

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY

BRIAN PRESTON,

Petitioner,

v.

WARDEN MICHAEL PHILLIPS ET AL.,

Respondent.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 20 MA 0027**

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Writ of Habeas Corpus

**BEFORE:**

David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

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**JUDGMENT:**

Denied.

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Brian Preston, *Pro Se*, # 752-934, Northeast Ohio Correctional Institution, 2240 Hubbard Road, Youngstown, Ohio 44505, Petitioner and

*Atty. Maura O'Neill Jaite*, Senior Assistant Attorney General, Ohio Attorney General's Office, Criminal Justice Section, 150 East Gay Street, 16<sup>th</sup> Floor, Columbus, Ohio 43215, for Respondents.

Dated: June 24, 2021

**PER CURIAM.**

{¶1} Petitioner Brian Preston, a self-represented prison inmate, has filed a petition for a writ of habeas corpus seeking immediate release from the Northeast Ohio Correctional Center (NEOCC). Petitioner's complaint names two respondents. The first is Michael Phillips, Warden of the NEOCC.<sup>1</sup> The NEOCC is one of the Ohio Department of Rehabilitation and Correction's (ODRC) prison institutions. The second respondent is Annette Chambers-Smith, Director of the ODRC. Respondents have filed a joint Civ.R. 12(B)(6) motion to dismiss, pointing out that Petitioner was released from incarceration shortly after filing this action. Accordingly, the Court dismisses the petition.

{¶2} A 2016 grand jury returned a three-count indictment against Petitioner. *State v. Preston*, Cuyahoga C.P. No. CR-16-606081-A (May 16, 2016). Count one was Aggravated Robbery (first-degree felony) in violation of R.C. 2911.01(A)(1), with a firearm specification, R.C. 2941.141(A). Count two was Robbery (second-degree felony) in violation of R.C. 2911.02(A)(2). Count three was Disrupting Public Services (fourth-degree felony) in violation of R.C. 2909.04(A)(1). Petitioner pleaded not guilty, the court appointed him counsel, and the case proceeded to discovery and other pretrial matters.

{¶3} About two months later, the parties reached a plea agreement. The State agreed to recommend to the court that count one be amended to Robbery (second-degree felony) in violation of R.C. 2911.02(A)(1), removal of the firearm specification, dismissal of counts two and three, and an 18-month prison sentence. In exchange, Petitioner agreed to withdraw his former pleas of not guilty and enter a guilty plea. The court accepted the recommendation and sentenced Petitioner accordingly, adding that he was subject to post-release control of up to three years. Petitioner did not pursue a direct appeal of his conviction or sentence.

{¶4} According to Petitioner, he completed his sentence and was released on October 30, 2017. After his release, Petitioner reoffended and the Adult Parole Authority (APA) charged him with numerous release violations. Following a release violation

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<sup>1</sup>. On its own accord, the Court substitutes Michael Phillips, Warden of the Northeast Ohio Correctional Center, for Douglas Fender, Warden of Lake Erie Correctional Institution.

hearing, the APA found him guilty of the violations and sentenced him to 180 days in prison.

{¶15} The day before he filed this original action in habeas, Petitioner filed in the trial court a Motion to Vacate Void Conviction and Sentence on February 24, 2020. He argued his sentence was void for two reasons. First, the court sentenced him to an eighteen-month term of imprisonment, below the statutory two-year minimum sentence for a second-degree felony. Second, the court sentenced him to a discretionary three-year period of post-release control rather than the statutorily mandated mandatory three-year period of post-release control.

{¶16} On March 10, 2020, the trial court issued a nunc pro tunc entry as of and for the July 13, 2016 Journal Entry of conviction and sentence. The court denied Petitioner's motion to vacate. The court corrected the plea to reflect that Petitioner pleaded guilty to Robbery, a third-degree felony rather than a second-degree felony as had appeared in the original entry. The court then added that Petitioner's argument regarding post-release control was moot.

{¶17} A month later, Respondents filed their joint motion to dismiss this action, pointing to Petitioner's release from prison.

{¶18} Habeas corpus is generally appropriate in the criminal context only if the petitioner is entitled to immediate release from prison. *Douglas v. Money*, 85 Ohio St.3d 348, 349, 708 N.E.2d 697 (1999). If a habeas corpus petitioner seeking release is subsequently released, the petitioner's habeas corpus claim is normally rendered moot. *Pewitt v. Lorain Correctional Inst.*, 64 Ohio St.3d 470, 472, 597 N.E.2d 92 (1992).

{¶19} According to the Ohio Department of Corrections and Rehabilitation Offender Search website, Petitioner was released from prison on April 4, 2020, and is now under the supervision of the Adult Parole Authority as a result of subsequent offenses unrelated to Petitioner's underlying conviction and sentence in this case.

{¶10} Writ denied. Final order. Clerk to serve notice as provided by the Rules of Civil Procedure. No costs assessed.

**JUDGE DAVID A. D'APOLITO**

**JUDGE GENE DONOFRIO**

**JUDGE CHERYL L. WAITE**