

[Cite as *State ex rel. Ellis v. Burnside*, 2015-Ohio-5432.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103469

**STATE OF OHIO, EX REL.
LDDARYL ELLIS**

RELATOR

vs.

**HONORABLE JUDGE JANET R. BURNSIDE,
ET AL.**

RESPONDENTS

**JUDGMENT:
COMPLAINT DISMISSED**

Writ of Mandamus
Motion Nos. 489447 and 489880
Order No. 491492

RELEASE DATE: December 18, 2015

FOR RELATOR

Lddaryl Ellis, pro se
Inmate No. A641-151
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430

ATTORNEYS FOR RESPONDENTS

For Judge Janet R. Burnside

Timothy J. McGinty
Cuyahoga County Prosecutor
By: James E. Moss
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

For Christopher LaRose, Warden

Mike DeWine
Ohio Attorney General
By: William D. Maynard
Assistant Attorney General
Criminal Justice Section
30 East Gay Street - 16th Floor
Columbus, Ohio 43215

FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Lddaryl Ellis has filed a complaint for a writ of mandamus. Ellis seeks an order from this court that compels Judge Janet Burnside to issue an order conveying Ellis to the trial court for a resentencing hearing as mandated by the appellate judgment rendered in *State v. Ellis*, 8th Dist. Cuyahoga No. 99803, 2014-Ohio-116. In addition, Ellis argues that he is entitled to a writ of mandamus in order to compel Judge Burnside to comply with Civ.R. 58(B) by providing him with a copy of the judgment of August 12, 2015, that denied a motion to be conveyed to the trial court for resentencing. Finally, Ellis argues that the Warden of the Trumbull Correctional Institution, Christopher LaRose, possesses a duty to transport Ellis to the trial court for resentencing as required by the appellate judgment rendered in *State v. Ellis, supra*. We decline to issue a writ of mandamus on behalf of Ellis.

{¶2} To be entitled to a writ of mandamus, Ellis must establish a clear legal right to the requested relief, a clear legal right on the part of Judge Burnside and LaRose to provide it, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452; *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 650 N.E.2d 899 (1995).

{¶3} In the case sub judice, Ellis's claim that he must be "resentenced" in the presence of Judge Burnside is barred from further review by the doctrine of res judicata.

The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel. Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter. Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. Issue preclusion applies even if the causes of action differ. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226; *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435, 692 N.E.2d 140.

{¶4} This court, in *State v. Ellis*, 8th Dist. Cuyahoga No. 101603, 2015-Ohio-1642 held that:

Defendant-appellant L'Ddaryl Ellis ("Ellis"), proceeding pro se, appeals from the trial court's denial of his motion filed pursuant to Crim.R. 43. Ellis presents one assignment of error, claiming that the trial court's correction of its original judgment entry of sentence imposed in this case violated his right to be present at "every stage of the criminal proceeding."

Because the trial court undertook the correction, only a ministerial action, under this court's mandate to vacate one of Ellis's convictions as ordered in *State v. Ellis*, 8th Dist. Cuyahoga No. 99830, 2014-Ohio-116 ("Ellis I"), which did not affect the total term of the prison sentence imposed on him, Ellis's assignment of error is overruled. The trial court's order is affirmed.

In Ellis I, this court stated the pertinent facts underlying this case as follows:

* * *

“Accordingly, we sustain the second assigned error as it relates to the aggravated riot conviction, but overrule the assigned error on the remaining convictions.

* * *

Judgment affirmed in part, reversed in part, and remanded to the trial court to vacate Ellis’s conviction for aggravated riot.

* * *

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court for actions consistent with this opinion.”

On remand, the trial court issued a corrected judgment entry that stated that “[t]he court finds Deft not guilty of Count 14,” aggravated riot. Therefore, the trial court imposed no sentence on that count. The total prison term imposed on Ellis remained unchanged.

Subsequently, Ellis filed a motion pursuant to Crim.R. 43, requesting the trial court to “reverse” the correction and to order him returned to court for a resentencing hearing.

After the state filed an opposition brief, the trial court denied Ellis’s motion. Ellis filed the instant appeal from that judgment entry.

* * *

Ellis argues that the trial court’s denial of his motion made pursuant to Crim.R. 43 was improper, because a correction of the journal entry of his sentence constituted a “resentencing” that required his presence. His argument lacks merit.

* * *

This court provided a similar mandate as the one given to the trial court in this case in *State v. Watts*, 8th Dist. Cuyahoga No. 90435,

2008-Ohio-3792, ¶ 1. In that case, although Watts’s conviction on one count and its accompanying sentence were vacated, this court did not order the trial court to hold another sentencing hearing; rather, the trial court was ordered only to correct the sentencing entry. *See also State v. Bell*, 70 Ohio App.3d 765, 592 N.E.2d 848 (8th Dist.1990); compare *State v. Green*, 8th Dist. Cuyahoga No. 89326, 2008-Ohio-228, ¶ 21 (appellant’s conviction on one count simply vacated); *State v. Fanning*, 8th Dist. Cuyahoga No. 88914, 2008-Ohio-2185, ¶ 20 (same).

In this case, the trial court in its original sentencing entry “merged” all of Ellis’s convictions for sentencing purposes and ordered them to be served after the three-year term imposed for the firearm specifications. Thus, despite the fact that this court vacated his conviction for aggravated riot in Ellis I, his total sentence remained unchanged. *Watts. State v. Lenard*, 8th Dist. Cuyahoga No. 99149, 2013-Ohio-1995, ¶ 19, this court additionally observed that, “Appellant benefits from this [acquittal] in that he has one fewer conviction,” thus, the fact that the correction of the record “was not made in open court and outside appellant’s presence, under these circumstances,” did not constitute error.

Because the trial court’s correction of its judgment entry was issued pursuant to this court’s mandate in Ellis I, was ministerial in nature, and did not require a resentencing hearing, Ellis’s assignment of error is overruled.

The trial court’s order is affirmed.

State v. Ellis, supra, ¶ 1.

{¶15} On August 4, 2015, Ellis filed a second motion premised upon the argument that he should have been conveyed to the trial court for resentencing. On August 12, 2015, Judge Burnside denied the second motion to convey Ellis for resentencing. Ellis did not appeal the order of August 12, 2015, which denied his second motion to be conveyed to the trial court for resentencing. Instead, on September 2, 2015, Ellis filed his complaint for a writ of mandamus in an attempt to be conveyed to the trial court for resentencing.

{¶6} The issue presently raised in support of the claim for a writ of mandamus, that Ellis was required to be conveyed to the trial court and be present during resentencing, has already been determined to be without merit in *State v. Ellis*, 8th Dist. Cuyahoga No. 101603, 2015-Ohio-1642. Ellis is not permitted to relitigate an issue previously addressed and found to be without merit. The doctrine of res judicata prevents relitigation of the issue of conveyance back to the trial court for resentencing. *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970); *State v. Cargo*, 93 Ohio App.3d 621, 639 N.E.2d 801 (1994); *State v. Day*, 8th Dist. Cuyahoga No. 67767, 1996 Ohio App. LEXIS 44847 (Nov. 2, 1995).

{¶7} It must also be noted that requiring Ellis to be conveyed to the trial court would constitute a vain act because no resentencing was required. *State ex rel. Strothers v. Turner*, 79 Ohio St.3d 272, 1997-Ohio-154, 680 N.E.2d 1238. The trial court was simply required to discharge a ministerial act by vacating a conviction as ordered in *State v. Ellis*, 8th Dist. Cuyahoga No. 99830, 2014-Ohio-116.

{¶8} Finally, Judge Burnside possesses no duty to serve Ellis, pursuant to Civ.R. 58(B), with a copy of the judgment entry that denied his motion to be conveyed to the trial court for resentencing. *Henderson v. Saffold*, 8th Dist. Cuyahoga No. 100406, 2014-Ohio-306; *State ex rel. Aziz v. Fuerst*, 8th Dist. Cuyahoga No. 78018, 2000 Ohio App. LEXIS 3833 (Aug. 24, 2000).

{¶9} Because Ellis has already availed himself of an adequate remedy in the ordinary course of law and the inapplicability of Civ.R. 58(B) to a criminal action or judgment, we find that this court is prevented from issuing a writ of mandamus.

{¶10} Accordingly, we grant Judge Burnside's motion for summary judgment and also grant Warden LaRose's motion to dismiss. Costs to Ellis. The court directs the clerk of courts to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

{¶11} Complaint dismissed.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
EILEEN T. GALLAGHER, J., CONCUR