ORIGINAL

IN THE OHIO SUPREME COURT
2013

State ex rel. Kristoffer T. Morris,	:	
Relator,	:	Case No. 2013-0565
v.	:	ORIGINAL ACTION IN MANDAMUS/PROHIBITION
David Cain, Judge, et al.,	:	
Respondents.	:	

RESPONDENT JUDGE DAVID CAIN'S MOTION TO DISMISS

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- **Introduction**

Relator filed this mandamus action on April 8, 2013 against the honorable Judge David Cain of the Franklin County Common Pleas Court. As a general matter, Relator asserts a sentencing error and specifically requests that this Court compel Respondent to issue an additional sentencing entry.

In filing this action, Relator seeks to have the Court waive filing fees and any required deposit. Relator is currently incarcerated for aggravated murder and other criminal offenses. Therefore, his case is subject to R.C. § 2969.25.

- **Relator failed to comply with R.C. § 2969.25**

This honorable Court has held on multiple occasions that the requirements of R.C. § 2969.25 are mandatory and that any failure to comply with these requirements merits dismissal of an inmate's claims. ***See, e.g., State ex rel. White v. Bechtel*** (2003), 99 Ohio St.3d 11, 2003 Ohio 2262. The Court has also held that strict compliance is required and that substantial compliance with the statute's requirements will not suffice. ***State ex rel. Manns v. Henson*** (2008), 119 Ohio St.3d 348, 349, 2008 Ohio 4478.

R.C. § 2969.25(A) required Relator to file "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 affidavit must contain a brief description of the nature of the civil action, the case name and number, the court in which the civil action was brought, and the name of each party to the civil action. It must also include the case's outcome including whether it was dismissed as frivolous or malicious and whether the court made an award against the inmate or the inmate's counsel for frivolous conduct.

Relator filed an affidavit regarding previous civil actions. However, it is

inaccurate. It is also deficient in a number of ways. Relator asserts that he has "not commenced any civil action or appeal against a government agency or employee in the previous five years in any state or federal court." Yet, this Court's own docket indicates that, in 2010, Relator filed a procedendo action against the 10th District Court of Appeals which was ultimately dismissed on May 5, 2010.[1]

Relator also failed to mention that he sued his criminal defense attorneys for theft in 2009 in the Franklin County Common Pleas Court. Relator voluntarily dismissed this case in February of 2010.[2] Relator's omission of these two civil actions merits dismissal of Relator's Complaint in this case.

In addition, Relator indicates in his affidavit that he sought a writ of habeas corpus. In fact, Relator has twice sought habeas relief in the United States District Court for the Southern District of Ohio.[3] As the U.S. Supreme Court stated in ***Keeney v. Tamayo-Reyes*** (1992), 504 U.S. 1, 14, "[t]he availability and scope of habeas corpus have changed over the writ's long history, but one thing has remained constant: Habeas corpus is not an appellate proceeding, but rather an original civil action in a federal court." Further, this Court has held that state habeas corpus proceedings are civil actions. ***See, Fuqua v. Williams*** (2003), 100 Ohio St.3d 211, syllabus, 2003 Ohio 5533.

Relator's affidavit briefly mentions one habeas action. It does not contain the case names or numbers or indicate the court in which Relator brought the actions. The affidavit fails to include the names of the parties to the civil actions and does not indicate

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1 See Case No. 2010-0269, captioned ***State of Ohio ex rel. Kristoffer Morris v. Tenth District Court of Appeals***.

2 See Case No. 09 CV 2139, captioned ***Morris v. Williams, et al.***

3 See Case No. 2:08 cv 1176, captioned ***Morris v. Warden***, and Case No. 2:10 cv 542, captioned ***Morris v. Warden, Southern Ohio Correctional Facility***.

the actions' outcomes. Finally, there is no statement in the affidavit regarding frivolousness or maliciousness. Again, Relator's affidavit indicates that he has initiated only one habeas action.

Having failed to comply with R.C. § 2969.25(A), Relator's case must be dismissed. In ***White***, this Court upheld the dismissal of an inmate's action where the inmate's affidavit relative to previous actions failed to "include a statement as to whether White's previous actions or appeals were dismissed as frivolous or malicious and whether any awards were made against White for frivolous or malicious conduct." ***Id.*** at 634-635. Here, as noted above, Relator's affidavit suffers from multiple deficiencies. In addition to being inaccurate, it fails to include the majority of information required by R.C. § 2969.25(A). This alone merits dismissal of Relator's current action.

However, Relator has also failed to comply with R.C. § 2969.25(C) despite seeking a waiver of filing fees. In seeking such a waiver, Relator had a mandatory duty to provide an affidavit of waiver and indigence which included a statement, certified by the institutional cashier, setting forth the balance in his account for each of the preceding six months. Relator was also required, when seeking waiver of the Court's filing fees, to include a statement setting "forth all other cash and things of value owned by the inmate at that time." ***Id.***

Relator has provided no statement regarding cash or other things of value he may own. Instead, he includes a statement setting forth things of value which he does not own. The list is not exhaustive by any means; cash is not mentioned at all. Again, the statute's requirements are mandatory. Relator was required to provide a statement

regarding cash or other things of value which he owned. Instead, he listed several things of value which he does not own. This also merits dismissal of Relator's action.

Further, though Relator provided a certified account statement, it includes balance information for six months preceding March 21, 2013. Relator filed his action on March April 8, 2013. Thus, Relator has failed to indicate his account balance for the required period. In ***Manns***, this Court upheld dismissal where the inmate failed to indicate a balance for the month previous to the filing of his action. Here, Relator failed to include balances for the 2 and ½ weeks prior to the filing of his action. Again, dismissal is appropriate.

- **Relator has an adequate remedy at law**

In seeking the extraordinary writ of mandamus, Relator asserts a sentencing error. He asks this Court to compel Respondent to issue an additional sentencing entry. A writ of mandamus is not appropriate under these circumstances. In ***State ex rel. Jaffal v. Calabrese*** (2005) 105 Ohio St. 3d 440, 441, 2005 Ohio 2591, this Court, in affirming the dismissal of a writ of mandamus, recognized, "'[m]andamus will not issue if there is a plain and adequate remedy in the ordinary course of law.' Sentencing errors by a court that had proper jurisdiction cannot be remedied by extraordinary writ." (internal cites omitted).

Here, Relator complains of a sentencing error, specifically that the Court's sentencing entry did not contain required information.[4] As this Court has recognized, such errors cannot be remedied through an extraordinary writ because they can be addressed on appeal and/or through post-conviction relief. As Relator has an adequate remedy at law, his request for a writ of mandamus must be dismissed.

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[4] In making this argument, Relator in no way concedes any error as to sentencing.

- **Conclusion**

Having failed in multiple ways to satisfy the mandatory requirements of R.C. § 2969.25(A) and (C), Relator's current action must be dismissed. Relator failed to list all the civil actions he has filed, failed to include required information for the civil cases he did list, and failed to provide the required information as to his finances. Further, as sentencing errors cannot be remedied through extraordinary writs, Relator's Complaint for the same must be dismissed.

Based on the above cited circumstances and well-settled law, Respondent moves this honorable Court to dismiss Relator's case with Relator to bear the costs of the action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the foregoing on those listed below, via regular U.S. Mail, this 6th day of May, 2013.

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