

ORIGINAL

IN THE SUPREME COURT OF OHIO

KERMIT HARRIS,

RELATOR,

CASE NO. 2010-0427

-vs-

THE HONORABLE MARY EILEEN KILBANE,

RESPONDENT.

RESPONDENT'S MOTION TO DISMISS COMPLAINT
FOR WRIT OF PROHIBITION

RELATOR, PRO SE

COUNSEL FOR RESPONDENT

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WILLIAM D. MASON
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RECEIVED
MAR 19 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 18 2010
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

The history of Cuyahoga County Court of Common Pleas case number CR-97-346368 has been summarized by the Eighth District Court of Appeals:

On January 8, 1997, Harris was charged with aggravated robbery, receiving stolen property, attempted murder, and felonious assault. The attempted murder and felonious assault counts both contained peace officer specifications. On May 6, 1997, a jury convicted Harris on all counts. He received an aggregate sentence of 24 years of imprisonment.

Harris filed a direct appeal, and his convictions were ultimately affirmed. See *State v. Harris* (June 18, 1998), Cuyahoga App. No. 72687 (*Harris I*). Subsequently, Harris filed a writ of mandamus seeking a new trial, which this court subsequently denied. See *State ex rel. Harris v. Cuyahoga Cty. Common Pleas Court* (Dec. 24, 1998), Cuyahoga App. No. 75216 (*Harris II*).

On December 18, 2008, the trial court sua sponte ordered that Harris be brought from Lake Eric Correctional Institution, where he was serving his sentence, for a resentencing hearing. On February 5, 2009, at the resentencing hearing, the trial court noted that, although Harris had been advised of postrelease control at his initial sentencing hearing, the notification was not documented in the sentencing entry. The trial court then advised Harris of his postrelease control responsibilities, stated that the original sentence would still apply, and issued a journal entry documenting Harris's original sentence and noting that he would be subject to five years of postrelease control.

State v. Harris, Cuyahoga App. No. 92892, 2010-Ohio-362, at ¶¶ 4-7.

Relator Kermit Harris appealed the trial court's resentencing of February 5, 2009, to the Eighth District Court of Appeals. *Id.* (*Harris III*). In his appeal Relator claimed the trial court's failure to properly impose post-release control in the original sentencing entry required a de novo sentencing hearing. The State conceded this issue and the court of appeals agreed and remanded the case to the trial court for a de novo sentencing hearing.¹

¹ The de novo sentencing hearing has not yet occurred at the time of the filing of Respondent's motion to dismiss in the instant case.

In his appeal in *Harris III* Relator also raised two additional assignments of error in which he claimed his original indictment of January 8, 1997 was defective for the identical reasons set forth in his complaint for writ of prohibition filed in the instant case. The Eighth District Court of Appeals found that Relator's claims concerning the alleged defective indictment of January 8, 1997 were barred by res judicata. *State v. Harris*, Cuyhaga App. No. 92892, 2010-Ohio-362, at ¶¶ 16-18.

On March 5, 2010, Relator filed a complaint for writ of prohibition ("Complaint") against Judge Mary Eileen Kilbane of the Eighth District Court of Appeals that is currently before this Court.

II. LAW AND ANALYSIS

A. Relator's Complaint Is Defective

Under R.C. 2969.25(A) an inmate who commences a civil action against a government entity or employee must file an affidavit that contains a description of each civil action or appeal of a civil action that an inmate has filed in the previous five years in any state or federal court. Relator has not filed an affidavit with his Petition that contains a description of each civil action or appeal of a civil action that he has filed in the previous five years.

In addition, under R.C. 2969.25(C) an inmate who files a complaint against a government entity or employee who seeks waiver of prepayment of the court's full filing fees must file with the complaint a waiver that contains: (1) a statement that sets forth the balance in the inmate account for the preceding six months, as certified by the institutional cashier; and (2) a statement that sets forth all other cash and things of value owned by the inmate. Although Relator did attach an affidavit of indigency to his Complaint, he has failed to provide a statement that sets forth the balance of his inmate account as certified by the institutional cashier or a statement that

sets forth all other cash and things of value owned by him as mandated by R.C. 2969.25(C).

The failure of Relator to comply with the requirements of 2969.25 warrants dismissal of his petition for writ of prohibition. *State ex rel. Manns v. Henson*, 119 Ohio St.3d 348, 2008-Ohio-4478, at ¶ 4 (court dismissed relator's complaint for writ of prohibition for failure to comply with R.C. 2969.25(A) and (C)).

B. Relator's Claims are barred by res judicata

In his Complaint Relator claims that the indictment in Cuyahoga County Court of Common Pleas case number CR-97-346368 was defective because: (1) the charge of aggravated robbery in count 1 of the indictment failed to include a missing mens rea; and (2) the charge of attempted murder in count 3 of the indictment incorrectly listed "2913.51" (receiving stolen property) as the murder charge. As a result, Relator claims, the trial court did not have jurisdiction to resentence Relator on February 5, 2009. (Relator Complaint at pp. 4-5).

In his appeal in *State v. Harris*, Cuyahoga App. No. 92892, 2010-Ohio-362 (*Harris III*), Relator raised these identical issues. The Eighth District Court of Appeals found that these claims concerning the alleged defective indictment of January 8, 1997 were barred by res judicata. *Id.* at ¶¶ 16-18.

Res judicata bars the litigation of all claims that either were or might have been litigated in a first lawsuit. *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, at ¶ 14. Because Relator's claims concerning the alleged defective indictment of January 8, 1997 have already been litigated in the Eighth District Court of Appeals, Relator's lawsuit by way of complaint for writ of prohibition is barred by res judicata.

C. Relator has not satisfied the requirements to be entitled to a writ of prohibition

To be entitled to the requested writ of prohibition, Relator must establish that (1) Respondent Judge Kilbane was about to exercise judicial or quasi-judicial power, (2) the exercise of that power was unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, at ¶ 7.

Relator has failed to establish that Respondent Judge Kilbane was about to exercise judicial power, that any exercise of judicial power was unauthorized by law, or that denying Relator's Complaint would result in injury for which no other adequate remedy exists in the ordinary course of law. Respondent Judge Kilbane along with the other two judges on the panel in *State v. Harris*, Cuyahoga App. No. 92892, 2010-Ohio-362 (*Harris III*) have already decided the issues before the court and rendered a written opinion that has released. "Prohibition is a preventive writ rather than a corrective remedy and is designed to prevent a tribunal from proceeding in a matter which it is not authorized to hear and determine. * * * It cannot be used to review the regularity of an act already performed." *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 248, 1992-Ohio-20.

In fact, in his Complaint Relator repeatedly claims that *the trial court* lacked jurisdiction to resentence Relator on February 5, 2009. Relator does not contend or establish in his Complaint that Respondent Judge Kilbane lacked jurisdiction to render an opinion in *Harris III*, was about to exercise judicial power, or that the exercise of that power was unauthorized by law.

Furthermore, Relator has failed to prove that denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. Relator has an adequate

remedy by way of appealing the decision of the Eighth District Court of Appeals in *Harris III*.

A writ of prohibition is not a substitute for an appeal. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275.

III. CONCLUSION

For the foregoing reasons, Respondent Judge Mary Eileen Kilbane respectfully requests that this Court grant her Motion To Dismiss Relator's Complaint For Writ Of Prohibition.

Respectfully submitted,

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SERVICE

A copy of the foregoing Respondent's Motion To Dismiss Relator's Complaint For Writ Of Prohibition was mailed this 16TH day of March 2010, to Kermit Harris, Pro Se, Inmate # 344720, Lake Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, Ohio 44030.



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