

[Cite as *State ex rel. Smith v. Ambrose*, 2010-Ohio-2109.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94576

**STATE OF OHIO, EX REL.
GREGORY SMITH**

RELATOR

vs.

JUDGE DICK AMBROSE

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Prohibition
Motion No. 431252
Order No. 433141

RELEASE DATE: May 10, 2010

FOR RELATOR

Gregory Smith, pro se
Inmate No. 365-935
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

By: James E. Moss
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶ 1} On January 26, 2010, the petitioner, Gregory Smith, commenced this prohibition action, which he captioned as “Complaint for Temporary Restraining Order,” against the respondent, Judge Dick Ambrose, to prevent the judge “from adversely ruling” on Smith’s pending motion for resentencing in the underlying case, *State v. Gregory Smith*, Cuyahoga County Common Pleas Court Case No. CR-362460. Smith had moved the trial court to conduct a sentencing hearing to comply with R.C. 2929.19(B)(3)(e) which requires the trial court in imposing a prison sentence to notify the defendant that a violation of postrelease control

could result in the parole board imposing an additional prison term of up to one-half of the stated prison sentence. On February 17, 2010, the respondent judge, through the Cuyahoga County Prosecutor, moved for summary judgment on the grounds of mootness because the trial judge had resentenced Smith to comply with the postrelease control notification requirements. This court notes that the respondent accepted Smith's complaint as one for prohibition, despite its pleading title.

{¶ 2} On February 24, 2010, Smith filed an amended complaint. Smith complains that the trial court did not have jurisdiction to conduct a hearing pursuant to R.C. 2929.191, but should have conducted a de novo hearing instead. Smith further alleges that the trial court did not have jurisdiction to conduct a resentencing hearing because this prohibition action and a habeas corpus action, *Gregory Smith v. Cuyahoga Cty. Sheriff's Department*, Cuyahoga County Court of Appeals Case No. 94626, were pending in this court. Smith also complains that because he had completely served one of his sentences, the respondent judge could not impose postrelease control on that sentence. He further states that the trial court wrongly imposed court costs upon him in retaliation for bringing the writ actions. On March 9, 2010, the respondent moved to dismiss the amended complaint because Smith had not obtained leave of court as required by Civ.R. 15(A). On March 24, 2010, Smith filed a motion for summary judgment and to strike all of the respondent's filings because the

pendency of the writ actions deprived him of all jurisdiction. For the following reasons this court grants the judge's motion for summary judgment, denies the motion to dismiss the amended complaint, denies Smith's motions to strike and for summary judgment, and denies the application for a writ of prohibition.

{¶ 3} The principles governing prohibition are well established. Its requisites are (1) the respondent against whom it is sought is about to exercise judicial power, (2) the exercise of such power is unauthorized by law, and (3) there is no adequate remedy at law. *State ex rel. Largent v. Fisher* (1989), 43 Ohio St.3d 160, 540 N.E.2d 239. Prohibition will not lie unless it clearly appears that the court has no jurisdiction of the cause which it is attempting to adjudicate or the court is about to exceed its jurisdiction. *State ex rel. Ellis v. McCabe* (1941), 138 Ohio St. 417, 35 N.E.2d 571, paragraph three of the syllabus. "The writ will not issue to prevent an erroneous judgment, or to serve the purpose of appeal, or to correct mistakes of the lower court in deciding questions within its jurisdiction." *State ex rel. Sparto v. Juvenile Court of Darke Cty.* (1950), 153 Ohio St. 64, 65, 90 N.E.2d 598. Furthermore, it should be used with great caution and not issue in a doubtful case. *State ex rel. Merion v. Tuscarawas Cty. Court of Common Pleas* (1940), 137 Ohio St. 273, 28 N.E.2d 273, and *Reiss v. Columbus Municipal Court* (App. 1956), 76 Ohio Law Abs. 141, 145 N.E.2d 447. Nevertheless, when a court is patently and unambiguously without jurisdiction to act whatsoever, the availability or adequacy of a remedy is

immaterial to the issuance of a writ of prohibition. *State ex rel. Tilford v. Crush* (1988), 39 Ohio St.3d 174, 529 N.E.2d 1245 and *State ex rel. Csank v. Jaffe* (1995), 107 Ohio App.3d 387, 668 N.E.2d 996. However, absent such a patent and unambiguous lack of jurisdiction, a court having general jurisdiction of the subject matter of an action has authority to determine its own jurisdiction. A party challenging the court's jurisdiction has an adequate remedy at law via appeal from the court's holding that it has jurisdiction. *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage County Court of Common Pleas* (1997), 78 Ohio St.3d 489, 678 N.E.2d 1365 and *State ex rel. Bradford v. Trumbull Cty. Court*, 64 Ohio St.3d 502, 1992-Ohio-116, 597 N.E.2d 116. Moreover, the court has discretion in issuing the writ of prohibition. *State ex rel. Gilligan v. Hoddinott* (1973), 36 Ohio St.2d 127, 304 N.E.2d 382.

{¶ 4} Furthermore, the proper remedy for sentencing errors is not an extraordinary writ, but an appeal. *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-617, 898 N.E.2d 950; and *State ex rel. Davis v. Cuyahoga County Court of Common Pleas*, Cuyahoga App. No. 93814, 2010-Ohio-1066. In *State ex rel. Jaffal v. Calabrese*, 105 Ohio St.3d 440, 2005-Ohio-2591, 828 N.E.2d 107, Jaffal sought to have his sentences vacated and be resentenced because of constitutional errors. The Supreme Court of Ohio ruled: "Sentencing errors by a court that had proper jurisdiction cannot be remedied by extraordinary writ." At ¶5. Rather, the proper remedy is appeal or postconviction relief. See,

also, *State ex rel. Carnail v. McCormick*, Cuyahoga App. No. 93524, 2009-Ohio-3884.

{¶ 5} In 1998, Smith pleaded guilty to one count of rape and one count of kidnapping, both first degree felonies. The trial court sentenced Smith to ten years on the rape charge and nine years on the kidnapping charge to be served consecutively. The sentencing journal entry did not explicitly notify Smith about postrelease control; rather, the entry provided that the sentence includes any extensions provided by law.

{¶ 6} In February 2008, Smith moved to vacate his sentence because it did not impose postrelease controls. The trial court granted this motion and held a resentencing hearing on April 1, 2008. The trial court reimposed the 19-year sentence and further stated: "Post release control is part of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28." (April 1, 2008 journal entry.)

{¶ 7} On January 14, 2009, Smith filed the subject motion for resentencing under the authority of *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958 and then filed the instant prohibition action. On January 29, 2010, the trial court granted the motion in part, ruling that Smith was entitled to a hearing under R.C. 2929.191 and ordering Smith returned for the hearing. The trial court conducted that hearing on February 10, 2010, and informed Smith that he was subject to five years of mandatory postrelease control and that the failure

to abide by the terms and conditions of postrelease control would subject him to being returned to prison for up to one-half of his original sentence. On February 17, 2010, the trial court issued a nunc pro tunc journal entry which restated the means of conviction, reimposed this sentence and then stated: "Post release control is part of this prison sentence for 5 years mandatory for the above felony(s) under R.C. 2967.28. Defendant advised that if post release control supervision is imposed following his/her release from prison and if he/she violates that supervision or condition of post release control under RC 2967.131(B), parole board may impose a prison term as part of the sentence up to one-half of the stated prison term originally imposed upon the offender." On February 24, 2010, Smith appealed the February 17, 2010 journal entry. *State v. Smith*, Cuyahoga County Court of Appeals Case No. 94732.

{¶ 8} Smith's claims concern sentencing and the proper imposition of postrelease controls. Thus, the writ of prohibition will not lie to prevent the respondent judge "from ruling adversely" on Smith's motion for resentencing. The common pleas court has jurisdiction to sentence convicted defendants for first degree felonies, and that includes the imposition of postrelease controls. The proper remedy for errors in that process is appeal. This would include any possible error under *State v. Dresser*, Cuyahoga App. No. 92105, 2009-Ohio-2888 which ruled that postrelease controls could not be imposed on the first of consecutive sentences, if the sentence had been completely served;

the procedural posture of *Dresser* was an appeal. Similarly, any issue concerning court costs does not affect the jurisdiction of the trial court and is the proper subject of appeal.¹ Moreover, this court notes that Smith is pursuing his proper remedy. Accordingly, because Smith has an adequate remedy at law, prohibition will not lie.

{¶ 9} The pendency of an extraordinary writ action does not affect the jurisdiction of the respondent unless and until the superior court issues an order commanding the respondent to do an action or otherwise expressly limiting the respondent's power. In the present case this court issued no order. Thus, the respondent had the power to proceed.

{¶ 10} Moreover, the court of appeals does not have jurisdiction in injunction. *State ex rel. Pressley v. Industrial Comm. of Ohio* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631, paragraph four of the syllabus. Thus, Smith titled his initial pleading incorrectly, and to the extent that Smith is actually seeking a temporary restraining order, this court does not have the power to grant his requested relief.

{¶ 11} Accordingly, this court grants the respondent's motion for summary judgment and denies the application for a writ of prohibition. Smith to pay costs.

¹ R.C. 2947.23 requires the imposition of court costs as part of the criminal sentence, even if the defendant is indigent. Then the trial court may waive costs, which appears to be what happened in this case.

The court directs the Clerk of the Eighth District Court of Appeals to serve notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. MCMONAGLE, J., and
JAMES J. SWEENEY, J., CONCUR