

[Cite as *State ex rel. Harris v. Sutula*, 2018-Ohio-5045.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107662

**STATE OF OHIO, EX REL.
BYRON HARRIS**

RELATOR

vs.

JUDGE JOHN D. SUTULA

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion No. 521579
Order No. 522997

RELEASE DATE: December 11, 2018

FOR RELATOR

Byron Harris, pro se
Inmate No. 690477
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ATTORNEYS FOR RESPONDENT

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By: James E. Moss
Assistant County Prosecutor
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EILEEN A. GALLAGHER, A.J.:

{¶1} On September 11, 2018, the relator, Byron Harris, commenced this mandamus action against the respondent, Judge John D. Sutula, to compel the judge to issue findings of fact and conclusions of law for a postconviction relief petition and rulings on multiple motions that Harris filed in the underlying case, *State v. Harris*, Cuyahoga C.P. No. CR-14-589543-A. On October 2, 2018, the respondent judge, through the Cuyahoga County Prosecutor, moved for summary judgment on the grounds of mootness and pleading deficiency. Harris never filed a response. For the following reasons, this court grants the judge's motion for summary judgment and denies the application for a writ of mandamus.

{¶2} In the underlying case, in September 2014, the grand jury indicted Harris on one count of aggravated murder, one count of murder, two counts of felonious assault, one count of

discharge of a firearm on or near prohibited premises and two counts of having a weapon while under disability. Throughout the pretrial proceedings, although he was represented by counsel, Harris made multiple pro se motions, including motions to dismiss counsel, a motion to suppress evidence and a motion for a competency hearing.

{¶3} In February 2016, the state nolleed one count of having a weapon while under disability. A jury found Harris guilty of aggravated murder, murder, two counts of felonious assault and discharge of a firearm on or near a prohibited premise all with one- and three-year firearm specifications. The court found him guilty of the remaining count of having a weapon while under disability. On March 11, 2016, the court sentenced him to 29 years to life.

{¶4} Harris timely appealed and the complete record was filed on May 19, 2016. This court subsequently affirmed. *State v. Harris*, 2017-Ohio-2751, 90 N.E.3d 342 (8th Dist.).

{¶5} Harris now seeks a writ of mandamus to compel the judge to issue findings of fact and conclusions of law for a postconviction relief petition that he filed on May 31, 2017, and various other “multiple motions” filed in the underlying case. Other than a motion seeking leave to amend his postconviction relief petition, filed on May 18, 2017, Harris does not specify what other motions he is seeking the judge to resolve. Harris did attach four pages from the docket of the underlying case in which he underlines various motions, rulings and notations. These pages are from before and after the trial.

{¶6} 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); and *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. Also, in mandamus, a relator must plead specific facts in order to withstand a motion to dismiss. *State ex rel. Iacovone v. Kaminiski*, 81 Ohio St.3d 189, 1998-Ohio-304, 690 N.E.2d 4. 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).

{¶7} Although mandamus should be used with caution, the court has discretion in issuing it. In *State ex rel. Pressley* at paragraph seven of the syllabus, the Supreme Court of Ohio ruled that “in considering the allowance or denial of the writ of mandamus on the merits, [the court] will exercise sound, legal and judicial discretion based upon all the facts and circumstances in the individual case and the justice to be done.” The court elaborated that in exercising that discretion the court should consider

the exigency which calls for the exercise of such discretion, the nature and extent of the wrong or injury which would follow a refusal of the writ, and other facts which have a bearing on the particular case. * * * Among the facts and circumstances which the court will consider are the applicant’s rights, the interests of third persons, the importance or unimportance of the case, the applicant’s conduct, the equity and justice of the relator’s case, public policy and the public’s interest, whether the performance of the act by the respondent would give the relator any effective relief, and whether such act would be impossible, illegal, or useless.

Id. at 161-162. *State ex rel. Bennett v. Lime*, 55 Ohio St.2d 62, 378 N.E.2d 152 (1978); *State ex rel. Dollison v. Reddy*, 55 Ohio St.2d 59, 378 N.E.2d 150 (1978); and *State ex rel. Mettler v. Commrs. of Athens Cty.*, 139 Ohio St. 86, 38 N.E.2d 393 (1941).

{¶8} The overwhelming thrust of Harris’ mandamus complaint is to obtain findings of fact and conclusions of law for his postconviction relief petition. R.C. 2953.21(A)(2) provides in pertinent part as follows: “a petition * * * shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction * * *.” Thus, Harris’ deadline for filing his petition was May 19, 2017. On May 18, 2017, Harris filed a motion seeking leave to amend his postconviction relief petition. This motion just sought leave to amend; it does not state any claims for relief. Therefore, it cannot be considered any kind of placeholder for a postconviction relief petition. Harris asserts that he mailed his petition on May 8, 2017, in order for it to be filed timely. However, the petition was not filed until May 31, 2017, more than a week after the deadline. The respondent judge summarily denied the petition on June 20, 2017.

{¶9} The Supreme Court of Ohio has established that a trial court has no legal duty to issue findings of fact and conclusions of law for an untimely postconviction relief petition. *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155; and [*State ex rel.*] *Dillon v. Cottrill*, 145 Ohio St.3d 264, 2016-Ohio-626, 48 N.E.3d 552. Therefore, despite whatever efforts Harris made, his petition was not timely filed and the respondent judge has no duty to issue findings of fact and conclusions of law.

{¶10} The mandamus claim to compel rulings on the other “multiple motions” is problematic. Harris did not plead sufficient facts to withstand a dispositive motion. He did not state what those motions were. The court declines to accept underlining on a docket sheet as sufficient pleading to state a claim.

{¶11} Moreover, to the extent that he seeks rulings on motions filed before his trial, the claim is not well founded. Any pending motions upon disposition of the underlying case are

deemed to be denied. *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 1998-Ohio-329, 692 N.E.2d 198; and *State ex rel. Harris v. Sheehan*, 8th Dist. Cuyahoga No. 93516, 2009-Ohio-4196. Ruling on them would be a vain act, which the law does not require. *Massachusetts Bonding & Ins. Co. v. Lopez*, 22 Ohio Law Abs. 387, 389 (9th Dist.1936) — “It is a maxim almost as old as the law itself, that the law does not require the doing of a vain act.” Similarly, compelling a ruling on the motion for leave to amend the postconviction relief petition after the judge had denied the motion would be a vain act.

{¶12} Regardless of what the respondent judge may or may not have done, the deficiencies in Harris’ complaint require denial of the writ. The relator has failed to comply with R.C. 2969.25, which requires an affidavit that describes each civil action or appeal filed by the relator within the previous five years in any state or federal court. The relator’s failure to comply with R.C. 2969.25 warrants dismissal of the complaint for a writ of mandamus. *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 1998-Ohio-218, 696 N.E.2d 594, and *State ex rel. Alford v. Winters*, 80 Ohio St.3d 285, 1997-Ohio-117, 685 N.E.2d 1242.

{¶13} The court notes that Harris endeavored to fulfill this requirement by filing an affidavit. However, his affidavit is not a complying affidavit, because he states that he had not filed any civil suits within the past two years and the statute requires five years. Furthermore, Harris had filed another mandamus action against the respondent judge on November 17, 2016. *State ex rel. Harris v. Sutula*, 8th Dist. Cuyahoga No. 105172, 2017-Ohio-544.

{¶14} Harris also did not comply with R.C. 2969.25(C), which requires that an inmate file a certified statement from his prison cashier setting forth the balance in his private account for each of the preceding six months. Although he filed a poverty affidavit and said that there was a cashier’s statement, there was no cashier’s statement. This also is sufficient reason to

deny the mandamus, deny indigency status and assess costs against the relator. *State ex rel. Pamer v. Collier*, 108 Ohio St.3d 492, 2006-Ohio-1507, 844 N.E.2d 842; and *Hazel v. Knab*, 130 Ohio St.3d 22, 2011-Ohio-4608, 955 N.E.2d 378 — the defect may not be cured by subsequent filings.

{¶15} Accordingly, this court grants the respondent's 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).

{¶16} Writ denied.

EILEEN A. GALLAGHER, ADMINISTRATIVE JUDGE

TIM McCORMACK, J., and
MELODY J. STEWART, J., CONCUR