

IN THE SUPREME COURT OF OHIO

State ex rel. William L. Ridenour, :
Appellant, : Case No. 07-1831
v. :
Timothy Brunsman, Warden, : On Appeal from an Original Action
Appellee. : in the Ross County Court of
Appeals, Fourth Appellate District

MERIT BRIEF OF APPELLANT WILLIAM L. RIDENOUR

William L. Ridenour (Inst. No. A134-385)
Chillicothe Correctional Institution
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Chillicothe, Ohio 45601-0990

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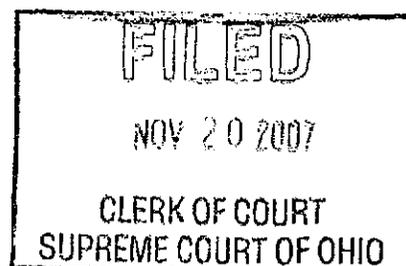
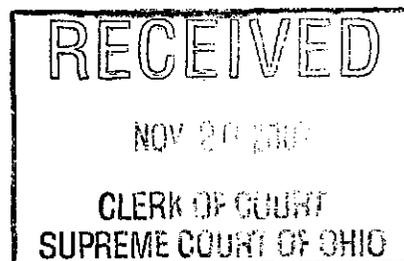


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STATEMENT OF FACTS

This case was filed as an original writ of mandamus complaint in the Court of Appeals for the Fourth Appellate District of Ohio on August 15, 2007. (Appx. 1). Appellant, William L. Ridenour, filed his writ of mandamus complaint to compel appellee, Chillicothe Correctional Institution Warden Timothy Brunsman, to provide him with adequate clothing for inclement weather, in accordance with the provisions in R.C. §2921.44(C). Appellant Ridenour alleged that such adequate clothing for inclement weather should include a raincoat, rubber overshoes and thermal underwear. After reviewing the complaint, the Court of Appeals concluded that it was fatally defective because appellant allegedly failed to comply with R.C. §2969.25(C). (Appx. 4, 5). However, the appellant did in fact comply with his statutory obligations under R.C. §2969.25(C), and his complaint was sua sponte dismissed through no fault of his own. On September 4, 2007, appellant filed a motion for reconsideration, in which he submitted the copy of the cashier statement the Court of Appeals clerk sent to him with his copy of the writ of mandamus. The Court of Appeals denied appellant's motion for reconsideration and his supplemental cashier statement. (Supp. 6).

The evidence will show that appellant did in fact comply with his statutory obligations in the provisions of R.C. §2969.25(C). The current policy and practice mandated at the Chillicothe Correctional Institution (CCI) for submitting a statement of the balance of an inmate's prison account for each of the preceding six months, and verified by the Institution Cashier, requires an inmate to (1) prepare the documents to be filed in the court,

along with an affidavit of indigency, and place the documents in a large unsealed envelope with sufficient postage for mailing (Supp. 2), (2) prepare a request to the Institution Cashier for a financial statement in the form of a "kite" attached to the outside of the unsealed envelope (Supp. 1), (3) deliver the unsealed envelope to the institution mailroom officer for transportation to the institution cashier, and (4) then the Institution Cashier is required by R.C. §2969.25(C) to prepare a verified financial statement and attach it to the affidavit of indigency before mailing the documents to the court. (Supp. 2). It is the current policy and practice of the CCI Institution Cashier to prohibit inmates from direct access to their financial statements. The only way a CCI inmate can receive a copy of the financial statement submitted by the cashier to the court is when the court sends the inmate a copy of his complaint and accompanying documents. (Supp. 3, 4, 5). Under the current policy and practice of the Institution Cashier, appellant cannot confirm whether or not the Institution Cashier has in fact submitted a verified financial statement of his prison account in accordance with the provisions in R.C. §2969.25(C), but the Court of Appeals clerk sent appellant a copy of the cashier statement that the CCI cashier apparently submitted to the court.

Appellant Ridenour has followed the institution procedure for requesting a verified financial statement to be included with his court documents. (Supp. 1). However, the institution cashier has failed in her responsibility to complete a "verified" financial statement for appellant. (Supp. 3, 4, 5). When appellant received his copy of the writ of mandamus filed in the Court of Appeals, the clerk of courts sent appellant a copy of the financial statement the CCI cashier submitted with appellant's complaint. (Supp. 3, 4, 5)

Although the Institution Inspector advised appellant that such financial statement was filed in the Court of Appeals, he did not determine whether or not the financial statement was verified in accordance with the provisions in R.C. §2969.25(C). (Supp. 11). Inmates at the Chillicothe Correctional Institution have no way of determining whether or not the cashier has in fact complied with the provisions in R.C. §2969.25(C). The Institution Cashier has failed to comply with her statutory obligations in R.C. §2969.25(C), and her corresponding policies and practices for inmates to obtain a verified financial statement from the institution cashier violates an inmate's right of access to the courts.

The CCI Institution Cashier clerk, Ms. T. Ogier, who is an agent of the appellee, has a statutory duty under R.C. §2969.25(C) to provide appellant with a verified financial statement to support his affidavit of indigency. She has breached her duty under R.C. §2969.25(C), which is the proximate cause of the sua sponte dismissal of appellant's writ of mandamus complaint in the Court of Appeals. (Supp. 9). The Deputy Chief Inspector's statement that she "obtained and reviewed a copy of the signed and dated inmate demand statement" appears somewhat disingenuous in light of the evidence from the clerk of courts. (Supp. 3, 4, 5). The actions, policy and practice of the CCI Institution Cashier, Ms. T. Ogier, has effectively undermined appellant's legitimate attempt to comply with the provisions in R.C. §2969.25(C).

Appellant Ridenour filed his notice of appeal to the Supreme Court of Ohio on October 4, 2007. (Appx. 2). In addition, he filed a motion for appointment of counsel and a motion to certify a conflict between the Fourth and Tenth Appellate Districts.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I:

THE IMPOSITION OF FILING AT THE SAME PRECISION IN TIMING IN R.C. §2969.25(A) IS NOT IMPOSED UPON ONE SEEKING TO FILE IN ACCORD WITH R.C. §2969.25(C).

The Supreme Court of Ohio has denied belated attempts to file documents required by R.C. §2969.25(A) in order to commence a civil action against a government entity or employee. In rejecting R.C. §2969.25(A) filings that are not submitted simultaneously with the petition, the Court pointed out that the particular section of the statute "requires that the affidavit be filed '[a]t the time that an inmate commences a civil action or appeal against a government entity or employee.'" See Fuqua v. Williams (2003), 100 Ohio St.3d 211, at ¶9, 797 N.E.2d 982. However, the text of R.C. §2969.25(C) in the statute reads, "If an inmate who files a civil or appeal against a government entity or employee seeks a waiver of the payment of the full filing fees assessed by the court in which the action or appeal is filed, the inmate shall file with the complaint or notice of appeal an affidavit that the inmate is seeking a waiver of the prepayment of the full filing fees and an affidavit of indigency." R.C. §2969.25(C). Thus, the additional imposition of filing at the same precision in timing stressed in Fuqua is not imposed upon one seeking to file in accord with R.C. §2969.25(C). See Richard v. Eberlin, not reported in N.E.2d, 2004 WL 1152863, (Ohio App. 7 Dist.), Ohio 2004, at ¶7. (Supp. 13).

On September 4, 2007, appellant filed a motion for reconsideration, in

which he submitted the copy of the cashier statement the Court of Appeals clerk sent to him with his copy of the writ of mandamus. A copy of the cashier statement was entered into the court record. (Supp. 3, 4, 5). However, the Court of Appeals denied appellant's motion for reconsideration and his supplemental cashier statement. (Supp. 6).

PROPOSITION OF LAW NO. II:

FAILURE OF THE TRIAL COURT TO GRANT LEAVE FOR INMATE TO AMEND HIS WRIT OF MANDAMUS IS AN ABUSE OF DISCRETION.

The Supreme Court of Ohio has held that Civ.R. 15(A) is applicable to writs and would allow an inmate to amend his or her original writ. See Gaskins v. Shiplevy (1995), 74 Ohio St.3d 149, 150, 656 N.E.2d 1282, 1995-Ohio-262, at 150.

In the relevant part, Civ.R. 15(A) states:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served ***. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. ***" (Civ.R.15(A))

To find an abuse of discretion, the court must determine whether the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. See Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Despite the trial court's broad discretion, a reading of Civ.R. 15(A) "indicates that a liberal amendment policy is

avored." See Butcher v. Three M Homes, Inc. (March 31, 1995), 11th Dist. No. 93-G-1783, 1995 Ohio App. LEXIS 1266, at 17. "While the rule allows for liberal amendment, motions to amend pleadings pursuant to Civ.R. 15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party." See Turner v. Cent. Local School Dist. (1999), 85 Ohio St.3d 95, 99, 706 N.E.2d 1261, citing Hoover v. Sumlin (1984), 12 Ohio St.3d 1, 465 N.E.2d 377, paragraph two of the syllabus. See also Civ.R. 15(B).

The record in the instant case clearly indicates that appellant made a good faith effort to amend his affidavit of indigency with a cashier statement. As a result, the trial court abused its discretion in failing to grant appellant leave to amend the cashier statement, as there is no evidence of bad faith, undue delay, or undue prejudice. First, absent from the record is any evidence that appellant is at fault for the failure to initially comply with R.C. §2969.25(C), or he acted in bad faith. Appellant was first notified of his failure to comply with R.C. §2969.25(C) in a sua sponte dismissal of his writ of mandamus complaint on August 28, 2007. (Appx. 4). On September 4, 2007, Appellant requested leave of the trial court to supplement the record with the cashier statement. Thus, there is no evidence of undue delay. Finally, the record fails to establish any undue prejudice incurred by appellee due to appellant's alleged initial failure to comply with R.C. §2969.25(C). Thus, amendments are permitted even after judgment. Civ.R.15(B).

The filing requirements of R.C. §2969.25(C) were formulated to restrict abusive litigation by inmates which would impair judicial efficiency. See, e.g., Bell v. Beightler, 10th Dist. No. 02AP-569, 2003-Ohio-88, at ¶37. In accordance with this purpose, R.C. §2969.25(B) states, "[i]f an inmate

who files a civil action in a court of common pleas *** has filed three or more civil actions or appeals of civil actions *** in the preceding twelve months *** the court may appoint a member of the bar to review the claim[.]” The purpose of the filing requirements of R.C. §2969.25(A) is protect the Ohio judicial system from frivolous law suits commenced by inmates.

An examination of appellant's affidavit and list of recent civil actions confirms that appellant has fully complied with the statutory prerequisites of R.C. §2969.25(A). In addition, appellant's list of civil actions commenced within the five years prior to his writ of mandamus demonstrates that he had not filed any frivolous civil actions within the twelve months prior to filing his writ. Hence, there is simply no evidence that appellant's alleged initial failure to properly file his writ of mandamus caused appellee any undue prejudice, as such failure did not require the appointment of a bar member to review the writ or alter the substance of the underlying action.

The Court of Appeals cites Fuqua as authority for its sua sponte dismissal of appellant's writ. Fuqua, however, is distinguishable from the instant case. In Fuqua, the petitioner filed a writ of habeas corpus in the court of appeals, but failed to file the affidavit required by R.C. §2969.25(A). Id. at ¶2, 797 N.E.2d 982. The distinguishable factor of Fuqua is that, on appeal to the Supreme Court of Ohio, the petitioner's sole argument was that R.C. §2969.25 was inapplicable to habeas corpus actions. Id. at ¶3, 797 N.E.2d 982. The petitioner never challenged the appellate court's denial of his request for leave of court as an abuse of discretion. Thus, the Court's isolated holding in Fuqua was that "the provisions in R.C. §2969.21 et seq. apply to State habeas corpus actions[.]” Id. at ¶6, 797 N.E.2d 982. At

no time did the Court hold that a petitioner is barred from amending his original petition, pursuant to Civ.R. 15(A), to conform with statutory mandates of R.C. §2969.25. In fact, at no time did the Court of Appeals in the instant case cite any authority or discuss the circumstance, as here, where the Institutional Cashier fails to comply with her statutory duty under R.C. §2969.25(C). Thus, the Court of Appeals abused its discretion by sua sponte dismissal of appellant's writ of mandamus on the basis of appellant's alleged failure to comply with R.C. §2969.25(C). See Hill v. Ohio Adult Parole Authority (2006), 10th Dist. 2006, 2006-Ohio-1299, WL 701126; State ex rel. Peeples v. Anderson (1995), 73 Ohio St.3d 559, 653 N.E.2d 371; Besser v. Griffey (1993), 88 Ohio App.3d 379, 623 N.E.2d 1326 (4th Dist.). (Supp. 22)

The Supreme Court has recognized that sua sponte dismissal of a complaint is generally inappropriate without first providing notice of the court's intention to dismiss and an opportunity to respond. The court in the instant case has provided neither notice of the court's intention nor an opportunity to respond. The Supreme Court has held that sua sponte dismissal without notice of the court's intention and an opportunity to respond is proper only where the complaint is frivolous or the claimant cannot prevail on the facts alleged in the complaint. See State ex rel. Collier v. Farley, 2006 WL 2692573, Ohio App. 4 Dist, 2006, citing State ex rel. Peeples v. Anderson (1995), 73 Ohio St.3d 559, 560; See also, State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn. (1995), 72 Ohio St.3d 106, 108. The Court of Appeals for the Fourth Appellate District has recognized that a court should not sua sponte dismiss a complaint without notice unless the complaint is frivolous or the claimant obviously cannot

prevail on the facts presented in the complaint. See State ex rel. Thacker v. Evans, not reported in N.E.2d, 2005 WL 503822, Ohio App. 4 Dist., 2005 at ¶8, citing State ex rel. Kralik v. Zwelling, 101 Ohio St.3d 134, 802 N.E.2d 657, 2004-Ohio-301, at ¶8. In the instant case, the court did not find the complaint to be frivolous nor that the claimant could not prevail on the facts presented in the complaint. The Supreme Court has made it clear that such facts as alleged by Appellant concerning the failure of the Appellee to provide adequate clothing is in fact sufficient to state a valid claim. See State ex rel. Carter v. Schotten, (per curiam) 70 Ohio St.3d 89, 637 N.E.2d 306, Ohio 1994, at headnote #15. Thus, the Court of Appeals has abused its discretion in the instant case.

PROPOSITION OF LAW NO. III:

THE INSTITUTIONAL CASHIER HAS FAILED TO PERFORM A DUTY EXPRESSLY IMPOSED BY OHIO REVISED CODE §2969.25(C), IN VIOLATION OF THE PROVISIONS OF OHIO REVISED CODE §2921.44(E).

The provisions in Ohio Revised Code §2921.44(E) provide that "[n]o public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office, or recklessly do any act expressly forbidden by law with respect to the public servant's office." In Ohio Revised Code §2901.22(C), it provides that "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances

when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." The provisions in Ohio Revised Code §2969.25(C) provides that "[a]n inmate filing a civil action or an appeal of a civil action against a government entity or employee seeking waiver of prepayment of court filing fees is required to submit a statement of the balance of his prison account for each of the preceding six months, verified by the institutional cashier." (emphasis added). The law in this statute expressly imposes a duty upon the institutional cashier to verify the statement of the balance of an inmate's prison account for each of the preceding six months. The record in the instant case clearly and unambiguously demonstrates that the CCI institutional cashier has failed to verify Appellant's financial statement and submit it to the court. She has acted with reckless and heedless indifference to the consequences and perversely disregarded a known risk that her conduct is likely to cause a certain result or is likely to be of a certain nature. (Supp. 3, 4, 5).

CONCLUSION

The decision below is fundamentally wrong in its reasoning and dangerous in its implications for inmates seeking waiver of prepayment of court filing fees. The decision undermines the structure and purpose of Ohio Revised Code §2969.25(C). In the decision below, the court ignores the statutory obligation of the institutional cashier in filing an inmate's affidavit of indigency and accompanying financial statement. If allow to continue, the actions of institutional cashiers throughout Ohio could easily make inmates'

court filings fatally defective. Such practice, if allowed to continue, would undermine the very foundation of the provisions in Ohio law.

The decision below must be reversed. A reversal will promote the exemplary purpose of Ohio Revised Code §2969.25(C) and preserve the unmistakable legislative intent, which this Court has uniformly supported.

Respectfully submitted,

William L. Ridenour
William L. Ridenour,
Appellant, In Propria Persona

CERTIFICATE OF SERVICE

I, William L. Ridenour, do hereby certify that a true and accurate copy of the foregoing MERIT OF APPELLANT was sent via regular U.S. Mail, postage prepaid, to counsel for appellee, Ms. Laura D. Wood (#0081872), Assistant Attorney General of Ohio, Corrections Litigation Section, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215, on this 13th day of November, 2007.

William L. Ridenour
William L. Ridenour,
Appellant, In Propria Persona

IN THE COURT OF APPEALS
ROSS COUNTY, OHIO

COURT OF APPEALS

NOTICE OF FILING

2007 AUG 15 PM 4: 08

FILED
ROSS COUNTY, OHIO
CLERK OF COURTS

August 15, 2007
CASE NO.: 07CA002979

TO: WILLIAM L RIDENOUR
#A134-385
CCI PO BOX 5500
CHILLICOTHE, OH 45601

A COPY OF A WRIT OF MANDAMUS ATTACHED, HERETO, WAS FILED WITH THE UNDERSIGNED AS CLERK OF THE COURT OF APPEALS OF ROSS COUNTY ON AUGUST 15, 2007 . THE APPEAL IS AN ORIGINAL ACTION.

August 15, 2007

TY D. HINTON, CLERK OF COURTS

By: *[Signature]*
Deputy

cc: *file copy*

IN THE SUPREME COURT OF OHIO

07-1831

State ex rel. William L. Ridenour, :
Appellant, : On Appeal from the Ross County
v. : Court of Appeals, Fourth
Timothy Brunsman, Warden, : Appellate District
Appellee. : Court of Appeals
Case No. 07CA2979

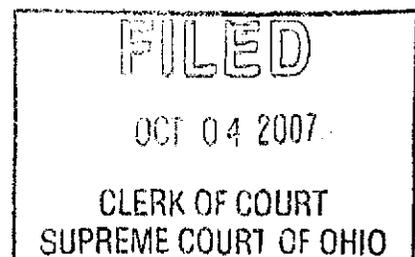
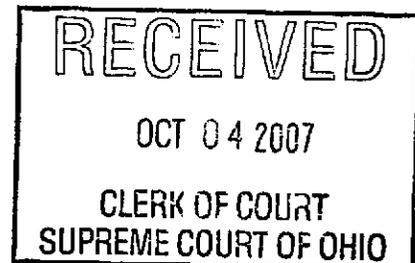
NOTICE OF APPEAL OF APPELLANT WILLIAM L. RIDENOUR

William L. Ridenour (Inst. No. A134-385)
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COUNSEL FOR APPELLEE, TIMOTHY BRUNSMAN, WARDEN



Notice of Appeal of Appellant William L. Ridenour

Appellant William L. Ridenour hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ross County Court of Appeals, Fourth Appellate District, entered in Court of Appeals case no. 07CA2979 on August 28, 2007.

The case originated in the Court of Appeals.

Respectfully submitted,

William L. Ridenour
William L. Ridenour,
Appellant, In Propria Persona

Certificate of Service

I, William L. Ridenour, do hereby certify that a true and accurate copy of this Notice of Appeal was sent via regular U.S. Mail, postage prepaid, to counsel for appellee, Laura D. Wood, Assistant Attorney General, Corrections Litigation Section, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215, on this 1st day of October, 2007.

William L. Ridenour
William L. Ridenour,
Appellant, In Propria Persona

IN THE COURT OF APPEALS OF OHIO
 FOURTH APPELLATE DISTRICT
 ROSS COUNTY

07 AUG 28 PM 2:34

State ex rel. William L. Ridenour, :
 Relator, :
 v. :
 Timothy Brunsman, Warden, :
 Respondent. :

ROSS COUNTY COURT OF APPEALS
 Case No. 07CA2979
**DECISION AND
 JUDGMENT ENTRY**

Relator, William L. Ridenour, has filed a complaint in mandamus to compel respondent, Chillicothe Correctional Institution Warden Timothy Brunsman, to provide him with adequate clothing during inclement weather. After reviewing the complaint, we conclude that it is fatally defective because relator failed to comply with R.C. 2969.25.

An inmate filing a civil action or an appeal of a civil action against a government entity or employee seeking waiver of prepayment of court filing fees is required to submit a statement of the balance of his prison account for each of the preceding six months, verified by the institutional cashier. R.C. 2969.25(C). See, also, *State ex rel. Pamer v. Collier*, 108 Ohio St.3d 492, 2006-Ohio-1507, at ¶5. Here, although relator filed an affidavit of indigency, he did not submit the cashier statement required by R.C. 2969.25(C).

"The requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal." *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003-Ohio-2262, at ¶5. See, also, *State ex rel. Qualls v. Story*, 104 Ohio St.3d 343, 2004-Ohio-6565. Moreover, relator cannot correct the omission because

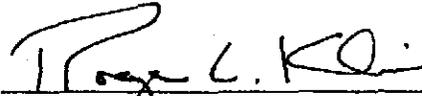
R.C. 2969.25 (C) expressly state that the verified statement shall be filed at the time an inmate commences a civil action or appeal against a government entity or employee.

Fuqua v. Williams, 100 Ohio St.3d 211, 2003-Ohio-5533, at ¶9.

Because relator has not complied with R.C. 2969.25, the writ of mandamus is **DENIED** and the complaint is sua sponte **DISMISSED. IT IS SO ORDERED. COSTS TO RELATOR.**

McFarland, P.J., Harsha, J.: Concur.

FOR THE COURT



Roger L. Kline
Administrative Judge

08/09/07

TO THE CASHIER'S OFFICE;

Please prepare a financial statement for me for the past six months, and attached it to the affidavit of indigency in the accompanying envelope, and mail the documents to the court.

In advance, thank you for your time and consideration.

Respectfully submitted,

William L. Ridenour
William L. Ridenour
#A134-385

Processed
8/10/07

KITE PROCEDURE

1. Check with your Sergeant or Case Manager to see if this communication can be handled without a kite.
2. Write only to the Department that handles the problem you have. Others will merely forward your kite.
3. State your problems clearly and completely and thereby get immediate attention.
4. Avoid duplication of Kites. Writing to more than one office about the same thing will not obtain any faster attention.
5. Kites are to be used only for communication between inmates and Institutional Staff and not for any other purpose.

Number: A134-385	Name: Ridenour	Date: 08/09/07
Unit: E-1	Lock: 211-B	Assignment: Yard wkr.
To: 		
Issued By (Staff Member Signature): _____		
_____ FOLD HERE _____		
CASE MANAGER	INST. INSPECTOR	QUARTERMASTER
CLASSIFICATION	INVESTIGATOR	RECORDS
COMMISSARY	JOB COORDINATOR	RECOVERY SERVICES
DENTAL	LIBRARY	RECREATION
DEPUTY WARDEN ADMINISTRATION	MAIL ROOM	RELIGIOUS SERVICES
DEPUTY WARDEN OPERATIONS	MAJOR	UNIT MANAGER _____
DEPUTY WARDEN SPECIAL SERVICES	MEDICAL	WARDEN
EDUCATION	MENTAL HEALTH	OTHER _____



KITE PROCEDURE

1. Check with your Sergeant or Case Manager to see if this communication can be handled without a kite.
2. Write only to the Department that handles the problem you have. Others will merely forward your kite.
3. State your problems clearly and completely and thereby get immediate attention.
4. Avoid duplication of Kites. Writing to more than one office about the same thing will not obtain any faster attention.
5. Kites are to be used only for communication between

JULY 25, 2000

REVISED POSTING

TO: ALL INMATES
FROM: CASHIER'S OFFICE
THRU: *Vince Branson*
VINCENT BRANSON, DEPUTY WARDEN ADMIN.
SUBJ: IN FORMA PAUPERIS AND INDIGENCY FORMS

EFFECTIVE SEPTEMBER 1, 2000; THERE WILL BE A PROCESSING CHANGE ON SENDING OUT INFORMA PAUPERIS AND INDIGENCY FORMS.

ALL IN FORMA PAUPERIS AND INDIGENCY FORMS MUST BE ACCOMPANIED WITH AN ADDRESSED ENVELOPE AND THE POSTAGE CASH SLIP WHEN FORWARDED TO THE CASHIER'S OFFICE.

THE CASHIER'S OFFICE WILL SIGN THE INDIGENCY FORM AND ENCLOSE IT ALONG WITH THE SIX MONTH CERTIFICATION IN THE ENVELOPE AND MAIL DIRECTLY FROM THE CASHIER'S OFFICE TO THE COURTS.

Eileen Cutlip
EILEEN CUTLIP - CASHIER
CHILLICOTHE CORRECTIONAL INST.

CC: INMATE BULLETIN BOARDS
ALL UNIT MANAGERS
FILE

08/10/2007

Chillicothe Correctional Institution

Inmate Demand Statement

Inmate Name: RIDENOUR, WILLIAM L

Number: A134385

Lock Location: CCI,E1,B,,211

Date Range: 02/10/2007 Through 08/11/2007

Beginning Account Balances:

Ending Account Balances:

	Saving	Debt	Payable		Saving	Debt	Payable
EPC Release Fi	\$0.00	\$0.00	\$0.00	EPC Release Funds	\$393.50	\$0.00	\$0.00
Pos Exemption	\$5.08	\$0.00	\$0.00	Pos Exemption	\$0.00	\$0.00	\$0.00
Inmate's Person	\$17.70	\$0.00	\$0.00	Inmate's Personal A	\$1.43	\$0.00	\$0.00
Begin Totals	\$22.78	\$0.00	\$0.00	End Totals	\$394.93	\$0.00	\$0.00

Transaction Date	Transaction Amount	Description	Comment	Saving Balance	Debt Balance	Payable Balance
03/01/2007	\$0.00	\$4.92 Reservation to Pos Exemption	Pos Exemption	\$22.78	\$0.00	\$0.00
03/02/2007	(\$20.84)	Withdrawal to ACCESS SECUREPAK	ACCESS CK#74248	\$1.94	\$0.00	\$0.00
03/02/2007	\$20.84	Reversed Withdrawal to ACCESS SECUREPAK	Reversed Task No. 3162859	\$22.78	\$0.00	\$0.00
03/02/2007	(\$20.84)	Withdrawal to ACCESS SECUREPAK	ACCESS SECUREPAK	\$1.94	\$0.00	\$0.00
03/02/2007	\$20.84	Reversed Withdrawal to ACCESS SECUREPAK	Reversed Task No. 3162959	\$22.78	\$0.00	\$0.00
03/02/2007	(\$20.84)	Withdrawal to ACCESS SECUREPAK	ACCESS	\$1.94	\$0.00	\$0.00
03/06/2007	(\$1.73)	Commissary Sale	Ticket Number 32536	\$0.21	\$0.00	\$0.00
03/09/2007	\$20.00	State Pay	State Pay	\$20.21	\$0.00	\$0.00
03/14/2007	(\$14.87)	Commissary Sale	Ticket Number 34160	\$5.34	\$0.00	\$0.00
03/27/2007	(\$3.65)	Commissary Sale	Ticket Number 36768	\$1.69	\$0.00	\$0.00
03/28/2007	(\$0.87)	Postage Charges (USPS)	LEGAL	\$0.82	\$0.00	\$0.00
04/01/2007	\$0.00	\$10.00 Reservation to Pos Exemption	Pos Exemption	\$0.82	\$0.00	\$0.00
04/03/2007	\$50.00	Money Order	Joann Cardine	\$50.82	\$0.00	\$0.00
04/03/2007	(\$10.00)	Copy Charges	COPIES CK#74500	\$40.82	\$0.00	\$0.00
04/04/2007	(\$39.58)	Commissary Sale	Ticket Number 38169	\$1.24	\$0.00	\$0.00
04/06/2007	\$20.00	State Pay	State Pay	\$21.24	\$0.00	\$0.00
04/11/2007	(\$12.05)	Commissary Sale	Ticket Number 39697	\$9.19	\$0.00	\$0.00
04/17/2007	(\$5.00)	Copy Charges	COPIES CK#74670	\$4.19	\$0.00	\$0.00
04/19/2007	\$393.50	EPC Release Funds	EPC	\$397.69	\$0.00	\$0.00
05/01/2007	\$0.00	\$10.00 Reservation to Pos Exemption	Pos Exemption	\$397.69	\$0.00	\$0.00
05/04/2007	(\$2.31)	Postage Charges (USPS)	LEGAL	\$395.38	\$0.00	\$0.00
05/04/2007	\$20.00	State Pay	State Pay	\$415.38	\$0.00	\$0.00

05/08/2007	(\$2.07) Postage Charges (USPS)	LEGAL	\$413.31	\$0.00	\$0.00
05/09/2007	(\$19.00) Commissary Sale	Ticket Number 44941	\$394.31	\$0.00	\$0.00
05/17/2007	(\$0.34) Postage Charges (USPS)	LEGAL	\$393.97	\$0.00	\$0.00
06/01/2007	\$0.00 \$10.00 Reservation to Pos Exemption	Pos Exemption	\$393.97	\$0.00	\$0.00
06/08/2007	\$20.00 State Pay	State Pay	\$413.97	\$0.00	\$0.00
06/11/2007	(\$19.68) Commissary Sale	Ticket Number 50630	\$394.29	\$0.00	\$0.00
08/21/2007	\$50.00 Money Order	JO ANN CARDINE	\$444.29	\$0.00	\$0.00
08/26/2007	(\$1.67) Commissary Sale	Ticket Number 53920	\$442.62	\$0.00	\$0.00
06/26/2007	(\$48.88) Commissary Sale	Ticket Number 53921	\$393.74	\$0.00	\$0.00
07/01/2007	\$0.00 \$10.00 Reservation to Pos Exemption	Pos Exemption	\$393.74	\$0.00	\$0.00
07/06/2007	\$20.00 State Pay	State Pay	\$413.74	\$0.00	\$0.00
07/11/2007	(\$13.22) Commissary Sale	Ticket Number 56280	\$400.52	\$0.00	\$0.00
07/11/2007	(\$4.59) Commissary Sale	Ticket Number 56281	\$395.93	\$0.00	\$0.00
07/18/2007	(\$2.30) Copy Charges	CK#75303	\$393.63	\$0.00	\$0.00
08/01/2007	\$0.00 \$10.00 Reservation to Pos Exemption	Pos Exemption	\$393.63	\$0.00	\$0.00
08/06/2007	\$20.00 State Pay	State Pay	\$413.63	\$0.00	\$0.00
08/07/2007	(\$5.00) Copy Charges	COPIES CK#75453	\$408.63	\$0.00	\$0.00
08/08/2007	(\$10.86) Commissary Sale	Ticket Number 61476	\$397.77	\$0.00	\$0.00
08/10/2007	(\$2.84) Postage Charges (USPS)	LEGAL	\$394.93	\$0.00	\$0.00

Outstanding Debts:

Start Date	Description	Case	Agency	County	Total Debt	Paid to Date	Balance Owed
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Total Outstanding Case Balances	\$0.00
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Outstanding Holds:

Start Date	Description	Case	Agency	County	Total Debt	Paid to Date	Balance Owed
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Total Outstanding Case Holds	\$0.00
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Outstanding Investments / EPC:

Investment Type	Investment Type Description	Invest Company	Company Description	Balance
EPC	Earned Prisoner Compensation	EPC Funds	EPC Funds	\$393.50

Description	Beginning	Ending	Amount
Resident Id: A134385			
Last Name: RIDENOUR			
First Name: WILLIAM			
Middle Name: L			
Total Deposits	2/11/2007 12:00:00 AM	8/11/2007 12:00:00 AM	\$613.50
Average Monthly Deposits	2/11/2007 12:00:00 AM	8/11/2007 12:00:00 AM	\$102.25
Total 1st Day Balances	2/11/2007 12:00:00 AM	8/11/2007 12:00:00 AM	\$28.63
Average 1st Day Balances	2/11/2007 12:00:00 AM	8/11/2007 12:00:00 AM	\$4.77
Balance as of		8/11/2007 12:00:00 AM	\$1.43
Current Balance		8/11/2007 12:00:00 AM	\$1.43
FFF Initial Payment as of		8/11/2007 12:00:00 AM	\$20.45

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

07 SEP 03 10:23

State ex rel. William L. Ridenour, :
Relator, :
v. :
Timothy Brunzman, Warden, :
Respondent. :

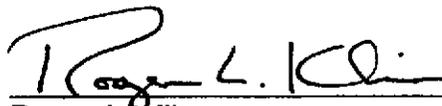
Case No. 07CA2979

ENTRY

Relator, William L. Ridenour, has filed a motion asking this court to reconsider our August 28, 2007 decision dismissing his complaint for a writ of mandamus because he failed to comply with R.C. 2969.25(C)'s requirement to submit a verified statement of the balance of his prison account for each of the preceding six months. Because this was an original action filed in the court of appeals, a motion to reconsider pursuant to App.R. 26(A) is not appropriate. See, also, *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, paragraph one of the syllabus (holding that "[t]he Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment in the trial court."). Therefore, relator's motion is **DENIED. IT IS SO ORDERED.**

McFarland, P.J., Abele, J.: Concur.

FOR THE COURT



Roger L. Kline
Administrative Judge

STATE OF OHIO :
 : ss. Affidavit of William L. Ridenour
COUNTY OF ROSS:

I, William L. Ridenour, do hereby depose and say that:

1. I have personal knowledge of the facts herein;
2. I am an age of majority and competent to testify;
3. This case was filed as an original writ of mandamus complaint in the Court of Appeals for the Fourth Appellate District of Ohio on August 15, 2007;
4. I, William L. Ridenour, filed my writ of mandamus complaint to compel appellee, Chillicothe Correctional Institution Warden Timothy Brunzman, to provide me with adequate clothing for inclement weather, in accordance with the provisions in R.C. §2921.44(C); Where I alleged that such adequate clothing for inclement weather should include a raincoat, rubber overshoes and thermal underwear; After reviewing the complaint, the Court of Appeals concluded that it was fatally defective because I allegedly failed to comply with R.C. §2969.25(C); However, I did in fact comply with my statutory obligations under R.C. §2969.25(C), and my complaint was sua sponte dismissed through no fault of my own;
5. On September 4, 2007, I filed a motion for reconsideration, in which I submitted the copy of the cashier statement the Court of Appeals clerk sent to me with my copy of the writ of mandamus; The Court of Appeals denied my motion for reconsideration and my supplemental cashier statement;
6. I did in fact comply with my statutory obligations in the provisions of R.C. §2969.25(C);

Affidavit of William L. Ridenour (Cont)

7. The current procedure and practice mandated by the Chillicothe Correctional Institution (CCI) for submitting a statement of the balance of an inmate's prison account for each of the preceding six months, and verified by the Institution Cashier, requires an inmate to (1) prepare the documents to be filed in the court, along with an affidavit of indigency, and place the documents in a large unsealed envelope with sufficient postage for mailing, (2) prepare a request to the Institution Cashier for a financial statement in the form of a "kite" attached to the outside of the unsealed envelope, (3) deliver the unsealed envelope to the institution mailroom officer for transportation to the institution cashier, and (4) then the Institution Cashier is required by R.C. §2969.25(C) to prepare a verified financial statement and attach it to the affidavit of indigency before mailing the documents to the court;
8. It is the current procedure and practice of the CCI Institution Cashier to prohibit inmates from direct access to their financial statements. The only way a CCI inmate can receive a copy of the financial statement submitted by the cashier to the court is when the court sends the inmate a copy of his complaint and accompanying documents;
9. Under the current procedure and practice of the Institution Cashier, I cannot confirm whether or not the Institution Cashier has in fact submitted a verified financial statement of my prison account in accordance with the provisions in R.C. §2969.25(C);
10. I have followed the institution procedure for requesting a verified

Affidavit of William L. Ridenour (Cont)

financial statement to be included with my court documents; However, the institution cashier has failed in her responsibility to complete a "verified" financial statement for me;

11. When I received my copy of the writ of mandamus filed in the Court of Appeals, the clerk of courts sent me a copy of the financial statement the CCI cashier submitted with my complaint;

12. Although the Institution Inspector advised me that such financial statement was filed in the Court of Appeals, he did not determine whether or not the financial statement was verified in accordance with the provisions in R.C. §2969.25(C);

13. Inmates at the Chillicothe Correctional Institution have no way of determining whether or not the cashier has in fact complied with the provisions in R.C. §2969.25(C);

14. I am an inmate incarcerated at the Chillicothe Correctional Institution;

15. The Institution Cashier has failed to perform her duty under the statutory obligations in R.C. §2969.25(C), and her corresponding procedures and practices for inmates to obtain a verified financial statement from the institution cashier obstructs an inmate's right of access to the courts;

16. The CCI Institution Cashier clerk, Ms. T. Ogier, who is an agent of the appellee, has a statutory duty under R.C. §2969.25(C) to provide me with a verified financial statement to support my affidavit of indigency; She has breached her duty under R.C. §2969.25(C), which is the proximate cause of the sua sponte dismissal of my writ of mandamus complaint in the Court of Appeals;

Affidavit of William L. Ridenour (Cont)

17. The Deputy Chief Inspector's statement that she "obtained and reviewed a copy of the signed and dated inmate demand statement" appears somewhat disingenuous in light of the evidence from the clerk of courts;

18. The action, procedure and practice of the CCI Institution Cashier, Ms. T. Ogier, has effectively undermined and obstructed my legitimate attempt to comply with the provisions in R.C. §2969.25(C);

19. I filed my notice of appeal to the Supreme Court of Ohio on October 4, 2007; In addition, I filed a motion for appointment of counsel and a motion to certify a conflict between the Fourth and Tenth Appellate Districts;

20. I have acted in good faith, without undue delay or prejudice to the appellee at all times relevant to my writ of mandamus complaint; and I am entitled to relief herein; The attached documents are true and accurate copies of original and non-original documents in my possession;

AFFIANT, SAYETH FURTHER NAUGHT.

William L. Ridenour
William L. Ridenour,
Affiant

NOTARY PUBLIC STATEMENT

Sworn to, or affirmed and subscribed in my presence according to law on this 18th day of October, 2007.

[Signature]
NOTARY PUBLIC

My Commission Expires:



JOHN M. PITTENGER
Notary Public, State of Ohio
My Commission Expires
June 20, 2009

DISPOSITION OF GRIEVANCE

INMATE: RIDENOUR, WILLIAM
LYNN

COMPLAINT CODE: STAFF / INMATE RELATIONS - Staff
Accountability - Failure to perform job duties

NUMBER: A134385

DISPOSITION: GRANTED - Problem corrected

INSTITUTION: CCI

GRIEVANCE NUMBER: CCI-09-07-000027

DATE: 09/19/2007

The disposition of this grievance will be delayed longer than 14 calendar days for the following reason(s):

Your grievance, filed on 09/06/2007, has been reviewed and disposed of as follows:

The Office of the IIS is in receipt of your NOG. On 8/9/07 the grievant sent a civil action to the courts. As a result of sending this item to the courts the Cashier's Office had to provide a six month copy of your account (demand statement) enclosed in the envelope. You state that on 8/31/07 you were advised by the Ross County Court of Appeals that the documents filed to the courts did not contain the financial statement.

To investigate your grievance this writer has checked your account in the Cashier's Office. This writer further verified this matter thru the Ross County Court of Appeals.

The grievant shall be advised that your mailing to the courts cost \$2.84 for postage. It was mailed 8/10/07. After contacting the Court of Appeals they advised this writer that the demand statements were on file. The statements are dated to include your account history from 2/8/07 thru 8/11/07. Based upon this your grievance is resolved.

No further action will be taken concerning this matter at this time.

If you wish, you may appeal this decision to the Chief Inspector within 14 calendar days. Appeal forms are available in the office of the Inspector of Institutional Services.

Hevin D. Scott

September 21, 2007

APPEAL TO CHIEF INSPECTOR

On September 19, 2007, the Chillicothe Correctional Institution (CCI) Inspector answered my September 6, 2007 Notification of Grievance. The CCI Inspector states that my grievance is resolved. However, given the fact that the Court of Appeals sua sponte dismissed my civil action, and I was forced to expend expenses for a Motion for Reconsideration in the Court of Appeals and a Notice of Appeal in the Supreme Court of Ohio, my problem has by no means been resolved.

On August 28, 2007, the Ross County Court of Appeals sua sponte dismissed my civil action by stating:

"An inmate filing a civil action or an appeal of a civil action against a government entity or employee seeking waiver of prepayment of court filing fees is required to submit a statement of the balance of his prison account for each of the preceding six months, verified by the institution cashier. R.C. §2969.25(C). (citation omitted) Here, although relator filed an affidavit of indigency, he did not submit the cashier statement required by R.C. §2969.25(C). *** Moreover, relator cannot correct the omission because R.C. §2969.25(C) expressly state that the verified statement shall be filed at the time an inmate commences a civil action or appeal against a government entity or employee. (citation omitted) Because relator has not complied with R.C. 2969.25, the writ of mandamus is DENIED and the complaint is sua sponte DISMISSED." (underscore emphasis added).

It appears that the court has sua sponte dismissed my civil action for one of two reasons: Either the CCI cashier failed to provide a financial statement of my prison account to the court altogether, or the cashier failed to "verify" such financial statement in accordance with the provisions in R.C. §2969.25(C). In the CCI Inspector's grievance disposition, he states that he contacted the Ross County Court of Appeals and the court advised him that my financial statement was on file with the court. The Inspector says "[b]ased upon this your grievance is resolved." He obviously did not determine whether or not the financial statement had been "verified" by the cashier in accordance with R.C. §2969.25(C).

The fact remains that my civil action in the Ross County Court of Appeals has been sua sponte dismissed because a "verified" financial statement was not included with my affidavit of indigency, in compliance with R.C. §2969.25(C). Consequently, it appears that Ms. T. Oger, Account Clerk II, at the CCI Cashier's Office has negligently, and with reckless disregard, failed to perform her job duties under R.C. §2969.25(C). Such negligence and reckless disregard for her statutory obligations appear to be the proximate cause of the sua sponte dismissal of my civil action in the Court of Appeals. Such negligence and reckless disregard by Ms. Oger has effectively denied me access to the courts, and caused substantial financial injury to me by forcing me to bear the costs and expenses to file a Motion for Reconsideration and a Notice of Appeal in the courts. The injury and financial loss that I have suffered has by no means been resolved by the CCI Institution Inspector.

Respectfully submitted,

William L. Ridenour
William L. Ridenour,
#A134-385

[Supp. 12]

Not Reported in N.E.2d, 2004 WL 1152863 (Ohio App. 7 Dist.), 2004-Ohio-2636
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Seventh District, Belmont County.
Timothy W. RICHARDS, Jr., Petitioner,
v.
Michelle EBERLIN, Warden, et al., Respondents.
No. 04-BE-1.
Decided May 20, 2004.

Background: Petitioner sought writ of habeas corpus. Prison warden filed motion to dismiss petition.

Holdings: The Court of Appeals, Belmont County, held that:

(1) petitioner's parole was improperly revoked, and thus, petitioner was entitled to credit against his sentence for time that passed between reversal of his third conviction and his reconviction, and
(2) adult parole authority's delay in commencing parole revocation hearing did not entitle petitioner to habeas corpus relief.

Petition dismissed.

West Headnotes

[1] KeyCite this headnote

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(E) Costs
197k883 Indigent Petitioners
197k883.1 k. In General.

Habeas corpus petitioner, who sought waiver of prepayment of filing fees, was not statutorily required to file affidavit of indigency at same time petition was filed. R.C. § 2121.01.

[2] KeyCite this headnote

197 Habeas Corpus
197I In General
197I(C) Existence and Exhaustion of Other Remedies
197k275 Particular Issues and Problems
197k278 k. Length of Sentence.

Petitioner's claim was valid for habeas corpus review; although prison warden claimed petitioner failed to exhaust institutional grievance processes available for claim of incorrect sentence calculation prior to filing action, petitioner was not simply claiming that his sentence was improperly calculated, but was

claiming that his parole was never revoked and that his only valid sentence has already been served.

[3] KeyCite this headnote

284 Pardon and Parole

284II Parole

284k72 Effect of Delinquency; Reimprisonment and Redetermination of Sentence

284k74 k. Concurrent or Consecutive Service of Sentences.

Statutory subsection providing that sentence of imprisonment shall be served consecutively to any other sentences of imprisonment when it is imposed for new felony committed by parolee, rather than statutory subsection providing that consecutive sentences may only be imposed where court specifies that sentences are to run consecutively, applied to defendant such that trial court was not required to explicitly order that second sentence run consecutive to first sentence, where, when defendant was on parole, he was sentenced for second felony. R.C. § 2929.41(B)(1,3).

[4] KeyCite this headnote

284 Pardon and Parole

284II Parole

284k72 Effect of Delinquency; Reimprisonment and Redetermination of Sentence

284k75 k. Good Conduct Allowances and Other Credits.

Habeas corpus petitioner's parole was improperly revoked, and thus, petitioner was entitled to credit against his sentence for time that passed between reversal of his third conviction and his reconviction; although following third conviction defendant was provided with notice of right to parole revocation hearing and waived that right, conviction was subsequently reversed and parole revocation hearing was not thereafter conducted, and petitioner committed his first offense prior to date new provisions of Adult Parol Authority were enacted, which provide that right to parole revocation hearing only triggers when parole authority has discretion in determining parole status.

[5] KeyCite this headnote

350H Sentencing and Punishment

350HV Sufficiency and Construction of Sentence Imposed

350HV(C) Construction

350HV(C)2 Punishment

350Hk1128 Concurrent or Consecutive Terms

350Hk1129 k. In General.

Six year sentence was not retroactively served; although defendant argued six year sentence was set concurrent to sentences for which more than six years were already served, defendant misunderstood that concurrent sentence meant that defendant could begin servicing six year sentence immediately and not have to wait until previous two sentences expired to serve six year sentence.

[6] KeyCite this headnote

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k516 Pardon and Parole

197k517 k. Revocation.

Adult parole authority's delay in commencing parole revocation hearing did not entitle petitioner to habeas corpus relief; although petitioner was held without hearing for 223 days, petitioner did not assert right to hearing during that time period, petitioner had been in prison for nearly 15 years such that there was no reason to believe petitioner experienced excessive anxiety, and petitioner did not allege that any defense was lost. R.C. § 2967.15; OAC 5120:1-1-19(A).

Petition for Writ of Habeas Corpus.

Timothy W. Richards, Jr., Pro Se, # 395-322, St. Clairsville, OH, for Petitioner.

Jim Petro, Attorney General, Mark J. Zemba, Asst. Attorney, Cleveland, OH, for Respondent.

PER CURIAM.

*1 {¶ 1} On January 5, 2004, Petitioner, Timothy W. Richards, Jr., filed with this court a petition seeking a writ of habeas corpus. Respondent, Michelle Eberlin, filed a motion to dismiss the petition on February 10, 2004. Petitioner then filed for summary judgment on April 9, 2004. For the following reasons, the motion for summary judgment is denied, the motion to dismiss is granted and the writ is denied.

FACTS

{¶ 2} On September 19, 1984 Petitioner was sentenced to five (5) to twenty-five (25) years incarceration for an aggravated burglary in Cuyahoga County case number 188454. On September 1, 1987, Petitioner was granted furlough. Petitioner was declared a furlough violator on November 23, 1987 and had his furlough revoked as a result. On March 10, 1989, Petitioner was granted parole. While on parole, Petitioner pled guilty to burglary with an aggravated felony specification and sentenced to eight (8) to fifteen (15) years incarceration, with eight (8) years actual incarceration, on September 1, 1989 in Cuyahoga County case No. 239340. Petitioner was again granted parole on March 8, 1999. He was subsequently sentenced to six (6) years incarceration after being found guilty of felonious assault on August 8, 2000 in Cuyahoga County case No. 390487. The six (6) year sentence was ordered to run concurrently with the previously mentioned sentences.

{¶ 3} After the imposition of this last sentence, Petitioner was sent two (2) notices informing him that he was entitled to a mitigation hearing under *Kellogg v. Shoemaker* (S.D. Ohio E.D. 1996), 927 F.Supp. 244. The notices were sent on September 25, 2000 and October 11, 2000. On October 18, 2000 Petitioner executed a waiver of the right to this hearing.

{¶ 4} Petitioner successfully appealed his 2000 conviction and sentence, which was reversed and remanded on September 20, 2001. The matter was retried, and on May 1, 2002 Petitioner was again convicted and sentenced to six (6) years to run concurrent with his previous sentences. This decision was affirmed on appeal by the Eighth District Court of Appeals. Petitioner filed a Notice of Appeal and a Motion for a Delayed Appeal with the Supreme Court on January 5, 2004.

{¶ 5} On January 5, 2004 Petitioner also filed this petition for habeas corpus. The gist of Petitioner's argument as to why he is being unlawfully held is as follows: first, he claims that because the first and second convictions, cases 188454 and 239340 were not explicitly ordered to be run consecutively, the

terms of incarceration ran concurrently. Next, Petitioner asserts that his parole was never revoked again when he was re-sentenced for the latest offense in May of 2002. Finally, Petitioner argues that when he was sentenced to a term of six (6) years in the most recent case, case number 390487, because the term was slated to run concurrent to the older sentences in cases 188454 and 239340, for which he had already served more than six (6) years total for those cases (which he claims were run concurrently), the sentence for the most recent conviction, 390487, was "retroactively served" and thus has already expired. Each of these contentions will be addressed separately below.

LAW

*2 [1] {¶ 6} Before addressing Petitioner's grounds for seeking the writ, this court must attend to Respondent's contention that Petitioner failed to meet the mandatory requirements for state habeas corpus actions set forth in R.C. 2969.21 through 2969.27. First, Respondent charges that Petitioner failed to both file an affidavit of indigency and a certified account statement. In his response to Respondent's motion to dismiss, Petitioner does not deny this allegation, but rather attempts to shift the blame to Respondent. Petitioner states that he did not file the affidavit "because the Respondent's (sic) failed to provide petitioner with a certified account statement of his balance for the six (6) months preceeding (sic) the filing of this action. * * * Petitioner has suffered numerous acts of discrimination as a result of utilizing the Inmate Grievance Procedure, and from exercising his right to access the courts. Petitioner can and will provide this Honorable Court with numerous dispositions (sic) from the Chief Inspector's Office, (sic) of how the Respondents have deliberately interfered and hindered Petitioner's ability to petition a court of record, in the event this court orders an evidentiary hearing." However, despite his assertions, Petitioner fails to substantiate his claims. Rather, on February 27, he requested this court allow him to file his affidavit "within a reasonable amount of time." Petitioner then filed his affidavit of indigency on March 1, 2004, nearly two (2) months after filing his original petition.

{¶ 7} The Supreme Court has denied belated attempts to file documents required by R.C. 2969.25(A) in order to commence a civil action against a government entity or employee. In rejecting R.C. 2969.25(A) filings that are not submitted simultaneously with the petition, the Court pointed out that the particular section of the statute "requires that the affidavit be filed '[a]t the time that an inmate commences a civil action or appeal against a government entity or employee.' (Emphasis added.)" *Fuqua v. Williams* (2003), 100 Ohio St.3d 211, at ¶ 9, 797 N.E.2d 982. Respondent argues that this interpretation also holds true for R.C. 2969.25(C). However, the text of that section of the statute reads, "If an inmate who files a civil action or appeal against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed, the inmate shall file with the complaint or notice of appeal an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency." R.C. 2969.25(C). Thus, the additional imposition of filing at the same precision in timing stressed in *Fuqua* is not imposed upon one seeking to file in accord with R.C. 2969.25(C).

[2] {¶ 8} Next, Respondent alleges that Petitioner failed to exhaust institutional grievance processes available to him prior to filing this action. Respondent claims that "Petitioner's claim of an incorrect sentence calculation is subject to the grievance system at his institution." However, Petitioner is not simply claiming that his sentence was improperly calculated, a claim that is addressable on direct appeal or by post conviction relief and thus not cognizable in a petition for habeas corpus. See *Heddleston v. Mack* (1998), 84 Ohio St.3d 213, 213, 702 N.E.2d 1198. Rather, Petitioner alleges that his parole was never revoked and his only valid sentence has already been served, issues which are proper for habeas review.

*3 [3] {¶ 9} Next we will review Petitioner's basis for his complaint. First Petitioner argues that his

first two (2) sentences were to run concurrent. Petitioner contends that because the second journal entry did not explicitly order the second sentence to run consecutive to the first, it must be construed as running concurrent. To support this argument, Petitioner looks to *Hamilton v. Adkins* (1983), 10 Ohio App.3d 217, 461 N.E.2d 319, which he accurately quotes as stating, "The imposition of consecutive sentences could only be accomplished if the trial court specified that the sentences were to be run consecutively. * * * Where there is an ambiguity in the language as to whether the sentences are to be served concurrently or consecutively, a defendant is entitled to have the language construed in his favor." *Id.* at 217-218, 461 N.E.2d 319. However, Petitioner fails to follow through on the court's reasoning, which relies on former R.C. 2929.41(B)(1), whereby the court must specify that a sentence is to be served consecutively. In *Adkins*, the reviewing court ruled that the trial court's failure to specify consecutive sentences in accordance with former R.C. 2929.41(B)(1) at the time of sentencing resulted in a lack of evidence of such intent, and thus the sentences were deemed to run concurrent. {¶ 10} However, former R.C. 2929.41(B)(1) did not apply to the current case. The portion of the statute relevant to the instant matter was former R.C. 2929.41(B)(3), which mandates that "A sentence of imprisonment shall be served consecutively to any other sentences of imprisonment, in the following cases: * * * (3) When it is imposed for a new felony committed by a probationer, parolee, or escapee." [FN1] Because Petitioner was on parole from his original sentence when he was sentenced for his second felony in 1989, former R.C. 2929.41(B)(3) was controlling and mandated consecutive sentences, eliminating any possible ambiguity such as that found in *Adkins*.

FN1. R.C. 2929.41 was subsequently amended by 1995 S 2, which took effect July 1, 1996 and is thus inapplicable to Petitioner's first two convictions, both of which occurred prior to that date.

[4] {¶ 11} Petitioner also contends that his parole was never revoked after his third and most recent conviction. Petitioner specifically states that following the August 8, 2000 conviction and, after that sentence was reversed and the offense retried, following the May 1, 2000 reconviction, the Adult Parole Authority failed to provide Petitioner with a notice of alleged parole violations, failed to conduct a revocation hearing to determine if there was cause to revoke parole, and failed to provide Petitioner an opportunity to present evidence in a mitigation hearing. Thus, he reasons, his parole was never revoked.

{¶ 12} Petitioner looks to the protections provided by *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, wherein the United States Supreme Court declared that due process entitles a parolee to a minimum of the following prior to parole revocation: 1) written notice of the claimed violation, 2) disclosure to the parolee of evidence against him, 3) opportunity to be heard in person and to present witnesses and evidence, 4) the right to confront and cross examine witnesses (unless good cause is lacking), 5) a neutral and detached hearing body, and 6) a written statement by the fact finders relaying the reasons for their determination and the evidence relied on. *Id.* at 488-489.

*4 {¶ 13} The court in *Morrissey* went on to further state, "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." *Id.* at 490. To this extent, the Sixth Circuit in *Kellogg v. Shoemaker*, 46 F.3d 503 (6th Cir.1995), held that the right to a revocation hearing afforded by *Morrissey* only triggers when the parole authority has discretion in determining parole status. *Id.* at 508. Thus, there was no right to a hearing when "a subsequent parole violation conviction had been established and the law gave the parole agency no authority to consider further mitigating factors." *Id.*, citing *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir.1993).

{¶ 14} Yet the court also determined that to apply the holding in Kellogg to persons convicted of a first offense prior to September 1, 1992 [FN2] would be a violation of the ex post facto clause. Consequently, those parolees who committed their first crime, the crime for which they are on parole, prior to September 1, 1992 are still entitled to a parole revocation hearing subsequent to being convicted of a crime as dictated by the "old" Ohio Adult Parole Authority provision. Kellogg, 46 F.3d at 510.

FN2. The controlling Ohio Adult Parole Authority provisions were enacted in new form on this date.

{¶ 15} As was previously stated, Petitioner contends that he was not afforded any of these rights after the 2000 conviction or after the 2002 retrial. However, Respondent has produced documents indicating otherwise. Attached to Respondent's motion are documents labeled exhibits K, L and M, which are, respectively: K) a letter dated September 25, 2000 giving notice of a mitigation hearing "under the Kellogg consent decree" set for October 10, 2000 and explaining Petitioner's various rights therein; L) a letter dated October 11, 2000 giving notice of the mitigation hearing, which was re-set for October 18, 2000 and again explaining Petitioner's various rights; and M) a form titled "WAIVER OF KELLOGG MITIGATION HEARING," signed by Petitioner and dated October 18, 2000. Thus, it is clear that Petitioner was indeed provided with notice of his right to a hearing in 2000, and in fact waived that right.

{¶ 16} The question remains, however, whether this revocation and notice thereof withstood the reversal, retrial, and reconviction in 2002. The case sub judice is analogous to Flenoy v. Ohio Adult Parole Auth. (1990), 56 Ohio St.3d 131, 564 N.E.2d 1060, wherein Flenoy was indicted for murder in 1981 while on parole. While being held at the Cuyahoga County Jail, Flenoy received an onsite hearing with the Adult Parole Authority. The hearing officer determined there was probable cause to believe that Flenoy had committed the murder he was accused of, and thus Flenoy was declared a parole violator and entitled to a final hearing to determine mitigating circumstances. Before that final hearing could take place, Flenoy was convicted of the murder and was sentenced to fifteen (15) years to life in 1982. Beyond having already been declared a parole violator, the murder conviction triggered the automatic parole revocation authorized under Ohio law for parolees who commit new felonies while on parole. After the murder conviction, Flenoy signed a form waiving his right to the mitigation hearing and stating, "I further understand that I have violated my parole by the conviction of a new felony * * * "

*5 {¶ 17} In 1988, Flenoy was granted federal habeas corpus relief from his murder conviction. Still in jail after this decision, Flenoy was retried for the murder and was subsequently reconvicted and sentenced to fifteen (15) years to life again. Contemporaneous to the new trial, Flenoy had filed writs of mandamus and habeas corpus in the state court, arguing that the grant of habeas corpus relief "fatally undercut the parole revocation stemming from that conviction" and thus required the Adult Parole Authority to either provide another parole revocation hearing or release him. Id. at 132. The Supreme Court rejected the argument of the Adult Parole Authority that Flenoy's reconviction disposed of any concerns regarding revocation of parole under the overturned conviction, saying:

{¶ 18} "We agree that Flenoy's reconviction made a revocation hearing unnecessary. See Ohio Adm.Code 5120:1-1-19(A)(1). But once the original revocation was voided, the APA was obliged to give him a hearing within a reasonable time. Coleman v. Stobbs (1986), 23 Ohio St.3d 137, 491 N.E.2d 1126. If an unreasonably long period went by before a hearing either was granted or became unnecessary, the APA lost its right to revoke Flenoy's parole. See United States ex rel. Sims v. Sielaff

(C.A.7, 1977), 563 F.2d 821, 828 (quashing parole violator warrant is only possible remedy where parole hearing has been unreasonably delayed); *Hamilton v. Keiter* (C.P.1968), 16 Ohio Misc. 260, 264, 241 N.E.2d 296." *Id.* at 134, 241 N.E.2d 296.

{¶ 19} As a result of the failure to grant Flenoy a hearing after he was granted habeas corpus relief, the Supreme Court held that if his parole was improperly revoked, he was entitled to a credit of eight and one half months against his sentence from the murder conviction, or the period of time that passed between the grant of habeas corpus relief and the reconviction, the time during which he was held without cause. See *Flenoy*, 56 Ohio St.3d at FN 1. In light of this, Petitioner should be credited 177 days. from accounting for the time not already credited that passed between reversal and reconviction. [FN3]

FN3. Petitioner's conviction was reversed and remanded on September 20, 2001, and he was subsequently reconvicted and resented on May 1, 2002. However, without reference as to how they arrived at the given dates, the court credited with Petitioner with jail time credit, including the period from March 15, 2002 to May 1, 2002, and thus that time will not be counted in this calculation.

[5] {¶ 20} As to Petitioner's claim that because his six (6) year sentence was retroactively served because it was set concurrent to a sentence for which more than six (6) years were already served, this is simply a misunderstanding about what concurrent means. Petitioner seems to argue that concurrent means time served for one sentence can be applied against another. For example, under Petitioner's understanding, a person could be serving a ten (10) year sentence, sentenced to a concurrent ten (10) year sentence after he has served nine and a half (9 1/2) years of the first sentence, and only have to serve the remaining six (6) months to complete both sentences. Such a result would be unjust.

{¶ 21} Concurrent sentences are defined as "Two or more sentences of jail time to be served simultaneously." *Black's Law Dictionary* (7 Ed.1999) 1367. In other words, a person need not finish serving the first sentence before the time for the second sentence can be served, as is the case with consecutive sentences. For example, in the hypothetical situation above, the person could begin serving the second ten (10) year term upon sentencing rather than having to wait the six (6) months for the first term to expire.

*6 {¶ 22} Therefore, when Petitioner was sentenced to six (6) years concurrent to his prior sentences, the sentences were not nullified upon imposition. Rather, he could begin serving the six (6) years immediately and not have to wait until the previous two (2) sentences have expired to serve the third. If the intent were otherwise, the court would have given him credit for time-served on the earlier offenses.

[6] {¶ 23} This does not complete the inquiry, however, as the issue remains that parole has yet to be revoked since the reversal of the first conviction. The Supreme Court has addressed the issues presented in this scenario, stating,

{¶ 24} "A court should apply a two-part test in determining whether the delay of the Adult Parole Authority, in not commencing a final parole revocation hearing, entitles an alleged parole violator to habeas corpus relief. First, it must be determined whether the delay was unreasonable. * * * Second, if the delay is found to be unreasonable, it must be determined whether the delay somehow prejudiced the alleged parole violator. The court must weigh any prejudice to the alleged parole violator in light of the interests protected by the 'reasonable time' requirement of R.C. 2967.15 and Ohio Adm.Code 5120:1-1-19(A)." *Coleman v. Stobbs* (1986) 23 Ohio St.3d 137, 139, 491 N.E.2d 1126.

{¶ 25} The court further instructed as to how the first factor, the reasonableness factor, may be determined by balancing three (3) factors, which are: 1) the length of the delay, 2) the reason for the

delay, and 3) the alleged parole violator's assertion of the right to a hearing within a reasonable time. Id. {¶ 26} In calculating the first factor, the delay in holding a hearing, this court looks to *State ex rel. Taylor v. Ohio Adult Parole Authority*, wherein the following was stated that "[n]either due process of law nor R.C. 2967.15's or former Ohio Adm.Code 5120:1-1-19(A)'s 'reasonable time' requirement compels a final revocation parole hearing while an alleged parole violator is imprisoned pending prosecution for, or after conviction of, another crime." (Citation omitted). Id. at 128, 491 N.E.2d 1126. Thus, the only time that need be considered in this determination of reasonableness is that time during which Petitioner was incarcerated solely for the alleged parole violation. As was previously stated, Petitioner's conviction was reversed and remanded on September 20, 2001 and he was reconvicted and resentenced on May 1, 2002. Thus, the length of time not stemming from the reconviction that Petitioner was held without a hearing was 223 days.

{¶ 27} The second factor, the reason for the delay, cannot be determined by this court, as no reason is put forth. As this court is not aware of what caused this delay, this factor may be assumed to weigh in favor of Petitioner. The third factor the alleged parole violator's assertion to the right to a hearing. This third factor weighs in favor of Respondent, for although Petitioner claims to have made multiple requests for a mitigation hearing after the reconviction, there is nothing in the record to corroborate this claim. Thus the first assertion of the right to a hearing this court is aware of is the present writ, filed over a year and a half after the reconviction.

*7 {¶ 28} Taking the above stated factors regarding the reasonableness of the Adult Parole Authority into consideration, this court must next balance that reasonableness with the prejudice that the delay imposed upon the defendant. *Coleman*, 23 Ohio St.3d at 139, 491 N.E.2d 1126. In determining the possible prejudice a delay would have on an alleged parole violator, the court in *Coleman* were mindful of the following interests: (1) preventing oppressive prehearing incarceration, (2) minimizing anxiety and concern of the subject, and 3) limiting the possibility that the delay will impair the subject's defense at the hearing once it is held. Id., citing *Hanahan v. Luther* (C.A.7, 1982), 693 F.2d 629, 635, certiorari denied (1983), 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1013.

{¶ 29} In applying these factors to the present case, it appears that the over six (6) months of incarceration while awaiting retrial without having parole properly revoked was oppressive. Regarding the second factor, there is no readily ascertainable fact to support the notion that the incarceration would have caused Petitioner excessive anxiety. Having been in prison for nearly all of the past decade and a half, this was not Petitioner's first exposure to prison. His conviction was not overturned on a substantive matter or a question of evidence, but on an issue regarding proper waiver of counsel procedures. He failed to request relief in this intervening time frame. Thus, there is no reason to believe that this time has caused excessive anxiety to Petitioner. Finally, evaluating the third factor, there is nothing to indicate that the intervening time period spent in prison impaired his defense at a hearing, as Petitioner waived the hearing after the first trial and has not indicated to this court that any defense, evidence, or witness has been lost or compromised since the original waiver was executed.

{¶ 30} Thus, despite oppressive incarceration for the time between reversal and reconviction, the weight of the facts before this court indicates that the Adult Parole Authority has not forfeited the right to immediately hold a final revocation hearing for Petitioner. However, once parole is formally revoked, Petitioner's sentence in the first two convictions should be credited against the time served in the interim, as the current six (6) year sentence was set to run concurrent with those two (2) already in existence at the time of the May 2002 sentencing.

{¶ 31} The petition for writ of habeas corpus is dismissed. However, as noted above, Petitioner is entitled to a timely hearing regarding the revocation of his parole.

{¶ 32} Costs taxed against Petitioner. Final order. Clerk to serve notice as provided by the civil rules.

Petition dismissed.

WAITE, P.J., DONOFRIO and VUKOVICH, JJ., concur.

Ohio App. 7 Dist., 2004.

Richards v. Eberlin

Not Reported in N.E.2d, 2004 WL 1152863 (Ohio App. 7 Dist.), 2004-Ohio-2636

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Not Reported in N.E.2d, 2006 WL 701126 (Ohio App. 10 Dist.). 2006-Ohio-1299
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.
Gary L. HILL, Plaintiff-Appellant,
v.
OHIO ADULT PAROLE AUTHORITY, Defendant-Appellee.
No. 05AP-1086.
Decided March 21, 2006.

Background: Inmate filed complaint seeking new parole hearing. The Ohio Adult Parole Authority (OAPA) moved to dismiss motion, and inmate filed motions to strike OAPA's motion and to amend. The Court of Common Pleas, Franklin County, No. 05CVH05-5458, granted OAPA's motion and denied inmate's motions, and inmate appealed.

Holdings: The Court of Appeals, Brown, J., held that:

- (1) inmate's belated affidavit was sufficient to demonstrate that compliance with statutory requirement that inmate file affidavit containing description of each civil action or appeal of civil action filed by him in previous five years in any state or federal court was not required;
- (2) such affidavit complied with statutory requirement that inmate file affidavit containing description of prior civil actions; and
- (3) inmate's affidavit of waiver and indigency and statement of institutional cashier certifying balance in inmate's account were sufficient to comply with statutory requirements.

Reversed and remanded.

West Headnotes

[1] KeyCite this headnote

98 Convicts
98k6 k. Actions.

Inmate's belated affidavit, filed in connection with his complaint seeking new parole hearing, to effect that he had not filed any civil action in previous five years in any state or federal court, was sufficient to demonstrate that compliance with statutory requirement that inmate file affidavit containing description of each civil action or appeal of civil action filed by him in previous five years in any state or federal court was not required. R.C. § 2969.25(A).

[2] KeyCite this headnote

98 Convicts
98k6 k. Actions.

Inmate's belated affidavit, filed in connection with his complaint seeking new parole hearing, to effect that he had not filed any civil action in previous five years in any state or federal court, was sufficient to comply with statutory requirement that inmate file affidavit containing description of each civil action or appeal of civil action filed by him in previous five years in any state or federal court, where such affidavit was filed after filing of inmate's complaint and motion of Ohio Adult Parole Authority (OAPA) to dismiss complaint on statutory grounds, but before trial court's judgment on such motion. R.C. § 2969.25(A).

[3] KeyCite this headnote

102 Costs

102VI Security for Costs; Proceedings in Forma Pauperis

102k127 Action or Defense in Forma Pauperis

102k132 Application and Proceedings Thereon

102k132(6) k. Oath and Affidavits.

Inmate's affidavit of waiver and indigency and statement of institutional cashier certifying balance in inmate's account, filed in connection with his complaint seeking new parole hearing, were sufficient to comply with statutory requirements for filing of civil actions by prison inmates, although belatedly filed. R.C. § 2969.25(C).

Appeal from the Franklin County Court of Common Pleas.

Gary L. Hill, pro se.

Jim Petro, Attorney General, and Janelle C. Totin, for appellee.

(REGULAR CALENDAR)

BROWN, J.

*1 {¶ 1} Gary L. Hill, plaintiff-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the court granted the motion to dismiss filed by the Ohio Adult Parole Authority ("OAPA"), defendant-appellee, denied appellant's motion to strike the OAPA's motion to dismiss, and denied appellant's motion to amend.

{¶ 2} Appellant is currently incarcerated. On May 17, 2005, appellant filed a "motion for a court order of immediate compliance to this court's previous order," which the trial court construed as a complaint against the OAPA. The action apparently sought an order granting him a new parole hearing based upon this court's decision in *Ankrom v. Hageman*, Franklin App. No. 04AP-984, 2005-Ohio-1546. On June 16, 2005, the OAPA filed a motion to dismiss pursuant to Civ.R. 12(B)(6). The OAPA argued that appellant failed to comply with R.C. 2969.25(C), which requires an inmate to file a certified statement from the institution's cashier, and R.C. 2969.25(A), which requires an inmate who commences a civil action against a governmental entity to file with the court an affidavit that contains a description of each civil action or appeal of a civil action that the inmate has filed in the previous five years in any court. On July 6, 2005, appellant filed a motion to strike the OAPA's motion to dismiss and a motion to amend.

{¶ 3} On September 14, 2005, the trial court filed a judgment in which it granted the OAPA's motion to dismiss, denied appellant's motion to strike the OAPA's motion to dismiss, and denied appellant's motion to amend. The court granted the OAPA's motion to dismiss based upon appellant's failure to comply with R.C. 2969.25(A). Appellant appeals the judgment of the trial court, asserting the following

six assignments of error:

[I.] The Trial Court erred in dismissing Mr. Hill's Complaint filed on 05-17-05, without providing a fair opportunity of litigation on the merits raised within said complaint within Case No. 05-CVH-5458 that was dismissed on or about 09-14-05. [Sic.]

[II.] The Trial Court erred by denying Mr. Hill's Due-process rights in not conforming within the "ORIGINAL CASE SCHEDULE" that caused U.S. and State Constitutional violations in denial to Witnesses, Discovery, et cetera[.] [Sic.]

[III.] The Trial Court erred in not providing an appropriate remedy within the Senate Bill II's ... Intent of "Old-law Offenders," held under the Adult Parole Board Authority in which such Offenders were Convicted through entry of a Plea Agreement ..., and Matters of Consideration through the Decision rendered within Layne V. Ohio Adult Parole Authority, 97 Ohio St.3d 456, 780 N.E.2d 548; and the Rulings within Ankrom et al., V. Harry Hageman et al., 2005-Ohio-1546 ... and within the Supportive finding of the Courts that have priorly ruled as is the Layne decision. [Sic.]

[IV.] The Trial Court erred by not declaring the Adult Parole Authority in violation of the Separation of Power(s) Doctrine upon the (A.P.A.) Failure to comply within the Trial Courts Intent of the Plea Agreement and therefore denying Mr. Hill a meaningful Consideration under the findings of the Layne decision during the review of Mr. Hill's Parole Board Hearing(s) that are a Liberty interest. [Sic.]

*2 [V.] The Trial Court erred in applying Cost assessed against Mr. Hill, Upon the Dismissal of his Complaint without holding a "Ability to Pay" hearing to consider his Indigency Status and there for causing a un-due Hardship on attacking his Inmate Account and denying him time to seek a remedy before debiting of his Inmate account ... and, the likelihood of possible remedy through a successful Appeal. [Sic.]

[VI.] The Court erred in not Staying Mr. Hill's Action until the determination of the ANKROM Case that Mr. Hill relies on to support the Merit for a Meaningful hearing and review. [Sic.]

{¶ 4} We will address appellant's first and second assignments of error together. Appellant argues, generally, in these two assignments of error that the trial court erred in dismissing his complaint. The trial court dismissed appellant's complaint pursuant to Civ.R. 12(B)(6). Appellate review of an order granting a Civ.R. 12(B)(6) motion to dismiss is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 814 N.E.2d 44, 2004-Ohio-4362, at ¶ 5. In the present case, the trial court based its dismissal upon appellant's failure to file an affidavit pursuant to R.C. 2969.25(A), which provides, in pertinent part: (A) At the time that an inmate commences a civil action or appeal against a government entity or employee, the inmate shall file with the court an affidavit that contains a description of each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court. * * *

The OAPA agrees with the trial court's reasoning and maintains that the trial court properly dismissed appellant's complaint based upon his failure to file an R.C. 2969.25(A) affidavit.

[1] {¶ 5} However, neither the OAPA, either below or on appeal, nor the trial court acknowledge that appellant, in fact, filed an affidavit contemporaneously with his July 6, 2005 motion to amend and motion to dismiss. In the affidavit, appellant averred that he had not filed any civil action in the previous five years in any state or federal court. This affidavit was filed after his May 17, 2005 complaint and the OAPA's June 16, 2005 motion to dismiss, but before the trial court's September 14, 2005 judgment.

{¶ 6} This court has found before that, if an inmate has not filed any civil actions in the previous five years, R.C. 2969.25(A) does not require him to file an affidavit. In *Church v. Ohio Dept. of Rehab. & Corr.* (June 15, 1999), Franklin App. No. 98AP-1222, this court found that the language of R.C. 2969.25(A) indicates that an inmate must submit an affidavit only when he has filed prior civil actions.

Thus, we concluded that, if there are no actions subject to the disclosure requirement in R.C. 2969.25(A), no affidavit need be filed. However, we specified that a written statement should be filed affirming that no prior actions subject to disclosure exist. In addition, we noted the inmate in Church had filed a motion to amend his complaint to add an R.C. 2969.25(A) affidavit, but the motion was denied by the trial court. We indicated that we did not believe R.C. 2969.25(A) precluded a court from granting a motion to amend or for leave in order to file the requisite affidavits, and that the trial court's denial of the inmate's motion to amend was erroneous. See, also, State ex rel. Pohlable v. Dept. of Rehab. & Corr., Franklin App. No. 04AP-720, 2005-Ohio-3153, at ¶ 18 (granting relator leave to amend his complaint to meet or attempt to meet the inmate filing requirements set forth under R.C. 2969.25).

*3 [2] {¶ 7} Further, this court has held that a trial court should accept an inmate's belated affidavit, even without a motion to amend, before dismissing the action for failure to comply with R.C. 2969.25(A). In Larkins v. Ohio Dept. of Rehab. & Corr. (2000), 138 Ohio App.3d 733, 742 N.E.2d 219, we stated that inmates should be granted some leeway as to compliance with R.C. 2969.25(A), and the trial court in that case should have accepted the inmates' affidavits appended to their memorandum contra the appellee's motion to dismiss. But, see, Richards v. Tate (Jan. 29, 2002), Belmont App. No. 01-BA-51 (the failure to file affidavit of past civil actions is not cured by a later submission); State ex rel. Ahmed v. Marple, Belmont App. No. 01 BA 23, 2002-Ohio-6898, at ¶ 3 (late submission of affidavit, filed after respondent's motion to dismiss, is non-compliant with R.C. 2969.25 [A]).

{¶ 8} At least one other appellate court has agreed with our above conclusions. In Snitzky v. Wilson, Trumbull App. No.2003-T-0095, 2004-Ohio-7229, at ¶ 17-38, the Eleventh District Court of Appeals found the trial court's failure to grant leave to an inmate to amend his writ of habeas corpus with an R.C. 2969.25(A) affidavit was an abuse of discretion, where there was no evidence that the inmate's failure to initially comply with the statute was done in bad faith, resulted in undue delay, or caused undue prejudice. The court in Snitzky also distinguished the Ohio Supreme Court's decisions in Fuqua v. Williams, 100 Ohio St.3d 211, 797 N.E.2d 982, 2003-Ohio-5533, and Hawkins v. S. Ohio Correctional Facility, 102 Ohio St.3d 299, 809 N.E.2d 1145, 2004-Ohio-2893. The court pointed out that neither of those cases specifically held that an inmate is barred from amending his original petition to conform to the statutory mandates of R.C. 2969.25(A).

{¶ 9} Based upon the above cases, we find the trial court erred in dismissing appellant's complaint. Pursuant to Church, appellant was not required to file an affidavit, as he had not filed any cases within the last five years, and the court should have accepted the affidavit as a written statement affirming that no prior actions subject to disclosure existed. Further, even if an affidavit was required, the trial court should have found appellant's belated affidavit, filed after the OAPA's motion to dismiss, was sufficient to comply with the requirements of R.C. 2969.25(A), based upon Church, Pohlable, and Larkins. For these reasons, appellant's first and second assignments of error are sustained.

{¶ 10} We address appellant's fifth assignment of error next. Appellant argues in his fifth assignment of error that the trial court erred in assessing costs against him upon dismissal of his complaint. On July 6, 2005, appellant filed, along with his R.C. 2969.25(A) affidavit, a statement by the correctional institution's cashier and an affidavit of waiver and indigency, indicating that he possessed insufficient funds and property to pay the court fees and costs. R.C. 2969.25(C) provides:

*4 (C) If an inmate who files a civil action or appeal against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed, the inmate shall file with the complaint or notice of appeal an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency. The affidavit of waiver and the affidavit of indigency shall contain all of the following:

(1) A statement that sets forth the balance in the inmate account of the inmate for each of the preceding six months, as certified by the institutional cashier;

(2) A statement that sets forth all other cash and things of value owned by the inmate at that time.

{¶ 11} For the same reasons as indicated above with regard to the affidavit under R.C. 2969.25(A), we find appellant's July 6, 2005 affidavit of waiver and indigency and statement of the institution's cashier were sufficient to comply with R.C. 2969.25(C), although belatedly filed. Thus, in light of these late filings, we conclude that the trial court erred in assessing costs against appellant. Therefore, appellant's fifth assignment of error is sustained.

{¶ 12} Appellant's remaining assignments of error relate to the underlying merits of his complaint. As the trial court never addressed the merits of appellant's claims, and its dismissal was premised solely upon appellant's failure to comply with R.C. 2969.25(C), which we have found was error, appellant's arguments under these assignments of error are not yet subject to review. Therefore, we overrule as moot appellant's third, fourth, and sixth assignments of error.

{¶ 13} Accordingly, appellant's first, second, and fifth assignments of error are sustained, appellant's third, fourth, and sixth assignments of error are overruled as moot, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings in accordance with law, consistent with this opinion.

Judgment reversed and cause remanded.

KLATT, P.J., and PETREE, J., concur.

Ohio App. 10 Dist., 2006.

Hill v. Ohio Adult Parole Authority

Not Reported in N.E.2d, 2006 WL 701126 (Ohio App. 10 Dist.), 2006-Ohio-1299

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Decision of the Chief Inspector on a Grievance Appeal

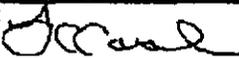
Inmate: RIDENOUR, WILLIAM LYNN	Institution: CCI
Number: A134385	Grievance No.: CCI-09-07-000027
Date: 10/01/2007	

The office of the Chief Inspector is in receipt of your notification of grievance, the disposition of that grievance, and your appeal to this office. A review of your appeal has been completed. The decision of the Inspector is hereby

Affirmed

In reaching this decision, I reviewed your grievance and appeal regarding an inmate demand statement prepared by the institutions cashier's office and sent to the court. I have also reviewed the Inspector's investigation and response. I also obtained and reviewed a copy of the signed and dated inmate demand statement. Having done so, I find that the Inspector responded fully and appropriately to your complaint.

This office will take no further action on this matter at this time.

Signature: 	Title: DEPUTY CHIEF INSPECTOR
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Civ. R. Rule 15

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Civil Procedure (Refs & Annos)
Title III. Pleadings and Motions
Civ R 15 Amended and supplemental pleadings

(A) Amendments

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(B) Amendments to conform to the evidence

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(C) Relation back of amendments

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper

party, the action would have been brought against him.

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

(D) Amendments where name of party unknown

When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and the copy thereof must be served personally upon the defendant.

(E) Supplemental pleadings

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(Adopted eff. 7-1-70)