**[Cite as *Phelps v. McClelland*, 2019-Ohio-2448.]**

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

STATE EX REL., LARRY PHELPS, :

Relator, :

No. 108021

v. :

ROBERT McCLELLAND, JUDGE :

Respondent. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT:** WRIT DENIED
**DATED:** June 14, 2019

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Writ of Mandamus
Motion No. 525648
Order No. 528279

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***Appearances:***

Larry Phelps, *pro se*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and James E. Moss, Assistant Prosecuting Attorney, *for respondent*.

EILEEN T. GALLAGHER, P.J.:

**{¶ 1}** On December 24, 2018, the relator, Larry Phelps, commenced this mandamus action against the respondent, Judge Robert McClelland, to compel "the trial court to enforce the specific terms of the contract entered into by Laura Phelps

and the Cuyahoga County Prosecutor's Office, to which he (Larry Phelps) is the intended beneficiary." The relator argues that in the underlying case, *State v. Phelps*, Cuyahoga C.P. No. CR-93-296965, his common-law wife entered into a plea agreement under which she would testify against him in exchange for immunity and deleting the two capital specifications on his indictment. Nevertheless, the two specifications were presented to the jury, which found him guilty of the second specification causing him to be sentenced to life imprisonment. On February 14, 2019, the respondent judge, through the Cuyahoga County Prosecutor, moved for summary judgment, inter alia, on the grounds of adequate remedy at law and res judicata. Relator filed his brief in opposition on March 4, 2019. For the following reasons, this court grants the judge's motion for summary judgment and denies the application for a writ of mandamus.

**Factual and Procedural Background**

**{¶ 2}** In 1985, Laura Phelps was working as a prostitute, and relator was her pimp. On August 26, 1985, Merle Johnston solicited her for sex but did not have any money. Nevertheless, he followed her home. Shortly after that, she saw Johnston in their home and talking to relator. She saw relator hit Johnston who fell down. The next day she saw Johnston, still alive, in their basement. Relator instructed him to place a bag over his head or around his eyes so that he could not see where they were taking him. She then saw relator assault him again. Relator then put him in the trunk of their car, drove to Pennsylvania with her, and disposed

of the body. Subsequently, the police ticketed Laura Phelps for an illegal U-turn while she was driving Johnston's car.

**{¶ 3}** In 1988, after relator beat Laura Phelps, she told the police about the August 1985 incident. Nevertheless, the police did not believe her. In November 1988, the Pennsylvania state police discovered the skeletal remains of a man in a remote rural area near Erie, Pennsylvania. Subsequent investigations revealed the man to be Merle Johnston who had severe fractures in the sternum, ribs, jawbone, and other parts of the skull.

**{¶ 4}** In March 1993, Laura Phelps gave a written statement to the police with her lawyer present, recounting the events of August 1985 and the assault on Merle Johnston. The grand jury indicted both relator and her for the aggravated murder of Johnston. The indictment charged relator with (1) aggravated murder with two capital felony murder specifications for aggravated robbery and kidnapping, (2) aggravated robbery, and (3) kidnapping.

**{¶ 5}** During pretrial proceedings, the trial court ruled that a common-law marriage existed between Laura Phelps and relator and that under Evid.R. 601 she may elect not to testify. This court affirmed this ruling in *State v. Phelps*, 100 Ohio App.3d 187, 652 N.E.2d 1032 (8th Dist.1995) ("*Phelps I*"). Because Laura Phelps was indicating that she would not testify, the state and Laura Phelps entered into an immunity agreement under which the state would dismiss the indictment in the underlying case against her, seek a grant of immunity for her for the murder of Merle Johnston, the homicide of Danny Atkins, and an alleged arson, and would "delete

the death penalty specification against Larry Phelps." In return, she would testify truthfully in the underlying case and waive any and all spousal privileges in connection with her testimony.

**{¶ 6}** During the trial of the underlying case, Laura Phelps testified as indicated above. Additionally, the state presented other evidence collaborating relator's murder of Johnston. One of Johnston's friends testified that he went drinking with Johnston that night and that Johnston said he was going hunting for a prostitute. Johnston's mother testified that she last saw her son on August 26, 1985, and that several days later, she received a credit card statement with a dishonored check for $350 made out to "Larry Phelps."

**{¶ 7}** On May 25, 1995, the jury convicted relator of aggravated murder and the second specification for kidnapping, as well as the counts for aggravated robbery and kidnapping. The trial judge immediately imposed a term of life imprisonment for Count 1, and terms of 10 to 25 years on each of the robbery and kidnapping counts, all consecutive.

**{¶ 8}** In the direct appeal, *State v. Phelps*, 8th Dist. Cuyahoga No. 69157, 1996 Ohio App. LEXIS 4067 ("*Phelps II*"), this court noted that Laura Phelps testified after being granted immunity and that the state also agreed to drop the death penalty specifications against relator. This court affirmed the conviction after overruling assignments of error on manifest weight, prosecutorial misconduct, admitting other acts evidence, ineffective assistance of trial counsel, lack of territorial jurisdiction, and improper venue.

**{¶ 9}** Since 1996, relator has made multiple attempts to vacate his convictions. In 2009, the trial court entertained a motion for new trial based on newly discovered evidence that in 1988 the police hypnotized Laura Phelps to obtain a better recollection of what happened in August 1985. The trial court denied the motion for new trial, and this court affirmed. *State v. Phelps*, 192 Ohio App.3d 484, 2011-Ohio-706, 949 N.E.2d 567 (8th Dist.) ("*Phelps III*"). In October 2014, relator filed a second motion for new trial based on newly discovered evidence, in which he presented an affidavit, which stated that another man killed Johnston. The trial court denied the motion because the affidavit was incredible and contradictory to other evidence. This court affirmed in *State v. Phelps*, 8th Dist. Cuyahoga No. 103206, 2016-Ohio-2631 ("*Phelps IV*").

**{¶ 10}** On November 9, 2017, relator filed the subject motion for specific performance of contract by a third-party beneficiary. In this motion, relator argued that the state and Laura Phelps entered into a contract under which she would testify and the state would grant her immunity and would also delete the two specifications from his aggravated murder charge. He asserts that Laura Phelps would not have testified against him, but for the agreement to delete the two specifications. Therefore, he is a third-party beneficiary under this contract and has the right to enforce it. The state and the court violated the contract by submitting the two specifications to the jury, which found him guilty of the kidnapping specification. He quoted the immunity hearing transcript in which the prosecutor asked the court to delete specifications 1 and 2 pursuant to the agreement. The court agreed: "the

Court will also pursuant to the request of the Prosecution delete the felony murder specifications being Specification 1 and Specification 2 in Count 1 of this indictment as they pertain to Larry Phelps * * * therefore, removing any possibility of the death penalty being imposed against Mr. Phelps in this case." (Tr. 53-54.) He argued that the breach of this contract prejudiced him because without Laura Phelps' testimony he would not have been found guilty, much less serving a life sentence. The trial court ruled that the motion had no merit and denied it on December 19, 2017.

**{¶ 11}** In *State v. Phelps*, 8th Dist. Cuyahoga No. 106735, 2018-Ohio-4709, ("*Phelps V*"), this court affirmed the trial court's ruling. This court reasoned that the written immunity agreement deleted the death penalty specifications and not the two felony murder specifications on the aggravated murder count. The court also discounted the motion based on newly discovered evidence because one of relator's attorneys was at the immunity hearing, and this court recognized in its direct appeal opinion that if Laura Phelps testified and waived spousal immunity, the state agreed to drop the death penalty specifications against relator. He also referred to the agreement in his 2009 motion for a new trial. Thus, the motion was barred by res judicata because he could have raised the issue at an earlier time. Finally, the court noted that because relator did not receive the death penalty or an additional sentence for the specification, the state lived up to its bargain and he was not prejudiced.

**{¶ 12}** Now relator resurrects the breach of contract argument through a writ of mandamus.

## Principles and Application of Law

**{¶ 13}** 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. 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).

**{¶ 14}** In *State ex rel. Pressley v. Indus. Comm. of Ohio,* 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), 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.

11 Ohio St.2d 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).

**{¶ 15}** In the present case, relator had adequate remedies at law that now preclude mandamus. Relator argues that there is no indication that the agreement was before the court in his case, Cuyahoga C.P. No. CR-93-296956-A. Thus, it could not be raised as an assignment of error on direct appeal. However, judicial notice of the transcript in relator's case shows that he and his attorneys were present at the immunity hearing and that it was part of the transcript in his case. (Pgs. 35-54, May 8, 1995.) Moreover, this court's direct appeal opinion contradicts this argument: "[t]he prosecutors also agreed to drop the death penalty specifications against

appellant." (Slip Opinion, pg. 4.) Thus, this court finds that the issue could have been raised on direct appeal.

**{¶ 16}** Moreover, relator raised the specific issue in a motion before the trial court, which summarily rejected it, and then he appealed to this court. Thus, he had an adequate remedy at law and used it; that now precludes a writ of mandamus. "[W]hen a plain and adequate remedy at law has been unsuccessfully invoked, a writ of mandamus will not lie to relitigate the same issue." *State ex rel. McKinney v. Schmenk*, 152 Ohio St.3d 70, 2017-Ohio-9183, 92 N.E.3d 9183, ¶ 13, quoting *State ex rel. Sampson v. Parrott*, 82 Ohio St.3d 92, 93, 694 N.E.2d 463 (1998). Similarly, res judicata bars relitigation of a second suit based upon the same cause of action between the same parties or those in privity with a party. Relator has already litigated this claim and lost. *Musa v. Gillett Communications, Inc.*, 119 Ohio App.3d 673, 696 N.E.2d 227 (8th Dist.1997). His reliance on *State ex rel. Weekley v. Young*, 141 Ohio St. 260, 47 N.E.2d 76 (1943), is misplaced. It does not stand for the proposition that a continuing breach of contract precludes the use of res judicata.

**{¶ 17}** 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).

{¶ 18} Writ denied.

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EILEEN T. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR