

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE ex rel. HARRY BARR,	:	PER CURIAM OPINION
Relator,	:	CASE NO. 2010-P-0006
- VS -	:	
HONORABLE LAURIE J. PTTMAN,	:	
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Petition dismissed.

Harry Barr, PID: 522-149, Lorain Correctional Institution, 2075 South Avon-Belden Road, Grafton, OH 44044 (Relator).

Victor V. Viglucci, Portage County Prosecutor, and *Denise L. Smith*, Chief Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Respondent).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for final disposition of the motion to dismiss of respondent, Judge Laurie J. Pittman of the Portage County Court of Common Pleas. As the sole basis for her motion, respondent submits that the substance of the petition of relator, Harry Barr, cannot be reviewed in the context of a mandamus proceeding because relator is trying to employ this action as a substitute for a prior direct appeal. For the following reasons, we conclude that the dismissal of this matter is warranted.

{¶2} The subject matter of the instant action concerns the propriety of relator's

2007 criminal conviction on one count of attempted rape. After respondent had denied relator's motion to dismiss the multi-count indictment, he entered a plea of no contest to the single count. Upon accepting this plea and finding relator guilty of attempted rape, respondent sentenced him to a prison term of eight years and determined that he was a habitual sexual offender.

{¶3} In bringing this action in mandamus, relator sought the issuance of a writ which would compel respondent to take the necessary steps to vacate his conviction for lack of jurisdiction. As the factual predicate for his sole claim, he states that, at the time he was first arraigned on the underlying charges, he was a prisoner at a state institution in Lorain County, Ohio. Based on this, he contends that the state was required to bring him to trial within one hundred-eighty days of his arraignment under R.C. 2941.401. Relator further contends that, since the state failed to satisfy the statutory requirement, respondent was deprived of the necessary jurisdiction to impose the conviction.

{¶4} In now moving to dismiss this matter for lack of a viable claim, respondent maintains that the merits of relator's "speedy trial" argument cannot be litigated in the present case because the point has already been fully addressed in a prior direct appeal before this court. Citing *State v. Barr*, 11th Dist. No. 2008-P-0031, 2009-Ohio-1146, she takes the position that it would be improper to allow relator to proceed on his mandamus petition when he has already had a full opportunity to contest the validity of his conviction.

{¶5} As an initial point, this court would note that, in responding to the motion to dismiss, relator has not contested respondent's assertion regarding the existence of the prior direct appeal. Similarly, this court's review of our docket in 2008 readily confirms that, immediately after the imposition of his sentence in the underlying criminal action,

relator pursued a direct appeal which ultimately resulted in the affirmance of his entire conviction. Furthermore, a review of our opinion in the direct appeal shows that we fully considered the issue of whether relator's speedy trial rights under R.C. 2941.401 and 2945.71 had been violated. *Id.* at ¶42-50.

{¶6} Given the prior proceedings before this court and the nature of the factual allegations in relator's instant claim, it is evident that he has tried to use this original action as a second appeal of his conviction. In reviewing similar situations, the Supreme Court has expressly held that such a use of a mandamus action is not permissible.

{¶7} In *State ex rel. Billings v. Friedland* (2000), 88 Ohio St.3d 237, the criminal defendant initially appealed his basic conviction to the Eighth Appellate District, raising the question of whether the statutory requirements for the waiver of a jury trial had been satisfied. After the appellate court had rejected the defendant's "waiver" argument and affirmed his conviction, he filed a separate mandamus action before the same appellate court, seeking a writ to compel the trial judge to vacate his underlying conviction. As the grounds for his mandamus claim, the defendant again contested the propriety of the jury waiver. In subsequently affirming the granting of summary judgment in favor of the trial judge, the Supreme Court specifically held that the mandamus claim did not have merit because, "if a plain and adequate remedy at law has been unsuccessfully invoked, a writ of mandamus will not issue to relitigate the same issue." *Id.* at 238.

{¶8} See, also, *State ex rel. Sampson v. Parrott* (1998), 82 Ohio St.3d 92, in which the Supreme Court upheld the dismissal of a mandamus petition on the basis that such a claim could not be used to challenge an alleged sentencing error when the point had already been reviewed in a delayed appeal, a postconviction motion, and a second

appeal.

{¶9} In responding to the motion to dismiss in the instant action, relator submits that the existence of an adequate legal remedy, i.e., his prior appeal, is not controlling under the facts of this case because his mandamus claim challenges the jurisdiction of respondent to impose the criminal conviction. In support of his point, relator cites *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, for the basic proposition that the availability of a direct appeal will not foreclose the granting of the writ when a trial judge totally lacks the authority to proceed against a party.

{¶10} Relator's reliance upon *Ballard* is misplaced, inasmuch as an alleged speedy trial error is not a jurisdictional defect. *Ballard* held: "A trial court is without jurisdiction to render judgment or to make findings against a person who was not served summons, did not appear, and was not a party in the court proceedings. A person against whom such judgment and findings are made is entitled to have the judgment vacated." *Id.* at paragraph one of the syllabus. This holding is based on the proposition that "a judgment rendered without proper service or entry of appearance is a nullity and void." *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 64.

{¶11} The violation of a defendant's speedy trial rights, however, is not a jurisdictional defect rendering subsequent judgments null and void. *State v. Shoemaker*, 4th Dist. No. 94CA1991, 1994 Ohio App. LEXIS 3437, at *6. ("[a] violation of the 'speedy trial' time limits *** is not a jurisdictional defect"), and cases cited therein.

{¶12} Pursuant to Civ.R. 12(B)(6), a claim in a civil action can be subject to an immediate dismissal when the nature of the factual allegations are such that, even if those allegations are construed in a manner most favorable to the plaintiff/relator, it will still be impossible for him to establish a set of facts under which he would be entitled to

the requested relief. *Painesville Mini Storage, Inc. v. City of Painesville*, 11th Dist. No. 2008-L-092, 2009-Ohio-3656, at ¶35. Applying this standard to the factual allegations in the instant matter, this court holds that relator has failed to state a viable claim for a writ of mandamus. That is, no matter what other facts relator may be able to prove, he will never be entitled to the issuance of the writ because the underlying substance of his claim has already been fully litigated in his prior direct appeal.

{¶13} Consistent with the foregoing discussion, respondent's motion to dismiss is granted. It is the order of this court that relator's entire petition in mandamus is hereby dismissed.

DIANE V. GRENDALL, J., COLLEEN MARY O'TOOLE, J., TIMOTHY P. CANNON, J.,
concur.