

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State ex rel. Roland Nickelson

Court of Appeals No. WD-11-039

Relator

v.

Alan Mayberry

DECISION AND JUDGMENT

Respondent

Decided: August 31, 2011

* * * * *

Roland Nickelson, pro se.

* * * * *

HANDWORK, J.

{¶ 1} On June 24, 2011, relator, Roland Nickelson, commenced this mandamus action against respondent, Judge Alan Mayberry, to compel the judge to reverse his decision denying Nickelson's May 17, 2011 petition for postconviction relief.

{¶ 2} The relevant history of this action is as follows. In February 2006, a jury found Nickelson guilty on three counts of kidnapping, one count of robbery, one count of

theft of drugs, and one count of aggravated robbery. For these offenses, relator received an aggregate sentence of 28 years and 11 months in prison.

{¶ 3} In September 2008, relator filed a postconviction petition requesting the trial court to vacate or set aside relator's conviction or sentence. On December 12, 2008, the trial court denied the petition on the grounds that it was untimely filed.

{¶ 4} In December 2010, relator filed a second postconviction petition, this time requesting resentencing. On January 13, 2011, the trial court, finding that relator had been properly sentenced, denied this motion.

{¶ 5} In his May 17, 2011 petition, relator again requested a resentencing hearing. As grounds for this petition, relator alleged deficiencies in Count 4 of the indictment against him, for robbery. The judge, in his May 26, 2011 order, addressed these alleged deficiencies and, upon finding no error—and further finding that the matter had been previously reviewed by this court—denied relator's motion.

{¶ 6} The principles that govern mandamus are well established and are as follows: (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. *State ex rel. Freed v. McMonagle*, 8th Dist. No. 82678, 2003-Ohio-3382, ¶ 7. "[A]lthough 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." *Id.* In addition, mandamus is not a substitute for appeal. *Id.* Thus, mandamus is not a vehicle by which to correct errors or procedural

irregularities in the course of a case. *State ex rel. Nelson v. Russo*, 8th Dist. No. 96706, 2011-Ohio-3698, ¶ 6. Relief in mandamus is also precluded where a relator had an adequate remedy, regardless of whether it was used. *Id.*

{¶ 7} In the instant case, relator had an adequate remedy at law, through direct appeal, to contest the respondent judge's denial of his motion. As stated by the court in *Freed*, supra, "[A]ppeal, not mandamus, is the proper remedy for correcting irregularities or errors in postconviction proceedings." *Id.* at ¶ 9. Thus, mandamus is precluded in the instant case.

{¶ 8} In addition, relator had multiple opportunities in the past to raise the argument concerning the language of the indictment. When relator did raise the argument, both the trial court and this court specifically rejected it. That this court has specifically rejected relator's argument also means that it is barred by res judicata. See *State ex rel. Nelson v. Russo*, supra, at ¶ 7.

{¶ 9} For all of the foregoing reasons, this court denies relator's application for a writ of mandamus. Costs are assessed against relator. The clerk is directed to serve upon all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DENIED.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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