

ORIGINAL

No. 2012-1563

IN THE SUPREME COURT OF OHIO

ORIGINAL ACTION IN MANDAMUS AND/OR PROHIBITION

STATE OF OHIO EX REL. CHRISTOPHER A. MCGLOWN,
Relator,

v.

JUDGE JAMES D. BATES
Respondent.

RESPONDENT'S MOTION TO DISMISS

Christopher A. McGlown
639-847
P.O. Box 4501
Lima, Ohio 45802

Pro Se Relator

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MOTION

Now comes Respondent, Hon. James D. Bates, Judge of the Lucas County Court of Common Pleas and, pursuant to *S.Ct.Prac.R.* 10.5, submits his motion to dismiss the relator's complaint for a Writ of Mandamus and/or Prohibition. This motion must be granted, since the relator has failed to state a claim and he has an adequate remedy at law.

Therefore, this Court is required to dismiss the complaint.

Respectfully submitted,

JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY

By: John A. Borell
John A. Borell
Assistant Prosecuting Attorney
Counsel for Respondent

MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

On September 14, 2012, the relator filed herein a complaint for a writ of mandamus and/or prohibition.¹ The allegations contained in the complaint are essentially incomprehensible and largely irrelevant. It appears that the complaint alleges various sentencing errors, *Complaint*, ¶¶ 6, 11-24, that the judgment of conviction was not a final, appealable order under *R.C. 2505.02* and *Crim.R. 32(C)*, *Id.*, ¶¶ 1, 10-11, and he was given incorrect information by the Respondent regarding sentencing, *Id.*, ¶¶ 22-23.

The complaint requests that this Court issue a writ ordering Respondent to: (1) issue a judgment of conviction that is a final order under *R.C. 2505.02* and *Crim.R. 32(C)*; (2) issue a order correcting various alleged sentencing errors; (3) vacate relator's conviction; (4) issue an order to the Ohio Department of Rehabilitation and Correction to return relator to Court; and (5) vacate relator's conviction and sentence and allow him to plead to the original plea agreement.

The Respondent now files this motion to dismiss seeking an order from this Court dismissing

¹ On June 8, 2012, the relator filed in the Sixth District Court of Appeals a complaint for a writ of mandamus and/or procedendo against Respondent Judge James D. Bates. The petition alleged that the Respondent's judgment of conviction did not comply with *R.C. 2505.02* and *Crim.R. 32(C)* and is therefore, not a final, appealable order. The relator requested that the Court issue a writ requiring the Respondent to issue a judgment entry that is a final, appealable order under *R.C. 2505.02* and *Crim.R. 32(C)*. *Id.*, ¶ 31.

The complaint also alleged various sentencing errors; that the trial court lacked subject matter jurisdiction; and that the Respondent denied a motion to correct an allegedly void sentence. However, the petition did appear to seek any relief based on these additional allegations.

On September 27, 2012, the relator filed in this Court an original action for a writ of habeas corpus. *State ex rel Christopher A. McGlown v. John Coleman, Warden*, Case No. 2012-1640. The complaint filed in the habeas case is virtually identical to the complaint filed herein and in the petition filed in the Court of Appeals. It raised the same sentencing and jurisdiction issues that were raised in this case as well as the original action that was filed in the Sixth District Court of Appeals.

relator's complaint for a writ of mandamus and/or prohibition, since the complaint fails to state a claim upon which relief can be granted. Specifically, the relator is not entitled to a writ of mandamus or prohibition because the Respondent's judgment of conviction complied with *R.C. 2505.02* and *Crim.R. 32(C)* and the relator has an adequate remedy at law for all other alleged errors.

Therefore, it appears beyond doubt that relator is not entitled to the requested extraordinary relief in mandamus or prohibition and his complaint must be dismissed..

II. STATEMENT OF THE FACTS

On October 21, 2006, a man entered a Columbus, Ohio license bureau office and applied for a duplicate driver's license in the name of Tyru McClendon. State of Ohio v. Christopher A. McGlown, Lucas App. No. L-07-1384, 2009 Ohio 1894, at ¶ 2. The man filled out and signed an application for a duplicate license and presented as identification a damaged Ohio driver's license and a debit card. Id. An employee of a Deputy Registrar of the Ohio Bureau of Motor Vehicles ("BMV") entered the information that the man provided into a BMV computer, took the man's picture and issued him a duplicate license. Id.

A BMV investigator later testified that within a few days of the issuance of the duplicate license, she received information that relator, Christopher McGlown, had obtained an Ohio driver's license in the name of Tyru McClendon. *Id.*, at ¶ 3. According to the investigator, she then compared the pictures in the BMV system, determining that the picture on the October 21 license did not match that of Tyru McClendon in his original license. *Id.* The picture did match that of relator. *Id.* The investigator placed a fraud alert on the license. *Id.*

On March 17, 2007, Westerville police arrested relator. *Id.*, at ¶ 4. On his person was the duplicate license, two debit cards and a Social Security card, all in the name of Tyru McClendon.

Id. During a police interview on the same day, relator admitted that he had used a computer printer to duplicate McClendon's license. *Id.* According to relator, he then added his own picture, tore the license in half and presented it to the license branch to obtain an authentic duplicate. *Id.*

On March 29, 2007, a Lucas County grand jury issued a two count indictment, charging relator with forgery in violation of *R.C.* 2913.31(A)(3) and a record tampering in violation of *R.C.* 2913.42 (A)(1) and (B)(4). *Id.*, at ¶ 5. Relator was arraigned and entered a plea of not guilty to both counts of the indictment.

On July 26, 2007, relator's appointed counsel moved to withdraw from representation, citing a "poor quality" of his relationship with relator. *Id.*, ¶ 6. On July 30, the trial court granted counsel's motion to withdraw and appointed substitute counsel. *Id.* On August 27, the trial judge recused herself and a second judge was assigned to the case. *Id.* On September 25, relator's second appointed counsel moved to withdraw at relator's request to permit relator to employ retained counsel. *Id.* The trial court did not immediately rule on counsel's request to withdraw, but again rescheduled the trial, this time for October 25. *Id.* In the meantime, relator moved to suppress the statements he made during his interview with Westerville police. *Id.*

On October 25, 2007, the trial court delayed voir dire to hear the motion to suppress. *Id.*, ¶ 7. At that hearing, relator appeared without retained counsel and complained about his communication with his appointed counsel. *Id.* Relator state to the Court that "I don't want him to represent me. I will go pro se my own self before I have this attorney with me." *Id.* The court advised relator that irrespective of whether the matter proceeded with appointed counsel or otherwise, the trial would go forward as scheduled. *Id.* Ultimately the trial court denied relator's request to proceed pro se and appointed counsel represented him during trial. *Id.*

The matter proceeded to a trial before a jury and relator was found guilty as charged. *Id.*, ¶ 8. The trial court accepted the verdict and sentenced relator to ten months imprisonment on the forgery count and four years imprisonment for tampering, to be served consecutively. *Id.*

The conviction and sentencing were affirmed by the Sixth District Court of Appeals. *Id.*, ¶ 1.

On September 14, 2012, the relator filed herein a complaint for a writ of mandamus and/or prohibition. The allegations contained in the complaint are essentially incomprehensible and largely irrelevant. It appears that the complaint alleges various sentencing errors, *Complaint*, ¶¶ 6, 11-24, that the judgment of conviction was not a final, appealable order under *R.C. 2505.02* and *Crim.R. 32(C)*, *Id.*, ¶¶ 1, 10-11, and that the relator was given incorrect information by the Respondent regarding sentencing, *Id.*, ¶¶ 22-23.

The complaint requests that this Court issue a writ ordering Respondent to: (1) issue a judgment of conviction that is a final order under *R.C. 2505.02* and *Crim.R. 32(C)*; (2) issue a order correcting various alleged sentencing errors; (3) vacate relator's conviction; (4) issue an order to the Ohio Department of Rehabilitation and Correction to return relator to Court; and (5) vacate relator's conviction and sentence and allow him to plead to the original plea agreement.

The Respondent now files this motion to dismiss seeking an order from this Court dismissing relator's complaint for a writ of mandamus and/or prohibition, since the complaint fails to state a claim upon which relief can be granted. Specifically, the relator is not entitled to a writ of mandamus or procedendo because the Respondent's judgment of conviction complied with *R.C. 2505.02* and *Crim.R. 32(C)* and the relator has an adequate remedy at law for all other alleged errors.

Therefore, it appears beyond doubt that relator is not entitled to the requested extraordinary relief in mandamus or prohibition and his complaint must be dismissed.

III. LAW AND ARGUMENT

A. Introduction

1. STANDARD FOR MOTION TO DISMISS

A dismissal under Rule 12(B) (6) is required when it appears beyond doubt that relator is not entitled to the requested extraordinary relief in mandamus or procedendo. *State ex rel. Rodak v. Betteski*, 104 Ohio St.3d 345, 2004 Ohio 6567, 819 N.E.2d 703. All factual allegations of the complaint must be presumed to be true and all reasonable inferences must be made in favor of the relator. *Perez v. Cleveland* (1993), 66 Ohio St.3d 397, 399, 613 N.E.2d 199. However, unsupported conclusions of an inmate's complaint for extraordinary relief are not considered admitted and are insufficient to withstand a motion to dismiss. *Fain v. Summit County Adult Probation Department*(1995), 71 Ohio St.3d 658, 659, 646 N.E.2d 1113.

2. WRIT OF MANDAMUS

The basic purpose of a writ of mandamus is to compel a public officer to perform the duties imposed on them by law. *State ex rel Scott v. Materson*(1962), 173 Ohio St. 402, 404, 183 N.E.2d 376, 379; *State ex rel Sneary, et al. v. Miller et al.*, 86 Ohio App.3d 684, 687, 621 N.E.2d 785, *motion to certify overruled* (1993), 66 Ohio St.3d 1473, 611 N.E.2d 835. Thus, in order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief requested and that the respondents were under a clear legal duty to perform the acts prayed for in the petition. *State ex rel. Westchester Estates, Inc. v. Bacon*(1980), 61 Ohio St.2d, 399 N.E.2d 81; *State ex rel. Harris v. Rhodes*(1978), 54 Ohio St.2d 41, 374 N.E.2d 641; *State ex rel. Van Curen v. Ohio Adult Parole Authority*(1976), 45 Ohio St.2d 298, 345 N.E.2d 75; *State ex rel. Pressley v. Industrial Commission of Ohio*(1967), 11 Ohio St.2d 141, 228 N.E.2d 631; *Gregory T. Howard v. Judge, Ruth Ann Franks*(Aug. 21, 2000), Lucas App. No. L-00-1163, unreported, 2000 Ohio App. LEXIS 3828 *3;

R.C. 2731.01. Lastly, a writ of mandamus cannot be used to supplant or supersede any other form of remedy and therefore, the law is well-settled in Ohio that mandamus will not lie where there is an adequate legal or equitable remedy. *State ex rel. Woodbury et al. v. Spitler*(1973), 34 Ohio St.2d 134, 296 N.E.2d 526; R.C. 2731.05.

3. WRIT OF PROHIBITION

A writ of prohibition is the most difficult of any of the extraordinary remedies to obtain. *State ex rel. Utility Workers Union of America v. MacElwane, Judge*(1961), 116 Ohio App. 183, 191, 187 N.E.2d 901, 906. A writ of prohibition is issued only in cases of extreme necessity. *Id.* The writ should be used with great caution and should not issue in doubtful or borderline cases. *ANS Connect v. Hon. William J. Coyne, et al.*, Cuyahoga App. No. 88602, 2006 Ohio 6599, at ¶ 6; *State ex rel. Utility Workers Union of America*, *supra*.

The question presented in every instance where the issuance of a writ of prohibition is requested is whether it clearly appears that the court whose action is sought to be prohibited has no jurisdiction of the cause which it is attempting to adjudicate, or is about to exceed its jurisdiction. *State ex rel. The Ohio Company, et al. v. Maschari, Judge*(1990), 51 Ohio St.3d 18, 20-21; 553 N.E.2d 1356, 1359.

The principles governing prohibition are well established. *ANS Connect*, *supra*. In order to be entitled to the requested writ of prohibition, relators must establish that (1) Respondent was about to exercise judicial power, (2) the exercise of that power was not authorized by law, and (3) denial of the writ would have caused injury for which no other adequate remedy in the ordinary course of law existed. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005 Ohio 3804, 831 N.E.2d 1003, at ¶14.

Where a court has general *subject-matter jurisdiction* over a cause of action, a writ of

prohibition will not be awarded to prevent an anticipated erroneous judgment, since an adequate remedy is available through an appeal. *State ex rel. Carody, et al. v. Justice, Judge*(1926), 114 Ohio St. 94, 150 N.E. 430. Thus, in the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction, such as a common pleas court, can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal. *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002 Ohio 4907, 775 N.E.2d 522, at ¶ 18; *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003 Ohio 1630, 786 N.E.2d 39, at ¶ 8. Therefore, if the lack of jurisdiction is not patent and unambiguous, there is generally no entitlement to a writ of prohibition to prevent a trial court's exercise of jurisdiction. *State ex rel. Brady v. Pianka*, 106 Ohio St.3d 147, 2005 Ohio 4105, 832 N.E.2d 1202, at ¶¶ 9-10.

B. Respondent's Sentencing Order Complied with R.C. 2505.02 and Crim.R. 32©)

The complaint alleges that the Respondent's judgment of conviction did not comply with R.C. 2505.02 and Crim.R. 32(C) and is therefore, not a final, appealable order. *Complaint*, ¶¶ 1, 10-11.² The relator requests that this Court issue a writ requiring the Respondent to issue a judgment entry that is a final, appealable order under R.C. 2505.02 and Crim.R. 32©). *Id.*, ¶ 1.³ The relator's allegations are, of course, incorrect.

The sole purpose of a Crim.R. 32(C) judgment of conviction is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run. *State of Ohio v. Lester*, 130 Ohio St.3d 303, 2011 Ohio 5204, 958 N.E.2d 142, ¶ 10. Thus, to be a final order, a judgment of conviction under R.C. 2505.02 and Crim.R. 32(C), a judgment of conviction merely requires that it sets forth (1) the fact of conviction, (2) the sentence, (3) the

² A copy of the Respondent's judgment of conviction is attached to the relator's complaint.

³ The complaint has three paragraphs that are numbered 1. This paragraph refers to the second paragraph 1 on page 7 of the complaint.

judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk. *State of Ohio v. Lester*, supra.; *State of Ohio v. Thomas R. Hach*, Summit App. No. 26173, 2012 Ohio 2603, ¶ 7; *State of Ohio v. Ronald S. Allen*, Lucas App. No. L-11-1077, 2012 Ohio 3504, ¶ 1; *State of Ohio v. Anthony K. Bolling*, Montgomery App. No. 24571, 2011 Ohio 6487, ¶ 13.

A review of the Respondent's judgment of conviction establishes that it includes all of the elements required by *R.C. 2505.02* and *Crim.R. 32(C)* and is, therefore, a final, appealable order. Thus, it appears beyond doubt that relator is not entitled to the requested extraordinary relief in mandamus or prohibition and his complaint must be dismissed..

C. Relator has an Adequate Remedy at Law.

Neither a writ of mandamus nor a writ of prohibition will issue if an adequate remedy exists in the ordinary course of law. *State ex rel Doe, et al. v. Capper, Judge*, 132 Ohio St.3d 365, 2012 Ohio 2686, 972 N.E.2d 553, ¶ 10; *State ex rel. Neguse v. McIntosh*, 115 Ohio St.3d 216, 2007 Ohio 4788, 874 N.E.2d 772, at ¶ 6; *State ex rel. Woodbury et al. v. Spitler*(1973), 34 Ohio St.2d 134, 296 N.E.2d 526; *R.C. 2731.05*.

The complaint alleges various sentencing errors, *Complaint*, ¶¶ 22-23. Sentencing errors by a court cannot be remedied by extraordinary writ, since there is an adequate remedy at law by direct appeal, delayed appeal, or post conviction relief. *State ex rel. Hudson v. Sutula*, 131 Ohio St.3d 177, 2012 Ohio 554, 962 N.E.2d 798, ¶ 1; *Jimison v. Wilson, Warden*, 106 Ohio St.3d 342, 2005 Ohio 5143, 835 N.E.2d 34, ¶ 9. Therefore, the relator is not entitled to a writ based on alleged sentencing errors.

The complaint also alleges that the relator was given incorrect information by the Respondent regarding sentencing, *Id.*, ¶¶ 22-23. As a result of this allegedly inaccurate information, the relator

decided to reject a pleas offer and go to trial. The relator claims that he did not discover that he was allegedly given inaccurate information until after the expiration of time for appeal.

However, the relator could have raised this issue in a delayed appeal or a petition for postconviction relief. *R.C.* 2953.21(A)(1)(a); *Civ.R.* 5(A)(1)(a). A delayed appeal and a petition for postconviction relief are adequate remedies at law. *State ex rel. Hayes v. Winkler, Judge*, 131 Ohio St.3d 66, 2011 Ohio 6046, 960 N.E.2d 954, ¶ 1; *State ex rel. Carnail v. McCormick, Judge*, 126 Ohio St.3d 124, 2010 Ohio 2671, 931 N.E.2d 110, ¶ 4.⁴

Thus, it appears beyond doubt that relator is not entitled to the requested extraordinary relief in mandamus or prohibition and his complaint must be dismissed..

D. The Complaint Fails to Allege Facts that Would Entire the Relator to a Writ of Prohibition

The relator's complaint seeks a writ of prohibition ordering the Ohio Department of Rehabilitation and Correction to return relator to Court. *Complaint*, ¶ 4, p.8. As previously established, in order to be entitled to the requested writ of prohibition, the relators must establish that (1) Respondent was about to exercise judicial power, (2) the exercise of that power was not authorized by law, and (3) denial of the writ would have caused injury for which no other adequate remedy in the ordinary course of law existed. Where a court has general subject-matter jurisdiction over a cause of action, a writ of prohibition will not be awarded to prevent an anticipated erroneous judgment, since an adequate remedy is available through an appeal.

The complaint does not allege any of the required elements for a writ of prohibition to be issued. However, even if the relator had asserted the required elements, he would still not be entitled

⁴ The relator also seeks a order requiring the Respondent to vacate the conviction and sentence and allow relator to plead guilty to the original plea agreement. This request for relief is again based on the allegation that the relator was given inaccurate sentencing information. Thus, the relator has an adequate remedy at law.

to a writ of prohibition, since the Respondent had subject matter jurisdiction over the relators's criminal case.

A court having general subject-matter jurisdiction, such as a common pleas court, can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal. *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002 Ohio 4907, 775 N.E.2d 522, at ¶ 18; *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003 Ohio 1630, 786 N.E.2d 39, at ¶ 8.

Original subject matter jurisdiction over a criminal action is determined pursuant to R.C. 2931.03. *State of Ohio ex rel. Kyle W. Blanton v. Judge Bruce Winters*, Ottawa App. No. OT-12-001, 2012 Ohio 973, ¶ 18. That statute grants to the court of common pleas original jurisdiction over all crimes and offenses, except cases of minor offenses. Thus, a common pleas court has subject matter and personal jurisdiction over felony cases when the accused has been served with a copy of the indictment. *Pishok v. Kelly*, Trumbull App. No. 2008-T-0093, 2009 Ohio 287, ¶ 15.

The relator's complaint fails to allege that he was not charged with a felony or that he was not served with a copy of the indictment. Thus, based on the allegations of the complaint, the Respondent had general subject-matter jurisdiction and can determine the Court's jurisdiction. Relator had an adequate remedy by appeal. Therefore, the relator is not entitled to a writ based on an alleged lack of jurisdiction.

Thus, based on the allegations of the complaint, it appears beyond doubt that relator is not entitled to the requested extraordinary relief in prohibition.

IV. CONCLUSION

This Court must grant the Respondent's motion to dismiss relator's complaint for a writ of mandamus and/or prohibition, since the complaint fails to state a claim upon which relief can be granted. Specifically, the relator is not entitled to a writ of mandamus or prohibition, because the Respondent's judgment of conviction complied with *R.C. 2505.02* and *Crim.R. 32(C)* and the relator has an adequate remedy at law for all other alleged errors.

Therefore, it appears beyond doubt that relator is not entitled to the requested extraordinary relief in mandamus or prohibition and his complaint must be dismissed.

Respectfully submitted,

**JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY**

By: John A. Borell
John A. Borell
Assistant Prosecuting Attorney
Counsel for Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Dismiss was sent by Ordinary U.S. mail on the 5th day of

October, 2012 to:

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Pro Se Relator



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