

ORIGINAL

In the
Supreme Court of Ohio

JASON C. THOMAS,

Petitioner-Appellant,

v.

ED SHELDON, Warden,

Respondent-Appellee.

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Case No. 2014-0622

HABEAS CORPUS

MEMORANDUM OPPOSING JURISDICTION

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TABLE OF CONTENTS

STATEMENT OPPOSING JURISDICTION1

STATEMENT OF CASE & FACTS2

ARGUMENT5

Appellee’s Assignment of Error 1

The Court should decline jurisdiction in this case as the appellate court’s decision was a routine fact based application of clearly established Ohio Supreme Court precedent presenting no substantial constitutional questions.5

 A. Thomas is not entitled to the extraordinary remedy of habeas in light of the existence of alternative remedies6

 B. Thomas is not entitled to immediate release from prison because his sentence has not expired9

 C. Thomas failed in his affirmative duty to provide a detailed list of all lawsuits he has filed in the previous five years under R.C. §2969.259

CONCLUSION.....10

CERTIFICATE OF SERVICE11

**STATEMENT WHY THIS CASE FAILS TO PRESENT
A SUBSTANTIAL CONSTITUTIONAL QUESTION OR
AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST**

Petitioner-Appellant Jason C. Thomas, (“Thomas”) is inmate #609-043, at the Toledo Correctional Institution in Toledo, Ohio. Ed Sheldon, as the Warden of that Institution, is the custodian of Thomas and is the correct Respondent-Appellee to this habeas corpus action.

This case originated by Thomas’ Petition for Writ of Habeas Corpus pursuant to R.C. §2725.01 filed in the Court of Common Pleas for Lucas County, Ohio, asserting entitlement to immediate release from custody due to violations of his due process rights to a jury trial and the ineffective assistance of trial counsel. In an opinion and judgment entry filed July 15, 2013, the trial court granted the Warden’s Civ. R. 12(B)(6) Motion to Dismiss because Thomas could not prevail on the facts as alleged in his petition.

On March 7, 2013, Thomas’ subsequent appeal was denied as meritless by the Court of Appeals for the Sixth Judicial District, Lucas County, Ohio, because the extraordinary remedy of habeas corpus is not available where there was an adequate remedy at law. *Thomas v. Sheldon*, 2014-Ohio-1006 (Ohio Ct. App. Lucas County March 7, 2014).

In this discretionary appeal, Thomas continues to argue against Ohio’s established precedent that “[f]or the purposes of seeking an extraordinary writ, the fact that the defendant waived his right to appeal or that the time for seeking the alternative remedies has expired does not alter the fact that he had an alternative remedy at law.” *Thomas v. Sheldon*, 2014-Ohio-1006 ¶8 citing *Billiter v. Banks*, 135 Ohio St.3d 426, 2013-Ohio-1719.

This well-settled issue does not present a case of public or great general interest. Nor does it involve a substantial constitutional question. Therefore, this Court should decline to exercise its discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

Thomas is currently serving an aggregate sentence of fifteen (15) years to life as a result of his 2009 negotiated plea of no contest and subsequent convictions of felony murder and felonious assault in the Mercer County Court of Common Pleas case *State v. Thomas*, Case No. 2009-CRM-008. The charges arose from the death of a ten and a half (10 ½) month old child with whom Thomas resided and for whom he provided care. See *State v. Thomas*, 2011-Ohio-4337, 2001 Ohio App. LEXIS 3587 (Ohio Ct. App., Mercer County Aug. 29, 2011). Thomas agreed to plead no contest to the reduced charges of only the first two (2) counts of his indictment in exchange for the state dismissing the remaining seven (7) counts in his original nine (9) count indictment. *Id.*

During his plea hearing, the state read the following stipulation of facts, signed by Thomas, into the record:

On or about January 14, 2009, approximately 7:17 p.m., the Celina Police Department received a report of an injured child in the City of Celina, County of Mercer, State of Ohio. Celina Police officers responded to the child's residence along with emergency medical service personnel and found a 10 [and a half] month old child apparently not breathing, unresponsive with multiple bruises on his face, chest and abdomen.

The child was taken to Mercer Health, and transferred to Children's Medical Center in Dayton, Ohio, where the child died on January 15, 2009. The cause of death was reported to be non-accidental multiple blunt force trauma to the child. Also, multiple bruises, broken bones and injuries to the child's internal organs were found. The opinion of the treating physician at Children's Medical Center was that the child was abused. The injuries and death were consistent with Shaken Baby Impact Syndrome.

Jason Thomas admitted to committing the assault against the minor child that resulted in the child's death.

State v. Thomas, 2011 Ohio 4337, ¶4 (Ohio Ct. App., Mercer County Aug. 29, 2011).

Apparently, Thomas failed to perfect any direct appeal from his conviction. However, on

August 4, 2010, over a year following his sentencing, Thomas filed a Motion to Withdraw his plea pursuant to Crim. R. 32.1 claiming “new” and previously undiscovered exculpatory evidence and asserting ineffective trial counsel and trial court error for improperly informing his of his right to appeal during the Rule 11 colloquy. *State v. Thomas*, 2011-Ohio-4337, ¶6 (Ohio Ct. App., Mercer County Aug. 29, 2011). The trial court denied Thomas’ motion on November 15, 2010 and the appellate court affirmed on August 29, 2011. *Id.*, at ¶7. The on-line docket for this Court does not reflect that Thomas appealed this denial further on discretionary review.

Over one year following the appellate court’s decision affirming the trial court’s denial of his R. 32 Motion to Withdraw, Thomas filed the instant habeas petition claiming his incarceration is unlawful and that he is entitled to immediate release due to the following constitutional errors:

1. The denial of the right to a jury trial under the Sixth Amendment to the Constitution of the United States, as applicable to the States through the due process clause of the Fourteenth Amendment to the Constitution of the United States.
2. The denial of the right to a jury trial under Article I, Section 5 of the Constitution of the State of Ohio.
3. The denial of the right to effective assistance of counsel under the sixth Amendment to the Constitution of the United States, applicable to the States through the due process clause of the Fourteenth Amendment to the Constitution of the United States.
4. The denial of the right to effective assistance of counsel under Article I, Section 10 of the Constitution of the State of Ohio.
5. The denial of the right to due process of law, under the Fifth and Fourteenth Amendments to the Constitution of the United States.⁶ The denial of the right to due process of law, under Article I, Section 10 of the Constitution of the State of Ohio.

(Petition, pp. 1-2.)

The Warden filed a Motion to Dismiss Thomas’ petition in that Thomas’ sentence has not

expired so he is not entitled to release, because alternative remedies exist(ed) by which he could have pursued his claims and for failure to comply with the mandatory requirements of R.C. §2969.25(A). In a July 15, 2013 Opinion and Judgment Entry, the trial court granted the Warden's Motion to Dismiss. Thomas appealed this decision to the Lucas County Court of Appeals arguing entitlement to habeas relief because he no longer had any available remedies.

The appellate court's March 7, 2014 decision rejecting his contention and affirming the trial court's decision is the subject of this discretionary appeal.

ARGUMENT

I. Appellee's Proposition of Law

The Court should decline jurisdiction in this case as the appellate court's decision was a routine fact based application of clearly established Ohio Supreme Court precedent presenting no substantial constitutional questions.

Revised Code §2725.01 sets forth who is entitled to a writ of habeas corpus:

Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.

However, under R.C. §2725.05, a writ of habeas corpus may *not* issue when:

If it appears that a person in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ of habeas corpus shall not be allowed. If the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order.

Thus, habeas corpus normally may be used only to challenge the jurisdiction of the sentencing court. *Stahl v. Shoemaker*, 50 Ohio St. 2d 351 (1977)(holding that when a petitioner does not attack the jurisdiction of the court, habeas corpus does not lie); *See Brewer v. Dahlberg* 942 F.2d 328 (6th Cir. 1991)(holding that a writ of habeas corpus will not be allowed in Ohio unless a petitioner alleges that he is being restrained by a court who lacked jurisdiction over him).

In this case, the appellate court correctly upheld the trial court's dismissal of Thomas' habeas petition because "failing to avail oneself of a remedy does not make it an inadequate remedy. Furthermore, the exhaustion of remedies does not entitle appellant to extraordinary relief." *Thomas v. Sheldon*, 2014-Ohio-1006 ¶8 (Ohio Ct. App. Lucas County March 7, 2014).

A. Thomas is not entitled to the extraordinary remedy of habeas in light of the existence of alternative remedies.

“[H]abeas corpus will lie in certain extraordinary circumstances where there is an unlawful restraint of a person’s liberty . . . but only, where there is no adequate legal remedy.” *In re Complaint for Writ of Habeas Corpus for Goeller*, 103 Ohio St.3d 427, 2004-Ohio-5579; *State ex rel. Jackson v. McFaul*, 73 Ohio St. 3d 185, 186, 1995-Ohio-228, 652 N.E.2d 746. In other words, habeas corpus may not be used as a substitute for other forms of action, such as direct appeal, post-conviction relief or mandamus. *Seebeck v. Zent*, 68 Ohio St.3d 109 (1993); *Ellis v. Macken*, 65 Ohio St.3d 161 (1992); *Adams v. Humphreys*, 27 Ohio St.3d 43 (1986); *Beard v. Williams Cty. Dept. of Social Services*, 12 Ohio St.3d 40 (1984). Importantly, the existence of an alternative remedy is enough to remove a petitioner’s allegations from habeas consideration, whether the alternative remedy opportunity still exists or not, as long as the petitioner *could have* taken advantage of it previously. *Luna v. Russell*, 70 Ohio St. 3d 561, 562 1994-Ohio-264.

Thomas’ instant claims asserting due process violations of his right to a jury trial, deficient trial counsel and trial court errors during his Rule 11 colloquy are claims properly presented in direct review. Claims considered “within the record” are based on allegations that can be determined by examination of the files and records in the case. See e.g. *State v. Milanovich*, 42 Ohio St. 2d 46 (1975). Record claims, including trial court error and ineffective trial counsel should be raised at the earliest opportunity in a direct appeal (including discretionary review to the Ohio Supreme Court). *State v. Szeftcyk*, 77 Ohio St.3d 93 (1996); *State v. Perry*, 10 Ohio St.2d 175 (1967). Likewise, his assertions of the denial of due process are appropriately asserted in direct review and not via the extraordinary writ of habeas corpus. *Wilson v. Hudson*, 127 Ohio St. 3d at 32, citing *Tucker v. McAninch*, 82 Ohio St.3d 423, 1998-

Ohio-220. Thomas did not seek direct review of his conviction, though he arguably may still pursue a delayed direct appeal pursuant to App. R. 5(A).

In any event, the existence of these alternative remedies are enough to remove a petitioner's allegations from habeas consideration, whether the opportunity still exists or not, as long as the petitioner could have taken advantage of it previously and/or still could pursue it. *Luna v. Russell*, 70 Ohio St. 3d at 562. See also *Billiter v. Banks*, 2013-Ohio-1719, 135 Ohio St. 3d 426, 428-29 citing *Jackson v. Wilson*, 100 Ohio St.3d 315, 2003-Ohio-6112 ¶ 9 ("even if these other remedies are no longer available to [the habeas petitioner], he is not thereby entitled to an extraordinary writ") and *State ex rel. Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 579 (2001) ("the fact that either or both of these alternative remedies may no longer be available because of [relator's] failure to timely pursue them does not render them inadequate").

In that Thomas could have pursued the remedy of a direct appeal he is not entitled to the extraordinary relief of habeas corpus to pursue his instant claims of alleged record errors.

Likewise, Thomas asserts an error resembling an involuntary plea claim due to the alleged off-the-record coercion of either his supposedly ineffective counsel and/or the prosecutor. Such a *de hors* the record claim is properly presented in a petition to vacate or set aside relief under R.C. §2953.21. Revised Code §2953.21(j), part of the postconviction relief statutory scheme, provides that "the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case * * *." *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, at ¶13. In that Thomas had the alternative remedy of a petition to vacate or set aside sentence in which to litigate his potentially outside the record claim(s), he may not bring these claim(s) via the extraordinary

remedy of habeas corpus.¹

Though he failed to avail himself of potential available remedies by which he could have sought redress for his instant claims, Thomas complained that he has exhausted his adequate remedies because “as a practical and a pragmatic matter” they are no longer “actually, nor chronically available.” The appellate court below correctly applied Ohio law in its decision rejecting Thomas’ assignment of error as follows:

{¶ 8} In the case before us, appellant does not allege that the trial court lacked jurisdiction to convict and sentence him. Furthermore, he had the right to appeal his conviction and sentence, but did not do so. He attempted to withdraw his plea on other grounds, but the Third District Court of Appeals held that he was not entitled to withdraw the plea. *Thomas*, 3d Dist. Mercer No. 10-10-17, 2011-Ohio-4337. Appellant had a right to file a postconviction relief petition, but failed to do so before the time limit. For purposes of seeking an extraordinary writ, the fact that the defendant waived his right to appeal or that the time for seeking the alternative remedies has expired does not alter the fact that he had an alternative remedy at law. *Billiter v. Banks*, 135 Ohio St.3d 426, 2013-Ohio-1719, 988 N.E.2d 556, ¶ 9. Appellant argues that the remedies available to him are inadequate. However, failing to avail oneself of a remedy does not make it an inadequate remedy. Furthermore, the exhaustion of remedies does not entitle appellant to extraordinary relief. Therefore, appellant’s sole assignment of error is not well-taken.

Thomas v. Sheldon, 2014-Ohio-1006 ¶8 (Ohio Ct. App. Lucas County March 7, 2014).

The appellate court’s decision that Thomas had (and/or may even still have) alternative remedies through which he could have pursued his instant claims is correct. In that this decision was a routine application of established Supreme Court precedent and does not raise substantial questions of constitutional law, this Court should decline to exercise discretion and dismiss this appeal.

¹ Respondent also notes that Thomas pursued a Crim. R. 32 proceeding to present his instant issues rather than upon direct review. However, claims raised in a post-sentence motion to withdraw a guilty plea which were raised or could have been raised in a direct appeal are barred by *res judicata*. *State v. Lorenzo*, 11th Dist. No. 2007-L-085, 2008-Ohio-1333, ¶21; *State v. Green*, 11th Dist. Nos. 2005-A-0069 & 2005-A-0070, 2006-Ohio-6695, ¶13; *State v. McDonald*, 11th Dist. No. 2003-L-155, 2004-Ohio-6332, ¶22

B. Thomas is not entitled to immediate release from prison because his sentence has not expired.

An inmate is not entitled to release after serving his minimum sentence, but an inmate may petition for a writ of habeas corpus only 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*, 27 Ohio St.3d 22 (1986); *Frazier v. Stickrath*, 42 Ohio App. 3d 114, 115-116 (1988). In Thomas' case, he received an aggregate sentence of fifteen (15) years to life in an entry filed July 31, 2009. Thomas' minimum sentence has not expired, let alone his maximum sentence of life. This, in addition to the reason set forth above, provides yet another reason why Thomas is not entitled to a writ of habeas corpus.

C. Thomas failed in his affirmative duty to provide a detailed list of all lawsuits he has filed in the previous five years under R.C. §2969.25.

In this Court's case of *Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 422 (1998), the petitioner failed to attach an affidavit describing each civil action or appeal of a civil action he had filed in the previous five (5) years in any state or federal court, as specified by R.C. §2969.25(A). This Court held that the Parole Board possessed discretion to grant parole and that there is no right to be released before the expiration of the individual's sentence. *Zanders*, 82 Ohio St.3d at 422. The Court further affirmed the dismissal of the Petitioner's action because there was a failure to file an affidavit pursuant to R.C. §2969.25 with the commencement of the proceeding. *Id.*; see also *State ex rel. Alford v. Winters*, 80 Ohio St.3d 285, 286 (1997).

The statute states that actions or claims that have been filed before can be dismissed from the action in question. R.C. §2969.24(A)(2), (B)(4). Further, if a prison inmate filed three or more actions in any twelve month period, then the Court may appoint a "member of the bar to

review the claim *** and make a recommendation regarding whether the claim asserted *** [is] frivolous or malicious under section 2969.24 of the Revised Code, any other provision of the law, or rule of court.” R.C. §2969.25(B). Without this information, the court is unable to decide whether a petitioner has complied with these mandatory requirements to proceed in a lawsuit against the State.

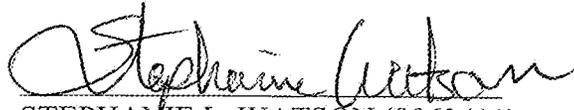
This Court has held that R.C. §2969.25 applies to habeas corpus actions. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533. The affidavit must be filed at the time an inmate commences the action. A belated attempt to file the affidavit does not excuse the inmate’s noncompliance with R.C. §2969.25. *Fuqua, supra* at 213. Thus, in addition to all of the above argued reasons, Thomas’ failure to comply with R.C. §2969.25 also requires dismissal of his petition. *Id.*; *See Zanders* 82 Ohio St.3d at 422; *Winters*, 80 Ohio St.3d at 286.

CONCLUSION

For the foregoing reasons, Respondent-Appellee respectfully requests that this Court decline jurisdiction in this matter as the decision of the appellate court was correct and this case raises no substantial matters of a constitutional nature. Likewise, this case does not present a matter of public or great general interest.

Respectfully submitted,

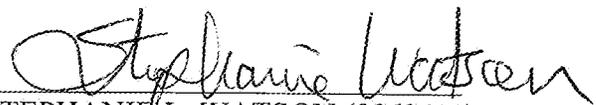
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Opposition to Jurisdiction has been forwarded to attorney Gene P. Murray, Esq., counsel for Petitioner-Appellant, Jason Thomas, at 227 West Center Street, Fostoria, Ohio, 44830 via U.S. mail, postage prepaid, this 28th day of April 2014.



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