

ORIGINAL

IN THE SUPREME COURT OF OHIO

SHAWN BOLES,	:	Case No. 2011-0808
	:	
Petitioner-Appellant,	:	On Appeal from the
	:	Ross County
vs.	:	Court of Appeals,
	:	Fourth Appellate District
ROBIN KNAB, Warden,	:	
	:	Court of Appeals Case
Respondent-Appellee.	:	No. 11CA003201
	:	

MERIT BRIEF OF APPELLEE ROBIN KNAB

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STATEMENT OF THE CASE AND FACTS

On January 27, 2011, Boles submitted a petition for habeas corpus with the Ross County Court of Appeals. The Warden filed a motion to dismiss for failure to state a claim upon which relief could be granted, which was granted on March 29, 2011. Boles appealed that dismissal on June 21, 2011, instituting this current action.

ARGUMENT

Proposition of Law No. I:

An error arising from a speedy trial violation is not a claim cognizable in habeas corpus

Habeas corpus is an extraordinary remedy and is generally available only to challenge the jurisdiction of the trial court. *Wireman v. Ohio Adult Parole Auth.* (1988), 38 Ohio St.3d 322, 322. Habeas corpus is not the proper mode of redress where the petitioner has been convicted of and sentenced to a term of incarceration by a court of competent jurisdiction; if errors or irregularities have occurred in the proceedings or sentence, a writ of error, i.e., appeal, is the proper remedy. *Ex parte Van Hagan* (1874), 25 Ohio St. 426, paragraph two of the syllabus; see also, *Burch v. Morris* (1986), 25 Ohio St.3d 18, 19.

While the Ohio Supreme Court has in limited instances extended habeas relief to non-jurisdictional-based claims, it is only in extraordinarily rare cases “where there is an unlawful restraint of a person’s liberty . . . but only where there is no adequate legal remedy, e.g., appeal or post-conviction relief.” *State ex rel. Jackson v. McFaul*, 73 Ohio St.3d 185, 186, 1995-Ohio-228. Habeas corpus may not be used as a substitute for other forms of action, such as direct appeal, post-conviction relief, or mandamus. *Adams v. Humphreys* (1986), 27 Ohio St.3d 43, 43; *In re Miller* (1984), 12 Ohio St.3d 40, 40. The existence of an alternative remedy will remove a petitioner’s allegations from habeas consideration. *Hughley v. Saunders*, 123 Ohio St.3d 446, 447, 2009-Ohio-5585, ¶1. Whether the remedy is still available is not of consequence; so long as the petitioner had

a remedy available at some point in time, habeas corpus relief is not available. See *Luna v. Russell*, 70 Ohio St.3d 561, 562, 1994 Ohio 264; *State v. Perry* (1967), 10 Ohio St.2d 175, 181-82.

A petition for writ of habeas corpus “is not and never was a postconviction remedy for the review of errors or irregularities of an accused’s conviction or for a retrial of the guilt or innocence of an accused. *Bellman v. Jago* (1988), 38 Ohio St.3d 55, 56. This Court has held that “sentencing errors by a court that had proper jurisdiction cannot be remedied by extraordinary writ.” *Jimison v. Wilson*, 106 Ohio St. 3d 342, 343; 2005-Ohio-5143, at ¶ 9; *Childers v. Wingard*, 83 Ohio St.3d 427, 427; 1998-Ohio-27. Such errors are not jurisdictional and are not cognizable in habeas corpus. *State ex rel. Massie v. Rogers*, 77 Ohio St.3d 449, 449-50; 1997-Ohio-258; *Dean. v. Maxwell* (1963), 174 Ohio St. 193, 198.

In his petition, Boles alleges that the trial court lacked jurisdiction under O.R.C. 2945.73(D). This provision, however, simply addresses speedy trial time, directing that,

When a charge of felony is dismissed pursuant to division (A) of this section, such dismissal has the same effect as a nolle prosequi. When an accused is discharged pursuant to division (B) or (C) of this section, such discharge is a bar to any further criminal proceedings against him based on the same conduct.

Boles’ reliance on this provision is not clear, as he seems to be alleging both a speedy trial violation or a double jeopardy violation. Yet regardless of inner-workings of Boles’ argument, the result is the same: both speedy trial and double jeopardy violations can be addressed by way of direct appeal and are thus not cognizable in habeas corpus.

Elersic v. Wilson, 101 Ohio St.3d 417, 417; 2004-Ohio-1501, at ¶ 3 (“Elersic’s speedy-trial

and double-jeopardy claims are not cognizable in habeas corpus. *Travis v. Bagley* (2001), 92 Ohio St.3d 322, 323, 2001 Ohio 198, 750 N.E.2d 166 (speedy trial); *Howard v. Randle*, 95 Ohio St.3d 281, 2002 Ohio 2122, P6, 767 N.E.2d 268 (double jeopardy)").

Given the nature of the allegations, even if all of Boles' alleged facts are presumed true, he could still not be granted habeas relief. Boles attempts to evade this result by tying in the notion of a sentencing error. Setting up this faulty premise, Boles then contends that *Bowen v. Sheldon*, 124 Ohio St.3d 551, 2010-Ohio-921 and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197 overruled the long-standing notion that sentencing errors are not cognizable in habeas corpus. According to Boles, sentencing errors are now jurisdictional errors and cognizable in habeas corpus as a result of *Bowen*. This is simply wrong.

Had Boles' speedy trial/double jeopardy somehow spilled into the sentencing context, the remedy still is not in habeas corpus. There is an adequate remedy at law, by way of an appeal, to challenge any alleged errors in sentencing. *State ex rel. Jaffal v. Calabrese*, 105 Ohio St.3d 440, 441, 2005-Ohio-2591, at ¶ 5.

The errors raised by Boles in his petition for a writ of habeas corpus are not jurisdictional in nature. Instead Boles focuses on alleged speedy trial violations. He had an adequate remedy at law to address his concerns. Boles' claim therefore does not state a case for habeas relief and must be dismissed.

Proposition of Law No. II:

Civ.R.12(B)(6) is the proper motion when a party fails to state a claim upon which relief can be granted.

Proposition of Law No. III :

The Court did not err in dismissing Petitioner's claim without inquiring as to the illegality of petitioner's detention where habeas relief cannot be granted.

Civ.R.12(B)(6) is properly granted when the petitioner fails to state a claim upon which relief can be granted. The purpose of a motion to dismiss for failure to state a claim for which relief can be granted is to test the sufficiency of the complaint. *State ex rel. Boggs v. Springfield Local School Dist. Bd. Of Ed.*, 72 Ohio St.3d 94, 95; 1995-Ohio-202. A complaint must be dismissed for failure to state a claim when, even if all alleged facts are presumed true, the plaintiff or petitioner still would not be entitled to the relief requested. *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St. 2d 242, 245, citing *Conley v. Gibson* (1957), 355 U.S. 41, 45.

Boles appears to be seeking habeas relief for a speedy trial violation, a double jeopardy violation, a sentencing error, or a combination of all these things. None is a jurisdictional issue. (See Proposition of Law No. I, supra). Habeas is not a remedy where direct appeal is or was possible. See *Luna*, 70 Ohio St.3d at 562, 1994 Ohio 264. Because a direct appeal is the remedy for the violation which Boles describes, habeas relief cannot be granted. *Elersic*, 101 Ohio St. 3d at ¶ 3. Thus, even if all the facts he alleges are presumed true, Boles is still not entitled to habeas relief. Boles has failed to state a claim upon which relief can be granted and the Appellate Court properly dismissed Petitioner's claim without further inquiry.

Proposition of Law No. IV:

The Court of Appeals 12(B)6 dismissal with prejudice is a final appealable order

On March 29, 2011, the Court of Appeals issued a final judgment dismissing Boles' case for failure to state a claim upon which relief can be granted. This dismissal constitutes a judgment that is an adjudication on the merits. *George v. State*, 2010-Ohio-5262, at ¶ 14, citing *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Servs.*, 123 Ohio St. 3d 54, 2009-Ohio-4176, at ¶ 15. When a court dismisses causes of action because they failed to state a claim, those rulings are appealable. *Id.*

Boles asserts that the Court of Appeals judgment is not a final appealable order for failure to conform to Civ.R. 54(b). The provision provides when more than one claim for relief is presented in an action the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for the delay. Civ.R. 54(b). In absence of a determination that there is no just reason for delay, any order which adjudicated fewer than all the claims shall not terminate the action as to any of the claims or parties. *Id.*

Boles asserts the Appellate Court did not adjudicate claims I and II of his original habeas brief. This assertion is unfounded. The claims are factually and legally indistinguishable. In both claims, Boles contends the court lacked jurisdiction to convict him under O.R.C. 2945.73(D). Recognizing this is not a claim cognizable in habeas law, the Court of Appeals dismissed Boles' claim for failure to state a claim upon which relief could be granted. This judgment incorporated all of Boles' claims; the Court of

Appeals held none of Boles' claims presented facts upon which relief can be granted. Therefore there is no Civ.R. 54(b) violation as Petitioner contends.

Proposition of Law No. V:

Failure to strictly comply with O.R.C. 2969.25(C) at the time of filing requires immediate dismissal of a habeas petition

This Court can affirm the dismissal of the habeas claim on alternate grounds.

Wright v. Ghee (1996), 74 Ohio St. 3d 465, 467 (" A reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assessed as a basis thereof." *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St. 3d 217, 222, 631 N.E.2d 150, 154. Accordingly, we affirm dismissal of the habeas claim on alternate grounds."). Thus, regardless of the Civ.R. 12(B)(6) ruling, the dismissal of Boles' petition can be affirmed due to his failure to properly file the petition.

When filing his petition, Boles failed to provide a verified copy of his inmate account statement. Inmates who file a civil action or appeal against a government entity or employee may seek a waiver of prepayment of a full filing fee. O.R.C. 2969.25(C). Inmates who request such a waiver are required to provide an affidavit of indigency, a statement certified by the institutional cashier setting forth the balance of their inmate account for the previous six months, and a statement setting forth all other cash and items of value owned by the inmate at the time of filing. *Id.* A petition that fails to comply with the requirements of O.R.C. 2969.25(C) must be dismissed. *State ex rel. Qualls v. Story*, 104 Ohio St.3d 343, 343, 2004-Ohio-6565, at ¶ 3.

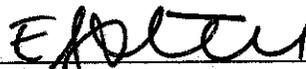
While Boles filed an affidavit of indigency – and thus did not pay the filings fees – he did not include a certified statement setting forth the balance of his inmate account for the previous six months. His petition therefore does not comply with the requirements of O.R.C. 2969.25(C)(1) and must be dismissed.

CONCLUSION

For the reasons stated herein, as well as the reasons stated by the Court of Appeals, the dismissal of Boles' habeas corpus petition should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was sent by regular U. S. Mail to Shawn R. Boles, #A410-417, Chillicothe Correctional Institution, P. O. Box 5500, Chillicothe, Ohio 45601, on July 18, 2011.



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