

[Cite as *Richards v. Tate*, 2002-Ohio-436.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

TIMOTHY W. RICHARDS JR.,	)	
	)	
PETITIONER,	)	CASE NO. 01-BA-51
	)	
VS.	)	OPINION
	)	and
ARTHUR TATE JR., WARDEN,	)	JOURNAL ENTRY
	)	
RESPONDENT.	)	

CHARACTER OF PROCEEDINGS: Petition for Writ of
Habeas Corpus

JUDGMENT: Respondent's Motion for
Summary Judgment Granted.
Petition dismissed.

APPEARANCES:

For Petitioner:	Timothy W. Richards, <i>pro-se</i> #395-322 Belmont Correctional Institution 68518 Bannock Road P.O. Box 540 St. Clairsville, Ohio 43950-0540
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For Respondent:	Betty D. Montgomery Attorney General M. Scott Criss Assistant Attorney General Corrections Litigation Section 140 East Town Street, 14 th Floor Columbus, Ohio 43215-6001
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: January 29, 2002

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PER CURIAM.

{¶1} This cause is before this Court on a complaint for writ of habeas corpus filed by petitioner on October 15, 2001. The gist of Petitioner's argument is that he is being unlawfully held as a parole violator, since the Eighth District Court of Appeals recently reversed his felonious assault conviction, which had served as the basis for finding a violation.

{¶2} On November 19, 2001, respondent filed an extensive motion to dismiss, which this Court converted to a summary judgment motion pursuant to Civ.R. 12(B)(6). Petitioner filed a response on December 13, 2001 and this matter now comes on for determination based on the pleadings before this Court.

CASE HISTORY

{¶3} Based on unrefuted records submitted by respondent, we may glean the criminal history involving petitioner.

{¶4} On September 19, 1984, Petitioner Timothy W. Richards Jr. was sentenced to an indefinite term of 5 to 25 years after his guilty plea to a single count of aggravated burglary. He was later granted furlough. He was subsequently found to be a furlough violator, effective November 23, 1987, and returned to prison. He was granted parole on March 10, 1989. Two months later he was indicted for aggravated burglary with an aggravated felony specification and one count of theft. He pled guilty to a reduced charge of burglary and on September 1, 1989 he was

sentenced to a term of 8 to 15 years incarceration, with eight (8) years actual incarceration. He was thereafter granted parole on March 8, 1999.

{¶5} Petitioner was subsequently indicted in March 2000 for felonious assault and was found guilty after a jury trial. On August 8, 2000 he was sentenced to six (6) years incarceration, consecutive to his sentences for the above noted offenses. On November 16, 2000, his parole was recommended to be revoked based on the conviction, after petitioner waived his right to a mitigation hearing. Petitioner appealed his conviction and sentence and on September 20, 2001, a divided Eighth District Court of Appeals reversed his conviction on a finding that there was not a valid waiver of his right to be represented by counsel.

The cause was remanded for further proceedings. The State of Ohio filed an appeal to the Ohio Supreme Court from such judgment and the memorandum in support of jurisdiction has not yet been ruled upon by the Ohio Supreme Court. The State of Ohio has also filed a motion for stay with the Ohio Supreme Court.

{¶6} Respondent presents several arguments in support of his position that a writ should not issue. First, petitioner's maximum sentence has not expired. Second, petitioner failed to verify his petition as required by R.C. 2725.04. Third, petitioner failed to attach copies of his commitment papers as

required by R.C. 2725.04(D). Fourth, petitioner failed to provide a detailed list of all lawsuits he has filed in the previous five years as required by R.C. 2969.25.

ANALYSIS

{¶7} Respondent contends that the petitioner has been returned to prison to complete serving terms of sentence imposed in 1984 and 1989. As neither maximum term has yet expired, the petitioner was not being held unlawfully and therefore is not entitled to pursue a complaint in habeas corpus. See *Frazier v. Stickrath* (1988), 42 Ohio App.3d 114.

{¶8} In response, *pro-se* petitioner reiterates that the only basis for the parole revocation was a conviction which has now been reversed and he should not be deprived of his liberty without legal justification for doing so.

{¶9} The Ohio Supreme Court has stated that "habeas corpus is available where an individual's maximum sentence has expired and he is being held unlawfully." *Morgan v. Ohio Adult Parole Auth.* (1994), 68 Ohio St.3d 344, citing *Hoff v. Wilson* (1986), 27 Ohio St.3d 22. It is uncontroverted that if the felonious assault charge against petitioner had been dismissed, and that was the sole factual basis for his parole revocation, he would have a solid foundation for his argument that he is entitled to a writ of habeas corpus. However, in the case before us, petitioner has

obtained a reversal and remand for further proceedings, not an outright dismissal of the charge against him. Moreover, the State of Ohio is appealing that reversal, so there has not yet been a final determination of the underlying case upon which petitioner relies in this complaint. While this Court has found unpersuasive the argument of the respondent that petitioner is not entitled to release because the maximum sentence has not expired (see *Ball v. Tate* [June 29, 1998], Belmont App. No. 97-BA-15, unreported), we do find that the lack of a final determination of the underlying felonious assault case is cause to prevent the issuance of a writ in this case. Moreover, the holding of the appellate court was not a finding resulting in the acquittal of petitioner. It was a remand for further proceedings to assure that the right to counsel as constitutionally guaranteed was protected. Conduct which may give rise to a parole violation need not be demonstrated by the same degree of proof needed to obtain a criminal conviction. As stated in *Barnett v. Ohio Adult Parole Auth.* (1998), 81 Ohio St.3d 385:

{¶10} "Parole and probation may be revoked even though criminal charges based on the same facts are dismissed, the defendant is acquitted, or the conviction is overturned, unless all factual support for the revocation is removed. *Zanders v. Anderson* (1996), 74 Ohio St.3d 269, 272, 658 N.E.2d 300, 302; *Flenoy v. Ohio Adult Parole Auth.* (1990), 56 Ohio St.3d 131, 132, 564 N.E.2d 1060, 1062."

{¶11} We therefore find that the mere fact of a reversal of a criminal conviction is not sufficient, by itself, to find that parole could not be revoked when the revocation is premised on the criminal conviction. The additional requirement is that all factual support for the revocation must also be removed.

{¶12} Respondent also asserts a lack of verification to his petition as grounds for dismissal. Under R.C. 2725.04:

{¶13} "Application for the writ of habeas corpus shall be by petition, signed and *verified* either by the party for whose relief it is intend * * *." (Emphasis added.)

{¶14} Failure to verify the petition is grounds for dismissal. *Ranzy v. Cole* (1998), 81 Ohio St.3d 109. Petitioner's effort to cure the deficiency by an Affidavit of Verity attached to a November 30, 2001, Request for Leave to File Instanter along with his statement of Prior Civil Actions is untimely. The statute clearly requires that the original petition be verified. That was not done in this case.

{¶15} Respondent also asserts that petitioner's failure to attach all of his commitment papers is fatal to his complaint. *Boyd v. Money* (1998), 82 Ohio St.3d 388. *Hadlock v. McFaul* (1995), 105 Ohio App.3d 24. In response, petitioner claims he was unable to comply with this requirement of R.C. 2725.04(D) because the Records Office at several penal facilities denied him access

to such records absent a court order. None of the cited cases provide an exception for this requirement and we have found none. Copies of commitment orders and causes of detention may be obtained from the respective clerk of courts offices as well as institutional records offices. These records are readily available public records.

{¶16} In this case respondent has provided a detailed history of the criminal convictions of petitioner supported by proper documentation. Such record information is extremely helpful in providing a chronology of events and persuasive for this Court to determine that respondent is entitled to summary judgment.

{¶17} Finally, petitioner's belated attempt on November 30, 2001, to list a civil action in mandamus filed in 1998 fails to comply with the statute. Under R.C. 2969.25:

{¶18} "(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 affidavit shall include all of the following for each of those civil actions or appeals:

{¶19} "(1) A brief description of the nature of the civil action or appeal;

{¶20} "(2) The case name, case number, and the court in which the civil action or appeal was brought;

{¶21} "(3) The name of each party to the civil action or appeal;

{¶22} "(4) The outcome of the civil action or appeal, including whether the court dismissed the civil action or appeal as frivolous or malicious under state or federal law or rule of court, whether the court made an award against the inmate or the inmate's counsel of record for frivolous conduct under section 2323.51 of the Revised Code, another statute, or a rule of court, and, if the court so dismissed the action or appeal or made an award of that nature, the state of the final order affirming the dismissal or award."

{¶23} Failure to file an affidavit listing each civil action filed in the previous five years is cause for dismissal of the petition. *State ex rel. Zanders v. Ohio Parole Bd.* (1998), 82 Ohio St.3d 421. In this case petitioner not only neglected to file the required affidavit at the time of filing the complaint, but also failed to provide the required information when he subsequently noted a single mandamus action he filed in 1998.

{¶24} For all the above stated reasons we find that respondent is entitled to summary judgment and this petition is dismissed.

{¶25} Costs taxed against petitioner. Final order. Clerk to serve notice on the parties as provided by the civil rules.

Donofrio, J., concurs
Waite, J., concurs
DeGenaro, J., concurs