

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. EMANUEL NEWELL,

RELATOR,

Case No. 2013-0862

-vs-

JUDGE WILLIAM E. MAHON, ET AL.,

RESPONDENTS.

RESPONDENT JUDGE NANCY FUERST'S MOTION TO DISMISS RELATOR'S
PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

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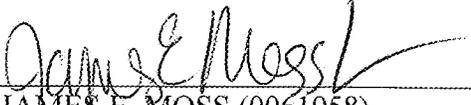
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RESPONDENT JUDGE NANCY FUERST'S MOTION TO DISMISS RELATOR'S
PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

Now comes Timothy J. McGinty, Prosecuting Attorney of Cuyahoga County, Ohio, by and through his undersigned assistant and on behalf of respondent Judge Nancy A Fuerst, and respectfully requests that this Court grant Respondent's motion to dismiss Relator's petition for writ of prohibition and mandamus for the reasons stated in the attached brief.

Respectfully submitted,

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BRIEF IN SUPPORT

1. Procedural History of the Case

On October 26, 1988, relator Emanuel Newell was found guilty by a jury in Cuyahoga County Court of Common Pleas case number CR-88-226066 of one count of felonious assault in violation of R.C. 2913.11 with a violence specification, a peace officer specification, an aggravated felony specification, and a three-year firearm specification under 2929.71 (Count 1), and one count of having a weapon while under a disability in violation of R.C. 2923.13 with a three-year firearm specification under 2929.71 (Count 2).

The journal entry issued by the trial court that same day indicated that Newell was sentenced to three years on each firearm specification in Counts 1 and 2 to run consecutively to each other, to fifteen years for Count 1 to run consecutively to the firearm specifications, and to one year for Count 2 to run concurrently with the sentence for Count 1 for a total sentence of twenty-one years. On December 2, 1988, the trial court issued a nunc pro tunc entry as if and for the sentencing journal entry of October 26, 1988, to indicate that the sentence for Count 1 was actually fifteen to twenty-five years.

This Court affirmed Newell's conviction in part, but vacated the three-year firearm specification in Count 2. *State v. Newell*, 8th Dist. No. 56801, 60128, 1990 WL 193357 (Dec. 6, 1990), cause dismissed for want of prosecution by *State v. Newell*, 60 Ohio St.3d 707 (1991), rehearing denied by *State v. Newell*, 61 Ohio St.3d 1414 (1991). On December 26, 1990 the trial court issued a journal entry in which the three-year firearm specification in Count 2 was omitted in compliance with the mandate of the Eighth District Court of Appeals in *State v. Newell*, 8th Dist. No. 56801, 60128, 1990 WL 193357 (Dec. 6, 1990).

On May 28, 2013, Newell filed a petition for writ of prohibition and mandamus (“Petition”) claiming that Judge William E. Mahon,¹ the judge originally assigned to case number CR-88-226066, unlawfully increased his sentence from “fifteen (15) years actual time” to “fifteen (15) years actual incarceration to twenty-five (25) years” for Count 1 when he issued a nunc pro tunc entry on December 2, 1988, as if and for the initial sentencing entry of October 26, 1988. (Relator’s Petition, Exhibits A and C). As a result, Newell claims, the nunc pro tunc entry issued by the trial court on December 2, 1988, should be vacated.

II. Relator is Not Entitled to a Remedy By Way of Prohibition or Mandamus

The requisites for mandamus are well established: (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. Additionally, although 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. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118.

In order to be entitled to a writ of prohibition, relator must establish that the respondent is about to exercise judicial or quasi-judicial power, that the exercise of such power is unauthorized by law, and that the denial of the writ will cause injury to relator for which no other adequate remedy in the ordinary course of law exists. *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 336, 1997-Ohio-0202.

In his Petition Newell is claiming that Judge William E. Mahon, the judge originally assigned to case number CR-88-226066, unlawfully increased his sentence from “fifteen (15) years actual time” to “fifteen (15) years actual incarceration to twenty-five (25) years” when he

¹ Relator incorrectly named Judge William Mahon as a respondent. Presiding Judge Nancy A. Fuerst is the judge currently assigned to case number CR-88-226066.

issued a nunc pro tunc entry on December 2, 1988, as if and for the initial sentencing entry of October 26, 1988. (Relator's Petition, Exhibits A and C). As a result, Newell maintains, the nunc pro tunc sentencing entry issued by the trial court on December 2, 1988, is void and fails to comply with Crim.R. 32(C). Newell's claims are without merit.

Nunc pro tunc entries are used to make the record reflect what the court actually decided and not what the court might or should have decided or what the court intended to decide. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, ¶ 18. In his Petition Newell claims that the trial court unlawfully modified his sentence that was imposed by the trial court on October 26, 1988, when it changed the language contained in the initial sentencing entry of from "fifteen (15) years actual time" to "fifteen (15) years actual incarceration to twenty-five (25) years" for Count 1 in the nunc pro tunc sentencing entry issued by the trial court on December 2, 1988. (Relator's Petition, Exhibits A and C).

However, Newell did not attach a copy of the transcript of the sentencing hearing held on or about October 26, 1988, or any other evidence to his Petition to prove that he was not properly sentenced in open court to fifteen (15) years to twenty-five (25) years as to Count 1 of the indictment. Newell's failure to attach the transcript of the sentencing hearing held on or about October 26, 1988, is understandable due to the fact that the trial transcript for case number CR-88-226066 was burned in a fire.² However, since Newell has failed to provide any evidence that he was not properly sentenced in open court to fifteen (15) years to twenty-five (25) years as to Count 1 on or about October 26, 1988, this Court should presume the regularity of the proceedings in case number CR-88-226066 and deny Newell's claim. *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 127 Ohio St.3d 202, 2010-Ohio-5073, ¶ 14 (when an appeal is

² See *State v. Newell*, 8th Dist. No. 56801, 60128, 1990 WL 193357, *1 (court recognized that trial transcript for case number CR-88-226066 was destroyed in a fire).

filed in this court without a transcript, we generally presume the regularity of the proceeding and affirm); *Christy v. Summit Cty. Bd. of Elections*, 77 Ohio St.3d 35, 39, 1996-Ohio-357 (since relators did not submit the hearing transcript within the time provided for filing evidence by S.Ct.Prac.R. X(9), we will not consider it and we will presume the regularity of the board's determination); *Gaskins v. Shiplevy*, 76 Ohio St.3d 380, 1996-Ohio-387, 382 (there is no showing by Gaskins to contradict the presumption of regularity accorded all judicial proceedings).

In fact, in 1990 the Eighth District Court of Appeals affirmed the trial court's imposition of a prison sentence of fifteen (15) to twenty-five (25) years upon Newell on Count 1 of the indictment in case number CR-88-226066. *State v. Newell*, 8th Dist. No. 56801, 60128, 1990 WL 193357 (Dec. 6, 1990). Moreover, the evidence in the record in case number CR-88-226066 establishes that Newell was properly sentenced to fifteen (15) years to twenty-five (25) years as to Count 1 of the indictment in case number CR-88-226066.

On April 24, 1989, counsel for Newell filed "Defendant-Appellant's Statement of the Proceedings Pursuant to App.R. 9(C)" with the trial court in case number CR-88-226066. In Defendant's Statement of the Proceedings filed on April 24, 1989, Newell, through counsel, acknowledged that "[o]n October 26, 1988 the defendant was sentenced to two three-year sentences for the same gun and 15 to 25 years on count one, and one year on count 2, which was to be served concurrently with count one." (See "Defendant-Appellant's Statement of the Proceedings Pursuant to App.R. 9(C)", p. 13, filed on April 24, 1989, attached to the "Notice of

Defendant's Filing of Statement of Proceedings Pursuant to App.R. 9(C)" filed contemporaneously with this Motion and identified as Exhibit A).³

Newell's counsel acknowledged in "Defendant-Appellant's Statement of the Proceedings Pursuant to App.R. 9(C)" filed with the trial court on April 24, 1989, in case number CR-88-226066 that Newell was sentenced to fifteen (15) years to twenty-five (25) years as to Count 1 of the indictment in case number CR-88-226066. Consequently, the evidence in the underlying criminal case supports the authority of the trial court to issue the nunc pro tunc entry on December 2, 1988, in case number CR-88-226066.

In his Petition Newell also maintains that the trial court's issuance of the nunc pro tunc entry on December 8, 1988, failed to meet the requirements of Crim.R. 32(C). However, because the nunc pro tunc entry issued by the trial court on December 2, 1988, in case number CR-88-226066 was issued to correct a clerical error, it relates back to the original sentencing entry issued by the trial court on October 26, 1988. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, ¶ 14 (a nunc pro tunc entry relates back to the original sentencing entry).

In *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, the Supreme Court of Ohio held that a judgment of conviction is a final appealable order under Crim. 32(C) when it sets forth: (1) the fact of the conviction; (2) the sentence; (3) the judge's signature; and (4) the entry on the journal by the clerk. *Id.* at ¶ 11.

A review of original the original sentencing entry issued by the trial court on October 26, 1988, in case number CR-88-226066 reflects that: (1) a jury found Newell guilty on all counts; (2) that there is a sentence for each of the counts for which Newell was found guilty; (3) the

³ Said "Notice of Defendant's Filing of Statement of Proceedings Pursuant to App.R. 9(C)" appends Defendant-Appellant's Statement of the Proceedings Pursuant to App.R. 9(C) filed on April 24, 1989, in Cuyahoga County Court of Common Pleas case number CR-88-226066. (Exhibit A).

signature of the trial judge; and (4) the file stamp of the Clerk Of Court. (Relator's Petition, Exhibit A). The nunc pro tunc entry issued by the trial court on December 2, 1988, simply corrected the sentence for Count 1. The remaining portions of the original sentencing entry issued by the trial court on October 26, 1988, remain otherwise unchanged. As a result, the original sentencing entry issued by the trial court on October 26, 1988, including the correction of Count 1 as set forth in the nunc pro tunc entry issued by the trial court on December 2, 1988, complies with Crim.R. 32(C).

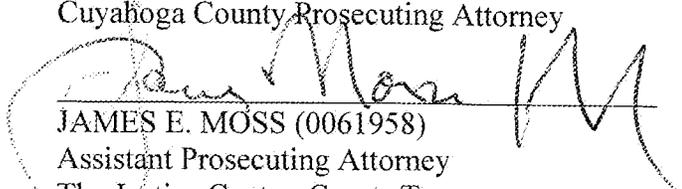
As a result, Newell has failed to establish: (1) that he has a clear legal right to have the nunc pro tunc entry issued by the trial court on December 2, 1988, vacated; (2) that respondent Judge Fuerst has a clear legal duty to vacate the nunc pro tunc entry issued by the trial court on December 2, 1988; and (3) that respondent Judge Fuerst is about to exercise judicial power that is unauthorized by law.

III. Conclusion.

For the foregoing reasons, respondent Judge Fuerst respectfully requests that this Court grant Respondent's motion to dismiss Relator's petition for writ of prohibition and mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Dismiss has been sent by ordinary U.S. Mail this 13th day of June, 2013 to Emanuel Newell, Pro Se, Inmate # 206453, at Allen Correctional Institution, P.O. Box 4501, 2338 North West Street, Lima, Ohio 45801, and to Ohio Attorney General Mike DeWine, counsel for respondents Judges of the Eighth Appellate District Court of Appeals of Ohio, at the Ohio Attorney General's Office, 30 East Broad Street, 14th Floor, Columbus, Ohio 43215.



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