

[Cite as *McAllister v. State*, 2004-Ohio-2632.]

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

JOHN LAWRENCE McALLISTER)	CASE NO. 04 BE 5
)	
PETITIONER)	
)	
VS.)	OPINION AND
)	JOURNAL ENTRY
STATE OF OHIO, WARDEN OF)	
BELMONT CORRECTIONAL)	
INSTITUTION, et al.)	
)	
RESPONDENTS)	

CHARACTER OF PROCEEDINGS: Petition for Writ for Habeas Corpus

JUDGMENT: Petition Dismissed.

APPEARANCES:

For Petitioner:

John Lawrence McAllister, pro se
#453-844
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For Respondent:

Atty. Jim Petro
Ohio Attorney General
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JUDGES:

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

Dated: May 19, 2004

PER CURIAM.

{¶1} Pro se Petition for Writ of Habeas Corpus was filed on February 5, 2004. Petitioner asserts that his plea agreement was not lawfully filed and therefore the sentence imposed upon him is invalid. He also asserts error in the fact that one counsel is listed as representing him on the plea agreement and a different counsel on the entry accepting the plea agreement. It is alleged that since his original counsel did not approve the entry, it is invalid.

{¶2} On March 25, 2004, the Respondents filed a Motion to Dismiss. They contend that extraordinary relief is not available when an adequate remedy at law exists. Second, the petition must be dismissed as Petitioner failed in his affirmative statutory duty to provide a detailed list of lawsuits he filed in the previous five years. Third, Petitioner failed to verify his petition as required by R.C. 2725.04. Fourth, Petitioner failed to attach copies of all the pertinent commitment papers as required by R.C. §2725.04(D). Finally, that the Petitioner's claims are without merit.

{¶3} In response to the Motion to Dismiss, on April 1, 2004, Petitioner filed a Motion to Amend his Petition for Writ of Habeas Corpus, seeking leave to file an additional commitment entry as well as his affidavit listing all civil actions within the preceding five years.

{¶4} Under R.C. 2725.01:

{¶5} “Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.”

{¶6} Petitioner herein is not challenging the jurisdiction of the court that imposed sentence, only that certain errors occurred which resulted in an illegal sentence. Habeas corpus does not lie where the Petitioner does not challenge the jurisdiction of the sentencing court. *Mays v. Engle* (1982), 69 Ohio St.2d 166, 431 N.E.2d 1006. If Petitioner believes that an irregularity occurred in the method his plea was accepted and sentence was imposed, he has available the legal remedy of direct appeal or delayed appeal to present such issues. As stated in *Gaskins v. Shiplevy* (1996), 76 Ohio St.3d 380, 383, 1996-Ohio-387, “* * * habeas corpus, like other extraordinary writ actions, is not available where there is an adequate remedy at law.”

{¶7} It is noted in the Respondents’ Motion to Dismiss that Petitioner has not filed a direct appeal from his sentence. He therefore has a legal remedy to address the issues which he presents in this extraordinary writ action.

{¶8} We now address the noncompliance with R.C. 2969.25(B). That statute recites in pertinent part:

{¶9} “(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.”

{¶10} Failure to comply with the mandatory requirement of the statute is cause for dismissal. *State ex rel. Washington v. Ohio Adult Parole Auth.*, 87 Ohio St.3d 258, 1999-Ohio-53. The statute applies to habeas corpus actions. *Fugua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533. A late submission that is not in conformity with the statute is not in compliance with the requirement that it be filed at the time the petition is filed. Moreover, the affidavit submitted by Petitioner fails to describe the nature of each civil action or whether an appeal was taken. The affidavit is wholly inadequate.

{¶11} The Ohio Supreme Court has held that, “[t]he requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal.” *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003-Ohio-2262, 788 N.E.2d 634, at ¶5.

{¶12} An examination of the petition shows that it is not verified as required by R.C. §2725.04. Failure to verify the petition is grounds for dismissal. *Ranzy v. Cole* (1998), 81 Ohio St.3d 109; *Chari v. Vore* (2001), 91 Ohio St.3d 323, 327-328, 744 N.E.2d 763; *Richards v. Tate* 7th Dist. No. 01 BA 51, 2002-Ohio-436 at ¶14. As noted in *Chari* at 327, “[v]erification’ means a ‘formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statements in the document.’ Garner, Black’s Law Dictionary (7 Ed.1999) 1556; see, also, Webster’s Third New International Dictionary (1986) 2543.” The absence of a verification of the petition is an independent ground for dismissal. *Chari*, supra.

{¶13} As regards the failure to attach all commitment papers the statute is explicit. Under R.C. 2725.04(D):

{¶14} “A copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or detention is without legal authority, such fact must appear.”

{¶15} Failure to include all commitment papers with the petition is cause for dismissal. *State ex rel. Bray v. Brigano*, 93 Ohio St.3d 458, 2001-Ohio-1587. Petitioner belatedly submitted an October 10, 2003 sentencing entry in Stark County, Ohio, case No. 2003 CR 1086, imposing a six month term upon a guilty plea to theft. That late submission is contrary to the express requirement of the statute.

{¶16} Finally, this Court finds no merit to Petitioner's argument that the representation by different counsel between the plea and sentencing somehow resulted in an invalid plea and illegal sentence. Moreover, as the plea agreement was attached to the judgment entry it is properly filed as part of the record. Petitioner's assertions lack legal merit.

{¶17} For all the above stated reasons the Respondents' Motion to Dismiss this Petition for Writ of Habeas Corpus is sustained. Petition dismissed at Petitioner's costs.

{¶18} Final order. Clerk to serve notice as provided by the civil rules.

Petition dismissed.

Waite, P.J., Donofrio and DeGenaro, JJ., concur.