

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

WILSHAWN W. SMITH,	:	PER CURIAM OPINION
Petitioner,	:	
- vs -	:	CASE NO. 2012-P-0025
HONORABLE JUDGE JOHN A. ENLOW,	:	
Respondent.	:	

Original Action for Writ of Habeas Corpus, Case No. 97 CR 0099.

Judgment: Petition dismissed.

Wilshawn W. Smith, pro se, 464 Zahn Drive, Apt. 4, Akron, OH 44313 (Petitioner).

Honorable Judge John A. Enlow, pro se, Portage County Common Pleas Court, 203 Main Street, Ravenna, OH 44266 (Respondent).

PER CURIAM.

{¶1} This is an original action whereby petitioner, Wilshawn W. Smith, requests a writ of habeas corpus pursuant to R.C. 2725 and Article IV, Section 3(B)(1) of the Ohio Constitution, seeking his immediate release from post-release control. For the following reasons, the petition is dismissed.

{¶2} Smith, no longer a prisoner held by the state of Ohio, argues the trial court improperly imposed post-release control, as reflected by its July 26, 2007 nunc pro tunc judgment entry holding that Smith “may” be subject to post-release control. Smith

contends that a writ of habeas corpus would immediately redress his invalid term of post-release control.

{¶3} R.C. 2725.01 defines those entitled to a writ of habeas corpus as “[w]hoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.”

{¶4} R.C. 2725.04 provides for the application of writ of habeas corpus. It mandates that the application shall specify, in part, “[t]hat the person in whose behalf the application is made is imprisoned or restrained of his liberty[.]” R.C. 2725.04(A).

{¶5} Smith acknowledges that he is no longer imprisoned but suggests that the conditions of post-release control restrain his liberty such that the writ may still be issued. As a general matter, the remedy of habeas corpus is available when the petitioner is presently in state-imposed confinement. *Tomkalski v. Maxwell*, 175 Ohio St. 377, 378 (1963), citing *In re Lockhart*, 157 Ohio St. 192 (1952). Thus, mere post-release control is typically not sufficient to merit a writ of habeas corpus. *State v. Keller*, 12th Dist. No. CA2003-10-259, 2004-Ohio-3998, ¶5, citing *State ex rel. Smirnoff v. Greene*, 84 Ohio St.3d 165, 167 (1998).

{¶6} In *Ross v. Kinkela*, 8th Dist. No. 79411, 2001 Ohio App. LEXIS 5090, the petitioner, no longer incarcerated, sought a writ of habeas corpus to be released from post-release control. The Eighth District, denying the writ, explained: “While we do not deny that post-release control necessarily carries some restraints, these circumstantial and non-custodial restraints do not give rise to habeas relief.” *Id.* at *4. Similarly, in *Harrod v. Harris*, 1st Dist. No. C-000791, 2001 Ohio App. LEXIS 2092 (May 11, 2001),

the petitioner filed a petition for a writ of habeas corpus during his post-release control term. The First Appellate District rejected the argument that post-release control was “tantamount to confinement” and denied the writ. See also *Miller v. Walton*, 163 Ohio App.3d 703, 2005-Ohio-4855 (1st Dist.) and *Totten v. Collins*, 10th Dist. No. 08AP-257, 2008-Ohio-4185.

{¶7} This court has also recognized “that a writ of habeas corpus will not lie when a petitioner is only subject to post-release control because the type of restraint involved in post-release control is not sufficient to satisfy the ‘incarceration’ requirement.” *Strzala v. Gansheimer*, 11th Dist. No. 2001-A-0090, 2002-Ohio-2665, ¶4, citing *Harrod v. Harris*, 1st Dist. No. C-000791, 2001 Ohio App. LEXIS 2092 (May 11, 2001). In this case, we likewise determine that Smith’s alleged deprivation of liberty is not of sufficient severity to warrant the extraordinary relief of habeas corpus.

{¶8} Smith additionally argues that a writ of habeas corpus is his only resort because he has no other adequate remedy at law. Generally, “[s]entencing errors by a court that had proper jurisdiction cannot be remedied by extraordinary writ’ because the petitioner ‘has or had adequate remedies in the ordinary course of law, e.g., appeal and postconviction relief, for review of any alleged sentencing error.’” *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, ¶40, quoting *State ex rel. Jaffal v. Calabrese*, 105 Ohio St.3d 440, 2005-Ohio-2591, ¶5. In accordance with this general rule, the Ohio Supreme Court has consistently held that sentencing errors are not cognizable in habeas corpus. *Id.*, citing *Majoros v. Collins*, 64 Ohio St.3d 442, 443 (1992).

{¶9} More recently, the Ohio Supreme Court addressed a similar scenario in *Patterson v. Ohio Adult Parole Auth.*, 120 Ohio St.3d 311, 2008-Ohio-6147. In

Patterson, the trial court convicted Patterson and included in his sentence a term of “up to 5 years post-release control.” *Id.* at ¶2. Upon his release from prison, Patterson filed a petition in the court of appeals for a writ of habeas corpus seeking his immediate termination from post-release control. *Id.* at ¶4. The parole authority filed a motion to dismiss, which was granted. *Id.*

{¶10} The Ohio Supreme Court held on appeal that “Patterson had an adequate remedy by way of direct appeal from his sentence to raise his claim that he did not receive proper notification about postrelease control at his sentencing hearing.” *Id.* at ¶8. The Court went on to note that it has “never held that these claims can be raised by extraordinary writ when the sentencing entry includes postrelease control, however inartfully it might be phrased.” *Id.* The Court affirmed the judgment. *Id.*

{¶11} Here, the trial court’s entry states that Smith “may” have to serve post-release control—just as equivocal as the “up to 5 years” post-release control entry in *Patterson*. Here, just as in *Patterson*, Smith had an adequate remedy at law via direct appeal to correct any deficiencies with this advisement. This is especially true because the entry includes language indicating that post-release control was part of the sentence, thereby giving Smith notice to raise any claimed errors on appeal.

{¶12} Therefore, based on the grounds of insufficient deprivation of liberty and adequate remedy at law, it is the order of this court that Smith’s petition for a writ of habeas corpus, filed on March 7, 2012, is dismissed.

TIMOTHY P. CANNON, P.J., DIANE V. GRENDALL, J., CYNTHIA WESTCOTT RICE, J., concur.