

**[Cite as *Kemp v. Ishee*, 2004-Ohio-390.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHARLES XAVIER KEMP

PETITIONER

VS.

TODD ISHEE, WARDEN

RESPONDENT

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CASE NO. 03 MA 182

## OPINION AND JOURNAL ENTRY

CHARACTER OF PROCEEDINGS:

## Petitioner's Writ for Habeas Corpus

**JUDGMENT:**

Petition Dismissed.

APPEARANCES:

For Petitioner:

Charles Xavier Kemp, pro se  
#255-618  
Ohio State Penitentiary  
878 Coitsville-Hubbard Road  
Youngstown, Ohio 44505

For Respondent:

Atty. Jim Petro  
Ohio Attorney General  
Atty. Gregory T. Hartke

Assistant Attorney General  
Corrections Litigation Section  
State Office Building, 11<sup>th</sup> Floor  
615 West Superior Avenue  
Cleveland, Ohio 44113-1899

JUDGES:

Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Joseph J. Vukovich

Dated: January 26, 2004

PER CURIAM.

{¶1} Petitioner Charles Xavier Kemp filed a petition for writ of habeas corpus on October 3, 2003. Petitioner asserts that in 1992 he was convicted of murder (including a firearm specification), of carrying a concealed weapon, and of illegal possession of a firearm in a liquor permit premises. He received a sentence of fifteen years to life in prison for the murder charge, with an additional three-year sentence for the firearm specification. He was also sentenced to two years in prison on the concealed weapons charge and one year on the illegal possession of a firearm charge, to be served concurrently to each other and consecutively with the sentence for murder. The basis of the petition is that the concealed weapons charge and the illegal possession of a firearm charge are allied offenses of similar import, and that he could only have been convicted of one or the other of the two, but not both. See R.C.

2941.25(A): “[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.”

{¶2} Respondent Todd Ishee, the warden of the Ohio State Penitentiary, filed a motion to dismiss on December 9, 2003. Respondent argues that the petition does not set forth a claim upon which relief may be granted and that Petitioner has failed to adhere to a number of technical requirements for filing and prosecuting a writ of habeas corpus. For the reasons that follow, we sustain Respondent’s motion and dismiss this petition.

{¶3} Habeas corpus is only appropriate in the criminal context if the petitioner is entitled to immediate release from prison or other type of physical confinement. *State ex rel. Carrion v. Ohio Adult Parole Auth.* (1998), 80 Ohio St.3d 637, 638, 687 N.E.2d 759. Petitioner has not yet completed his minimum term on the murder conviction, and therefore, would not be eligible for immediate release from prison if the petition were granted. Therefore, no relief is available in habeas corpus.

{¶4} In addition, habeas corpus is only available in extraordinary circumstances where there is no adequate legal remedy available for the unlawful restraint of a person’s liberty. *State ex rel. Jackson v. McFaul* (1995), 72 Ohio St.3d 185, 186, 652 N.E.2d 746. If the petitioner could have pursued a direct appeal or

postconviction relief, habeas corpus will not lie as a remedy. *Luna v. Russell* (1994), 70 Ohio St.3d 561, 561, 639 N.E.2d 1168. In the instant case, the arguments made in this petition could have and should have been presented on direct appeal. See, e.g., *State v. Rice* (1982), 69 Ohio St.2d 422, 433 N.E.2d 175. Petitioner did not raise these issues in his direct appeal. See *State v. Kemp* (Jan. 29, 1993), 9th Dist. No. 15704. Although Petitioner filed a further appeal to the Ohio Supreme Court, the appeal was dismissed for lack of prosecution. *State v. Kemp* (1993), 66 Ohio St.3d 1520, 614 N.E.2d 1050. Petitioner had an adequate remedy by way of direct appeal, but failed to fully utilize it. Therefore, this petition must be dismissed.

{¶15} Respondent has also pointed out that Petitioner did not file a copy of his commitment papers with his petition and did not verify the petition, as required by R.C. 2725.04:

{¶16} “*Application for the writ of habeas corpus shall be by petition, signed and verified either by the party for whose relief it is intended, or by some person for him, and shall specify.*

{¶17} “\* \* \*

{¶18} “(D) *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.”  
(Emphasis added.)

**{¶9}** Failure to attach copies of the commitment papers to the habeas corpus petition requires the petition to be dismissed. *Boyd v. Money* (1998), 82 Ohio St.3d 388, 389, 696 N.E.2d 568. Failure to verify the petition also warrants dismissal. *Chari v. Vore* (2001), 91 Ohio St.3d 323, 327-328, 744 N.E.2d 763.

**{¶10}** Furthermore, according to R.C. §2969.25, Petitioner was also required to file with his petition a list of all other civil actions filed by the petitioner within the past five years:

**{¶11}** “(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:

**{¶12}** “(1) A brief description of the nature of the civil action or appeal;

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

**{¶14}** “(3) The name of each party to the civil action or appeal;

{¶15} “(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 date of the final order affirming the dismissal or award.”

{¶16} 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. On this basis alone we must dismiss the petition.

{¶17} For all the foregoing reasons, we sustain Respondent's motion to dismiss this petition. This is a final order. Notice to be served on the parties as provided for in the civil rules.

Waite, P.J., Donofrio and Vukovich, J., concur.