ 7, 896 N.E.2d 699 (concluding that, because the defendant could have, but did not, raise a claimed sentencing error on direct appeal, the error was "now barred by the doctrine of res judicata"); *State v. Hudson*, 161 Ohio St.3d 163, 2020-Ohio-3849, ¶ 16.

[The state] concedes, therefore, [Petitioner's] sentence was contrary to *Hitchcock* but contends [Petitioner's] argument is barred by the doctrine of res judicata because he did not raise the error in a direct appeal. We agree. *State v. Hall*, 11th Dist. Trumbull No. 2020-T-0031, 2021-Ohio-791, ¶ 22 [appellant barred from collateral attack on sentence based on *Hitchcock* when appellant failed to file direct appeal].

We conclude the trial court possessed subject-matter jurisdiction over [Petitioner's] case and personal jurisdiction over [Petitioner]. *See Harper* at ¶ 25, quoting *Smith v. Sheldon*, 157 Ohio St.3d 1, 2019-Ohio-1677, ¶ 8, 131 N.E.3d 1 (stating that "'a common pleas court has subject-matter jurisdiction over felony cases'"); *Henderson* at ¶ 36, citing *Tari v. State*, 117 Ohio St. 481, 490, 159 N.E. 594 (1927) (noting that "[i]n a criminal matter, the court acquires jurisdiction over a person by lawfully issued process, followed by the arrest and arraignment of the accused and his plea to the charge"). Accordingly, any error in the exercise of the trial court's jurisdiction rendered [Petitioner's] sentence voidable, not void. *State v. Thompson*, 10th Dist. Franklin No. 19AP-359, 2020-Ohio-6756, ¶ 12.

> [Petitioner] could have, but did not, raise an argument regarding his sentence to a consecutive term of community control in a direct appeal. *See State v. Reynolds*, 79 Ohio St.3d 158, 161, 679 N.E.2d 1131 (1997); *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996); *State v. Braden*, 10th Dist. No. 17AP-321, 2018-Ohio-1807, ¶ 13. As [Petitioner's] sentence was voidable, res judicata bars [Petitioner's] claims in the present appeal. *Thompson*, supra, 2020-Ohio-6756, ¶ 13.

State v Christy, 5th Dist. Fairfield No. 20-CA-29, 2021-Ohio-1470, ¶ 23-27.

{¶8} The Fifth District's reasoning compels a similar result here. Upon consideration of Respondent's Civ.R. 12(B)(6) Motion to Dismiss and/or Summary Judgment Motion, IT IS ORDERED by this Court that said Motion to Dismiss be, and the same is hereby, GRANTED. Accordingly, the writ is denied and the cause DISMISSED. Costs waived.

{¶9} The clerk of courts is hereby directed to serve upon all parties not in default notice of this judgment and its date of entry upon the journal. Civ.R. 58.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB