

[Cite as *State ex rel. Henderson v. Gallagher*, 2010-Ohio-2611.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94894

**STATE OF OHIO, EX REL.,
ROGERS T. HENDERSON**

RELATOR

vs.

EILEEN A. GALLAGHER, JUDGE

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus and Prohibition
Motion No. 433187
Order No. 434137

RELEASE DATE: June 4, 2010

FOR RELATOR

Rogers T. Henderson, pro se
Inmate # 379-442
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Mansfield, Ohio 44901

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

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

MARY EILEEN KILBANE, J.:

{¶ 1} On March 25, 2010, the relator, Rogers T. Henderson, commenced this writ action seeking both mandamus and prohibition against the respondent, Judge Eileen A. Gallagher, to compel the judge to rule on a motion for resentencing, which he filed in August 2009, in the underlying case, *State v. Henderson*, Cuyahoga County Common Pleas Court Case No. CR-381404, and to prohibit the judge from denying the motion. On April 2, 2010, the respondent judge, through the Cuyahoga County Prosecutor, moved for summary judgment, arguing that the matter is moot and that Henderson conceded the judge's

jurisdiction to rule on the motion. Henderson never filed a response. For the following reasons, this court grants the respondent's motion for summary judgment and denies the applications for writs of mandamus and prohibition.

{¶ 2} On December 1, 1999, Henderson pleaded guilty to murder under R.C. 2903.02 with a firearm specification. The judge sentenced him to three years on the firearm specification, consecutive to 15 years for the murder. Henderson maintains that this is a void and unauthorized sentence, because R.C. 2929.02 requires a 15 years to life sentence. Thus, he moved the court for resentencing.¹ Because the motion has been pending since last August, he asserts that mandamus will lie to compel the judge to rule on the motion. Because R.C. 2929.02 specifies a 15-year-to-life sentence, he maintains that prohibition will lie to prevent the judge from sustaining a sentence not allowed by the statute. The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v.*

¹ The docket of the underlying case shows that Henderson had previously moved for resentencing on March 31, 2009, and that the respondent judge denied the motion on July 1, 2009. The docket also shows that Henderson never appealed.

Niehaus (1987), 33 Ohio St.3d 118, 515 N.E.2d 914. Furthermore, mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 631 N.E.2d 119; *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 295 N.E.2d 659; and *State ex rel. Pressley v. Indus. Comm. of Ohio* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631, paragraph three of the syllabus. Thus, mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerningham v. Gaughan* (Sept. 26, 1994), Cuyahoga App. No. 67787. Furthermore, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108, and *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 564 N.E.2d 86.

{¶ 3} Attached to the respondent judge's motion for summary judgment is a certified copy of a file-stamped April 5, 2010 journal entry in which the judge denied the August 2009 motion for resentencing. This establishes that the mandamus claim is moot. The judge has exercised her discretion and fulfilled her duty to rule on the motion. Accordingly, this court denies the mandamus claim.

{¶ 4} 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. Furthermore, if a petitioner had an adequate remedy, relief in prohibition is precluded, even if the remedy was not used. *State ex rel. Leshner v. Kainrad* (1981), 65 Ohio St.2d 68, 417 N.E.2d 1382, certiorari denied (1981), 454 U.S. 854, 102 S.Ct. 360, 70 L.Ed.2d 147; cf. *State ex rel. Sibarco Corp. v. City of Berea* (1966), 7 Ohio St.2d 85, 218 N.E.2d 428, certiorari denied (1967), 386 U.S. 957, 87 S.Ct. 1022, 18 L.Ed.2d 104. Prohibition will not lie unless it clearly appears that the court has no jurisdiction of the cause that 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 Mun. Court* (1956), 76 Ohio Law Abs. 141, 145 N.E.2d 447.

{¶ 5} The common pleas court has jurisdiction over murder cases and motions for resentencing. Moreover, Henderson has or had an adequate remedy at law through appeal from the original conviction and sentence or from the denial of one of his motions for resentencing. Therefore, this court denies his prohibition claim.

{¶ 6} Accordingly, this court grants the respondent's motion for summary judgment and denies the relator's applications for writs of mandamus and prohibition. Costs assessed against relator. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. MCMONAGLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR