

IN THE SUPREME COURT OF OHIO

MICHAEL MANNNS, : Case No. 07-1811
 :
 Petitioner-Appellant, : On Appeal from the
 : Ashtabula County
 vs. : Court of Appeals,
 : Eleventh Appellate District
 RICH GANSHEIMER, Warden, et al., :
 : Court of Appeals Case
 Respondents-Appellees. : No. 2007A0017
 :
 :

MERIT BRIEF OF APPELLEES RICH GANSHEIMER AND TERRY COLLINS

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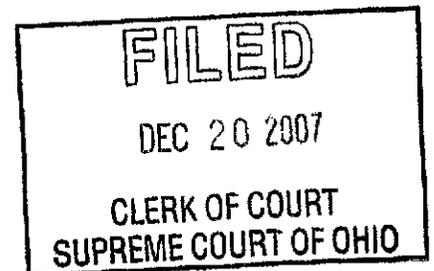


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INTRODUCTION

This case asks whether the Eleventh District Court of Appeals erred in granting summary judgment in favor of Respondents-Appellees as to Petitioner-Appellant Michael Manns' entire habeas corpus claim. The correct answer is that the appellate court's judgment was appropriate. First, Manns' failure to attach his commitment papers to his Petition required dismissal. Second, Manns has an adequate alternative legal remedy in which to raise his claims and, therefore, habeas corpus is not available. Third, Manns is not entitled to immediate release because his maximum sentence has not expired. Fourth, the Eighth District Court of Appeals for Cuyahoga County appropriately modified and reduced Manns' death sentence to a term of life imprisonment for the crime of aggravated murder.

Manns' claim to the contrary — that he was entitled to extraordinary relief in habeas corpus because he was never returned to the common pleas court for resentencing pursuant to Crim.R. 32 and 43 after his death sentence was vacated and, therefore, is being held in prison without a valid sentencing entry — finds no support in the law. *See Johnson v. Mitchell*, 85 Ohio St. 3d 123, 1999-Ohio-441; *Cotten v. Houk*, 12th Dist. No. CA2003-12-041, 2004-Ohio-5823. Consequently, the Court should reject Manns' claim and affirm the judgment below.

STATEMENT OF THE CASE AND FACTS

Petitioner-Appellant Michael Manns is state prisoner number 149-337 and is incarcerated at the Lake Erie Correctional Institution. Respondent-Appellee Rich Gansheimer is the Warden at that Institution.

The Ohio Court of Appeals for the Eighth Appellate District, Cuyahoga County, set forth the facts on direct appeal:

On November 10, 1975 at approximately 1:00 p.m., two men entered Blonder's Paint Store and were offered assistance by a Blonder's employee. As they proceeded to the check-out counter carrying gallons of paint, Duane Farrow entered the store. At that point, guns were drawn and George Clayton, a codefendant who previously had been convicted and sentenced to death for the crime in question, stated: "This is a stick-up." At least two, and possibly three, of the men had guns. Duane Farrow and a second man herded ten employees and customers at gunpoint into a washroom in the back of the store where Farrow demanded their money and jewelry.

Emerson Morgan, the manager of Blonder's, was removed from the washroom at gunpoint, grabbed by the collar and threatened to be shot if he did not find and open the safe by Michael Manns. There was no safe but there was a large unlocked wooden box which contained a smaller gray metal box. Morgan led his assailant to those boxes. Manns opened the gray metal box and found only receipts. One of Manns' fingerprints was found on the gray metal box.

After Manns took money from the cash register, Morgan was returned to the washroom. The testimony at trial indicated that within a few seconds to a few minutes of Morgan returning to the washroom, one of the robbers yelled "Let's get out of here," a shot was heard immediately thereafter, Farrow ran out of the washroom, a shuffle of feet was heard at the back door and the back door slammed. The robbers left the scene in a waiting car driven by Duran Harris.

When the victims exited the washroom a few minutes later, Detective-Sergeant William Prochazka was found lying on the floor with a gunshot wound in his left jaw. Prochazka died as a result of that wound.

George Clayton testified against the appellant. According to his testimony, Michael Manns suggested and planned the Blonder's robbery after an earlier robbery attempt of a paint store on East 40th and Prospect failed. He testified to the following: Both he and Manns walked into Blonder's and pulled out guns when Duane Farrow entered; Manns held a gun on the victims, helping Farrow direct them to the back of the store; Manns brought Morgan out of the washroom at gunpoint to find the safe; as Morgan was returned to the washroom, he (Clayton) saw what appeared to be a detective car pull by the front of the store and saw a man approaching the store; as the man entered the store, Clayton got the "drop" on him and turned him over to Manns; as he (Clayton) watched the front, Manns shot the man; the three ran out the back of the store to a waiting car; once in the car, Manns stated he shot the man because he was a "roller," which is street parlance for an undercover policeman.

The appellant took the stand and admitted going to Blonder's to steal. However, he testified that he did not have a gun at the scene, did not know the others had guns, expected to grab the cash box and run out the back of the store while Clayton and Farrow created a distraction up front, remained in the store and searched the gray metal box out of fear of Clayton, abandoned Clayton and Farrow at his first opportunity, which was before Prochazka entered the store, and went to a nearby store to call his brother for a ride home.

State v. Manns (Mar. 8, 1979), 8th Dist. No. 38526, 1979 Ohio App. LEXIS 9377, at *2-5.

On August 31, 1977, Manns was convicted of ten counts of aggravated robbery, R.C. 2911.01, ten counts of kidnapping, R.C. 2905.01, and one count of aggravated murder, R.C. 2903.01, with three specifications, to-wit: aggravated robbery, kidnapping and killing a police officer while engaged in his duties at the time of the offense. Manns was found guilty of all of the charges, including the three specifications, and was sentenced to concurrent terms of 7-25 years on the twenty aggravated robbery and kidnapping charges. After a mitigation hearing, Manns was sentenced to death by electrocution for the crime of aggravated murder. (Petition, Appendix A.)

Manns filed a direct appeal. On March 8, 1979, the Eighth District Court of Appeals for Cuyahoga County modified and reduced Manns' death sentence to a term of life imprisonment for the crime of aggravated murder. *State v. Manns* (Mar. 8, 1979), 8th Dist. No. 38526, 1979 Ohio App. LEXIS 9377, at *11 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Bell v. Ohio*, 438 U.S. 637 (1978)).

More than twenty years later, on February 20, 2007, Manns filed a petition for a writ of habeas corpus. In his petition, Manns alleged that he was entitled to extraordinary relief in habeas corpus because he was never returned to the common pleas court for resentencing pursuant to Crim.R. 32 and 43 after his death sentence was vacated. (Petition p. 4.) Manns argued that "the Supreme Court of Ohio did not have authority to substitute the death penalty with another penalty by modifying the death penalty or in any other manner." (Petition p. 6.) According to Manns, "[i]n the absence of a valid trial court journal entry, the Respondents does not have jurisdiction to hold Petitioner in commitment, the Warden at the Lake Erie Correctional Institution and the DR&C are presently illegally restraining Petitioner based upon the lack of a valid and lawful sentencing journal entry of commitment from the Cuyahoga County Court of Common Pleas." (Petition p. 8.)

On August 20, 2007, the Eleventh District Court of Appeals issued a per curiam decision granting summary judgment in favor of Respondents-Appellees:

{¶8} In this matter, petitioner claims he is being held in prison without a valid sentencing entry. He claims the trial court had a duty to conduct a new sentencing hearing following the vacation of his death sentence by the Eighth District. We disagree. The Eighth District's judgment was "modified and affirmed as modified." *State v. Manns*, 1979 Ohio App. LEXIS 9377. Modification of a trial court's judgment entry is well within the authority of an appellate court. See App.R. 12(A)(1)(a).

{¶9} Moreover, we note the Twelfth Appellate District has reached a similar conclusion. In *Cotten v. Houk*, the prisoner claimed the Supreme Court of Ohio could not impose a life sentence after vacating his death sentence. *Cotten v. Houk*, 12th Dist. No. CA2003-12-41, 2004 Ohio 5823. The Twelfth District disagreed, holding:

{¶10} “In modifying appellant’s sentence, the Ohio Supreme Court simply followed the mandate issued by the United States Supreme Court in *Lockett and Bell*. In *Lockett and Bell*, the United States Supreme Court *** reversed the Ohio Supreme Court’s decisions upholding the imposition of the death penalty and remanded those decisions to the Ohio Supreme Court for further proceedings according to law. This was precisely the very same action taken by the Ohio Supreme Court in 1978 when, fully aware of the *Lockett and Bell* decisions, it modified appellant’s sentence to life imprisonment.” *Id.* at ¶7.

{¶11} Petitioner’s life sentence was appropriately imposed by the Eighth District’s modification of the trial court’s judgment entry. Thus, there is no error regarding the jurisdiction of the sentencing court.

{¶12} Finally, petitioner has not demonstrated that this is an extraordinary circumstance in which his life sentence should be challenged. Even if petitioner had met this burden, his claim would still fail, because he had another adequate remedy at law, to wit -- a direct appeal to the Supreme Court of Ohio, to challenge the Eighth District’s imposition of a life sentence. *State ex rel. Jackson v. McFaul*, 73 Ohio St.3d at 186. *See, also, Cotten v. Houk*, at ¶8. Petitioner did not appeal the Eighth District’s decision to the Supreme Court of Ohio.

{¶13} Respondents’ motion for summary judgment is granted. It is the order of this court that final judgment is entered in favor of respondents as to petitioner’s entire habeas corpus claim.

Manns v. Gansheimer, 11th Dist No. 2007-A-0017, 2007-Ohio-4221, ¶8-13.

On October 2, 2007, Manns, pro se, filed a notice of appeal. Subsequently, Manns served his appellate brief to which Respondents-Appellees now respond.

ARGUMENT

Proposition of Law No. I:

A Petition Is Fatally Defective and Subject to Dismissal where the Petitioner Failed to Attach Copies of All of His Pertinent Commitment Papers.

Under R.C. § 2725.04(D), “[a] copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy” Failure to attach copies of the commitment papers (judgment entry of sentence, etc.) to the habeas corpus petition requires dismissal. *Boyd v. Money*, 82 Ohio St.3d 388, 389, 1998-Ohio-221; *Cornell v. Schotten*, 69 Ohio St.3d 466, 467, 1994-Ohio-74; *see also State ex rel. Parker v. Ohio Parole Bd.*, 68 Ohio St.3d 23, 23, 1993-Ohio-18; *Bloss v. Rodgers* (1992), 65 Ohio St.3d 145, 146.

This Court has held that failure to attach commitment papers to the Petition precludes effective review of the Petition. In *Bloss v. Rodgers*, (1992) 65 Ohio St.3d 145, this Court stated:

These commitment papers are necessary for a complete understanding of the petition. Without them, the petition is fatally defective. When a petition is presented to a court that does not comply with R. C. 2725.04(D), there is no showing of how the commitment was procured and there is nothing before the court on which to make a determined judgment except, or course, the bare allegations of petitioner’s application.

Bloss, 65 Ohio St.3d at 146.

The failure of Petitioner to include his commitment papers with his Petition is not cured by a later submission by, for example, the Respondent. *Cornell*, 69 Ohio St.3d at 466-67. Therefore, if the petitioner has violated R. C. 2725.04(D) by failing to attach the commitment papers to his habeas corpus petition, the petition is *fatally* defective and must be dismissed. *See State ex rel. Johnson v. Ohio Dept. of Rehab. & Corr.*, 95 Ohio St.3d 70, 71, 2002-Ohio-1629; *State ex rel. Bray v. Brigano* (2001), 93 Ohio St.3d 458, 459.

Manns attached one of his commitment papers to his habeas petition. Specifically, Manns attached a copy of the trial court's Journal Entry in case number CR-22905. (Petition, Appendix A.) However, Manns failed to attach a copy of the March 8, 1979 decision of the Eighth District Court of Appeals modifying and reducing Manns' death sentence to life imprisonment on the basis of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Bell v. Ohio*, 438 U.S. 637 (1978). *State v. Manns* (Mar. 8, 1979), 8th Dist. No. 38526, 1979 Ohio App. LEXIS 9377, at *11.

Attaching some of the paperwork is insufficient. Manns must attach *all* of his pertinent commitment papers, or his petition is *fatally* defective. See *State ex rel. Johnson*, 95 Ohio St.3d at 71; *State ex rel. Bray*, 93 Ohio St.3d at 459. Manns' failure to attach his commitment papers to his Petition requires dismissal. *Boyd v. Money*, (1998) 82 Ohio St.3d 388.

Proposition of Law No. II:

Habeas corpus is appropriate only if the petitioner is entitled to immediate release.

Habeas relief is available only when the petitioner is entitled to immediate release from confinement. *State ex rel. Massie v. Rogers*, 77 Ohio St.3d 449, 449-50, 1997-Ohio-258; *Pewitt v. Superintendent, Lorain Correctional Inst.*, 64 Ohio St.3d 470, 1992-Ohio-91; *Rollins v. Haskins* (1964), 176 Ohio St. 394; R.C. 2725.01, et seq.; R.C. 2725.17. An inmate is not entitled to release after serving his minimum sentence, but an inmate may petition for a writ of habeas corpus if his maximum sentence has expired and that individual is being held unlawfully. *Heddleston v. Mack*, 84 Ohio St. 3d 213, 214, 1998-Ohio-320; *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St. 3d 344, 346, 1994-Ohio-380; *Hoff v. Wilson* (1986), 27 Ohio St.3d 22. The burden of proof is on the petitioner to show that he is illegally detained and, therefore, entitled to immediate release. *Halleck v. Koloski* (1965), 4 Ohio St.2d 76.

In the instant case, Manns has not demonstrated that he is entitled to immediate release from confinement and, therefore, he is not entitled to a writ of habeas corpus. Manns is serving a lawful sentence which should not be disturbed.

Proposition of Law No. III:

Habeas corpus, like other extraordinary writ actions, is not available when there is an adequate remedy at law.

Habeas corpus normally may be used only to challenge the jurisdiction of the sentencing court. *Wireman v. Ohio Adult Parole Authority*, (1988) 38 Ohio St.3d 322. This Court has recognized that in certain extraordinary circumstances where there is an unlawful restraint of a person's liberty, habeas corpus will lie notwithstanding the fact that only nonjurisdictional issues are involved, but only where there is no adequate legal remedy, e.g., appeal or postconviction relief. *State ex rel. Jackson v. McFaul*, (1995) 73 Ohio St.3d 185; *State ex rel. Pirman v. Money*, (1993) 69 Ohio St.3d 591; *Adams v. Humphreys*, (1986) 27 Ohio St.3d 43, *Beard v. Williams Cty. Dept. of Social Services*, (1984) 12 Ohio St.3d 40. If another remedy exists or existed at one time, habeas should not be granted. *Luna v. Russell*, (1994) 70 Ohio St.3d 561.

This Court has long recognized that any alleged errors in sentencing cannot be heard in habeas corpus: “[E]ven assuming error in sentencing, such errors are not of the nature which are cognizable in a habeas corpus proceeding.” *Dean v. Maxwell*, (1963) 174 Ohio St. 193, 198. Habeas corpus is not the proper mode of redress where the petitioner has been convicted of a criminal offense and sentenced to imprisonment therefor by a court of competent jurisdiction; if errors or irregularities have occurred in the proceedings or sentence, a writ of error, *i.e.*, appeal, is the proper remedy. *Ex Parte Van Hagan* (1874), 25 Ohio St. 426, paragraph 2 of the syllabus; *see also Burch v. Morris* (1986), 25 Ohio St.3d 18.

As the Eleventh District Court of Appeals correctly held, Manns' had "not demonstrated that this is an ordinary circumstance in which his life sentence should be challenged. Even if petitioner had met this burden, his claim would still fail, because he had another adequate remedy at law, to wit – a direct appeal to the Supreme Court of Ohio, to challenge the Eighth District's imposition of a life sentence." *Manns v. Gansheimer*, 11th Dist No. 2007-A-0017, 2007-Ohio-4221, ¶12 (citing *State ex rel. Jackson v. McFaul* (1995), 73 Ohio St.3d 185, 186 and *Cotten v. Houk*, 12th Dist. No. CA2003-12-041, 2004-Ohio-5823, ¶8). However, as the appellate court correctly noted, Manns' did not appeal the appellate court's decision to impose a life sentence. *Id.* In fact, Manns apparently took no action to challenge his life sentence for over twenty years, and he is not permitted to now challenge the alleged sentencing error issue in a habeas proceeding.

Proposition of Law No. IV:

The Eighth District Court of Appeals for Cuyahoga County appropriately modified and reduced Manns' death sentence to a term of life imprisonment for the crime of aggravated murder.

Even if Manns' claim could be considered in this habeas action, it has no merit. Despite Manns' claims that his "rights as provided for in Crim. R. 43(A) were violated," (Appellant's Brief p. 11), the Rules of Criminal Procedure, including Crim.R. 32 and 43, do not apply to cases on appeal. *Johnson v. Mitchell* (1999), 85 Ohio St. 3d 123, 124, 1999-Ohio-441 (citing Crim.R. 1(C)(1) and *State v. McGettrick* (1987), 31 Ohio St. 3d 138, 141, fn. 5).

Additionally, R.C. 2929.06, which requires a resentencing hearing in the trial court when a death sentence is vacated on appeal based on the unconstitutionality of the statutory procedures for imposing the death penalty, did not become effective until 1981, a few years after the vacation of Manns' death sentence. *See Johnson v. Mitchell*, 85 Ohio St. 3d at 124. Prior to the

enactment of Section 2929.06 in 1981, there was no comparable statute ordering a new hearing when a death sentence was vacated. Rather, whenever this Court vacated a death sentence, it modified the sentence and reduced it to life imprisonment. *See, e.g., State v. Leigh* (1972), 31 Ohio St.2d 97; *State v. Tingler* (1972), 31 Ohio St. 2d 100; *see also State v. Davis* (1978), 56 Ohio St. 2d 51, 58; *State v. Cornely* (1978), 56 Ohio St. 2d 1, 7; *State v. Kaiser* (1978), 56 Ohio St. 2d 29, 34.

As the Eleventh District Court of Appeals correctly determined, “[t]he Eighth District’s judgment was ‘modified and affirmed as modified. . . . Modification of a trial court’s judgment entry is well within the authority of an appellate court. See App.R.12(A)(1)(a).’” *Manns v. Gansheimer*, 11th Dist No. 2007-A-0017, 2007-Ohio-4221, ¶8.

For the foregoing reasons, Manns was not entitled to a sentencing hearing when the Eighth District Court of Appeals modified and reduced his sentence in 1978. As the appellate court correctly determined, Manns’ “life sentence was appropriately imposed by the Eight District’s modification of the trial court’s judgment entry. There is no error regarding the jurisdiction of the sentencing court.” *Manns v. Gansheimer*, 11th Dist No. 2007-A-0017, 2007-Ohio-4221, ¶11. As a result, Manns is not entitled to a writ of habeas corpus.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh District Court of Appeals granting summary judgment in favor of Respondents-Appellees as to Manns' entire habeas corpus claim was appropriate, and this Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Merit Brief of Respondents-Appellees Rich Gansheimer and Terry Collins* has been forwarded to Michael Manns, #149-337, at the Lake Erie Correctional Institution, 501 Thompson Road, P.O. Box 8000, Conneaut, Ohio 44030, via U.S. mail, postage prepaid, this 20th day of December, 2007.


JERRI L. FOSNAUGHT
Assistant Attorney General

APPENDIX

LEXSEE

MICHAEL MANNs, Petitioner, vs RICH GANSHEIMER, WARDEN, et al., Respondents.

CASE NO. 2007-A-0017

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, ASHTABULA COUNTY

2007 Ohio 4221; 2007 Ohio App. LEXIS 3819

August 17, 2007, Decided

PRIOR HISTORY: *State v. Manns, 1979 Ohio App. LEXIS 9377 (Ohio Ct. App., Cuyahoga County, Mar. 8, 1979)*

DISPOSITION: **[**1]** Writ Denied.

COUNSEL: Michael Manns, Pro se, Conneaut, OH (Petitioner).

Marc E. Dann, Attorney General, and Jerri L. Fosnaught, Assistant Attorney General, Columbus, OH (For Respondents).

JUDGES: CYNTHIA WESTCOTT RICE, P.J., DIANE V. GRENDALL, J., COLLEEN MARY O'TOOLE, J., concur.

OPINION

PER CURIUM OPINION

Original Action for Writ of Habeas Corpus.

PER CURIAM.

[*P1] This action is currently before this court for consideration of a petition for writ of habeas corpus filed by petitioner, Michael Manns. Respondents, Rich Gansheimer, Warden of the Lake Erie Correctional Institution, and Terry Collins, Director of the Lake Erie Correctional Institution, have filed a motion for summary judgment.

[*P2] In 1977, petitioner was convicted of ten counts of aggravated robbery, ten counts of kidnapping, and one count of aggravated murder. The convictions related to crimes committed during a paint store robbery in Cuyahoga County. Petitioner received prison sentences of seven to 25 years on each of the aggravated

robbery and kidnapping convictions, to be served concurrently to each other. In addition, the Cuyahoga County Court of Common Pleas sentenced petitioner to death for the aggravated murder conviction.

[*P3] **[**2]** Petitioner appealed his convictions and death sentence to the Eighth District Court of Appeals. The Eighth District affirmed petitioner's convictions. *State v. Manns, 8th Dist. No. 38526, 1979 Ohio App. LEXIS 9377*. However, based upon the United States Supreme Court's decisions in *Lockett v. Ohio (1978)*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 and *Bell v. Ohio (1978)*, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010, the Eighth District modified petitioner's death sentence to a term of life imprisonment for his aggravated murder conviction. *1979 Ohio App. LEXIS 9377, at *11*. There is no evidence in the record suggesting that petitioner appealed the Eighth District's decision to the Supreme Court of Ohio.

[*P4] In February 2007, Petitioner filed his original action for a writ of habeas corpus in this court. In March 2007, this court issued an alternative writ. Thereafter, respondents filed their motion for summary judgment. Petitioner has not responded to respondents' motion for summary judgment.

[*P5] Pursuant to *Civ.R. 56(C)*, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dresher v. Burt (1996)*, 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264. In addition, it must appear from the evidence **[**3]** and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party. *Civ.R. 56(C)*

[*P6] In another habeas corpus case, this court recently held that "although a question as to the sufficiency of the [petitioner's] allegations should usually be raised in a *Civ.R. 12(B)(6)* motion, a sufficiency argument can

form the basis of a proper motion for summary judgment." (Citation omitted.) *Thompson v. Gansheimer*, 11th Dist. No. 2006-A-0086, 2007 Ohio 3477, at P16. This approach is consistent with the directive articulated by the Supreme Court of Ohio -- "if the petition states a claim for which habeas corpus relief cannot be granted, the court should not allow the writ and should dismiss the petition." *Pegan v. Crawmer* (1995), 73 Ohio St.3d 607, 609, 1995 Ohio 175, 653 N.E.2d 659.

[*P7] Most commonly, a petition for a writ of habeas corpus attacks the jurisdiction of the sentencing court. *State ex rel. Jackson v. McFaul* (1995), 73 Ohio St.3d 185, 187, 1995 Ohio 228, 652 N.E.2d 746. In addition, in extraordinary circumstances, the petition may attack nonjurisdictional issues, but only if there is no other "adequate legal remedy, e.g., appeal or postconviction relief." *Id.* at 186.

[*P8] In this matter, [**4] petitioner claims he is being held in prison without a valid sentencing entry. He claims the trial court had a duty to conduct a new sentencing hearing following the vacation of his death sentence by the Eighth District. We disagree. The Eighth District's judgment was "modified and affirmed as modified." *State v. Manns*, 1979 Ohio App. LEXIS 9377. Modification of a trial court's judgment entry is well within the authority of an appellate court. See *App.R. 12(A)(1)(a)*.

[*P9] Moreover, we note the Twelfth Appellate District has reached a similar conclusion. In *Cotten v. Houk*, the prisoner claimed the Supreme Court of Ohio could not impose a life sentence after vacating his death sentence. *Cotten v. Houk*, 12th Dist. No. CA2003-12-41, 2004 Ohio 5823. The Twelfth District disagreed, holding:

[*P10] "In modifying appellant's sentence, the Ohio Supreme Court simply followed the mandate issued by the United States Supreme Court in *Lockett and Bell*. In *Lockett and Bell*, the United States Supreme Court *** reversed the Ohio Supreme Court's decisions upholding the imposition of the death penalty and remanded those decisions to the Ohio Supreme Court for further proceedings according to [**5] law. This was precisely the very same action taken by the Ohio Supreme Court in 1978 when, fully aware of the *Lockett and Bell* decisions, it modified appellant's sentence to life imprisonment." *Id.* at P7.

[*P11] Petitioner's life sentence was appropriately imposed by the Eighth District's modification of the trial court's judgment entry. Thus, there is no error regarding the jurisdiction of the sentencing court.

[*P12] Finally, petitioner has not demonstrated that this is an extraordinary circumstance in which his life sentence should be challenged. Even if petitioner had met this burden, his claim would still fail, because he had another adequate remedy at law, to wit -- a direct appeal to the Supreme Court of Ohio, to challenge the Eighth District's imposition of a life sentence. *State ex rel. Jackson v. McFaul*, 73 Ohio St.3d at 186. See, also, *Cotten v. Houk*, at P8. Petitioner did not appeal the Eighth District's decision to the Supreme Court of Ohio.

[*P13] Respondents' motion for summary judgment is granted. It is the order of this court that final judgment is entered in favor of respondents as to petitioner's entire habeas corpus claim.

CYNTHIA WESTCOTT RICE, P.J., [**6] DIANE V. GRENDALL, J., COLLEEN MARY O'TOOLE, J., concur.

LEXSEE

STATE OF OHIO, APPELLEE v. MICHAEL MANN, APPELLANT

No. 38526

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

1979 Ohio App. LEXIS 9377

March 8, 1979

NOTICE:

PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS AND EXCEPTIONS.

SUBSEQUENT HISTORY: Writ of habeas corpus denied *Manns v. Gansheimer*, 2007 Ohio 4221, 2007 Ohio App. LEXIS 3819 (Ohio Ct. App., Ashtabula County, Aug. 17, 2007)

PRIOR HISTORY: [*1] APPEAL FROM COMMON PLEAS COURT, No. 22905 Cr.

DISPOSITION: The Judgment of the Trial Court is Modified and is Affirmed as Modified.

COUNSEL: For Plaintiff-Appellee: John T. Corrigan

For Defendant-Appellant: John W. Martin

JUDGES: PARRINO, C.J., JACKSON, J., CORRIGAN, J., CONCUR

OPINION BY: PARRINO

OPINION

JOURNAL ENTRY AND OPINION

PARRINO, C.J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is modified and is affirmed as

modified. Each assignment of error was reviewed and upon review the following disposition made:

Michael Manns, the appellant, was convicted of ten counts of aggravated robbery, *R.C. 2911.01*, ten counts of kidnapping, *R.C. 2905.01*, and one count of aggravated murder, *R.C. 2903.01*, with three specifications, to-wit: aggravated robbery, kidnapping and killing a police officer while engaged in his duties at the time of the offense. See § O R.C. 2929.04(A)(6) and (7). He was found guilty of all of the charges, including the three [*2] specifications, and was sentenced to concurrent terms of 7-25 years on the twenty aggravated robbery and kidnapping charges. After a mitigation hearing, he was sentenced to death by electrocution for aggravated murder.

On November 10, 1975 at approximately 1:00 p.m., two men entered Blonder's Paint Store and were offered assistance by a Blonder's employee. As they proceeded to the check-out counter carrying gallons of paint, Duane Farrow entered the store. At that point, guns were drawn and George Clayton, a codefendant who previously had been convicted and sentenced to death for the crime in question, stated: "This is a stick-up." At least two, and possibly three, of the men had guns. Duane Farrow and a second man herded ten employees and customers at gunpoint into a washroom in the back of the store where Farrow demanded their money and jewelry.

Emerson Morgan, the manager of Blonder's, was removed from the washroom at gunpoint, grabbed by the collar and threatened to be shot if he did not find and open the safe by Michael Manns. There was no safe but there was a large unlocked wooden box which contained a smaller gray metal box. Morgan led his assailant to those boxes. Manns [*3] opened the gray metal box and found only receipts. One of Manns' fingerprints was found on the gray metal box.

After Manns took money from the cash register, Morgan was returned to the washroom. The testimony at trial indicated that within a few seconds to a few minutes of Morgan returning to the washroom, one of the robbers yelled "Let's get out of here," a shot was heard immediately thereafter, Farrow ran out of the washroom, a shuffle of feet was heard at the back door and the back door slammed. The robbers left the scene in a waiting car driven by Duran Harris.

When the victims exited the washroom a few minutes later, Detective-Sergeant William Prochazka was found lying on the floor with a gunshot wound in his left jaw. Prochazka died as a result of that wound.

George Clayton testified against the appellant. According to his testimony, Michael Manns suggested and planned the Blonder's robbery after an earlier robbery attempt of a paint store on East 40th and Prospect failed. He testified to the following: Both he and Manns walked into Blonder's and pulled out guns when Duane Farrow entered; Manns held a gun on the victims, helping Farrow direct them to the back of the [*4] store; Manns brought Morgan out of the washroom at gunpoint to find the safe; as Morgan was returned to the washroom, he (Clayton) saw what appeared to be a detective car pull by the front of the store and saw a man approaching the store; as the man entered the store, Clayton got the "drop" on him and turned him over to Manns; as he (Clayton) watched the front, Manns shot the man; the three ran out the back of the store to a waiting car; once in the car, Manns stated he shot the man because he was a "roller," which is street parlance for an undercover policeman.

The appellant took the stand and admitted going to Blonder's to steal. However, he testified that he did not have a gun at the scene, did not know the others had guns, expected to grab the cash box and run out the back of the store while Clayton and Farrow created a distraction up front, remained in the store and searched the gray metal box out of fear of Clayton, abandoned Clayton and Farrow at his first opportunity, which was before Prochazka entered the store, and went to a nearby store to call his brother for a ride home.

Michael Manns appeals the judgment of the trial court and assigns nine errors.

"I. THE TRIAL [*5] COURT'S ADMISSION OF TESTIMONY REGARDING OTHER ACTS OF THE DEFENDANT VIOLATED THE MANDATE OF R.C. 2945.59, THEREBY SEVERELY PREJUDICING THE DEFENDANT AND DENYING HIM A FAIR TRIAL."

According to Clayton's testimony, he and Manns attempted to rob a paint store on East 40th and Prospect

approximately two hours before the Blonder's robbery in question. Both he and Manns drew guns but left the store immediately upon seeing the clerk "mess with the desk." Harris and Farrow waited in the car for the two-some. The group then drove around discussing another paint store to rob and ultimately chose the Blonder's store in question.

The appellant contends this testimony was improperly admitted as a prior criminal act. We disagree.

Defense counsel's opening statement and line of cross-examination indicated the presence of the appellant at the scene was not in issue but whether he had a gun, knew the others intended to use guns and abandoned the criminal activity before the detective entered were critical issues in the case.

In order for evidence of a prior act to be admissible, there must be substantial evidence that the appellant committed the prior act, *State v. Burson* (1974), 38 Ohio [*6] St. 2d 157, the prior act must be relevant to proof of the guilt of the appellant of the offense in question, *State v. Curry* (1975), 43 Ohio St. 2d 66, there must be an inextricable relationship between the crime in question and the prior act, *State v. Lytle* (1976), 48 Ohio St. 2d 391, and the prior act must be admitted for one of the purposes enumerated in R.C. 2945.59, i.e., to prove motive, intent, absence of mistake or accident and common scheme, plan or system in doing the act in question.

In the instant case, Clayton's testimony was substantial evidence that Manns committed the prior act. The prior robbery was not admitted for the purpose of showing the accused had a propensity for crime. Rather, the circumstances of the prior robbery had probative significance because it demonstrated the accused's knowledge that Clayton had a gun and intended to commit his theft offenses at gunpoint as well as negative the appellant's assertion that he acted under duress. The temporal proximity of the prior act and the method employed to rob the paint store on East 40th and Prospect which formed the background to the time in question was relevant to show the appellant's intent [*7] to willingly participate in the crime of aggravated robbery rather than theft at Blonder's.

The first assignment of error is not well taken.

"II. THE FAILURE OF THE STATE TO PROVIDE DISCOVERY IN ACCORDANCE WITH THE OHIO RULES OF CRIMINAL PROCEDURE SEVERELY PREJUDICED THE DEFENDANT AND DENIED HIM A FAIR TRIAL."

The appellant also contests the introduction of the prior criminal act through Clayton's testimony for the reason that the prosecutor did not inform the defense of

the substance of this testimony prior to trial in compliance with discovery. The record reveals that a few weeks before Clayton testified, he gave oral statements to the prosecutor concerning the substance of the testimony in question which the prosecutor neither reduced to writing nor recorded. The defense had filed a motion for discovery to which the prosecutor responded that oral statements had been made by the codefendant. (Tr. 908). The trial court permitted Clayton's testimony to stand on two grounds: firstly, oral statements not reduced to writing are not discoverable, citing *State v. Montalvo* (1974), 47 Ohio App. 2d 296; and, secondly, that the defense failed to file a motion to compel in accordance [*8] with *State v. Hicks* (1976), 48 Ohio App. 2d 135.

We need not decide whether *State v. Montalvo, supra*, announces the applicable law in this jurisdiction for we find that *State v. Hicks, supra*, disposes of the issue before us. The defense failed to file a motion to compel discovery after it became aware that the codefendant had made oral statements. The failure to file such a motion constitutes a waiver of the appellant's right to discovery.

In addition to the *Hicks* rationale, we would overrule this assignment of error for the reason that no prejudice to the accused is demonstrated on the record. The test of prejudice is not whether the testimony incriminated the accused, but whether the undisclosed information surprised the defense so that it could not adequately present its case or cross-examine on the evidence presented. The appellant asserts that the prosecutor's failure to disclose this information prevented a thorough investigation of the prior crime. Yet, defense counsel did not request a continuance or indicate the need for further investigation to the court on the record despite the fact that Clayton's testimony already had been interrupted with the testimony [*9] of two intervening witnesses and a continuance would have been reasonable under the circumstances. We also note that further investigation could have been conducted on the weekend between Clayton's testimony and the final presentation of appellant's case. There were no defense witnesses or suggestions to the court following the weekend that the prior criminal activity did not occur as the appellant now argues on appeal.

The appellant's failure to request a continuance or present any evidence of prejudice to the trial court coupled with the vigorous and thorough examination of Clayton by defense counsel disclosed on the record lead us to the conclusion that the appellant was not prejudiced by Clayton's testimony.

The second assignment of error is overruled.

"III. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE STATE TO PRESENT THE REBUTTAL TESTIMONY OF GENE YOUNG, RALPH TKROGH, AND BENNY RICHARDSON,

THEREBY PREJUDICING THE DEFENDANT AND DENYING HIM A FAIR TRIAL."

During the state's case in chief, there was evidence that one of the guns carried by the assailants had a pearl handle and that the detective was shot by a .38. On rebuttal the state presented the testimony [*10] of Gene Young and Ralph Tkrogh to show that a pearl-handled .38 was taken from the appellant in February of 1974, contradicting the appellant's denial of that incident.

Benny Richardson also testified on rebuttal and denied that he had seen the appellant with a pearl-handled .38 approximately three weeks prior to the Blonder's incident. The prosecutor attempted to impeach Richardson with a prior statement by Richardson to police, which Richardson denied was a true statement and insisted was made under threat. Richardson's statement to police was admitted into evidence with the instruction that it was not substantive evidence and could be used only to impeach the witness' credibility.

The assignment of error is not well taken for several reasons. Firstly, the record contains no objection to the testimony of these witnesses by defense counsel. This court will not consider errors assigned for the first time on appeal. See *State v. Williams* (1977), 51 Ohio St. 2d 112. Secondly, the presentation of rebuttal testimony is within the discretion of the trial court. See § O.R.C. 2945.10(D); *State v. Bayless* (1976), 48 Ohio St. 2d 73, syllabus No. 3. The appellant has not sustained [*11] the heavy burden of demonstrating the unfairness and prejudice to the accused by the admission of the rebuttal testimony. Thirdly, the rebuttal testimony was relevant to the material issue regarding the appellant's familiarity with weapons, his expectations that his accomplices would carry and use weapons, and to impeach the appellant's credibility.

The remaining six assignments of error deal with the mitigation hearing and the imposition of the death penalty. We need not address these assignments of error in light of *Lockett v. Ohio* (1978), U.S. , 57 L. Ed. 2d 973, and *Bell v. Ohio* (1978), U.S. , 57 L. Ed. 2d 1010, holding R.C. 2929.04(B) unconstitutional. In accordance with that opinion, that portion of appellant's sentence which imposed the death penalty is hereby modified and reduced to life imprisonment for the crime of aggravated murder.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

A certified copy of this entry shall [*12] constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. Exceptions.

N.B. This entry is made pursuant to the third sentence of *Rule 22(D), Ohio Rules of Appellate Procedure*.

This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

LEXSEE 2004 OHIO 5823

**PRINCE CHARLES COTTEN, SR., Petitioner-Appellant, -vs- MARC C. HOUK,
WARDEN, Respondent-Appellee.**

CASE NO. CA2003-12-041

**COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, MADI-
SON COUNTY**

2004 Ohio 5823; 2004 Ohio App. LEXIS 5283

November 1, 2004, Decided

SUBSEQUENT HISTORY: Stay denied by *Cotten v. Houck*, 104 Ohio St. 3d 1430, 2004 Ohio 6921, 2004 Ohio LEXIS 3194 (2004)

Discretionary appeal not allowed by *Cotten v. Houck*, 2005 Ohio 1024, 2005 Ohio LEXIS 520 (Ohio, Mar. 16, 2005)

PRIOR HISTORY: **[**1]** CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS. Case No. 2003CV-08-269.

DISPOSITION: Judgment of the Court of Common Pleas affirmed.

COUNSEL: Prince Charles Cotten, Sr., petitioner-appellant, f Pro se, London, OH.

James Petro, Ohio Attorney General, M. Scott Criss, Corrections Litigation Section, Columbus, OH, for respondent-appellee.

JUDGES: POWELL, J. YOUNG, P.J., and VALEN, J., concur.

OPINION BY: POWELL

OPINION

POWELL, J.

[*P1] Petitioner-appellant, Prince Charles Cotten, Sr., appeals a decision of the Madison County Court of Common Pleas dismissing his petition for a writ of habeas corpus filed against respondent-appellee, Marc C. Houk, warden of the correctional facility where appellant is currently incarcerated and serving a life sentence.

[*P2] In 1976, appellant was convicted of aggravated murder and sentenced to death. While reviewing

the conviction and sentence on direct appeal, the Supreme Court of Ohio -- acting in conformity with the mandates issued in *Lockett v. Ohio* (1978), 438 U.S. 586, 57 L. Ed. 2d 973, 98 S.Ct. 2954, and *Bell v. Ohio* (1978), 438 U.S. 637, 57 L. Ed. 2d 1010, 98 S.Ct. 2977, wherein the United States Supreme Court held Ohio's death penalty scheme unconstitutional -- subsequently modified **[**2]** and reduced appellant's death sentence to life imprisonment. See *State v. Cotton* (1978), 56 Ohio St. 2d 8, at 13-14, 381 N.E.2d 190.

[*P3] Nearly 15 years later, appellant filed his habeas corpus petition, claiming he was being unlawfully held under the Ohio Supreme Court's 1978 decision reducing his sentence to life imprisonment. The common pleas court granted appellee's motion to dismiss on grounds that appellant failed to challenge the jurisdiction of the sentencing court and because appellant was not entitled to immediate release since his life sentence had not expired.

[*P4] Appellant submits five assignments of error on appeal. Although touching on numerous and diverse issues, appellant's assignments can all be narrowed to the principal claim that the common pleas court erred in dismissing the petition for habeas corpus.

[*P5] Habeas corpus is an extraordinary civil remedy to enforce the right of personal liberty and is available to free a person unlawfully detained for any reason, but only where there is no adequate legal remedy. See *State ex rel. Jackson v. McFaul*, 73 Ohio St. 3d 185, 1995 Ohio 228, 652 N.E.2d 746. Habeas corpus is not a substitute for, nor **[**3]** is it a concurrent remedy with, a direct appeal. *Walker v. Maxwell* (1965), 1 Ohio St. 2d 136, 137, 205 N.E.2d 394.

[*P6] Appellant suggests that the Ohio Supreme Court could not impose a life sentence while reviewing his case on direct appeal inasmuch as the state's highest

court was without jurisdiction to sentence appellant. Instead, appellant claims only the common pleas court had jurisdiction to impose a sentence other than the death penalty. In this regard, appellant argues he is challenging the jurisdiction of the "sentencing court," i.e., the Ohio Supreme Court.

[*P7] In modifying appellant's sentence, the Ohio Supreme Court simply followed the mandate issued by the United States Supreme Court in its decisions in *Lockett and Bell*. In *Lockett and Bell*, the United States Supreme Court granted certiorari to review the Ohio Supreme Court's decisions in those death penalty cases. The Supreme Court reversed the Ohio Supreme Court's decisions upholding the imposition of the death penalty and remanded those decisions to the Ohio Supreme Court for further proceedings according to law. This was precisely the very same action taken by the Ohio Supreme Court [**4] in 1978 when, fully aware of the *Lockett and Bell* decisions, it modified appellant's sentence to life imprisonment.

[*P8] In addition, habeas corpus will not lie where an alleged error or irregularity in a criminal proceeding can be challenged on appeal, and where appeal is or was available. *Davie v. Edwards*, 80 Ohio St. 3d 170, 1997 Ohio 127, 685 N.E.2d 228. Here, appellant could have directly appealed the Ohio Supreme Court's 1978 decision to impose a life sentence but chose not to.

[*P9] Finally, appellant is not entitled to habeas corpus unless "his maximum sentence has expired and [he] is being held unlawfully." *Frazier v. Stickrath* (1988), 42 Ohio App. 3d 114, 116, 536 N.E.2d 1193 (emphasis added). Appellant has not served his maximum sentence and is not being held unlawfully.

[*P10] Based upon the foregoing, we conclude that appellant was not entitled to habeas corpus relief. The common pleas court did not err in granting appellee's motion to dismiss appellant's petitions. Appellant's assignments of error are hereby overruled.

[*P11] Judgment affirmed.

YOUNG, P.J., and VALEN, J., concur.