[Cite as *State ex rel. Perry v. McClelland*, 2019-Ohio-354.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107535

STATE OF OHIO, EX REL.
DAVEION PERRY

RELATOR

vs.

THE HONORABLE JUDGE ROBERT MCCLELLAND

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion No. 520910
Order No. 524303

RELEASE DATE: January 29, 2019

FOR RELATOR

Daveion Perry, pro se
Inmate No. 691391
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430

ATTORNEYS FOR RESPONDENT

Michael C. O'Malley
Cuyahoga County Prosecutor
By: James E. Moss
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KATHLEEN ANN KEOUGH, J.:

{¶1} On August 13, 2018, the relator, Daveion Perry, commenced this mandamus action against the respondent, Judge Robert McClelland, to compel the judge to issue a final, appealable order in the underlying case, *State v. Perry*, Cuyahoga C.P. No. CR-16-610816-A. Perry argues that because the judge did not properly impose postrelease control on counts 13, 14, and 15, there is no final, appealable order, and mandamus will lie to remedy the omission. On September 7, 2018, the respondent judge, through the Cuyahoga County prosecutor, moved for summary judgment because the original sentencing entry was a final, appealable order. Perry filed his brief in opposition on September 17, 2018. For the following reasons, this court grants the judge's dispositive motion and denies the application for a writ of mandamus.

{¶2} Perry pleaded guilty to aggravated murder, five counts of aggravated robbery, four counts of kidnapping, two counts of felonious assault, all with three-year firearm specifications,

one count of breaking and entering (Count 13), one count of obstructing official business (Count 14), and one count of tampering with evidence (Count 15).[1] Perry entered the plea pursuant to a plea bargain in which the state agreed not to seek the death penalty in exchange for Perry making a full confession and pleading guilty to all counts.

{¶3} In the October 28, 2016 sentencing journal entry, the respondent judge listed every count, noted that Perry had pled guilty to every count, and then resolved every count by either imposing a sentence for the count or merging the counts. After sentencing Perry to life without parole on Count 1, aggravated murder, the judge sentenced him to 12 months for Count 13, 12 months for Count 14, and 36 months for Count 15, all concurrent to Count 1. The judge then ruled:

> As to counts 2 through 15: postrelease control is part of this prison sentence for 5 years mandatory for the above felony(s) under R.C. 2967.28. Defendant advised that if/when postrelease control supervision is imposed following his/her release from prison and if he/she violates that supervision or condition of postrelease control under R.C. 2967.13(B), parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the offender.

This court further notes that the trial judge notified Perry of postrelease control during the hearings. (Tr. 18-19 and 53.)

{¶4} Perry appealed, and his appointed counsel filed an *Anders* brief. This court allowed Perry to file a pro se brief. After a full review including Perry's pro se arguments, this court, finding that no meritorious argument existed, dismissed the appeal. *State v. Perry*, 8th Dist. Cuyahoga No. 105307, 2017-Ohio-7324.

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[1]These counts resulted from the death of a 15-year-old boy who was working at a fast-food restaurant. The store's video surveillance system recorded the incident.

{¶5} On June 28, 2018, Perry filed his motion for a final, appealable order on the grounds that the trial court had not properly imposed postrelease control on Counts 13, 14, and 15. The trial court denied the motion on July 3, 2018. Perry appealed this decision in *State v. Perry*, 8th Dist. Cuyahoga No. 107470, but voluntarily dismissed the appeal in early August 2018. Perry now brings this mandamus action to compel the judge to issue a final, appealable order.

{¶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). Furthermore, mandamus is not a substitute for appeal. *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. Jerninghan 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).

{¶7} Perry's argument is that the imposition of the postrelease control for the final three counts was improper and did not follow the statute. If a sentencing entry does not follow the statute, it is void and does not present a final, appealable order. Perry maintains the blanket imposition of postrelease control violates the principle that there must be a sanction for each count. Moreover, those counts were third- and fifth-degree felonies that are subject to a discretionary three-year period of postrelease control. R.C. 2967.28(C).

{¶8} The Supreme Court of Ohio rejected Perry's argument in *State ex rel. Pruitt v. Cuyahoga Cty. Ct. of Common Pleas,* 125 Ohio St.3d 402, 2010-Ohio-1808, 928 N.E.2d 722. In that case, Pruitt argued that his sentencing entries failed to comply with Crim.R. 32(C) and did not constitute final, appealable orders because postrelease control was not part of the sentence. He sought mandamus to compel a final, appealable order. The Supreme Court ruled "that the sentencing entry sufficiently included language that postrelease control was part of his sentence so as to afford him sufficient notice to raise any claimed errors on appeal rather than by extraordinary writ. *See Watkins v. Collins,* 111 Ohio St.3d 425, 2006-Ohio-5082, ¶ 51-53, 857 N.E.2d 78 * * *." 2010-Ohio-1808, ¶ 4. So too in the present case, the sentencing entry's language on postrelease control gave Perry sufficient notice to raise any errors on postrelease control through appeal. He had adequate remedies at law that now preclude mandamus.

{¶9} Accordingly, this court grants the judge'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).

{¶10} Writ denied.

KATHLEEN ANN KEOUGH, JUDGE

MARY EILEEN KILBANE, A.J., and
SEAN C. GALLAGHER, J., CONCUR