

[Cite as *State ex rel. Brown v. McCormick*, 2016-Ohio-5524.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104568

STATE OF OHIO, EX REL.
JEFFREY BROWN

RELATOR

vs.

THE HONORABLE TIMOTHY McCORMICK

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion No. 497662
Order No. 498697

RELEASE DATE: August 24, 2016

FOR RELATOR

Jeffrey Brown
Inmate No. 664-316
Richland Correctional Institution
1001 Olivesburg Road
Mansfield, Ohio 44901

ATTORNEYS FOR RESPONDENT

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

MELODY J. STEWART, J.:

{¶1} On June 9, 2016, the relator, Jeffrey Brown, commenced this mandamus action against the respondent, Judge Timothy McCormick, to compel the judge to correct Brown's sentence in the underlying case, *State v. Brown*, Cuyahoga C. P. No. CR-13-580402-A, by resentencing him. Brown maintains the failure to include a mandatory fine renders the sentence void and requires a resentencing hearing. On June 27, 2016, the respondent judge moved for summary judgment on the grounds of adequate remedy at law: Brown has or had adequate remedies to contest his sentence through motion and appeal, and he has used them. On July 12, 2016, Brown moved to strike the exhibits to the summary judgment motion,¹ moved to strike the respondent's motion for misrepresentation, and filed his brief in opposition. For the following reasons, this court grants the motion for summary judgment and denies the application for a writ of mandamus.

{¶2} In the underlying case, the grand jury indicted Brown for two counts of drug trafficking, and one count of drug possession. The grand jury had also indicted him in *State v. Brown*, Cuyahoga C.P. No. CR-13-580090-A for four counts of drug trafficking, and one count each of drug possession, possessing criminal tools, and having weapons while under disability, along with various specifications. Brown reached a plea agreement under which he would plead guilty to one count of drug trafficking in each case, including a second-degree felony in the underlying case. During the plea hearing the trial court advised Brown of the rights he was waiving, the possible sentences, and the period of postrelease control, but the judge did not tell him that the second-degree felony carried a mandatory \$7,500 fine. After accepting the guilty

¹Brown styled his filing as a "Motion *in limine* or in the alternative motion to strike exhibits A-F of respondent's motion for summary judgment and motion in opposition to respondent's motion for summary judgment." (Italics sic.)

plea, the trial judge sentenced Brown to five years imprisonment on the second-degree felony and six months concurrent for the charge in the other case.

{¶3} On the following day, April 29, 2014, the trial judge held another hearing because he realized that he had not imposed the mandatory fine. Defense counsel orally moved to withdraw the guilty plea. The trial judge adjourned the hearing to allow defense counsel to file a written motion. At the reconvened hearing, the state of Ohio waived the mandatory fine. The trial judge accepted the waiver, reimposed the original sentence, and denied the motion to withdraw the plea.

{¶4} On appeal, Brown, through his counsel, argued that the trial court had denied him due process of law by failing to inform him of all the penalties, including the mandatory fine. He also argued the trial court denied him due process of law by refusing to allow him to withdraw his plea. This court rejected those arguments because Brown failed to demonstrate that a manifest injustice had occurred. *State v. Brown*, 8th Dist. Cuyahoga No. 101427, 2014-Ohio-5795. Brown's appellate counsel moved for reconsideration arguing that all of the irregularities, including the failure to disclose the mandatory fine, created a manifest injustice that should permit Brown to withdraw his plea. This court denied the motion.

{¶5} On May 5, 2016, Brown moved the trial court for resentencing on the grounds that the failure to impose the mandatory fine rendered the sentence void. He relied upon *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, in which the Supreme Court of Ohio ruled that the failure to impose a required fine renders that part of the sentence void and ordered a resentencing for the limited purpose of imposing the mandatory fine. The respondent judge denied the motion, and Brown appealed that order in *State v. Brown*, 8th Dist. Cuyahoga No. 104575.

{¶6} Brown now argues that mandamus will lie to correct the void sentence: by imposing a sentence outside the statutory requirements, the trial judge exceeded his jurisdiction. Mandamus will lie to compel a court to vacate a judgment issued beyond its jurisdiction and, if appropriate, correct the mistake. *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182, 553 N.E.2d 650 (1990). The respondent judge argues that mandamus will not lie because Brown has or had adequate remedies at law that preclude the issuance of an extraordinary writ.

{¶7} 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. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Furthermore, mandamus is not a substitute for appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973); *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), 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*, 8th Dist. Cuyahoga No. 67787, 1994 Ohio App. LEXIS 6227 (Sept. 26, 1994). 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; *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.*, 56 Ohio St.3d 33, 564 N.E.2d 86 (1990). Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St.

581, 113 N.E.2d 14 (1953); *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (8th Dist.1993).

{¶8} To counter the judge's motion for summary judgment, Brown argues that the respondent judge did not properly place before this court the various pleadings and orders upon which he bases his summary judgment motion, because he did not identify them through an affidavit; thus this court may not consider them in adjudicating that motion. However, this court may take judicial notice of such filings pursuant to Evid.R. 201(B)(2).

{¶9} Brown also submits that the respondent judge may not argue that Appeal No. 104575 presents an adequate remedy at law because Brown had not submitted his brief. Therefore, the judge's argument is pure speculation. Given that the only argument Brown raised in his motion for resentencing, the denial of which he is appealing in 104575, is that the sentence is void for failure to impose the mandatory fine, this argument is unpersuasive.

{¶10} This court declines to issue the writ of mandamus to compel a resentencing, because Brown had or has adequate remedies at law to contest his sentence. Brown could have raised the void argument in his first appeal, Appeal No. 101427. He did address the matter as part of an argument to allow him to withdraw his guilty plea. Moreover, he may address the issue in Case No. 104575, his appeal of this very issue that he raised in his motion for resentencing. Furthermore, appeal with its full record is the better vehicle for determining the propriety and effect of the state's waiver.

Accordingly, this court grants the motion for summary judgment and denies the application for a writ of mandamus. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶11} Writ denied.

MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR