

ORIGINAL

IN THE SUPREME COURT OF OHIO

DONALD TURNER,

APPELLANT,

-vs-

JUDGE BRIAN J. CORRIGAN,

APPELLEE.

Case No. 2013-1811

On Appeal from the
Cuyahoga County Court
Of Appeals, Eighth
Appellate District

MERIT BRIEF OF APPELLEE

APPELLANT, PRO SE

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TABLE OF CONTENTS

PROCEDURAL HISTORY OF THE CASE1

LAW AND ARGUMENT4

 Proposition of Law No. I:4
 The Eighth District Court of Appeals erred in granting respondent Brian J. Corrigan, Judge, request for summary judgment which was contrary to law.

 Proposition of Law No. II:6
 The Eighth District Court of Appeals did err in denying mandamus relief as to Appellant’s claim involving the failure of the trial court judge to impose sentence as required by law based on a finding that Appellant’s claim was moot because he had already completed his sentence.

 Proposition of Law No. III:7
 The Eighth District Court of Appeals erred in dismissing Appellant’s mandamus action based upon a finding that Appellant fail to provide an affidavit as required by Local Appellant [sic] Rule 45(B)(1)(a).

 Proposition of Law No. IV:9
 The Eighth District Court of Appeals erred in dismissing Appellant’s mandamus action based upon a finding that Appellant had another adequate remedy by means of direct appeal and that he had already unsuccessfully sought relief through a mandamus petition dismissed by the Ohio Supreme Court.

CONCLUSION12

CERTIFICATE OF SERVICE12

MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY OF THE CASE

On October 18, 2006, appellant Donald Turner (“Turner”) was found guilty by a jury in Cuyahoga County Court of Common Pleas case number CR-04-453056-A of robbery in violation of R.C. 2911.02. The trial court also found Turner guilty of a notice of prior conviction specification under R.C. 2929.13(F)(6). The trial court subsequently sentenced Turner to five years in prison and to postrelease control for three years under R.C. 2967.28.

On November 2, 2006, Turner appealed his convictions. *State v. Turner*, 8th Dist. Cuyahoga No. 88958, 2007-Ohio-5732 (“*Turner I*”), appeal not accepted for review by *State v. Turner*, 117 Ohio St.3d 1458, 2007-Ohio-1635. In *Turner I* the Eighth District Court of Appeals affirmed Turner’s convictions, but vacated his sentence and remanded the case back to the trial court for a de novo sentencing hearing due to the failure of the trial court to properly impose postrelease control. *Id.* at ¶ 56-57.

On May 29, 2008, the trial court held a hearing and amended Turner’s sentence to include three years of postrelease control. (Turner’s Petition, Ex. C). On June 24, 2008, Turner filed an appeal with the Eighth District Court of Appeals in which he alleged that his indictment in case number CR-04-453056-A was defective and that the trial court failed to conduct a resentencing hearing as mandated by this Court in *Turner I*. *State v. Turner*, 8th Dist. Cuyahoga No. 91695, 2008-Ohio-6648. (“*Turner II*”), appeal not accepted for review by *State v. Turner*, 121 Ohio St.3d 1476, 2008-Ohio-6648. On November 6, 2008, the Eighth District Court of Appeals Court in *Turner II* determined that the sentencing journal entry issued by the trial court on May 30, 2008, failed to reflect the trial court’s sentence or means of conviction and remanded

the case back to the trial court for clarification of the disposition of all counts, including specifications.

On November 12, 2008, the trial court issued a revised sentencing entry that included the trial court's original sentence and means of conviction as mandated by the Eighth District Court in *Turner II*. (Turner's Petition, Ex. E). On December 18, 2008, the Eighth District Court in *Turner II* issue on opinion in which the Court held that Turner's claim that his indictment is defective is barred by res judicata and that his claim that the trial court did not conduct a new sentencing upon remand by the Eighth District Court of Appeals is overruled because Turner failed to file a transcript of the resentencing hearing. *State v. Turner*, 8th Dist. Cuyahoga No. 91695, 2008-Ohio-6648. ("*Turner I*").

On February 22, 2012, Turner filed a notice of appeal alleging that the trial court failed to impose a proper sentence and that his indictment in case number CR-CR-04-453056-A is defective. *State v. Turner*, 8th Dist. Cuyahoga No. 97978 ("*Turner III*"). On February 28, 2012, the Eighth District Court of Appeals in *Turner III*, sua sponte, dismissed Turner's appeal for failure to file a timely appeal. On March 27, 2012, Turner filed a motion for delayed appeal with the Eighth District Court of Appeals alleging that the trial court failed to impose a proper sentence and that his indictment in case number CR-CR-04-453056-A is defective. *State v. Turner*, 8th Dist. Cuyahoga No. 98150. ("*Turner IV*"). On April 25, 2012, the Eighth District Court in *Turner IV*, sua sponte, denied Turner's motion for delayed appeal and dismissed his appeal.

On November 5, 2012, Turner filed a petition for writ of mandamus ("*Petition I*") asking this Court to compel: (1) respondents the Cuyahoga County Clerk of Courts and Legal Account Clerk Supervisor for the Clerk of Courts Cindi Condol to refrain from collecting court costs

incurred by Turner in *State v. Turner*, 8th Dist. Cuyahoga No. 97978 (“*Turner III*”) and *State v. Turner*, 8th Dist. Cuyahoga No. 98150. (“*Turner IV*”); (2) the Eighth District Court of Appeals to review and rule on Turner’s briefs filed in *State v. Turner*, 8th Dist. Cuyahoga No. 97978 (“*Turner III*”) and *State v. Turner*, 8th Dist. Cuyahoga No. 98150. (“*Turner IV*”); **(3) respondent Judge Brian Corrigan to conduct a do novo sentencing hearing as mandated by the Eighth District Court of Appeals in *State v. Turner*, 8th Dist. Cuyahoga No. 88958, 2007-Ohio-5732 (“*Turner P*”);** and (4) respondents the Ohio Adult Parole Authority and the Bureau of Sentencing Computation (BOSC) to eliminate the one to five-year sentence Turner received in Cuyahoga County Court of Common Pleas case number CR-94834 and to “no longer make any decisions and rulings based thereupon”. (Turner’s Petition I, attached to Respondent’s motion for summary judgment as Ex. A).

On November 21, 2012, respondents Judge Brian Corrigan, Cuyahoga County Clerk of Courts, and Legal Account Clerk Supervisor for the Clerk of Courts Cindi Condol filed a motion to dismiss Turner’s Petition I. (Respondents’ motion to dismiss Turner’s Petition I filed on November 21, 2012, attached to Respondent’s motion for summary judgment as Ex. B). On January 23, 2013, this Court granted Respondents’ motion to dismiss Turner’s Petition I. (Respondent’s motion for summary judgment, Ex. C).

On July 11, 2013, Turner file a petition for writ of mandamus (“Petition II”) asking the Eighth District Court to compel appellee Judge Brian Corrigan to conduct a do novo sentencing hearing as mandated by the Eighth District Court of Appeals in *State v. Turner*, 8th Dist. Cuyahoga No. 88958, 2007-Ohio-5732 (“*Turner P*”). *State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717 (“Petition II”).

On August 8, 2013, appellee Judge Corrigan filed a motion for summary judgment to Turner's Petition II. On September 16, 2013, Turner filed a motion for leave to file a response in opposition to Respondent's motion for summary judgment to Petition II. On October 22, 2013, the Eighth District Court granted appellee Judge Corrigan's motion for summary judgment and denied Turner's Petition II.

On November 15, 2013, Turner appealed the Eighth District Court's judgment to this Court as an appeal as of right.

II. LAW AND ARGUMENT

Proposition of Law No. I:

The Eighth District Court of Appeals erred in granting respondent Brian J. Corrigan, Judge, request for summary judgment which was contrary to law.

In his first proposition of law Turner claims that the Eighth District Court of Appeals erred when it granted appellee Judge Corrigan's motion for summary judgment to Turner's Petition II because appellee Judge Corrigan's motion for summary judgment failed to comply with Civ. R. 56(C). More specifically, Turner maintains that appellee Judge Corrigan did not attach any evidentiary material to his motion for summary judgment, that appellee Judge Corrigan failed to establish there was no genuine issue as to any material fact, and that appellee Judge Corrigan failed to establish that he was entitled to summary judgment.

However, appellee Judge Corrigan attached exhibits to his motion for summary judgment that established that Turner was not entitled to a remedy by way of writ of mandamus. On November 5, 2012, Turner filed a petition for writ of mandamus ("Petition I") asking this Court to compel: (1) respondents the Cuyahoga County Clerk of Courts and Legal Account Clerk Supervisor for the Clerk of Courts Cindi Condol to refrain from collecting court costs incurred by Turner in *State v. Turner*, 8th Dist. Cuyahoga No. 97978 ("*Turner III*") and *State v. Turner*, 8th

Dist. Cuyahoga No. 98150 (“*Turner IV*”); (2) the Eighth District Court of Appeals to review and rule on Turner’s briefs filed in *State v. Turner*, 8th Dist. Cuyahoga No. 97978 (“*Turner III*”) and *State v. Turner*, 8th Dist. Cuyahoga No. 98150 (“*Turner IV*”); **(3) respondent Judge Brian Corrigan to conduct a do novo sentencing hearing as mandated by the Eighth District Court of Appeals in *State v. Turner*, 8th Dist. Cuyahoga No. 88958, 2007-Ohio-5732 (“*Turner I*”)**; and (4) respondents the Ohio Adult Parole Authority and the Bureau of Sentencing Computation (BOSC) to eliminate the one to five-year sentence Turner received in Cuyahoga County Court of Common Pleas case number CR-94834 and to “no longer make any decisions and rulings based thereupon”. (Turner’s Petition I, attached to appellee’s motion for summary judgment as Ex. A).

On November 21, 2012, respondents Judge Brian Corrigan, Cuyahoga County Clerk of Courts, and Legal Account Clerk Supervisor for the Clerk of Courts Cindi Condol filed a motion to dismiss Turner’s Petition I. (Respondents’ motion to dismiss Turner’s Petition I filed on November 21, 2012, attached to appellee’s motion for summary judgment as Ex. B). On January 23, 2013, the Supreme Court of Ohio granted Respondents’ motion to dismiss Turner’s Petition I. (Appellee’s motion for summary judgment, Ex. C).

On July 11, 2013, Turner file a second petition for writ of mandamus (“Petition II”) asking this Court to compel appellee Judge Corrigan to conduct a do novo sentencing hearing as mandated by this Court in *State v. Turner*, 8th Dist. Cuyahoga No. 88958, 2007-Ohio-5732 (“*Turner I*”). Turner previously raised this same claim in his third grounds for relief in his Petition I. (Compare Petition II filed in the underlying case with Petition I, p. viii, attached to appellee’s motion for summary judgment as Ex. A).

Because Turner filed duplicate petitions for writ of mandamus, the Eighth District Court properly determined that Turner's Petition II should be denied. *State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717, ¶ 8 ("Petition II"). Consequently, appellee Judge Corrigan properly attached evidence to his motion for summary judgment to Turner's Petition II that established that there was no genuine issue of material fact and that appellee Judge Corrigan was entitled to summary judgment.

Therefore, Turner's first proposition of law should be denied.

Proposition of Law No. II:

The Eighth District Court of Appeals did err in denying mandamus relief as to Appellant's claim involving the failure of the trial court judge to impose sentence as required by law based on a finding that Appellant's claim was moot because he had already completed his sentence.

In his second proposition of law Turner claims that the Eighth District Court of Appeals erred when it denied his Petition II on the basis that Turner had already completed his sentence in case number CR-04-453056-A. But a careful examination of the Eighth District Court's opinion in *State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717 ("Petition II") reveals that the Eighth District Court did not deny Turner's Petition II on the basis that he had already completed his sentence in case number CR-04-453056-A.

The Eighth District Court in *Turner* explained, as part of the procedural history of the underlying case before this Court, that this Court granted respondent Judge Corrigan's motion to dismiss Turner's Petition I after respondent Judge Corrigan claimed that Turner's Petition I was moot because Turner had already completed his sentence. *State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717, ¶ 4 ("Petition II"). The Eighth District Court did not, as Turner maintains, deny Turner's Petition II because it determined he had

already completed his sentence. *See State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717 (“Petition II”).

Turner also claims in his second proposition of law that the trial court erred when it improperly amended its sentencing journal entry issued on May 30, 2008. However, the Eighth District Court properly determined that Turner was not entitled to raise this claim by way of mandamus since had an adequate remedy by way of appeal to raise this claim and, in fact, previously raised this claim when he filed his Petition I before this Court. *State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717, ¶ 4 and 8 (“Petition II”). Turner is attempting to revive a claim that has already been denied by this Court in *State ex rel. Turner v. Stewart*, 981 N.E.2d 881, 2013-Ohio-158 (slip copy) and found to be duplicative in *State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717, ¶ 8 (“Petition II”).

Therefore, Turner’s second proposition of law should be denied.

Proposition of Law No. III:

The Eighth District Court of Appeals erred in dismissing Appellant’s mandamus action based upon a finding that Appellant fail to provide an affidavit as required by Local Appellant [sic] Rule 45(B)(1)(a).

In his third proposition of law Turner claims that the Eighth District Court erred when it determined that the affidavit Turner attached to his Petition II failed to comply with Loc.App.R 45(B)(1)(a) rendering his Petition II defective. Turner’s claim is without merit.

Loc.App.R 45(B)(1)(a) requires that extraordinary writs contain an affidavit specifying the details of the claim. “All complaints must contain the specific statements of fact upon which the claim of illegality is based and must be supported by an affidavit from the plaintiff or relator specifying the details of the claim. Absent such detail and attachments, the complaint is subject to dismissal.” Local App.R. 45(B)(1)(a).

Turner attached an affidavit of verity to his Petition II in which he stated, in part, that the “[c]ontents contained in the foregoing petition with supporting memorandum attached thereto, which I state are true and accurate to the best of my own personal knowledge, information, and belief.” Turner’s affidavit failed to set forth the details of his claim as mandated by Local App.R. 45(B)(1)(a) thereby subjecting his Petition II to dismissal . *State ex rel. Leon v. Cuyahoga Cty. Court of Common Pleas*, 123 Ohio St.3d 124, 2009-Ohio-4688, ¶ 1 (court affirmed denial of appellant’s petition for writ of mandamus and procedendo due to appellant’s failure to comply with Local App.R. 45(B)(1)(a)); *State ex rel. Jones v. McGinty*, 8th Dist. Cuyahoga No. 92602, 2009-Ohio-1258, ¶ 2 (a statement that verifies that relator has reviewed petition and that contents are true and accurate is insufficient under Local App.R. 45(B)(1)(a) and fatally defective). Therefore, the Eighth District Court correctly determined that Turner’s Petition II was defective. *State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717, ¶ 5-7 (“Petition II”).

In his brief Turner relies upon *State ex rel. Madison v. Cotner*, 66 Ohio St.2d 448 (1981) and *State ex rel. Millington v. Weir*, 60 Ohio App.2d 348 (10th Dist. 1978) in support of his contention that the Eighth District Court erred when it determined that Turner’s failure to comply with Loc.App.R. 45(B)(1)(a) rendered his Petition II defective. However, in *Madison* and *Millington* the courts determined that petitions for writ of mandamus could not be stricken for failure to comply with R.C. 2731.04 since Civ.R. 11 eliminates the requirement of an affidavit except when otherwise specifically provided by the civil rules.

Madison and *Millington* are distinguishable from the instant case since the Eighth District Court in *Turner* determined that Turner’s Petition II was defective for failure to comply with its

local rule and not R.C. 2731.04, a state statute. In addition, the *Madison* and *Millington* opinions predate the existence of Loc.App.R 45(B)(1)(a) which became effective February 1, 1999.

Moreover, more recently this Court in *State ex rel. Leon v. Cuyahoga Cty. Court of Common Pleas*, 123 Ohio St.3d 124, 2009-Ohio-4688, affirmed the denial of appellant's petition for writ of mandamus and procedendo due to appellant's failure to comply with Local App.R. 45(B)(1)(a) and the Eighth District Court's reasonable interpretation of its own rule. *Id.* at ¶ 1.

Therefore, Turner's third proposition of law should be denied.

Proposition of Law No. IV:

The Eighth District Court of Appeals erred in dismissing Appellant's mandamus action based upon a finding that Appellant had another adequate remedy by means of direct appeal and that he had already unsuccessfully sought relief through a mandamus petition dismissed by the Ohio Supreme Court.

In his fourth proposition of law Turner claims that that the Eighth District Court erred when it determined that: (1) Turner had an adequate remedy by way of direct appeal to raise his claim that appellee Judge Brian Corrigan failed to conduct a do novo sentencing hearing as mandated by the Eighth District Court of Appeals in *State v. Turner*, 8th Dist. Cuyahoga No. 88958, 2007-Ohio-5732 ("*Turner I*"); and (2) Turner had already unsuccessfully sought to obtain the same relief through a petition for writ of mandamus that was dismissed by this Court in *State ex rel. Turner v. Stewart, et al.*, Supreme Court of Ohio case number 2012-1867. (See Respondents' motion for summary judgment filed on August 8, 2013, Exhibits A-C).

In his brief Turner claims that he did not have an adequate remedy by way of appeal of the trial court's sentencing journal entry issued on May 30, 2008, because his appeal was dismissed by the Eighth District Court of Appeals. However, on June 24, 2008, Turner filed an appeal with this Court in which he alleged that his indictment in case number CR-04-453056-A was defective and that the trial court failed to conduct a resentencing hearing as mandated by this

Court in *Turner I. State v. Turner*, 8th Dist. Cuyahoga No. 91695, 2008-Ohio-6648. (“*Turner I*”), appeal not accepted for review by *State v. Turner*, 121 Ohio St.3d 1476, 2008-Ohio-6648. On November 6, 2008, this Court in *Turner II* determined that the sentencing journal entry issued by the trial court on May 30, 2008, failed to reflect the trial court’s sentence or means of conviction and remanded the case back to the trial court for clarification of the disposition of all counts, including specifications.

On November 12, 2008, the trial court issued a revised sentencing entry that was made part of the record and included the trial court’s original sentence and means of conviction as mandated by the Eighth District Court in *Turner II*. (Turner’s Petition, Ex. E). On December 18, 2008, the Eighth District Court in *Turner II* issue on opinion in which the Court held that Turner’s claim that his indictment is defective is barred by res judicata and that his claim that the trial court did not conduct a new sentencing upon remand by the this Court is overruled because Turner failed to file a transcript of the resentencing hearing. *State v. Turner*, 8th Dist. Cuyahoga No. 91695, 2008-Ohio-6648. (“*Turner II*”).

Consequently, Turner had an adequate remedy at law to challenge the trial court’s sentencing journal entry issued on May 30, 2008, but did not perfect his appeal due to his failure to file a transcript of the resentencing hearing. Because Turner had an adequate remedy to challenge the trial court’s sentencing journal entry issued on May 30, 2008, he is precluded from seeking a remedy by way of writ of mandamus regardless if the adequate remedy was used. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 47, 1997–Ohio–245 (where a plain and adequate remedy at law has been unsuccessfully invoked, a writ of mandamus will not lie to relitigate the same issue); *State ex rel. Martin v. Russo*, 130 Ohio St.3d 269, 2011-Ohio-5516, ¶ 3 (mandamus is not a substitute for an unsuccessful appeal).

Turner also maintains in his brief that the Eighth District Court erred when it denied Turner's Petition II on the basis that Turner had previously sought the same relief in his Petition I by way of writ of mandamus that was dismissed by this Court on January 23, 2013. *State ex rel. Turner v. Corrigan*, 8th Dist. Cuyahoga App. No. 100102, 2013-Ohio-4717, ¶ 8 ("Petition II").

Turner contends that because this Court did not render an opinion when it dismissed Turner's Petition I, he is not barred from filing a subsequent petition for writ of mandamus in which he raises the same claims alleged in his Petition I. However, Turner previously litigated his claim that appellee Judge Corrigan improperly amended the sentencing journal entry issued by the trial court on May 30, 2008, when he filed his Petition I before this Court. Turner cannot relitigate this same issue that was previously decided by this Court in *State ex rel. Turner v. Stewart*, 981 NE.2d 881, 2013-Ohio-158 (slip copy).

Res judicata bars the litigation of all claims that either were or might have been litigated in a first lawsuit. *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, ¶ 36; *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, ¶ 14. Because Turner has already challenged the trial court's sentencing journal entry issued on May 30, 2008, when he filed his Petition I, Turner's claim that he is entitled to a de novo sentencing hearing is barred by res judicata. *State ex rel. Hondo v. McGinty*, 8th Dist. No. 94915, 2010-Ohio-2900, ¶ 4 (court denied petition for writ of mandamus because the Supreme Court of Ohio dismissed a complaint for writ of mandamus in which relator raised the same claim).

Consequently, the Eighth District Court of Appeals correctly held that: (1) Turner had an adequate remedy by way of direct appeal to raise his claim that appellee Judge Brian Corrigan failed to conduct a do novo sentencing hearing as mandated by the Eighth District Court of Appeals in *State v. Turner*, 8th Dist. Cuyahoga No. 88958, 2007-Ohio-5732 ("*Turner P*"); and (2) Turner had already unsuccessfully sought to obtain the same relief through a petition for writ of

mandamus that was dismissed by this Court in *State ex rel. Turner v. Stewart, et al.*, Supreme Court of Ohio case number 2012-1867.

Therefore, Turner's fourth proposition of law should be denied.

III. CONCLUSION

For the foregoing reasons, appellee Judge Brian Corrigan respectfully requests that this Honorable Court affirm the judgment of the Eighth District Court of Appeals denying Appellant's petition for writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing merit brief of appellee Judge Brian Corrigan was sent this 16TH day of January, 2014, by regular U.S. Mail to Donald Turner, Pro Se, Inmate # 514553, at Lebanon Correctional Institution, P.O. Box 56, 3791 State Route 63, Lebanon, Ohio 45036.



James E. Moss
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