

IN THE SUPREME COURT OF OHIO

HADIR HERMIZ, : CASE NO. 2012-0089
Relator :
v. : Original Action in Mandamus
JUDGE MICHAEL TUCKER :
Respondent :

**MOTION TO DISMISS OF RESPONDENT,
JUDGE MICHAEL TUCKER**

Hadir Hermiz #628-808, Pro Se
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

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Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
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Attorney for Respondent

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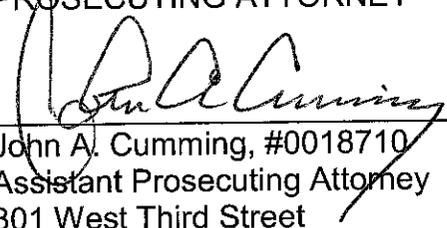
MOTION TO DISMISS

Pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure and S. Ct. Prac. R. 10.5(A), the Respondent moves the Court to Dismiss Relator's complaint for a Writ of Mandamus in its entirety, for the reason that Relator's complaint fails to state a claim against Respondent upon which relief in mandamus can be granted.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: _____


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MEMORANDUM

On January 18, 2012, Relator, Hadir Hermiz, an inmate at the Nobel Correctional Institution, filed his complaint for a Writ of Mandamus, alleging that his jail time credit has been incorrectly computed. Specifically, in his complaint, Relator asks this Court to issue a Writ of Mandamus compelling Respondent "to apply the appropriate jail time credit to Petitioner's sentence which is 40 days ...". In his affidavit attached to his complaint, Relator contends that he has been given 92 days of jail time credit; that he is actually entitled to 132 days of jail time credit; and that he is therefore entitled to 40 days of additional jail time credit.

Affidavit of Petitioner, ¶¶ 1 and 2. In paragraph 7 of his affidavit, Relator asks this Court to either grant him an additional 40 days of jail time credit “on its own” or, alternatively, that this Court order Respondent to grant him an additional 40 days of jail time credit.

For all of the reasons which follow, the Respondent submits that Relator’s complaint fails to state a claim upon which relief in mandamus can be granted, and that the complaint should be dismissed in its entirety as a matter of law.

1. The Complaint must be dismissed because Relator had an adequate remedy at law by way of direct appeal.

On November 22, 2011, Relator filed motions requesting additional jail time credit in each of his three underlying criminal cases (Case Nos. 2009-CR-2334, 2009-CR-4300, and 2010-CR-746, Montgomery County Common Pleas Court). In Entries filed on December 22, 2011 in each of Relator’s three criminal cases, Respondent overruled Relator’s November 22, 2011 motions, and found that the jail time credit previously granted in each case would remain in force. Certified copies of the Entries filed by Respondent in Case Nos. 2009-CR-2334, 2009-CR-4300, and 2010-CR-746 on December 22, 2011 are attached hereto.

Apparently dissatisfied with Respondent’s rulings denying him additional jail time credit, Relator has instituted the instant mandamus action, requesting that he be given an additional 40 days of jail time credit. However, it is axiomatic that “[m]andamus will not issue when relators have an adequate remedy in the ordinary cause of law.” State ex rel. Kingsley v. State Employment Relations Board, 130 Ohio St. 3d 333, 2011-Ohio-5519, ¶13, quoting State ex rel. Voleck v. Powhatan Point, 127 Ohio St. 3d 299, 2010-Ohio-5679; ¶7; R.C.2731.05.

Relator had an adequate remedy in the ordinary cause of law by way of direct appeal of Respondent's rulings regarding his jail time credit. "Alleged errors regarding jail-time credit are not cognizable in mandamus but may be raised by way of the defendant's direct appeal of his criminal case." State ex rel. Rankin v. Ohio Adult Parole Authority, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶10. See, also, State ex rel. Brown v. Summit County Court of Common Pleas, 99 Ohio St. 3d 409, 2003-Ohio-4126, at ¶4 ("... Brown had an adequate remedy at law by appeal to raise any error by the trial court in calculating his jail-time credit."); State ex rel. Jones v. O'Connor, 84 Ohio St. 3d 426, 426, 1999-Ohio-470 ("...Jones had an adequate remedy at law by appeal to review any sentencing error by Judge O'Connor in failing to calculate his correct jail-time credit."). Since Relator had an adequate remedy at law by way of direct appeal if he was dissatisfied with Respondent's calculation of his jail time credit, his complaint should be dismissed as a matter of law.¹

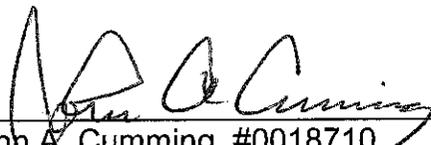
2. Conclusion

For all of the foregoing reasons, Respondent respectfully requests this Court to dismiss Relator's complaint for a Writ of Mandamus with prejudice, assess costs to Relator, and order any other relief deemed necessary and just by this Court.

¹ Relator's complaint should also be dismissed because he has failed to properly caption his complaint as required by R.C. 2731.04. The Relator's failure to properly caption his complaint warrants dismissal. Blankenship v. Blackwell, 103 Ohio St. 3d 567, 2004-Ohio-5596, ¶34.

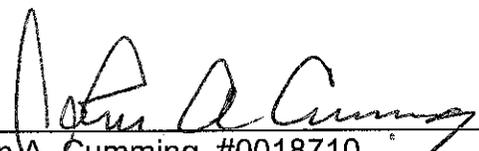
Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

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Attorney for Respondent,

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by ordinary U.S. mail, postage prepaid, on the 24th day of January, 2012, to Hadir Hermiz #628-808, Noble Correctional Institution, 15708 McConnelsville Road, Caldwell, Ohio 43724.


John A. Cumming, #0018710
Assistant Prosecuting Attorney

Case: 2009 CR 02334
0016757955
DET: JICE

FILED
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2011 DEC 22 P 3:57

GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY COUNTY, OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Jail Time Credit Report and Entry Upheld

The State of Ohio
Plaintiff

Case No.: 2009 CR 02334
Offense: Escape (Misd) (F5)
Sentencing Date: May 26, 2010
Institution: Bureau of Sentence Computation (BOSC)

-vs-

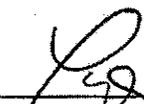
Hadir Hermiz
Defendant

ENTRY

The Honorable Michael L. Tucker, Judge

On August 9, 2011, the Court ruled that the defendant be granted 5 days of Jail Time Credit in C#2009 CR 02334. On November 22, 2011 the defendant filed an additional motion requesting a Jail Time Credit report be conducted. The Court upholds its decision from August 9, 2011, which granted the defendant with 5 days.

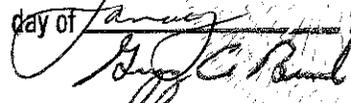
APPROVE:



Michael L. Tucker, Judge

cc: Institution: BOSC
Defendant, Hadir Hermiz
Defense Attorney, Pro Se

I hereby certify this to be a true and correct copy.

Witness my hand and seal this 25
day of January 2012
 Clerk

Clerk of Common Pleas

Court of Montgomery County, Ohio

By  Deputy



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2011 DEC 22 P 3:51
GREGORY A. BRUSH
CLERK OF COURTS

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Jail Time Credit Report and Entry Upheld

The State of Ohio
Plaintiff
-vs-
Hadir Hermiz
Defendant
Case No.: 2009 CR 04300
Offense: Robbery (Use Of Force) (F3)
Sentencing Date: May 26, 2010
Institution: Bureau of Sentence Computation (BOSC)
ENTRY

The Honorable Michael L. Tucker, Judge

On August 9, 2011, the Court ruled that the defendant be granted 82 days of Jail Time Credit in C#2009 CR 04300. On November 22, 2011 the defendant filed an additional motion requesting a Jail Time Credit report be conducted. The Court upholds its decision from August 9, 2011, which granted the defendant with 82 days.

APPROVE:

Michael L. Tucker, Judge

cc: Institution: BOSC
Defendant, Hadir Hermiz
Defense Attorney, Pro Se

I hereby certify this to be a true and correct copy.

Witness my hand and seal this 20
day of January 2012

Clerk

Clerk of Common Pleas
Court of Montgomery County, Ohio
By
Deputy



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CLERK OF COURTS
MONTGOMERY COUNTY, OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Jail Time Credit Report and Entry Upheld

The State of Ohio

Plaintiff

-vs-

Hadir Hermiz

Defendant

Case No.: 2010 CR 00746

Offense: Breaking and Entering (2 Counts) (F5)

Sentencing Date: May 26, 2010

Institution: Bureau of Sentence Computation (BOSC)

ENTRY

The Honorable Michael L. Tucker, Judge

On August 9, 2011, the Court ruled that the defendant be granted 82 days of Jail Time Credit in C#2010 CR 00746. On November 22, 2011 the defendant filed an additional motion requesting a Jail Time Credit report be conducted. The Court upholds its decision from August 9, 2011, which granted the defendant with 82 days.

APPROVE:

Michael L. Tucker, Judge

cc: Institution: BOSC
Defendant, Hadir Hermiz
Defense Attorney, Pro Se

I hereby certify this to be a true
and correct copy.

Witness my hand and seal this 25
day of January 2012

Clerk

Clerk of Common Pleas
Court of Montgomery County, Ohio

By
Deputy