

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

JAMES PESCI,	:	<b>PER CURIAM OPINION</b>
Relator,	:	
- v. -	:	<b>CASE NO. 2011-A-0049</b>
RICHARD GANSHIEMER, et al.,	:	
Respondents.	:	

Original Action for Writ of Habeas Corpus.

Judgment: Petition dismissed.

*James Pesci*, pro se, PID: 385-424, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Relator).

*Mike DeWine*, Ohio Attorney General, and *M. Scott Criss*, Assistant Attorney General, Criminal Justice Section, 150 East Gay Street, 16th Floor, Columbus, OH 43215-6001 (For Respondents).

PER CURIAM.

{¶1} This habeas corpus action is presently before this court for consideration of the motion to dismiss filed by respondents, Richard Ganshiemer, warden of the Lake Erie Correctional Institution, and the Ohio Department of Rehabilitation and Correction, pursuant to Ohio Civil Rule 12(B)(6). In their motion, respondents claim that relator, James Pesci, has “failed to state a claim upon which relief can be granted.” Respondents contend that the factual allegations in Pesci’s petition are not sufficient to state a viable claim, as the writ of habeas corpus relief is not available when there is or

was an adequate remedy at law and relator's sentences are not expired. For the following reasons, we hold that the dismissal of the instant action is justified.

{¶2} On August 29, 2011, Pesci filed a petition for a writ of habeas corpus, pursuant to R.C. 2725 and Article IV, Section 3(B)(1) of the Ohio Constitution. Pesci seeks a writ of habeas corpus because he contends he is being unlawfully restrained in violation of both the Ohio and United States Constitutions. Pesci argues that he is entitled to immediate release from incarceration as his sentences, imposed by Cuyahoga and Lake Counties, are void for failure to properly impose post-release control.

{¶3} In response, this court issued an alternative writ on September 12, 2011, ordering respondents to file an answer or a motion to dismiss within 20 days. Respondents submitted a motion to dismiss. Pesci then filed a brief in opposition and a motion for summary judgment.

**{¶4} Cuyahoga County**

{¶5} In three different cases in the Cuyahoga County Court of Common Pleas, Pesci pled guilty to the following: receiving stolen property (case No. CR-364532); burglary, six counts of receiving stolen property, and one count of possession of a dangerous ordnance (case No. CR-370751); and four counts of receiving stolen property (case No. CR-370752). On January 14, 2000, the trial court sentenced Pesci in all three cases to a total of six and one-half years in prison.

{¶6} On November 13, 2009, Pesci, although having served his sentences imposed by Cuyahoga County, filed in each case a motion to vacate the void judgment arguing the trial court failed to impose post-release control. The trial court denied the motions after indicating that the sentences had expired and no post-release control

would be imposed. The Eighth District Court of Appeals determined that “even if the trial court failed to advise Pesci at his plea hearings regarding postrelease control, the failure did not constitute a manifest injustice. Pesci would not have been prejudiced by the omission as he has completed his sentences and is not subject to postrelease control.” *State v. Pesci*, 8th Dist. No. 94904, 2011-Ohio-1058, ¶11.

**{¶7} Lake County**

**{¶8}** After being sentenced in Cuyahoga County, Pesci was indicted in Lake County. On January 11, 2001, the jury returned a guilty verdict against Pesci on three burglary counts. He was sentenced on January 16, 2001, to a total of seven years, to be served consecutively to the sentence he was serving out of Cuyahoga County. Pesci filed a direct appeal with this court and his conviction was upheld. *State v. Pesci*, 11th Dist. No. 2001-L-026, 2002-Ohio-7131.

**{¶9} Petition for Writ of Habeas Corpus**

**{¶10}** We note that Pesci’s entire claim for relief is based upon his belief that both of his sentences are void as a result of the trial court’s failure to properly advise him of post-release control.

**{¶11}** In *State ex rel. Pruitt v. Cuyahoga Cty. Ct. of Common Pleas*, 125 Ohio St.3d 402, 2010-Ohio-1808, the Supreme Court of Ohio noted that an extraordinary writ is not appropriate to remedy incomplete references of explanations of post-release control. Such errors are to be raised on appeal rather than by a writ.

**{¶12}** In *State v. Fischer*, the Supreme Court of Ohio held, “when a judge fails to impose statutorily mandated postrelease control as part of a defendant’s sentence, that part of the sentence is void and must be set aside.” 128 Ohio St.3d 92, 2010-Ohio-

6238, ¶127. Only the offending portion of the sentence is subject to correction; the remainder of the sentence remains valid. *Id.* at ¶17.

{¶13} With respect to the sentences imposed by the Cuyahoga County Court of Common Pleas, Pesci filed an appeal alleging the trial court's failure to properly impose post-release control. At the time Pesci moved the trial court to "vacate void sentence," he had served his sentence and, thus, resentencing was not an option. Consequently, the trial court determined that Pesci was not subject to post-release control. This decision was upheld by the Eighth District Court of Appeals based on the authority of *Fischer*, *supra*. Pesci, therefore, exercised the proper remedy at law—an appeal—to raise his claim that he did not receive proper notification of post-release control. *Briseno v. Cook*, 121 Ohio St.3d 38, 2009-Ohio-308, ¶1.

{¶14} Pesci is currently serving his sentence imposed by the Lake County Court of Common Pleas. We note that "[h]abeas corpus is available where an individual's maximum sentence has expired and he is being held unlawfully." *Adkins v. McFaul*, 76 Ohio St.3d 350, 351 (1996), citing *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344 (1994). Since Pesci has not finished serving his maximum sentence imposed by the Lake County Court of Common Pleas, he is not entitled to immediate release as a matter of law.

{¶15} Respondents' motion to dismiss is granted. It is the order of this court that the entire habeas corpus petition, filed August 29, 2011, is dismissed.

TIMOTHY P. CANNON, P.J., CYNTHIA WESTCOTT RICE, J., and MARY JANE TRAPP, J., concur.