

[Cite as *State ex rel. Jones v. Vivo*, 2001-Ohio-3336.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO, EX REL.)	
DAVID JONES,)	
)	CASE NO. 00 CA 273
PETITIONER,)	
)	
- VS -)	<u>OPINION</u>
)	<u>AND</u>
ANTHONY VIVO, MAHONING COUNTY)	<u>JOURNAL ENTRY</u>
CLERK OF COURTS,)	
)	
RESPONDENT.)	

CHARACTER OF PROCEEDINGS: Petition for Writ of Mandamus by
Petitioner. Motion to Dismiss by
Respondent.

JUDGMENT: Motion to Dismiss - Granted.
Petition - Dismissed.

APPEARANCES:

For Petitioner:

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For Respondent:

Attorney Paul Gains
Prosecuting Attorney
Attorney Thomas Michaels
Assistant Prosecuting Attorney
120 Market Street
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JUDGES:

Hon. Joseph J. Vukovich

Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 27, 2001

PER CURIAM:

{¶1} This case involves an original action to this court on a Petition for Writ of Mandamus by Petitioner and a subsequent Motion to Dismiss by Respondent. Specifically, Petitioner alleges that Respondent, Mahoning County Clerk of Courts, has failed to send Petitioner copies of his indictments and to certify his Criminal Appearance and Execution Docket. Petitioner alleges that his Sixth Amendment right to a speedy trial had been violated and that Respondent is intentionally impeding Petitioner's attempt to gather information to substantiate that violation.

{¶2} The facts indicate that Petitioner was indicted on April 8, 1997 for Engaging in a Pattern of Corrupt Activity, Theft, Falsification, and Insurance Fraud, under Case No. 97CR246. On September 26, 1997, Petitioner was reindicted by a superseded indictment under Case No. 97CR730 and the prior case was dismissed.

On May 2, 1997, Petitioner waived all statutory time periods in Case No. 97CR246. On October 15, 1997, Petitioner waived his right to a speedy trial in Case No. 97CR730. Petitioner was free on bond under both cases prior to his being sentenced.

{¶3} On May 11, 1999, Petitioner pled guilty to Tampering with Records and two counts of theft. On August 12, 1999, Petitioner was sentenced to four to fifteen years incarceration for the above offenses and ordered to pay restitution. No direct appeal as of right was taken from the above sentencing.

{¶4} On September 13, 2000, Petitioner filed a Motion to Vacate Restitution; on October 26, 2000, a Motion to Withdraw his Guilty Plea; and on December 8, 2000, a Motion for Relief from Judgment, along with various motions. On December 14, 2000 and February 13, 2001, the trial court denied Petitioner's various motions, holding that Petitioner had failed to comply with the mandatory time frame

since he did not file his Petition for Post-Conviction Relief within 180 days after his time for appeal had expired.

{¶5} On December 19, 2000, Petitioner filed this instant Petition for Writ of Mandamus. On January 19, 2001, Respondent filed a Motion for Leave to Move or Plead, which was granted and on February 20, 2001, Respondent filed a Motion to Dismiss. Petitioner answered the Motion to Dismiss on March 19, 2001, with Respondent replying to this answer on March 28, 2001.

{¶6} It has long been noted that mandamus is a civil action, (see Dutton v. Hanover (1903), 42 Ohio St. 215) and that civil rules are applicable to mandamus actions in the Court of Appeals. State ex rel. Millington v. Weir (1978), 60 Ohio App.2d 348. In his Petition for Writ of Mandamus, Petitioner states that he is an inmate in the State of Ohio and that Respondent is a government employee. In the above Petition, Petitioner also filed an affidavit of indigency and alleged that he is without the necessary funds to pay the costs of this action.

{¶7} Since Petitioner is an inmate who is seeking a waiver of filing fees and Respondent is a government employee, R.C. 2969.25 (C)(1) applies to this action. That statute states, in relevant part, that:

{¶8} "(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 indigency shall contain all of the following:

{¶9} 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;

{¶10} A statement that sets forth all other cash and things of value owned by the inmate at that time." R.C. 2969.25(C). (Emphasis added).

{¶11} Petitioner has not submitted a statement that sets forth the balance of his inmate account nor has he accounted for all other things of value which he owns.

{¶12} The requirements of R.C. 2969.25 are mandatory. See State ex rel. Zanders v. Ohio Parole Bd. (1998), 82 Ohio St.3d 421; State ex rel. Alford v. Winters (1997), 80 Ohio St.3d 285. Petitioner's argument that R.C. 2969.25(C) is inapplicable to mandamus actions related to criminal matters is without basis. See Alford, *supra*.

{¶13} Assuming arguendo that Petitioner could have overcome Respondent's Motion to Dismiss, his Petition for Writ of Mandamus would still be without merit.

{¶14} For a Writ of Mandamus to be granted, Relator must demonstrate: (1) that Relator has no plain and adequate remedy in the ordinary course of law; (2) that Respondent is under a clear legal duty to perform some act or acts; and (3) that Relator has a clear legal right to the relief prayed for. State ex rel. Berger v. McMonagle (1983), 6 Ohio St.3d 28.

{¶15} Although Petitioner does not cite directly to R.C. 149.43 "Availability of public records; mandamus action," he is clearly attempting to acquire public records relating to his conviction. At page 8 of Petitioner's Petition for Writ of Mandamus he states, "Evid.R. 803(8) suggests a special deference to public records and reports." Petitioner has demonstrated that he wanted these records in order to pursue post-conviction relief. In State ex rel. Steckman v. Jackson (1994), 70 Ohio St.3d 420, the court stated, "A defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of R.C. 149.43 to support a petition for post-conviction relief." The fact that Petitioner has not availed himself of a direct appeal in his case, is immaterial to the issue presented. Thus, Petitioner has no clear legal right to the relief prayed for.

{¶16} Petitioner's underlying issue in both his Motions before the trial court and this Mandamus action, was that he was denied

his right to a speedy trial. As previously noted on May 2, 1997, Petitioner waived all statutory time periods in Case No. 97CR246. Again on October 15, 1997, Petitioner waived his right to a speedy trial in Case No. 97CR730. The Ohio Supreme Court has addressed the issue of a defendant's express written waiver of his statutory right to a speedy trial. In State v. O'Brien (1987), 34 Ohio St.3d 7, the Supreme Court held in pertinent part:

{¶17} "An accused's express written waiver of his statutory rights to a speedy trial as provided in R.C. 2945.71, if knowingly and voluntarily made, may also constitute a waiver of the coextensive speedy trial rights guaranteed by the United States and Ohio Constitutions."

{¶18} Insofar as the constitutional right, as distinguished from the statutory right, to a speedy trial is concerned, affirmative action on the part of a defendant in the nature of a demand to be tried is necessary to invoke the constitutional protection. State v. Gettys (1976), 49 Ohio App.2d 241. In the underlying case, there was no affirmative action by Petitioner in the nature of a demand to be tried in this matter. On the contrary, Petitioner himself, submitted two (2) separate motions to continue this matter. The first, which was granted, was submitted to the Court on October 28, 1998. The second motion for continuance in this matter was submitted by Petitioner on April 30, 1999.

{¶19} Also, concerning the issue of whether Petitioner was denied his right to a speedy trial, Petitioner must bear the burden of showing that his claims are not barred by the doctrine of *res judicata*. Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceedings except on direct appeal, any defense or any claimed lack of due process that was raised or could have been raised at the trial which resulted in that conviction or on appeal from that judgment. See State v. Perry (1967), 10 Ohio St.2d 175.

{¶20} In this case, the "speedy trial" issue was not raised in a direct appeal and Petitioner is barred from raising that issue at this time. Petitioner had a plain and adequate remedy in the ordinary course of law, that being by direct appeal, and thus he has not fulfilled that requirement to be entitled to a Writ of Mandamus.

{¶21} For all the reasons cited above, Petitioner's Petition for Writ of Mandamus is denied. Respondent's Motion to Dismiss is granted.

{¶22} Costs taxed to Petitioner.

{¶23} Final Order. Clerk to serve notice pursuant to the Ohio Civil Rules.

Vukovich, J., concurs.

Donofrio, J., concurs.

DeGenaro, J., concurs.