

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO ex rel. ROBERT A. ZIMCOSKY,	:	PER CURIAM OPINION
	:	
Relator,	:	CASE NO. 2009-L-141
	:	
- vs -	:	
	:	
JUDGE RICHARD L. COLLINS,	:	
	:	
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Writ denied.

Robert A. Zimcosky, PID: 511-617, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Relator).

Charles E. Coulson, Lake County Prosecutor, and *Michael L. DeLeone*, Assistant Prosecutor, Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Respondent).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for consideration of the motion for summary judgment of respondent, Judge Richard L. Collins of the Lake County Court of Common Pleas. As the primary basis for his motion, respondent states that relator, Robert A. Zimcosky, cannot challenge the calculation of his jail-time credit in the context of a mandamus proceeding because the docket of the underlying criminal case shows that he could have pursued an alternative legal remedy. For the following

reasons, this court concludes that the granting of summary judgment is warranted in this instance.

{¶2} A review of the parties' limited evidentiary materials demonstrates that the basic facts of this matter are not in dispute. Relator is presently an inmate at the Lake Erie Correctional Institution in Ashtabula County, Ohio. His incarceration is based upon a July 2006 conviction in the Lake County Court of Common Pleas for operating a motor vehicle while under the influence of alcohol or a drug of abuse, a third-degree felony, in violation of R.C. 4511.19(A)(1)(a).

{¶3} The docket of the common pleas proceedings shows that the case against relator actually began before the Mentor Municipal Court. According to relator, he was initially cited for driving while under a suspension, failure to maintain physical control of a vehicle, and felony "OVI." After the municipal court had fully disposed of the first two charges, the "OVI" offense was bound over to the common pleas court and assigned to respondent.

{¶4} Immediately upon the filing of an information on the matter, relator waived the need for an indictment and entered a guilty plea on the felony "OVI" charge. After accepting the plea and making an express finding of guilt, respondent rendered his final judgment in the matter on July 31, 2006. As to relator's sentence, respondent ordered him to serve a term of five years and fined him the sum of \$1,000. In addition, the final judgment stated that relator was entitled to eight days of jail-time credit.

{¶5} Following the imposition of the five-year sentence, relator pursued a direct appeal to this court. In *State v. Zimcosky*, 11th Dist. No. 2006-L-181, 2007-Ohio-6250, relator did not assert any assignments of error regarding respondent's calculation of his

jail-time credit. Instead, he only challenged the decision to impose the maximum term of five years for the felony “OVI” offense. Ultimately, this court overruled relator’s sole assignment and upheld the imposed sentence in its entirety.

{¶6} In May 2009, after serving nearly three years of his imposed term, relator moved respondent for an award of an additional jail-time credit. Once the State of Ohio had filed a response on the matter, respondent issued a separate judgment denying the “credit” request.

{¶7} Approximately five months subsequent to the denial of his post-judgment motion, relator initiated the instant proceeding in mandamus. In maintaining this action, he sought the issuance of an order which would require respondent to give him ninety-seven days of additional credit. As the basis for his sole claim, relator maintained that, because the two charges of driving while under a suspension and driving while under the influence had occurred at the same time, they should have been viewed as “allied” offenses for purposes of his sentencing. Based on this, he further asserted that he was entitled to a credit for the separate days he had served for the offense of driving while under a suspension.

{¶8} In now moving for summary judgment on relator’s claim, respondent has not contested the merits of relator’s basic argument concerning whether the additional jail-time credit should have been awarded. Rather, he submits that this action cannot go forward because the “credit” question cannot be properly addressed in a mandamus proceeding. Specifically, respondent contends that, since relator could have raised the “credit” issue in a direct appeal from his original conviction or the denial of his motion for additional credit, relator cannot satisfy the essential element of a mandamus claim that

no other adequate remedy at law could be pursued to obtain the same relief.

{¶9} In support of the foregoing point, respondent has attached to his present motion certified copies of the following three documents: (1) the docket of the criminal proceeding against relator in the Lake County Court of Common Pleas; (2) the original sentencing judgment of July 31, 2006; and (3) the May 27, 2009 judgment in which the motion for additional credit was overruled. In his brief opposing the summary judgment motion, relator has not challenged the authenticity of these documents. Furthermore, he has not disputed the fact that both of the judgments in question addressed the issue of the amount of jail-time credit to which he was entitled. Instead, relator only maintains that, as a matter of law, he can satisfy every element for the writ because, at the time he instituted the instant action, no other remedies were available to him.

{¶10} Even though relator has attempted to cite case law in support of his legal position, our review of the controlling precedent readily shows that the statement of the law in respondent's present motion is correct. Specifically, our review establishes that, whenever a prison inmate has tried to contest the calculation of his jail-time credit in the context of a mandamus action, the courts of this state have consistently concluded that this type of proceeding cannot be employed for such a purpose. For example, in *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, a prison inmate sought the writ to compel the parole authority to recognize an additional credit in his favor of one hundred forty-three days. As part of the issues raised in his mandamus petition, the inmate alleged that the trial court in the underlying case had miscalculated the amount of his actual credit. In holding that the substance of this allegation was not properly before it, the *Rankin* court stated: "Alleged errors regarding jail-time credit are

not cognizable in mandamus but may be raised by way of the defendant's direct appeal of criminal case." *Id.* at ¶10.

{¶11} In the years subsequent to *Rankin*, this court has followed the holding of the Supreme Court on numerous occasions. See, e.g., *State ex rel. Miller v. Lucci*, 11th Dist. No. 2006-L-241, 2007-Ohio-2316. In explaining the legal principle underlying the *Rankin* decision, this court has stated:

{¶12} "The basic logic for [the *Rankin*] holding is that, in raising an alleged error in the calculation of jail time, the relator will not be able to satisfy the elements for the writ because his ability to appeal the trial court's calculation constitutes an adequate remedy at law. See *Brown v. Summit Cty. Court of Common Pleas*, 99 Ohio St.3d 409, 2003-Ohio-4126, ***; *Jones v. O'Connor*, 84 Ohio St.3d 426, 1999-Ohio-470, ***. In other words, once a trial court has rendered a decision on the 'credit' issue, the correctness of that decision can only be contested in a direct appeal from the judgment in which the decision was made. See, also, *State ex rel. Stanton v. Sutula* (July 16, 1998), 8th Dist. No. 74511, 1998 Ohio App. LEXIS 3288." *State v. Scranton*, 11th Dist. No. 2005-P-0020, 2005-Ohio-2886, at ¶6.

{¶13} In essentially arguing that the foregoing precedent cannot be applied to him, relator emphasizes that he no longer has the ability to pursue a direct appeal from respondent's denial of his post-judgment motion for additional credit; in light of this, he submits that he should be allowed to proceed because there is no alternative remedy available to him at this time. However, in considering a similar argument in the context of a prior mandamus action, this court has expressly held that a party is not permitted to employ a writ of mandamus as a substitute remedy when he previously failed to invoke

an adequate legal remedy in a timely fashion.

{¶14} Specifically, in *Scranton*, 2005-Ohio-2886, the trial judge issued multiple judgments concerning the amount of an inmate’s jail-time credit. In each instance, the inmate failed to bring a timely appeal from the trial judge’s determination. Subsequently, the inmate filed a mandamus action to compel the judge to render a new decision on the matter. In concluding that the inmate could not satisfy the “adequate legal remedy” element for the writ, we analyzed the facts of that case in the following manner:

{¶15} “In the instant action, [the inmate’s] own factual allegations readily indicate that, as part of the sentencing judgment in the underlying criminal case, [the trial judge] made an express determination as to the amount of jail-time credit to be granted to [the inmate]. In addition, his allegations show that [the trial judge] rendered separate written judgments on his post-conviction motions for additional credit. Since the sentencing judgment and the ‘motion’ judgments constituted final appealable orders under R.C. 2505.02(B), [the inmate] could have contested [the trial judge’s] decision through a direct appeal from any of those judgments. Furthermore, the fact that [the inmate] can no longer pursue a direct appeal on the ‘credit’ issue does not alter the analysis as to the viability of a mandamus claim; i.e., because a direct appeal is the proper means for correcting an error in the calculation of the credit, [the inmate] is not permitted to ignore the appellate process and then try to employ a mandamus action as a substitute for an appeal.” *Id.* at ¶7.

{¶16} In support of his position on this point, relator cites the recent opinion of the Eighth Appellate District in *State ex rel. Ferguson v. Villanueva*, 8th Dist. No. 93171,

2009-Ohio-5387. However, our review of the *Ferguson* decision readily shows that it involved a situation in which the trial judge had failed to render an actual ruling upon the inmate's written request for additional credit. Accordingly, the writ in *Ferguson* was only issued to compel the trial judge to issue a judgment, not to control the judge's discretion in determining the amount of the credit.

{¶17} In the present matter, the evidentiary materials before this court establish that respondent has ruled upon the "credit" issue twice in the underlying case, and that no new motions are pending before him at this time. Moreover, those materials indicate that, in rendering his May 2009 judgment denying relator's post-judgment motion for an additional credit, respondent disposed of all matters pending before him at that time; as a result, the May 2009 judgment constituted a final order under R.C. 2505.02(B) which could have been the subject of a direct appeal to this court. Given these circumstances, the foregoing case law dictates the conclusion that relator had an adequate remedy at law through which he could have fully litigated the "credit" issue.

{¶18} In order to prevail in a summary judgment exercise, the moving party must be able to demonstrate that: (1) there are no genuine issues of fact remaining to litigate; (2) the moving party is entitled to judgment as a matter of law; and (3) even when the evidentiary materials are construed in a manner most favorable to the non-moving party, the nature of those materials are such that a reasonable person could only reach a conclusion against the non-moving party. *Edwards v. Southeast Local School Dist. Bd. of Educ.*, 11th Dist. No. 2005-P-0057, 2007-Ohio-585, at ¶32. When a defendant/respondent has moved for summary judgment in regard to a claim of the plaintiff/relator, it is only necessary for him to satisfy the foregoing standard as to one element of the

pending claim.

{¶19} Under Ohio law, it is well settled that a writ of mandamus will lie only when, inter alia, the relator can prove that there was no alternative legal remedy he could have sought in lieu of the writ. See, e.g., *State ex rel. Duffy v. Pittman*, 11th Dist. No. 2006-P-0043, 2007-Ohio-346, at ¶15. Pursuant to the foregoing discussion, this court concludes that respondent has met the standard for summary judgment as to this element of relator's sole claim. That is, respondent's evidentiary materials show that he has previously rendered two decisions concerning the amount of relator's jail-time credit. Since relator could have challenged respondent's calculation in a direct appeal from either of those prior decisions, he had an adequate legal remedy, as a matter of law.

{¶20} Therefore, respondent's motion for summary judgment is granted. It is the order of this court that final judgment is hereby entered in favor of respondent as to relator's sole mandamus claim.

DIANE V. GRENDALL, J., CYNTHIA WESTCOTT RICE, J., TIMOTHY P. CANNON, J.,
concur.