[Cite as *Draughon v. Jenkins*, 2016-Ohio-5364.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

MICKEY DRAUGHON,	:	Case No. 16CA3528
Petitioner-Appellant,	:	
v.	:	<u>DECISION AND JUDGMENT ENTRY</u>
CHARLOTTE JENKINS, WARDEN,	:	**RELEASED 07/18/2016**
Respondent-Appellee.	:	

<u>APPEARANCES</u>:

Mickey Draughon, Chillicothe, OH, pro se appellant.

Michael DeWine, Ohio Attorney General, and Jerri L. Fosnaught, Ohio Assistant Attorney General, Columbus, OH, for appellee.

Harsha, J.

{¶1} In 1997 Mickey Draughon was convicted of rape with a sexually-violent-predator specification and other crimes. Several years after his conviction and his direct appeal, the Supreme Court of Ohio ruled that a conviction of the underlying sexually violent offense cannot be used to support a sexually-violent-predator specification that is alleged in the same indictment, i.e. only a conviction that existed prior to the indictment can support such a specification. In 2015 Draughon filed a petition for a writ of habeas corpus, claiming the Supreme Court's decision applied retrospectively to his conviction. After the trial court dismissed his petition, he filed this appeal.

{¶2} First, Draughon asserts that the trial court erred in dismissing his petition for failure to state a claim upon which relief can be granted. However, even if the specification in his indictment was defective as he contends, Draughon had an adequate remedy by appeal or postconviction motion to contest the application of that

specification to his sentence. Therefore, his claim was not cognizable in habeas corpus. And contrary to his contentions, the trial court did not fraudulently convert Draughon's habeas corpus claim into something he was not arguing by substituting the term "retroactive" for his term "retrospective." The terms "retroactive" and "retrospective" may be used interchangeably in this context. And contrary to his assertion, the trial court properly applied higher court precedent.

{¶3} Next Draughon argues that the trial court erred in dismissing his habeas corpus petition based on res judicata. Because the trial court could properly take judicial notice of his prior unsuccessful appeals where he raised the same claim, his argument is meritless.

{¶4} Finally, Draughon contends that the trial court erred in dismissing his habeas corpus petition based on a failure to comply with R.C. 2969.25(A). Although Draughon's underlying substantive contention about R.C. 2969.25(A) is right, the trial court's dismissal of his petition was ultimately correct even if this alternate rationale was not. We overrule Draughon's assignments of error and affirm the judgment of the trial court.

I. FACTS

{¶5} The Franklin County Grand Jury returned an indictment charging Draughon with multiple felonies and multiple specifications; relevant for our purposes is the count for rape with a sexually-violent-predator specification. A jury convicted Draughon of all the charges and the trial court found him guilty of the specifications. The court sentenced him to an aggregate prison term of 20 years to life and adjudicated him a sexual predator.

{¶6} On direct appeal the Tenth District Court of Appeals affirmed, and the Supreme Court of Ohio denied Draughon's motion to file a delayed appeal. *See State v. Draughon*, 10th Dist. Franklin No. 97AP11-1536, 1998 WL 614637 (Sept. 1, 1998), motion for leave to file delayed appeal denied, *State v. Draughon*, 84 Ohio St.3d 1473, 704 N.E.2d 580 (1999).

{¶7} Several years later the Supreme Court of Ohio held that "[c]onviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, syllabus. However, it did not indicate that the error involved a jurisdictional defect.

{¶8} In 2011 Draughon filed motions to vacate his sentence based in part on his claim that under the Supreme Court's decision in *Smith*, his rape conviction could not support the sexually-violent-predator specification. After the trial court denied the motions, the Tenth District Court of Appeals affirmed. *State v. Draughon*, 10th Dist. Franklin Nos. 11AP-703 and 11AP-995, 2012-Ohio-1917. At ¶ 24 of its opinion the court of appeals rejected Draughon's argument that the Supreme Court's holding in *Smith* applied retroactively to his closed criminal case:

> Appellant urges that *Smith* applies to his case and, therefore, the trial court erroneously found him guilty of the specification because the underlying rape conviction did not predate the indictment. However, this court has held that *Smith* does not apply retroactively to closed cases. *State v. Haynes*, 10th Dist. No. 01AP–430 (Jan. 26, 2006) (memorandum decision). Accordingly, at the time appellant was convicted and sentenced, the trial court properly could find appellant guilty of the sexually violent predator specification based upon conduct alleged in the indictment.

{¶9} The Supreme Court of Ohio did not accept Draughon's discretionary appeal from the court of appeals' judgment. *State v. Draughon*, 132 Ohio St.3d 1516, 2012-Ohio-4021, 974 N.E.2d 113.

{¶10} In 2013 Draughon filed a motion for resentencing, again arguing that in the absence of evidence of a qualifying prior conviction the trial court erred in imposing an enhanced sentence for his rape conviction. The trial court denied the motion, and the Tenth District Court of Appeals affirmed. *State v. Draughon*, 10th Dist. Franklin No. 13AP-345, 2014-Ohio-1460. The court of appeals held that res judicata barred Draughon from relitigating this claim. *Id.* at ¶ 14. Further attempts by Draughon to appeal were rejected by the Supreme Court of Ohio and the Supreme Court of the United States. *State v. Draughon*, 139 Ohio St.3d 1419, 2014-Ohio-2487, 10 N.E.3d 739, petition for writ of certiorari denied *Draughon v. Ohio*, __ U.S. __, 135 S.Ct. 762, 190 L.Ed.2d 635 (2014).

{¶11} Finally, in 2015 Draughon filed a petition in the Ross County Court of Common Pleas for a writ of habeas corpus to compel his immediate release from the Chillicothe Correctional Institution. Draughon argued that the Franklin County trial court had lacked subject-matter jurisdiction to add a sentencing enhancement for his rape conviction because the sexually-violent-predator specification in the indictment was improper under *Smith*. He claimed that *Smith* should have been "retrospectively" applied to his convictions and sentence.

{¶12} The common pleas court granted the warden's motion and dismissed Draughon's petition. The court determined that: (1) Draughon had adequate remedies in the ordinary course of law to raise his claim; (2) res judicata precluded Draughon

from raising the same claim that he previously unsuccessfully raised; (3) Draughon had not demonstrated that he is entitled to immediate release from confinement when his maximum life sentence had not expired; and (4) Draughon failed to comply with R.C. 2969.25(A) by not filing an affidavit describing each civil action or appeal from a civil action that he had filed in the previous five years in any state or federal court.

II. ASSIGNMENTS OF ERROR

{¶13} Draughon assigns the following errors for our review:

1. APPELLANT CONTENDS THAT (1) THE TRIAL COURT ABUSED ITS DISCRETION, COMMITTED PLAIN ERROR AND DENIED HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAW PURSUANT TO THE 1ST, 5TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTON WHEN THE TRIAL COURT DELIBERATELY CONVERTED APPELLANT'S ASSIGNMENT OF ERROR INTO AN ISSUE APPELLANT NEVER INTENDED IT TO BE, AND (2) WHERE THE TRIAL COURT FAILED TO ADHERE TO WELL-ESTABLISHED UNITED STATES SUPREME COURT LAW.

2. APPELLANT CONTENDS THAT THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE 1ST, 5TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE TRIAL COURT JUDGE REFUSED TO ACCEPT APPELLANT'S STATEMENT THAT HE FILED HIS R.C. 2969.25(A) AFFIDAVIT WITH HIS HABEAS PETITION AND EVIDENCE.

3. APPELLANT SUBMITS THAT THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE 1ST, 5TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT ERRONEOUSLY APPLIED THE DOCTRINE OF RES JUDICATA TO A MOTION TO DISMISS, WHICH IS CONTRARY TO LAW.

III. STANDARD OF REVIEW

{¶14} "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers-Klarich v. Middletown Mgt., Inc.*,

125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. "In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12; *Rose v. Cochran*, 4th Dist. Ross No. 11 CA3243, 2012-Ohio-1729, ¶ 10. This same standard applies in cases involving claims for extraordinary relief, including habeas corpus. *Boles v. Knab*, 130 Ohio St.3d 339, 2011-Ohio-5049, 958 N.E.2d 554, ¶ 2 ("Dismissal under Civ.R. 12(B)(6) for failure to state a claim was warranted because after all factual allegations of [petitioner's habeas corpus] petition were presumed to be true and all reasonable inferences therefrom were made in his favor, it appeared beyond doubt that he was not entitled to the requested extraordinary relief in habeas corpus"); *Lloyd v. Robinson*, 4th Dist. Ross No. 14CA3462, 2015-Ohio-1331, ¶ 11.

IV. LAW AND ANALYSIS

A. Adequate Remedy in the Ordinary Course of Law

{¶15} In his first assignment of error Draughon asserts that the trial court erred by denying him due process and equal protection when it deliberately converted his claim into something he did not argue. He also contends the trial court failed to adhere to United States Supreme Court precedent.

{¶16} " 'Like other extraordinary-writ actions, habeas corpus is not available when there is an adequate remedy in the ordinary course of law.' " *Billiter v. Banks*, 135 Ohio St.3d 426, 2013-Ohio-1719, 988 N.E.2d 556, ¶ 8, quoting *In re Complaint for Writ of Habeas Corpus for Goeller*, 103 Ohio St.3d 427, 2004-Ohio-5579, 816 N.E.2d 594, ¶

6. Draughon had an adequate remedy by appeal or post-conviction motion to raise his claim that under *Smith*, the trial court erred in imposing the sentencing enhancement for the sexually-violent-predator specification accompanying his rape conviction.

{¶17} There is a limited exception to the general rule that prohibits extraordinary relief, i.e. a writ, where there is an adequate remedy of law. This exception permits habeas corpus petitions to raise jurisdictional claims but only when there is a patent and unambiguous lack of jurisdiction. *See, State ex rel. Mowen v. Mowen*, 119 Ohio St.3d 462, 2008-Ohio-4759, 895 N.E.2d 163, ¶ 12, citing *Ross v. Saros*, 99 Ohio St.3d 412, 2003-Ohio-4128, 792 N.E.2d 1126, ¶ 13-14. Draughon essentially claims that this exception is applicable here; he argues the trial court lacked subject-matter jurisdiction to enhance his sentence because of the grand jury's purportedly improper specification under *Smith*.

{¶18} In effect Draughon challenges the validity or sufficiency the indictment charging him with rape and the contested specification accompanying that charge. But it is a longstanding principle that " 'habeas corpus is not available to test the validity or sufficiency of an indictment or other charging instrument.' " *Galloway v. Money*, 100 Ohio St.3d 74, 2003-Ohio-5060, 796 N.E.2d 528, ¶ 6, quoting *Turner v. Ishee*, 98 Ohio St.3d 411, 2003-Ohio-1671, 786 N.E.2d 54, ¶ 7.

{¶19} Moreover, at best Draughon raises a sentencing error, not a jurisdictional flaw. Habeas corpus is inappropriate here because sentencing errors are generally not jurisdictional and thus are not cognizable in habeas corpus. *See State ex rel. O'Neal v. Bunting*, 140 Ohio St.3d 339, 2014-Ohio-4037, 18 N.E.3d 430, ¶ 13, citing *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 15, and *State ex rel.*

Hudson v. Sutula, 131 Ohio St.3d 177, 2012-Ohio-554, 962 N.E.2d 798, ¶ 1. And in fact, although *Smith* held the application of the specification improper under the then current law, it did not characterize the defect as jurisdictional.

{¶20} Likewise, courts that have addressed Draughon's substantive claim that resentencing is warranted based on the retrospective or retroactive application of *Smith* have resolved it in the ordinary course of law by post-conviction proceeding and have rejected it. *See, e.g., State v. Ditzler*, 9th Dist. Lorain No. 13CA010342, 2013-Ohio-4969, ¶ 11, quoting *Waver v. Gansheimer*, N.D. Ohio No. 1:06 CV 1239, 2009 WL 3151314 (Sept. 25, 2009) (affirming the denial of a convicted felon's postconviction motion to vacate the sexually-violent-predator specification by holding that " '[t]he *Smith* decision does not have retroactive application to closed cases' "); *State v. Haynes*, 10th Dist. Franklin No. 07AP-2007-Ohio-6540 (affirming the denial of a motion for a new trial because the court had previously rejected the convicted felon's claim that *Smith* had retroactive application to his convictions for sexually-violent-predator specifications). The Supreme Court of Ohio refused further appeals from the appellate decisions in *Ditzler* and *Haynes*. *See State v. Ditzler*, 139 Ohio St.3d 1429, 2014-Ohio-2725, 11 N.E.3d 284; *State v. Haynes*, 117 Ohio St.3d 1460, 2008-Ohio-1635, 884 N.E.2d 68.

{¶21} Notwithstanding the Supreme Court of Ohio's subsequent decision in *Smith,* Draughon has failed to establish a patent and unambiguous lack of jurisdiction on the part of the trial court to convict him of the sexually-violent-predator specification and sentence him accordingly. Consequently, the trial court did not err in dismissing his habeas corpus petition for failure to state a claim upon which relief can be granted.

{¶22} Draughon also argues in his first assignment of error that the trial court erred by deliberately converting his argument concerning the "retrospective" application of *Smith* into an argument concerning its "retroactive" application. We reject this argument because "[t]he terms 'retroactive' and 'retrospective' may be used interchangeably" in this context. *See Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, fn. 2, citing *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 1, fn. 1. And even if the trial court had used an improper term, that did not alter the correctness of its judgment that habeas corpus was not cognizable for Draughon's claim.

{¶23} Furthermore, notwithstanding Draughon's contention to the contrary, the trial court's dismissal of the habeas corpus petition was in accordance with precedent, and not contrary to "well-established United States Supreme Court law." Draughon's "reliance on federal cases indicating a right to raise this claim in federal habeas corpus cases does not warrant a different result, because 'the state writ of habeas corpus is not coextensive with the federal writ.' " *Casey v. Hudson*, 113 Ohio St.3d 166, 2007-Ohio-1257, 863 N.E.3d 171, ¶ 7, quoting *State ex rel. Smirnoff v. Greene*, 84 Ohio St.3d 165, 168, 702 N.E.2d 423 (1998).

{¶24} We overrule Draughon's first assignment of error.

B. Res Judicata

{¶25} In his third assignment of error Draughon argues that the trial court erred in applying res judicata to bar his habeas corpus claim. Draughon is correct that as a general proposition, "[w]hen the res judicata defense depends on documents outside the pleadings, the proper procedure is for the court to convert the motion to dismiss into

a motion for summary judgment and provide the opposing party with notice and an opportunity to respond." *Jefferson v. Bunting*, 140 Ohio St.3d 62, 2014-Ohio-3074, 14 N.E.3d 1036, ¶ 12. And in general it is also true that a trial court cannot take judicial notice of proceedings in another case, the rationale being that the appellate court cannot review whether the trial court correctly interpreted the prior case because the record of the prior case is not before the appellate court. *See generally* Giannelli, 1 Baldwin's Oh. Prac. Evid., Section 201.6 (3d Ed.2015).

{¶26} But both the trial court and this court can take judicial notice of Draughon's prior appellate cases, which are readily accessible on the internet. *See In the Matter of Helfrich*, 5th Dist. Licking No. 13CA20, 2014-Ohio-1933, ¶ 35, appeal not accepted for review *In re Helfrich*, 140 Ohio St.3d 1498, 2014-Ohio-4845, 18 N.E.3d 1252, citing *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 974 N.E.2d 516, ¶ 8, 10 (with the latter case holding that a court can take judicial notice of appropriate matters, including judicial opinions and public records accessible from the internet, in determining a Civ.R. 12(B)(6) motion without converting it to a motion for summary judgment); Giannelli at Section 201.6 ("[t]his rule [generally precluding a court from taking judicial notice of other cases] has been relaxed if the record is accessible on the internet"). Moreover, Draughon freely acknowledges his previous unsuccessful post-conviction cases where the courts rejected the same claim he makes here.

{¶27} Therefore, the trial court did not err in effectively taking judicial notice of Draughon's prior unsuccessful appeals, and dismissing this petition on the basis of res judicata. "Res judicata bars [Draughon] from using habeas corpus to obtain a successive appellate review of the same claim." *See, e.g., Cool v. Turner*, 135 Ohio

St.3d 185, 2013-Ohio-85, 985 N.E.2d 462, ¶ 1, citing *State ex rel. Harsh v. Sheets*, 135 Ohio St.3d 185, 2013-Ohio-85, 985 N.E.2d 462, ¶ 1. We overrule Draughon's third assignment of error.

C. R.C. 2969.25(A)

{¶28} In his second assignment of error Draughon contends that the trial court erred in dismissing his habeas corpus petition based on a failure to comply with the R.C. 2969.25(A) requirement that "[a]t the time that an inmate commences a civil action or appeal against a governmental entity or employee, the inmate shall file with the court an affidavit that contains a description of each civil action or appeal or a civil action that the inmate has filed in the previous five years in any state or federal court." He contends that he did not need to file this affidavit because he had not filed any civil action or appeal against a governmental entity or employee in the five-year period before he filed his habeas corpus petition.

{¶29} Draughon is correct. "The plain language of the statute includes no requirement that inmates who have not filed a civil action or appeal of a civil action against a government entity or employee in the requisite five-year period file this affidavit." *State ex rel. Wickensimer v. Bartleson*, 123 Ohio St.3d 154, 2009-Ohio-4695, 914 N.E.2d 1045, ¶ 3.

{¶30} Nevertheless, the trial court correctly dismissed Draughon's petition because: 1) he had an adequate remedy in the ordinary course of law and 2) res judicata barred him from raising the same claim that he had previously unsuccessfully raised in prior proceedings. Therefore, he cannot demonstrate that he suffered any prejudice from the trial court's error in citing R.C. 2969.25(A) as an alternate basis to

dismiss the petition. *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, ¶ 7 (court upheld the dismissal of a habeas corpus petition although it determined the court's rationale was incorrect by holding that "we will not reverse a correct judgment simply because it was based in whole or in part on an incorrect rationale"). We overrule Draughn's second assignment of error.

V. CONCLUSION

{¶31} We presume all factual allegations of Draughon's habeas corpus petition are true and make all reasonable inferences in his favor. However, it appears beyond doubt that he is not entitled to the requested extraordinary relief in habeas corpus because he has an adequate remedy in the ordinary course of law to raise his claim, and res judicata bars him from obtaining a successive appellate review of the same claim. We overrule Draughon's assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: ________________________________
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.