[Cite as *State ex rel. Lisboa v. McCafferty*, 2009-Ohio-4377.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93051

STATE OF OHIO, EX REL., JOSE LISBOA, JR.

RELATOR

vs.

JUDGE BRIDGET McCAFFERTY

RESPONDENT

JUDGMENT: COMPLAINT DISMISSED

WRIT OF PROHIBITION
MOTION NO. 420884
ORDER NO. 425343

RELEASE DATE: August 24, 2009

FOR RELATOR

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KENNETH A. ROCCO, J.:

{¶ 1} On March 27, 2009, the petitioner, Jose Lisboa, Jr., commenced this prohibition action against the respondent, Judge Bridget McCafferty, to prevent the respondent from proceeding in the underlying case, *State of Ohio v. Jose Lisboa*, Cuyahoga County Common Pleas Court Case No. CR-451451. Lisboa argues that because the judge imposed a sentence beyond the statutory limits, the conviction and sentence were without jurisdiction, had no effect, and kept the speedy trial statute, R.C. 2945.71, running; the time for a speedy trial has long since lapsed and, thus, the respondent is without jurisdiction to proceed. On April 14, 2009, the respondent judge, through the Cuyahoga County Prosecutor,

moved to dismiss. Lisboa filed a brief in opposition on May 20, 2009. For the following reasons, this court grants the motion to dismiss.

{¶ 2} The underlying case began in May 2004. On September 24, 2004, Lisboa entered into a plea agreement under which he pleaded guilty to one count of aggravated assault, and one count of domestic violence. He received an agreed sentence of ten years of community control sanctions. As part of the plea bargain he agreed to leave the country voluntarily within 45 days and not return for at least ten years. However, before he could voluntarily leave the federal government deported him.[1]

{¶ 3} In April 2006, Lisboa moved for a new trial and filed a postconviction relief petition, which the trial court denied on December 22, 2006. Lisboa appealed. *State v. Lisboa*, Cuyahoga App. No. 89283, 2008-Ohio-571.[2]

{¶ 4} On appeal, this court vacated Lisboa's plea and sentence and remanded for further proceedings. This court ruled as follows: R.C. 2929.15(A)(1) provides that the maximum term of community control sanctions is five years. A sentence of ten years of community control exceeds the statutory limitations and is therefore void. The trial court did not have jurisdiction to

[1] Lisboa contended that persons who voluntarily leave the country may be able to apply to re-enter at a later date, but persons who are deported may not return. *State v. Lisboa,* Cuyahoga App. No. 89283, 2008-Ohio-571, fn.1.

[2] Lisboa also filed a second motion for a new trial in May 2007. At Lisboa's request this court stayed the appeal until the trial court denied this second motion in August 2007.

impose such a sentence. Because the sentence was an integral part of the plea bargain, the guilty plea was also vacated. Id.

{¶ 5} Lisboa argues that because the sentence exceeded the jurisdiction of the trial court, those proceedings are null and void. "The effect of determining that a judgment is void is well established. It is as though the proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." *State v. Bezak*, 114 Ohio St.3d 94, 96, 2007-Ohio-3250, 868 N.E.2d 961, ¶12, citing *Romito v. Maxwell* (1967), 10 Ohio St.3d 266, 267-268, 227 N.E.2d 223. Thus, Lisboa argues that the speedy trial statute, R.C. 2945.71, was never tolled and kept running; that he should be discharged because more than 270 days have passed since 2004; that the error is so egregious that the trial court is patently beyond its jurisdiction; and that the extraordinary remedy of prohibition should issue to prevent the trial court from proceeding in the underlying case.[3]

{¶ 6} However, these arguments are not persuasive.

{¶ 7} 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 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 County* (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* (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 by an appeal from the court's holding that it has jurisdiction. *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage Cty. Court of Common Pleas* (1997), 78 Ohio St.3d 489, 678 N.E.2d

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[3] The trial court denied a speedy trial motion to dismiss in February 2009.

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.

{¶ 8} First, "R.C. 2945.71 does not apply to criminal convictions that have been overturned on appeal." *State v. Hull,* 110 Ohio St.3d 183, 2006-Ohio-4252, 852 N.E.2d 706, paragraph one of the syllabus; see, also, *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583 (holding that R.C. 2945.71 is not applicable to retrials; the statute includes no references whatever to retrials). In *State v. Kerby*, Clark App. No. 2006 CA 73, 2007-Ohio-3810, the appellate court rejected the appellant's argument that because his no contest plea had been reversed and was of no effect, the speedy trial statute had kept running and then expired. This is the same argument that Lisboa makes. The fact that the trial court exceeded its jurisdiction in imposing sentence does not distinguish Lisboa's case. It is still an overturned conviction, and the speedy trial statute does not apply.

{¶ 9} Moreover, an extraordinary writ, such as prohibition, is not the proper remedy for addressing speedy trial issues. In *State ex rel. Jakim v. Ambrose*, Cuyahoga App. No. 90785, 2008-Ohio-45, this court rejected the writ of prohibition as a proper remedy for speedy trial issues. In *State ex rel. Hamilton v. Brunner*, 105 Ohio St.3d 304, 2005-Ohio-1735, 825 N.E.2d 607, ¶7, the

Supreme Court of Ohio held that a claim of a denial of speedy trial "is not cognizable in an extraordinary-writ proceeding." *State ex rel. Kix v. Angelotta* (1985), 18 Ohio St.3d 115, 480 N.E.2d 407; *Jackson v. Wilson,* 100 Ohio St.3d 315, 2003-Ohio-6112, 798 N.E.2d 1086, ¶8 ("[a] claimed violation of a criminal defendant's right to a speedy trial is not cognizable in habeas corpus. *Travis v. Bagley* (2001), 92 Ohio St.3d 322, 323, 750 N.E.2d 166."). See, also, *Gales v. State,* Cuyahoga App. No. 84300, 2004-Ohio-2327 and *State v. Michailides*, Cuyahoga App. No. 93006, 2009-Ohio-2733.

{¶ 10} To the extent that Lisboa alternatively argues that his right to a speedy trial, flowing from the United States and Ohio Constitutions, as compared to the statute, has been violated, his argument is again unpersuasive. He has not provided this court with persuasive authority that, given the peculiar procedural posture of his case, his constitutional right to a speedy trial has been violated and that prohibition is the proper remedy for such a violation. Absent such authority and following the admonition that prohibition should not issue in a doubtful case, this court declines to issue the writ.

{¶ 11} Accordingly, we grant the respondent's motion and dismiss Lisboa's complaint for a writ of prohibition. Petitioner to pay costs. The Clerk of the Eighth District Court of Appeals is directed to serve notice of this judgment upon all parties as required by Civ.R. 58(B).

KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, A.J., and
ANN DYKE, J., CONCUR